

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company's) **Docket No. 031033-EI**
waterborne transportation contract with)
TECO Transport and associated benchmark)
_____) **Filed November 8, 2004**

**RESIDENTIAL ELECTRIC CUSTOMERS'
RESPONSE IN OPPOSITION TO TAMPA ELECTRIC COMPANY'S
MOTION FOR RECONSIDERATION AND/OR CLARIFICATION**

Catherine L. Claypool, Helen Fisher, William Page, Edward A. Wilson, Sue E. Strohm, Mary Jane Williamson, Betty J. Wise, Carlos Lissabet, and Lesly A. Diaz (the "Residential Electric Customers" or "RECs"), by and through their undersigned attorney, hereby file their Response in Opposition to Tampa Electric Company's Motion for Reconsideration and/or Clarification ("TECO's Motion"). In support of their response, the Residential Electric Customers say:

1. TECO's motion consists of two major assertions: (1) the Commission made mistakes of law and/or fact warranting some non-specific change to Order No. PSC-04-0999-FOF-EI ("Final Order") which presumably would increase the allowable coal transportation charges approved in the Final Order; and (2) that the Commission should "clarify" the Final Order to state that will "accept without reservation the results of a new RFP which follows the guidelines set out in the [Final Order]" no matter how much higher the RFP results might be in comparison to the rates approved in the Final Order. Both assertions are baseless and TECO's motion should be denied in all respects.

DOCUMENT NUMBER-DATE
12022 NOV-8 3
FPSC-COMMISSION CLERK

Standard for Reconsideration

2. It is well established that there is a specific, high bar standard for parties seeking relief by a motion for reconsideration. Specifically, to prevail on a motion for reconsideration, the moving party must identify a point of fact or law which was overlooked or which the 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); *Pingree v. Quaintance*, 394 So.2d 162 (Fla. 1st DCA 1981). 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). TECO has not met the standard here.

3. TECO appears to argue that the Commission should reverse itself because the approved coal transportation rates are (1) lower than those allowed under the flawed, now abandoned benchmark; (2) less than currently allowed to Progress Energy Florida (“Progress”); (3) flawed because allegedly based on confidential Progress costs not available to TECO; (4) based on a misunderstanding of whether certain rates to JEA by TECO Transport were spot or long-term; and (5) stale in the sense that the Commission ignored evidence that transportation rates were now higher than when they started the RFP.

4. The uncontradicted evidence in case is that the transportation benchmark was not only fatally flawed, but had been for very many years. For TECO to argue now that the transportation rate approved by the Commission based on the record evidence is unfair because it is too low compared to historic rates allowed under the benchmark is more than a little ridiculous. TECO, and all concerned, should recognize that the necessary conclusion from this

case ought to be that TECO had been allowed to recover excess and unreasonable amounts from its customers for many years by the continued reliance on a benchmark that was no longer rationally based, assuming that it ever was. The Residential Electric Customers would submit to the Commission that TECO's argument here fails to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. The Commission should give this argument short shrift and reject it.

5. The record evidence in this case more than adequately demonstrates that TECO's cross-Gulf barges and tugs are both larger and faster than the vessels used by Progress and that TECO, therefore, should be able to carry coal at a lower rate. More importantly, however, is the fact that the burden was on TECO to prove that the coal transportation costs it was seeking to recover from its customers were necessary, reasonable and prudent. It had an opportunity to make such a showing through the issuance of a fair, open and reasonable RFP process, but, as found by the Commission here, failed to do so. Merely because Progress is being allowed a higher, presumably short-term trans-Gulf rate, pursuant to a settlement agreement, while it attempts to obtain bids for that service on a going forward basis, is no rational reason for suggesting TECO should get the same rate for the five years of its contract. Again, TECO's argument here fails to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order.

6. The Final Order states the following with respect to how the adjustment to TECO's ocean barge rate adjustment was arrived at:

. . . based on rates paid by other utilities for ocean barge service, we find that the rates for ocean barge service under Tampa Electric's current contract with TECO Transport overstate a fair market rate by \$2.41 per ton for shipments from the Davant terminal to Big Bend Station and by \$4.08 per ton for shipments from Port Arthur, Texas, to Big Bend Station.

Final Order at page 20. When one reviews the Confidential Appendix 7 to the staff

recommendation it is abundantly clear that the staff did not recommend, nor did the Commission base its adjustment on, the current cost being allowed Progress, again per a settlement agreement of limited duration. The adjustment made here is different than the approved rate for Progress. While the Progress rate was discussed, it is clearly just one of many others discussed and, again, is not the specific rate the Commission's adjustment is based upon. More importantly, the competent, substantial evidence of record in this case would easily support a substantially greater adjustment than the Commission made for TECO's ocean barge rate. For example, in addition to the rates obtained by JEA, Gulf Power and Progress, the Commission had available to it the pricing model utilized by the Residential Electric Customers' witness Dr. Hochstein (Exhibit 56). Dr. Hochstein's model, which used substantially the same public model used by TECO witness Dibner, included backhaul revenues and other cost adjustments based upon his substantial experience in the industry and resulted in a "total fronthaul" required freight rate from Davant to Tampa that was substantially lower than the rest of the rates offered and which, necessarily, would have resulted in a substantially larger disallowance. The bottom line is that the Commission's adjustment was not based upon the Progress confidential number and the record evidence supports substantially larger adjustments than were approved, therefore TECO cannot have been prejudiced by the Progress number being accepted in the record or being discussed as arguing for TECO's adjustment. Once again, TECO's argument here fails to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order.

7. The Residential Electric Customers are of the understanding that the seemingly preferential rate TECO Transport gave JEA was, like the Progress number discussed above, not

the specific number which the Commission's ultimate adjustment was based upon. Moreover, it is the Residential Electric Customers' view that the record supports the conclusion that the rate to JEA was not a "spot" rate, but longer term, which, if true, would mean that the unfavorable comparison of the rate TECO Transport charged JEA versus its affiliate TECO was "apples to apples" and all the more sound. If, as TECO alleges, the JEA rate was a spot rate, then the disparity, and resulting adjustment, should be considered even larger since the record, and common sense, makes clear that spot prices for coal transportation are invariably higher than for long-term contracts. TECO fails to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order.

8. TECO's suggestion that the Commission should have considered alleged changes in waterborne transportation rates that show those rates increasing, as opposed to what the rates might have been when it was conducting its flawed and failed RFP, is nothing short of absurd. TECO had an obligation, and the Commission so found, to conduct a fair, reasonable and open RFP with the goal of finding "market prices" for the necessary transportation services. What prices it could have obtained then, as opposed to now and in future times, are the relevant prices or costs. Again, there is no error to justify reconsideration.

9. Lastly TECO argues that the Commission should clarify its Final Order to say that the Commission will accept as reasonable any transportation rates, no matter how high, that result from a renewed and fair, per the Final Order, RFP. This request is absurd and flies in the face of the statements by one or more Commissioners during the agenda conference that the customers would not be caused to pay more now or later for TECO's failure to get the RFP right the first time. Once again, there is no error for the Commission's reconsideration and the

requested clarification is both inconsistent with the Final Order and nonsensical.

WHEREFORE, for the reasons stated above, the Residential Electric Customers would respectfully request that the Commission deny TECO's Motion for Reconsideration and/or Clarification.

Respectfully submitted,

/s/ Michael B. Twomey _____

Michael B. Twomey
Attorney for Petitioner Residential
Customers of Tampa Electric Company
Post Office Box 5256
Tallahassee, Florida 32314-5256
Telephone: 850-421-9530

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of this petition has been served by U.S. Mail or email this 8th day of November, 2004 on the following:

Wm. Cochran Keating, Esq.
Senior Attorney
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Harold McLean, Esq.
Public Counsel
Office of Public Counsel
111 West Madison Street, Rm.812
Tallahassee, Florida 32399-1400

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman
McWhirter, Reeves
117 South Gadsden Street
Tallahassee, Florida 32301

Lee L. Willis, Esq.
James D. Beasley, Esq.
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302

Robert Scheffel Wright, Esq.
Landers and Parsons
Post Office Box 271
Tallahassee, Florida 32302

/s/ Michael B. Twomey
Attorney