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MAY 10 PM 3:59

COMMISSION
CLERK

May 10, 2004

HAND DELIVERED

Ms. Blanca S. Bayo, Director
Division of Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Review of Tampa Electric Company's waterborne transportation contract with
TECO Transport and associated benchmark; FPSC Docket No. 031033-EI

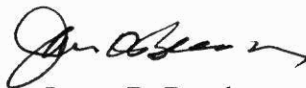
Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Tampa
Electric Company's Motion for Leave to File Reply to Residential Electric Customers' Response to
Motion to Compel and Request for Protective Order.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this
letter and returning same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,



James D. Beasley

- CMP _____
- COM 5 _____
- CTR _____
- ECR JDB/pp
Enclosure
- GCL _____
- OPC cc: All Parties of Record (w/enc.)
- MMS _____
- RCA _____
- SCR _____
- SEC 1 _____
- OTH _____

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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company's)
Waterborne transportation contract with) DOCKET NO. 031033-EI
TECO Transport and associated benchmark.) FILED: May 10, 2004
_____)

**TAMPA ELECTRIC COMPANY'S MOTION FOR LEAVE TO FILE
REPLY TO RESIDENTIAL ELECTRIC CUSTOMERS' RESPONSE TO
MOTION TO COMPEL AND REQUEST FOR PROTECTIVE ORDER**

Tampa Electric Company ("Tampa Electric" or "the company") hereby moves the Commission for leave to file the attached reply to the Residential Electric Customers' Response to Motion to Compel and Request for Protective Order and, as grounds therefor, says:

1. The reply filed on behalf of the Residential Electric Customers to Tampa Electric's Motion to Compel harbors serious deficiencies in legal analysis and case law references that need to be exposed and corrected.

2. The attached Reply does just that and will facilitate the Commission's proper understanding of how Mr. Twomey, on behalf of the Residential Electric Customers, has evaded his responsibility to comply with legitimate discovery requests made on behalf of Tampa Electric.

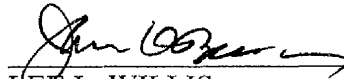
3. The attached Reply to Mr. Twomey's filing will facilitate the Commission's consideration of proper case law governing the conduct of discovery particularly as it relates to privileged and confidential information.

4. The Commission's consideration of the attached Reply will enable the Commission to rule promptly on Tampa Electric's Motion to Compel and will not adversely affect the rights of any party to this proceeding.

WHEREFORE, Tampa Electric moves the Commission to consider the attached Reply to Residential Electric Customers' Response to Motion to Compel and Request for Protective Order.

DATED this 10th day of May 2004.

Respectfully submitted,



LEE L. WILLIS
JAMES D. BEASLEY
JOHN P. FONS
RICHARD E. DORAN
Ausley & McMullen
Post Office Box 392
Tallahassee, Florida 32302
(850) 224-9115

ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of foregoing Motion for Leave to File Reply to Residential Electric Customers' Response to Motion to Compel and Request for Protective Order, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 10th day of May 2004 to the following:

Mr. Wm. Cochran Keating, IV*
Senior Attorney
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

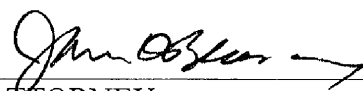
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Mr. Timothy J. Perry
McWhirter, Reeves, McGlothlin,
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Mr. Robert Scheffel Wright*
Mr. John T. LaVia, III
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ATTORNEY

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: May 10, 2004
_____)

**TAMPA ELECTRIC COMPANY'S REPLY TO RESIDENTIAL
ELECTRIC CUSTOMERS' RESPONSE TO MOTION
TO COMPEL AND REQUEST FOR PROTECTIVE ORDER**

Tampa Electric Company ("Tampa Electric" or "the Company") by and through its undersigned attorneys files this Reply to Residential Electric Customers' Response to Motion to Compel and Request for Protective Order and says:

1. On February 6, 2004, Tampa Electric served its First Set of Interrogatories (1-8) and First Request for Production of Documents (1-17) on Residential Electric Customers. In turn, Residential Electric Customers filed responses on February 16, 2004 and February 23, 2004 objecting in part to the production of the requested documents on privilege grounds. However, their responses failed to describe the nature of the documents sought to be protected from disclosure, in direct contravention of Florida discovery rules. Tampa Electric then filed a Motion to Compel responses on April 19, 2004. Residential Electric Customers responded to the Motion to Compel and sought a protective order on April 26, 2004. This reply follows.

2. The Florida Rules of Civil Procedure state that parties to litigation are entitled to obtain discovery from adverse parties and that the method for avoiding production of such discovery material must be followed closely by those objecting to production. In particular, Rule 1.280 (5) provides:

Claims of privilege for protection of trial preparation materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or

subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Residential Electric Customers failed to abide by this rule. As will be explained below, they have waived any opportunity to withhold documents based on claims of attorney-client or attorney work product privilege despite their contrary argument.

3. A party's objection to a request for document production or other discovery based upon an assertion of privilege which fails to comply with the requirements of Rule 1.280 (5) waives any asserted privilege unless the discovery request is itself invalid on its face. See Nationwide Mutual Fire Insurance Company v. Hess, 814 So.2d 1240 (Fla. 5th DCA 2002), TIG Insurance Corporation of America v. Johnson, 799 So.2d 339 (Fla. 4th DCA 2001); Shell Oil Company v. Par Four Partnership, 638 So.2d 1050 (Fla. 4th DCA 1994) (discussing validity of discovery request on its face). In their objections to Tampa Electric Company's First Set of Interrogatories (1-8) and First Request for Production of Documents (1-17), Residential Electric Customers made a choice not to generate a privilege log or assert the defense of an invalid request per the ruling in Shell Oil, supra. Based upon their failure to abide by the terms of Rule 1.280 (5), Residential Electric Customers have waived the right to assert any privilege and all requested documents should be produced immediately.

4. Residential Electric Customers seek to excuse their failure to abide by Rule 1.280 (5) on two grounds: (1) that Tampa Electric has somehow consented to their failure to provide a privilege log; and (2) because material sought by Tampa Electric appears on its face to be privileged, Tampa Electric bears the burden of proving that it is not privileged, citing First Union Nat. Bank v. Turney, 824 So.2d 172 (Fla. 1st DCA 2001). Neither excuse is valid.

5. First, in paragraph 8 of their Response and Motion for Protective Order (“Response”), Residential Electric Customers suggest that Tampa Electric excused their failure to provide a privilege log: “TECO complains that Residential Electric Customers have not produced a privileged log yet concedes on page 12 of the motion that preparation of such a log would defeat the purpose of the privilege and result in disclosure of the desired privileged information.” This is a curious reading of the Motion to Compel considering that, on page 12, paragraph 30, Tampa Electric asserted the following:

Tampa Electric is entitled to know with respect to each “document” (as defined in Tampa Electric’s request) of the “Residential Customers” (as defined in Tampa Electric’s request) the following with respect to each document: (1) the precise privilege asserted; (2) the date of the document; (3) the person who drafted the document; (4) the persons to whom the document was sent; and (5) a general description of the document. On information and belief, these documents, which Mr. Twomey claims are attorney client privileged, will reveal who Mr. Twomey’s client really are. Following the provision of this information, these documents should be produced to the prehearing officer for an in camera inspection and ruling on the applicability of the privilege asserted. From Mr. Twomey’s response, it is clear he has withheld documents based on this privilege but has not in any way provided any information by which anyone could test the validity of his assertion. Such a response is clearly inadequate.

Contrary to Residential Electric Customers’ interpretation, the language on page 12 expressly explains Tampa Electric’s argument that Rule 1.280 (5) entitles it to know the nature of that which is sought to be privileged. In making this argument, Tampa Electric adhered to the settled standard that a privilege log should contain information sufficient to identify the withheld communication or document, including among other things, the general subject matter of the communication or document, the source of the communication or document and the persons present during the communication or the addressee of the document. See Rule 26.1 (G)(6), S.D. Fla. L.R. Furthermore, as noted in Calzone v. Capital Bank, 689 So.2d 289, 281 (Fla. 3d DCA

Fla. L.R. Furthermore, as noted in Calzone v. Capital Bank, 689 So.2d 289, 281 (Fla. 3d DCA 1995), it is appropriate to provide the privilege log to the Court in an in camera proceeding so that the Court may address the propriety of the claim of privilege. However, by failing to either undertake the creation of a privilege log with appropriate limited information or presenting said log to the hearing officer for an in camera hearing, the Residential Electric Customers have waived their right to claim privilege.

6. As for the second justification offered by Residential Electric Customers for their non-compliance, the right of a client to protect **confidential** communications with counsel from disclosure, absent a showing that the communication falls within a specific exception to the privilege is well settled. Butler, Pappas, Wheihmuller v. Coral Reef of Key Biscayne Developers, Inc., 2003 WL 22800190 (Fla. 3d DCA Nov. 2003). However, in this case there has been no assertion by Residential Electric Customers that specific confidential communications between them and their attorney “made in the rendition of legal services” are included within the documents in their possession that are otherwise targeted for production to Tampa Electric.

7. Stated differently, Residential Electric Customers failed to refute the reasonable probability that there are a variety of documents that have been shared among the officers and directors of Consumer Federation of the Southeast (“CFSE”), Mr. Twomey, Dr. Lynch, Residential Electric Customers, and/or others, which speak to the existence of a mutual or joint effort on the part of all or some of them to utilize monies from business competitors of TECO Transport or of Tampa Electric, which do not contain confidential communications between a lawyer and client or attorney work product. For example, documents written to one of the Residential Electric Customers by Mr. Dartland or Mr. Sachs about how CFSE might motivate a competitor to fund the litigation may exist. Mr. Twomey might have been copied on such a

document or e-mailed an attached copy. Such a document may reasonably lead to the discovery of relevant evidence about a variety of matters, including, but not limited to, the credibility and accuracy of any expert witnesses offered by Residential Electric Customers at the hearing, the accuracy of any documented “studies” or position papers they may seek to offer into evidence, the tie-in (if any) between the figures for rate increases Residential Electric Customers contend are unreasonable in this docket and those that the CFSE (and possible corporate backers) are touting in their media campaign to discredit Tampa Electric and TECO Transport before this Commission.

8. However, rather than address these matters, Residential Electric Customers have merely asserted very broad and vague objections “to any and all production” requested by Tampa Electric. For example, Tampa Electric’s Request for Production No. 6 sought “all documents received by Residential Electric Customers from any person unrelated to Tampa Electric addressing any issue in this docket or the subject matter of the transportation of bulk commodities by any mode of transportation.” Residential Electric Customers responded to this request with a two-part answer that “the vast majority” of the documents in their possession were public records from the Commission and that Tampa Electric had “obtained identical copies” of them or that “[a]ll other documents that the Residential Electric Customers have received are protected by the attorney /client privilege and/or work product doctrine.” They offered no further detail in their Response to Motion to Compel and Request for Protective Order. Rather, in paragraph 39 of the Motion to Compel, they merely state: “All documents responsive to the Request for Production No. 6 were either *described in the initial response*, were provided prior to the April 22 deposition or will be provided in the late filed exhibits.” (Italics added).

9. This is not sufficient to meet the exception set forth in Shell Oil wherein the court recognized that the request for documents sought production of “legal correspondence between Shell employees and in-house counsel concerning the [subject] lease agreement.” Id. at 1051. Recognizing that confidential lawyer client communications are privileged and protected from disclosure to third persons absent a showing that an exception to the privilege existed, the court granted a writ of certiorari and quashed the trial court’s order compelling production. A similar result occurred in Hess, supra. Hess requested production of “any and all letters, memoranda and other written or recorded communications to or from attorneys for Nationwide concerning the decision of the District Court of Appeal in Delta Casualty Company, et al. v. Pinnacle Medical, Inc., et al., from October 2, 1999 to date concerning compliance with that decision.” The 5th DCA noted that “on its face, that request required disclosure of attorney client communications”, and held that absent an in camera inspection, disclosure would not be appropriate. 814 So.2d at 1243 citing Shell Oil.

10. Residential Electric Customers have failed, in either their initial objections to production or in their response, to present the hearing officer any documents for in camera review. Accordingly, they have waived any argument as to the applicability of Shell Oil. No where on the face of Tampa Electric’s First Set of Interrogatories (1-8) and First Request for Production of Documents (1-17) did Tampa Electric make the type of request made by the lawyers in Shell Oil or Hess.

11. Furthermore, Residential Electric Customers’ reliance upon Estate of McPherson, ex rel. Liebreich v. Church of Scientology Flag Service Organization, Inc., 813 So.2d 1032, Fla 2d DCA 2002, is misplaced in the context of the facts here. In that case the personal representative

of McPherson's estate sought certiorari review to quash a trial court order granting the Church of Scientology's 42nd discovery request:

Plaintiff's counsel is to provide within 20 days, all documents in possession, custody, or control concerning the payment by Robert Menton or any other entity associated with Robert Menton, directly or indirectly, during the period of January 1, 2000 to the present, of any sum of money exceeding \$500 to the plaintiff or her attorney or any representative or agent of plaintiff, intended for any cost, expense, or fee associated with this litigation, including, without limitation, any deposit slips, bank statements, checks, wire transfer records and bank drafts.

McPherson at 1033.

In evaluating the propriety of this request, the Second District noted:

Here the defendant in a wrongful death case is seeking information from the plaintiff and its counsel regarding Menton's contribution to fund the litigation. As the estate contends this will create a chilling effect on receiving future funding. Furthermore, the estate points out that if it is forced to disclose how much money it has to spend on litigation prior to the conclusion of the case, the Church will know how long the estate can last before it has to throw in the towel due to lack of funds." The fact that this is the Church's 41st request for production bolsters the conclusion that the Church will litigate until the estate can no longer afford to continue. With this in mind, we hold the production of the requested documents will cause the estate to suffer irreparable harm.

McPherson at 1034.

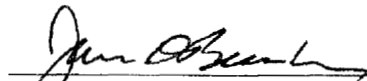
Clearly, the concern in McPherson over one side prolonging the litigation to the point where the opposition can no longer continue litigation is not applicable in this proceeding. This matter is set for a hearing at the end of this month. No party can outlast another in this docket. Moreover, Tampa Electric had filed one request for production of documents and one request for answers to interrogatories and has been stonewalled without an appropriate basis in law by Residential Electric Customers. Citation to the McPherson decision is wholly inappropriate on this ground.

12. The discussion within McPherson over the request that the estate and counsel provide documents revealing Menton's funding for the litigation shows that the request was not calculated to lead to relevant evidence. The court cited American Medical System v. Osborn, 651 So.2d 209, 211, Fla. 2d DCA 1995, wherein it was recognized that if the matters that are the focus of the discovery and the claimed injury have no rational connection, the request for production should be subject of a protective order. However, this line of inquiry is not applicable to the facts in this case. To the contrary, Residential Electric Customers are supported by an outside organization, CFSE, which has admitted that it is providing funding to the group for payment of its attorneys' fees and costs. See attached letter dated November 24, 2003 from Walter Dartland, Executive Director CFSE, to Michael Bullock, CSX Transportation. Residential Electric Customers have also presented an expert witness to the court. Because CFSE is widely known to have solicited the participation of competitors of TECO Transport in funding efforts to encourage this Commission to unravel the contract arrangement between TECO Transport and Tampa Electric, it is relevant and important for this Commission to have information that could shed light on the funding of one or more of those expert witnesses which may impact the court's assessment of their credibility and reliability. As such, neither McPherson nor the cases cited therein are applicable in resolving this motion.

13. In conclusion, despite the fact that they are represented by an experienced litigator, the Residential Electric Customers failed to abide by the clear, unambiguous provision of Florida Rule of Civil Procedure 1.280 (5). They did not provide a privilege log to document those items they believe were exempt from production or inquiry based upon attorney client privilege or attorney work product doctrine. Nor did they seek an in camera review from this Commission to evaluate whether documents would be excluded from production under the Shell Oil exception.

Instead, they simply made general objections to production which are not sufficient as a matter of law to protect the documents from Tampa Electric's review. They have waived their right to claim any privilege in the documents. The documents should be produced immediately to Tampa Electric as requested based upon the arguments and citations provided herein.

Respectfully submitted this 10th day of May, 2004.



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JAMES D. BEASLEY
JOHN P. FONS
RICHARD E. DORAN
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ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Tampa Electric Company's Reply to Residential Electric Customers' Response to Motion to Compel and Request for Protective Order, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 10th day of May, 2004 to the following:

Mr. Wm. Cochran Keating, IV*
Senior Attorney
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0863

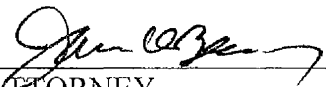
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ATTORNEY

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.)
_____)

ATTACHMENT TO

**TAMPA ELECTRIC COMPANY'S REPLY TO RESIDENTIAL
ELECTRIC CUSTOMERS' RESPONSE TO MOTION
TO COMPEL AND REQUEST FOR PROTECTIVE ORDER**



PO. Box 630

Jacksonville, FL 32202

Walter Dariland
Executive Director

Michael Bullock
CSX Transportation
500 Water Street - J842
Jacksonville, FL 32202

November 24, 2003

Dear Michael:

I'm writing to offer CSX Transportation the opportunity to support a new consumer advocacy group, the Consumer Federation of the Southeast (CFSE), in its effort to open long-closed markets to fair competition in Florida and elsewhere. I am certain we share a common interest in ensuring the lowest possible energy costs through competitive markets, especially in the area of transportation.

By offering whatever financial assistance you can to CFSE, you will help consumers fight for affordable electric utility rates in Florida by changing current practices allowed under Florida's flawed energy transportation policy. In addition, we want all transportation companies to have a fair chance at providing services to Florida utilities.

CFSE, though new, already is deeply engaged in opening these markets. Specifically, we are supporting positions in regulatory rate hearings before the Florida Public Service Commission that call for scrutiny into transportation pass-through requests from two investor-owned utilities, Tampa Electric Company and Progress Energy. Both companies have long engaged in the practice of awarding sweetheart transportation deals to affiliated companies, effectively shutting out companies like yours.

I am contacting you, in part, because PSC records indicate your company was among a list of potential bidders for the TECO waterborne transportation contract. As you know, TECO eschewed bids from other companies, and, as it has done for 45 years now, once again *awarded* the transportation contract to a sister company, TECO Transport.

We have supported the intervention of a group of TECO customers in that case, providing them with the initial financial help necessary to hire an attorney. And, we're pleased to report the TECO customers were successful in persuading the PSC to assign the TECO transportation issue to a separate docket hearing (Docket No. 031033).

That hearing, now set for May 26 and 27, 2004, will provide an opportunity to fully develop arguments as to why it is important that TECO re-bid this contract, as well as what a poor deal the current contract is for TECO customers.

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That hearing, now set for May 26 and 27, 2004, will provide an opportunity to fully develop arguments as to why it is important that TECO re-bid this contract, as well as what a poor deal the current contract is for TECO customers.

The requirements of TECO's waterborne transportation solicitation for bids were uncharacteristic of standard business practices and inaccurate for a number of practical and technical reasons - many of which have been raised by CFSE and by the PSC staff.

Examples of TECO's irregular bid requirements include such red flags as 1) a desired five-year contract with an individual provider, instead of shorter periods with several contractors, 2) terminals offering 1.5 million tons of inventory space, and 3) requiring terminal facilities to accept responsibility for cargo loss. And there's more.

- Requires that bidders use "sources convenient to Mississippi and Ohio River systems" and that "terminal facilities should be accessible to Mississippi River barge traffic," which eliminates some ports in the Gulf of Mexico that are not located in Louisiana.
- Requires consent decree options ranging up to 3 million tons annually for Ocean shipping alone, and requires that terminals pay for port demurrage.


With legal assistance from consumer attorney Mike Twomey, CFSE also won a recent decision from the PSC to hold a similar hearing on Progress Energy's self-dealings and transportation costs. A hearing date for Progress Energy's spin-off docket is in the works.

An important goal for consumers is that these spin-off hearings result in TECO and Progress Energy actively seeking open and fair bids in the future. Consumers will benefit from greater industry competition. To be sure, we can all expect the utilities to mount a strong public and legal battle to thwart these efforts. That's why we need your help!

Your contribution will help us further our ongoing education effort, prepare for the coming PSC hearings, and build our organization into a strong consumer advocacy presence. While CFSE is a not-for-profit organization, contributions to it are not tax deductible. Our corporate status does not require us to reveal our contributors, and we will keep your identity confidential to protect you from possible industry backlash. We recognize that confidentiality can be extremely important to corporations in this industry.

Included with this letter are representative newspaper articles on CFSE and the TECO issue. If you would like more information, or wish to discuss any of these issues further, please feel free to call me at (850) 562-2086.

Sincerely,



Walter Dartland,
Executive Director