

State of Florida



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DATE: August 5, 2004

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

FROM: Division of Economic Regulation (Bohrmann, Matlock, Trapp, VonFossen) *sum RLT RVF*
Office of the General Counsel (C. Keating, Rodan) *WCK*

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

AGENDA: 08/17/04 – Regular Agenda – Motions for Reconsideration and Clarification of Non-Final Order – Oral Argument Not Requested; Participation at the Commission’s Discretion

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

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

Case Background

This recommendation addresses two motions for reconsideration filed by Tampa Electric Company (“Tampa Electric”) seeking reconsideration of non-final orders ruling on confidentiality requests. The first motion, filed June 7, 2004, seeks reconsideration of Order No. PSC-04-0543-CFO-EI, issued May 26, 2004, in Docket No. 031033-EI, which granted in part and denied in part Tampa Electric’s request for confidential classification of portions of its response to the Florida Industrial Power Users Group’s (“FIPUG”) First Set of Interrogatories. Tampa Electric seeks reconsideration of that portion of the Order that denied confidential treatment for the Example Inland Barge Transportation Rate Analysis contained on Bates Stamp Page Nos. 5-10 in Tampa Electric’s response to Interrogatory No. 4. FIPUG responded in opposition on June 21, 2004. Staff recommends in Issue 1 that this motion be denied.

The second motion, also filed June 7, 2004, seeks reconsideration of Order No. PSC-04-0544-CFO-EI, issued May 26, 2004, which granted in part and denied in part Tampa Electric’s

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request for confidential classification of portions of intervenor testimony and exhibits. In particular, Tampa Electric seeks clarification of that portion of the Order which addressed Exhibit RFW-1 to CSX Transportation ("CSX") witness Robert F. White's testimony and reconsideration of that portion of the Order which denied confidential treatment for specified information on pages 2 and 28 of Office of Public Counsel ("OPC") witness Michael J. Majoros' testimony and Exhibit MJM-5 to Mr. Majoros' testimony. OPC and FIPUG jointly responded in opposition on June 21, 2004. Staff recommends in Issues 2 and 3 that this motion for reconsideration and clarification be granted.

The Commission has jurisdiction over this subject matter pursuant to Chapter 366, Florida Statutes, including Sections 366.04, 366.05, and 366.06, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant Tampa Electric Company's motion for reconsideration of Order No. PSC-04-0543-CFO-EI?

Recommendation: No. Tampa Electric's motion for reconsideration fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Order. (RODAN, C. KEATING, VONFOSSSEN)

Staff Analysis: The standard of review for a motion for reconsideration of a Prehearing Officer's order is whether the motion identifies a point of fact or law that the Prehearing Officer 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.re1. 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." Steward Bonded Warehouse, Inc. v. Bevis.

By Order No. PSC-04-0543-CFO-EI, the Prehearing Officer denied confidential classification for Bates Stamp Page Nos. 5-10 of Tampa Electric's response to FIPUG's First Set of Interrogatories, No. 4, with the exception of the last line of a table on Bates Stamp Page No. 10 and the accompanying footnote, which the Order holds as confidential. In its motion for reconsideration, Tampa Electric argues that the Prehearing Officer failed to consider that the information in question summarizes Tampa Electric witness Brent Dibner's analytical methodology establishing waterborne transportation market rates and as such, is proprietary confidential business information created by Mr. Dibner. Tampa Electric notes that Mr. Dibner wrote this simplified description to help FIPUG and the other parties in the docket understand his methodology. Tampa Electric asserts that although this information is presented in less detail than Mr. Dibner's model and report, it is a description of the same proprietary methodology used by Mr. Dibner to establish waterborne transportation market rates. Next, Tampa Electric argues that Mr. Dibner developed the methodology described on Bates Stamp Page Nos. 5-10 based on his extensive experience working in the maritime transportation industry. Tampa Electric asserts that if that information is made public, it could be taken and used by Mr. Dibner's competitors and would cause significant harm to Mr. Dibner's ability to earn his livelihood as a maritime industry consultant.

Tampa Electric notes that the Order states as the basis for denying confidential treatment to Bates Stamp Page Nos. 5-10 that the analysis is not based upon the Dibner Maritime Associates ("DMA") model or methodology. Tampa Electric asserts that this is incorrect and that the Commission should reconsider the Order's conclusion that the information on Bates Stamp Page Nos. 5-10 is not entitled to confidential treatment. Tampa Electric argues that all of Bates Stamp Page Nos. 5-10 of its response to Interrogatory No. 4 is entitled to confidential protection since it constitutes information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.

In its response, FIPUG argues that Tampa Electric's motion for reconsideration fails to identify a point of fact or law that the Commission has overlooked. FIPUG contends that Tampa Electric's motion is a reargument of its request for confidential classification. FIPUG asserts that Tampa Electric's sole argument is that the information in the Example Inland Barge Transportation Rate Analysis ("Example") on Bates Stamp Page Nos. 5-10 contains confidential proprietary information of DMA and Mr. Dibner. FIPUG contends that the Order should stand because the Example itself states that "[i]t is not the methodology, structure, or model used by DMA" FIPUG also asserts that the Example notes that it "may have limitations in its adaptability" FIPUG argues that given the limited adaptability of the Example and the fact that it does not contain the methodology, structure or model used by DMA, it is highly unlikely that its dissemination poses any risk of harm to Mr. Dibner.

In denying confidential treatment to the majority of the Example on Bates Stamp Page Nos. 5-10 in Tampa Electric's response to FIPUG's Interrogatory No. 4, the Prehearing Officer found that the information was not proprietary confidential business information. In particular, the Prehearing Officer stated:

However, the information on Bates Stamp Pages 5-10, with the exception of the last line of the table on Bates Stamp Page 10 and accompanying footnote, is an inland barge transportation rate analysis which Tampa Electric acknowledges is not the methodology, structure or model used by DMA and is further described as a simplified approach. Since the analysis is not based upon the DMA model or methodology, it is not proprietary confidential business information. Therefore, confidential classification is denied for the above mentioned portions of Tampa Electric's answer to Interrogatory No. 4 (Bates Stamp Page Nos. 5-10).

Order No. PSC-04-0543-CFO-EI, p. 2.

Tampa Electric fails to identify any point of fact or law that the Prehearing Officer overlooked in this analysis. Staff notes, as stated by Tampa Electric, that the rate analysis is a simplified example of a reasonable approach to inland barge costing. While conceptually similar, it is not the methodology, structure or model used by DMA. The analysis reflects a common sense approach using data commonly available to the industry. The Example's analysis shows general costing concepts and does not reveal the intricacies of Mr. Dibner's model. Further, Tampa Electric has not shown how revealing the Example would impair DMA's competitive business interests when it is, in fact, not the methodology, structure or model used by DMA. For these reasons, staff recommends that the Commission deny Tampa Electric's motion for reconsideration of Order No. PSC-04-0543-CFO-EI.

Issue 2: Should the Commission grant Tampa Electric's motion for reconsideration of Order No. PSC-04-0544-CFO-EI?

Recommendation: Yes. The Order, based on a mistake of fact, erroneously denies confidential classification to information which, if made public, would allow one to calculate the confidential contractual rate for transportation services provided by TECO Transport to Tampa Electric. (RODAN, C. KEATING, MATLOCK)

Staff Analysis: The standard of review for a motion for reconsideration of a Prehearing Officer's order is whether the motion identifies a point of fact or law that the Prehearing Officer 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.re1. 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." Steward Bonded Warehouse, Inc. v. Bevis.

The portions of Order No. PSC-04-0544-CFO-EI at issue denied confidential classification to specified information on pages 2 and 28 of OPC witness Michael J. Majoros' testimony and on Exhibit MJM-5, page 1 of 8, to Mr. Majoros' testimony.

First, Tampa Electric requests reconsideration of the denial of confidential treatment of certain information contained on page 2 of Mr. Majoros' testimony, at lines 7, 9, and 12. Tampa Electric notes that the figure shown on line 7 in conjunction with the figure shown on line 9, if made public, would allow one to calculate Tampa Electric's confidential contractual rate for transportation services provided by TECO Transport. According to Tampa Electric, Mr. Majoros' recommended rate is shown on line 9, and he states that this rate represents a certain percent reduction, listed on line 7, in the contractual rate Tampa Electric pays to TECO Transport under the contract that took effect January 1, 2004. According to Tampa Electric, revealing both of these numbers will reveal Tampa Electric's contract rate with TECO Transport, which is competitive contractual information.

Second, Tampa Electric asserts that the figure shown on line 12, in conjunction with the figure shown on line 9, also allows one to calculate Tampa Electric's contractual rate for transportation services from TECO Transport under the contract that took effect on January 1, 2004. According to Tampa Electric, Mr. Majoros' recommended rate is shown on line 9, and he states that his rate demonstrates that the contractual rates are overcharging ratepayers by a certain number of dollars annually, which is the figure shown on line 12. Tampa Electric notes that because the 5.5 million maximum annual tonnage under the contract is publicly known and was disseminated in the RFP, it is possible to derive the contractual rate. Tampa Electric asserts that dividing the figure shown on line 12 by the annual tonnage gives the per ton amount that Mr. Majoros believes is being overcharged; adding this per ton amount to Mr. Majoros' recommended rate on line 9 shows the contract rate to within a few cents per ton. Tampa

Electric contends that revealing both of these numbers will reveal Tampa Electric's contract rate with TECO Transport, which is confidential contractual information.

Tampa Electric states that the minimum redaction of the information on page 2 that would protect competitive confidential information is to treat the figure shown on line 9 as confidential. Alternatively, Tampa Electric asserts that if the figure on line 9 is not treated confidentially, the two numbers shown on lines 7 and 12 must both be treated as confidential to avoid revealing the contract rate.

Tampa Electric also seeks reconsideration of the denial of confidential treatment with respect to page 28, lines 1-2, of Mr. Majoros' testimony. Tampa Electric asserts that these numbers must be treated consistently with the numbers shown on page 2, lines 7, 9, and 12, discussed above. The figure on page 28, line 1, is the same figure shown on page 2, line 7. The figure on page 28, line 2, is the same figure shown on page 2, line 9.

Further, Tampa Electric seeks reconsideration of the denial of confidential treatment with respect to the information shown in Mr. Majoros' Exhibit MJM-5, page 1 of 8, column 8, row 4. According to Tampa Electric, the number shown in row 4 is the same as that shown on pages 2 and 28 of Mr. Majoros' testimony and cannot be revealed without revealing the proprietary confidential contract rate.

In its joint response, OPC and FIPUG argue that Tampa Electric's motion for reconsideration fails to identify a point of fact or law that the Commission has overlooked. OPC and FIPUG note that Order No. PSC-04-0544-CFO-EI held that the percentage figures and the dollar amount contained on page 2, lines 7 and 12, and page 28, line 1, of Mr. Majoros' testimony are not confidential. OPC and FIPUG argue that these figures are the result of Mr. Majoros' analysis and are his professional work product and opinion. According to OPC and FIPUG, Tampa Electric's motion does not oppose their arguments that the percentage figure and the dollar amount do not contain information about contract terms and rates or disclose any information about existing contracts. OPC and FIPUG further assert that Tampa Electric's motion demonstrates the correctness of their argument that the percentage figure and dollar amount cannot be used to back into other confidential numbers in the absence of the recommended rate number appearing on page 2, line 9, and Exhibit MJM-5, page 1 of 8, column 8, row 4. OPC and FIPUG contend that Tampa Electric's motion should be denied and, at a minimum, the information on page 2, lines 7 and 12, and page 28, line 1, should be made public consistent with Order No. PSC-04-0544-CFO-EI.

Staff believes that Order No. PSC-04-0544-CFO-EI, based upon a mistake of fact, erroneously denies confidential classification to information which, if made public, would allow one to calculate the confidential contractual rate for transportation services provided by TECO Transport to Tampa Electric. That contractual rate has been granted confidential classification by Order No. PSC-04-0548-CFO-EI, issued May 26, 2004, in this docket. Accordingly, staff recommends that the Commission grant Tampa Electric's motion for reconsideration. Confidential classification should be granted for the numbers appearing on page 2, lines 7 and 12, and page 28, line 1, of Mr. Majoros' testimony so that the confidential contractual rate paid by Tampa Electric to TECO Transport cannot be calculated. With this information held confidential, disclosure of the information on page 2, line 9, on page 28, line 2, and in Exhibit

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MJM-5, page 1 of 8, column 8, row 4, will not allow one to calculate the confidential contractual rate. Thus, confidential classification is not necessary for the information on page 2, line 9, on page 28, line 2, or in Exhibit MJM-5, page 1 of 8, column 8, row 4.

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Issue 3: Should the Commission grant Tampa Electric's motion for clarification of Order No. PSC-04-0544-CFO-EI?

Recommendation: Yes. The Commission should clarify Order No. PSC-04-0544-CFO-EI as requested in Tampa Electric's motion. (RODAN, C. KEATING)

Staff Analysis: Order No. PSC-04-0544-CFO-EI states at page 2, in pertinent part:

Page 1 of 9 of Exhibit RFW-4 to Mr. White's testimony is a letter to Tampa Electric regarding the CSX proposal. The letter, with the exception of lines 3-6, contains information available to the public and would not impair efforts of the utility to contract for goods and services on favorable terms. Therefore, confidential classification is granted for Page 1 of 9, lines 3-6 of Exhibit RFW-4 and denied for the remainder of Page 1 of 9 of Exhibit RFW-4 to Mr. White's testimony.

In its motion for clarification, Tampa Electric notes that only lines 3-6 on page 1 of 9 of Exhibit RFW-4 are granted confidential classification. Tampa Electric requests clarification that the Order references **lines 3-6 of the first paragraph in the body of the letter**. Tampa Electric asserts that technically lines 3-6 of the letter are Tampa Electric witness Joann Wehle's title and business address, which is not confidential information.

Staff recommends that the Commission grant Tampa Electric's motion for clarification. The clarification sought by Tampa Electric will properly reflect the information that Order No. PSC-04-0544-CFO-EI was intended to hold as confidential.

In sum, staff recommends that the Commission clarify Order No. PSC-04-0544-CFO-EI as requested in Tampa Electric's motion.

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Issue 4: Should this docket be closed?

Recommendation: No. This docket should remain open. (RODAN, C. KEATING)

Staff Analysis: A post-hearing recommendation is scheduled for Commission vote at the September 7, 2004, Agenda Conference; accordingly, this docket should remain open.