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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Review of Tampa Electric Company's waterborne transportation contract with TECO Transport and associated benchmark

Docket No. 031033-EI
Filed: May 19, 2004
COMMISSION CLERK

RESIDENTIAL CUSTOMERS' OBJECTION TO NOTICE OF INTENT TO SERVE SUBPOENA ON NON-PARTY PURSUANT TO RULE 1.351, FLORIDA RULES OF CIVIL PROCEDURE

The "Residential Customers," Catherine L. Claypool, Helen Fisher, William Page, Edward A. Wilson, Sue E. Strohm, Mary Jane Williamson, Betty J. Wise, Carlos Lissabet, and Lesley A. Diaz, hereby object to the Notices of Intent to Serve Subpoena on Nonparty Pursuant to Rule 1.351, and state: that the proposed discovery would be improper harassment of a nonparty because it seeks private financial records that are not discoverable; that the proposed discovery seeks to intimidate nonparties and to foster a chilling effect against persons who exercise their rights of freedom of speech and association; that the proposed discovery seeks discovery of matters irrelevant to this case and already deemed nondiscoverable by Order Requiring In Camera Inspection issued by Chairman Braulio L. Baez, as Prehearing Officer, on May 13, 2004; and, that the proposed discovery seeks to invade the work product of parties to the case.

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Besides these substantive objections to the proposed discovery, the Residential Customers must point out that the Notice and attached subpoena are procedurally improper and violate Rule 1.351, Fla. R. Civ. P. Rule 1.351 is designed to eliminate the need for taking a deposition of a record custodian when the party seeking discovery merely wants copies of the records only and does not require testimony. See Committee Notes to Rule 1.351. When obtaining of records is a noncontroversial matter to be accomplished without needless expense (for example, when medical

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records are sought in a personal injury case), Rule 1.351 provides a logical procedure.

Rule 1.351(b) provides that a party seeking documents from a nonparty may serve a notice of intent to serve a subpoena “at least ten days before the subpoena is issued.” Rule 1.351(b), Fla. R. Civ. P. The notice is served only on parties to the case. Id. The proposed subpoena must be attached to the notice, “and shall state the time, place, and method for production of the documents or things and the name and address of the person who is to produce the documents or things.” Id. The notice “shall state that the person who will be asked to produce the documents or things has the right to object to the production under this rule and that the person will not be required to surrender the documents or things.” Id. Rule 1.351 specifically prohibits the proponent of the discovery from furnishing a copy of the notice and proposed subpoena to the person upon whom the subpoena is to be served. Id. If any party objects to production under this rule within ten days of service, or if the person served with the subpoena objects, the documents “shall not be produced under this rule,” but must be obtained pursuant to Rule 1.310, the standard rule for depositions upon oral examination. Id. The Committee Notes to Rule 1.351 clarify that the prohibition against furnishing a copy of the notice and proposed subpoena to the person upon whom the subpoena is to be served is “to avoid premature production of documents by nonparties.”

Rule 1.351(c) provides that, if no objection is made by a party served with the notice of intent, then the party seeking discovery must file a certificate of counsel that no objection has been filed before seeking issuance of the subpoena. Only then can the subpoena be delivered.

TECO’s Notices violate Rule 1.351 in a multitude of ways that are prejudicial to the other parties to this case, as well as to the nonparty from whom the records are sought:

1. The Notices of Intent to Serve Subpoena attach an actual subpoena (signed and issued

by the clerk), rather than a proposed subpoena.

2. The Subpoena commands the nonparty to appear at the offices of Ausley & McMullen seven days after the Notice of Intent to serve subpoena was served, i.e., before the expiration of the 10-day period to object to the subpoena.

3. The Subpoena fails to specify that no testimony is required and that only production of documents is sought.

4. The Subpoena fails to give the recipient an option to deliver or mail copies of the documents.

5. The Subpoena fails to advise the recipient of the right to object, and that on objection, the documents need not be produced.

6. TECO failed to file a “Certificate of Counsel . . . that no timely objection has been received from any party” before presenting the subpoena to the clerk for issuance, thus misleading the clerk into prematurely issuing the subpoena.

7. TECO prematurely served the Subpoena on the proposed deponent, Walter Dartland, Director of CFSE, before the parties had a chance to file their objections, thus creating confusion as to whether he was required to appear for deposition and creating the risk of premature production.

TECO’s flagrant violation of the discovery rule has created needless confusion and expense, and should be subject to sanction under Section 120.569(2)(e) and (f), Florida Statutes (2004).

Respectfully submitted,

/s/ Michael B. Twomey

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of this objection has been served by U.S.

Mail and email this 19<sup>th</sup> day of May, 2004 on the following:

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