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April 26, 2004

**VIA HAND DELIVERY**

Blanca S. Bayo, Director  
Division of Records and Reporting  
Betty Easley Conference Center  
4075 Esplanade Way  
Tallahassee, Florida 32399-0870

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COMMISSION  
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Re: Docket No.: 031033-EI

Dear Ms. Bayo:

On behalf of the Florida Industrial Power Users Group (FIPUG), enclosed for filing and distribution is the original and 15 copies of the following:

- ▶ Joint Response in Opposition to Tampa Electric Company's Request for Confidential Classification of Portions of the Testimony and Exhibits of Intervenor Witnesses.

Please acknowledge receipt of the above on the extra copy and return the stamped copy to me. Thank you for your assistance.

Sincerely,

Timothy J. Perry

AUS	_____
CAF	_____
CMP	_____
COM	<u>5</u> _____
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ECR	_____
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OPC	_____ Enclosure
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SEC	<u>1</u> _____
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(Per:  
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**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.

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Docket No.: 031033-EI  
Filed: April 26, 2004

**JOINT RESPONSE IN OPPOSITION TO TAMPA ELECTRIC COMPANY'S  
REQUEST FOR CONFIDENTIAL CLASSIFICATION OF PORTIONS OF THE  
TESTIMONY AND EXHIBITS OF INTERVENOR WITNESSES**

The Citizens of the State of Florida (Public Counsel) and the Florida Industrial Power Users Group (FIPUG), pursuant to rules 25-22.006 and 28-106.204, Florida Administrative Code, respond in opposition to Tampa Electric Company's (TECo) Request for Confidential Classification of Portions of the Testimony and Exhibits of Intervenor Witnesses filed April 14, 2004. Public Counsel and FIPUG request that the Commission enter an order denying TECo's requests to shield from public review the information described below. As grounds therefore, Public Counsel and FIPUG state:

1. On March 30, 2004, TECo filed a Motion for Temporary Protective Order. Public Counsel and FIPUG responded on April 6, 2004, arguing that: 1) TECo had failed to comply with the Commission's confidentiality rules, and 2) TECo had failed to justify its confidentiality request.

2. On April 14, 2004, TECo filed its Request for Confidential Classification of Portions of the Testimony and Exhibits of Intervenor Witnesses. In this pleading, TECo, in an attempt to cure the deficiency in its first pleading, facially follows the Commission's confidentiality procedures. However, it still fails to carry its burden to justify keeping the information secret.

3. As Intervenor have previously noted, the policy of the State of Florida is that all public records be open to review:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Section 119.01(1), Florida Statutes. The Commission has recognized that:

Florida law presumes that documents submitted to governmental agencies shall be public records. The only exceptions to this presumption are the specific statutory exemptions provided in the law and exemptions granted by governmental agencies pursuant to the specific terms of a statutory provision. This presumption is based on the concept that government should operate in the "sunshine." Rule 25-22.006(4)(c), Florida Administrative Code, provides that it is the Company's burden to demonstrate that the documents fall into a statutory exemption or that the information is proprietary confidential business information, the disclosure of which will cause the Company or its ratepayers harm.

Order No. PSC-01-2252-CFO-EI at 2, Docket No. 000061-EI (November 16, 2001). Shielding information from public view is the exception, not the rule, and requires the party seeking to withhold information to justify how the information qualifies for one of the narrow statutory exceptions which would keep the information confidential. TECo has failed to do so in this case.

4. As a preliminary matter, TECo again attempts to rely on its Non-Disclosure Agreements with FIPUG as justification for its confidentiality request. It states: "all of the information in question is protected by virtue of a Non-Disclosure Agreement entered into by and between Tampa Electric . . . and FIPUG. . . ."<sup>1</sup> The presence of a Non-Disclosure Agreement between TECo and FIPUG provides no justification to award materials confidential status. TECo's agreement with FIPUG specifically belies any claim that FIPUG has assented to confidential classification of the material at issue. The agreement clearly reserves FIPUG's right to challenge any alleged claim of confidentiality:

Nothing in this Agreement is intended to preclude [FIPUG] from challenging the merits of whether a particular document is

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<sup>1</sup> TECo's Request at 2.

proprietary confidential business information within the meaning of Section 366.093, Florida Statutes.<sup>2</sup>

5. TECo's "rationales" for its claims of confidentiality for information in the testimony and exhibits of Public Counsel and FIPUG's witnesses are not only insufficient, they are often inaccurate and misleading. For example, Intervenor witness Majoros conducted an analysis which yielded several figures which appear in his prefiled testimony, including the percentage amount TECo seeks to overcharge ratepayers for waterborne transportation services from its sister company<sup>3</sup> and the dollar amount of such overcharge.<sup>4</sup> TECo alleges this information is confidential because: 1) it contains "information about the contract terms and rates" that have been paid or will be paid is, "competitive contractual information," and future bidders may be influenced if they had such information; 2) it discloses "proprietary terms and conditions" of existing contracts; and 3) the information, though not confidential,<sup>5</sup> could be used to "back into" confidential information.

6. Not one of these "rationales" is applicable to either the percentage figure or the dollar amount which Mr. Majoros testifies should be disallowed. These figures are the result of Mr. Majoros' analysis and are his professional work product and opinion. Neither number contains information about contract terms and rates nor does it disclose any information about existing contracts. Further, the information cannot be used to "back into" other confidential numbers; in fact, TECo fails to explain how the information could be used in such a manner, perhaps because it is not possible to use the figures to "back into" any confidential information.

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<sup>2</sup> Non-disclosure Agreement between TECo and FIPUG, ¶ 3.

<sup>3</sup> Majoros testimony, page 2, line 7, and page 28, line 1.

<sup>4</sup> Majoros testimony, page 2, line 12.

<sup>5</sup> It is telling that two of TECo's justifications claim that the information it seeks to shield is confidential while the third justification claims it is not. The information cannot be in both categories.

7. TECo also claims that the ocean rate Mr. Majoros calculated<sup>6</sup> is confidential. TECo claims that: 1) the information contains the proprietary work product of Dibner Maritime Associates LLC (DMA) that is in the nature of a trade secret; 2) the information contains “information about the contract terms and rates” that have been paid or will be paid, that it is “competitive contractual information” and that future bidders may be influenced if they had such information; and 3) the information “discloses in great detail” TECo’s contract and transportation rates which would be harmful to TECo’s ability to contract for goods and services on favorable terms and, likewise, harmful to the competitive interests of TECo and TECo Transport. Inexplicably, in one of the places the Majoros’ ocean rate appears,<sup>7</sup> but not the others, TECo claims that the information, though not confidential,<sup>8</sup> can be used to “back into” confidential information.

8. None of TECo’s “rationales” apply to Mr. Majoros’ calculation of the appropriate ocean rate. This figure is a result of Mr. Majoros’ analysis and is his professional work product and opinion. The rate does not contain information about contract terms and rates nor does it disclose any information about existing TECo or TECo Transport contracts. Rather, it is Mr. Majoros’ estimation of the proper rate that TECo should pay TECo Transport. Further, the information cannot be used to “back into” other confidential numbers. Mr. Majoros’ ocean rate calculation cannot be duplicated without access to Mr. Dibner’s model, which is not available to the public.

9. Mr. Majoros’ exhibits contain excerpts from Mr. Dibner’s Final Report<sup>9</sup> filed with the Commission on January 5, 2004, and documents TECo provided in response to

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<sup>6</sup> Majoros testimony, page 26, line 12 (the second figure), Exhibit No. MJM-5, page 1 of 8, row 3, columns 6 and 8.

<sup>7</sup> Exhibit No. MJM-5 at page 1 of 8, row 3, column 8.

<sup>8</sup> See footnote 3, *supra*.

<sup>9</sup> Exhibit Nos. MJM-3, page 4 of 4 and MJM-5, pages 2, 4 and 8 of 8.

discovery<sup>10</sup> which TECo claims are confidential. TECo wants these documents shielded in their entirety for various reasons, including that: 1) they contain bid information provided in response to TECo's RFP or prior transportation proposals; 2) they reveal the bidders' identities; 3) they reveal TECo's bid evaluation assumptions that divulge planned operations and existing contractual data; 4) the information contains the proprietary work product of DMA that is in the nature of a trade secret; 5) they contain "information about the contract terms and rates" that have been paid or will be paid, that is "competitive contractual information" and that future bidders may be influenced if they have such information; 6) they contain detailed information about TECo's coal needs; 7) they disclose in "great detail" TECo's contract and transportation rates which would be harmful to TECo's ability to contract for goods and services on favorable terms and, likewise, harmful to the competitive interests of TECo and TECo Transport; and 8) the information, though not confidential, could be used to "back into" confidential information. This "shotgun" approach to confidentiality must fail.

10. None of these justifications explains why the exhibits must be kept confidential in their entirety. Each exhibit contains information — such as titles, column headings and text — that could not possibly impair the competitive interests of TECo, TECo Transport, or DMA nor would the information reveal bidder information or allow one to "back into" confidential information. TECo's request to shield every inch of these documents from the public is an abuse of the confidentiality process.

11. TECo also overreaches in its confidentiality request related to Public Counsel and FIPUG witness Mr. Wells' testimony and exhibits. For example, Mr. Wells' testimony contains

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<sup>10</sup> Exhibit No. MJM-5, pages 3 and 7 of 8.

an excerpt from a letter sent to TECo by one of the companies to whom it sent the RFP.<sup>11</sup> TECo claims the correspondence is confidential because:

The information in question reveals the **identity of bidders** that submitted proposals in response to Tampa Electric's RFP. Disclosing bidders identities and the information included in their confidential proposals would discourage those bidders from participation in future RFPs as they do not desire for their competitors to have access to the terms and conditions under which they will bid on transportation services. . . .<sup>12</sup>

12. TECo's justification has no application to the excerpt it wants to hide. First, the company that authored the letter is not a bidder and did not submit a bid in response to TECo's RFP. Second, the letter does not contain any confidential proposals that, if made public, would deter the company from participating in future RFPs. Finally, the information is already a matter of public record: similar information appeared unredacted, without objection by TECo, in the intervenor testimony of Dr. Anatoly Hochstein. In sum, TECo fails to justify why the excerpt qualifies for an exemption from public disclosure. The "justification" it does provide is inapplicable.

13. Exhibit No. HGW-4 is a copy of the letter from which the excerpt above was taken. TECo claims the letter is confidential in its entirety, stating in its request:

The information in question contains bid information provided in response to Tampa Electric's RFP or information contained in prior proposals relating to coal transportation. Disclosing bidders' identities and the information included in their confidential proposals would discourage those bidders from participation in future RFPs as they do not desire for their competitors to have access to the terms and conditions under which they will bid on transportation services.<sup>13</sup>

As with the excerpt, TECo fails to justify why the entire letter requires confidential treatment. The letter does not contain any confidential proposals or other information that, if made public, would deter the company from participating in future RFPs. Further, the information is already a matter of public record.

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<sup>11</sup> Wells testimony, page 7, lines 1-5.

<sup>12</sup> TECo's Request at 18, emphasis added.

<sup>13</sup> TECo's Request at 18.

14. Similarly, TECo's "rationale" for keeping Mr. Wells' Exhibit No. HGW-5, confidential in its entirety is inapposite. Exhibit No. HGW-5 is a letter from a bidder indicating a desire to meet with TECo to discuss the rejection of its proposal. The letter does not contain any confidential proposals or other information that, if made public, would deter the company from participating in future RFPs. There is no reason why the letter itself should remain confidential, even if the author's identity is concealed.<sup>14</sup>

15. In summary, the information appearing at the pages referenced below should be made public:

- Majoros testimony, page 2, lines 7 and 12;
- Majoros testimony, page 26, line 12 (the second figure);
- Majoros testimony, page 28, line 1;
- Exhibit No. MJM-3, page 4 of 4;
- Exhibit No. MJM-5, page 1 of 8, row 3, columns 6 and 8;
- Exhibit No. MJM-5, pages 2, 3, 4, 7 and 8 of 8;
- Wells testimony, page 7, lines 1-5; and
- Exhibit Nos. HGW-4 and HGW-5

**WHEREFORE**, Public Counsel and FIPUG request that the Commission enter an order denying TECo's Request for Confidential Classification described above.

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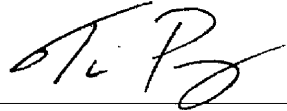
<sup>14</sup> However, the author's identity is in the public record, appearing in TECo's Motion to Compel filed April 19, 2004.



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**CERTIFICATE OF SERVICE**

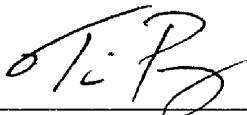
**I HEREBY CERTIFY** that a true and correct copy of the foregoing Joint Response in Opposition to Tampa Electric Company's Request for Confidential Classification of Portions of the Testimony and Exhibits of Intervenor Witnesses has been furnished by (\*) hand delivery, or U.S. Mail this 26th day of April 2004, to the following:

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