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July 12, 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 Brief and Post-Hearing Statement of Issues and Positions.

Also enclosed is a high density diskette containing the above-referenced Brief and Post-Hearing Statement of Issues and Positions generated on a Windows 98 operating system and using Word 2000 as the word processing software.

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

JDB/pp  
Enclosure

cc: All Parties of Record (w/enc.)

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: July 12, 2004  
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**TAMPA ELECTRIC COMPANY'S  
BRIEF AND POST-HEARING  
STATEMENT OF ISSUES AND POSITIONS**

Tampa Electric Company ("Tampa Electric" or "the company") pursuant to the Commission's Order Establishing Procedure<sup>1</sup> issued December 11, 2003, as modified by the Prehearing Order<sup>2</sup> issued on May 25, 2004, submits this its Brief and Post-Hearing Statement of Issues and Positions:

**BRIEF**

**Summary of Tampa Electric's Position**

Tampa Electric's customers are the beneficiaries of a model waterborne coal transportation system in the form of Tampa Electric's affiliate, TECO Transport. Created in the mid-1950s through Tampa Electric's foresight, TECO Transport has been continually upgraded and streamlined since its inception. Those improvements have resulted in unparalleled efficiencies and reliability that allow TECO Transport to effectively provide Tampa Electric's coal transportation needs.

The Request for Proposal ("RFP") process Tampa Electric utilized in 2003 to assist in replacing its then expiring contract with TECO Transport, the bid evaluation process that followed that effort and the transportation rate study conducted by the company's expert waterborne transportation consultant were all administered and conducted in a fair, proper and

<sup>1</sup> Order No. PSC-03-1398-PCO-EI.

<sup>2</sup> Order No. PSC-04-0535-PHO-EI.

reasonable manner. The rates ultimately put into place following those efforts are four percent lower than the rates under the previous contract, are fair and reasonable, and the amounts paid by Tampa Electric under its new contract with TECO Transport should be approved for cost recovery purposes.

Competing suppliers of goods and services have participated in this docket with the goal of securing all or a portion of the services TECO Transport performs for Tampa Electric.<sup>3</sup> As this brief will demonstrate, a careful evaluation of their various proposals makes clear that, from the standpoint of Tampa Electric's customers, the competing proposals were properly rejected for sound reasons based on economic, reliability and operational considerations. The record, including testimony from an intervenor witness, clearly demonstrates this.

Despite all of the testimony, allegations, proposals and counter proposals contained in the lengthy record of this proceeding, the issues deferred from the 2003 fuel adjustment docket to be decided here are fairly straightforward. After consideration of the record, Tampa Electric urges the Commission to make three determinations. First, the Commission should find that Tampa Electric's RFP process was fair, informative and reasonable and that the results of that process together with the rate study performed by Mr. Dibner, were sufficient to establish the market price for coal transportation. Secondly, the Commission should find that Tampa Electric's projected coal transportation costs for 2004 – 2008 under its new contract with TECO Transport are reasonable for cost recovery purposes. Thirdly, the Commission should determine that no intervenor party has demonstrated the existence of changed circumstances or any other

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<sup>3</sup> Fully two thirds of the hearing time - - two of the three days of hearing - - was consumed by CSXT's excruciatingly detailed self-serving attacks which, by the end of the hearings, were described by Chairman Baez as a "theater of the absurd."

significant ground warranting a departure from the coal transportation benchmark methodology the Commission adopted in Order No. 20298.

**Background**

This docket was established for the purpose of addressing three issues deferred from the 2003 fuel and purchased power cost recovery hearing. Those three issues are: 1) the appropriateness of the RFP process utilized by Tampa Electric; 2) the appropriateness of Tampa Electric's payments to its affiliate, TECO Transport, for the waterborne transportation of coal from the mine to Tampa Electric's generating facilities under an agreement that became effective on January 1, 2004; and 3) the appropriateness of continued reliance upon the coal transportation pricing benchmark methodology the Commission adopted in Order No. 20298, issued November 10, 1988 (Order No. 20298) and reaffirmed in Order No. PSC-93-0443-FOF-EI issued March 3, 1993 (Order No. 93-0443). The analysis of these issues must start with a thorough understanding of existing Commission policy in order to make a reasoned judgment on whether any party to this proceeding has carried the burden of establishing a need for any change to existing policy.

**Existing Commission Policy**

The Commission determined in Order No. 20298 that, if a competitive market exists, the Commission will rely upon a market based mechanism to determine whether the costs that Tampa Electric incurs for waterborne transportation services from TECO Transport are reasonable:

Considering the many advantages offered by a market pricing system we, as a policy matter, shall require its adoption for all affiliated fuel transactions for which comparable market prices may be found or constructed.

The Commission in that order then approved a stipulation adopting a market-based benchmark methodology tied to the two lowest publicly available rail rates for coal transportation to municipal electric utilities in Florida after concluding that:

. . . rail service and the total waterborne system are not only comparable but competitive to a large degree, as well.

As demonstrated by the testimony of Tampa Electric Witnesses Wehle and Murrell, and Residential Customers' Witness Hochstein, rail rates represent the upper end of market rates for coal transportation from the Midwest – the location of the mines from which Tampa Electric, for operational and economic reasons, acquires its coal supply.

Both the rail-based market benchmark and a proper evaluation of the CSXT bids in response to Tampa Electric's June 27, 2003 RFP provide reliable indicators of the market price. Further, as will be demonstrated herein, the prices paid to TECO Transport are well below both of these rail-based indicators and, based on a detailed market study presented by Tampa Electric's Witness Dibner, are below the applicable maritime market. We turn first to the overwhelming evidence of the existence of the competitive market.

## I.

### **COMPETITIVE MARKETS CLEARLY EXIST FOR THE MOVEMENT OF COAL FROM MIDWESTERN MINES TO TAMPA ELECTRIC'S GENERATING FACILITIES IN TAMPA, AND FOR THE INDIVIDUAL SEGMENTS OF THAT TOTAL MOVEMENT.**

#### **The Market for Movement of Coal from the Mines to Tampa**

All of the evidence in this proceeding establishes conclusively the existence of an active market for coal transportation from mine sources to the generating plants of Tampa Electric.

Tampa Electric's Witness Dibner described the current status of the overall waterborne transportation market and concluded definitively that there is a market for the transportation of coal from Tampa Electric's supply sources to Tampa. (Tr. 112, lines 15-21)

CSXT, by its interest and very active participation in this docket, certainly demonstrates that there is a market for the transportation of coal from the mine to Tampa Electric's generation facilities. CSXT's position on Issue 3 in this proceeding assumes the existence of such a market and concludes that CSXT's competitive proposals should set the market rate. CSXT's Witness Sansom testified that waterborne delivery of domestic coal provides a competitive alternative to the rail delivery of domestic coal, especially Midwestern coals. (Tr. 1143, line 21 through Tr. 1144, line 5) Tampa Electric's Witness Murrell, based on his extensive experience as an executive, first with Electric Fuels Corporation and later with CSXT, and as a part owner of world-wide and domestic coal mining interests, concluded that an active market for coal transportation definitely exists, as evidenced by 1) the number of waterborne transportation providers who received Tampa Electric's RFP and 2) CSXT's rail proposals. (Tr. 1378, line 25 through Tr. 1379, line 14)

Residential Customers' Witness Dr. Hochstein also agreed that a market exists for coal transportation from the Midwest to Tampa Electric saying: "It's a fact of life, the market is in existence. It does exist." (Deposition Tr. 68, lines 1-11)

Mr. Majoros, testifying for FIPUG and OPC, accepted Mr. Dibner's market based model for the inland and ocean-going segments of the total transportation package (Tr. 852, lines 16-17), although he went on to make erroneous and unwarranted adjustments to the models' results, discussed later herein.

In Order No. 20298 the Commission embraced the objective of coal transportation as being a move from the coal mine to the generating station. Both CSXT and TECO Transport have the ability to provide this service, as do other waterborne carriers. OPC and FIPUG have also tacitly conceded that there is a market for this service by agreeing to rely on a market proxy in the Progress Energy Florida settlement agreement filed April 29, 2004 and approved by this Commission on June 29, 2004. Neither OPC nor FIPUG should now be heard to suggest that a market does not exist for Tampa Electric, having recently conceded that such a market exists for similarly situated Progress Energy Florida. Finally, Staff's position on Issue 2 concludes that a competitive market exists for the transportation of the company's solid fuel requirements from the company's mining sources to Tampa.

In summary, the record in this case demonstrates beyond dispute that there is a market to transport coal from domestic coal mines to Tampa Electric's generating stations.

**The Market for the Segmented Transportation, Transloading, Storage and Blending Services**

A competitive market exists not only for the transportation of coal from the mine to Tampa, but also for each of the three segments of the waterborne transportation system from the coal mines in the Midwest and Appalachia to Tampa Electric's generating facilities.

It should be recognized at the outset that the Commission was eminently correct in Order No. 20298 that the integrated total waterborne transportation cost is the cost which should be compared with the cost of comparable market alternatives. The key consideration from the Commission's regulatory standpoint and from the standpoint of Tampa Electric's customers is and should be the total cost of getting the coal from the mine to the plant. Notwithstanding this overall focus, a market also exists for each of the three water segments: river, terminal and ocean.

Tampa Electric's Witness Dibner described the current status of each of the three segments relied upon by Tampa Electric. (Tr. 60, line 10 through Tr. 67, line 13) Mr. Dibner concluded and demonstrated that there is a market for the transportation of coal from Tampa Electric's supply sources to Tampa, and that there is an observable market for each of the three legs of the waterborne transportation system. (Tr. 112, lines 15-21) Mr. Dibner further pointed out that bids were received for both the river and the terminaling segment as well as two rail proposals from CSXT. (Tr. 113, lines 4-8)

Mr. Dibner's market study identifies five large participants in the inland fleet, operators of two Gulf Coast terminal facilities near the mouth of the Mississippi River and five large ocean coal transportation market participants who actively compete for business of the type at issue here. (DMA Report, Exhibit 4, Bates stamp pages 77, 99 and 108) Staff's position on Issue 2 concurs that a market exists for the river and terminal segments.

The evidence shows that a competitive market exists for the ocean leg. There are no barriers to entry for waterborne carriers. Unlike rail, which is a fixed line over rights-of-way used exclusively by one railroad, there is no fixed or restrictive use of waterways.

*Competitive carriers capable of providing Gulf transportation will redirect their fleets if the price is high enough.* Mr. Dibner testified that TECO Transport competes for other ocean-going business, domestically and in the preference trade. Ms. Wehle indicated that TECO Transport's shipments to Tampa Electric account for only 38% of TECO Transport's revenues. (Tr. 449, lines 6-11) Mr. Dibner indicated that there are five to seven significant operators with some 60 to 70 vessels operating in this competitive market. He testified that TECO Transport's fleet enjoys the position of being the low cost provider among these market participants, because of its scale and the design and configuration of its fleet. (Tr. 277, lines 20-25)



Mr. Dibner testified that other market participants could be motivated to leave other customers if they believe that serving Tampa Electric's needs would be more rewarding. (Tr. 278, lines 12-23) Their failure to do so demonstrates that TECO Transport is able to provide more efficient and reliable service at lower rates than any other carrier in the market.

The fact that no proposals were received for the ocean leg is certainly understandable given the efficiency and low rates of TECO Transport's waterborne transportation of coal to Tampa Electric. Dr. Hochstein conceded that no carrier could reasonably offer rates equal to or lower than TECO Transport's. (Tr. 731, lines 3-4) Dr. Hochstein also acknowledged that there are other coastal barge lines, such as Matson, International Shipbuilding, Express Marine, Moran and Dixie Carriers (Deposition Tr. 159, lines 15-18) that could deliver coal to Tampa, but they were unable to pursue the contract due to prior commitments. (Tr. 729, line 17 through Tr. 730, line 16)

There was no credible evidence offered by any intervenor party that a competitive market does not exist for either the entire transportation requirement or for any of the segments. There is no factual support in the record for the suggestion that the ocean-going segment is a monopoly. To the contrary, as just demonstrated, the record evidence supports a determination that there are existing ocean-going competitors who could, but choose not to, compete against TECO Transport for the ocean-going segment. This is unlike the situation with CSXT which has no rail competitors.

## II.

### **AS A MATTER OF FLORIDA LAW AND SOUND POLICY, AFFILIATE PRICES MUST BE DETERMINED BY A MARKET TEST WHERE A MARKET EXISTS.**

In GTE Florida, Inc. v. Deason, 642 So.2d 545 (Fla. 1994) the Florida Supreme Court reviewed an order of the Commission disallowing a portion of the cost of services supplied to GTE by its affiliate, GTE Data Services. The Commission concluded that GTE's transaction with its affiliate was not an "arm's length" transaction. Based on this finding, the Commission disallowed an amount by which the price actually charged by the affiliate exceeded an amount equal to the cost of the service plus a reasonable return.

The Court reversed the Commission noting that the record demonstrated that GTE Data Services charged its affiliate, GTE, rates equal to or less than those charged to non-affiliates. The Court stated that the mere fact that a utility is doing business with an affiliate does not mean that unfair or excessive profits are being generated. The Court further held that the standard must be whether the transactions exceed the going market rate or are otherwise inherently unfair. The Court said if the answer is "no," then the Commission may not reject the utility's position and substitute cost based pricing in its place. The record in this case clearly demonstrates that the rates being charged by TECO Transport under the contract now in effect with Tampa Electric are less than the going market rate for the services provided, and there is no record evidence whatsoever that the rates in question are otherwise inherently unfair.

Policy considerations also support the determination of affiliate prices based on a market test. In the proceeding that gave rise to the current market based methodology, the Commission explored in minute detail all of the various ramifications of differing means of assessing the reasonableness of the price of affiliate provided goods and services. After a lengthy hearing and

a companion hearing concerning Florida Power Corporation, the Commission stated in Order No. 20298:

. . . [W]e have concluded that it is desirable, where possible, to gauge the reasonableness of fuel costs sought to be recovered through a utility's fuel adjustment clause by comparison to a standard that attempts to measure what a given product or service would cost had it been obtained in the competitive market through an arm's-length contract with an unaffiliated third party. . . .

In reaching this conclusion, the Commission agreed that the previous cost-plus pricing methodology had been administratively costly, caused unnecessary regulatory tension and left the lingering suspicion that it resulted in higher costs to a utility's customers. After considerable discussion, the Commission in Order No. 20298 concluded that the many advantages offered by a market pricing system over a cost-plus model dictated the adoption of a market-based system for all affiliate transactions for which comparable market prices may be found or constructed. CSXT Witness Sansom acknowledged that the same advantages recognized by the Commission in Order No. 20298 hold true today. (Tr. 1147, line 19 through Tr. 1150, line 6)

Dr. Sansom testified that a market test was the most cost effective means of ensuring that ratepayers are not charged more than the appropriate cost for fuel and fuel related services. (Tr. 1148, lines 4-8) He further stated his belief that the advantages of a market test include the fact that a market-based test allows the utility to comply with existing policy and ensures that only just and reasonable costs are paid by ratepayers. (Tr. 1148, lines 9-13) Dr. Sansom further agreed that a market-based test provides an appropriate cost comparison, so that the utility has the incentive to obtain the lowest cost fuel and related services. (Tr. 1148, lines 14-22) He further agreed that a market-based test best protects against any self dealing opportunities in affiliate relationships. (Tr. 1148, line 23 through Tr. 1149, line 2)

Dr. Sansom went on to agree that, once established, the market test relieves the Commission and Staff of the burden of constantly evaluating each cost component in the affiliate procurement system. (Tr. 1149, lines 3-7) He further stated the belief that it is very difficult for a utility to have the right incentives in a situation where goods or services supplied by the utility's affiliate are priced on a cost-plus basis. (Tr. 1149, lines 8-16) Finally he agreed that, given the choice between using a market test or a cost-plus test, this Commission and consumers would be better served using market tests in judging the Tampa Electric/TECO Transport affiliate relationship. (Tr. 1150, lines 1-6)

### III.

#### **THE PROCESS UTILIZED BY TAMPA ELECTRIC TO DEVELOP ITS NEW MARKET CONTRACT RATES WAS PRUDENT, FAIR AND REASONABLE.**

#### **Tampa Electric's RFP Process and Rate Development were Reasonable, Informative and Compliant with Industry Standards**

Tampa Electric acted prudently in analyzing the market and entering into a waterborne transportation contract with TECO Transport in 2003. The company actually did more than it was required to do. Although Order No. 20298 stated that Tampa Electric is free to negotiate its contracts with its affiliates in any manner that it deems to be fair and reasonable, Tampa Electric went a step further and issued a comprehensive and informative RFP. In addition, it hired two specialized consulting firms to assist in evaluating the bids and directed one of the expert consultants to model the waterborne transportation markets. (Tr. 464, lines 13-24)

Tampa Electric retained Dibner Maritime Associates ("DMA"), a firm specializing in the maritime transportation industry, to provide an analysis of the waterborne transportation bids that were received. Tampa Electric also requested that DMA conduct a comprehensive study of the inland river, terminal and ocean market rates to ascertain whether the bids met the company's

full requirements for waterborne coal transportation service for the period 2004 – 2008. Mr. Dibner's evaluation of the inland river and terminal bids resulted in his recommendation to 1) reject the non-conforming river bid; 2) use the terminal bid the company received to set the market rate for that segment; and 3) use Mr. Dibner's analysis of the transportation markets to set appropriate market rates for the inland river and ocean transportation segments. Tampa Electric agreed with Mr. Dibner's recommendation and incorporated his recommended rates into the new contract. (Tr. 464, line 25 through Tr. 465, line 13)

### **Reasonableness of Bid Solicitation**

Mr. Dibner's involvement in the bid solicitation included providing additional names of companies he felt might be interested in bidding. (Tr. 67, lines 21-25) The bid solicitation was provided to a wide range of potential suppliers and was noticed in industry publications to alert other potentially interested bidders. (Tr. 68, lines 1-8)

Mr. Dibner testified that Tampa Electric's bid solicitation fairly represented bid solicitations commonly used to secure waterborne coal transportation and terminal services. He concluded that the terminology, requirements, conditions, rates of cargo handling and other operating specifications are ones that are common in the industry and would be familiar and easily understood by prospective bidders. He further concluded that the bid solicitation represents the distinct requirements of the necessary movements for Tampa Electric's needs – inland barge, inland barge to ocean vessel and U. S. flag Jones Act ocean bulk vessels. (Tr. 68, lines 10-22) Tampa Electric Witness Murrell confirmed that Tampa Electric's bid solicitation was handled in accordance with accepted industry standards. He testified that the solicitation process was entirely appropriate and conducted with sufficient time for industry participants to respond. (Tr. 1368, lines 9-16)

Witness Wehle testified that the conditions and requirements included in the RFP are very similar to those used in Tampa Electric's prior waterborne transportation RFP. She agreed with Witnesses Dibner and Murrell that the RFP provisions are typical, reasonable requirements and conditions necessary to ensure that the services Tampa Electric receives under the contract are the services it requires to reliably serve its customers. (Tr. 411, line 24 through Tr. 412, line 6)

Witness Hochstein, while initially critical of Tampa Electric's RFP, conceded in his deposition that he has had no experience preparing or reviewing a RFP for either rail or waterborne transportation services. (See Hochstein Deposition Tr. 16, line 1) Dr. Hochstein further testified that he has not negotiated any waterborne contracts and has not analyzed any coal transportation contracts (Deposition Tr. 19, line 22 through Deposition Tr. 20, line 19), nor has he ever been employed by a waterborne carrier. (Deposition Tr. 20, line 24 through Deposition Tr. 21, line 7) Notwithstanding Dr. Hochstein's obvious lack of qualifications to make these criticisms, Tampa Electric will address briefly the concerns he raised.

### **Total Volume Requirement**

Dr. Hochstein challenged the total volume requirement and integrated service preference. However, as Witness Dibner explained, these are widely recognized shipper preferences for the very reason that they provide significant benefits, both economic and operational. Having a single, focused carrier provides economies of scale, flexibility, responsiveness and a direct path to establish responsibility. By Dr. Hochstein's own admission, allowing multiple carriers to transport partial volumes would only lead to higher transportation costs. Dr. Hochstein's testimony provides:

Even if they [other waterborne carriers] had the technical capacity, due to the smaller size of the barges, no carrier could reasonably

offer rates equal to or lower than TECO Transport. (Tr. 731, lines 2-6.)

TECO Transportation (sic) barges are likely the only reasonable way for Tampa Electric to transport coal between Davant, LA and Tampa in the future. (Tr. 743, lines 8-10.)

### **Demurrage Requirement**

Dr. Hochstein challenged the demurrage requirement, which holds TECO Transport responsible for charges for any undue delays in delivery to the terminal. Witness Murrell testified that the demurrage requirement in the RFP is a common provision he has seen in many contract solicitations worldwide. He concluded that Dr. Hochstein's concern was probably attributable to his lack of experience in this area. (Tr. 1374, line 9 through Tr. 1375, line 1) Ms. Wehle pointed out that the demurrage requirement protects Tampa Electric and its customers from additional expenses caused by others over whom Tampa Electric has no control. (Tr. 117, lines 9-20) Mr. Dibner also concluded that the demurrage requirement protects Tampa Electric's customers from incurring unwarranted expenses. (Tr. 117, lines 4-20)

### **Range of Volume Requirement**

Dr. Hochstein also challenged the "range of volume requirement" because he thought it required too wide a range. Mr. Murrell testified that this range of volume is a common provision in transportation contracts and one which provides Tampa Electric with flexibility and which accurately describes the very real contingency Tampa Electric faces with its environmental consent decrees. (Tr. 1373, line 15 through Tr. 1374, line 3)

Witness Wehle stated that the range of volume requirement is standard, reasonable and absolutely necessary to ensure that Tampa Electric receives the services it requires. (Tr. 412, lines 8-22) The range of options available to Tampa Electric during the second phase of its environmental agreements range from repowering Big Bend to natural gas, to continuing

operation of that plant at roughly its current coal usage - - a range that necessitates the breadth of coal volume variance stated in the RFP. Tampa Electric wanted all potential bidders to be fully informed of this, and rightly so.

**Storage Volume Requirement**

Dr. Hochstein next challenged the “storage volume” requirement as being non-standard because he believed the volume requirement to be too large. Witness Murrell pointed out that this is the level of service Tampa Electric is already receiving from TECO Bulk Terminal and that the one bidder on the terminal service did not object to this requirement. (Tr. 1375, lines 3-15)

**Other Provisions in the RFP**

Tampa Electric witnesses refuted Dr. Hochstein’s challenges to these and other RFP requirements including the weight management standard (Murrell, Tr. 1375, line 17 through Tr. 1376, line 2) (Wehle, Tr. 413, lines 9-15); the cargo loss requirement (Murrell, Tr. 1376, lines 9-22) (Wehle, Tr. 413, lines 17-25); and the “no cost expedition of shipment” requirement (Murrell, Tr. 1376, lines 16-22) (Wehle, Tr. 414, lines 1-9).

It suffices to say that Witness Hochstein’s criticisms of the RFP provisions are unfounded and are based simply on his lack of knowledge and experience in dealing with RFPs and transportation contracts.

**IV.**

**TAMPA ELECTRIC’S PAYMENTS UNDER ITS CURRENT CONTRACT WITH TECO TRANSPORT ARE SIGNIFICANTLY BELOW MARKET RATES.**

**Mr. Dibner Firmly Established the Reasonableness of the Rates Relative to the Market**



Tampa Electric's customers benefit greatly from the waterborne coal transportation contract Tampa Electric and TECO Transport entered into on October 6, 2003 and which became effective January 1, 2004. As previously pointed out, Intervenor Witness Dr. Hochstein acknowledged that no carrier could reasonably offer rates equal to or lower than those of TECO Transport. (Tr. 731, lines 2-4)

The new Tampa Electric-TECO Transport contract replaces a 1998 waterborne coal transportation contract between the two parties. The payments made by Tampa Electric under the 1998 agreement were found to be fair and reasonable by the Commission in each fuel adjustment proceeding over the life of that agreement. The rates under the new Tampa Electric-TECO Transport contract are four percent lower than under the 1998 contract. (Tr. 150, lines 12-16). Moreover, as discussed later, the rates under the Tampa Electric-TECO Transport contract are significantly below the rates proposed in the CSXT bids when an "apples-to-apples" comparison is made, and are also below the market rate for maritime bulk commodity transportation as confirmed by Mr. Dibner. They are also significantly below the last approved rail-based benchmark price.

The reasonableness of Tampa Electric's RFP process and the reasonableness of the market rates included in Tampa Electric's new contract with TECO Transport were supported by Mr. Dibner, whose professional experience in the maritime markets spans some 27 years. (Tr. 56, line 5 through Tr. 57, line 18) Mr. Dibner has broad experience in advising and supporting shippers and consignees in structuring a variety of transportation arrangements, including coal transportation for various electric utilities. His work has included assisting electric utilities in estimating coal transportation costs and assisting carriers in bidding on long-term transportation contracts. (Tr. 59, lines 4-22)

Mr. Dibner utilized an inland river model to determine rates for inland river barge transportation. As source data, he utilized the river barge bid solicitation Tampa Electric received, data published by the U. S. Army Corps of Engineers, barge line filings, information from interviews with river service providers and industry norms and rules of thumbs. (Tr. 88, lines 21-25). His recommended river transportation market rates were very similar to the river barge bid Tampa Electric received. (Tr. 89, lines 20-24)

For terminal services Mr. Dibner relied upon the bona fide bid Tampa Electric received, which was very close to prior rates tendered by the bidder and the current provider. (Tr. 91, line 22 through Tr. 92, line 11)

In developing market rates that a TECO Transport competitor would charge for the ocean segment, Mr. Dibner analyzed recent earnings of Jones Act vessels of the sizes of the core fleet of TECO Transport barges currently used to serve Tampa Electric's needs. (Tr. 94, lines 13-15) Mr. Dibner stated that his goal was to hold TECO Transport to a market rate that was below the maritime rate for other vessels in the market. As a consequence, he established a rate which is substantially below the maritime market. (Tr. 191, lines 4-9) Mr. Dibner utilized the lowest cost, most efficient vessels to build a model fleet to meet Tampa Electric's needs. He then used the average cost of that fleet as opposed to the marginal cost of the last barge needed. This had the effect of further suppressing the rates. (Tr. 193, lines 3-11.)

Mr. Dibner averaged time charter earnings opportunity costs with depreciated replacement values in order to bring TECO Transport economies into the rate setting analysis. He also examined the supply and demand balance of the U.S. flag fleet and evaluated more than five years of monthly historical rates to identify price trends on the inland waterways. Mr. Dibner refrained from including any standby or capacity charges for the equipment that have

reasonably been charged to meet fluctuating demands on a monthly or annual basis. His models are anything but theoretical. (Tr. 131, lines 7-17)

Mr. Dibner and Tampa Electric took care to ensure that the Commission's Staff and the intervenors were given access to Mr. Dibner's models so they could review and gain an understanding of how the models worked and what they considered. Mr. Dibner conducted a tutorial session for Staff and intervenors in Tallahassee. Commission Staff and intervenors were provided unlimited access to the models over a period of months and were free to make changes to the assumptions and to test results of the models and their sensitivities. The input values that drove the calculations in the models were allowed to be edited. Only the formulas in the models were held constant to ensure the integrity of the models although the formulas were fully disclosed in minute detail to Staff and intervenors. (Tr. 131, line 25 through Tr. 132, line 10)

Again, Mr. Dibner shared with Staff and intervenors all of the formulas that make up his models and all of the inputs he relied upon in performing his study. Any party was free to retain other experts in the waterborne transportation industry to corroborate or reject the inputs to Mr. Dibner's models. None of the intervenors has challenged Mr. Dibner's assumptions despite the fact that every single variable was set forth explicitly for review. Mr. Dibner and Tampa Electric went out of their way to ensure that Staff and intervenors were fully versed on the inputs, formulas and outputs of Mr. Dibner's models.<sup>4</sup>

Mr. Dibner was the only expert witness in this proceeding testifying about actual maritime transactions. Unlike Dr. Hochstein, who has no actual experience in bidding on business, setting rates or analyzing waterborne business (Hochstein Deposition, Tr. 19, line 22

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<sup>4</sup> Mr. Twomey's assertion (Tr. 51, line 8) that Mr. Dibner's model is a "black box" is simply incorrect.

through Deposition Tr. 20, line 19; Hochstein Deposition Tr. 20, line 24 through Deposition Tr. 21, line 7; Tr. 130, lines 3-15), Mr. Dibner based his recommendations on 27 years of continuous involvement in the maritime markets. Mr. Majoros also lacks experience in the maritime industry, having testified in only one proceeding about the rates charged by an intrastate barge company regulated by the Hawaii Public Utilities Commission. (Tr. 840, line 9 through Tr. 842, line 14) Dr. Sansom's experience has been primarily with respect to rail transportation. (Tr. 1134, line 23 through Tr. 1135, line 3)

**The Rates Under the New Agreement are Lower than the CSXT Bid**

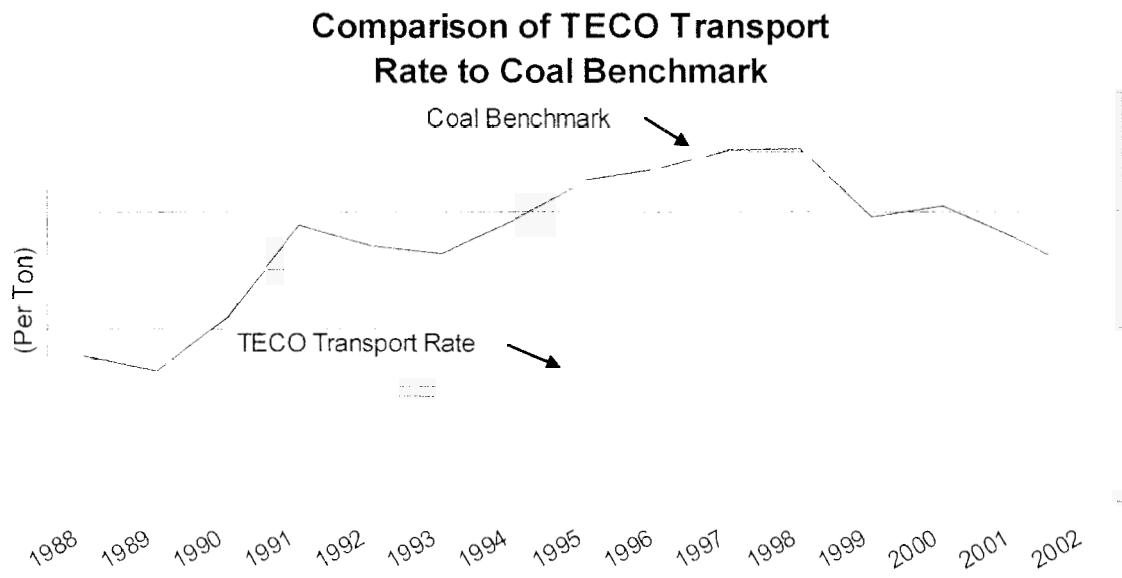
As will be discussed later, the rail proposals put forth by CSXT grossly understate or ignore substantial additional capital costs that must be considered to provide a reasonable comparison with the waterborne rate. However, even without taking into account the capital costs that CSXT omitted, Ms. Wehle demonstrated that the CSXT bids, when properly adjusted to reflect the other non-capital cost components apparent on the face of the bids, are actually higher than the total waterborne transportation rate set forth in the new TECO Transport-Tampa Electric agreement. Ms. Wehle's Document No. 3, Exhibit 4 sets forth a detailed calculation showing that, when properly adjusted to reflect certain costs that Tampa Electric would necessarily incur under the rail bids if they had been implemented, the adjusted rail rate is well above the market rates included in the TECO Transport contract that became effective January 1, 2004.

During the hearing, CSXT's attorney Mr. Wright inquired of Ms. Wehle regarding her Deposition Exhibit No. 6 (marked Hearing Exhibit No. 83) which is an update of a similar exhibit page contained in Ms. Wehle's direct testimony. (Tr. 553, lines 6-24) Ms. Wehle explained that Exhibit 83 showed the impact on CSXT's proposed rate of adding in the fuel

surcharge, synfuel adder, demurrage charge and necessary trucking costs, all of which costs would be necessarily incurred under CSXT's bids but were not reflected in the proposed rate. The resulting rate is significantly higher than the actual rate charged under the Tampa Electric-TECO Transport contract. CSXT's proposals simply would have been a bad deal for Tampa Electric's customers, taking into account all of the non-capital costs reflected in the proposals but not included in the CSXT quoted rate. In simple terms, looking only at CSXT's quoted rate would be like examining only the base price of an automobile and ignoring the cost of all of the options. Again, the cost analysis set forth in Exhibit 83 shows CSXT's proposed rates to be higher than those in the Tampa Electric-TECO Transport contract, without even considering the substantial capital costs required to upgrade the generating station facilities to accept coal by rail. Those capital costs would only drive the total cost higher. (Tr. 466, lines 7-17)

**The New Contract Rate is Significantly Lower Than the Most Recently Calculated Rail-Based Benchmark**

Ms. Wehle testified that the differential between Tampa Electric's contract rate and the most recently calculated rail proxy benchmark is about the same as it was in 1988 when the benchmark was first adopted by the Commission. This is graphically depicted in Confidential Document No. 7 of Ms. Wehle's Rebuttal Exhibit No. 73. This exhibit demonstrates that TECO Transport's rates, year-after-year, have been considerably below the rail rate alternative with the existing contract rate being even lower than that which preceded it. (Tr. 460, lines 1-14) Set forth below is a non-confidential version of that exhibit (with prices redacted) showing the relative movement of the benchmark and the prices paid by Tampa Electric.



The company's ratepayers have been the beneficiaries of the over \$500 million in savings represented by the consistent and relatively stable gap between the higher benchmark rate and the lower actual rate paid by Tampa Electric to its affiliate. This is unlike the situation with the former Progress Energy Florida benchmark that set the actual recoverable amount at the higher benchmark amount, regardless of actual costs.

#### **Summary of Point IV**

The record firmly demonstrates that the rates to be paid to TECO Transport by Tampa Electric under the contract that became effective January 1, 2004 are reasonable because, among other things, those rates are four percent lower than the rates of the previous contract that expired December 31, 2003. They are lower than CSXT's rail transportation bids, properly evaluated. They are below the market rate for maritime bulk commodity transportation as confirmed by Mr. Dibner's extensive and conservative market proxy study. Finally, they are significantly lower than the rail-based benchmark calculated under the Commission's currently approved policy. Tampa Electric's customers are the beneficiaries of the highly efficient and low priced

waterborne transportation services provided by TECO Transport and all amounts paid by Tampa Electric in accordance with that agreement should be approved for cost recovery.

V.

**THE COMMISSION SHOULD REJECT THE BACKHAUL  
ADJUSTMENT PROPOSED BY WITNESSES MAJOROS  
AND HOCHSTEIN AS BEING INCONSISTENT WITH A  
MARKET-BASED COAL TRANSPORTATION RATE.**

It would be totally improper to consider TECO Transport's backhaul activity when setting a market rate for providing Tampa Electric's coal transportation services. This Commission has considered backhaul in the past only where contracts are priced at cost-plus and backhaul revenues and costs are part of the calculation of costs. As discussed in Section I, above, a competitive market exists for the movement of coal, thus any cost-based consideration would be at odds with Commission precedent. It would also be inappropriate under GTE Florida, Inc. v. Deason, where the affiliate-provided services are priced at or below market, as discussed in Point II above.

Consideration of backhaul is not appropriate in the context of a market rate. Backhaul profit was previously considered by the Commission to be a cost reduction item under the cost-plus pricing methodology previously utilized by the Commission. However, when the Commission moved to a market-based transportation model for Tampa Electric and Florida Power Corporation, it appropriately ceased being concerned with the costs and revenues of the service provider. Instead of including any costs and revenues relating to backhaul, the Commission focused upon how the rate for such service compared with market prices or a market proxy for comparable service. This has been the case for Tampa Electric ever since the 1988 issuance of Order No. 20298. Not once under the market-based pricing methodology adopted in that order has the Commission or any fuel adjustment docket participant concerned



itself with the existence or non-existence of backhaul revenues or backhaul costs. In each instance the Commission has determined that the prices paid by Tampa Electric to TECO Transport for its transportation needs have been fair and reasonable based on a market analysis, without delving into the costs and revenues incurred by TECO Transport. This is as it should be where the reasonableness of amounts paid is gauged by market indicators. The rates paid by Tampa Electric under the contract that expired in December 2003 were repeatedly found by the Commission to be reasonable, without reference to any backhaul considerations. The Commission should continue this approach in examining the reasonableness of the new lower rates paid under the current Tampa Electric-TECO Transport contract.

In arguing in favor of a backhaul adjustment, Mr. Majoros and Dr. Hochstein distort the market-based methodology, ignore the court's holding in GTE Florida, Inc. v. Deason and contravene the policy this Commission has implemented since Order No. 20298, all in an effort to develop an excuse for a downward adjustment. This is inappropriate and should be rejected.

## VI.

### **THE COMMISSION SHOULD REJECT VARIOUS OTHER UNWARRANTED PROPOSALS PUT FORTH BY MR. MAJOROS.**

#### **The Commission Should Reject Mr. Majoros' "Preference Trade Premium" Adjustment**

Mr. Majoros' proposed "preference trade premium" adjustment is likewise unsound. Mr. Dibner explained that what Mr. Majoros characterizes as a premium is actually an economically sound consideration of the opportunity loss incurred by TECO Transport in serving Tampa Electric when it could be participating in Jones Act movements and more highly profitable preference trade opportunities. (Tr. 141, line 22 through Tr. 142, line 11) Mr. Dibner further indicated Mr. Majoros provides no basis for his proposed adjustment other than saying, in his



opinion, such a premium would not be used in the model of a competitive market. What Mr. Majoros does in this regard is to ignore the reality of opportunities that TECO Transport and other similarly situated ocean-going carriers have in the market place – opportunities that must be considered in arriving at a market price. (Tr. 142, lines 20-21)

It should also be noted in considering each of Mr. Majoros' conclusions and recommendations that the limit of his experience with regard to any maritime backhaul matters was a single audit-like involvement on behalf of the Hawaiian Consumer Advocate in analyzing the intrastate rates being proposed by an intrastate barge line operation regulated by the Hawaiian Commission, a very different circumstance. (Tr. 840, lines 9-18). Like Dr. Hochstein, Mr. Majoros criticisms are unfounded and are based on his lack of knowledge and experience in dealing with waterborne coal transportation. He has no experience in preference trades.

**Mr. Majoros' Suggestion that the Terminal Services Component Should Remain Unchanged from the 1998 TECO Transport Contract is Erroneous**

Mr. Majoros reduced the transportation rates in the new contract to reflect the price for terminal services in the 1998 contract that preceded it. Both Ms. Wehle and Mr. Dibner explained the fallacy of that adjustment.

The rate Mr. Dibner recommended was based on a bona fide market bid received by Tampa Electric through the RFP process which stands as a valid, contemporaneous indication of the market price for terminal services and was appropriately relied upon in his analysis. (Tr. 149, lines 4-8) Ms. Wehle points out that under the right of first refusal clause in the prior Tampa Electric and TECO Transport contract, Tampa Electric was required to provide TECO Transport with the then current market rate. (Tr. 451, lines 18-23) Even though Mr. Majoros concedes that the terminal services bid provided to Tampa Electric by that other terminal is a market rate, Mr. Majoros would have the Commission believe that the right of first refusal

concept extends to the rates under the prior contract. That is, if the market rates established in 1998 were lower than the rates in 2004, TECO Transport should be held to the older rate. In a word, this is absurd. (Tr. 451, line 18 through Tr. 452, line 3)

**The JEA Spot Movement Price Comparison Relied Upon by Mr. Majoros and Dr. Hochstein Fails to take Into Account the Nature of the JEA Transaction**

Witnesses Majoros and Hochstein argue that because JEA paid TECO Transport \$9 per ton for certain waterborne coal transportation of pet coke in 2003 and Mr. Dibner's proposed rate for a similar movement is higher, Tampa Electric is paying too much. However, as explained by Witness Wehle, the pet coke shipments to JEA were unrepresentative spot transactions negotiated by a broker. She further explained that spot transaction costs may be higher or lower depending upon the circumstances of the deal and the conditions of the market at a given time. She testified that Document No. 5 of her Rebuttal Exhibit (Exhibit 5) demonstrated that a broker of pet coke indicated that the 2004 rates from TECO Ocean Shipping to JEA are significantly higher than Tampa Electric's pet coke rate. Witness Wehle concluded that it is simply not reasonable to compare a spot rate to a five-year contract that ensures transportation services are available as required. (Tr. 452, lines 20-23) A spot rate may be higher or lower than a long-term contract rate.

**VII.**

**TAMPA ELECTRIC ACTED PROPERLY IN REJECTING CSXT'S RAIL PROPOSALS.**

Tampa Electric properly rejected CSXT's unsolicited October 2002 proposal and the two alternative rail bids CSXT submitted in response to the 2003 RFP

### **The October 2002 Proposal**

First, the unsolicited October 2002 proposal was not a bona fide proposal. It was conditioned on CSXT's Board's approval, was not firm in any of its proposed terms and was presented at a time when CSXT knew Tampa Electric was contractually obligated to take deliveries from TECO Transport or incur dead freight charges. To have entered into an agreement based on CSXT's preliminary proposal, Tampa Electric would have had to breach its existing agreement. Moreover, no rail facilities exist at Tampa Electric's Big Bend or Polk generating stations which could accommodate shipment by rail. (Tr. 418, line 16 through Tr. 419, line 8). Clearly, given all of the unresolved factors that would require further negotiations if Tampa Electric had been in need of the proposed transportation services, CSXT's proposal did not constitute an "offer" which, under contract law, could then be accepted to form a binding contract.

Even more importantly, the proposal came at a time when Tampa Electric was conducting evaluations of its own generating resource needs and attempting to make significant decisions about how to comply with two environmental consent decrees. Significant issues included how long Gannon Station could continue to operate as a coal-fired facility. (Tr. 419, line 16 through Tr. 420, line 2) Another important issue under consideration at that time was the future of burning coal at Big Bend Station. (Tr. 420, lines 17-25) It simply was not practical or prudent for the company to enter into any type of serious discussions regarding future coal deliveries with CSXT or any other party in October and November 2002.

### **CSXT's 2003 RFP Bids**

Ms. Wehle described Tampa Electric's evaluation and ultimate rejection of the two bids the company received from CSXT in response to the 2003 RFP. Although nonconforming in

that they were not responsive to the request for waterborne proposals, Tampa Electric nevertheless carefully considered CSXT's bids and hired Sargent & Lundy to evaluate the costs of constructing rail and rail unloading infrastructure at Big Bend and Polk Power Stations to accommodate rail deliveries. (Tr. 377, line 6 through Tr. 378, line 7)

Sargent & Lundy, under the leadership of project manager Paula Guletsky, performed a detailed analysis of CSXT's estimate of the capital costs associated with the rail improvements that would be required at Big Bend Station to receive and unload rail shipments of coal. Based on Sargent & Lundy's detailed analysis, together with assessments made by Mr. Murrell, it became very clear that CSXT dramatically understated the capital costs and the time necessary to construct the needed rail facilities including permitting time. (Tr. 428, lines 3-10) In fact, CSXT's bids included only 21% of the costs of the necessary facilities in its bid. (Tr. 1312, lines 2 – 12)

It is important to reiterate that Tampa Electric rejected CSXT's rail proposals not only because of the understated capital costs, but also based on numerous other considerations that made the proposals unattractive and not in the best interest of Tampa Electric or its customers. It has already been indicated that the CSXT proposed rate, when properly adjusted to include all costs apparent on the face of the bids, even excluding the understated capital costs, would have been more costly to Tampa Electric's customers than the transportation rate incorporated in the existing contract with TECO Transport. (Exhibit 83)

#### **Other Considerations Justifying Rejection of the CSXT Bids**

Other terms and conditions of the CSXT bids call for their rejection as well, including the requirement that Tampa Electric take an annual minimum of one million tons per year from a CSXT direct rail origin source or face significant dead freight penalties. (Tr. 429, lines 6 – 12)

This provision would have required Tampa Electric to change its sources of coal supply. CSXT also required that CSXT provide 80% of the annual solid fuel requirements of Polk Power Station. That facility currently uses a 60/40 blend of pet coke to coal with pet coke currently priced at less than a fourth of the cost of coal. (Duff Deposition at Tr. 84) CSXT cannot deliver pet coke directly to Polk Power Station as that fuel is sourced from the Lake Charles, Louisiana area and the Texas Gulf Coast which are served solely by waterborne transportation. (Tr. 1393, lines 8-12) Thus, under this requirement, Tampa Electric would have to choose between doing without pet coke and paying substantially more for its fuel at Polk Power Station, or being subject to dead freight penalties. (Tr. 429, lines 12-20) Either alternative would be harmful to Tampa Electric's customers.

These and other considerations detailed in Ms. Wehle's Rebuttal Testimony rendered CSXT's proposals simply unreasonable, incomplete and unfeasible. (Tr. 429, line 21 through Tr. 430, line 8) It was clearly in Tampa Electric's customers' interests to reject the CSXT bids.

CSXT bids were also properly rejected because they were not firm bids. When asked on cross examination whether CSXT expected Tampa Electric to evaluate its proposals based on what was included in those proposals, CSXT's Mr. White stated: "We are not locked into any of these things." (Tr. 957, line 2) Mr. White went on to suggest that the rate is "pretty much locked in," with everything else being "pretty much a negotiable item." (Tr. 957, lines 3-5) However, in further cross, Mr. White conceded that the price in the CSXT bid is not locked in and that CSXT anticipated Tampa Electric would attempt to "push back" on some aspects of the proposal, including the price. (Tr. 958, line 17 through Tr. 959, line 9). (Tr. 959, lines 14-16) Indeed, Mr. White conceded that the proposed capital cost contribution for constructing the rail

coal delivery facilities was fully negotiable and CSXT would consider negotiating a higher cost contribution amount. (Tr. 985, lines 3-19)

Tampa Electric was also concerned with the fact that CSXT's proposals failed to state how the required rail receiving facilities at Big Bend and Polk Power Stations would be paid for. Witness Murrell testified, based on his experience as a Vice President with CSXT, that CSXT historically does not advance the cash to the shipper for the construction of rail facilities. He said that, almost without exception, it is the shipper's responsibility to construct and pay for the facilities up front. CSXT then allows the shipper to take a reduction credit on a per car basis until the expended capital for the construction of the new facilities is recovered. According to Mr. Murrell it could take anywhere from twelve to twenty years for Tampa Electric to recoup this investment, which would present significant risks to Tampa Electric. At such time as CSXT proposed a rail rate increase, according to Mr. Murrell, Tampa Electric would have to choose between paying higher rates for transportation or failing to recover capital costs it paid for the new rail receiving facilities. (Tr. 1384, line 14 through Tr. 1385, line 22) CSXT's Mr. White agreed that the proposal could allow CSXT to require Tampa Electric to repay the railroad for any costs advanced for the facilities. (Tr. 976, lines 15-23)

Tampa Electric was also concerned with the price escalation provisions of the CSXT bids. As Mr. White testified, the bid would need to be adjusted by what is known as a RCAFU factor (rail cost adjustment factor unadjusted) and also a fuel surcharge. (Tr. 951, lines 21-25) Mr. White agreed that the CSXT proposal has fuel in the RCAFU and also has a fuel surcharge – a situation that he conceded would be a “double dip.” Mr. White said he did not think any prudent business person would pay for the fuel twice. However, by Mr. White's own

concession, if Tampa Electric had accepted CSXT's proposals as presented it would have been double dipped. (Tr. 951, line 21 through Tr. 952, line 4)

Mr. Murrell further testified that, because of the escalation factors used in the CSXT bid, the rates in the CSXT proposals would almost certainly escalate faster than the rates in the TECO Transport contract, making the CSXT rail delivery option even more expensive over time in comparison with the existing waterborne transportation contract. (Tr. 1403, lines 8-13) Mr. Murrell's confidential Document No. 3 to his Exhibit 62 demonstrated this effect.

The relative fuel efficiency of waterborne versus rail transportation was also a point of concern. During the hearing, Dr. Sansom stated that he had erroneously responded during his deposition that a barge is more fuel efficient on a per-ton mile basis than rail movements of coal. At the hearing, he reversed himself and claimed that rail transportation is more fuel efficient on a per-ton mile basis than moving coal on the Mississippi River. (Tr. 1156, lines 11-18) It appears Dr. Sansom was correct the first time, during his deposition, inasmuch as Dr. Hochstein confirmed during his deposition, that a ton of commodity can be transported over twice as far by water with a gallon of fuel as it can by rail.<sup>5</sup> (Hochstein Deposition, page 56, line 1-8; Hochstein Late-Filed Deposition Exhibit No. 5)

The quality of service provided by CSXT is also a significant concern. Mr. Martin Duff, Tampa Electric's Fuels Coordinator, testified CSXT's service is "poor at best" (Duff Deposition Tr. 78) and, that in his experience, it was a recurring problem (Duff Deposition Tr. 79) and had deteriorated over time. (Duff Deposition Tr. 79-80) CSXT's service shortfalls appear systemic,

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<sup>5</sup> This is not the only occasion where Dr. Hochstein and Dr. Sansom have voiced diametrically opposed opinions. For example, Dr. Hochstein testified that coal from coal fields in the Midwest can only rationally be transported to Tampa Electric's Big Bend Station by water (Tr. 710, lines 1-3), a statement that led Dr. Sansom to conclude that Dr. Hochstein is "incredibly stupid." (Tr. 1136, lines 14-25)

prompting CSXT to try to explain its deficiencies in a presentation by CSXT's Vice President of Coal, Michael Sullivan, at the Eastern Fuel Buyers Conference in Orlando in May 2004. (See Exhibit 98). Ms. Wehle's rebuttal exhibit (Exhibit 5) included, as a composite Document No. 3, a series of recently published stock brokerage evaluations and trade press articles describing the current delivery failings of the rail industry in general and CSXT in particular. Bates stamp page 79 of that exhibit cites a shipper survey ranking CSXT's on-time deliveries as the worst in the industry and getting worse.

This considerable collection of evidence supports the appropriateness of Tampa Electric's rejection of the CSXT bids.

### VIII.

#### **CSXT'S CAPITAL COST ESTIMATE FOR NEEDED RAIL INFRASTRUCTURE ADDITIONS WAS GROSSLY UNDERSTATED.**

As noted previously, CSXT's bid proposals included a vaguely worded offer for CSXT to assume a stated amount of the costs for added rail facilities and rail car unloading facilities that would be required in order for Tampa Electric to take rail deliveries at Big Bend and Polk Power Stations. As part of its evaluation of the CSXT bid package, Tampa Electric retained Sargent & Lundy to perform an independent evaluation of CSXT's proposals and CSXT's estimated cost of the proposals. Sargent & Lundy has designed over six hundred fossil fuel power stations including some fourteen hundred generating units, with each of these projects including fuel, receiving and distribution systems. In addition, Sargent & Lundy has performed countless retrofit projects of the type involved here, including fuel switching and new coal delivery systems. (Tr. 1312, lines 19-23) Paula Guletsky, who served as project manager on this independent assessment, testified that she has served as project manager for Sargent & Lundy on



approximately three dozen electric utility projects, all but two of which were utility retrofit projects like the CSXT proposal. (Tr. 1350, lines 2-18)

Sargent & Lundy's evaluation of the CSXT proposal concluded that, while the concept of retrofitting the Big Bend and Polk Power Stations to receive coal by rail contained no fatal conceptual flaws, the cost estimates for implementing the concept were grossly understated. (Tr. 1310, line 24 through Tr. 1311, line 3)

Similarly, Sargent & Lundy found the review and adjustments to the CSXT proposal made by Mr. Stamberg, an engineer employed by Energy Ventures Analysis, Inc., were low and reflected his apparent lack of experience in estimating the design requirements for an electric utility, coal-fired power plant retrofit project of this type. (Tr. 1311, lines 4-8)

Ms. Guletsky testified that both the CSXT estimate and Mr. Stamberg's adjustments failed to consider the need for basic infrastructure requirements. (Tr. 1311, lines 9-16) In addition to these omissions Mr. Stamberg's adjustments failed to consider the need for utility grade equipment. (Tr. 1311, lines 17-19)

Finally, the actual design of some of the modifications made by Mr. Stamberg is completely inadequate, such as the rapid discharge pit, which is half the size of the specifications of the project. (Tr. 1311, lines 22-25)

Ms. Guletsky concluded that the CSXT cost estimate for implementing 2 to 5.5 million ton built in rail coal delivery systems for Tampa Electric's Big Bend and Polk Power Stations, as adjusted by Mr. Stamberg, includes only approximately 21% of the amount that would be required to actually implement this concept based on the engineering standards and guidelines Sargent & Lundy has consistently adhered to in countless similar electric utility retrofit projects. (Tr. 1312, lines 2-9) Ms. Guletsky testified that the report prepared by Sargent & Lundy was

prepared in accordance with Sargent & Lundy's strict engineering standards and guidelines. The company's staff of professionals who worked on this task are power industry experts with over 120 years of collective experience in the planning and design of fossil power projects. (Tr. 1310, lines 4-9)

Ms. Guletsky further described the safeguards and cross-checks used by Sargent & Lundy. She and her staff prepared the report, and she reviewed the concept and cost estimates contained in the report. The report was then reviewed, approved and stamped by a professional engineer licensed in the state of Florida. (Tr. 1310, lines 20-23)

Ms. Guletsky further stated that assisting clients with the planning, design and implementation of capital projects for power generation and distribution facilities is Sargent & Lundy's sole charter. It is what they do all day, every day, and what they have done continuously for 113 years. (Tr. 1312, lines 14-18)

In contrast to the extensive experience and qualifications of Sargent & Lundy, Ms. Guletsky and her project team, the CSXT project description and cost estimates were sponsored by two witnesses, neither of whom has the qualifications necessary to present or support reasonable cost estimates for a project of this nature. CSXT's only company Witness, Mr. White, could only testify second hand as to the work done by an engineer named Mr. Richard Schumann, who was not a witness in this proceeding. When questioned about the basis for Mr. Schumann's work, Mr. White could only speak in general terms about the "great work" Mr. Schumann has performed. This is notwithstanding the fact that Mr. Schumann had conceded that certain cost estimates he made in his analysis were "truly a guess." (Tr. 972, lines 7-15) Mr. White did not prepare the cost estimate performed by Mr. Schumann and therefore could not address any of the detail that went into the estimate.

Mr. Stamberg, employed by Mr. Samson's two consulting firms since 1971, testified that neither of those firms has ever designed or overseen the design of coal-fired power plants. (Tr. 1225, lines 17-21) Mr. Stamberg himself has never designed or overseen the design of a coal-fired power plant coal unloading and distribution system. (Tr. 1226, lines 19-21) The only construction project that Mr. Stamberg, as an engineer, has seen through to commercial operation during the past 20 years was a single wastewater treatment plant. (Tr. 1226, line 22 through Tr. 1227, line 7) He testified that he had never seen through to commercial operation a coal-fired power plant project or a coal-fired power plant coal unloading and coal distribution system. (Tr. 1227, lines 13-17) It was Mr. Stamberg's inexperience which led to his omission of large portions of necessary equipment and led to his inclusion of only 21% of the costs required to construct the facilities to reliably receive coal at Tampa Electric's generation stations.

It should be abundantly clear that Sargent & Lundy is eminently more qualified to present an accurate and reliable estimate of the cost of the work that would be needed at Big Bend and Polk Power Stations. It is equally apparent that the economic interest of CSXT would be best served through the development of as low an estimate as possible for this work. On balance, the qualifications, experience and reputation of Sargent & Lundy far exceed those of the sponsors of the CSXT cost estimate, which lends credence to the validity of Sargent & Lundy's findings and supports the prudence of Tampa Electric rejecting the CSXT rail delivery proposals.

## IX.

**THE COAL AND PET COKE UNLOADING, TRANSLOADING, BLENDING AND STORAGE SERVICES TAMPA ELECTRIC RECEIVES FROM TECO BULK TERMINAL ARE ESSENTIAL TO TAMPA ELECTRIC'S EFFICIENT, COST-EFFECTIVE AND RELIABLE OPERATIONS.**

Witnesses for CSXT and the Residential Customers alleged that Big Bend Station should be utilized for coal storage and blending rather than the terminal in Davant, Louisiana. They suggested that Tampa Electric should use foreign coal delivered directly to Big Bend Station or another location in Tampa without considering the company's operational needs or boiler fuel design. As Witness Wehle testified, these witnesses ignore the fact that coal is not a fungible product. (Tr. 469, lines 11-18)

Contrary to the assertions of Drs. Sansom and Hochstein, Big Bend Station does not have storage capacity to physically accommodate the amounts and multiple types of coals required by Tampa Electric. Ms. Wehle testified that while it may be common for Midwestern utilities to store 30 to 45 days of inventory, this Commission determined in Order No. PSC-93-0165-FOF-EI that Tampa Electric must maintain up to 98 days of system inventory, recognizing the distance between Tampa Electric's generating stations and the coal fields serving them. (Tr. 431, lines 19-24)

The intervenor witnesses also overlook different types of coal Tampa Electric is required to maintain in storage in order to accommodate the requirements of its different coal-fired generators, discussed by Ms. Wehle at Tr. 432, lines 16-25. The intervenor witnesses likewise fail to consider the benefits Tampa Electric derives for its ratepayers by maintaining its inventory levels at Davant and in Tampa for reliability and also to insulate the company and its customers from price volatility. (Tr. 432, lines 1-10) Tampa Electric maintains inventory for reliability purposes and for protection against unexpected changes in markets, extreme weather conditions, economic reasons and operational contingencies. (Tr. 469, line 25 through Tr. 470, line 3)

Dr. Hochstein's suggestion that South American coal be delivered directly to Tampa Electric ignores the fact that the channel leading to Big Bend Station is not deep enough to

accommodate the larger vessels that typically deliver foreign coal. (Tr. 469, lines 21-23) Moreover, to put it into perspective, South American coal represents only about five percent of Tampa Electric's total annual fuel coal deliveries, and that minimal amount should not be relied upon as an excuse to disrupt the efficiencies that Tampa Electric derives from the services provided in Davant, even if direct deliveries to Big Bend Station were possible, which they are not.

Finally, Big Bend Station does not have the blending facilities that are needed to create the coal and petroleum coke blend burned at Polk Power Station. Polk Power Station burns a blend of South American coal, domestic coal and petroleum coke. Two of these resources must be transported past the mouth of the Mississippi River; therefore it is more cost effective to bring the South American coal to be blended at the terminal in Davant. (Tr. 470, lines 4-11; Tr. 434, line 21 through Tr. 435, line 5)

As Ms. Wehle concluded, it would not be reasonable, practical or feasible to increase the storage capabilities at Big Bend Station, even if it did have the ability to blend coal and pet coke for Polk Power Station, which it does not. TECO Bulk Terminal is an essential link in Tampa Electric's transportation system. Besides being needed for coal blending and storage, it is also a necessary coordinating facility that allows the coal in river barges, which cannot cross the Gulf of Mexico, to be transloaded into ocean-going vessels. (Tr. 435, lines 11-19)

For all of the foregoing reasons, utilization of the terminal in Davant, Louisiana is essential for Tampa Electric's transloading, storage and blending needs and the overall efficiency and reliability of Tampa Electric's operations.

## X.

### **DR. SANSOM'S RECOMMENDED COST RECOVERY ADJUSTMENTS ARE PUNITIVE, UNWARRANTED AND GO WELL BEYOND THE SCOPE OF THIS PROCEEDING.**

Dr. Sansom testified that Tampa Electric should be made to suffer many millions of dollars worth of fuel cost recovery disallowances based on an analysis that is faulty and contrived at best and which goes well beyond the scope of the proceeding.

As Ms. Wehle indicated, Dr. Sansom's testimony is primarily based on "Monday morning quarterbacking" through the development of a very selective scenario that must include terminating or modifying existing coal supply contracts in order to justify rail movements and achieve the bi-modal approach Dr. Sansom espouses. To do this, he had to go back in time to a period when rail origin coal prices were less expensive than under Tampa Electric's existing coal contracts, and to then suggest that Tampa Electric breach its coal contracts – something which Dr. Sansom knows is against public policy and would result in monetary penalties, which are conveniently excluded from his analysis. (Tr. 439, lines 1-13)

Ms. Wehle went on to point out that implementing Dr. Sansom's restructuring of existing coal contracts and coal sources could have serious legal implications and result in liquidated damages, not to mention adversely impacting the company's reputation and its ability to negotiate contracts on favorable terms going forward. (Tr. 44, lines 10-19). Witness Wehle indicated that Tampa Electric has existing long-, medium- and short-term coal agreements based upon the genuine needs of the company's generating units. These contracts were entered into based upon the company's prudent procurement practices analyzing the best market information available. It is important to note that Tampa Electric's coal contracts were entered into based upon an overall analysis of delivered coal prices. Since there are no rail facilities in place, the

company's contracts are such that river and ocean barges are the most economic modes of transportation. That is precisely the reason the company issued a waterborne transportation RFP. (Tr. 15-25)

Ms. Wehle effectively rebutted Dr. Sansom's analysis that LG&E, TVA and Seminole's coal supply transportation costs are lower as compared to Tampa Electric. First, Dr. Sansom used delivered cost information, lumping commodity and transportation costs together. In response to questions from Commissioner Deason predicated on the fact that the purpose of this proceeding is to address transportation costs, Dr. Sansom could not say whether these various other utilities enjoy lower transportation costs than Tampa Electric under its current contract with TECO Transport. (Tr. 1101, line 24 through Tr. 1104, line 3)

Even if Dr. Sansom could separate out the transportation costs from the total delivered price, Ms. Wehle testified that it would be completely unfair and improper to compare the transportation costs of Tampa Electric, a southeastern utility, to those of LG&E and TVA which are Midwestern utilities that are advantaged by having the coal fields closer to their generators. (Tr. 441, lines 7-12) Ms. Wehle also addressed Dr. Sansom's analysis of Seminole, noting that he compared the Seminole twenty to thirty year coal supply agreement with a coal supplier to Tampa Electric's agreement – a comparison of apples (transportation) and oranges (supply). Ms. Wehle observed that, given the very long-term nature of the Seminole contract, it may include volume discounts and other arrangements not available for shorter-term arrangements. In addition, as discussed earlier, Dr. Sansom's analysis looked at delivered coal prices which preclude any comparison of the transportation costs to the utility. (Tr. 443, line 14 through Tr. 444, line 6) Dr. Sansom's suggestion that Tampa Electric should have bid on PITT 8 and Illinois Basin coal in the second quarter of 2003 is yet another example of the witness' use of hindsight



and cherry picking of coal purchases to support his argument. (Tr. 444, line 22 through Tr. 445, line 8) What happened to coal prices in the second quarter of 2003 may be an aberration and not consistent with prices throughout a longer term. (Tr. 444, lines 27 through Tr. 445, line 17)

In essence, Dr. Sansom is attempting to convert this proceeding from one limited to addressing the issue of the appropriate level of payment by Tampa Electric to TECO Transport for waterborne coal transportation services into an omnibus proceeding that addresses both coal procurement and coal transportation services. He does this based on selective and self-serving hindsight, no less. This is simply beyond the scope of this proceeding and the three issues deferred from the November 2003 fuel adjustment proceeding. It is noteworthy that the expanded scope and retrospective and selective redefinition of Tampa Electric's portfolio of coal supply sources are essential to the punitive adjustment Dr. Sansom urges. Absent these arbitrary props, the CSXT rail rates reflected in its two bids must lose out to the lower transportation rates set forth in the Tampa Electric-TECO Transport contract.

Mr. Murrell also addressed Dr. Sansom's suggestion that Tampa Electric terminate and/or modify its coal supplies. Mr. Murrell concluded that even if Tampa Electric were free to switch to rail delivered coal, most of the coals located on CSXT's lines have high ash fusion temperatures. Given the low ash fusion temperature requirements of Big Bend Units 1-3, Mr. Murrell stated that this could result in Tampa Electric having to source coal in a two or three rail line haul or have to truck or barge the coal to transloading facilities, all of which would drive up the cost of getting the coal to Tampa by rail. (Tr. 1392, line 9 through Tr. 1393, line 3)

Mr. Murrell rejected Dr. Sansom's BTU loss conclusion, saying that the actual coal pile inventories for both TECO Bulk Terminal and Big Bend Power Station do not provide any evidence that any appreciable amount of coal has been lost to transloading of coal over time.



(Tr. 1393, line 20 through Tr. 1394, line 4) In addition, Mr. Murrell disagreed with Witness Sansom's contention that there is a 25 cents per ton loss of the heating value of the coal that is carried on barges, due to moisture increase during transit. Mr. Murrell indicated the loss would only be a small fraction of the 25 cents per ton Dr. Sansom assumed. (Tr. 1394, lines 6-18)

With respect to Dr. Sansom's suggestion that Tampa Electric should have cancelled the Galatia Coal contract, Ms. Wehle pointed out that Dr. Sansom ignore the fact that the company expected it would continue to need this coal for Gannon Station beyond the point in time when its right to terminate the contract expired in July 2002. (Tr. 446, lines 16-19)

In conclusion, Dr. Sansom's recommended massive cost recovery disallowances should be rejected as obvious attempted coercion and retribution. Dr. Sansom's proposed penalties are based on a simplistic methodology of comparing rates established under different agreements from those to which Tampa Electric is a party, and on contrived scenarios based on "Monday morning quarterbacking." His method would necessitate terminating or modifying existing coal contracts in order to justify rail delivery of coal. This is simply wrong and beyond the scope of this proceeding, and the Commission should reject his approach.

## XI.

### **DR. HOCHSTEIN'S ALTERNATE OCEAN MARKET RATE METHODOLOGY IS FAULTY, BASED ON ERRONEOUS DATA AND SHOULD BE REJECTED.**

To begin with, it should be reiterated that Dr. Hochstein has not negotiated any waterborne contracts, nor has he analyzed any coal transportation contracts (Deposition, Tr. 19, line 22 through Deposition, Tr. 20, line 19) He has never been employed by a waterborne carrier. (Deposition, Tr. 20, line 24 through Deposition, Tr. 21, line 7) Notwithstanding this

lack of experience, Dr. Hochstein proposed a substitute freight (ocean) rate of \$5.12 per ton. (Tr. 749, lines 1-6)

Dr. Hochstein's alternative methodology was soundly rejected by Mr. Dibner who explained Dr. Hochstein's apparent misunderstanding of the methodology Mr. Dibner employed. Contrary to Dr. Hochstein's interpretation, Mr. Dibner used depreciated replacement costs resulting in substantial investment reductions and valuations yielding lower rates. (Tr. 143, lines 1-7) Mr. Dibner explained Dr. Hochstein's methodology is also erroneous because he did not establish replacement costs for any of the tug/barge units in TECO Transport's service but instead relied upon the Corps of Engineers' planning guide information for replacement costs for the purely hypothetical generic ship used in his example. Mr. Dibner explained that the Corps of Engineers information relied upon by Dr. Hochstein is not widely used or accepted, nor is it used by real-world vessel operators. (Tr. 143, lines 7-21)

As Mr. Dibner explained, Dr. Hochstein's analysis was performed in a cursory manner in which he relied on limited and inapplicable statistics, applied them in error and presumed that he could cast aside market conditions, bid proposals and actual costs. (Tr. 144, lines 6-11)

Mr. Dibner pointed out that Dr. Hochstein's recalculation of TECO Transport's freight rates were incorrect and inappropriate. Mr. Dibner sponsored Document No. 1, Exhibit No. 5 which corrects Dr. Hochstein's incorrect assumptions and omissions and graphically demonstrates the corrected result. Those correctives are summarized in Mr. Dibner's testimony (at Tr. 145, line 8 through Tr. 146, line 23). After this, Mr. Dibner concludes that, when fairly adjusted, Dr. Hochstein's \$5.12 per ton is more realistically \$10.05 per ton which is substantially above the ocean segment rate per ton Mr. Dibner recommends. (Tr. 146, line 16 through Tr.

147, line 3) Mr. Dibner concluded that Dr. Hochstein's freight rate calculation deviates from reality to pure hypothesis and must be rejected in its entirety. (Tr. 147, lines 6-8)

Perhaps the most important point that leaps from the pages of Dr. Hochstein's testimony is the ridiculous suggestion that Tampa Electric should be made to absorb many millions of dollars in the annual rates it pays to TECO Transport – the very carrier who Dr. Hochstein admits has the lowest transportation rates of any participant in the market. This just does not follow, and the Commission should soundly reject Dr. Hochstein's proposed adjustment.

## **XII.**

### **NO INTERVENOR HAS MET THE BURDEN OF DEMONSTRATING ANY CHANGED CIRCUMSTANCES REQUIRING A MODIFICATION OR REJECTION OF THE COMMISSION APPROVED BENCHMARK METHODOLOGY.**

The Commission's current policy for determining the reasonableness of amounts paid by Tampa Electric to its affiliate for coal transportation services is embodied in the benchmark methodology approved in Order No. 20298. In order to effect a deliberate change in policy, the Commission must adequately explain the reason for the change based on competent substantial evidence in the record. Florida Cities Water Company v. State, 705 So.2d 620 (Fla. 1st DCA 1998). In her opening statement at the hearing, FIPUG's attorney misinterpreted Tampa Electric's comments regarding the burden of proof in this proceeding. (Tr. 33, lines 3-11). Tampa Electric agrees that it has the burden of proving the reasonableness of amounts it pays to TECO Transport. Under existing Commission policy it meets this burden by demonstrating that the rate used to calculate those payments is lower than the rail based rate calculated in accordance with the Commission approved benchmark methodology. However, the intervenors

are the proponents of changing or eliminating the currently approved benchmark methodology and, on that issue, they – not Tampa Electric - clearly have the burden of proof.

It is fundamental that with respect to issues before administrative tribunals, as under the general rule applicable in court proceedings, “the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.” Florida Department of Transportation v. JWC Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981) citing Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977). In the Balino case the court reviewed the issue of who has the burden of proof at a Medicaid benefits reclassification hearing – the recipient of the benefits seeking continued assistance or the Department of Health and Rehabilitative Services. The court agreed that the burden should be placed on the Department since it was the proponent of the reclassification.

Here, the intervenors are the proponents of change and have the clear burden of demonstrating through competent substantial evidence a justification for any such change.

The Commission adopted the existing coal transportation benchmark after thoroughly considering evidence from all participants in the 1988 proceeding that gave rise to Order No. 20298. The Commission approved a stipulation based upon the record in that proceeding indicating that the prices Tampa Electric was paying to its waterborne coal transportation affiliate were reasonable. In so doing the Commission stated:

If one considers the objective of coal transportation services to be the movement of the coal from the mine to the generating plant, then rail service and the total waterborne system are not only comparable, but competitive to a large degree, as well. We believe using the average of the two lowest publicly available rail rates for coal being shipped to Florida will provide a reasonable market price indication of the value being provided by TECO’s affiliate waterborne system.

As reflected in Ms. Wehle's Rebuttal Exhibit 5, Confidential Document No. 7, the TECO Transport waterborne transportation rate has been consistently below the benchmark approved in Order No. 20298 and, most recently, was below the coal benchmark level by very close to the same amount as it was when the benchmark proposal was adopted in 1988.

As OPC has previously argued in connection with the benchmark methodology, an agency should not ignore or set aside a stipulation without record evidence of fraud, overreaching, misrepresentation or withholding of facts by the adversary of some other reason rendering it void. (Spitzer v. Bartlett Brothers Roofing, 437 So.2d 758, 760 (Fla. 1st DCA 1983)) (See page 16, Initial Brief of OPC, filed in Citizens v. Beard, S.Ct. Case No. 79,675, June 17, 1992)

No intervenor party to this proceeding has proffered any evidence of changed circumstances warranting departure from the existing Commission approved methodology. Dr. Sansom attempts to show changed circumstances by claiming an inability to obtain certain information from the Commission's Staff, his statement that certain confidential information the Staff provided him for JEA's actual rail costs only showed non-discounted information, and his unsupported contention that the benchmark calculations Tampa Electric has made since the inception of the benchmark are "invalid." Rather than demonstrating changed circumstances, Dr. Sansom is simply challenging the decisions and orders this Commission has issued on this subject for the past fifteen years. As Ms. Wehle testified, Dr. Sansom's claims and contentions are simply wrong. Since the benchmark was first established in 1988, Tampa Electric has provided accurate and complete information as prescribed in Attachment "A" of Order No. 20298.

Again, when the Commission adopted the benchmark methodology it knew that the approved TECO Transport waterborne rate was well below the benchmark by a margin very similar to the most recent application of that benchmark methodology. (See Chart on page 21) Nothing has changed and Dr. Sansom's arbitrary rejection of the benchmark is unwarranted. Unsubstantiated allegations that the benchmark is "irrelevant" or "out of date" do little to establish changed circumstances, yet that is all the intervenor witnesses have put forth. In actuality, the benchmark methodology provides the same means of comparing Tampa Electric's payments to TECO Transport to the rail alternative as it did back in 1988 when adopted. Even Dr. Hochstein agreed that a benchmark can be useful as a maximum cap and characterized the current rail based benchmark as "a good maximum cap, agreed." (Hochstein Deposition Tr. 213, lines 22-25; Deposition Tr. 86, line 19 through Tr. 87, line 4)

The fact is rail rates represent the upper end of the market, and function as an appropriate maximum rate. Intervenors' attack on the benchmark only evidences their desire to move on to some other methodology or regulatory approach. That does not satisfy the burden of proof to modify or reject existing approved Commission policy, and their efforts in this regard should be rejected.

### XIII.

**STATUTORY, CONSTITUTIONAL AND POLICY  
CONSIDERATIONS COMPEL THE REJECTION OF ANY  
SUGGESTION THAT THE COMMISSION ABROGATE,  
MODIFY OR REQUIRE A REBIDDING OF THE  
CURRENT TAMPA ELECTRIC-TECO TRANSPORT  
AGREEMENT.**

During the hearing Commissioner Jaber expressed a desire that the parties address the scope of the Commission's authority to take certain actions such as requiring a rebidding of the

Tampa Electric-TECO Transport agreement, as mentioned by certain intervenor witnesses. Similar issues were reviewed by the Supreme Court of Florida in United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116 (Fla. 1986). In United Telephone the Court reviewed two orders of the Commission modifying revenue distribution contracts between telephone companies. The Court quashed the two orders and held that the state statutes empowering the Commission did not permit it to modify rate contracts between the regulated telephone utilities.

The Court stated that in reviewing actions by the Commission the threshold issue is to establish a grant of legislative authority to take the particular action in question, as the Commission derives its power solely from the Legislature. Id., at 496 So.2d 118. The Court held that the Commission lacked any demonstrated statutory authority to modify revenue distribution contracts between regulated telephone companies. The Court noted that Section 364.14, Florida Statutes, empowers the Commission to alter telephone company rates, charges or practices which the Commission finds to be unjust, unreasonable, unduly discriminatory or unduly preferential. However, the Court went on to say that this jurisdiction only comes into play where the Commission finds that a rate, charge or practice is unjust, unreasonable, unduly discriminatory or unduly preferential as applied to ratepayers, not as between utility companies. With respect to this case, nowhere in Chapter 366, Florida Statutes, is the Commission authorized, either directly or through any reasonable inference, to reform or abrogate a utility's contracts with its suppliers of goods or services. Instead, the Commission, in administering the fuel and purchased power cost recovery clause, has consistently interpreted its authority to review the evidence and allow recovery of prudently incurred costs and disallow those costs which the Commission concludes were not prudently incurred.

In the United Telephone decision, the Court also noted that the Supreme Court of the United States has held that a state regulatory agency cannot modify or abrogate private contracts unless such action is necessary to protect the public interest. Abrogating private contracts in the absence of such public necessity constitutes a violation of the impairment of contracts clause of the United States Constitution. Id., at 496 So.2d 119. (Citing Arkansas Natural Gas Co. v. Arkansas Railroad Commission, 261 U.S. 379, 43 S.Ct. 397, 67 L. Ed. 705 (1923)). Here there has been no demonstration that any abrogation, modification or rebidding and replacement of the Tampa Electric-TECO Transport contract is necessary to protect the public interest. If anything, the evidence conclusively demonstrates that the current contract is, indeed, in the public interest and should be found reasonable for cost recovery purposes.

In United Gas Pipeline Company v. Bevis, 336 So.2d 560 (Fla. 1976) the Florida Supreme Court stated:

We have generally prohibited all forms of contract impairment. E.g., Yamaha Parts Distr. Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975); Fort Lauderdale v. State ex rel. Elston Bank & Tr. Co., 125 Fla. 89, 160 So. 584 (1936).

Policy reasons, likewise, argue against any action by the Commission to reform, rebid or prescribe some methodology to replace the terms and conditions of the existing agreement between Tampa Electric and TECO Transport. This Commission traditionally has recognized that its statutory role is to regulate the rates and services of public utilities and not to usurp management prerogative by micromanaging the utility's operations. Such regulatory restraint is especially appropriate here where, under the Commission's current policy set forth in Order No. 20298, there is no obligation for Tampa Electric to utilize an RFP process. The intervenors' urging that the Commission micromanage Tampa Electric should also be soundly rejected on the



basis of record evidence of the efficiency of TECO Transport and the low rates that it charges Tampa Electric for the services provided.

### **CONCLUSION**

Based upon the foregoing, Tampa Electric urges the Commission to find and declare that Tampa Electric's RFP process was reasonable and appropriate; that the resulting transportation rates developed by Mr. Dibner are fair, reasonable and appropriate for cost recovery; and that the benchmark pricing policy approved in Order No. 20298 should be retained and applied as a useful tool for testing the reasonableness of rates paid by Tampa Electric to its affiliate, TECO Transport, on a going forward basis.

### **POST-HEARING STATEMENT OF ISSUES AND POSITIONS**

**ISSUE 1: Is Tampa Electric's June 27, 2003, request for proposals sufficient to determine the current market price for coal transportation?**

**Tampa Electric's Position:**

\*Yes. The RFP was administered in a manner clearly articulating Tampa Electric's needs. Bids received were carefully and fairly evaluated. Taken together with the market price analysis performed by Mr. Dibner, they provided a clear picture of the then current market rates for coal transportation services. \*

**ISSUE 2: Are Tampa Electric's projected coal transportation costs for 2004 through 2008 under the winning bid for its July 27, 2003, request for proposals for coal transportation reasonable for cost recovery purposes?**

**Tampa Electric's Position:**

\*Yes. Pricing under the current contract is four percent lower than under the contract it replaced; is lower than CSXT's proposal when properly evaluated; is shown by Mr. Dibner to be

below the comparable maritime market; is significantly below the most recent transportation benchmark price; and should be approved. \*

**ISSUE 3: 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?**

**Tampa Electric's Position:**

\*No. No party has demonstrated the need for a policy change. The benchmark serves as a useful price cap, as opposed to the former Progress Energy benchmark that set the recoverable amount. It continues to provide the same valid and useful information as it did when it was adopted. \*

DATED this 12th day July 2004.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief and Post-Hearing Statement of Issues and Positions, filed on behalf of Tampa Electric Company, has been furnished by U.S. Mail or hand delivery (\*) on this 12th day of July 2004 to the following:

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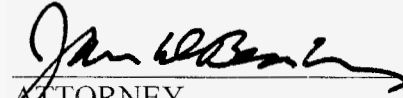
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