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January 13, 2004

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 040001-EI

Dear Ms. Bayo:

On behalf of the Citizens of the State of Florida, the Florida Industrial Power Users Group and the Florida Retail Federation, enclosed for filing and distribution are the original and 15 copies of the following:

- The Citizens of the State of Florida's, the Florida Industrial Power Users Group's and the Florida Retail Federation's Joint Response to Tampa Electric Company's Motion for Reconsideration of Order No. PSC-03-1461-FOF-EI.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

VGK/bae
Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause and generating performance incentive factor.

Docket No. 040001-EI
Filed: January 13, 2004

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The Citizens of the State of Florida's,
The Florida Industrial Power Users Group's and the Florida Retail Federation's
Joint Response to Tampa Electric Company's
Motion for Reconsideration of Order No. PSC-03-1461-FOF-EI

The Citizens of the State of Florida (OPC), the Florida Industrial Power Users Group (FIPUG), and the Florida Retail Federation (FRF) (hereinafter Respondents), pursuant to rules 25-22.060 and 28-106.204, Florida Administrative Code, file this Joint Response to Tampa Electric Company's (TECo) Motion for Reconsideration of Order No. PSC-03-1461-FOF-EI (Final Order). TECo's motion simply reargues the same points which the Commission considered and rejected in its extensive deliberations regarding the Gannon shut down issue. Thus, TECo's motion should be denied in its entirety. As grounds therefore, the Respondents state:

1. TECo correctly identifies the well-known standard for a motion for reconsideration and then promptly ignores that standard in its motion. The purpose of a motion for reconsideration is to identify a point that the Commission overlooked or failed to consider. Its purpose is *not* to reargue positions which have been rejected:

> The purpose of a petition for rehearing is merely to bring to the attention of the trial court or, in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance. Hollywood Inc. v. Clark, 153 Fla. 501, 509, 15 So.2d 175; Maule Industries Inc. v. Seminole Rock and Sand, Fla., 91 So.2d 307. It is not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the judgment or the order.[1]

[1] *Diamond Cab Co. of Miami v. King*, 146 So.2d 889, 891 (Fl. 1962)

This Commission has often noted that a motion for reconsideration "is not an appropriate venue for rearguing matters which were already considered."[2] TECo's motion does nothing more than reargue points the Commission considered or previously ruled upon. Despite TECo's protestations otherwise, it simply disagrees with the Commission.

2. Though lengthy in rhetoric, TECo's motion makes the same point in different guises. TECo argues that the Commission's decision to offset a portion of consumers' increased fuel expenses, flowing directly from TECo's internal decision to shut down the Gannon plants early, by O&M expenditures which TECo saved due to the early shut down, is: beyond the scope of what the Commission may consider in this docket and/or violative of ratemaking principles. These matters were squarely before the Commission and extensively discussed; thus, TECo engages in reargument prohibited in a motion for reconsideration.

3. As to TECo's claim that this issue is beyond the scope of what may be considered in this case, the issue about which TECo now complains was clearly identified as an issue for decision in this case. In addition, as discussed below, the Commission discussed and rejected TECo's argument during the decision making process.

4. Issue 17L is identified in Prehearing Order No. PSC-03-1264-PHO-EI at p. 33:

> Should the Commission offset Tampa Electric's requested fuel cost increase by the O&M savings that resulted from its decision to cease operations at its Gannon Units 1 through 4 prior to December 31, 2004?

At the Prehearing Conference, counsel for TECo noted that he objected to the inclusion of Issue 17L "because it mixes base rate with fuel cost recovery"[3] (the very *same* argument made in TECo's motion for reconsideration). TECo counsel then stated: "If you're inclined to allow it in, we would supply a position on it."[4] Chairman and Prehearing Officer Baez ruled that Issue 17L

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[2] Order No. PSC-96-1024-FOF-TP at 2; *see also*, Order No. PSC-96-0347-FOF-WS at 3.
[3] Transcript of Prehearing Conference at 48.
[4] *Id.*

was appropriate. TECo did not seek reconsideration of Chairman Baez's ruling regarding the propriety of the issue and the action clearly contemplated by it. TECo cannot now complain that the issue is beyond the scope of the proceeding.

5. Further, the Commission has continuing and ongoing jurisdiction over all fuel and purchased power costs recovered from ratepayers.[5] There can be no doubt that the action taken by the Commission in the Final Order relates to the fair and reasonable recovery of such costs from ratepayers and is thus clearly within the scope of this proceeding.

6. The remainder of TECo's argument centers on the allegation that the Commission confused base rate making with fuel and purchased power cost recovery matters. TECo's motion on this point fails the reconsideration standard as well. The Commission by no stretch of the imagination overlooked or failed to consider TECo's position, reiterated again in its motion. The issue was discussed in both the testimony of TECo witness Jordan and FIPUG witness Brown.[6] In fact, Ms. Jordan acknowledged "...that on a case-by-case basis the Commission has allowed recovery of certain expenses through the fuel and purchased power clause that would traditionally be recovered through base rates." [7]

7. But most importantly, the Commissioners explicitly discussed and explicitly rejected the position TECo argues again on reconsideration:

> Commissioner Davidson: . . . It strikes me as it is since the costs that are sought to be recovered in the fuel proceeding and the savings relate to the very same incident. It's not as if the savings result from something completely different and unrelated to the event which is giving rise to this request for money.
>
> . . .
>
> [T]hat's why I see it as something that's entirely appropriate for this proceeding

[5] Final Order at 3.
[6] Tr. at 788, 822-23, and 1060-61.
[7] Tr. at 1060.

> because it is tied to that very same event, pursuant to which the company is seeking to recover costs in a fuel proceeding. It's unlike other types of O&M costs that might not be related to fuel clauses.[8]

This was codified in the Final Order:

> Because these O&M savings derive from the same finite decision that resulted in replacement fuel costs, we believe that, under the unique circumstances presented, the replacement fuel costs to be borne by customers should be offset to some extent by the amount of savings.[9]

8. The Commission's decision was fully within its authority and the Commission also discussed that point during its deliberations. Commissioner Deason noted other instances, such as the oil back out docket, where capital expenditures were flowed through the fuel clause and netted against fuel savings.[10] The Commission permits security costs, which are normally base rate items, to flow through the fuel clause.[11] The Commission discussed Order No. 14546, where the Commission adopted a policy to permit recovery through the fuel clause of base rate items upon appropriate showing.[12] Thus, this point was explicitly considered and rejected.

9. TECo twists and turns this same basic and repetitive theme and mischaracterizes the Commission's action to no avail. For example, TECo says the Commission may not "disallow" prudent expenses. However, no prudent expenses were "disallowed." Rather, the Commission ordered a "fair and reasonable *sharing* of the O&M savings associated with the units' closure...".[13] The Commission simply required TECo to share[14] part of the savings it realized from the early closure.

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[8] Tr. at 1212.
[9] Final Order at 21.
[10] Tr. at 1215.
[11] *See*, Order No. PSC-01-2516-FOF-EI.
[12] Tr. at 1216.
[13] Final Order at 21, emphasis added. Thus, TECo's citations for this point have no applicability here. Just as an example, *Zia Natural Gas Co. v. New Mexico Public Utility Commission*, 998 P.2d 564 (NM 2000), a New Mexico case relied on by TECo to ostensibly demonstrate error on reconsideration, concerned the arbitrary disallowance of an income tax expense in a rate case. As noted, there was no disallowance here but a sharing of savings.
[14] TECo's use of the term "disallowance" is similar to its attempt to label the Commission's decision a "penalty." As noted above, the Commission has simply required TECo to share the savings with ratepayers who bear all the expense.

10. TECo complains that the Commission did not consider the "full context" in which its decision was made.[15] This amazing statement flies in the face of the extensive testimony taken in this case and the hours of discussion among the Commissioners before they reached their unanimous decision. TECo spends much of its time in this section discussing the evidence which the Commission heard, considered, discussed, and rejected.

11. TECo argues that the Commission's decision to require it to share the savings flowing from its actions is not "symmetrical" and is unfair. This argument is highly ironic coming from TECo – ratepayers must bear 100% of the increased cost, but receive only 80% of the savings. It seems that it may well be the ratepayers who have received the "asymmetrical" treatment of which TECo complains.

12. TECo's reliance on *GTE v. Clark*, 668 So.2d 971 (Fla. 1996), to support its position on equity and fairness is particularly puzzling.[16] Without the sharing the Final Order requires[17], it would be ratepayers who would be harmed to the benefit of TECo. Further, the cases TECo attempts to rely on for its "symmetry" argument are simply inapposite to the facts before the Commission in this matter. None of the factual situations are in the least similar to the situation in this case, described succinctly by Commissioner Davidson above, where the costs TECo sought to recover and the savings which the Commission required TECo to share relate to the very same incident.[18]

13. Finally, despite the fact that the Commission noted that its decision was based on

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[15] In this section of its motion, TECo reiterates, yet again, its contention that fuel costs were inappropriately mixed with base rate items.

[16] Factually, *GTE v. Clark*, is similarly far a field. It concerns the propriety of a surcharge to be collected from customers after reversal of a Commission order disallowing certain costs which the Court, in a prior decision, found appropriate.

[17] Respondents filed a Motion for Reconsideration which urges the Commission to correct an error in the calculation of the amount to be shared with ratepayers. This correction must be made to prevent further utility benefit at ratepayer expense.

[18] For example, Order No. PSC-94-0337-FOF-EI concerned a limited proceeding to investigate TECo's return on equity in which the Commission in which the Commission denied OPC's request to reduce TECo's rates.

the "unique circumstances presented,"[19] TECo raises the specter of a parade of horribles which it claims will result from the Commission's decision, for "all investor-owned utilities and the ratepayers in this state."[20] In keeping with this hyperbole, TECo engages in a broad range of speculation as to the dire consequences of the Commission's decision. However, there is no evidence whatsoever to support this conjecture and it should be rejected out of hand. Further, the Commission's past practices, which have been acknowledged by TECo, include other instances where base rate recovery has occurred through the fuel clause, yet such treatment has not led to the dire consequences which TECo predicts.

14. In sum, TECo's motion alleges nothing new and raises no point which the Commission overlooked or failed to consider.

WHEREFORE, TECo's motion for reconsideration should be denied.

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[19] Final Order at 21.
[20] TECo Motion at 10.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint Response to TECo's Motion for Reconsideration has been furnished by (*) hand delivery or U.S. Mail this 13th day of January, 2004, to the following:

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