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November 14, 2008

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Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Petition for Rate Increase by Tampa Electric Company;
Docket No. 080317-EI

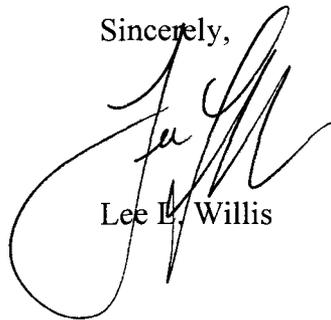
Dear Ms. Cole:

Enclosed are the original and fifteen (15) copies of Tampa Electric Company's Motion for Summary Final Order on FIPUG's Lack of Standing for filing in the above-referenced.

Please acknowledge receipt and filing of this document by stamping the duplicate copy of this letter and returning same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,



Lee L. Willis

LLW/bjd

cc: All Parties of Record (w/encls.)

DOCUMENT NUMBER-DATE

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Rate Increase)
by Tampa Electric Company)
_____)

DOCKET NO. 080317-EI

FILED: November 14, 2008

TAMPA ELECTRIC COMPANY'S MOTION
FOR SUMMARY FINAL ORDER ON FIPUG'S LACK OF STANDING

Pursuant to Rule 28-106.204, Florida Administrative Code, Tampa Electric Company ("Tampa Electric" or "the company") requests that the Florida Public Service Commission ("FPSC" or "Commission") enter a summary final order holding that the Florida Industrial Power Users Group ("FIPUG") does not have standing to participate in this docket and dismissing FIPUG from this docket, and states:

INTRODUCTION

1. FIPUG filed a petition to intervene ("FIPUG Petition") in this docket on August 26, 2008. [doc. 07761-08] Therein, FIPUG alleged that (1) it is an "ad hoc association consisting of industrial users of electricity in Florida," (2) the "cost of electricity constitutes a significant portion of FIPUG members' overall costs of production" and (3) the "amount of the rate increase approved, if any, as well as cost of service and rate class issues will affect FIPUG members' substantial interests by increasing their costs of electricity, thus affecting their production costs, their competitive posture and their levels of employment." FIPUG Petition, ¶¶ 5-6.

2. FIPUG also alleged that its interests are "of the type that this proceeding is designed to protect." FIPUG Petition, ¶7 (citing Agrico Chemical Company v. Dep't of Env. Reg., 406 So. 2d 478 (Fla. 2nd DCA 1981)). Although it was granted on September 16, 2008 [doc. 8662-08], FIPUG's Petition does not expressly allege that a substantial number of FIPUG's

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members would have standing to participate in this docket, that the subject matter of the FPSC's determination in this case is within FIPUG's general scope of interests and activities and that the relief requested by FIPUG in this case is of a type appropriate for an association to receive on behalf of its members.

3. After repeatedly requesting that FIPUG identify its members participating in this proceeding and after repeated refusals by FIPUG to provide the requested information, Tampa Electric served its First Set of Interrogatories (Nos. 1 – 7) to FIPUG on October 3, 2008 [doc. 09373-08]. Tampa Electric's Interrogatory No. 1 requested that FIPUG identify all of its members.¹ The purpose of this interrogatory was to enable Tampa Electric to evaluate whether a substantial number of FIPUG's members would have standing in this case, the first inquiry when evaluating whether an association has standing in administrative litigation.

4. FIPUG served its objections to Tampa Electric's First Set of Interrogatories on October 23, 2008 [doc. 10085-08]. FIPUG's Objection to Tampa Electric's Interrogatory No. 1 stated: "In addition to its general objections, FIPUG objects to this request on the grounds that it is not relevant to the subject matter of this docket and is not reasonably calculated to lead to the discovery of admissible evidence. In addition, it is overly broad as it seeks information regarding entities not participating in this case. Further, such information is confidential trade secret information. Without waiving these objections, FIPUG will provide the names of those FIPUG companies that normally participate in matters affecting the TECO service area pursuant to the Non-Disclosure Agreement executed between the parties. TECO is well aware of the

¹Interrogatory No. 1 states: "Identify each current member of FIPUG, including the following, with respect to each member. a. Name of member, b. Business address, c. FIPUG's principal contact with the member, d. Nature of member's business activities e. Location of member's business facilities."

address, nature of business activities, and business facilities of these customers." (Emphasis added)

5. FIPUG served its answers on November 4, 2008 (Exhibit Three) [doc. 10351-08]. FIPUG's answer to Interrogatory No. 1 a., b., and d. states: "FIPUG is an ad hoc association consisting of industrial users of electricity. The FIPUG companies normally participating in matters affecting the TECO service territory are: [list of five companies claimed to be confidential by FIPUG]."

6. FIPUG's answer is notable for what it says and what it does not say. The answer affirms under oath that FIPUG is an "ad hoc association," as opposed to a corporation or partnership. The answer conspicuously does not use the term "members" and does not identify any entity that is actually participating in this case under the fictitious name of FIPUG. Instead, FIPUG's answer uses the phrase "companies normally participating in matters affecting the TECO service territory." This deliberate non-use of the word "member(s)" reflects the fact that FIPUG is not a real association with an identifiable membership, but rather, is a loosely organized and ever changing group² of entities that from time to time seek to participate in utility rate cases on a confidential basis behind the cloak of the fictitious name FIPUG – not in their own names.

² According to Black's Law Dictionary (5th Ed. p.38), the term "ad hoc" means "for this; for this special purpose." FIPUG's use of "ad hoc" in its self-description is further proof that FIPUG is not a real association with governing documents, procedures, members and officers, but is nothing more than a group of entities that have hired lawyers and witnesses so they can participate in this proceeding behind a veil of secrecy.

7. A review of the records of the Department of State, Division of Corporations, reveals that FIPUG is not a Florida corporation and is not a foreign corporation registered to do business in Florida.³

8. As shown below, there is no genuine issue of material fact regarding FIPUG's lack of legal capacity or standing to participate in his case; therefore, the Commission should enter a summary final order finding that FIPUG does not have the legal capacity or standing to participate in this proceeding and dismiss FIPUG from this docket.

Argument

9. The Commission should enter a summary final order⁴ holding that FIPUG does not have standing to participate in this proceeding for two reasons. First, under Florida law, an unincorporated association like FIPUG has no legal existence and generally does not have the capacity to participate in litigation as an entity separate from its members. See Asociacion de Perjudicados Por Inversiones Efectuadas En USA v. Citibank, 770 So. 2d 1267, 1269 n. 3 (Fla. 3d DCA 2000). Rather, in the absence of an enabling or permissive statute conferring associational standing (not present here), an unincorporated association must participate in litigation in the names of the individuals composing it, not a fictitious name. Id.

³ FIPUG has not alleged that it is a corporation and in its answer to Interrogatory No. 1 has stated that it is an "ad hoc" corporation. To the extent the Commission is uncertain about FIPUG's status as an unincorporated association, Tampa Electric requests that the Commission take official recognition that FIPUG is not listed in the Division of Corporation's records as a corporation. The Commission may do so pursuant to Section 90.202(6), Florida Statutes, which allows judicial or official recognition of "Records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States." (emphasis added)

⁴Rule 28-106.204(4), F.A.C., states: "In cases in which the Division of Administrative Hearings has final order authority, any party may move for summary final order whenever there is no genuine issue as to any material fact." According to Rule 25-40.001, F.A.C., the Commission has not excepted Rule 28-106.204, F.A.C., so the Commission, which has final order authority in this case, stands in the shoes of DOAH.

10. Two Florida appellate decisions illustrate these principals. In Walton-Okaloosa-Santa Rosa Medical Society v. Spires, 153 So. 2d 325, 327 (Fla. 1st DCA 1969), the court held that an action for an injunction against a local unincorporated medical association could not be maintained in the name of the association, because the unincorporated medical society had no legal capacity to be sued. In Citibank, supra, the Third District Court of Appeals affirmed a trial court order dismissing an action for damages brought by an unincorporated association of investors on grounds that the association had no legal capacity (standing) to sue. 770 So. 2d at 1269. In both cases, the courts noted that the individual members of the association would have standing to participate in their individual capacities. See Medical Society, 153 So. 2nd at 327 and Citibank, 770 So. 2d at 1269. Id.

11. FIPUG's answer to Interrogatory No 1. states that FIPUG is an "ad hoc association." The records of the Department of State, Division of Corporations, show that FIPUG is not a Florida corporation and is not a foreign corporation registered to do business in Florida. FIPUG's deliberate non-use of the word "member(s)" in its answer reflects the fact that FIPUG is not a real association with an actual, identifiable membership, but rather, is a loosely organized and ever changing group of entities who from time to time seek to participate in utility rate cases on a confidential basis behind the cloak of the fictitious name FIPUG – not in their own names. Like the associations in Citibank and Medical Society, FIPUG is an unincorporated association with no legal capacity to sue or be sued or to participate in this case in the name of FIPUG and the Commission should enter a summary final order finding that FIPUG does not have the legal capacity or standing to participate in this docket.

12. Second, even if FIPUG is a type of legal entity with the general legal capacity to participate in administrative litigation, FIPUG's refusal to fully answer Tampa Electric's

Interrogatory No. 1 leaves an undisputed factual record showing that that FIPUG does not meet the test for associational standing. To have standing under the APA,¹ an association must demonstrate that a substantial number of its members would have standing, that the subject matter of the agency determination is within the association's general scope of interests and activities and that the relief requested is of a type appropriate for an association to receive on behalf of its members. See Florida Home Builders v. Dept. of Labor and Employment Security, 412 So.2d 351 (Fla. 1982); Friends of the Everglades, Inc. v. Board of Trustees of Intern. Imp. Trust Fund, 595 So.2d 186 (Fla. 1st DCA 1992); Farmworker Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services, 417 So.2d 753 (Fla. 1st DCA 1982).

13. Here, Tampa Electric gave FIPUG an opportunity to list its entire membership (if it has a “membership”) and to make an evidentiary showing that a substantial number of its members (if it has any real “members”) would have standing to participate in this case. FIPUG refused to fully answer the question and claimed that the answer it gave is confidential. FIPUG’s answer did not use the term “members,” but described five entities as “companies normally participating in matters affecting the TECO service territory.” The wording of FIPUG’s answer confirms that FIPUG is not a real association with members, but is nothing more than a group of entities that have hired lawyers and witnesses so they can participate in this proceeding behind a veil of secrecy.⁵

14. Since FIPUG is not a real association with an identifiable group of members, it simply cannot satisfy the first prong of the test for associational standing, namely whether a substantial number of its members would have standing to participate in the case. Even if

⁵ FIPUG’s answer to Interrogatory No. 1 did not state that the five “companies normally participating in matters affecting the TECO service territory” are customers of Tampa Electric, which further calls the standing of FIPUG into question.

FIPUG can be considered an association under some loose definition of the term, its failure to provide its entire membership list (and its position that its membership list is secret and not relevant) leaves the Commission unable to ascertain whether "a substantial number" of FIPUG's "members" would have individual standing to participate in this case. Based on the undisputed factual record before the Commission, FIPUG has failed to show that it has any "members" or that a substantial number of its "members" have standing to participate in this case. Accordingly, the Commission must conclude that FIPUG does not meet the test for standing as an association and should enter a summary final order finding that FIPUG does not have standing to participate in this case.

Conclusion

15. Although FIPUG's Petition to Intervene was granted, FIPUG has now provided an interrogatory answer under oath that it is an "ad hoc association," not a corporation. The records of the Department of State, Division of Corporations do not reveal a domestic or foreign corporation named "Florida Industrial Power Users Group" that registered to do business in Florida. FIPUG's interrogatory answer and Florida's official corporate records demonstrate that FIPUG is an unincorporated association that lacks the legal capacity to participate in litigation in Florida.

16. FIPUG has also refused to disclose a membership list or to identify any entity as a "member" of FIPUG. Without a membership list, which FIPUG claims is secret and irrelevant, the record before the Commission does not show that a substantial number of FIPUG's members would have individual standing to participate in this case, the first of the three tests for determining whether an association has standing to participate in administrative litigation.

Accordingly, the Commission should enter a summary final order finding that FIPUG does not have standing to participate in this case and dismiss FIPUG from this docket.

DATED this 14th day of November, 2008.



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ATTORNEYS FOR TAMPA ELECTRIC
COMPANY

CERTIFICATE OF SERVICE
DOCKET NO. 080317-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Summary Final Order on FIPUG's Lack of Standing, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 14th day of November, 2008 to the following:

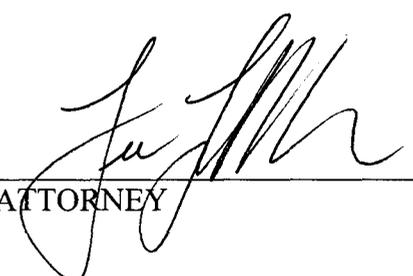
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