BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause and generating performance incentive factor.	DOCKET NO. 010001-EI ORDER NO. PSC-01-1444-PCO-EI ISSUED: July 5, 2001

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL AND GRANTING IN PART AND DENYING IN PART MOTION FOR PROTECTIVE ORDER

I. BACKGROUND

On March 7, 2001, Florida Industrial Power Users Group ("FIPUG") served its First Set of Interrogatories to Tampa Electric Company (Nos. 1 - 23) and its First Request for Production of Documents to Tampa Electric Company (Nos. 1 - 6) in this docket. On March 16, 2001, Tampa Electric Company ("TECO") filed its Objections, Motion for Protective Order and Written Response to FIPUG's interrogatories and document requests ("Objections and Motion for Protective Order").

On April 11, 2001, FIPUG filed a Motion to Compel Tampa Electric Company to Respond to Discovery and Request for Expedited Motion Hearing ("Motion to Compel"). On April 18, 2001, TECO filed its Response to FIPUG's Motion to Compel and Request for Expedited Motion Hearing ("Response to Motion to Compel"). By Order No. PSC-01-1057-PCO-EI, issued May 3, 2001, FIPUG's Request for Expedited Motion Hearing was granted. Subsequently, a motion hearing was held on May 31, 2001.

In its Objections and Motion for Protective Order, TECO objected specifically to all or portions of Interrogatories Nos. 1, 4, 11(a), 11(c), and 18, and Requests for Production Nos. 1 and 2. In its Motion to Compel, FIPUG asked this Commission to compel TECO to respond, or respond further, to Interrogatories Nos. 1, 2, 3, 4, 5, 7, 11(a), 11(c), 15, 17, and 18, and Requests for Production Nos. 1, 2, and 3. Prior to the May 31, 2001, motion hearing, FIPUG and TECO informally resolved their disputes as to Interrogatories Nos. 3, 4, 5, 15, and 17, and Request for Production No. 2.

Rulings on Interrogatories Nos. 7, 11(a), and 11(c) were made at the motion hearing. With respect to Interrogatory No. 7, TECO

was ordered to provide FIPUG with the name of a witness capable of answering the question set forth in the interrogatory, and any related follow-up questions, in a short deposition to be held at a date to be agreed upon by the parties. With respect to Interrogatory No. 11(a) and (c), TECO's request for a protective order was denied, and TECO was ordered to respond fully by July 5, 2001. Request for Production No. 1 was resolved by the parties at the motion hearing, with TECO agreeing to respond to the request within three weeks of the motion hearing based on clarification offered by FIPUG.

At the motion hearing, FIPUG indicated that Interrogatory No. 11(e) is also in dispute. With that addition, Interrogatories Nos. 1, 2, 11(e), and 18, and Request for Production No. 3 remain in dispute and are the subject of this order. Pursuant to Rule 28-106.206, Florida Administrative Code, this dispute is governed by Rules 1.280 through 1.400, Florida Rules of Civil Procedure.

II. ANALYSIS AND FINDINGS

Interrogatory No. 1

FIPUG's Interrogatory No. 1 states:

> Identify each firm contract to purchase capacity and energy to which TECO or any affiliate is or was a purchasing party for the period 1999-2002. For each contract, identify the selling entity; the amount of capacity and energy TECO or any affiliate purchased or purchases under the contract; the term (duration) of the contract; and a description of the nature of the obligation (take-and-pay vs. take or pay).

TECO objects to this interrogatory on the ground that the information requested is irrelevant and overbroad. TECO specifically objects to the portion of the interrogatory requesting information regarding contracts between TECO affiliates and parties other than TECO. TECO contends that such transactions are not relevant to this proceeding. Further, TECO asserts that it does not have access to any of its affiliates contracts to which TECO is not a party, and thus does not control this information. TECO contends that even if it did have such access, providing the

requested information would likely harm the competitive interests of the affected affiliate. TECO indicates that it will provide the requested information with respect to TECO's contracts with affiliates, subject to FIPUG's execution of a non-disclosure agreement, if necessary, to protect any proprietary confidential business information that may be involved.

FIPUG asserts that this interrogatory seeks information concerning the prudence of TECO's power purchases and, thus, is relevant to this docket. FIPUG asserts that the interrogatory is not overbroad because it is limited to a period of three years and seeks only "fundamental information" concerning the contracts.

Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that the scope of discovery extends to "any matter, not privileged, that is relevant to the subject matter of the pending action." The rule goes on to state that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information is reasonably calculated to lead to the discovery of admissible evidence." In considering the arguments of the parties, I have applied this standard in my consideration. In doing so, I first believe that Interrogatory No. 1 seeks information reasonably calculated to lead to the discovery of admissible evidence and relevant to this docket. The information sought could conceivably indicate that TECO is purchasing power at more or less favorable prices and terms than that at which an affiliate is purchasing power at a given time during the period specified in the interrogatory. Such information may lead to the discovery of admissible evidence concerning the prudence of TECO's power purchases.

Second, the interrogatory is not overbroad. TECO's argument of overbreadth hinges on its assertion that the interrogatory is irrelevant, an assertion discounted above. The interrogatory is limited to a three year period and seeks specific information concerning a specific type of transaction.

Third, TECO's contention that it does not have access to this information, and thus does not control this information, is not compelling. As previously recognized by this Commission, a party need not have actual possession of documents to be deemed in control of them. (Order No. PSC-94-0571-CFO-WU, issued May 13,

1994, citing In re Folding Carton Antitrust Litigation, 76 F.R.D. 420 (N.D.Ill. 1977).) In Order No. PSC-94-0571-CFO-WU, the prehearing officer compelled from a regulated utility the production of non-regulated affiliates' tax returns relevant to the subject matter of that proceeding. This Commission has similarly compelled from regulated utilities the production of other affiliate documents and information reasonably calculated to lead to the discovery of admissible evidence in the underlying proceedings. (See, e.g, Order No. PSC-92-0819-PCO-WS, issued August 14, 1992; Order No. PSC-96-0822-PCO-WS, issued June 25, 1996; and Order No. PSC-96-0182-PCO-PU, issued February 8, 1995 (compelling from Peoples Gas System the production of non-regulated affiliate information to TECO).)

Fourth, in its Objections and Motion for Protective Order, TECO states that "[t]o the extent that a Motion for Protective Order is required, Tampa Electric's objections are to be construed as a request for a Protective Order." Therefore, to the degree that the motion to compel is granted, a question still remains as to whether this information should be protected from disclosure as confidential commercial information. Thus, TECO's objection is considered a motion for protective order on the grounds that the information requested is confidential commercial information.

Rule 1.280(c)(7), Florida Rules of Civil Procedure, allows issuance of protective orders to protect trade secrets or other confidential commercial information. When ruling on a motion for protective order involving commercial information, a two part test is used to decide if the information is discoverable. First, the movant, TECO, must demonstrate that the information sought is confidential by virtue of being a trade secret or some other type of confidential commercial information. See Order No. PSC-00-0291-PCO-EU, issued February 11, 2000, in Docket No. 991462-EU; Kavanaugh v. Stump, 592 So.2d 1231, 1232-3 (Fla. 5th DCA 1992); Inrecon v. The Village Homes at Country Walk, 644 So.2d 103, 105 (Fla. 3rd DCA 1994); Rare Coin-it v. I.J.E., Inc., 625 So.2d 1277 (Fla. 3rd DCA 1993). If the movant makes a showing that the information is confidential, the burden shifts to the opposing party, FIPUG, to establish that its need for the information outweighs the countervailing interest in withholding production. See Order No. PSC-00-0291-PCO-EU, issued February 11, 2000, in Docket No. 991462-EU; Inrecon at 105; Rare Coin-it at 1277; Higgs

v. Kampgrounds of America, 526 So.2d 980, 981 (Fla. 3rd DCA 1988); Eastern Cement Corp. V. Dep't of Environmental Protection, 512 So.2d 264, 265-6 (Fla. 1st DCA 1987). Broad discretion is granted in balancing the competing interests of the parties and a wide variety of factors can be considered. See Fortune Personnel Agency of Ft. Lauderdale, Inc. v. Sun Tech Inc. of South Florida, 423 So.2d 545, 547 (Fla. 4th DCA 1982); Inrecon at 105.

In its Objections and Motion for Protective Order, TECO states that answering this interrogatory would likely cause significant harm to the competitive interests of its affected affiliates. At the motion hearing, TECO asserted that some FIPUG members may be generating electricity and selling wholesale power in competition with TECO's unregulated affiliate and thus may have a competitive interest in the response to Interrogatory No. 1. FIPUG did not dispute this assertion. However, FIPUG pointed out generally that utilities, like TECO, "have all the information" concerning their particular business activities. FIPUG asserted that it has no other source for this information when attempting to monitor utility activity. TECO did not dispute this assertion.

Upon consideration of the parties' arguments and the legal standards described above, FIPUG's motion to compel is granted as it relates to Interrogatory No. 1. However, in an effort to balance FIPUG's interest in obtaining the requested information with TECO's concerns over the sensitive nature of the information, any responsive information concerning transactions between TECO and a TECO affiliate or between a TECO affiliate and a party other than TECO shall be provided pursuant to a non-disclosure agreement, the terms of which shall be determined by the parties to this dispute. The non-disclosure agreement shall be designed to prevent the disclosure of information to entities whose knowledge of this information may harm the competitive interests of TECO or an affiliate of TECO. If the parties cannot agree to the terms of a non-disclosure agreement within 10 days of the issuance date of this order, the parties shall notify the Commission in writing as to whether: (1) it appears that an agreement may be reached given additional time; or (2) it appears that an agreement cannot be reached even given additional time. If the parties believe additional time may be beneficial, their notification to the Commission shall be filed jointly and shall indicate the additional time sought. If it appears that an agreement cannot be reached at

the end of the initial 10 day period or at the end of any additional period, notification to the Commission may be filed either individually or jointly by the parties, and the terms of a non-disclosure agreement shall be established through an expedited proceeding.

Interrogatory No. 2

FIPUG's Interrogatory No. 2 states:

As to all generation and transmission capacity in the retail rate base committed to serve firm wholesale contracts during the 1999-2002 period, provide
(a) the amount of firm capacity committed to the wholesale market;
(b) the rate base book value of the committed capacity;
(c) the capacity required to back up each firm commitment to serve;
(d) the rate base book value of back up capacity;
(e) the revenue received or to be received for this generation and transmission capacity for each month of 1999-2002 compared to the carrying costs charged to retail customers for the capacity.

At the motion hearing, FIPUG indicated that only parts (a), (b), and (e) of this interrogatory are in dispute.

In its answer to part (a) of this interrogatory, TECO stated, in pertinent part, that "[s]ince separation of assets from the retail jurisdiction is not required by the Commission for short-term sales, which are less than one year in term and/or are non-firm in nature, the accounting records do not distinguish between firm and non-firm sales within this category." In its answer to part (b), TECO stated that "[s]ince Tampa Electric is not required to jurisdictionally separate rate base for these short-term opportunity sales, the rate base is not separately identified." In its answer to part (e), TECO states that the revenues from these types of customers and contracts are reported in TECO's monthly filings in this docket, and that the comparison requested is not available because non-separated sales are not assigned cost responsibility through a jurisdictional separation process.

In its Motion to Compel, FIPUG asserts that TECO has provided a "non-answer" and avoids answering the questions posed. FIPUG further asserts that TECO can clearly identify that capacity it has dedicated to wholesale sales and knows the value of that capacity. Likewise, FIPUG asserts that TECO has the ability to identify the carrying costs charged to retail ratepayers for this capacity. Thus, FIPUG asserts that TECO should be compelled to respond to parts (a), (b), and (e) of this interrogatory.

In its Response to Motion to Compel, TECO contends that it has answered this interrogatory to the best of its ability and that FIPUG simply disagrees with TECO's answer. TECO points out that separated sales are not in the retail rate base, while non-separated sales, both firm and non-firm, are not assigned a rate base book value or cost responsibility. TECO reiterates its answer to the interrogatory by stating that TECO does not have the information requested because it is not required by the Commission to separate from retail rate base the assets used to serve the sales in question.

Upon consideration of the parties' arguments, I find TECO's answers to be non-responsive to parts (a), (b), and (e) of the interrogatory. TECO's argument, simply put, is that TECO does not keep the information sought in the way that FIPUG has requested it. However, TECO has not indicated that it cannot provide the information requested or that providing the requested information would be unduly burdensome. TECO's assertion at the motion hearing, that "the company is at a loss to really figure out how to start assembling that information," is not sufficient by itself to support a finding that TECO should not be compelled to provide a more responsive answer to this interrogatory. Further, the relevance of the information requested is not in dispute. Therefore, to the extent that TECO has engaged in or continues to engage in non-separated, firm wholesale contracts for the period set forth in Interrogatory NO. 2, TECO shall provide FIPUG the information sought in parts (a), (b), and (e) of the interrogatory within 14 days of the issuance date of this order.

Interrogatory No. 11(e)

FIPUG's Interrogatory No. 11(e) asks TECO to provide the incremental costs of power purchases made on the day of, the day

before, and the day after each interruption identified in response to Interrogatory No. 10. TECO's answer to this interrogatory states that "Tampa Electric will provide the requested information upon FIPUG's execution of an appropriate non-disclosure agreement."

TECO does not address Interrogatory No. 11(e) in its Objections and Motion for Protective Order. FIPUG does not address Interrogatory No. 11(e) in its Motion to Compel. However, at the start of the motion hearing, FIPUG indicated that it disputes TECO's assertion that the information requested in Interrogatory 11(e) for the years 1998 and 1999 is sensitive information requiring a non-disclosure agreement. FIPUG asserted that the information for these years was "stale" and objects to signing a non-disclosure agreement for that information. (FIPUG conceded that an argument could be made for confidential treatment of this information for 2000 and 2001.) TECO did not specifically address this interrogatory at the motion hearing.

Under the legal standards previously stated, TECO, to obtain an order protecting this information from disclosure, must first demonstrate that the information sought is confidential by virtue of being a trade secret or some other type of confidential commercial information. TECO has not moved for a protective order and has not attempted to demonstrate the confidential nature of the information sought in this specific interrogatory. Thus, TECO shall respond to the interrogatory within 14 days of the issuance date of this order. If TECO believes that the information sought in this interrogatory is confidential in nature and wishes to protect the information through a non-disclosure agreement, TECO may file a motion for protective order which describes with specificity the confidential nature of this information. To avoid any additional delay, any such motion shall be filed by TECO within seven days of the issuance date of this order.

Interrogatory No. 18

FIPUG's Interrogatory No. 18 states:

> Provide TECO's system hourly incremental costs for calendar years 1998, 1999, and 2000. Explain how system incremental costs are calculated and reconcile these

costs with the hourly system lambda data provided to FERC in Form No. 714.

TECO objects to this interrogatory on the ground that it is overbroad and would impose a tremendous burden on TECO to gather, research, and present answers. TECO asserts that this information is not contained in any specific report or document and would require a "major undertaking." Specifically, TECO asserts that this information "would have to be gleaned from more than 52,000 hours of data then analyzed, reconciled and discussed." TECO also objects to this interrogatory on the ground that disclosure of this information would harm TECO's ability to compete in the wholesale power market to the detriment of TECO and its customers.

In its Motion to Compel, FIPUG asserts that the information sought in this interrogatory is directly related to the issue of whether TECO is acting prudently. Citing Goodyear Tire & rubber Co. v. Cooey, 359 So.2d 1200 (Fla. 1st DCA 1978), and Carson v. City of Ft. Lauderdale, 173 So. 2d 743 (Fla. 2nd DCA 1965), FIPUG contends that simply because responding to this interrogatory would require some effort to gather the information does not mean that TECO may avoid doing so.

The parties do not dispute the relevance of the information sought in this interrogatory. The issue requiring resolution is whether or not TECO should be protected from responding to this interrogatory. Consistent with TECO's Objections and Motion for Protective Order, TECO's objection is considered a motion for protective order on the grounds that responding to this interrogatory would impose an undue burden on TECO and would cause significant harm to its competitive interests. The appropriate standard of review for a motion of protective order is set forth at pages four and five, above.

At the motion hearing, TECO argued that Interrogatory No. 18 creates an undue burden. TECO reiterated that responding to this interrogatory would require analyzing, reconciling, and discussing approximately 52,000 hours of data. In addition, TECO stated that responding to this interrogatory would require recreation of TECO's system operation for every hour of every day for the years requested by FIPUG. TECO asserted that this process would require an estimated three months of programming time and an additional six

months of time for analysis by those TECO employees involved in that aspect of TECO's business.

FIPUG reiterated, at the motion hearing, its argument that it is not appropriate to object to discovery simply because responding to discovery will require a large amount of work or will be costly. FIPUG asserted that customers are entitled to see the system operation information sought in this interrogatory in order to review the prudence of TECO's actions and to determine whether appropriate prices were charged. FIPUG further asserted that it has no other source for this information.

Upon consideration of the parties' arguments and the legal standards described above, TECO's request for a protective order as to Interrogatory No. 18 is granted, and FIPUG's motion to compel a response to this interrogatory is denied. Although FIPUG may have no other source for the information sought in this interrogatory, FIPUG has not demonstrated that its need for this information outweighs the burden that TECO would face in attempting to respond to the interrogatory. The parties should attempt to determine whether this information, or a reasonable proxy thereof, can be conveyed in a less burdensome manner. Having granted TECO's request for protective order on the grounds of undue burden, it is unnecessary to reach the issue of competitive harm from disclosure of this information.

Request for Production No. 3

FIPUG's Request for Production No. 3 states:

> Order No. PSC-97-1273-FOF-EU, ordered that "TECO shall credit its Fuel Clause with the system incremental fuel cost associated with the FMPA and Lakeland sales. In addition, TECO shall document how the incremental fuel costs are calculated in its fuel adjustment filings." Provide documentation used during the period that TECO sold power from generation in the TECO rate base.

TECO's response to this request provides a narrative explaining how the incremental fuel cost of the FMPA sale was determined for the period January 1, 2000, through March 15, 2001, when the sale was not separated from the retail rate base. In its

response, TECO indicates that it ran the Historical Allocation Pricing ("HAP") program each day to determine the incremental cost for each hour of the sale. TECO provided no documents in its response.

In its Motion to Compel, FIPUG requests that TECO either provide documentation to support its compliance with the Commission's order or, if it has no such documentation, to so state. In its Response to Motion to Compel, TECO states that it has answered FIPUG's request but has no documentation beyond what was provided.

At the motion hearing, FIPUG indicated that TECO is willing to provide the reports produced by the HAP program for the FMPA sale, pursuant to a non-disclosure agreement. FIPUG objects to TECO's requirement of a non-disclosure agreement, asserting that the HAP reports do not contain confidential information. FIPUG asserts that the HAP reports should not be kept secret from TECO's ratepayers.

TECO asserted at the motion hearing that it has no documents indicating that it complied with the Commission's order, but that TECO complied with the Commission's requirements and filed a final FMPA compliance report, a copy of which was served on FIPUG. TECO points out that FIPUG previously signed a non-disclosure agreement to review the HAP reports pursuant to a decision made by a former Commissioner after an in camera review of these reports in another docket.

Under the legal standards previously stated, TECO, to obtain an order protecting this information from disclosure, must first demonstrate that the information sought is confidential by virtue of being a trade secret or some other type of confidential commercial information. TECO has not moved for a protective order. The record of this proceeding does not indicate the basis for the former Commissioner's ruling referred to by TECO. Further, that ruling, and the basis for it, were not reduced to writing, and thus provide little guidance for a determination of confidentiality in this proceeding. Thus, TECO shall respond to the interrogatory within 14 days of the issuance date of this order. If TECO believes that the information sought in this interrogatory is confidential in nature and wishes to protect the information

through a non-disclosure agreement, TECO may file a motion for protective order which describes with specificity the confidential nature of this information. To avoid any additional delay, any such motion shall be filed by TECO within seven days of the issuance date of this order.

Based upon the foregoing, it is

ORDERED by Commissioner Lila A. Jaber, as Prehearing Officer, that Florida Industrial Power Users Group's Motion to Compel Tampa Electric Company to Respond to Discovery is granted in part and denied in part, as set forth in the body of this order. It is further

ORDERED that Tampa Electric Company's Motion for Protective Order is granted in part and denied in part, as set forth in the body of this order.

By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer, this 5th day of July, 2001.

LILA A. JABER
Commissioner and Prehearing Officer

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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 the Commission Clerk and Administrative Services, 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.