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October 27, 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:

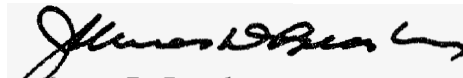
Enclosed for filing in the above docket on behalf of Tampa Electric Company are the  
original and fifteen (15) copies of the following:

1. Motion for Reconsideration and/or Clarification
- 11608-04 2. Request for Official Recognition and Motion to Reopen Record
- 11609-04 3. Request for Oral Argument

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/bjd

Enclosures

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

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: October 27, 2004  
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**TAMPA ELECTRIC COMPANY'S  
MOTION FOR RECONSIDERATION AND/OR CLARIFICATION**

Tampa Electric Company ("Tampa Electric" or "the company") files this its Motion for Reconsideration pursuant to Rule 25-22.060, Fla. Admin. Code. The company further moves the Commission for clarification of its final order in this proceeding. As grounds thereof, Tampa Electric says:

**Preface**

1. Tampa Electric urges this Commission to reconsider its decision in Order No. PSC-04-0999-FOF-EI ("Order No. 0999") regarding the recovery of Tampa Electric's waterborne coal transportation costs. That order adopts a market price for Tampa Electric which: (1) is far below any of the rates the Commission has found reasonable for Tampa Electric to recover over the last 15 years; and (2) is suspected to be far below the market price the Commission contemporaneously found reasonable for Progress Energy Florida ("PEF") to recover for waterborne coal transportation costs in 2004. The end result of the Commission's decision and the wide disparity of treatment are so significant that the Commission's decision denies Tampa Electric both procedural and substantive due process and equal protection of the law.

2. The Commission's decision further denies Tampa Electric due process by relying on confidential information which was not made part of the record and which Tampa Electric had no opportunity to inquire about, distinguish or rebut. The Commission also erred in failing to distinguish the character of the JEA isolated spot movements compared to those in the Tampa Electric long-term contract movements, and by overlooking market information on the record.

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showing significantly increased costs of waterborne coal transportation to JEA in 2004. In addition, the Commission erred by using only the “freight portion” of the JEA rate and by not taking into account other customary charges that were included in the Tampa Electric rates, i.e., port charges and demurrage.

3. The end result of the Commission’s decision embodied in Order No. 0999 is completely at odds with both the historic prices found to be reasonable and the current market prices. The Commission overlooked extensive evidence that the market price for waterborne coal transportation services has not gone down but, in fact, has increased.

#### **The Historical Price**

4. The price determined for Tampa Electric in this proceeding is more than \$2 lower than the lowest price (in 1989) this Commission held to be reasonable in each of the years since 1988. This is evidenced in Hearing Exhibit No. 7, which included Document No. 7 of witness Wehle’s rebuttal exhibit (JTW-2). The significant reduction in cost recovery mandated by Order No. 0999 is entirely at odds with prior decisions by the Commission – decisions that were based on careful analysis. Each year since 1988, this Commission has carefully reviewed Tampa Electric’s coal transportation costs paid to TECO Transport. Each year this Commission concluded that the costs were reasonable. The rate approved for recovery in Order No. 0999 is lower than the rate approved in 1989, the lowest rate in the past. There is no support in the record that suggests the waterborne coal transportation market has declined from 1989 rates.

#### **Obligation to Use the Best Data Available**

5. Order No. 0999 determined the market price for waterborne coal transportation by a review of prices paid by other utilities in prior years saying: “. . . we find that the best alternative is to rely on actual rates paid by other utilities for inland river barge and ocean barge service. . .” (Order No. 0999, pg. 16.) Once the Commission decided that prices paid by other

utilities would be the basis of its decision, it was obligated to use the best information available, not only from this record but also from other contemporaneous Commission determinations concerning the reasonable market price for similar waterborne coal transportation services. On July 20, 2004, this Commission issued Order No. PSC-04-0713-AS-EI (“Order No. 0713”) approving a Stipulation and Settlement of PEF waterborne coal transportation costs for 2004. In a separate pleading, Tampa Electric requests that this Commission take official recognition of Order 0713 and the unredacted Stipulation and Settlement containing the contemporaneous rates the Commission found to be reasonable for PEF for 2004.

6. In order to implement its market analysis, the Commission relied on the Staff calculations and analysis set forth in Appendix 7 attached to the Staff’s August 26, 2004 recommendation. That information was not presented at the hearing nor was it placed in evidence. This appendix cites confidential information relating to PEF that was not furnished to Tampa Electric at the hearing. Moreover, this was information which, on the face of the redacted document, PEF clearly contended unfairly understated its costs. The confidential information relied on by the Commission was not received in evidence and Tampa Electric was denied any opportunity to challenge or otherwise address it.

### **Best Practices Principle**

7. The best practices principle advocated here is the same principle applied by this Commission in Order No. 0999 with respect to Tampa Electric’s bidding process. **The** Commission in Order No. 0999 held that Tampa Electric was not obligated to bid. However, once the decision was made, it was obligated to use the best process available to reach a fair result. Likewise, the Commission was not required to use an analysis of prices paid by other utilities. However, once that decision was made, the Commission had an obligation to use the best information available to make its decision. In this proceeding the Commission ignored

relevant information in the record. In addition, the Commission's end result was dramatically different than findings made in a contemporaneous proceeding which determined the reasonable market price for PEF to recover during 2004.

8. It was a fundamental error for the Commission to first hold that prices paid by PEF for transportation to Crystal River are relevant to a determination of the market price for Tampa Electric and then to use historical confidential PEF waterborne coal transportation pricing information not furnished to Tampa Electric while ignoring its own contemporaneous decision establishing the reasonable market price for PEF for 2004. It was also unreasonable to use PEF's confidential information in the analysis where the exhibit the Commission relied on showed on its face PEF's contention that the price was significantly understated. The Commission should take official notice of the waterborne coal transportation prices found to be reasonable in the Commission's July 20, 2004 Order No. PSC-04-0713-AS-EI ("Order 0713"). Order 0713 approved as reasonable an FOB barge rate for PEF which Tampa Electric believes is between \$3 and \$4 per ton higher than the market rates found to be reasonable for Tampa Electric<sup>1</sup>. Both utilities are similarly situated, as recognized by the Commission in its reliance, albeit inappropriate, on confidential historical PEF pricing information in this proceeding.

9. Additionally, in response to any suggestion that the approved 2004 Progress Energy rate resulted from a settlement and therefore does not stand as precedent, it is very clear that the Commission found the rate to be fair and reasonable and, therefore, recoverable from Progress Energy's customers. Otherwise, the Commission would not have approved the rate for cost recovery. Parties may agree on the provisions of a settlement, but only the Commission decides what is appropriate for customers to pay. If the approved rate is reasonable for Progress

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<sup>1</sup> This belief is based on public information including public documents filed by PEF, the FPSC's Staff recommendation in Docket No. 031057-EI, and testimony filed by FPSC Staff witness William McNulty in Docket No. 030001-EI. This estimated amount includes an estimate for Progress Fuels' integrating, coordinating, and scheduling costs in addition to an estimate of the stipulated FOB barge rate.

Energy's customers to pay for waterborne coal transportation services in 2004, it should likewise be considered a reasonable proxy for the recoverable cost of waterborne coal transportation provided to Tampa Electric.

**Use of Confidential Information Not Furnished to Tampa Electric and Not in Evidence**

10. The Commission erred in relying on rates paid by PEF for waterborne coal shipments from the IMT Terminal to the Crystal River Station because that information was taken from the confidential portion of a PEF audit which information was withheld from Tampa Electric, is not in evidence, and was characterized by PEF as being inaccurate. Tampa Electric was only furnished a redacted version of the audit which was identified as Exhibit 65 "Progress Terminal Rates." The redacted audit was received in evidence. Further, Order No. 0999 admits that PEF's response to the audit claims there were non-contractual costs not fully covered by the contract and which were not considered in the audit findings. (See Order No. 0999, pg. 19.) Tampa Electric was denied due process of law by the Commission's use of information withheld from Tampa Electric and not in evidence as a basis of its decision in this case. The due process clauses of the State and Federal Constitutions forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation. Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 US 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937).

11. In the Ohio Bell case the US Supreme Court found that the Ohio Commission erred in not placing into evidence certain information it relied on and in not affording Ohio Bell an opportunity to explain or rebut the information. The Court observed:

The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record.

The type of due process denial observed in the Ohio Bell case has been identified and rejected in numerous other cases, e.g., United States v. Abilene & Southern Railway Co., 265

US 274 (1924) (. . . a finding without evidence is beyond the power of the Commission Nothing can be treated as evidence which is not introduced as such. . . .); Forbes v. Bushnell Steel Construction Co., 76 So.2d 268 (Fla. 1954) (decree rendered without sufficient evidence in the record cannot be upheld on appeal); Matthews v. Matthews, 133 So.2d 91, 2nd DCA 1961 (rendering judgment based upon private, extrajudicial knowledge without record evidence is not permissible); Thorn v. Florida Real Estate Commission, (all parties to a hearing must be fully apprised of the evidence submitted or to be considered). See also, Constitution of the State of Florida, Article 1, Section 9; 5th and 14th Amendments to the Constitution of the United States.

12. In Florida Gas Company v. Hawkins, 372 So.2d 1118 (Fla. 1979), the Commission reviewed a decision of the Commission dismissing an application for new rates. The Commission relied upon information contained in the utility's surveillance reports which were not made a part of the record. Florida Gas was denied an opportunity to explain the contents of the surveillance reports as they related to the application for new rates.

The Court reversed the Commission and, citing the Ohio Bell decision, stated:

When factual matters affecting the fairness of utility rates are being considered by a regulatory commission the rudiments of fair play and due process require that the Company must be afforded a fair hearing and an opportunity to explain or rebut those matters. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to avoid delay, when the minimal requirement of a fair hearing has been neglected or ignored.

13. The PEF audit was presented by OPC's Mr. Vandiver's cross-examination of Brent Dibner (see Tr. 175). Mr. Beasley objected to the exhibit because it contained redactions and Tampa Electric was not given the opportunity to see the unredacted version of the exhibit saying "we are essentially shooting in the dark" (Tr. 177). Mr. Vandiver responded that the exhibit provided a relevant and timely comparison. The Commission overruled the objection (Tr. 178) and marked it as Exhibit 65 titled "Progress Terminal Rates." The cross-examination

using this exhibit was solely related to the terminal rate which was not redacted on the exhibit. The redacted Exhibit 65 was received in evidence but the unredacted exhibit was not furnished to Tampa Electric or the Commission at the hearing and was not placed in evidence.

14. Notwithstanding this clear denial of due process, the Staff's Second Alternative Recommendation stated at page 35:

Based on the audit of Progress Fuel's Corporation, the contract price for shipping coal from the IMT terminal to Crystal River Station is shown in Exhibit 7. In response to the audit PEF suggested there might be non-contractual costs not fully covered in the contract. However, Staff believes that, for comparative purposes, any implied understatement of the PEF rate is offset by the efficiency of the TECO Transport ocean fleet. Both Witness Dibner and Dr. Hochstein testified that TECO Transport's tug/barge units were significantly more efficient than those of Progress Fuel's (Exh. 65, Exh. 66, Tr. 729). (Emphasis supplied)

The Commission adopted Staff's Second Alternative Recommendation (see Agenda Tr. 75). In its Order No. 0999 at pg. 19, the Commission relied on the confidential portion of Exhibit 65 which was not introduced into evidence and which was not furnished to Tampa Electric at the hearing. Moreover, in adopting Staff's Recommendation quoted above, the Commission relied on a Staff analysis and calculation which was not in the record and relied in part on confidential information which not only was not in the record but was challenged by PEF as incorrect and incomplete.

15. The Commission also erred in the reasoning on page 19 of the order that since TECO Transport barges are more efficient than those used by PEF, the market price to deliver coal to Tampa Electric is less than the market price to deliver coal to PEF. There is no evidence to support that conclusion and this reasoning makes no sense. The undisputed fact that TECO Transport is an efficient carrier is irrelevant to the question of what is the market price. Its only significance is that TECO Transport is capable of providing a favorable price and, therefore,



competing favorably in the market. The efficiency of a carrier is not a reasonable excuse for distorting a market price determination with assumptions regarding relative costs.

**PEF's Price for 2004 Found Reasonable is Far Above the Tampa Electric Price**

16. On July 20, 2004, this Commission issued Order No. 0713 approving a Stipulation and Settlement of PEF waterborne coal transportation costs for 2004. This order approved a 2004 rate for FOB barge transportation of waterborne coal for PEF which Tampa Electric believes is about \$3 to \$4 higher than the market rate the Commission found in Order No. 0999 to be the appropriate market rate for Tampa Electric once Progress Fuels' administrative costs are considered. These administrative costs must be added to make the rates comparable. This information was readily available to the Commission but maintained as confidential in Order 0713 consistent with the Commission's Order PSC-04-0705-CFO-EI issued on July 20, 2004.

17. Tampa Electric is denied equal protection of the law in Order No. 0999 which uses dated PEF information to arrive at a market rate for Tampa Electric while ignoring more recent and relevant PEF information of the price the Commission found to be reasonable for PEF to recover for its waterborne coal transportation costs. The Commission's analysis using the PEF information by necessity found that the prices paid by PEF are relevant. It is error and a denial of equal protection of the law for the Commission not to consider the most recent and relevant information of the prices for waterborne coal transportation the Commission found were reasonable for PEF after the Commission found that a comparison of rates paid by PEF was relevant in determining the market price for Tampa Electric. This principle is consistent with the Commission's finding in Order No. 0999 that once a task is undertaken by the company (e.g., competitive bidding), it had an obligation to ensure that the task was completed in the best

possible way. Failure to consider the most recent readily available information is inconsistent with that principle.

18. Section IV of the Commission's Order No. 0999, at pages 15-20, discusses the reasonableness of costs incurred under the current contract by Tampa Electric in 2004 and beyond using an analysis of rates paid by other utilities in prior years. (Gulf Power 2001 data; PEF 2003 data; spot contract non-affiliate transaction December 2002 data; JEA 2003 data). In so doing the Commission overlooked or failed to consider compelling testimony of witnesses Dibner and Wehle that the JEA transactions were fill in or spot movements entirely distinguishable from the long term commitment of capital, equipment and personnel required under the contract between TECO Transport and Tampa Electric. Moreover, even if those rates could have been properly considered, which they could not, the Commission failed to consider more recent and relevant JEA spot movement pricing, including all of the various overlooked rate components, adjustments and charges described in paragraph 2 above. Once it undertook this analysis, the Commission was under an obligation to use the best information available concerning the market in 2004. It was error not to use the 2004 TECO Transport rate to JEA identified in Ms. Wehle's rebuttal testimony for TECO Transport's service to JEA which is significantly higher than the rates identified for JEA at page 18 of the Order.

#### **Revised Bidding Procedure**

19. Tampa Electric has been and will be dedicated to conducting its bidding process in an open, fair and reasonable manner. The company understands and will comply with the procedures the Commission contends will enhance the fairness of the process. However, the company firmly believes that had these procedures been in place and used with respect to its June 27, 2003 bid, the end result would not have been different. The contract Tampa Electric entered into with TECO Transport was and is below the market price, below the contract rate it

replaced, below the historical rates this Commission has found to be reasonable over the last 15 years and, on information and belief, either approximates or is lower than the rate approved for PEF for cost recovery in 2004.

**Request for Clarification Concerning Rebidding**

20. Tampa Electric seeks clarification of Section V of Order No. 0999, at page 20 which provides that . .

Tampa Electric, at its own discretion, may choose to rebid all or any portion of its existing coal transportation requirements in an attempt to mitigate the impact of the cost recovery disallowance discussed above.

The Commission should clarify that the Commission will accept the results of an open, competitive RFP process regardless of whether the rate determined in that process is above or below the existing contract price; once the reasonableness of the process is established on the front-end, the Commission should accept the results of the process. Statements made during the September 2, 2004 Agenda Conference leaves doubt whether Tampa Electric would only incur downside risks in a rebid and would not, therefore, be able to mitigate the results of Order No. 0999 by establishing market rates via a new bid process which is open and fair.

21. No reasonable person would voluntarily undertake a rebid if the result of that action risks an increase in the regulatory disallowance.

22. Tampa Electric believes that its contract with TECO Transport is at or below the market price and that following the procedures outlined by the Commission could result in a determination of a market price that is (1) above the current contract; and (2) dramatically above the price after the Commission's adjustments in Order No. 0999.

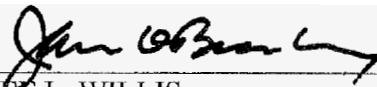
23. The Commission's Order No. 0999 holds that a fair RFP is the best method to determine market price. The Commission should clearly and unequivocally state that it will

accept without reservation the results of a new RFP which follows the guidelines set out in Order No. 0999.

WHEREFORE Tampa Electric requests that the Commission reconsider and/or clarify its Order No. 0999

DATED this 27th day of October 2004.

Respectfully submitted,



LEE L. WILLIS

JAMES D. BEASLEY

Ausley & McMullen

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ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Reconsideration and/or Clarification, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (\*) on this 27th day of October, 2004 to the following:

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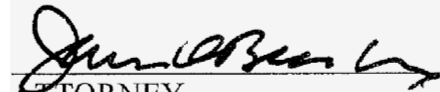
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