

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Determination of regulated earnings of Tampa Electric Company pursuant to stipulations for calendar years 1995 through 1999.

DOCKET NO. 950379-EI
ORDER NO. PSC-00-0904-PCO-EI
ISSUED: May 8, 2000

ORDER GRANTING FLORIDA INDUSTRIAL POWER USERS GROUP'S (FIPUG)
MOTION TO COMPEL TAMPA ELECTRIC COMPANY TO RESPOND TO FIPUG'S
FIRST SET OF INTERROGATORIES, AND DENYING TAMPA ELECTRIC
COMPANY'S MOTION FOR PROTECTIVE ORDER

On September 20, 1999, pursuant to Rule 28-106.206, Florida Administrative Code, and Order No. PSC-96-0272-PCO-EI, Tampa Electric Company (Tampa Electric or TECO), filed its Objections, Motion for Protective Order and Written Response to the Florida Industrial Power Users Group's First Set of Interrogatories (Nos. 1-10) and Motion for Protective Order. On September 28, 1999, FIPUG filed a Motion to Compel Discovery Compliance (Motion to Compel).

In its Motion, TECO objects to FIPUG's Interrogatories Nos. 1, 2, 3, 7, 8, and 9. TECO also states, "To the extent that a Motion for Protective Order is required, Tampa Electric's objections are to be construed as a request for Protective Order. The Motion for Protective Order and each objection are discussed below.

Interrogatory No. 1

FIPUG's Interrogatory No. 1 states:

TECO's Earnings Surveillance Reports (ESRs) filed with the Commission show construction expenditures for calendar year 1997 of \$124.4 million and \$174.3 million for 1998. Categorize the construction expenditures under the following headings (for 1997 and 1998): New generating plant; Generating plant repair; New transmission; Transmission repair; New distribution; Distribution repair; and General (independently list any items over \$1 million).

TECO objects to this interrogatory "on the ground that responding to this interrogatory would be unduly burdensome and

DOCUMENT NUMBER-DATE

05696 MAY-88

FPSC-RECORDS/REPORTING

would require Tampa Electric to engage in significant and time-consuming research, analysis and reporting of information having no relevance to the subject matter of this proceeding."

In its motion to compel, FIPUG claims that this information is "solely in TECO's possession," and states that, "TECO has the burden in an earnings evaluation to prove its prudent investment in assets used and in useful service." Further, FIPUG asserts that, "[i]t is certainly not burdensome to provide such information in the broad general categories requested to enable further detailed inquiry."

Florida law requires more than just a claim that a request is over broad or burdensome and cites First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Association, Inc., 545 So. 2d 502 (Fla. 4th DCA 1989). In that case, the Court stated:

Lastly, we turn our attention to petitioners' objections that some of the discovery sought was 'overly broad' or 'burdensome'. Such objections, standing alone would not constitute a basis for granting certiorari relief. (Citation omitted) More importantly, such words of art have little meaning without substantive support. Is this objection raised because petitioners would be required to produce a railroad boxcar full of documents, or are they merely objecting to the production of a half-inch thick file folder? Since the trial court has to consider petitioners' other objections, it is incumbent upon petitioners to quantify for the trial court the manner in which such discovery might be overly broad or burdensome. They must be able to show the volume of documents, or the number of man-hours required in their production, or some other quantitative factor that would make it so.

Id. at 503

Regarding TECO's claim that this information has no relevance to the subject matter of this proceeding, FIPUG's response states:

This proceeding is about *TECO's earnings*; part and parcel of a review of earnings is a review of the rate base upon which a return is sought and the utility's ordinary and necessary expenditures; thus, the request is not only

relevant, but critical to the analysis which must take place in this docket. Emphasis added by FIPUG.

Based on the information above, TECO has not met its burden of showing that this interrogatory is overly broad or burdensome. Further, the information requested in this interrogatory is relevant to the subject matter of this proceeding. Therefore, TECO shall respond to this interrogatory.

Interrogatory No. 2

FIPUG's Interrogatory No. 2 states:

Did TECO make any payments to companies in which TECO Energy (TE) owns more than a 5% interest made in 1997 or 1998? If yes, list the total amounts paid to each company in 1997 and 1998 and the nature of services rendered or commodities purchased (1997, 1998): Company service purchased from; Service purchased; Amount paid; Company commodity purchased from; Commodity purchased; and Amount paid.

TECO objects to this interrogatory "on the ground that it calls for information that is not relevant to the subject matter of this proceeding nor would the information be likely to lead to the discovery of admissible evidence."

In its motion to compel, FIPUG states:

One hundred percent (100%) of each dollar expended by TECO to cover reasonable and prudent expenses reduces the refund due to FIPUG and other customers. It is reasonable and proper to subject payments to affiliated companies to public scrutiny in detail. They are not arms length transactions. Customers and the Commission are entitled to evaluate these expenditures to insure that they are priced competitively.

Further, FIPUG claims that the information requested is "solely in TECO's possession" and "must be made available for review."

Rule 1.280(b)(1), Florida Rules of Civil Procedure, allows parties to obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action. This rule also provides, "It is not ground for objection that the

information sought will be inadmissible ... if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

FIPUG's response to TECO's objection sufficiently explains how the information requested in this interrogatory is relevant. Therefore, TECO shall respond to this interrogatory.

Interrogatory No. 3

FIPUG's Interrogatory No. 3 states:

The ESRs for 1997 and 1998 list O&M expenses of \$210 million and \$227 million, respectively. Were any payments to companies in which TECO Energy (TE) owns more than 5% interest made? If yes, list the total amount paid to each company in 1997 and 1998.

TECO objects to this interrogatory "on the ground that it calls for information that is not relevant to the subject matter of this proceeding nor would the information be likely to lead to the discovery of admissible evidence."

In its motion to compel, FIPUG does not address to TECO's objection to this interrogatory. However, it appears that the information requested is relevant to the subject matter of this proceeding. Additionally, it is likely to lead to the discovery of admissible evidence. Therefore, TECO shall respond to this interrogatory.

Interrogatory No. 7

FIPUG's Interrogatory No. 7 states:

Is TECO a wholly-owned subsidiary of TE? If yes, is there any circumstance of law or fact that shields TECO from the claims of TE's creditors?

TECO objects to the second question of this interrogatory, claiming that it calls for a legal analysis and "Tampa Electric is not required to perform FIPUG's legal analysis in responding to interrogatories."

In its motion to compel, FIPUG asserts that a response to this interrogatory would not require a legal analysis, stating that "It

is a factual question which TECO would be required to answer." FIPUG cites to Rule 1.340(b), Florida Rules of Civil Procedure, which expressly provides:

An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to a fact or calls for a conclusion or asks for information not within the personal knowledge of the party. A party shall respond to such an interrogatory by giving the information the party has and the source on which the information is based.

FIPUG also states that although TECO is a "large complex company," this in and of itself "does not shield it from discovery of information leading to relevant evidence."

Pursuant to Rule 1.280, Florida Rules of Civil Procedure, "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action." TECO has not claimed that a response to this interrogatory would violate a privilege, nor has TECO demonstrated that the information sought is not relevant to the subject matter of this proceeding. Therefore, TECO shall respond to this interrogatory.

Interrogatory No. 8

FIPUG's Interrogatory No. 8 states:

At the FPSC Agenda Conference held on August 31, 1999, TECO submitted the document attached as Exhibit 1. Provide a detailed analysis of the "Cost Recovery Clause Reductions" remunerated therein.

TECO objects to this interrogatory, stating that "it calls for Tampa Electric to perform an analysis which FIPUG, itself, presumably is capable of performing. Tampa Electric also objects "on the grounds that the term 'detailed analysis' is vague. The document referred to in this interrogatory speaks for itself and requires no further analysis by Tampa Electric."

In its motion to compel, FIPUG asserts that TECO should be required to provide the information requested in this interrogatory because "TECO generated this document and provided no support for

it at the Agenda Conference. FIPUG has no way of knowing what analysis, if any, TECO performed to generate the document."

Again, TECO does not assert that providing the information requested would violate a privilege, nor does TECO assert that the information sought is irrelevant and not likely to lead to the discovery of admissible evidence. Based upon the foregoing, TECO shall respond to this interrogatory.

Interrogatory No. 9

FIPUG's Interrogatory No. 9 states:

At the FPSC agenda conference of September 7, FIPUG offered the document attached as Exhibit 2, which TECO's counsel classified as fantasy. Please review Exhibit 2 and correct any misstatements of fact showing the correction. Disregard the assumption that TECO be required to refund all earnings in excess of an 11% return on equity.

TECO objects to this interrogatory. While TECO admits that "[the document in question contains many errors," TECO "objects to FIPUG's demand for elaboration on the ground that it calls for information which is protected and privileged as attorney/client communication and work product." TECO goes on to state that, "[t]his is no different than a party seeking through discovery a list of all cross examination questions which an adversary might be planning in preparation for trial. This is inappropriate and not required under the rules of discovery."

In its motion to compel, FIPUG states, "The purpose of discovery is to ascertain true facts in order to expedite the legal process. It frustrates this intent if parties attempt to conceal facts in order to spring them in cross-examination at trial." FIPUG maintains that TECO should be required to provide an explanation regarding its characterization of FIPUG's document as "fantasy."

The Florida Supreme Court in Surf Drugs, Inc. vs. Vermette, 236 So.2d 108, 111 (Fla. 1970), found:

A primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluff and legal gymnastics. Revelation through

discovery procedures of the strength and weaknesses of each side before trial encourages settlement of cases and avoids costly litigation. Each side can make an intelligent evaluation of the entire case and may better anticipate the ultimate results.

Additionally, Rule 1.280(b)(5), Florida Rules of Civil Procedure, provides that if a party withholds information otherwise discoverable claiming that the information is privileged, the party shall make the claim expressly and shall describe the nature of the documents in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

In its objection, TECO does not comply with Rule 1.280(b)(5), Florida Rules of Civil Procedure. Therefore, TECO shall respond to this interrogatory.

TECO's Motion for Protective Order

TECO asserts that its "objections to FIPUG's discovery requests are submitted pursuant to the authority contained in Slatnick v. Leadership Housing Systems of Florida, Inc., 368 So.2d 79 (Fla. 3rd DCA 1979). TECO also requests that "[t]o the extent that a Motion for Protective Order is required, Tampa Electric's objections are construed as a request for a Protective Order."

Rule 1.280(b)(5), Florida Rules of Civil Procedure, requires a party to make such a claim expressly and to describe the nature of the documents in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. TECO has failed to meet the burden of proof outlined in this rule. Therefore, TECO's motion is hereby denied.

Award of Expenses of Motion

In its motion to compel, FIPUG requests the Commission to enter an order compelling TECO to promptly respond to discovery propounded by FIPUG. In addition, FIPUG requests an award of attorney fees.

Uniform Rule 28-106.206, Florida Administrative Code, provides that parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.200, Florida Rules of

Civil Procedure. In addition, this rule states, "[t]he presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanctions in accordance with the Florida Rules of Civil Procedure, except contempt."

Rule 1.380(a)(4), Florida Rules of Civil Procedure, expressly provides for this remedy. Specifically, this provision states:

If the motion is granted and after opportunity for hearing, the court shall require the party or deponent whose conduct necessitated the motion or the party or counsel advising the conduct to pay the moving party the reasonable expenses incurred in obtaining the order that may include attorney fees, unless the court finds that the opposition to the motion was justified or that other circumstances make an award of expenses unjust.

Although Uniform Rule 28-106.206, Florida Administrative Code, and Rule 1.380, Florida Rules of Civil Procedure, provide authority for this Commission to impose sanctions for discovery violations, it does not appear that TECO has frustrated the purposes of discovery, nor is it apparent that TECO's participation constitutes an improper purpose as defined in Section 120.595(1)(e)1., Florida Statutes. Therefore, FIPUG's request for an award of attorney fees is denied.

Based on the foregoing, it is

ORDERED by Chairman Joe Garcia, as Prehearing Officer, that Tampa Electric Company's Objections to Florida Industrial Power Users Group's First Set of Interrogatories are disposed of as set forth in the body of this Order. It is further

ORDERED that Florida Industrial Power Users Group's Motion to Compel is granted, as set forth in the body of this Order. It is further

ORDERED that Tampa Electric Company's Motion for protective Order is denied. It is further

ORDERED that Tampa Electric Company shall provide responses to the First Set of Interrogatories propounded by Florida Industrial Power Users Group as soon as possible, but not later than seven days after the date of issuance of this Order.

ORDER NO. PSC-00-0904-PCO-EI
DOCKET NO. 950379-EI
PAGE 9

By ORDER of Chairman Joe Garcia, as Prehearing Officer, this
8th day of May, 2000.

A handwritten signature in black ink, appearing to read "Joe Garcia", written over a horizontal line.

Joe Garcia
Chairman and Prehearing Officer

(S E A L)

SAC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.