BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company's waterborne transportation contract with TECO Transport and associated benchmark	))))	**Docket No. 031033-EI** **Filed July 12, 2004**

POST HEARING BRIEF OF RESIDENTIAL ELECTRIC CUSTOMERS

Catherine L. Claypool, Helen Fisher, William Page, Edward A. Wilson, Sue E. Strohm, Mary Jane Williamson, Betty J. Wise, Carlos Lissabet, and Lesly A. Diaz (the "Residential Electric Customers" or "RECs"), by and through their undersigned attorney, hereby file their Post Hearing Brief in this docket.

Summary of Conclusion

The outcome of this case involves money and lots of it! All the customer parties allege that Tampa Electric Company's ("TECO" or the "Utility") waterborne transportation rates are excessive by tens of millions annually, but virtually all the Utility's current coal and coal transportation costs are declared confidential and held from the consuming public's view. Further, it seems abundantly clear now that even the confidential transportation costs are intentionally misleading because they exclude often substantial costs to get the coal from the mine to the river barges and, thus, do not represent the total transportation costs. Rates that are not confidential, however, and which are difficult for customers to ignore are TECO's overall residential rates, which are 79 percent higher than those of the Fernandina Beach Division of Florida Public Utilities Company ("FPUC") and fully 24 percent higher than Gulf Power Company's ("Gulf Power"), a non-nuclear electric utility burning mostly coal, like TECO.

The Residential Electric Customers have no choice but to pay these rates because TECO is a regulated monopoly. As shown in Exhibit 112, TECO customers using 1,000 kWh per month pay $99.01.1 If they could switch to the most efficient electric utility regulated by this Commission, FPUC in Fernandina Beach, they would each save $524.16 per year! If served by Gulf Power they would still each save $227.16 per year. According to TECO Energy's 2003 Annual Report, TECO sold 8,265 megawatt-hours of residential sales in that year,2 which means that if all TECO's residential customers could have taken service in Fernandina Beach their collective savings would have exceeded $361 million annually. If all could have been served by Gulf Power, their collective annual savings would still have exceeded $156 million. It doesn't require expert testimony to understand that this level of excessive rates must necessarily curb economic development in TECO's service territory, while, more importantly, depriving its residential customers, including the Residential Electric Customers, of substantial monies they could otherwise have spent on food, shelter, clothing, medicines or education. The Residential Electric Customers would like to know why the huge differences for regulated companies producing exactly the same product?

Presently there are no answers, but the large and inexplicable variances in the rates approved by this Commission for this fundamentally generic product suggest that: (1) TECO's overall rates are prima facie excessive; and (2) this Commission is failing in its statutory responsibility to see that TECO's rates are just, fair and reasonable. While TECO's base rates are not at issue in this case, the clearly excessive and unreasonable rates TECO pays its affiliate, TECO Transport, which rates are shrouded in excessive, unnecessary and indefensible secrecy,

1 Exhibit 112, PSC document entitled, "Total Cost For 1,000 kilowatt hours – Residential Electric Service, effective April 15, 2004 – December 31, 2004"

must be viewed as a significant contributor to this Utility's overall, unacceptably high rates. Reducing TECO's payments to TECO Transport to merely "market-based" rates is the first step this Commission can take in bringing the Utility's overall rates more in line with the more efficient electric utilities in the state.

While there is not sufficient evidence in this record to judge whether the rail benchmark made sense from the outset in 1988, there is substantial evidence to show that it doesn't make sense now and has not for years. That TECO was overcharging its customers for coal transportation to the benefit of its affiliates should have been apparent if the Commission and parties had only studied the available data for other Florida utilities taking coal by rail and water. True, much of the data at the Commission was held confidential, but not all of it. For example, Gulf Power, which ships by both rail and water, doesn't purchase from affiliates and has substantially lower rates, and doesn't try to withhold its fuel and fuel transportation costs from its customers. Municipal electrics ship by rail and water and are precluded by law from withholding their cost data, while Progress Energy's coal shipping costs, even while confidential, could still be compared to TECO's. Governor Bush recently said with respect to evaluating Florida's schools, "If you don't grade, you don't care." Florida's regulated electric utilities should be compared, contrasted and graded, but they are not, at least adequately.

The evidence in this case reveals that TECO issued an RFP for its water coal transportation only because it had been pushed by Commission staff to do so. When it did, the document was so restrictive by its terms that only TECO Transport could "win," although it didn't even have to bid to win because it had an undisclosed "meet or beat" or "right of first

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2 Page 7, 2003 TECO Energy Annual Report & Proxy Statement, part of Staff Comprehensive Exhibit 2.

refusal" provision in its prior contract that entitled it to win automatically. There was a widely held view in the industry that TECO Transport, as it had previously, would get the contract and, as a result, some vendors didn't bother replying. CSXT, the rail provider, wasn't invited to bid and its offer was rejected for unconvincing reasons when it submitted one nonetheless. As expected, TECO Transport "won" because there were no "qualified" bids for the river and trans-Gulf legs and only one for the terminaling component. TECO's expert used a confidential proprietary computer model to establish "market" prices for the river and Gulf legs and TECO Transport was allowed to "meet" the single terminaling bid – from a confidential operator – which bid was <u>higher</u> than what TECO was paying per the last contract. The Commission and TECO's customers were left in the unnecessary and unenviable position of trying to cobble together "market prices" from complicated, often secret, computer models. This unsatisfactory result could have been avoided had TECO issued a fair and open RFP and had it done so in a timely manner.

TECO has nothing resembling a "least-cost" fuel and fuel transportation strategy designed to minimize its delivered fuel costs.3 Instead, it purchases and transports its coal and other solid fuels in a manner that necessarily results in virtually every ton having to be transported by its affiliate, TECO Transport. Coal that might be purchased at lower cost and shipped at lower cost by rail is a non-starter because Big Bend Station will not currently accept rail deliveries despite the fact that it would clearly be cost-effective for it to do so. South American, or other foreign coal, is carried past Tampa Bay and on to the Lower Mississippi, where it is transloaded at TECO Transport facilities and then shipped back across the Gulf of

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3 Testimony of Doctor Sansom Tr. Line 8, page 1096.

Mexico on TECO Transport vessels to Big Bend with the result that the affiliate earns, and TECO customers pay for, unnecessary transloading fees and a second Gulf transit. Cost-effective modifications to Big Bend Station to allow receipt of ocean-going vessels and fuel blending so that lower-cost, direct shipments to Big Bend are possible have not been made.

TECO's efforts to suggest that TECO Transport's revenues from transporting the Utility's coal are immaterial are unconvincing, as are its suggestions that the business, if lost, could be made up elsewhere. TECO Energy's 2003 Annual Report, entered into the record as part of Staff Exhibit 2, paints a substantially different, if not desperate, picture. TECO Energy, seemingly a holding company of holding companies, and with a myriad of subsidiaries and affiliates probably unknown to its average electric customer, lost over $909 million in 2003 from its failed wholesale energy strategy and could clearly use the money:

> Our financial results for 2003 reflect the write-offs associated with our decision to exit from our ownership of the two large merchant plants, which are included as discontinued operations, and losses incurred at the merchant plants. <u>The net loss in 2003 was $909.4 million</u>, primarily due to $1,084.1 million of charges detailed in the following table.

(Page 2, "Results Summary" 2003 Annual Report, Composite Exhibit 2.) (Emphasis supplied.) The "factors" and "risks" that are laid out in the "Investment Considerations" and "General Business and Operational Risks" sections of the Annual Report make compelling reading and serve to highlight the importance to the corporate parent of retaining all of the coal transportation revenues. (2003 Annual Report, pages 31-35).

The coal transportation revenues flowing from TECO's customers through to the parent corporation are not insignificant. As reflected in the 2003 Annual Report, roughly 40 percent of TECO Transport's $260.6 million revenues that year, or $104.2 million, came from hauling TECO's solid fuels. (2003 Annual Report, page 34.) TECO Transport's 2003 net income was down substantially from the prior year, due in part to disappearing business from TECO:

> Net income in 2003 was $15.3 million, before a $0.8 million charge for a change in accounting principle, compared with $21 million in 2002. <u>The decrease was primarily due to lower tonnage for Tampa Electric due to the conversion of the Gannon Station</u> from coal to the natural gas fired Bayside Station, continued weak results from the river transportation and terminal businesses due to lower northbound shipments and a very competitive pricing environment . . . .

(2003 Annual Report, page 11.) (Emphasis supplied.) Clearly, any TECO modifications made to directly accept foreign coal at Big Bend Station, or to take rail-delivered coal would necessarily deprive TECO Transport, and, thus, the corporate parent, TECO Energy, of desperately needed revenues.

The "TECO Transport" section of the 2003 Annual Report, at page 11-12, also effectively puts the lie to TECO's hearing testimony that "backhaul" revenues were effectively insignificant, if not non-existent. This section makes clear that TECO Transport relies heavily on <u>northbound</u> (read as backhaul) shipments of imported raw materials, consisting of steel, imported furnace coke and petroleum coke, among others. (2003 Annual Report, page 12.)

This Commission should not allow TECO to constrain it solely to examining computer model innards in order to divine competitive market prices for coal transportation services as a result of its failure to properly seek competitive bids for the transportation of its coal. Rather, the Commission should compel TECO to rebid the transportation contract, to include the clearly viable rail option, and should publicly announce that it will referee the results. Necessarily, any rebidding must include affirmative statements that bidders will not be wasting their time and effort due to a TECO Transport right of first refusal.

If the Commission determines that it is incapable of requiring TECO to issue a fair and open RFP and that it is, thus, forced to make the best of the situation by determining from this record "market-based" transportation costs so that disallowances can be made to bring TECO's rates closer to the rest of the electric utilities it regulates, then it should do the following:

(1) Declare the Order No. 20298 rail benchmark to be excessive, ineffective and inapplicable on a going forward basis;

(2) Adopt the recommendations and adjustments put forth by Public Counsel's witness Mike Majoros for the river segment of the transportation route. After all, Public Counsel's adjustments are just common-sense and obvious reductions to TECO's witness Dibner's "black box" model's excessive results. Furthermore, witness Majoros' adjustments lead to rates that are confirmed by rates charged by Gulf Power to its customers;

(3) Use the terminaling rate last paid to TECO Transport's Davant terminal under the old contract, not the higher bid received from the other terminal operation on the Lower Mississippi. Allowing TECO to increase the costs to its customers by use of the "meet or beat" provision of the old contract defies not just common sense, but minimal regulatory standards, especially given the nature of the corporate self-dealing here and TECO's overall indefensibly high rates;

(4) Adopt the cross-Gulf rate recommended by REC's witness Dr. Anatoly Hochstein. While bids resulting from a fair and open RFP process, to include the rail alternative, are preferable to "modeling" numbers, Dr. Hochstein's results, which are based on the comprehensive and widely utilized U.S. Army Corps of Engineers' data, are clearly more supportable and reasonable than TECO witnesses Dibner's secret proprietary model.

Furthermore, Dr. Hochstein's adjustments are fully supported by the non-confidential transportation cost data filed with the Commission by Gulf Power, as well as by the declassified shipping data in the record from both TECO and Progress Energy.

(5) The total per ton adjustment should be the confidential reduction recommended by Doctor Hochstein at page 780 of the transcript. If adopted, his recommended could save TECO's customers tens of millions of dollars annually;

Additionally, to ensure the intolerable situation the Commission and TECO's customers find themselves in presently is not repeated in four or five years, the Commission should further:

(6) Order TECO, as part of the ongoing annual fuel adjustment proceedings to adopt and publish an overall "least-cost" coal and coal transportation policy. Such a policy should include an inventory of all coals serviceable in TECO's boilers as well as an examination of which mine location/transportation modes will result in the overall least cost of coal as measured in cents per BTU. Only in this way can the Commission dispel the clear perception, if not actuality, that TECO purchases its coal, irrespective of its price, to justify shipping all of it by TECO Transport. Consideration of such a policy should necessarily include an examination of the benefits-costs of: (a) modifying Big Bend to receive ocean-going vessels directly without transloading in Davant; (b) modifying Big Bend to accomplish all necessary blending for its boilers and those at Polk Power Station, so that transloading and blending at Davant with the accompanying cross-Gulf shipping by TECO Transport, can be avoided where cost beneficial; and (c) modifying Big Bend to receive rail deliveries, when doing so would allow TECO to accept rail-delivered coal where the combined cost of the coal and rail transportation, plus the

costs of any rail modifications, would allow lower-cost delivered coal than some now being delivered by TECO Transport; and

(7) Order TECO to work with Commission staff and the parties to this docket on the drafting of a fair and open RFP for coal transportation for the contract to follow the current contract. This work should begin at least a full year prior to the expiration of the current contract and should include: (a) a statement that bids clearly may be for segments of the route, not the full requirements; (b) that rail deliveries are acceptable; and (c) that the RFP state that TECO Transport will be required to bid simultaneously with other vendors and will not have a right of first refusal

BURDEN OF PROOF

Commissioner Deason got it exactly right on the burden of proof during the hearing when he said:

> COMMISSIONER DEASON: I can share some initial thoughts, but it would be very preliminary at this point. But, in my opinion, it is clear that the burden is upon TECO to justify the prudency of their costs. The Commission has employed a certain mechanism, which was the benchmark. That very mechanism has come into question as to its adequacy or its appropriateness and whether it has outlived its usefulness. But that doesn't mean that the burden still doesn't rest with TECO.

(Tr-1128). That the burden of proof is completely and totally the regulated utility's is so fundamental and well established as to require no citation of authority to this Commission.

CONCLUSIONS OF LAW

The Residential Electric Customers have reviewed CSX Transportation's ("CSXT") Legal Brief to be filed in its post-hearing brief and adopt it as their own in its entirety. Specifically, the Residential Electric Customers agree with CSXT that (1) the Commission's prior orders and any stipulations approved therein do not restrict this Commission's actions in this docket; (2) this Commission has the statutory authority and obligation to (a) require TECO to conduct a new, fair and open RFP process; (b) to supervise the "winners" of the RFP process; and (c) to require that TECO enter into appropriate contracts with the "winners" of the RFP process for the benefit of all of TECO's captive customers; (3) that the Commission has the authority to require TECO to negotiate in good faith with CSXT for the installation of coal-by-rail delivery facilities at Big Bend and to meaningfully manage competition between the water and rail transportation of its coal deliveries to provide the lowest possible fuel supply costs for the benefit of its customers; and (4) that the Commission should open another docket for: (a) the purpose of investigating TECO's intentional practice of buying coal "freight on board barge," which has the result of concealing the true cost of its waterborne transportation, and (b) for the purpose of determining the amounts TECO should be required to refund to its customers as a result of its deceptive practices.

STATEMENT OF THE FACTS

The Residential Electric Customers do not intend to fully describe the "Statement of the facts" in this proceeding, which, of course, are rather lengthy. Rather, the REC will adopt the collective statements of the facts as presented in the briefs of the other customer parties, namely, Office of Public Counsel ("Public Counsel"), Florida Industrial Power Users Group ("FIPUG"), and the CSX Transportation ("CSXT"), and will cite below to specific relevant facts in the record in arguing their positions on the three issues major issues in this case.

ARGUMENT

ISSUE 4: **Should the Commission modify or eliminate the waterborne coal transportation benchmark that was established for Tampa Electric by Order No. PSC-93-0443-FOF-EI, issued March 23, 1993, in Docket No. 930001-EI?**

RES. CUST.: *Yes. The benchmark allows for unreasonable and excessive cost recovery and should be eliminated. TECO should be compelled in the future to fairly and openly bid for transportation services. Any transportation leg not receiving adequate bids should be returned to cost of service regulation. Otherwise, services should be awarded to the lowest qualified bidder.*

Discussion:

Per Order No. 20298, which accepted the TECO/Public Counsel stipulation providing for the "Benchmark Transportation Calculation," it is clear that this stipulation arose from the testimony of Mr. Hugh Stewart, a General Engineer at the Federal Energy Regulatory Commission, who was testifying in the docket on behalf of Commission staff. As reflected at page 8 of the Order (Comp. Ex. 6):

> On cross-examination, Mr. Stewart acknowledged that he had developed a "sanity check," using the publicly reported rail coal rates paid by Florida municipally-owned utilities, which showed that the total transportation costs paid by TECO to its affiliate were less than the surrogate rail cost.

Interestingly, although Mr. Stewart's "sanity check" and the transportation benchmark were based on publicly reported rail tariffs offered to Florida municipal electrics, existing and actual rail rates to the Gannon/Tampa Bay area were readily available, although presumably held confidential:

> Except for a small (less than ten percent or about 500,000 tons per year) share of TECO's requirements of Gatliff's sales, which are delivered to Gannon Station directly by rail, all of TECO's coal is delivered to Big Bend and Gannon Stations by barge under the direction of TECO Transport and Trade Corporation.

(Comp. Ex. 6, Order 20298, at page 4.) As reflected in this record, not only did the rather wide and consistent gap between the rail benchmark and the actual waterborne rates paid argue from the beginning that the benchmark was excessive, so, too did the actual rail rates to Gannon versus the rail benchmark.

As reflected at page 24 of Order No. 20298, the rail benchmark used the average of the lowest two "current publicly available rail rates to Florida utilities on a cents per ton mile basis" and then multiplied that number times the "weighted average rail miles from all coal sources for Tampa Electric to plants."

Flaws in the Rail Benchmark as used

As noted by Doctor Sansom at page 1090, not only is the rail benchmark flawed, but so too is Ms. Wehle's defense of it for TECO:

> Yes. But, of course, she has a very serious flaw in her data. When she uses the TECO Transport rate, she does not include all the transportation for the water move in her number, which is an absolutely fatal flaw. It is like your kid came home from school and said he made straight As. And you said, "Well, how did you do in Spanish?" And he said, "I got an F. Oh, I made straight As all the other ones."
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> * * *
>
> Well, she fails to tell the Commission that an important transportation

> component of moving the coal from the mine is moving it from the mine to the barge. So she is comparing apples and oranges, even if the benchmark were correct, which you are looking at a document that shows that it isn't.

So, as is clearly reflected in the now declassified FPSC Form 423s for TECO contained in Exhibit 101, the rates TECO touts for its waterborne transportation as being clearly advantageous to its customers versus the rail benchmark don't tell the complete transportation story since the coal is purchased FOB barge and, thus, the mine to barge transportation cost is concealed in the cost of the coal.

Just as importantly, the inadequacy of the rail benchmark is demonstrated by its failure to compare to the real world price of delivering coal by rail to the Tampa Bay area. As testified to by Doctor Sansom, the rail benchmark for the year 2000 was $26.23 per ton, whereas the declassified 423s for that year show CSX delivering coal from the same region for $16 per ton. (Tr. 1090-1091.) The difference is $10.23 or 64 percent over the actual cost of rail transportation to Gannon that month. Similarly, for May, 2001 the rail benchmark would declare that anything below $23.87 was reasonable for TECO to assess to its customers, whereas the declassified Form 423 for that month showed the actual cost per ton for rail shipments to Gannon was $16.35. (Tr. 1092-1093). The difference here, $7.52, is 46 percent higher than the actual cost of rail transportation to Gannon, hardly a ringing endorsement that the amounts paid to TECO Transport for waterborne transportation are reasonable, let alone a bargain.

No provision of law or prior Commission orders precludes the reduction of affiliated coal transportation costs recoverable in customer rates and, indeed, this Commission has a statutory mandate to reduce the level of the recovery and to reduce it substantially. TECO has too long enjoyed a free ride trading on the "wisdom" or "heroics" of its leaders forming its waterborne coal transportation system nearly 50 years ago. As revealed in Order No. 20298, the inherent suspicions resulting from the affiliated and, thus, less-than-arms' length coal transportation contracts were further complicated by affiliated coal purchases. Order No. 20298 didn't mandate the use of the rail benchmark in 1988, it merely approved its stipulated use by agreement of TECO and Public Counsel.

Specifically, and initially, TECO made an exception to its almost exclusive use of the affiliated waterborne transportation system when it used CSX rail to ship affiliated Gatliff coal to its Gannon Station. It did so for years up to 2002 when it converted Gannon to natural gas. The entire time the Commission was using the constructed rail benchmark based on published rail tariffs (not the actual lower rates reflecting volume discounts) to Florida municipal electrics, which rates were not confidential, to determine if TECO's confidential water rates were prudent and reasonable, it effectively overlooked the level of actual rail rates to Gannon Station, which is just a short distance from the Big Bend Station. If TECO is now arguing that CSXT's proffered rail service to Big Bend establishes a "market," which it is, wouldn't it have been more reasonable to judge what TECO was paying its affiliate by comparison to what it was paying the non-affiliated CSXT? We submit that it would have been and now declassified cost data for both running back to 1994, especially as compared to the benchmark for those years shows both that the benchmark made no sense and that the water rate was excessive by contrast to the CSXT's Gannon rate.

Doctor Hochstein, an internationally recognized expert on maritime, ports and waterways matters, testifying on behalf of the Residential Electric Customers, stated that he saw as the chief flaw of the rail benchmark (1) that he thought that actual market prices for the transportationrelated services should have been determined, when possible, instead of applying rail rates as a proxy, and (2) rail rates for much of the Midwestern coal in question, depending upon the distance from the mine to the river, would almost always be greater than water rates, with the result that testing water rates by use of a rail-based proxy was not economically sound. (Tr. 720 and Comp. Exhibit 97, Depo. of Doctor Hochstein, pages 48-51.)

At this point it might be appropriate to attempt to dispel the notion TECO has persisted in advancing that there are unalterable and fundamental differences in the professional opinions of Doctor Hochstein and Doctor Sansom, such that the customers should lose and TECO prevail here. TECO attempted at hearing to make a big deal of the fact that in Doctor Sansom' deposition.

As pointed out on cross of Doctor Sansom at hearing, he said of one of Doctor Hochstein's statements in his prefiled direct testimony, "I read that statement, and I thought he was incredibly stupid," and of a second of Doctor Hochstein's statements in his testimony, "That was another dumb statement."

Doctor Sansom, it's true, had these reactions in his deposition, acknowledged them at hearing (Tr. 1136-1137) and pointed out he had apologized "for the tone" he used. Given these "facts," is Doctor Sansom's verbal fisticuffs, notwithstanding his apology for the tone, reason enough for the Commission to give the point and match to TECO? We think not.

What if TECO alleges in its brief that Doctor Sansom and Dr. Hochstein "have diametrically opposed opinions on the economic efficiency of waterborne delivery of coal to Tampa Electric's Big Bend and Polk Power Stations versus rail delivery." Even if it were true, we would suggest that TECO still doesn't belong in the winner's corner just yet. But it's not true!

When questioned by Lee Willis about Doctor Sansom's responses in his own deposition, Doctor Hochstein responded with good grace and humor and, more importantly, qualified his prefiled testimony to essentially say that waterborne transportation of bulk cargo would be expected to be less expensive than rail, but not in all cases, and certainly depending upon the mine origin's distance from the river. It is probably fair to say that Dr. Hochstein concluded that you have to run the numbers in each case to be sure which mode is less expensive, but the Commission would do better to read this specific exchange between Mr. Willis and Doctor Hochstein and to decide for itself:

BY MR. WILLIS:

Q. Okay. And you also say: "Thus, the reasonableness of the waterborne rates paid should properly be measured by comparing them to other comparable waterborne rates, not by applying the rail rate per ton mile to the rail distance from the Midwestern fields to Big Bend."

A. That is exactly my opinion.

Q. Would you agree, then, that TECO Transport could always provide a lower cost coal transportation service from the Midwest to Tampa than the railroad?

A. I have not done quantitative comparisons of these two modes of transportation. I believe that for certain areas when mines are located close to navigable waterways, waterways in general would be less expensive. I do not deny, if a mine is located someplace else, sometimes the railroad might be more cost competitive. But for the mines located along waterways, I do believe that waterborne transportation is the lowest cost transportation.

Q. So you would also agree with me, would you not, that if you were conducting a market test, that one reasonable way to do that market test for a waterborne carrier would be to look at the rail rate and to be sure that the waterborne rate was below the rail rate; isn't that correct?

A. It depends on the objective and the task. If we conduct a calculation between two modes of transportation, then routinely that's exactly what we do. We calculate cost by water transportation for planning purposes, with rail transportation, and select the most effective mode of transportation. It does not mean, however, that railroad cost can be used as a sufficient measure of waterborne rates.

Q. But you would expect the waterborne rate to be below the rail rate, would you not?

A. Yes, I do.

Q. Has Mr. Twomey talked with you subsequent to the deposition of Dr. Robert Sansom yesterday?

A. Yes, he did talk to me.

Q. Did he tell you about Dr. Sansom's testimony with respect to your testimony?

A. Not in any details. He mentioned that that was a question, that he disagreed with some of our findings. That's what Mr. Twomey mentioned to me. Not in any detail, I did not listen to this conversation. And that's all what I know, that's all Mr. Twomey told me.

Q. I want to read you exactly what he said, and then I want you to comment on it.

A. All right.

Q. The question posed to him was: "Do you agree or disagree with Dr. Hochstein's statement at page 5, lines 2 through 3 of his testimony, that coal from the Midwest coal fields can only rationally be transported to Tampa Electric's Big Bend Station by water? His answer: "I read that statement, and I thought he was incredibly stupid."

A. (Laughter.) That, Mr. Twomey did not tell me. I am very disappointed because Dr. Sansom appeared to me to be a very nice individual. Again, I stand for this statement. <u>But I would like to emphasize that it is not a quantitative statement, it is a qualitative statement. And quite possible that for specific mines, for specific locations, the rail might be less expensive. It is possible</u>. However, in general, in general, to move large quantities of coal from the mines located in direct proximity to waterways, my expectation is -- and I emphasize expectation -- that water mode would be less expensive, with all due respect to Mr. Sansom.

MR. TWOMEY: That son-of-a-bitch.

(Laughter.)

BY MR. WILLIS:

Q. I want to read you another statement that was said in the deposition and get you to comment on that. The question posed was: "Do you agree or disagree with Dr. Hochstein's statement on page 14, lines 16 through 17, that water transportation of bulk cargo when available is almost always less expensive than rail? His answer: "That was another dumb statement."

A. Now I am accustomed to this remark. (Laughter.) But I still stand for my statement. <u>I emphasize once and once again it is a qualitative statement which describes a general situation, nothing original about that</u>. It is common knowledge. And that's why huge amounts of bulk cargo is moving along the Mississippi River system. <u>Again, it does not mean that in certain specific situations, it depends on the location of a region and the location of the destination, railroad might be less expensive</u>. I don't deny that. As a general statement in most of the cases water transportation would be a lower cost and considerably. Now, again, I emphasize considerably lower, especially per ton mile.

(Comp. Exhibit 97, pages 48-51 of Doctor Hochstein deposition.) (All emphasis supplied.) As may be ascertained, there is no serious disagreement between the two doctors, let alone any bad blood. Which transportation mode is less expensive is largely fact dependent, depending chiefly on how far the mine is from the river, although, as is discussed elsewhere in this brief and in the briefs of other customer parties, head-to-head comparisons of rail versus waterborne rates are always more useful, and certainly more honest, if the costs to get the coal to the water and loaded on the barges are included in the water rate and not disguised in the FOB barge price of the coal. Drs. Hochstein and Samson are in agreement that the rail benchmark is fatally flawed and should be discarded, while they are also in apparent agreement that whether a given coal may be transported less expensively to Big Bend by either water, or rail, is a fact-dependent question, which, necessarily requires a case-by-case examination.

Conclusion:

Not even TECO has made a serious attempt to defend the retention of the rail benchmark. All other parties, including Commission Staff, have dismissed it as substantially overstating the "market price" for coal transportation to Big Bend with the result that TECO has been able to overcharge its customers for waterborne coal transportation. The Commission should eliminate the benchmark and find a more realistic measure for determining the reasonableness of TECO's coal transportation charges.

ISSUE 2: **Is Tampa Electric's June 27, 2003, request for proposals sufficient to determine the current market price for coal transportation?**

RES. CUST.: *No. The RFP was flawed in numerous respects as was the evaluation of the few bids received. Thus, it cannot be used to determine the current market price for coal transportation.*

Discussion:

Perhaps the most obvious indicator of the sufficiency, fairness and openness of TECO's June 27, 2003 RFP is the fact that with over $140 million in transportation revenues on the table (40% of $260.6 million) virtually no companies submitted bids. This, in a market in which TECO witness Dibner testified the inland or river market was out of balance with there being a greater supply of vessels than demand for their services and "the lower Mississippi River river-to-ocean barge terminal services market dominated by two major companies that are adjusting to reduced demand, even as many of their costs are fixed. Consequently they are fighting aggressively for business." (Tr. 60-67.) Witness Dibner testified that the ocean segment was in balance with full employment in the domestic sector. (Tr. 67.) He also testified that he thought the RFP's conditions were reasonable and appropriate to the market and the services TECO was soliciting. (TR. 68.) He stated that aside from the two rail solicitations that were testified to by TECO witness Wehle, TECO received one bid for inland services, which he recommended as being non-compliant because the vendor was in bankruptcy and because it only offered to carry about 20 percent of the total volume. (Tr. 81-83.) The one terminal operator, whose identity was confidential, was in compliance, so witness Dibner used its bid to establish the market price. (Tr. 83-84.)

Doctor Hochstein advanced numerous criticisms of the TECO RFP, as did Doctor Sansom and others. Doctor Hochstein's criticisms, which he said limited the number of vendor respondents, included the following industry "non-standard" requirements: (1) the "range of volume" requirement that placed a tonnage range of from 2 to 5.5 million on preferably a single provider without breaking the volumes up into long and short-term contracts; (2) a "demurrage requirement" placing requirements on ports usually borne by carriers if they fail to meet schedules; (3) a "storage requirement" at the terminal placing substantially more demands on a terminal than was common in the industry; (4) a requirement for eight, separate storage coal piles, which he thought highly unusual; (5) a too restrictive "payment schedule;" (6) a requirement for weight measurement that he thought unreasonably placed risks on ports, not standard in the industry; (7) a "cargo loss requirement" that was non-industry; and (8) a "no-cost expedition of shipment" requirement he believed to be non-standard. Dr. Hochstein testified that the consequences of these requirements would be to limit RFP responses and to necessarily increase the bid amounts of any bid received. (Tr. 721-728.)

Doctor Hochstein testified that the "all or nothing" requirement or preference of the RFP severely limited, or even precluded, eligible respondents because it was well known in the industry that there were no companies with sufficient ocean-going vessels to carry the maximum tonnages, but that there were carriers that could have bid on partial requirements. (Tr. 732.) Doctor Hochstein testified that he believed that there were at least six inland barge companies with the capacity to carry the full requirements of the river leg, but that the integrated preference put them off because they were incapable of it, plus the fact that many assumed that the contract would necessarily go to TECO Transport as it had in the past. (Tr. 733-737.)

In light of his conclusion that the rail benchmark was fatally flawed, Doctor Hochstein concluded that market prices should be ascertained, first, by the use of a fair and open RFP in which TECO Transport would have to bid and with a statement that there would be no right of first refusal to the affiliated company. He stated that he believed that a fair bidding process should result in market prices being established through the competitive bidding process for both the river and terminal components, but likely not the Gulf leg. The lowest qualified bidders should be given the business for the first two components and the Commission should return to a cost of service methodology for the Gulf leg if no market price could be established through the RFP process. (Tr. 738-745.)

Conclusion

Through its many restrictive industry non-standard provisions, the TECO RFP was designed to fail, or at least "fail" in the sense that it would elicit any non-affiliated responses that could be taken seriously. The killer restriction, of course, was the undisclosed right of first refusal that allowed TECO Transport not to enter the expensive and time consuming fray of preparing a bid, while still coming in at the end to claim the prize, even in cases, as with the terminaling award, it could "meet" a bid that was even higher than what it was earning before and in a market in which witness Dibner said the participants were "fighting aggressively for business." The RFP was a complete and total failure, as it was intended by TECO to be, and it should be rejected with the requirement that TECO start over and in a fair manner.

ISSUE 3: **Are Tampa Electric's projected coal transportation costs for 2004 through 2008 under the winning bid to its June 27, 2003, request for proposals for coal transportation reasonable for cost recovery purposes?**

RES. CUST.: *No. Tampa Electric's proposed charges are excessive and inflated as compared to "market" rates as established through customer party testimony and rates paid for comparable services by other regulated and municipal electric utilities.*

Discussion:

Terminal Rate

TECO decided to use the one terminal services bid witness Dibner found to be qualified, which, fortuitously, despite the weak market, happened to be higher than what TECO Transport was already charging at its Davant operation. Allowing TECO Transport to increase its charges in a weak market and without having to bid is simply ridiculous and clearly unacceptable. Furthermore, there is evidence in the record in Exhibit 65 to show that Progress Energy is paying $1.97 per ton for terminaling and transloading services of the same type being provided to TECO by TECO Transport. The Progress Energy rate is significantly below the confidential rate being charged to TECO. The $1.97 is clearly a "market rate." In order to get the pot right, the Commission, at a minimum, should reduce the amount provided for by the new contract by the difference between the new contract rate and $1.97. Then, in order to eliminate the absurdity of allowing TECO Transport to "meet" a higher rate than what it was already charging under the old contract, the Commission should further reduce the allowable rate by the difference between the old and new terminaling contract rates.

River Rate

Absent requiring TECO to rebid the river transportation in a fair and open manner, the Commission must construct a fair and reasonable rate, which apparently possible, although cumbersome.

Gulf Power, which has substantially lower overall rates than TECO and which does not attempt to shield either its coal or coal transportation costs from its customers, ships coal from, amongst other places, the Cook dock to International Marine Terminals ("IMT"), which is just across the river from Davant, for transloading to Gulf's Crist Plant near Pensacola, but also ships coal directly from the Cook dock straight to the Crist Plant. As reflected in Exhibit 71, the never classified Form 423-2(b) for Gulf Power for the month of January, 2001, reveals, at line 4, that the rate Gulf Power pays for the combined river and trans-Gulf shipment to Crist Plant, which in this case involves an Intercoastal waterway move, which is necessarily more expensive than TECO's trans-Gulf shipments because the number of barges per tug are limited to just four, is a total of $8.77. Likewise, at line 8 of the same exhibit, is reflected that Gulf Power pays $5.17 for just the IMT to Crist Plant trans-Gulf move. The difference is $3.60 per ton, which, necessarily is what Gulf Power pays for the river leg. Contrast this number to the much higher and confidential number for river transportation that TECO supports on the basis of witness Dibner's confidential and proprietary model. TECO should be limited to no more than $3.60 per ton for its comparable Cook dock to Davant trips and comparably reduced amounts for river voyages of varying distances.

Another route the Commission may take to arrive at an appropriate river rate for TECO is to make the backhaul adjustment proposed by Public Counsel witness Majoros for the river, which is reflected in Exhibit 18. While the adjustment is confidential, it is based upon the roughly 30 percent river backhaul arrived at by witnesses Hochstein, Majoros and Dibner. These are revenues going to TECO Transport as a direct result of the forward, or southbound, hauls being performed for TECO, and TECO and its customers should be given credit for them, especially since Majoros' adjustment to Dibner's model's number brings the TECO number substantially closer to the $3.60 per ton Gulf Power publicly reports paying from the Cook dock to IMT.

Ocean Rate

Witness Dibner has used his confidential proprietary model to, predictably, calculate a confidential "market rate" for the ocean or trans-Gulf leg from Davant to Big Bend. His confidential rate is, curiously, somewhat greater than the publicly reported rate TECO Transport provided to JEA for shipping petcoke from Texas to Jacksonville, a distance that is roughly twice the distance from Davant to Big Bend. (Exhibit 16 and Tr. 308) The Wehle suggestion that the lower rate was supported by the JEA move being a "spot" contract rate is both inconsistent with the duration of the JEA work by TECO Transport, as well as with Doctor Hochstein's testimony that spot contracts demand a premium, not a reduced rate. (Tr. – 758.)

Using U.S. Army Corps of Engineers' data, Doctor Hochstein calculated that a full recovery, or replacement, rate for the Texas to Jacksonville route would be $11.59 for a 25,000 ton ship, assuming no backhaul, which is substantially less than the $9 rate charged to JEA. (Exhibit 55.) This rate to JEA compares very favorably to the actual ocean rate witness Dibner calculated as market-based, which, in turn, is substantially more than the $5.12 per ton rate Doctor Hochstein calculated as being a reasonable rate. (Tr. 763.)

Doctor Hochstein's model uses well-established U.S. Army Corps of Engineers shipping cost data to arrive at a "cost-based" rate for the ocean leg, as oppose to the more esoteric methodology advanced by witness Dibner. It should be noted, as has he, that the data Doctor Hochstein uses is for self-propelled vessels, which have higher crewing requirements and, which, therefore, are typically more expensive to operate than the "rule-busting" tug-barge combinations operated by TECO Transport. Doctor Hochstein calculates that if TECO Transport had to compete with foreign ships on foreign to US routes it could command only $2.15 per ton. (Tr. 766.)

With respect to TECO's notable failure to use foreign coal, as opposed to Gulf Power's rather substantial use of it (Exhibit 57 & 60), Doctor Hochstein testifies that it is his belief that TECO could arrange to take foreign coal in a cost-efficient manner, either directly at Big Bend or near by, with the result that it could avoid the transloading at Davant and the shipment back across the Gulf to Big Bend at the sizeable savings reported at line 9, Tr. 769. It is Doctor Hochstein's testimony that TECO has the necessary land at Big Bend to perform the necessary blending and, further, that cost-effective improvements, with some federal funding assistance, could easily be made to take the ocean-going foreign coal vessels of somewhat greater draft. (Tr. 768 – 779.) The savings per ton he calculates would be the number at line 12, page 775.

In summary, Doctor Hochstein concludes that TECO could reduce its transportation costs in a manner that would save its customers in excess of $10 million annually (actual confidential number at line 9, page 780) "if there is a more reasonable proxy calculation for the market rates" and that the total savings could be at least two or three times that amount (actual savings at line 12, page 780) "if the entire pattern of transportation is modified in favor of direct delivery of foreign coal. (Tr. 780.)

Conclusion

The rates which TECO has committed to pay to its sister company, TECO transport, for the next five years to provide TECO with waterborne transportation service, and which it seeks to recover from ratepayers, are excessive and unreasonable. Such rates should be rejected and substantially reduced

TECO's Request for Proposals (RFP) issued in 2003 was fatally flawed primarily because it contained numerous industry non-standard requirements that either discouraged vendors from responding, or, if they did respond, would have necessarily increased the bids. These requirements clearly limited the number of responsive bids. Additionally, it is clear that some potential bidders declined to respond because of the perception that the contract would be awarded to TECO Transport no matter the level of unaffiliated bids. Although it was not publicly disclosed, the fact was that TECO Transport had a "meet or beat" provision in the prior contract that allowed it to "win" the new contract merely by meeting the price offering of any unaffiliated vendors. Furthermore, the RFP also stated a preference for integrated service and provided an unreasonably short period for responses. The integrated service preference necessarily limited the number of potential respondents who might have been capable of, and interested in, bidding on one or more legs of the service, but not the entire transportation route.

It is Dr. Hochstein's testimony, and the Residential Electric Customers' position, that TECO should be required to reissue the RFP without the burdensome non-industry standards and with a public statement that the TECO Transport will have to compete as well, and that the contract will be awarded to the respondent submitting the lowest, qualified bid. The Commission should announce that it will referee the bid openings to ensure the fairness of the process. By reissuing the RFP, the Residential Electric Customers believe the Commission can ascertain which of the three legs or components of the transportation route have true "markets."

For those legs for which there is an actual "market," as represented by one or more RFP responses (the Residential Electric Customers believe that there are clearly markets for the river and transloading segments), the Residential Electric Customers believe the allowed cost recovery from TECO's customers should be limited to the lowest-cost bid for those segments. If there is not a market, as indicated by a lack of responsive bids, which may be the case for the Gulf leg, then the Residential Electric Customers believe the Commission should establish the allowable ceiling for that leg by a return to cost plus regulation as measured by the actual reasonable and necessary costs of providing the Gulf transportation leg services, plus a return on investment at the same level as currently being earned by TECO.

The Residential Electric Customers believe that any leg that does not have demonstrable markets, as shown by fair competitive bidding, should have rates established by the cost, plus, or cost of service, methodology, as opposed to any method, like TECO witness Dibner's, that relies upon "black box" modeling. Mr. Dibner's modeled rates are flawed for the reasons demonstrated in Dr. Hochstein's testimony and the use of his rates should be rejected out of hand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this petition has been served by U.S. Mail or email this 12th day of July, 2004 on the following:

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