ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Review of Tampa Electric Company's 2004-2008 Waterborne Transportation Contract with TECO Transport and Associated Benchmark	)	DOCKET NO. 031033-EI
	)	FILED: November 8, 2004

CSX TRANSPORTATION'S RESPONSE TO TAMPA ELECTRIC COMPANY'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

CSX Transportation ("CSXT") pursuant to Rule 25-22.060, Florida Administrative Code ("F.A.C."), hereby respectfully submits its response to Tampa Electric Company's ("TECO" or "Tampa Electric") Motion for Reconsideration And/Or Clarification ("TECO's Motion") of Commission Order No. 04-0999-FOF-EI, Final Order Terminating Benchmark for Affiliate Coal Transportation Transactions, Finding Request for Proposals Insufficient for Determining Market Price, and Disallowing Recovery of Specified Costs Incurred Under Affiliate Coal Transportation Contract ("Order No. 04-0999"). In summary, while CSXT believes that the evidence supports even greater reductions in TECO's rates, CSXT supports Order No. 04-0999 and urges the Commission to reject TECO's Motion on all counts. Much of TECO's presentation asks the Commission to re-weigh the evidence and is accordingly inappropriate. With regard to TECO's argument that the Commission deprived TECO of due process by considering evidence relating to Progress Energy Florida's ("Progress" or "PEF") waterborne transportation costs, CSXT would simply point out that the value considered by the Commission (as one of three values for somewhat comparable coal transportation movements) was not

CMP
COM 5
CTR
ECR
GCL
OPC
MMS
RCA
SCR
SEC 1
OTH

the value used to determine the maximum allowable rate to be charged by TECO Transport, and TECO's argument is therefore wholly unfounded. **Moreover, the result achieved by the** Commission, in terms of disallowance of cost recovery by TECO, was well within the range -- indeed, on the low end of the range -- of potential results supported by competent, substantial evidence of record and reflected in other parts of the Commission Staff's recommendation in this docket. Accordingly, the Commission should deny TECO's Motion regarding reconsideration of Order No. 04-0999.

TECO's Motion purportedly seeking "clarification" of Order No. 04-0999 appears to be an inappropriate attempt by TECO to induce the Commission to ratify TECO's "offer of settlement" put forth in TECO's Motion to Hold Proceedings In Abeyance and Offer of Settlement,[1] which was clearly and properly denied by the Commission. The PSC was in fact entirely clear in its pronouncements regarding TECO's ability to conduct a new RFP, and therefore no clarification is needed. Moreover, it is inappropriate for TECO to ask the Commission to agree, in advance, to accept the results of an undefined process, the implementation of which obviously cannot possibly be known or evaluated until such implementation were to be complete. Accordingly, the PSC cannot legally do what TECO asks because it

[1] PSC Document No. 09504-04, filed in the instant docket on August 31, 2004.

would deprive the parties of their rights to a point of entry for an action affecting their substantial interests under Florida's Administrative Procedure Act. Accordingly, the Commission should reject TECO's Motion with regard to clarification as well.

Discussion - TECO's Motion for Reconsideration

It is well-settled that it is not appropriate to use a motion for reconsideration as a vehicle for re-arguing matters that have already been considered.[2] With regard to reconsideration, TECO's Motion consists for the most part of inappropriate requests that the Commission re-weigh the evidence, and accordingly, TECO's Motion should be denied. TECO's Motion also purports to claim that TECO has been deprived of due process by the Commission's "relying on" certain information relating to Progress Energy Florida's waterborne coal transportation costs. This latter point fails, appallingly, for the simple reason that

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[2] The Commission recently articulated its standards of review for motions for reconsideration in In Re: BellSouth Telecommunications, Inc., Docket Nos. 981834-TP and 990321-TP, Order No. PSC-04-0228-FOF-TP, 2004 WL 438553 (Fla. Pub. Serv. Comm'n, March 2, 2004), as follows:

> The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which this Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958).

the Commission did not use the Progress cost value in determining the reductions to be imposed on TECO's cost recovery in this docket. Accordingly, and as discussed more fully below, TECO's Motion for Reconsideration should be denied.

In its Motion for Reconsideration, TECO asserts the following:

1. that the Commission should reconsider because the costs authorized for recovery by Order No. 04-0999 are lower than historical costs (payments to TECO's affiliate, TECO Transport) that the Commission allowed TECO to recover from its captive customers (Paragraphs 1, 3, and 4);
2. that the Commission authorized cost recovery for TECO that TECO suspects is less than that authorized for Progress Energy Florida (Paragraphs 1 and 5);
3. that TECO was denied due process by the Commission's "relying" on information relating to Progress's waterborne transportation costs that were not available to TECO (Paragraphs 6 to 18);
4. that the Commission erred by failing to distinguish the character of the JEA spot coal transportation movements that the Commission considered from the longer-term coal transportation movements under TECO's contract with TECO Transport (Paragraph 2); and
5. that the Commission overlooked evidence that market prices for coal transportation services have increased (Paragraphs

3 and 4).

Each of these assertions is addressed below.

Historical Coal Transportation Costs

The following discussion addresses TECO's assertions identified in Items Nos. 1 and 5 above. Most of TECO's assertions are inappropriate, and largely irrelevant, requests by TECO that the Commission re-weigh the evidence that it considered in reaching its decisions. For example, TECO's assertion that the Commission should reconsider because the rates authorized are lower than historical rates is misplaced because it ignores the fact that the Commission had before it both historical transportation cost information for TECO (data in Exhibit 101, summarized at page 22 of CSXT's post-hearing statement, and probably elsewhere) and also information regarding the potential costs of coal transportation services for TECO in 2002 and 2003, when TECO was making its decisions that the Commission has found deficient and imprudent in this case. **The Commission weighed all** of this information and determined that TECO's decisions were defective and imprudent.

TECO's assertion is also utterly irrelevant to the case at bar. What is relevant, and what the Commission properly considered, is what cost options TECO had available to it when it made its decisions in 2003 (and 2002) relating to coal transportation services for the period 2004 through 2008. These included other rates observed in the market and the actual, bona

fide offers made to TECO by CSXT in 2002 and 2003.

Moreover, TECO's assertion is at best only partially true, because TECO's waterborne coal transportation costs (and its rail coal transportation costs) in fact declined over a large portion of the relevant time period. A table, prepared using non-confidential historical TECO coal transportation cost data and included in CSXT's non-confidential post-hearing statement (at page 22), shows that TECO's waterborne coal transportation costs to its Gannon Station declined significantly over the 1994-1995 to 2001 period, e.g., from $25.59 per ton in 1995 to $19.99 per ton in 2001. The same table shows that CSXT's charges for transportation service to Gannon also declined over the same period. Further, the record demonstrates that the transportation rates offered to TECO by CSXT in 2002 and 2003 were even less than the rates charged for delivery to Gannon in 2000 and 2001. (This is readily shown by comparing the CSXT values in the above-referenced table to CSXT's offered rates in Exhibits 22 and 28.) Thus, there is ample support in the record for the conclusion that both waterborne and all coal transportation costs have declined over the relevant period, through and including 2002 and 2003, when TECO was making its decisions for 2004-2008. **The** Commission had before it and considered this evidence, which demonstrates that coal transportation costs available to TECO in 2002 and 2003 were lower than previously; thus, TECO's effort to induce the Commission to re-weigh the evidence must fail.

TECO also asserts in its Motion that coal transportation costs have increased and that the Commission should reconsider its Order in light of this allegation (which, as discussed above, is contradicted by the record at least as to what TECO knew in 2002 and 2003 when it was making the decisions relevant here). Once again, this is irrelevant to the Commission's decisions. What is relevant is what information TECO had available when it made its decisions in 2003 and 2002, and as to this, the Commission was well-informed.

TECO's argument that the Commission should use "more recent" and the "most recent" data (TECO's Motion at 8) information is also misplaced. **TECO is attempting, improperly, to translate its** notion of a "best practices" principle into an inappropriate "most recent data" principle, which is wrong for this reason: TECO must be held to task for the decisions it made based on what it knew, and what was available to TECO, when it made those decisions. See, e.g., In Re: Fuel and Purchased Power Cost Recovery Clause and generating Performance Factor, Docket No. 880001-EI, Order No. 19042, 1988 WL 391427 at 7 (Fla. Pub. Serv. Comm'n, March 25, 1988) ("While the clear vision of hindsight suggests that it is possible that FPC could have acted more expeditiously in concluding the contract and that some benefit might have derived from it, we are unable to find that the delays were so unreasonable . . . that the utility's actions rise to the level of imprudence.") This is no more than the proper

application of the standard principle of regulatory prudency reviews, namely that utilities' decisions are to be evaluated according to what they knew (or reasonably should have known) and according to what options they had available to them when those decisions were made. As Commissioner Davidson stated at the September 21 Agenda Conference,

> [A] future RFP would be acceptable in general, but it wouldn't be acceptable to me if the number comes in even higher than where we should have been had we done this process correctly. . . . So go through a perfect open process, if market conditions have changed, **the ratepayers shouldn't have to pay the price of the mistake of not doing it right in the first instance**.

Agenda Conference Transcript, PSC Document No. 10456-04 at 34 (emphasis supplied).

Progress Coal Transportation Rates

The rates approved for Progress as a result of a 2004 settlement are likewise irrelevant here. The rates set for Progress's cost recovery purposes are expressly the result of settlement negotiations, and accordingly were determined pursuant to such negotiations and pursuant to the give-and-take that occurred therein.[3] Further, those rates are temporary, pending the full implementation of the settlement between Progress and the parties to its docket. The Commission's order approving the stipulation in the Progress Spin-Off Docket specifically

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[3] See In Re: Review of Progress Energy Florida, Inc.'s Benchmark for Waterborne Transportation Transactions With Progress Fuels, (the "Progress Spin-Off Docket"), PSC Docket No. 031057-EI, Order No. PSC-04-0713-AS-EI (July 20, 2004).

incorporated the stipulation and clearly states that:

> This Stipulation and Settlement is based on the unique factual circumstances of this case and shall have no precedential value in proceedings involving other utilities or in other proceedings involving PEF before this Commission.

Order No. 04-0713 at 9. Moreover, the record in this case contains explanations of how Progress's waterborne coal movements are different from TECO's movements. See, e.g., TR 188. Thus, the values approved for Progress's cost recovery are perhaps informative, but by no means determinative, of what the appropriate rates for TECO's cost recovery purposes are.

Even more significantly, TECO's efforts to focus on Progress's situation highlights a gross inconsistency in TECO's own position: the fact that Progress transports approximately two-thirds of its coal by rail. If TECO wishes to be compared to Progress, then it is more than appropriate for the Commission to consider (and perhaps to reconsider, on its own motion) its decision in light of the fact that Progress transports the substantial majority -- approximately two-thirds -- of its coal via rail, to the cost-effective benefit of Progress's customers. The Staff's Recommendation indicates that transporting 1 to 2 million tons of coal per year by rail would save TECO's captive customers an additional $4 million to $5 million per year above the reductions voted by the Commission on September 21; it is obvious that transporting even more coal by rail, say the same percentage as Progress, would save TECO's customers even more.

In light of this evidence, which the Commission had and considered, it is clear that the Commission's decision to impose reductions of only $15.3 million per year (approximate, based on projected tonnages) on TECO was well within the range, indeed on the low end of the range, supported by competent, substantial evidence of record, and accordingly, TECO's Motion must be denied.

Due Process Claim

TECO's purported due process claim is baseless. It appears to be true that the Commission considered the costs incurred by Progress, apparently as a contextual reference point along with the costs incurred by other Florida utilities for waterborne coal transport in the overall trans-Gulf coal transportation markets between 2001 and 2003 (i.e., when TECO was making its decisions for 2004 through 2008). **However, it is facially clear -- from** the language of Order No. 04-0999 describing how the adjustments are to be made and from Appendix 7 to the Staff's Recommendation -- that the Commission did not use the Progress cost value to determine TECO's rates. Moreover, this was known to TECO on August 26, when TECO received the confidential appendices to the Staff's Recommendation, because Confidential Appendix 7 to that Recommendation states the estimated cost value **(based on** Progress's costs) that the Staff considered, and it is clear that that number was not the value used to determine TECO's allowable costs for cost recovery purposes.

Accordingly, TECO's assertion that it was deprived of due process is utterly baseless and is nothing more than a desperate attempt to sow confusion. For the sake of "cleanliness" of the record, the Commission could, on its own motion, simply amend Order No. 04-0999 to delete the references to the Progress number and to Progress's trans-Gulf barge costs, because that number was not used in setting TECO's rates and is therefore not needed by the Commission to support its Order No. 04-0999.

JEA Transportation Costs

TECO's assertion that the Commission failed to distinguish the JEA spot coal transportation movements is simply another attempt to get the Commission to re-weigh the evidence. TECO's witness Joann Wehle testified on this subject, and the Commission considered her testimony. From the Commission's Order, it appears that the Commission simply did not agree with her analysis, and TECO is now trying to reargue an issue the Commission has decided. Moreover, the notion proffered in TECO's Motion is contradicted by TECO's own witness Wehle, who testified that CSXT's 2000 and 2001 coal transportation rates to TECO's Gannon Station were less than previous rates because, in her experience, it was "the difference between a spot contract and a long-term contract." TR 534. Ms. Wehle also agreed that "possibly" "a transporter, either a barge company or a railroad company, will generally give a lower rate for long-term" transportation services than for spot transportation. TR 534-35.

Accordingly, the Commission should reject and deny TECO's Motion with regard to this assertion as well.

The Big Picture - The Reductions Imposed By The Commission Were Well Within The Range Supported By The Evidence.

The cost recovery reductions advocated in the Staff's Recommendations that included numeric values ranged from $13.8 million per year to $20.3 million per year. Although based on different analyses and comparisons, all of these values were, and are, supported by competent, substantial evidence of record. In Order No. 04-0999, the Commission imposed reductions on TECO's allowable cost recovery of $15.3 million per year. In CSXT's view of the world, and in the view of the other intervenors, the reductions should have been greater; TECO wishes that they were less. However, both the $13.8 million per year value and the $20.3 million per year value were supported by competent, substantial evidence of record, and the Commission, well within its discretion, determined to impose reductions on the lower end of this range. See, e.g., Gulf Power Co. v. Florida Pub. Service Comm'n, 453 So. 2d 799, 804-5 (Fla. 1984) (affirming the Commission's decision to set Gulf Power's coal inventory at a midpoint between Gulf's proposed but unsupported value and the Staff's proposed value).

Considering all of the competent, substantial evidence of record, the PSC could, on its own motion, clarify that the reductions that it voted to impose produce fair, just, and reasonable rates when considered in light of all of the

competent, substantial evidence available, including backhaul revenues, CSXT's offers, and all other factors that the Commission considered. Indeed, the Commission could, on its own motion, reconsider and impose even greater reductions than the $15.3 million per year determined in Order No. 04-0999. The Commission could, on its own motion, consider the analyses presented in Staff's First Alternate Recommendation and also in Staff's Third Alternate Recommendation, because these are in fact supported by competent, substantial evidence and would produce reductions that would bracket the approximately $15.3 million per year reductions imposed by Order No. 04-0999.[4] Such a comparison and consideration would demonstrate that the $15.3 million per year reductions were on the low end of the range supported by competent, substantial evidence of record.

Discussion - TECO's Motion for Clarification

At paragraphs 19-23 of its Motion, TECO purports to ask the Commission to "clarify" its intent with regard to a potential

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[4] In its deliberations at the September 21 Agenda Conference and also in Order No. 04-0999, the Commission made it abundantly clear that the most desirable measure of the market price for coal transportation would, in fact, be the market price as revealed by a valid, fair, open, truly competitive RFP process. Of course, CSXT agrees with this principle and proposition. In this light, CSXT respectfully suggests that the Commission (and, of course, TECO) had before it competent, substantial evidence of a valid, viable market price for all of TECO's coal transportation requirements -- namely, CSXT's offers made to TECO in October 2002 and July 2003. The Commission could accordingly, on its own motion, reconsider its decision and base its final decision regarding TECO's allowable cost recovery on the Commission Staff's Third Alternate Recommendation.

rebid. TECO asks the Commission to approve a hypothesized RFP-rebid process in advance of its implementation and asks the Commission to bind itself to "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." TECO's Motion at 10. No clarification is needed: the Commission's decision was abundantly clear, both from the Order and from the agenda conference discussion as well, that it would be up to TECO whether to conduct a new RFP, if TECO deemed it appropriate in an effort to mitigate the impacts of the Commission's decisions in this case. TECO is inappropriately attempting to get the Commission to tie the Commission's own hands with regard to such a rebid. TECO's request also appears to be a ploy to escape responsibility for the consequences of its actions and decisions based on what it knew when it made them. Additionally, TECO's request is legally improper because it attempts to deprive substantially affected persons and parties, including all of the intervenors in this docket, of their rights to a point of entry and a hearing under Florida administrative law.

Order No. 04-0999 is clear as to the Commission's intent with respect to any rebid: it's up to TECO's discretion, and it's up to TECO to petition for appropriate regulatory treatment of any changes that TECO wants made to its cost recovery as a result of any such rebid. At page 20 of the Order, the Commission

stated the following:

> We note that Tampa Electric, at its own discretion, may choose to rebid all or any portion of its existing coal transportation requirements to attempt to mitigate the impact of the cost recovery disallowance discussed above. Should Tampa Electric decide to rebid, the company may petition this Commission for an alternate regulatory treatment of its coal transportation costs based on the results of the rebid.
>
> As noted above, we believe that the best tool for determining a market rate for coal transportation services is an open, competitive RFP process. Thus, whether Tampa Electric chooses to rebid all or any portion of its existing coal transportation requirement prior to, or in connection with, the termination of its current contract with TECO Transport, we believe that Tampa Electric must conduct any such rebid through an open, competitive RFP process.

(Emphasis supplied.)

TECO's "invitation" to the Commission to bind the Commission's own hands is inappropriate and even verges on being silly: the Commission probably has never approved, and probably will never approve, such a pig-in-a-poke: an unknown, undefined, as-yet-unimplemented process, let alone the outcomes of such a process, in advance. This is illogical, contrary to the public interest, and contrary to the Commission's overriding obligations to protect the public interest and to base its decisions affecting substantial interests on the basis of record evidence. In this regard, TECO's requested relief would violate basic tenets of Florida administrative law by depriving substantially affected persons and parties, including all of the intervenors in this docket, of their rights to a point of entry in the

Commission's proceedings and to have the Commission determine TECO's rates pursuant to a hearing, based on evidence of record.

CSXT respectfully suggests to the Commission that what is really going on here is that TECO is attempting, in light of changed market circumstances, to escape the consequences of its imprudent actions and decisions made in 2002 and 2003. TECO appears to be attempting to escape the consequences of its earlier decisions by trying to bind the Commission to a rebid that may show that its payments to TECO Transport (i.e., the payments pursuant to the contract that the Commission has determined to be imprudent) appear reasonable when evaluated against current market conditions, thereby drawing attention away from the fact that TECO could have realized even greater savings by making prudent decisions earlier, when it had the chance. TECO's proposal is analogous to an entity trying to justify higher payments for crude oil today, when prices are pushing $60 per barrel, when the entity paid $35 per barrel last year but could have bought the same volumes of oil for $28 per barrel when it made its purchase decision.

Discussion at the September 21 Agenda Conference also made it clear that the Commission intended that TECO would not be allowed to escape the consequences of its actions based on what TECO knew when it made the decisions in question. As Commissioner Davidson stated,

> [A] future RFP would be acceptable in general, but it wouldn't be acceptable to me if the number comes in

> even higher than where we should have been had we done this process correctly. . . . So go through a perfect open process, if market conditions have changed, **the ratepayers shouldn't have to pay the price of the mistake of not doing it right in the first instance**.

Agenda Conference Transcript, PSC Document No. 10456-04 at 34 (emphasis supplied).

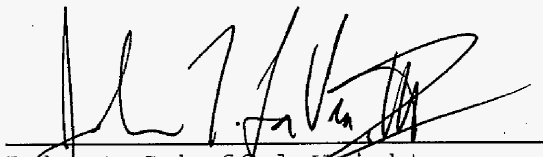
For all of the foregoing reasons, TECO's Motion with regard to clarification must also be denied.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Commission should deny TECO's Motion for Reconsideration And/Or Clarification in all respects.

Respectfully submitted this 8th day of November, 2004.

LANDERS & PARSONS



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