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ORIGINAL

March 1, 2004

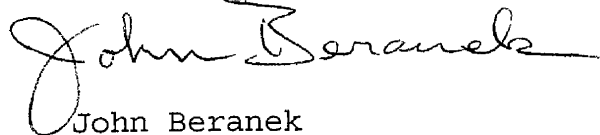
Director, Division of the Commission
Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0863

Re: Docket No.: 031033-EI

Dear Sir/Madam:

Enclosed is a copy of the Petition for Review by Tampa Electric Company Concerning Intermediate Agency Action by the Florida Public Service Commission which was filed this day in the First District Court of Appeal.

Sincerely,



John Beranek

JB/cds

Enclosure

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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

In re: Review of Tampa
Electric Company 2004-2008
Waterborne Transportation
Contract with TECO Transport
and Associated Benchmark
-----/

Case NO.: 1D04-
L.T. Case No.: PSC 031033-EI
Order of January 30, 2004

PETITION FOR REVIEW BY TAMPA ELECTRIC COMPANY
CONCERNING INTERMEDIATE AGENCY ACTION BY
THE FLORIDA PUBLIC SERVICE COMMISSION

Petitioner Tampa Electric Company seeks review pursuant to Section 120.68(1) of the January 30, 2004, intermediate order by the Florida Public Service Commission (PSC) which order required production of certain documents sought by the Office of Public Counsel (OPC). This petition for review is accompanied by an appendix containing the order sought to be reviewed and other relevant documents. The appendix is designated (A. ___) herein. Also within this petition is a Motion for Stay and a request for leave to amend and supplement.

This petition for review and appendix are filed in an abbreviated format to preserve jurisdiction in this court to review the order in question if it becomes necessary. If a final decision by this court on this discovery issue does become necessary, petitioner Tampa Electric will seek leave to amend and expand the petition and appendix and to consolidate it with other probable similar arguments made in a further petition for review on other discovery orders now pending before the Public

DOCUMENT NUMBER-DATE

03050 MAR-25

FPSC-COMMISSION CLERK

Service Commission. In short, this petition is now filed in an abbreviated format to preserve this court's jurisdiction.

The order in question of January 30, 2004, required Tampa Electric Company to produce the balance sheet and income statements of a separate company TECO Transport for December 31, 1992 and the past five years. (A. Tab B, p.5-6). Tampa Electric's position was that it did not possess or have access to the balance sheet and income statements from TECO Transport because the two companies, while affiliated, are actually entirely separate and distinct entities. Tampa Electric Company produces electric power and provides electric services under PSC regulation. TECO Transport is a separate unregulated company in the worldwide transportation business. (A. Tab B, Exh. A). Although "TECO Transport" appears in the title of this docket, it is not a party to this PSC proceeding.

The order of January 30, 2004, overruled Tampa Electric's objections to a motion to compel by OPC and directed that Tampa Electric respond to request number 9 by producing the TECO Transport documents by February 6, 2004. (A. Tab B, p.5-6). It was subsequently discovered that the documents sought in regard to number 9 had previously been filed with the United States Securities and Exchange Commission. Thus this order has been largely mooted as of the date of this pleading. However, Tampa Electric Company does not wish to waive this issue and other

similar issues being pursued before the PSC that may well result in further related and similar non-final issues on which review before this court will be sought. Thus, to avoid any possible arguments as to collateral estoppel or res judicata, Tampa Electric Company files this petition to preserve this court's jurisdiction to grant full appellate review.

As previously indicated, petitioner does not seek an Order to Show Cause at this point and instead requests that this court stay any further action or consideration of this matter for a period of 30 days to determine whether review of this particular order will become necessary. At the end of this requested 30 day period, Tampa Electric Company will advise the court as to whether review of this order has become necessary.

Jurisdiction

This court has jurisdiction to consider this petition for review under Rules 9.190(b)(2) and 9.100, as well as Section 120.68(1), Florida Statutes. Section 120.68(1) provides that "A preliminary, procedural or intermediate order of the agency...is immediately reviewable if review of the final agency action would not provide an adequate remedy." This court has previously held that the scope of review under Section 120.68(1) "is analogous to...the right of review by common law writ of certiorari." Charlotte County v. General Dev. Utilities, Inc., 653 So. 2d 1081, 1084 (Fla. 1st DCA 1995). This court has

repeatedly followed this standard in administrative appeals of non-final orders. See 800, Inc. v. Florida Department of Revenue, 837 So. 2d 574, 575 (Fla. 1st DCA 2003); Department of Transportation v. OHM Remediation Services Corp., 772 So. 2d 572, 573 (Fla. 1st DCA 2000). Thus the standard of review on this petition will be very similar to certiorari as outlined above.

Because this is a proceeding before the Public Service Commission concerning electrical service and rates, any final order entered in the case will be within the appellate jurisdiction of the Florida Supreme Court by direct appeal. See Rule 9.030(a)(1)(B)(ii), Fla. Rules of Appellate Procedure. However, the 1980 Amendments to Article V of the Florida Constitution deleted the Supreme Court's jurisdiction over non-final orders when a final order would be directly appealable to that Court. As a result, the Supreme Court no longer has jurisdiction to review non-final orders regardless of the ultimate reviewability of a final order from the Public Service Commission before that Court.

Administrative non-final orders under Section 120.68(1) are thus now reviewable by the district courts of appeal under the provisions of Article V, Section 4(b) of the Florida Constitution as amended in 1980 and Rules 9.030(b)(1)(B) and 9.130(a)(3), of the Florida Appellate Rules.

Factual Background

The factual background of the relationship between Tampa Electric Company and TECO Transport was detailed in the affidavit of Joann T. Wehle which was filed as an attachment to the Tampa Electric Response in Opposition to the production of these documents. (A. Tab B, Exh. A). Thus these facts are the subject of sworn, uncontested testimony.

Tampa Electric Company and TECO Transport are separate legal entities and operate as completely separate companies, one providing regulated electrical service and the other engaged in competitive bulk commodity transportation services. (A. Tab B, Exh. A). TECO Transport delivers coal to Tampa Electric Company in Florida but is in the general shipping business on a worldwide basis. (A. Tab B, Exh. A).

While Tampa Electric and TECO Transport are part of the same corporate entity, they are at most sister corporations with separate officers and directors. (A. Tab B, Exh. A). Tampa Electric's books and records are entirely separate from the books and records of the transportation operations carried out by TECO Transport. (A. Tab B). Financial and budgetary information with respect to TECO Transport's operations are totally outside the knowledge of Tampa Electric, and Tampa Electric never had the requested information in its possession when it entered into the contract at issue in the underlying

proceeding. In short, Tampa Electric Company has been ordered to produce the proprietary financial records of a legally separate non-party with which it has a contract for coal shipment. (A. Tab B). Tampa Electric Company has already fully disclosed that contract and the amounts it pays pursuant to that contract. (A. Tab B).

No Adequate Remedy by Appeal After Final Order

Absent interlocutory review by this court, there will be no effective appellate remedy concerning this order. Even an appeal to the Supreme Court from a final order will be inadequate. Under the constitutional limitations on the jurisdiction of the Florida Supreme Court, it is doubtful that that Court would have jurisdiction to determine the validity or invalidity of this non-final order. Since the Supreme Court no longer has jurisdiction to review non-final orders, there would be no appellate remedy before the Florida Supreme Court as to this discovery order.

In addition, there will be no effective appellate remedy after a final order because TECO Transport is not a party to this case and TECO Transport cannot appeal from whatever final order is entered. Tampa Electric Company may or may not wish to appeal from the final order.

information relating to the amounts it has paid to TECO Transport for the transportation services which the Tampa Electric Company receives from TECO Transport.

The law applied by the PSC was absolutely inapplicable. The case most heavily relied upon was Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127 (D. Del. 1986). The Afros decision enunciates a three-prong test for the production of documents between affiliated companies. Not one of the three prongs of the Afros test would require production in this situation. Afros was completely inapplicable. The more applicable case law was found in Penwalt Corp. v. Plough, Inc., 85 F.R.D. 257 (D. Del. 1979) holding that the existence of sister corporations does not automatically permit an inference of control. The Commission below rejected the application of the Penwalt Corp. case and committed serious error in relying on the totally inapplicable Afros three prong approach. Thus, a departure from established law causing irreparable prejudice has occurred and review by this court is necessary.

Motion for Leave to Amend and Supplement as Necessary

As previously indicated, petitioner Tampa Electric Company moves to be allowed to amend and supplement this petition for review if it becomes necessary. This petition is filed now out of abundance of caution to avoid any possible arguments of res judicata or collateral estoppel. Petitioner Tampa Electric

A Departure from the Substantial Requirements of Law

The discovery order in question was clear error. The motion demands production of the balance sheet and income statements for over five years from a non-party. The documents in question are not Tampa Electric documents but are instead documents of a company which is not a party to this proceeding before the Commission. Tampa Electric does not possess or have access to the balance sheet and income statements for TECO Transport and this was fully demonstrated in the uncontested affidavit which supported Tampa Electric's objections. (A. Tab B, Exh. A).

The TECO Transport documents in question do not show what Tampa Electric Company pays to TECO Transport nor do the documents relate to Tampa Electric Company's costs. In short, financial and budgetary information relating to the TECO Transport operations are not relevant to the determination of the reasonableness of Tampa Electric's costs for providing electric service. Thus, these documents are irrelevant in addition to being documents of an unregulated non-party.

Tampa Electric Company has not been uncooperative in discovery. Tampa Electric did have access and produced the consolidated balance sheets and income statements from TECO Energy which is the parent company of TECO Transport. Tampa Electric has also already provided OPC with access to all

believes that a further petition for review may well become necessary concerning an order by the Public Service Commission of February 16, 2004, in which a request for discovery was granted in part on behalf of the Florida Industrial Power Users Group (FIPUG) which has sought the production of documents in the same controversy concerning TECO Transport. (A. Tab D). This order of February 16, 2004, is also contained in the appendix to this petition for review. (A. Tab D and E). This order is now pending on motion for reconsideration which was filed before the Public Service Commission on February 26, 2004. (A. Tab E). In the event that this motion for reconsideration is denied, then a further petition for review on the February 16, 2004, order will be filed.

At that time a motion to consolidate the two petitions will be filed and a full appendix containing all of the necessary documents will be filed. Thus the present petition for review is filed in this abbreviated format in an abundance of caution to preserve jurisdiction and ensure that full appellate review can be granted if necessary.

WHEREFORE petitioner Tampa Electric Company requests that this matter be held in abeyance for a period of 30 days pending the filing of more complete argument and a further petition of review along with a motion to consolidate and a more complete

appendix. Tampa Electric Company does not seek an Order to Show Cause at this time.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the following this 1st day of March, 2004:

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APPENDIX

INDEX

- A. 1/9/04 Citizens' First Motion to Compel Production of Documents
- B. 1/16/04 Tampa Electric Company's Response in Opposition to Office of Public Counsel's First Motion to Compel Production of Documents
- C. 1/30/04 Order Granting Motion to Compel Production of Documents by OPC
- D. 2/16/04 Order Granting In Part and Denying In Part Motion to Compel by FIPUG
- E. 2/20/04 Tampa Electric Company's Motion for Reconsideration of Order Granting In Part and Denying In Part Motion to Compel

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 9th day of January, 2004:

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Florida Department of State, Division of Corporations

Corporations Online
Public Inquiry

www.sunbiz.org

Florida Profit

TECO TRANSPORT CORPORATION

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FL

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Last Event
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AMENDMENT

Event Date Filed
08/07/1997

Event Effective Date
NONE

Registered Agent

Name & Address

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Florida Profit

TECO ENERGY, INC.

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Document Number F15141	FEI Number 592052286	Date Filed 01/16/1981
State FL	Status ACTIVE	Effective Date 01/15/1981
Last Event CORPORATE MERGER	Event Date Filed 06/30/1997	Event Effective Date NONE

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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

B

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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: January 16, 2004
_____)

**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 Power¹ 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.² 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.

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

² 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.

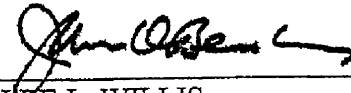
15. Here, like in Peoples Gas, the information sought by OPC does not appear to be reasonably calculated to lead to the discovery of admissible evidence. Accordingly, OPC's motion to compel in this proceeding should be denied on the same grounds that the motion to compel in Peoples Gas was denied.

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 16th day of January 2004.

Respectfully submitted,



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 16th day of January 2004 to the following:

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

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Landers & Parsons, P.A.
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.

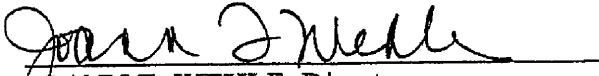
While Tampa Electric and TECO Transport are part of the same corporate entity, they have separate officers and employees, operate different systems in different geographic areas and maintain completely separate books and records.

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.

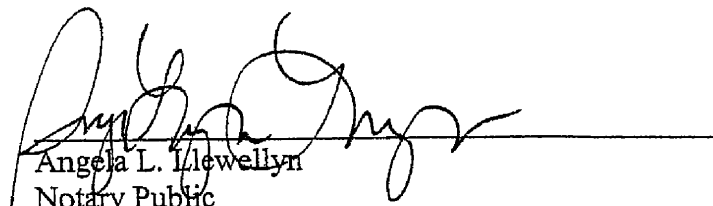
Tampa Electric stands ready, willing and able to share relevant cost information concerning its operation as may be needed for the resolution of issues in this proceeding, subject to appropriate safeguards to protect against the disclosure of confidential proprietary business information. However, the 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.

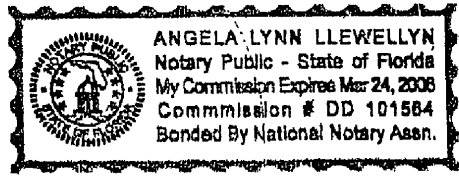
FURTHER AFFLIANT SAYETH NAUGHT.

DATED this 15th 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 15th day of January
2004.


Angela L. Llewellyn
Notary Public
State of Florida at Large



C

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-04-0118-PCO-EI
ISSUED: January 30, 2004

ORDER GRANTING MOTION TO COMPEL PRODUCTION OF DOCUMENTS

On January 9, 2004, the Citizens of the State of Florida through the Office of Public Counsel (OPC), filed a Motion to Compel Production of Documents. On January 16, 2004, Tampa Electric Company (Tampa Electric) filed a response opposing OPC's Motion to Compel.

Rule 28-106.211, Florida Administrative Code, grants broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case" Based upon this authority, and having considered the Motion and Response, the rulings are set forth below.

OPC states that on December 3, 2003, it served 10 requests for production of documents on Tampa Electric and on January 4, 2004, Tampa Electric served its responses on OPC. OPC states that Document Request No. 9 reads as follows:

Produce the balance sheet and income statement for TECO Transport for December 31, 1992 and the past five years.

Tampa Electric's response stated:

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.

OPC argues that discovery of the requested information is a critical element of preparation for the hearing and that 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. In support of its

position, OPC cites Section 366.093, Florida Statutes, which states, in pertinent part:

(1) The commission shall continue to have reasonable access to all public utility records and records of the utility's affiliated companies...

. . . .

(2) Discovery in any docket or proceeding before the commission shall be in the manner provided for in Rule 1.280 of the Florida Rules of Civil Procedure. Information which affects a utility's rates or cost of service shall be considered relevant for purposes of discovery in any docket or proceeding where the utility's rates or cost of service are at issue.

According to OPC, production should be compelled in the public interest pursuant to the Commission's general access to affiliate records pursuant to the above-cited statute.

In further support of its position, OPC cites Order No. PSC-01-1725-PCO-EI, issued August 23, 2001, in Docket No. 010827-EI, In Re: 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. Order No. PSC-01-1725-PCO-EI outlined the standards for dealing with motions to compel. Citing Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127, 130 (D. Del 1986), the Order set forth three factors to be considered when deciding whether a subsidiary may be compelled to obtain documents from a parent or affiliate for discovery: 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. OPC argues that with regard to the first factor, TECO Transport and Tampa Electric have the same registered agent for service of process and have two common officers/directors according to the Florida Secretary of State website. OPC also states that one individual also serves as a TECO Energy, Inc. officer/director. OPC argues that with regard to the second factor, TECO Transport is a signatory to the contract at issue in this docket and its balance sheet and income statement are highly relevant to the central issue of this docket. OPC states that with regard to the third factor, TECO Transport has signed a five year coal transportation contract and thus benefits from an outcome favorable to Tampa Electric.

Tampa Electric responds that it opposes OPC's Motion to Compel. Tampa Electric states that the requested documents are documents of a company not a party to this proceeding and that it does not possess or have access to the balance sheet and income statement for TECO Transport. In support of its position, Tampa Electric cites Rule 1.350, Florida Rules of Civil Procedure, which does not require a party to respond to discovery requests that are not within its possession, custody or control. Tampa Electric states that its affidavit of Joanne T. Wehle, Tampa Electric's Director of Wholesale Marketing and Fuels, details the separateness of Tampa Electric and TECO Transport and the lack of access Tampa Electric has over the books and records of TECO Transport. According to Tampa Electric, the requested documents do not show what Tampa Electric pays TECO Transport for services provided to Tampa Electric and the requested documents do not relate to Tampa Electric's costs. Tampa Electric argues that OPC is not adversely affected in the preparation of its testimony by not having access to the documents requested. Tampa Electric states that financial and budgetary information relating to TECO Transport operations is not relevant to the determination of the reasonableness of Tampa Electric's cost of providing service. Tampa Electric further states that it 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.

Tampa Electric argues that OPC's reliance on Section 366.093, Florida Statutes, is misplaced. According to Tampa Electric, the books and records of TECO Transport do not govern or affect what Tampa Electric pays TECO Transport for its services. Tampa Electric asserts that its transactions with TECO Transport are governed by the current transportation agreement between the two companies and OPC has access to that agreement. Tampa Electric states that the Rules of Civil Procedure and Section 366.093, Florida Statutes, do not contemplate unwarranted access to the books and records of a non-party "just for the sake of having access for a fishing expedition."

Tampa Electric asserts that OPC's reliance on the Afros decision and Order No. PSC-01-1725-PCO-EI is misplaced, as each of the three prongs in the Afros test is inapplicable to the facts of this case. With respect to the first prong, Tampa Electric states that while Tampa Electric and TECO Transport are both owned by the same corporate entity, they have separate officers and employees, operate different systems in different geographic areas and

maintain completely separate books and records. Tampa Electric states that TECO Transport and Tampa Electric operate as completely separate entities. With respect to the second prong of the Afros test, Tampa Electric states that 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. With respect to the third prong of the Afros test, Tampa Electric asserts that TECO Transport will not receive any benefit from the outcome of this litigation since the transportation contract is already in place and will remain in place regardless of the outcome of this litigation.

Tampa Electric states that OPC's reliance on the fact that TECO Transport and Tampa Electric have the same registered agent for service of process is of no consequence as the registered agent simply performs a ministerial function and does not direct or control the activities of the two corporations. Tampa Electric states that the same reasoning applies to the fact that the two companies have common officers/directors with one individual serving as a TECO Energy, Inc. officer/director. In support of its position, Tampa Electric relies on Penwalt Corp. v. Plough, Inc., 85 F.R.D. 257, 263 (D. Del 1979), cited in the Afros case, with regard to sister companies:

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

Tampa Electric states that in the Penwalt decision, 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 board of directors, or that their respective business operations are so intertwined as to render meaningless their separate corporate identities. Tampa Electric asserts that no such allegations can be made in the instant case.

In support of its position, Tampa Electric cites Order No. PSC-02-1613-PCO-SU, issued November 21, 2002, Docket No. 020384-GU, In Re: Petition for Rate Increase by Peoples Gas System. In that Order, the Commission denied OPC's motion to compel Peoples Gas to produce various financial documents provided to management of Tampa Electric, TECO Energy and affiliates of Peoples Gas since the requested information did not appear to be reasonably calculated to lead to the discovery of admissible evidence. According to Tampa Electric, the instant case is similar to Peoples Gas in that the utility and the non-party have separate officers and employees,

operate different systems in different geographic areas, maintain separate books and records, are operated as completely separate entities, and involve the utility being a party to the proceeding while the affiliate is not.

Upon review of the pleadings and consideration of the arguments, OPC's Motion to Compel Production of Documents is granted. Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that the scope of discovery extends to "any matter, not privileged, that is relevant to the subject matter of the pending action." The rule goes on to state that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information is reasonably calculated to lead to the discovery of admissible evidence." Section 366.093(2), Florida Statutes, provides that in any proceeding where the utility's rates or cost of service are at issue, information which affects those rates or cost of service shall be considered relevant for discovery purposes. I find that OPC's Document Request No. 9 seeks information reasonably calculated to lead to the discovery of admissible evidence and relevant to this docket. Among the issues deferred to this docket from Docket No. 030001-EI are: (1) the continued appropriateness of the current benchmark mechanism for determining reasonableness of costs incurred by Tampa Electric when it purchases coal transportation services from TECO Transport; and (2) the reasonableness of Tampa Electric's projected coal transportation costs from 2004-2008 under its new contract with TECO Transport. The information sought by OPC relates to TECO Transport's costs to provide coal transportation service, and, thus, may lead to the discovery of admissible evidence on the issues in this proceeding noted above. Precluding discovery on this matter could effectively preclude parties from pursuing, if they choose, a cost-based alternative to the current benchmark mechanism or looking at cost as a basis for determining the reasonableness of the new contract rate.

As noted in Order PSC-01-1725-PCO-EI, mentioned above, the Commission may compel a subsidiary to obtain documents from a parent or affiliate for discovery based on consideration of the three factors set forth in Afros. See also Order No. PSC-02-0254-PCO-EI, issued February 27, 2003, Docket No. 001148-EI, In Re: Review of the retail rates of Florida Power & Light Company, and Order No. PSC-96-0822-PCO-WS, issued June 25, 1996, Docket No. 951056-WS, In Re: Application for rate increase in Flagler County by Palm Coast Utility Corporation. In light of the factors set forth in Afros, in particular TECO Transport's direct connection as

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a party to the contract at issue, Tampa Electric shall respond to Document Request No. 9 by the close of business on February 6, 2004.

It is therefore,

ORDERED by Chairman Braulio L. Baez, as Prehearing Officer, that OPC's Motion to Compel Production of Documents from Tampa Electric is granted. It is further

ORDERED that Tampa Electric shall fully respond to the document request discussed in this Order by the close of business on February 6, 2004.

By ORDER of Chairman Braulio L. Baez, as Prehearing Officer, this 30th day of January, 2004.

/s/ Braulio L. Baez

BRAULIO L. BAEZ
Chairman and Prehearing Officer

This is a facsimile copy. Go to the Commission's Web site, <http://www.floridapsc.com> or fax a request to 1-850-413-7118, for a copy of the order with signature.

(S E A L)

JAR

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.

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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.

D

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-04-0158-PCO-EI
ISSUED: February 16, 2004

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL

On January 20, 2004, the Florida Industrial Power Users Group (FIPUG) filed a Motion to Compel Tampa Electric Company (Tampa Electric) to fully respond to Interrogatory Nos. 25 and 29-32 from FIPUG's First Set of Interrogatories and Document Request Nos. 10, 11, and 13 from FIPUG's First Request for Production of Documents. On January 27, 2004, Tampa Electric filed a Response in Opposition to FIPUG's Motion to Compel.

Rule 28-106.211, Florida Administrative Code, grants broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case" Based upon this authority, and having considered the Motion and Response, the rulings are set forth below.

FIPUG states that on December 5, 2003, it served its First Set of Interrogatories (Nos. 1-34) and First Request for Production of Documents (Nos. 1-23) on Tampa Electric, and on January 5, 2004, Tampa Electric served its responses on FIPUG. FIPUG states that Tampa Electric refused to respond to relevant questions concerning TECO Transport and refused to produce the transportation contracts at issue in this docket, insisting instead that they be reviewed in Tampa Electric's presence. FIPUG asserts that the requested information is critical to enable it to prepare its testimony and prepare for hearing. According to FIPUG, the information it seeks is relevant and likely to lead to the admission of relevant evidence because it relates directly to the issues in this docket, thus falling within the broad scope of discovery addressed in Rule 1.280(b), Florida Rules of Civil Procedure.

FIPUG states that Interrogatory Nos. 29 and 30 seek information related to TECO Transport's earnings under its prior

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contract with Tampa Electric for waterborne transportation and its projected earnings under the contract signed in October 2003 with Tampa Electric. FIPUG further states that Interrogatory Nos. 31 and 32 seek information related to which companies TECO Transport does most of its business with and which commodities it most frequently transports. FIPUG states that Tampa Electric did not object to these Interrogatories, but refused to answer them claiming lack of access to the information. FIPUG asserts that since Tampa Electric and TECO Transport are affiliated companies, their revenues go to the same place - the parent company, TECO Energy. According to FIPUG, Tampa Electric should be required to obtain the requested information from either its affiliate or its parent company. FIPUG argues that the requested information is necessary to judge the reasonableness of the amount Tampa Electric agreed to pay its sister company, TECO Transport.

FIPUG states that its Document Request Nos. 10, 11, and 13 request drafts of the contract executed in October 2003 between Tampa Electric and TECO Transport, the contract itself, and the prior contract between the parties. FIPUG further states that Interrogatory No. 25 asks Tampa Electric to identify the differences between the contract signed in October 2003 and the previous contract with TECO Transport. FIPUG states that Tampa Electric did not object to FIPUG's discovery requests or provide the information to FIPUG, but instead offered to make the information available for review by FIPUG. According to FIPUG, it should be provided with copies of the requested documents for analysis since the contracts and contract comparison are integral to this case and since FIPUG has signed a non-disclosure agreement with Tampa Electric.

Tampa Electric responds that it opposes FIPUG's Motion to Compel. First, Tampa Electric states that it did not refuse to answer Interrogatory No. 25. Tampa Electric states that Interrogatory No. 25 asks it to identify any and all differences between the existing contract between Tampa Electric and TECO Transport which expires at the end of 2003 and the new contract executed on October 6, 2003. Tampa Electric asserts that the old and new transportation contracts speak for themselves. According to Tampa Electric, rather than attempting to characterize the contents of the two contracts and any differences that might exist between them, it offered FIPUG access to a comparison of the two

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documents that shows each change in legislative format as well as to the two contracts themselves so that FIPUG could make its own comparison and reach its own conclusions as to the nature of any differences that might exist between the two contracts.

Tampa Electric further states that it did not refuse to answer Interrogatory Nos. 29 through 32, rather, it stated that it does not know 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. Tampa Electric asserts that it provided truthful statements that fully answer the interrogatories. In support of its position, Tampa Electric cites Rule 1.350, Florida Rules of Civil Procedure, which does not require a party to respond to discovery requests that are not within its possession, custody or control. Tampa Electric further asserts that the requested information is irrelevant to this proceeding since the information does not indicate what Tampa Electric pays TECO Transport for waterborne transportation services provided to Tampa Electric. According to Tampa Electric, the books and records of TECO Transport are kept entirely separate from the books and records of Tampa Electric. Tampa Electric states that it provided FIPUG with access to all information relating to the amounts paid or to be paid to TECO Transport for transportation services it provides to Tampa Electric.

Tampa Electric states that the Commission-approved methodology for assessing the reasonableness of amounts paid by Tampa Electric to TECO Transport for transportation services was approved by way of stipulation in Order No. 20298, issued November 10, 1988, in Docket No. 870001-EI and reaffirmed in Order No. PSC-93-0443-FOF-EI, issued March 23, 1993, in Docket No. 930001-EI. According to Tampa Electric, when the current procedure was approved, OPC and staff agreed that details concerning the coal supply and coal transportation contracts between Tampa Electric and its affiliates were not subject to the proceeding that gave rise to the stipulation and that Tampa Electric was free to negotiate a contract without the involvement of the parties or the Commission so long as the pricing resulting from the contract remained at or below the pricing benchmarks. Tampa Electric asserts that while

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FIPUG may allege deficiencies in the currently approved benchmark pricing methodology, there has been no determination by the Commission that the benchmark is no longer valid. Tampa Electric states that Interrogatory Nos. 25 and 29-32 seek information that is irrelevant to the appropriateness of payments made by Tampa Electric for coal transportation services and will not lead to the discovery of admissible evidence.

With regard to Document Request Nos. 10, 11, and 13, Tampa Electric states that it has offered FIPUG access to the requested contracts in the offices of Tampa Electric's counsel, subject to the non-disclosure agreement between FIPUG and Tampa Electric. Tampa Electric asserts that FIPUG has, in the recent past, openly disclosed confidential information covered by non-disclosure agreements in a public meeting and has provided confidential information to individuals who are not signatories to a confidentiality agreement with Tampa Electric. According to Tampa Electric, these disclosures have made it clear that neither FIPUG nor counsel for FIPUG should be permitted to have physical possession or control of copies of the confidential documents requested.

Upon review of the pleadings and consideration of the arguments, FIPUG's Motion to Compel is granted in part and denied in part, as set forth below. Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that the scope of discovery extends to "any matter, not privileged, that is relevant to the subject matter of the pending action." The rule goes on to state that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information is reasonably calculated to lead to the discovery of admissible evidence." Section 366.093(2), Florida Statutes, provides that in any proceeding where the utility's rates or cost of service are at issue, information which affects those rates or cost of service shall be considered relevant for discovery purposes.

Interrogatory Nos. 29-32

I find that FIPUG's Interrogatory Nos. 29-32 seek information reasonably calculated to lead to the discovery of admissible evidence and relevant to this docket. Among the issues deferred to this docket from Docket No. 030001-EI are: (1) the continued

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appropriateness of the current benchmark mechanism for determining reasonableness of costs incurred by Tampa Electric when it purchases coal transportation services from TECO Transport; and (2) the reasonableness of Tampa Electric's projected coal transportation costs from 2004-2008 under its new contract with TECO Transport. The information sought by FIPUG relates to these issues, and, thus, may lead to the discovery of admissible evidence on these issues.

As noted in Order No. PSC-01-1725-PCO-EI, issued August 23, 2001, in Docket No. 010827-EI, In Re: 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, the Commission may compel a subsidiary to obtain documents from a parent or affiliate for discovery based on consideration of the three factors set forth in Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127, 130 (D. Del. 1986). See also Order No. PSC-02-0254-PCO-EI, issued February 27, 2003, Docket No. 001148-EI, In Re: Review of the retail rates of Florida Power & Light Company, and Order No. PSC-96-0822-PCO-WS, issued June 25, 1996, Docket No. 951056-WS, In Re: Application for rate increase in Flagler County by Palm Coast Utility Corporation.

The Order, citing Afros, set forth three factors to be considered when deciding whether a subsidiary may be compelled to obtain documents from a parent or affiliate for discovery: (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. In light of the factors set forth in Afros, in particular TECO Transport's direct connection as a party to the contract at issue, Tampa Electric shall respond to Interrogatory Nos. 29-32 by the close of business on February 23, 2004. ✓

Document Request Nos. 10, 11, and 13

Rule 1.350(a), Florida Rules of Civil Procedure, states, in part, that "[a]ny party may request any other party to produce and permit the party making the request, or someone acting in the requesting party's behalf, to inspect and copy any designated documents . . . that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed." (Emphasis

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added.) FIPUG states, and Tampa Electric does not refute, that the parties have signed a non-disclosure agreement that would cover the documents requested in Document Request Nos. 10, 11, and 13. Still, Tampa Electric states a concern that this information may be released by FIPUG. Tampa Electric did not object to the discovery on any other grounds.

In essence, Tampa Electric has requested a protective order through its Response in Opposition to FIPUG's Motion to Compel. To provide FIPUG the ability to effectively prepare for hearing by having unfettered access to these documents and to address Tampa Electric's concern about potential disclosure of the documents, Tampa Electric shall, by the close of business on February 23, 2004, provide FIPUG copies of each document requested pursuant to the following terms: (1) FIPUG shall not disclose the documents or the information contained therein to any other person; (2) the documents shall be returned to Tampa Electric no later than 15 days after a final order in this docket has been issued and is no longer subject to appeal or further proceedings; and (3) the otherwise applicable terms of the non-disclosure agreement between FIPUG and Tampa Electric shall govern the handling of the documents.

Interrogatory No. 25

Interrogatory No. 25 requests Tampa Electric to identify the differences between the existing contract between Tampa Electric and TECO Transport which expires at the end of 2003 and the new contract executed on October 6, 2003. As set forth above, FIPUG will have access to both contracts and can conduct its own analysis of the differences between the contracts. Accordingly, FIPUG's Motion to Compel Tampa Electric to respond to Interrogatory No. 25 is denied.

It is therefore,

ORDERED by Chairman Braulio L. Baez, as Prehearing Officer, that FIPUG's Motion to Compel is granted in part and denied in part as set forth in the body of this Order.

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

	/s/Braulio L. Baez
	BRAULD L. BAEZ Chairman and Prehearing Officer

This is a facsimile copy. Go to the Commission's Web site,
<http://www.floridapsc.com> or fax a request to 1-850-413-7118,
 for a copy of the order with signature.

(S E A L)

JAR

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

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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.

E

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.

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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