

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: February 17, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Economic Regulation (Bohrmann, Floyd, Trapp, Windham)
Office of the General Counsel (C. Keating, Rodan)

RE: Docket No. 031033-EI – Review of Tampa Electric Company's 2004-2008 waterborne transportation contract with TECO Transport and associated benchmark.

AGENDA: 03/01/05 – Regular Agenda – Decision on Motions for Reconsideration/Clarification of Final Order – Oral Argument Requested

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Recommendation should be addressed by Commissioners Baez, Deason, Bradley, and Davidson

FILE NAME AND LOCATION: S:\PSC\GCL\GCO\WP\2003\031033\031033.RCM.DOC

Case Background

This docket was opened in late 2003 to address three issues: (1) whether to modify or eliminate the benchmark mechanism previously established to determine the reasonableness of amounts paid by Tampa Electric Company (“Tampa Electric”) to its affiliate, TECO Transport, for waterborne coal transportation service; (2) whether a request for proposals (“RFP”) initiated by Tampa Electric on June 27, 2003, was sufficient to determine the market price for coal transportation service; and (3) whether Tampa Electric’s projected coal transportation costs under the winning bid to the RFP were reasonable for cost recovery purposes. Along with Tampa Electric, the Office of Public Counsel (“OPC”), Florida Industrial Power Users Group (“FIPUG”), CSX Transportation (“CSX”), and a group of nine Tampa Electric residential customers (“Residential Customers”) participated as parties to the proceeding, with each submitting prefiled testimony and exhibits for the Commission’s consideration. The

Commission heard extensive evidence on these issues during a formal administrative hearing that spanned three full days.

Upon consideration of the evidence presented and the parties' post-hearing briefs, the Commission disposed of these issues by vote at its September 21, 2004, Agenda Conference. On October 12, 2004, the Commission memorialized its vote in Order No. PSC-04-0999-FOF-EI ("Final Order").¹ By its Final Order on these issues, the Commission: (1) eliminated the benchmark for Tampa Electric's affiliate coal transportation transactions; (2) found that Tampa Electric's June 27, 2003, RFP was insufficient for determining market price for the coal transportation services sought; and (3) limited Tampa Electric's recovery of costs incurred under the contract it signed with TECO Transport as a result of the RFP process. The Commission also specified certain minimum criteria for future competitive bidding processes for coal transportation service, required the filing of the schedule under which any future competitive bidding processes for such services would be conducted, and required the filing of an alternative regulatory mechanism to be adopted if a future bidding process did not produce competitive bids. Finally, the Commission required Tampa Electric to perform a study to determine the feasibility of procuring coal from rail-origin mines.

On October 27, 2004, Tampa Electric filed a motion for reconsideration and/or clarification of the Final Order and a request for official recognition and motion to reopen the record. At the same time, Tampa Electric filed a request for oral argument on its motions. On November 4, 2004, OPC filed a response in opposition to Tampa Electric's post-hearing motions. On November 8, 2004, FIPUG, CSX, and the Residential Customers each filed responses in opposition to Tampa Electric's motions.

On October 27, 2004, CSX filed a motion for clarification or, in the alternative, reconsideration of the Final Order. No party filed a response to CSX's motion.

This recommendation addresses Tampa Electric's post-hearing motions and CSX's motion for clarification/reconsideration. The Commission has jurisdiction over this matter pursuant to Chapter 366, Florida Statutes, including Sections 366.04, 366.05, and 366.06, Florida Statutes.

¹ Order No. PSC-04-0999-FOF-EI is attached to this recommendation for reference as Attachment A.

Discussion of Issues

Issue 1: Should the Commission grant Tampa Electric Company's request for oral argument?

Recommendation: Yes. Oral argument may aid the Commission in its understanding and disposition of the underlying motion. (C. Keating, Rodan)

Staff Analysis: In its request for oral argument, Tampa Electric asserts that oral argument on the matters raised in its motion for reconsideration and/or clarification and request for official recognition and motion to reopen record will assist the Commission in its deliberations by providing a more complete presentation of the relevant facts. Tampa Electric further states that oral argument would provide the Commission the opportunity to request clarification of the arguments presented, as necessary.

In its response to Tampa Electric's request for oral argument, FIPUG states that Tampa Electric has raised no points that merit additional argument in this docket. FIPUG contends that the Commission thoroughly discussed the matters at issue before making a final decision. In its response to Tampa Electric's request, CSX states that the request for oral argument is deficient in that it does not explain with particularity why oral argument would aid the Commission in comprehending and evaluating the issues. CSX contends that Tampa Electric's request appears to be an invitation to engage the Commission in rearguing and re-weighting factual matters.

Rule 25-22.060, Florida Administrative Code, provides that the Commission, at its discretion, may grant a request for oral argument on a motion for reconsideration of a final order. The Commission has traditionally granted oral argument upon a finding that oral argument would aid the Commission in its understanding and disposition of the underlying motion. Given the complexity of the matters at issue and given that approximately five months have passed since the Commission's original vote on these matters, staff believes that oral argument on Tampa Electric's motions may assist the Commission in its understanding and disposition of the motions. Thus, staff recommends that the Commission grant Tampa Electric's request for oral argument on its motions.

Issue 2: Should the Commission grant Tampa Electric Company's motion for reconsideration and/or clarification of Order No. PSC-04-0999-FOF-EI?

Recommendation: No. In its request for reconsideration, Tampa Electric does not identify a point of fact or law that the Commission overlooked or failed to consider in rendering its Final Order. Further, Tampa Electric's request for reconsideration improperly asks the Commission to reweigh the evidence considered by the Commission in rendering its Final Order. Tampa Electric's request for clarification should be denied because it asks the Commission to make findings inconsistent with the Commission's decision and clear intent. (C. Keating, Rodan)

Staff Analysis:

Request for Reconsideration

Tampa Electric asks the Commission to reconsider only that portion of its Final Order finding that the rates in Tampa Electric's current contract with TECO Transport are unreasonable for cost recovery purposes and limiting Tampa Electric's cost recovery to a rate determined by reference to rates paid by other utilities for comparable services.

The standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering the 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). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. vs. Bevis.

Tampa Electric's request for reconsideration fails this standard of review. Tampa Electric does not identify a point of fact or law that the Commission overlooked or failed to consider, but instead makes unsupported assertions that it was denied due process and equal protection of the law and asks the Commission to improperly engage in reweighing the extensive evidentiary record it considered in rendering its Final Order.

No Mistake of Law

Tampa Electric first argues that it was denied "both procedural and substantive due process and equal protection of the law" because the market price determined by the Commission is: (1) below any of the rates that the Commission found reasonable for Tampa Electric over the last 15 years; and (2) suspected by Tampa Electric to be below the market price that the Commission found reasonable for PEF.

As to the first point, the Commission's obligation is to set reasonable rates on a going-forward basis. In doing so, the Commission determines the reasonableness, or prudence, of costs that a utility wishes to recover in its rates. That determination is by no means limited to or bound

by the Commission's past determinations of what may have been reasonable, particularly where costs for a particular item change with a changing market, as the record in this proceeding demonstrated to be the case. For the last 15 years identified by Tampa Electric, the Commission used a benchmark mechanism established in 1988 to help gauge the reasonableness of the amounts paid by Tampa Electric to its affiliate for coal transportation services. In this proceeding, the Commission eliminated that benchmark, having explicitly found that it was obsolete. The Commission also found that Tampa Electric's RFP process was insufficient to establish a market rate for coal transportation services. Tampa Electric does not seek reconsideration of either of those portions of the Final Order. The Commission was then left with determining a fair market rate for purposes of cost recovery. In reaching its decision, the Commission heard extensive testimony on the subject from all parties and was presented with five alternative recommendations from staff concerning how best to determine a market rate. The Commission certainly did not deny Tampa Electric due process or equal protection under the law simply because it determined a market rate below the rate previously approved for cost recovery.

As to the second point, Tampa Electric glosses over the obvious distinction that the coal transportation rates approved for PEF in 2004 were the result of a confidential stipulation² between PEF, OPC, and FIPUG in a separate docket and that the stipulation was not part of the record in this proceeding. In Docket No. 031057-EI, which proceeded in approximately the same time period as this docket, the Commission was presented with a stipulation of the parties addressing the two issues in that case: (1) how to establish the appropriate recovery by PEF for each waterborne coal transportation service provided to it by its affiliate, Progress Fuels Corporation, for 2004; and (2) how to establish the appropriate recovery by PEF for each waterborne coal transportation service provided to it by Progress Fuels Corporation for 2005 and beyond. The stipulation establishes recoverable rates for 2004 and establishes a competitive bidding process to be followed by PEF for services rendered in 2005 and beyond. Notably, the stipulation, which was approved in its entirety, provides that it "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." A stipulation, by its nature, typically represents a compromise among the parties to a proceeding based on the specific facts and circumstances of the proceeding, including the information at each party's disposal and each party's evaluation of the risks of going to hearing. It would very likely chill the incentive of parties to enter into stipulations if the terms of those agreements – particularly confidential terms - are given precedential value in other cases in spite of explicit language in the stipulation to the contrary.³

² By Order No. PSC-04-0705-CFO-EI, issued July 20, 2004, the Commission granted confidential classification for the rates specified in the stipulation, finding that the rates constituted "information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms" which is entitled to confidential classification pursuant to Section 366.093, Florida Statutes. That order has not been challenged.

³ As FIPUG points out, Tampa Electric has itself recognized that the facts and issues related to the PEF and Tampa Electric coal transportation dockets are different. At the time that these issues were spun out of the 2003 fuel cost recovery docket, Tampa Electric argued against consolidating the PEF and Tampa Electric issues into one docket:

While the issues are waterborne coal transportation, **the parties, their circumstances are completely different and the issues are different**, and we think it would be – on top of that, it

Further, the stipulation is not part of the record established in this proceeding. By a separate motion addressed in Issue 3, Tampa Electric asks the Commission to reopen the record of this proceeding to consider the stipulation. For purposes of its request for reconsideration, Tampa Electric must demonstrate that the Commission made a mistake of fact or law by overlooking or failing to consider the stipulation. The Commission could not have made such a mistake because the stipulation was not part of the record before the Commission and, for many of the reasons discussed above and in Issue 3, should not be. In fact, it would have been a mistake of law for the Commission to consider such a matter outside of the record. The Commission certainly did not deny Tampa Electric due process or equal protection of the law by determining a market rate that *may* have been lower than the confidential rates provided in a stipulation involving another utility that was not a part of the record before the Commission.

Tampa Electric next argues that it was denied due process because the Commission, in determining a market rate for ocean barge service, relied upon rates paid by PEF that Tampa Electric believes were taken from the confidential portion of a PEF audit response which was withheld from Tampa Electric and was not part of the record. The basis for Tampa Electric's argument is entirely incorrect. In determining the market rate for ocean barge service, the Commission relied on data in the record concerning rates paid by JEA, PEF, and Gulf Power Company for comparable services. The data from which the PEF rates were determined was made part of the record as Hearing Exhibit 65. Exhibit 65 contains a redacted version of PEF's response to two disclosures made in staff's Waterborne Transportation Audit Report for PEF. As part of its response to the first disclosure, PEF provided a table showing Progress Fuels' weighted average contractual cost per ton for coal shipped by water from the mine to Crystal River. The "\$/Ton" column of the table was redacted, thus Tampa Electric assumes that the Commission relied upon the confidential version of this document to obtain the rate information. The Commission did not. The Commission calculated a rate based on the information presented in the redacted version of the document that was provided to every party at the hearing, including Tampa Electric. This calculation was explained in detail in Appendix 7 to staff's post-hearing recommendation in this docket, which also was provided to every party. Thus, Tampa Electric should have been aware that the calculation was based on non-confidential information that Tampa Electric was provided at hearing. As OPC points out, Tampa Electric's failure to fully comprehend the evidence in the record does not constitute a failure on the Commission's part.

No Mistake of Fact

Having argued throughout this proceeding that no adjustment was necessary based on the market rates derived from computer models that the Commission rejected, Tampa Electric now contends that the Commission did not do as well as it should have in its attempt to determine a market rate based on rates paid by other utilities. Tampa Electric asserts that once the Commission chose to use comparable rates paid by other utilities as the basis for determining a market rate for ocean barge service, it was then obligated to use only the best available data concerning such comparable rates. Tampa Electric contends that the Commission gave undue

would be an administrative nightmare for you to handle confidential information pertaining to competing interests in the same docket. So we would urge that you find that be ill-advised and not do that.

Hearing Transcript in Docket No. 030001-EI at 1109. (Emphasis added.)

weight to data concerning the rates paid by JEA and PEF for ocean barge service. In doing so, Tampa Electric asks the Commission to improperly engage in reweighing the extensive evidentiary record it considered in rendering its Final Order.

Ironically, it was the shortcomings of Tampa Electric's RFP process that put the Commission in the position of determining a market rate for Tampa Electric's coal transportation service with less than what it considered to be the best information. At page 16 of its Final Order, the Commission stated:

Having found that Tampa Electric's RFP was insufficient for gauging a market rate and recognizing that it would be impractical to require Tampa Electric to issue a new RFP for coal transportation services given our lack of authority to rescind the current contract, we do not have at our disposal the one tool – an open, competitive RFP process – that we believe best allows us to determine a reasonable rate. Rather, we are faced with determining what a market rate would have been based on computer models of the market for inland river barge and ocean barge services, a single *bona fide* bid for terminal services, comparable rates paid by other utilities for these services, and analysis of rail rates offered by CSXT to transport certain tonnages. While we believe that each alternative view of the relevant markets has advantages and disadvantages in establishing a proxy for the results of competitive bidding, we find that the best alternative is to rely upon actual rates paid by other utilities to non-affiliates for inland river barge and ocean barge service and the one *bona fide* bid for terminal services.

As noted above, the Commission was presented with several alternative recommendations from staff. Three of those alternatives offered different methodologies by which the Commission could establish a market rate for Tampa Electric's coal transportation service. After a long discussion with staff at agenda concerning the relative merits of each approach, the Commission chose to use record evidence concerning rates paid by JEA, PEF, and Gulf Power Company to arrive at a market rate proxy for ocean barge service.

Use of PEF Rate

Tampa Electric asks the Commission to reweigh the evidentiary value it placed on rates paid by PEF as comparable market rates for ocean barge service, asserting that such rates were not truly comparable. Tampa Electric notes that PEF's audit response, which served as the basis for calculation of the PEF rate, claims that there were non-contractual costs not fully recovered by the contract and which were not considered in the audit findings. Yet Tampa Electric also recognizes that the Commission took this into account when evaluating the PEF rates. At page 19 of its Final Order, the Commission stated:

We note that in response to the audit, Progress Energy Florida suggested that there might be non-contractual costs not fully covered by the contract. For comparative purposes, however, we believe that any implied understatement of the rate paid by Progress Energy Florida is offset by the efficiency of the TECO Transport ocean fleet. Both Mr. Dibner and Dr. Hochstein testified that TECO

Transport's tug/barge units were significantly more efficient than those used to serve Progress Energy Florida's ocean barge shipping needs.

Appendix 7 of the staff recommendation provided further explanation, noting: (1) that Tampa Electric's witness Dibner had indicated that the cost per ton for barges similar in size to those used to serve PEF's ocean barge needs would be higher than the rate he estimated for TECO Transport's tug/barge units; and (2) that Residential Customers' witness Hochstein supported the same conclusion by providing data from the U.S. Corps of Engineers showing that daily capital and operating costs of vessels the size of the units used to serve PEF are 30% higher than units of the size used by TECO Transport. Clearly, the Commission considered this matter, and Tampa Electric's request for reconsideration on this point is improper reargument.

Tampa Electric also asserts that the Commission erred in its reasoning that because 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. Tampa Electric claims that the fact that TECO Transport is an efficient carrier is irrelevant to the question of market price. Again, this reflects an attempt by Tampa Electric to improperly reargue use of the PEF rate as part of the basis for the Commission's decision.

Beyond the fact that Tampa Electric's complaints about use of the PEF rate amount to improper reargument, Tampa Electric ignores the fact that the Commission did not base its decision to limit Tampa Electric's recovery of costs for ocean barge service solely on the PEF rate. In fact, Appendix 7 to staff's recommendation makes clear that *PEF's rate was not used as the basis for the specific adjustment to Tampa Electric's cost recovery for ocean barge service*. Thus, reconsideration on this point would do nothing to change the final result that Tampa Electric disagrees with.

Use of JEA Rate

Tampa Electric also asks the Commission to improperly reweigh the evidentiary value it placed on rates paid by JEA as comparable market rates for ocean barge service, asserting that such rates were not truly comparable. First, Tampa Electric contends that the Commission erred in failing to distinguish the JEA coal movements as isolated spot movement rather than Tampa Electric's long-term contract movements. However, the nature of the JEA coal movements in comparison to Tampa Electric's coal movements was discussed in the direct testimony, and during the cross-examination, of several witnesses and was the subject of several hearing exhibits.

Second, Tampa Electric contends that the Commission overlooked market information in the record showing increased costs of waterborne coal transportation provided by TECO Transport to JEA in 2004. What Tampa Electric fails to mention is that the record indicates that the 2004 rate paid by JEA was for a single transaction with no backhaul and that the contract was signed after the time period in which Tampa Electric tested the market with its RFP. Further, Tampa Electric fails to mention that the Commission relied, to Tampa Electric's benefit, on the higher priced 2002 JEA transactions rather than the lower priced 2003 transactions.

The Commission considered each of these concerns and rejected them when it chose to use the rates paid by JEA as comparable market rates for ocean barge service.

The Big Picture

In this docket, the Commission heard extensive evidence on the issues – three days of testimony and over 100 exhibits. In its post-hearing recommendation, staff presented the Commission with five alternative recommendations concerning the appropriate amount to allow Tampa Electric to recover in its rates. Those alternatives ranged from no reduction in the costs that Tampa Electric would incur under its 2004-2008 contract with TECO Transport to reductions anywhere between \$13.8 million per year and \$20.3 million per year. Each of the alternative recommendations was supported by competent, substantial evidence of record. At its post-hearing Agenda Conference, the Commission concluded, based on the record, that the costs incurred by Tampa Electric under its contract with TECO Transport were not reasonable for purposes of cost recovery. Then, recognizing that each of the alternatives that proposed a reduction was aimed at establishing a market-based rate, the Commission questioned staff concerning the basis for each alternative. The Commission ultimately adopted portions of two alternative recommendations and determined that a reduction of \$15.3 million per year was appropriate based on the actual rates paid by other utilities to non-affiliates for inland river barge and ocean barge service. The Commission's decision was well within the range of possible adjustments that were supported by the record.

As discussed above, Tampa Electric has not identified a point of fact or law that the Commission overlooked or failed to consider in rendering its Final Order. Instead, Tampa Electric has asked the Commission to improperly engage in reweighing the extensive evidentiary record it considered in rendering its Final Order. Tampa Electric's request for reconsideration should thus be denied.

Request for Clarification

Tampa Electric requests clarification of Section V of the Final Order, 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.

Tampa Electric states that the Commission should clarify that it 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. Tampa Electric contends that once the reasonableness of the process is established on the front-end, the Commission should accept the results of the process. According to Tampa Electric, statements made during the September 2, 2004, Agenda Conference leave doubt as to whether it would only incur downside risks in a rebid and would not be able to mitigate the results of the Final Order by establishing market rates via a new bid process which is open and fair.

In response to Tampa Electric's request for clarification of the Final Order, the intervenors argue that Tampa Electric is requesting that the Commission reword its order to essentially pre-approve its RFP process. OPC contends that Tampa Electric does not really want clarification, but seeks to be relieved of any risk if it chooses to rebid. CSX asserts that Tampa Electric's request for clarification appears to be an attempt to induce the Commission to ratify Tampa Electric's offer of settlement put forth in Tampa Electric's Motion to Hold Proceedings in Abeyance and Offer of Settlement, filed August 31, 2004, which was denied by the Commission. Further, Residential Customers contend that Tampa Electric's request is contradictory to the statements by one or more Commissioners during the Agenda Conference that the customers should not be caused to pay more now or later for Tampa Electric's failure to get the RFP right the first time.

The Commission's decision on this point was clear: if Tampa Electric deems it appropriate, it may attempt to mitigate the impact of the Final Order by rebidding all or any part of its existing coal transportation requirements. It is within Tampa Electric's discretion as to whether it takes that step.

Tampa Electric's requested clarification goes well beyond clarifying the Commission's decision by asking the Commission to tie its hands by pre-approving cost recovery for rates developed through a new RFP process. As Tampa Electric states in its motion: "The Commission should clearly and unequivocally state that it will accept without reservation the results of a new RFP . . ." In deliberations at its post-hearing Agenda Conference, at least one Commissioner made clear that it was not his intention to create such a situation:

[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 [Tampa Electric] 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.

(Commissioner Davidson, Agenda Conference Transcript at 34.)

In conclusion, Tampa Electric's requested clarification goes well beyond clarifying the Commission's decision, is inconsistent with the Commission's decision, and is at odds with the Commission's intent in rendering its Final Order.

Issue 3: Should the Commission grant Tampa Electric Company's request for official recognition and motion to reopen record?

Recommendation: No. (C. Keating, Rodan)

Staff Analysis: In its request for official recognition and motion to reopen record, Tampa Electric requests that the Commission take official notice of its decision in Order No. PSC-04-0713-AS-EI, issued July 20, 2004, Docket No. 031057-EI, In Re: Review of Progress Energy Florida, Inc.'s Benchmark for Waterborne Transportation Transactions with Progress Fuels, and the unredacted stipulation and settlement approved by that order ("PEF stipulation"). Tampa Electric notes that this order was entered subsequent to the close of the record in this proceeding but prior to the Commission's consideration and ultimate decision with respect to the appropriate rate for Tampa Electric to pay for waterborne coal transportation costs in 2004. According to Tampa Electric, the PEF stipulation represents the best contemporaneous evidence of what the Commission considers to be the appropriate rates for waterborne coal transportation provided to both PEF and Tampa Electric. Tampa Electric argues that the Commission should take official recognition of the PEF stipulation because it relied upon historical PEF waterborne coal transportation rates in considering and deciding this proceeding. Tampa Electric contends that official recognition of the order will further the goals of fairness, uniformity, and even-handed regulation of two similarly situated Commission-regulated electric utilities. Tampa Electric requests that the Commission reopen the record of this proceeding for the limited purpose of including the order and the PEF stipulation.

Tampa Electric does not offer any legal authority in support of its motion to reopen the record, and the courts have held that the specific relief sought by Tampa Electric is prohibited. In Lawnwood Medical Center, Inc., v. Agency for Health Care Administration, 678 So. 2d 421 (Fla. 1st DCA 1996), the court found that AHCA erred by reopening the record of an administrative proceeding to take selective official recognition for the purpose of making additional findings of fact. In that case, AHCA reopened the record of a proceeding to take official recognition of three specific documents after an administrative law judge had issued a proposed recommended order but before the agency took final action. In this case, Tampa Electric asks the Commission to go even further than AHCA by reopening the record to take selective official recognition of a single document after the Commission has issued its Final Order in this proceeding.

If the Commission wishes to reopen the record of this proceeding for purposes of considering the PEF stipulation, it must first determine that the PEF stipulation represents a change in circumstances so significant that its Final Order is no longer in the public interest.⁴ To afford due process, the Commission would then be required to allow all parties the opportunity to present evidence concerning the relevance of the PEF stipulation and the weight to be afforded it. The PEF stipulation contains nothing so significant as to merit further proceedings in this case. Indeed, it would be inconsistent with the stipulation itself, and thus the order approving the stipulation, to allow it to be given any precedential value in this case.

⁴ McCaw Communications of Florida, Inc. v. Clark, 679 So. 2d 1177 (Fla. 1996), citing Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966).

As noted in Issue 2, above, it would be inappropriate to take official recognition of the PEF stipulation in this docket. The stipulation, which was approved in its entirety, provides that it “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.” A stipulation, by its nature, typically represents a compromise among the parties to a proceeding based on the specific facts and circumstances of the proceeding, including the information at each party’s disposal and each party’s evaluation of the risks of going to hearing. It would very likely chill the incentive of parties to enter into stipulations if the terms of those agreements – particularly confidential terms - are given precedential value in other cases in spite of explicit language in the stipulation to the contrary. Further, taking official recognition of the PEF stipulation in this docket would likely involve disclosing the stipulated rates from that document to Tampa Electric⁵, in conflict with the Commission’s finding in Order No. PSC-04-0705-CFO-EI⁶ that those rates constitute “information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms” which is entitled to confidential classification pursuant to Section 366.093, Florida Statutes.

Further, as CSX notes, the stipulation was signed April 29, 2004, based on information available to the parties at that time. The Commission’s duty in this case, however, was to determine whether Tampa Electric’s contract rates were prudent based on what Tampa Electric knew or reasonably should have known at the time it tested the market. Tampa Electric’s RFP process took place in the summer of 2003, well before the PEF stipulation was signed. Thus, Tampa Electric, by asking the Commission to officially recognize the PEF stipulation, is asking the Commission to inappropriately exercise hindsight in making its prudence determination.

Reopening the record of this proceeding to officially recognize the PEF stipulation would do little beyond adding an untimely piece of data for the Commission to review in determining the prudence of the rates paid by Tampa Electric to TECO Transport. As discussed in Issue 2, the Commission was presented with a substantial amount of timely market data at hearing that supported reductions of \$13.8 million to \$20.3 million in annual cost recovery, and the Commission acted on that data by finding that a reduction of \$15.3 million was appropriate.

In sum, the Commission should deny Tampa Electric’s request for official recognition and motion to reopen the record.

⁵ If the confidential rates are not disclosed to Tampa Electric, Tampa Electric could argue that it was denied due process by not being provided access to information made a part of the record.

⁶ See footnote 2.

Issue 4: Should the Commission grant CSX Transportation's motion for clarification of Order No. PSC-04-0999-FOF-EI?

Recommendation: Yes. (C. Keating, Rodan)

Staff Analysis: In its motion for clarification, CSX requests that the Commission clarify the Final Order to precisely reflect the Commission's vote on Issue 3 of Staff's Recommendation relating to specific requirements imposed on Tampa Electric's future coal transportation procurement processes. CSX requests that the Final Order include the following requirement that was specifically stated and reflected as approved in the Commission's Vote Sheet from the September 21, 2004, Agenda Conference:

The Commission should order Tampa Electric to conduct fair, open, and reasonable RFP processes for solid fuel procurement for 2009 and beyond. The Commission should evaluate Tampa Electric's request for recovery of costs for 2009 and beyond based on the results of the RFP.

CSX requests that the Final Order be clarified to clearly state this requirement as voted by the Commission. CSX suggests that this language be added to the second full paragraph of Section V and/or incorporating the language into the ordering paragraphs of the Final Order.

CSX states that in an abundance of caution, it also moves, in the alternative, for reconsideration of the Final Order to grant the same relief.

Staff believes that the clarification sought by CSX is implied in the Commission's Final Order. Nonetheless, noting no opposition to CSX's motion, staff sees no harm in the Commission clarifying its Final Order to more explicitly confirm the nature of its vote. Thus, staff recommends that the Commission grant CSX's motion. If the Commission approves this recommendation, it does not need to address CSX's alternative motion for reconsideration.

Docket No. 031033-EI
Date: February 17, 2005

Issue 5: Should this docket be closed?

Recommendation: The docket should be closed after the time for filing an appeal has run.

Staff Analysis: The docket should be closed 32 days after issuance of the order, to allow the time for filing an appeal to run.