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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In Re: Review of Tampa Electric Company's 2004-2008 Waterborne Transportation Contract with TECO Transport and Associated Benchmark) DOCKET NO. 031033-EI) FILED: April 12, 2004

COMMISSION CLERK

CSX TRANSPORTATION'S RESPONSE TO TAMPA ELECTRIC COMPANY'S MOTION TO COMPEL RESPONSES TO DISCOVERY AND FOR A DETERMINATION AS TO NON-CONFIDENTIAL NATURE OF CERTAIN CSXT PROVIDED INFORMATION AND CSXT'S RENEWED MOTION FOR PROTECTIVE ORDER

CSX Transportation ("CSXT"), pursuant to Section 366.093, Florida Statutes, Rules 25-22.006, and 28-106.204, Florida Administrative Code ("F.A.C."), and Rule 1.280(b), Florida Rules of Civil Procedure, hereby responds to Tampa Electric Company's ("TECO") Motion to Compel Responses to Discovery and for a Determination as to Non-Confidential Nature of Certain CSXT Provided Information ("Motion to Compel") and renews its motion for protective order with regard to portions of its answers to TECO's Interrogatories Nos. 3, 6-9, 11, 18, 23, 29, 31, 34, 36-39, 41-43, 54, and 55. As specific grounds for CSXT's response and renewal of its motion for protective order, CSXT states as follows:

Background

1. On February 25, 2004, TECO propounded its First Set of

Interrogatories (Nos. 1-65) on CSXT. On March 12, 2004, CSXT filed and served, in redacted format, its answers to TECO's First

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1 All references herein to the Florida Statutes are to the 2003 edition thereof.

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Set of Interrogatories (Nos 1-65), portions of which contained confidential, proprietary business information entitled to protection under Section 366.093, Florida Statutes, and Rule 25-22.006, F.A.C. Also on March 12, 2004, CSXT filed its Notice of Intent to Seek Confidential Classification and Motion for Temporary Protective Order with regard to the responses to TECO's First Set of Interrogatories in which CSXT sought protection of portions of its responses to TECO's Interrogatories Nos. 3, 6-9, 11, 18, 23, 29, 31, 34, 36-39, 41-43, 54, and 55.

2. On April 5, 2004, TECO served CSXT with a copy of its Motion to Compel.² In its Motion to Compel, TECO identifies the responses to eleven interrogatories, Nos. 6, 7, 8, 9, 11, 18, 34, 36, 38, 40, and 43 for which it seeks relief from the Commission. The relief sought by TECO with regard to CSXT's responses to the eleven interrogatories falls into three distinct categories: 1) with regard to Interrogatories Nos. 6, 7, 8, 9, 11, 18, 34, 36, and 38, TECO requests that the confidential responses provided by CSXT to TECO's request for proposals ("RFP") be deemed non-confidential; 2) with regard to Interrogatory No. 40, TECO requests that CSXT be required to provide specific cost information which CSXT deems highly confidential and irrelevant

² Rule 28-106.204, F.A.C., requires that a movant confer with other parties prior to filing a motion. TECO's counsel did not confer with CSXT's counsel prior to filing its Motion to Compel. If TECO had conferred with CSXT, many of the issues raised in TECO's Motion to Compel could have been resolved amicably.

to this proceeding; and 3) with regard to Interrogatory No. 43, TECO requests that CSXT's confidential response concerning the rate CSXT charges to Duke Power for transportation of coal by rail be deemed non-confidential. Each category of interrogatories will be addressed separately herein.

CSXT's Bid Information (Interrogatories Nos. 6, 7, 8, 9, 11, 18, 34, 36 and 38)

3. Interrogatories Nos. 6, 7, 8, 9, 11, 18, 34, 36, and 38 (the "Bid Interrogatories") each address aspects of CSXT's responses to TECO's RFP. For example, Interrogatory No. 6 asks:

Did CSXT's Bids A and B include a provision that the bid price be adjusted by CSXT's fuel surcharge per Tariff CSXT 8200 for all shipments of coal to Tampa Electric's Big Bend Station?

4. CSXT provided complete responses to each of the Bid Interrogatories and the content of these responses is not at issue here.³ Rather, TECO objects to the fact that CSXT has sought confidential treatment for portions of its responses to the Bid Interrogatories.

³ In several cases, TECO requests that CSXT be ordered to answer questions not posed in the interrogatory. For example, with regard to Interrogatory No. 34, TECO requests that "CSXT be compelled to indicate whether its answer to Interrogatory No. 34 is an additional charge per ton published in CSXT's tariffs"; and with regard to Interrogatory No. 36, TECO requests that "CSXT be ordered to disclose whether the confidential portion of its answer it [sic] published in CSXT's tariff." Motion to Compel at 4. CSXT objects to TECO's attempt to require CSXT to answer questions not posed in the original interrogatories. CSXT is under no obligation to answer interrogatories that have not been properly propounded. If TECO wants these questions answered, its remedy is to propound additional interrogatories.

5. Undersigned counsel has conferred with TECO's counsel concerning TECO's objections to CSXT's responses to the Bid Interrogatories and the issue has been amicably resolved. CSXT has agreed to expand the group of individuals allowed to review the confidential responses to the Bid Interrogatories, but only the responses to the Bid Interrogatories, to include any of TECO's employees or consultants who were originally privy to CSXT's RFP response or who need to see the information to prepare for this docket.

6. Otherwise, portions of CSXT's responses to the Bid Interrogatories continue to be confidential, proprietary business information entitled to protection under Section 366.093, Florida Statutes, and Rule 25-22.006, F.A.C., and as discussed below, CSXT renews its motion for protective order concerning said responses.

CSXT's Cost Information (Interrogatory No. 40)

7. In Interrogatory No. 40, TECO asks CSXT to:

Provide CSXT's estimate of costs it expected to incur in each year 2004 - 2008 in providing service to Tampa Electric under its Bid Proposals A and B.

CSXT objected to this interrogatory on the grounds that it is not reasonably calculated to lead to the discovery of relevant, admissible evidence. CSXT's costs are not at issue in this proceeding. In addition, CSXT indicated that it would be unduly burdensome to complete a response for all potential combinations

of sources and volumes of coal.

8. TECO asserts that the "viability and credibility" of CSXT's bids are at issue in this proceeding, thus CSXT should be required to respond. See Motion to Compel at 5. CSXT respectfully disagrees. CSXT's ability to perform pursuant to its bid and to provide the coal transportation services offered to TECO therein cannot be seriously subject to question; accordingly, CSXT believes that TECO's attempts to obtain CSXT's cost information can only be for the purpose of harassing CSXT and attempting to obtain the information for TECO's competitive advantage as against CSXT. CSXT believes that TECO must know that CSXT's bids are viable, given CSXT's extensive role in providing coal transportation services to every Florida utility, except TECO, that uses coal as a generating fuel. TECO surely knows that CSXT is the preferred coal transporter for Progress Energy Florida, which also has a barge affiliate, because CSXT's rail service is more cost-effective than barge transportation. Accordingly, CSXT concludes that TECO is simply attempting to harass CSXT, probably hoping against hope that TECO can intimidate CSXT into withdrawing from this docket, by seeking CSXT's extremely sensitive cost information even when TECO knows that CSXT's bids are fully viable and credible.

9. CSXT's ability to perform pursuant to its bid is amply demonstrated by the following summary facts. CSXT currently transports approximately 50 percent of the coal that is burned at

power plants in Peninsular Florida, including approximately 65 to 70 percent of the coal consumed at Progress Energy Florida's Crystal River coal-fired units which are located not far north of Tampa on Florida's Gulf Coast. CSXT also transports approximately 25 percent of the coal that is burned at power plants in the Southeastern Electric Reliability Council region and approximately 60 percent of the coal that is burned at power plants in the VACAR (Virginia and the Carolinas) reliability council region.

10. Cost information of this type is extremely sensitive in the competitive context, because it can be used to infer how "low" a price a supplier may be willing to accept, or how "high" a price a buyer may be willing to pay; either will squeeze the seller or buyer, and it is only reasonable to conclude that this is why the Legislature provided for protection of competitively sensitive information through Section 366.093, Florida Statutes.

11. CSXT avers that its prices are above its costs. See Affidavit of Michael Sullivan, attached hereto as Exhibit A and incorporated herein. If the Commission wishes to see information demonstrating this fact, CSXT would have no objection to an ex parte, in camera inspection by either the Prehearing Officer or the full Commission. Alternatively, CSXT would suggest that an impartial special master, such as a retired state or federal court judge, be asked to review the information in camera, with PSC Staff in attendance if the Commission desires it, and furnish

a report confirming what CSXT here avers.

12. Moreover, if TECO wishes to attempt to assert that CSXT is actually pricing below its costs, such a charge is misplaced here. TECO could attempt to pursue such a claim in either state or federal court under the applicable antitrust statutes. This fuel cost proceeding is not the proper forum.

13. In summary, CSXT should not be required to give TECO CSXT's extremely sensitive cost information. CSXT's costs are not relevant to the real issues in this proceeding - what is relevant is that CSXT has offered to provide coal transportation services, for up to all of TECO's coal transportation needs, at rates that are substantially below what TECO is paying, and hopes to continue paying, its affiliate. The viability and credibility of CSXT's bids are not seriously subject to challenge, given the facts (1) that CSXT already transports half of all the coal burned at Peninsular Florida power plants, and (2) that CSXT currently transports coal for every Florida utility that uses coal as a boiler fuel except TECO! Given these facts, it cannot be seriously disputed that CSXT can provide coal-by-rail transportation service to TECO and that CSXT can stand behind its bids.

Duke Power Information (Interrogatory No. 43)

14. In Interrogatory No. 43, TECO asks CSXT to:

Describe in detail the circumstances surrounding CSXT's increase in rates charged to Duke Power for provisions of rail transportation to Duke Power.

CSXT provided a complete response to this interrogatory and the content of CSXT's response is not at issue here. Rather, TECO objects to the fact that CSXT has sought confidential treatment for its response to Interrogatory No. 43 because the requested information relates to a confidential contract between Duke Power and CSXT.

15. Undersigned counsel has conferred with TECO's counsel concerning TECO's objections to CSXT's response to Interrogatory No. 43 and the issue remains under discussion. CSXT will inform the Commission as to the results of those discussions in the near future.

Renewed Motion for Protective Order

16. The information identified in CSXT's responses to TECO's Interrogatories Nos. 3, 6-9, 11, 18, 23, 29, 31, 34, 36-39, 41-43, 54, and 55 remains confidential, proprietary business information within the meaning of Section 366.093, Florida Statutes, in that it is information that CSXT treats as confidential and has not otherwise disclosed publicly, and in that disclosure of the confidential information to the public or to anyone in a position to use such information against CSXT's competitive business interests would be severely detrimental to CSXT's competitive, business, and economic interests. Accordingly, CSXT is entitled to confidential protection of the subject information pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006, F.A.C.

17. In accord with the provisions of the foregoing statute and rule, CSXT hereby renews its request that the Commission issue a protective order requiring that all persons coming into possession of the confidential information treat the information as confidential and protect it from disclosure to anyone other than as permitted by the non-disclosure agreements between CSXT and such parties. CSXT also renews its request that the Commission's protective order declare the confidential information exempt from the provisions of Chapter 119, Florida Statutes.

CONCLUSION

WHEREFORE, CSX Transportation respectfully urges the Commission to deny TECO's motion to compel and for determination that certain information contained in CSXT's interrogatory responses is not confidential. Notwithstanding TECO's failure to comply with Rule 28-106.204, F.A.C., which requires that a movant confer with other parties prior to filing a motion, CSXT has arranged for an exchange of letters authorizing TECO personnel who had already seen the information contained in CSXT's bids to see CSXT's responses to the Bid Interrogatories. TECO's attempts to obtain CSXT's cost information are baseless because CSXT's ability to perform the service that CSXT has offered to TECO, at the prices quoted in CSXT's bids, is not seriously subject to dispute. TECO's attempts to harass CSXT in this manner should be rejected. Finally, regarding the Duke Power-CSXT matter

addressed in Interrogatory No. 43, CSXT and TECO are attempting to amicably resolve the matter. CSXT will provide the Commission with an update as to the status of the discussions concerning Interrogatory No. 43 in the near future.

Respectfully submitted this 12th day of April, 2004.

LANDERS & PARSONS

A handwritten signature in black ink, appearing to read "John T. LaVia, III", written over a horizontal line.

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John T. LaVia, III
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Counsel for CSX Transportation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and one copy of the foregoing has been filed with the Clerk's Office, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399 and that a true and correct copy of the foregoing has been served by U.S. Mail or hand delivery (*) this 12th day of April, 2004, on the following:

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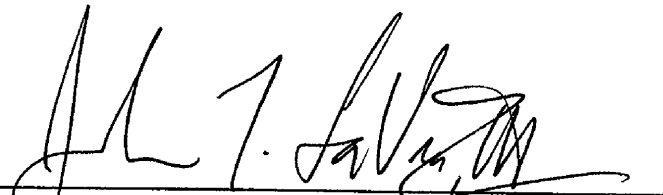
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Attorney

AFFIDAVIT OF MICHAEL SULLIVAN

1. My name is Michael Sullivan. I am employed as the Assistant Vice President - Utility South, for the Coal Sales and Marketing Department of CSX Transportation, Inc. and my business address is 500 Water Street, Jacksonville, Florida 32202.

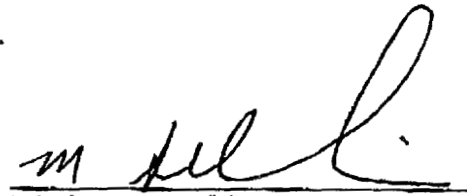
2. In July 2003, I participated in preparing the bids submitted by CSX Transportation, Inc. ("CSXT") in response to Tampa Electric Company's ("TECO") solicitation for coal-by-rail transportation services No. WB-2004. My participation included developing the prices proposed by CSXT in its bids. My participation also involved my being aware of the costs that CSXT would expect to incur to provide the offered services.

3. In 2002, I also participated in preparing/reviewing a proposal to TECO to provide essentially the same coal-by-rail transportation services. CSXT submitted this proposal to TECO in October 2002. CSXT's 2003 bids (i.e., those submitted in response to TECO's solicitation No. WB-2004) covered more points of coal origin than CSXT's 2002 proposal, but for the same coal origins, the prices in CSXT's 2002 proposal were identical to the prices submitted in our 2003 bids. To the

best of my knowledge and belief, no one at TECO ever questioned the viability or credibility of CSXT's October 2002 proposal to TECO.

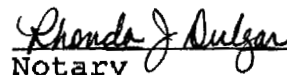
4. CSXT's prices, including those offered to TECO in October 2002 and those offered in CSXT's July 2003 response to TECO's solicitation No. WB-2004, are greater than the costs that CSXT would expect to incur in providing the offered services.

FURTHER AFFIANT SAYETH NAUGHT.


Michael Sullivan

STATE OF FLORIDA
COUNTY OF Leon

The foregoing instrument was acknowledged before me this ___ day of April, 2004, by Michael Sullivan, who is ___ personally known to me OR produced identification, type of identification produced Florida Driver's License.


Notary

Rhonda J. Dulgar
Print Name

My Commission Expires:

