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**Tampa Electric Company, a wholly owned subsidiary of TECO Energy, Inc. d/b/a TECO Peoples Gas and International Brotherhood of Electrical Workers, AFL–CIO, Local Union 108.** Cases 12–CA–144359, 12–CA–152306, and 12–CA–167550

September 16, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND MCFERRAN

On June 28, 2016, Administrative Law Judge Michael A. Rosas issued the attached decision. The General Counsel filed exceptions.<sup>1</sup>

The National Labor Relations Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge’s rulings, findings, and conclusions, to amend the conclusions of law and remedy, and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4.

“4. The Respondent promised employee Jonathan Sinkler a wage increase in order to encourage him to abandon his support for the Union representation in violation of Section 8(a)(1) of the Act.”

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative actions

<sup>1</sup> There are no exceptions to the judge’s findings that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employee Jonathan Sinkler and by promising Sinkler a wage increase to encourage him to abandon his support for the Union, violated Sec. 8(a)(5), (3), and (1) by withholding annual merit wage increases due in December 2014 and 2015 without first notifying the Union and giving it an opportunity to bargain and attributing that unilateral change to union representation, and violated Sec. 8(a)(5) and (1) by failing and refusing to provide the Union with wage increase information requested by the Union in May 2015. The General Counsel excepts to certain inadvertent errors in the judge’s decision and recommended Order.

<sup>2</sup> We shall amend the judge’s conclusions of law to correct the name of employee Jonathan Sinkler, amend the remedy to include the standard supporting language and authorities, and modify the judge’s recommended Order to conform to the Board’s standard remedial language for the violations found. We shall also substitute a limited bargaining order for the judge’s recommended affirmative bargaining order in accordance with *Mimbres Memorial Hospital*, 337 NLRB 998, 998 fn. 2 (2002). We shall substitute a new notice to conform to the Order as modified.

designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5), (3), and (1) by withholding employees’ annual merit wage increases, we shall order the Respondent to implement the wage increases scheduled for December 2014 and December 2015 and make bargaining unit employees whole for the loss of earnings suffered as a result of the unlawfully withheld wage increases. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, in accordance with our recent decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall order the Respondent to compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

Having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with relevant and necessary information requested on May 11, 2015, we shall order the Respondent to provide the Union with the requested information.

ORDER

The National Labor Relations Board orders that the Respondent, Tampa Electric Company, a wholly owned subsidiary of TECO Energy, Inc., d/b/a TECO Peoples Gas, Sarasota, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union sympathies and support.

(b) Promising wage increases to employees in order to discourage employees from supporting International Brotherhood of Electrical Workers, AFL–CIO, Local 108 (the Union) or any other union.

(c) Withholding merit wage increases from unit employees because of their support for the Union.

(d) Unilaterally changing the terms and conditions of employment of its unit employees by withholding merit wage increases.

(e) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the Respondent’s unit employees.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Implement the wage increases that were scheduled for December 2014 and 2015 and were withheld from unit employees.

(b) Make employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawfully withheld wage increases, in the manner set forth in the amended remedy section in this decision.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time utility coordinators, senior utility technicians, utility technicians and apprentice technicians employed by the Employer at its facility in Sarasota, Florida excluding all other employees, professional, warehouse and office clerical employees, engineers, managers, guards and supervisors as defined in the Act.

(e) Furnish to the Union in a timely manner the information requested by the Union on May 11, 2015.

(f) Within 14 days after service by the Region, post at its Sarasota, Florida facility copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Rea-

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 5, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 16, 2016

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Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on  
your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union sympathies and support.

WE WILL NOT promise you wage increases to encourage you to abandon your support for International Broth-

erhood of Electrical Workers, AFL–CIO, Local 108 (the Union) or any other union.

WE WILL NOT withhold your annual merit wage increases because you selected the Union as your exclusive collective-bargaining representative.

WE WILL NOT change your terms and conditions of employment by withholding merit wage increases without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL implement the merit wage increases withheld from unit employees that were scheduled for December 2014 and 2015.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of our unlawfully withheld wage increases, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time utility coordinators, senior utility technicians, utility technicians and apprentice technicians employed by the Employer at its facility in Sarasota, Florida excluding all other employees, professional, warehouse and office clerical employees, engineers, managers, guards and supervisors as defined in the Act.

WE WILL furnish to the Union in a timely manner the information requested by the Union on May 11, 2015.

TAMPA ELECTRIC COMPANY D/B/A TECO  
PEOPLES GAS

The Board’s decision can be found at [www.nlr.gov/case/12-CA-144359](http://www.nlr.gov/case/12-CA-144359) or by using the QR code below. Alternatively, you can obtain a copy of the

decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.



*Caroline Leonard and Dallas L. Manuel II, Esqs.*, for the General Counsel.

*Thomas M. Gonzalez, Esq. (Thompson, Sizemore, Gonzalez & Hearing, P.A.)*, for the Respondent.

#### DECISION

#### STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Tampa, Florida, on March 7 and April 25, 2016. Based on timely filed charges by The International Brotherhood of Electrical Workers, AFL–CIO, Local Union 108 (the Union), the General Counsel of the National Labor Relations Board (the General Counsel) issued the initial complaint against Tampa Electric Company, a wholly owned subsidiary of TECO ENERGY, INC. d/b/a TECO Peoples Gas (the Company or Respondent) on February 16, 2016.

The amended consolidated complaint alleges that a company supervisor and agent violated Section 8(a)(1) of the National Labor Relations Act (the Act)<sup>1</sup> in September 2014 by (1) coercively interrogating employees about their union sympathies and (2) promising wage increases in order to induce employees to abandon their support for the Union.<sup>2</sup> The complaint further alleges violations of Section 8(a)(3) and (1) by: (1) withholding annual wage increases in December 2014 and 2015 because employees voted for the Union as their exclusive collective-bargaining representative. Finally, the complaint alleges violations of Section 8(a)(5) and (1) based on (1) the aforementioned changes to the Company’s compensation customary practices without providing notice and opportunity to bargain, and (2) the failure and refusal to furnish merit wage increase information requested by the Union.

The Company denies making any promises of wage increases if employees rejected union representation or engaging in coercive interrogation about the union, insisting its supervisory and agent statements were merely responsive to questions posed by employees. With respect to the withholding of wage increases, the Company contends that it held up the customary increases in order to bargain over wages with the Union, as employees’ newly certified bargaining representative. The Company further denies discriminating against unit employees, insisting that wage increases are entirely discretionary. With respect to the Union’s request for merit wage increase infor-

<sup>1</sup> 29 USC §§ 151-169.

<sup>2</sup> All dates refer to 2014 unless otherwise noted.

mation, the Company contends that the information is irrelevant to the Union's role but was, in any event, provided to the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Company, a Florida corporation, is engaged in the sale and distribution of natural gas to residential and commercial customers at its facility in Sarasota, Florida, where it annually derives gross revenues in excess of \$250,000 and purchases goods and services valued in excess of \$50,000 directly from points outside the State of Florida. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Company's Compensation Practices*

The Company, a wholly owned subsidiary of TECO Energy, Inc., d/b/a TECO Peoples Gas, and a utility specializing in electric and gas delivery, is headquartered in Tampa, Florida. Its facility in Sarasota, Florida (the Sarasota Division), is managed by Steven Patterson. The Sarasota Division includes apprentices, technicians, senior technicians, and utility coordinators, and professional and clerical employees.

Every December since at least 2008, the Company has issued approximately 3 percent merit wage increases (merit raises) to Sarasota Division employees. The process begins in the fall of each year with memoranda to "Performance Coaches" regarding a merit budget and timeline for the Company's performance review and merit wage increase processes (the annual merit process). Merit raises are usually effective in late December and they typically appear in the first pay paychecks of the following year. The annual merit budget process is based on several factors, including performance evaluations. The process is implemented at the division level and passed on through several management levels until it reaches the Company's chief executive officer and the compensation department.

Merit raises are determined by each employee's direct supervisor/coach based on that year's merit budget established by the Company's Compensation Department, the employee's performance and the employee's status relative to the salary "midpoint" for their job classification. The Compensation Department publishes a salary chart indicating the range of acceptable salaries for each job classification, based on surveys of industry standards in the vicinity. For all utility coordinators, senior utility technicians and apprentice utility technicians at the Sarasota Division, the range is from 80 percent to 120 percent of the midpoint. The guidelines provide an exception for exceptional employees, who may earn over 110 percent of the midpoint based on merit raises or bonuses.

The company-wide merit budget has been 3 percent since 2009. Patterson's role in the annual merit budget process con-

forms to Company practice. As supervisor and coach for the Sarasota Division, his performance ratings are based on fixed categories: Unacceptable, Effective, Commendable and Exceptional. After entering the ratings into the computer database, he enters his recommended merit raises. With one exception, Patterson's merit raise recommendations over the past 5 years have ranged between 2.7 percent and 3.2 percent. Those recommendations are reviewed and almost always approved entirely up the management chain in the following order: Southern Territory manager Jesus Vega, director of gas operations Rick Wall, senior vice president William Whale and chief executive officer John Ramil. The final step is a review by the compensation department for conformity with the merit budget.

###### B. *Discussion about Union Representation*

The Sarasota Division conducts weekly team meetings every Wednesday led by Patterson on different topics. The first Wednesday of the month is a general meeting covering numerous topics with presentations by human resource personnel and other speakers. On September 3, Patterson was away on training. However, employees still convened and heard a presentation by Eric Shyrock, the human resources officer who services the Sarasota Division, about the Company's pension system and its recent purchase of the New Mexico Gas Company.<sup>3</sup> Some questions or comments by employees alluded to the unionization or attempted unionization of the New Mexico Gas Company. Shyrock did not address those questions or comments. As was his custom, after the presentation, Shyrock remained available to answer individual questions after the meeting.

When the meeting ended, Shyrock was speaking with several employees when Jonathan Sinkler and Cody Young, apprentices at the time, approached. Young asked him how the New Mexico Gas Company employees unionized, if that would be possible for Company employees to unionize, what the benefits were and the protection it would provide employees. He also alluded to other Company divisions that were already unionized. Shyrock replied that it was one of those "tricky subjects," explaining that the union is something that stands in between employees and the Company's human resources office.<sup>4</sup>

At that point, Sinkler mentioned an incident that occurred about 45 days earlier in which he went to the wrong location in responding to a reported gas leak. As a result of the incident, Patterson and Vega met with Sinkler. They reviewed the job procedure and explained the significance of Sinkler's mistake. Pursuant to protocol, Patterson provided Sinkler with a "Lessons Learned" form and instructed him to complete it. Sinkler was not disciplined, but was still worried about the possibility

<sup>3</sup> Shyrock is employed by TECO Energy Services Company, the Company's parent organization. It is not disputed that he was an agent pursuant to Sec. 2(13) of the Act.

<sup>4</sup> Shyrock generally corroborated Sinkler's version about the substance of their conversation, but was more credible as to what was said by Sinkler and/or Young. Sinkler's testimony regarding this meeting was mostly vague and merely paraphrased the conversation. (Tr. 21-23; 192-197.)

of further discipline.<sup>5</sup> Shryock, unfamiliar with the incident, surmised that if Sinkler was going to be disciplined as a result of the incident, he would have been notified already. As Sinkler walked away, a coworker remarked that Shryock was “not who you ask to start a union.”<sup>6</sup>

On September 4, Shryock brought up Sinkler’s inquiry about unionization at a human resources team meeting.<sup>7</sup> Shryock then called Patterson and set up a meeting at the Sarasota Division the following morning. Patterson was “shocked” to hear that Sinkler had raised issues regarding the gas leak incident and about interest in unionizing.

On September 5, Patterson and Shryock met during the morning in Patterson’s office. After lunch, Patterson and Shryock called Sinkler into Patterson’s office to go over Sinkler’s completed Lessons Learned form. In accordance with Patterson’s customary practice, Sinkler read the form out loud and Patterson followed with a discussion about the mistake.

After discussing the gas leak incident, Patterson told Sinkler, “I feel like I’ve been left a little in the dark . . . I end every meeting with a ‘do you all have any issues or concerns for me?’ And we just had midyear performance reviews, and I didn’t hear anything out of anybody.” Sinkler requested clarification and Patterson replied that Shryock passed along Sinkler’s inquiry about unionizing. Sinkler responded that “[w]e were just joking around talking.” Patterson asked who else Sinkler was referring to and he revealed it was Young. The discussion had reverted to the performance issue for a few moments when Patterson asked, “Well, why are you wanting to unionize?” Sinkler insisted he knew little about unions, but heard that employees at the Company’s new affiliate in New Mexico were unionized and was curious. Patterson then asked Sinkler, “What do you think a union could do for you?” Sinkler again professed ignorance of any independent knowledge about unions, but added that he also heard from other employees that the Company’s Lakeland, Florida employees were covered by a union contract and received a guaranteed 3 percent raise. Patterson replied, “Well, I can do that for you, bud.”

The meeting continued, with the topic of discussion alternating between Sinkler’s performance and unions. Patterson said at some point, “If I don’t know anything that’s going on, I can’t help to know. If there’s anything that’s going on . . . if you tell me, then I can do something. If not—maybe, I can’t.” Shryock eventually interjected that it was not a “strong arm by HR,” that it was just their job to hear what the issues were. Finally, Sinkler asked Patterson, “Man to man, am I going to lose my

<sup>5</sup> Sinkler conceded that on cross-examination that his concern about the potential for further discipline was based on speculation and not any statements on Patterson’s part. (Tr. 50–51.)

<sup>6</sup> The testimony by Sinkler and Shryock was fairly consistent regarding this portion of the conversation. (Tr. 22–23, 44, 47–50, 198–201.)

<sup>7</sup> Contrary to Shryock’s assertion, I find that he was instructed to follow up with about the gas leak incident as a pretext for further information regarding Sinkler’s interest in union affiliation. Shryock’s testimony that the gas leak issue was “weird” was not credible, since Patterson had already implemented the counseling and positive discipline through the Lessons Learned exercise. Moreover, Shryock opined to Sinkler on September 3 that no further disciplinary action was likely.

job?” Patterson replied that he did not know and was going to have to run things by “the higher-ups.”

Within 10 to 20 minutes after Sinkler departed from the office, Patterson called Sinkler and asked him to return to the office to change the date on his Lessons Learned form to that day, instead of the date when he originally turned it in weeks before. A few minutes later, Sinkler called Shryock, who left Patterson’s office to take the call. Sinkler told Shryock that he did not feel comfortable changing the date since he had already completed the form. Sinkler was not required to change the date, and no discipline issued from his refusal to do so.<sup>8</sup>

### C. Employees Choose Union Representation

On November 3, the Union filed a petition to serve as the bargaining representative for a unit consisting of 19 field employees at the Company’s Sarasota Division. The Board conducted a representation election at the Sarasota Division on December 10. The Union prevailed by a vote of 16 to 3.

On December 19, the Company distributed a memorandum to unit employees sharing its expectation that the National Labor Relations Board (the Board) would certify the results of the election. The Company also expressed its disappointment that the Union would be certified as the unit’s labor representative, preempting the Company’s “opportunity to continue to work directly with each team member going forward.” It expressed respect for that decision, noting the existence of “union-represented team members at other locations.” With the Union as employee-members exclusive representative, however, the Company “can no longer routinely convey status on certain items without first bargaining with the [Union]; like future wage increases, hours of work, and changes in working conditions. During the collective bargaining process, the company must maintain the status quo related to these matters. This will be a change from our past routine.” The memorandum concluded with the following “detail:”

1. [The Company] will be promptly reaching out to [the Union] to commence collective bargaining over your wages, hours, and working conditions.
2. A 2015 wage increase cannot be implemented because the increases were not determined as of the date of certification and therefore are not part of the status quo.
3. Your 2014 Performance Sharing Program (PSP) potential payout will be awarded during the first quarter of 2015, as this program was determined before the date of election certification and therefore is part of the status quo.
4. Your Paid Time Off (PTO) benefit announced September 16, 214 will continue to be implemented effective

<sup>8</sup> Although portions of Sinkler’s testimony were vague, I credit his version of the September 5th meeting, which was partially corroborated by Shryock. (Tr. 24–29, 63–65, 73–75, 215–218, 221–223, 226–228, 241–246.) Patterson’s recollection, on the other hand, that he merely asked if Sinkler had any more questions regarding the Union, was inconsistent with Shryock’s testimony regarding the timing of the meeting and Patterson’s attempt to have Sinkler return to the meeting after it concluded. (Tr. 276–277.)

January 1, 2015, as this benefit change was announced to all Sarasota team members well before the certification date and therefore is a part of the status quo.

5. [The Company] will continue to maintain all other existing working conditions until such time as either a CBA is achieved or business changes occur that fall within our right to manage the operations.<sup>9</sup>

The Company received notice of the Union's certification on December 23. Since that date, the Union has been the labor representative of employees in the following bargaining unit (unit employees):

All full-time and regular part-time utility coordinators, senior utility technicians, utility technicians and apprentice technicians employed by the Employer at its facility in Sarasota, Florida excluding all other employees, professional, warehouse and office clerical employees, engineers, managers, guards and supervisors as defined in the Act.

On December 29, Paul Davis, the Company's director of employee relations, reached out in an email to the Union's business manager, Floyd Suggs. Suggs responded that afternoon, requesting bargaining dates, certain information to prepare for bargaining, and that "if any pay raise [sic] or bonus are schedule [sic] please pay these employees theirs."<sup>10</sup>

*D. The Company Withholds 2015 Merit Raises from the Unit Employees*

In October 2014, the Company initiated the process for the 2015 merit budget. On October 24, the compensation department notified supervisors/coaches of the timeline, including the effective date for wage increases on December 22, 2014. On November 13, the compensation department notified supervisors/coaches of the implementation of a 3 percent merit budget, "effective November 10th," and their ability to enter the applicable data in the Company's computer system on November 18.

In November, Patterson conducted year-end performance review meetings with the Sarasota Division's employees and entered his overall performance rating and merit raise percentage recommendations for each employee into the Company's database. Vega completed his review of Patterson's recommendations by December 8.<sup>11</sup>

In accordance with the timeline, Wall and Whale completed their reviews and approvals of Patterson's recommendations for the Sarasota Division raise percentages by December 11. On December 15, however, the Sarasota Division recommendations were "Rejected."<sup>12</sup>

On December 19, the compensation department issued its final memorandum of the year, indicating that the annual merit process was complete and that the 2015 merit raises had been approved. That day, Patterson read a different memorandum to the employees of the Sarasota Division, signed by Whale and

senior vice president—corporate services and chief human resources officer Phil Barringer, stating in pertinent part:

Please be advised that the Company expects the NLRB to certify the results of the representation election conducted December 10, 2014. As a result of this election, all Sarasota Division Apprentices, Utility Technicians, Sr. Utility Technicians, and Utility Coordinators will be exclusively represented by the International Brotherhood of Electrical Workers (IBEW), Local 108.

We and your management team are disappointed in this outcome. ...

For your information, with the IBEW elected as your exclusive representation [sic], Peoples Gas can no longer routinely convey status on certain items without first bargaining with the IBEW; like future wage increases, hours of work, and changes in working conditions. During the collective bargaining process, the company must maintain the status quo related to these matters. This will be a change from our past routine. . . .

2. A 2015 wage increase cannot be implemented because the increases were not determined as of the date of certification and therefore are not part of the status quo.

3. Your 2014 Performance Sharing Program (PSP) potential payout will be awarded during the first quarter of 2015, as this program was determined before the date of election certification and therefore is part of the status quo.

The Company paid merit raises to its unrepresented employees for the year 2015 commencing on December 22. The Company did not, however, pay the 2015 merit raises to unit employees at that time.

*E. Bargaining and Request For Information*

Upon learning that unit employees did not receive the customary merit raises given to nonunit employees on or after December 22, the Union filed the original charge in Case 12—CA—144359 on January 13, 2015.

In late January, the Company furnished the Union with the information requested on December 29 and the parties discussed bargaining dates. The initial bargaining session occurred on March 26, 2015. The negotiations included the wages to be paid in 2015, but the parties did not discuss merit raises at that session.

The second day of bargaining took place on May 8, 2015. The Company's labor counsel, Thomas Gonzalez, offered to settle Case 12—CA—144359 in conjunction with an agreement on a 2015 merit raise for unit members. The Union proposed a 5 percent retroactive raise "across the board" for 2015, and a similar 5 percent raise for 2016 if no contract was reached by the end of the year. The increases were to be paid in addition to the merit raise that would be paid to unit members for 2015. The Union did not propose the continuation of annual merit raises.

The parties negotiated over the percentage of merit raises, with the Company at 2.5 percent and the Union at 3 percent. The Union then requested the high, low, and average raise per-

<sup>9</sup> Jt. Exh. 10.

<sup>10</sup> GC Exh. 3(a)-(b).

<sup>11</sup> Jt. Exh. 8(c).

<sup>12</sup> GC Exh. 8.

centages given to the four nonunit Sarasota Division employees for 2015, and the Company furnished those numbers even while asserting that they were not comparable. Bowden then requested that the Company furnish the high, low, and average merit raise percentages given to unrepresented employees at the Tampa Division of Peoples Gas for 2015. Davis rejected the request because it was not relevant to wage negotiations for Sarasota Division employees. Bowden disagreed, insisting the request was a relevant consideration in negotiating a wage increase for unit employees. The Company did not relent and bargaining moved on to other topics.<sup>13</sup>

On May 11, 2015, Bowden emailed Davis renewing the Union's demand for the wage increase data. The information sought "the low percent awarded, the high percent awarded, and average percent awarded for the 2014 merit amounts paid to the Tampa Division [Company] employees." Davis replied on May 12, 2015, refusing the request "because the data are not relevant or necessary to the union's representation of the bargaining unit. Moreover, this information is confidential in the hands of the Company." Davis provided a further explanation distinguishing the current situation from the 2014 merit pay plan:

As you know, under the pay plan the company designated an amount of money which would be available for payment of raises. In the 2014 year, that amount was equal to 3% of payroll. Each division made decisions as to the raises that would be paid to each individual employee, exercising discretion based on several factors. PGS Operations did not have to spend all of the money and the 3% average was to be determined across all divisions. There is no relationship between different divisions as to the particular raise awarded to a particular employee, or between individual employees of those divisions.

We previously have provided information concerning the merit raises awarded to non-bargaining unit employees at the Sarasota Division. These data were relevant because the total amount of money available for increases was to be distributed on a division-wide basis, and not just among bargaining unit members. But data relating to other divisions had no impact on or relevance to the merit increases that were given under the merit pay plan.

Bowden replied the following day, insisting the requested information was relevant and disagreeing with the distinction made by the Company regarding wages paid to employees in its different divisions:

The same information on the Tampa Division will show what was given to all employees, and resolve your concern on the relevance of the Sarasota data because of only four samples. The Union respectfully demands that the information on the 2014 Tampa Division merit amounts be provided.

The parties also bargained on May 13, 2015. During a break, Bowden approached Davis and asked him if he planned to pro-

vide the requested wage data for the Tampa Division. Davis replied that he was not going to provide it upon advice of counsel. Bowden informed Davis that the Union would file a Board charge. The following day, Bowden filed a charge in Case 12-CA-152306. Four days later, the Region indefinitely postponed the hearing scheduled for June 1, 2015, in Case 12-CA-144359, one of several that would follow.

Three bargaining sessions later, on August 25, 2015, the Company announced its intention to pay the 2015 merit budget increases to the unit employees, retroactive to December 22, based on the percentages that had been recommended as of December 10:

2015 Wages: The company is concerned with the pace of negotiations and since it is now the end of August, we feel that it is important that we get something finalized for this year (2015) and beyond for wages. And most importantly for wages, we have been talking to the NLRB to resolve the ULPs. Which includes compensation for 2015, and have been unable to resolve the matter based on the Board's insistence to include charges the company did not commit. Therefore, the company is going to do the following:

- a. Pay the 2015 merit increases, which were recommended but not finalized on December 10, 2014, treating that recommendation as the final amount and paying retro-active to December 22, 2014.
- b. For those individuals who have been promoted since December 22, 2015, the company will provide what it considers to be the status-quo NCNE Wage & Skill Progression plan. Promotion base wage increases will not be affected by the percentage wage increase.

Unit employees finally received the 2015 raises in their paychecks for the August 31 to September 13, 2015 pay period, retroactive to December 22.

#### *F. The Company Withholds Merit Increases for 2016*

The Compensation Department issued its memoranda regarding the 2016 annual merit process on October 23, 2015, November 13, 2015, and December 16, 2015. Patterson performed the year-end performance evaluations for unit employees in November 2015, but did not enter any merit raise percentages into the database. The Company did pay 2016 merit raises to its unrepresented employees retroactive to December 21, 2015, but excluded unit employees on the ground that the parties were still negotiating for the initial contract.

#### Legal Analysis

##### I. The September 5th Meeting

The General Counsel contends that Patterson and Shyrock violated Section 8(a)(1) by: (1) interrogating Sinkler about support for union representation by Sinkler and other employees; and (2) promising Sinkler that employees would receive an annual wage increase of 3 percent if they refrained from supporting the Union. The Company denies that Patterson promised Sinkler a 3 percent wage increase if he opposed unionization. With respect to the alleged interrogation, the Company

<sup>13</sup> This finding is based on the credible and undisputed testimony of Robert Thomas, the Union's assistant business manager. (Tr. 83-84, 88, 107-108, 110-111.)

contends that Patterson merely followed up with Sinkler about his previous inquiry regarding unionization.

In determining whether questioning of an employee about protected activity is lawful, the Board considers whether, under all the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); See also *800 River Rd. Operating Co. LLC v. NLRB*, 784 F.3d 902, 913 (3d Cir. 2015). Factors considered under this analysis include the identity of the questioner, the place and method of the interrogation, the background of the questioning, and the nature of the information sought. *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295 (2009), *enfd. sub nom. Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812 (D.C. Cir. 2014).

Patterson, Sinkler's direct supervisor, summoned him to a meeting in his office on September 5 to discuss a work incident. Patterson, accompanied by Shryock, incorporated that discussion into one about Sinkler's questions about unionization on September 3. After Sinkler responded that he was just joking with a coworker, Patterson elicited the name of the other employee. During further discussion about Sinkler's performance, Patterson asked Sinkler why he wanted to unionize. After Sinkler explained that company employees at another facility unionized and received a 3 percent raise, Patterson replied, "Well, I can do that for you, bud." He further remarked, "if I don't know anything that's going on, I can't help to know." Shryock added that they were not trying to "strong arm" Sinkler and were just trying to elicit the issues. Before the meeting concluded, Sinkler asked Patterson if his job was at risk. Patterson replied that he would have to consult with upper management. Ratcheting up the pressure regarding a the possibility of further investigation into the gas leak incident, Patterson called Sinkler a short while later and asked him to return to the office to backdate the form. Sinkler refused but the message was clear: Patterson's investigation into the gas leak incident was not over.

Patterson's statement suggesting he could provide Sinkler with a 3 percent raise constituted an unlawful promise of a benefit in order to sway Sinkler's support for union representation. *Valerie Manor, Inc. & New England Health Care Employees Union, District 1199, SEIU*, 351 NLRB 1306, 1310 (2007) (employer's promise to talk about giving raises constituted an unfair labor practice under section 8(a)(1)).

Regarding Sinkler's interest in a union, he opened the proverbial door in his discussion with Shryock 2 days earlier. However, Patterson jumped on Sinkler's question and pulled him into a full throttled discussion mixing Sinkler's performance problem with an inquiry as to the reasons for his interest in unionization, as well as that of coworkers. This conversation with Sinkler, an apprentice, held in Patterson's office, concluded with a reasonable belief on Sinkler's part that he might receive further discipline as a result of his responses.

Under the circumstances, Patterson's interrogation constituted coercive interrogation in violation of Section 8(a)(1) of the Act. *Fixtures Mfg. Corp.*, 332 NLRB 565 (2000) (supervisor unlawfully coerced employee during an interrogation by warn-

ing that employee would "have to deal with it" if he distributed union literature).

## II. The Withholding of Customary Wage Increases

The complaint alleges that the Company violated Section 8(a)(5) and (1) of the Act by withholding customary annual merit wage increases in December 2014 and 2015 without notice to the newly certified Union and affording it an opportunity to bargain over the change. Furthermore, by discontinuing such a practice, while continuing it for unrepresented employees, the Company allegedly discriminated against represented employees in violation of Section 8(a)(3). The Company contends that it was compelled to hold up the customary increases in order to bargain over wages with the Union as employees' newly certified bargaining representative.

Sections 8(a)(5) and 8(d) of the Act oblige an employer that is party to a collective-bargaining relationship to bargain in good faith over "wages, hours, and other terms and conditions of employment." Under such circumstances, an employer violates Section 8(a)(5) if it unilaterally changes a term or condition of employment without first providing the union with notice or an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 747 (1962). Thus, where a past practice of adjusting wages constitutes a term or condition of employment, the unilateral discontinuance of that practice violates Section 8(a)(5). *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997).

It is undisputed that in December 2014 and 2015 the Company withheld wage increases from unit employees. It is also undisputed that the Company unilaterally withheld unit employees' 2015 evaluations without giving the Union notice and an opportunity to bargain over the change. The only issue is whether the Company's merit raises constituted an established practice regularly expected by employees, and hence a term or condition of employment. See *United Rentals, Inc.*, 349 NLRB 853, 855 (2007) (employer's customary "practice of conducting merit reviews and adjusting wages based on those reviews and other fixed criteria" constitutes a term or condition of employment); *Daily News of Los Angeles*, *supra* at 1236 (merit wage-increase program constitutes a term or condition of employment "when it is an 'established practice . . . regularly expected by the employees'"); See also *NLRB v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 28 (1st Cir. 1999) (same).

The factors relevant to this determination include "the number of years that the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof." *Daily News*, *supra* at 1236; See also *Mission Foods & United Food & Commercial Workers Int'l Union Local 99, CLC*, 350 NLRB 336, 337 (2007).

The Company has utilized a merit budget process since at least 2008 and merit raises pursuant to that practice were regularly granted in December of each year. In addition, the Company used fixed criteria to determine whether an employee will receive a raise, and the amount thereof. The Company's system of granting merit increases was based on several fixed criteria with four categories (Unacceptable, Effective, Commendable, and Exceptional) to determine the percentage of budget going

to wage increases, as well as the employee's position, grade, salary band, and performance rating (itself arrived at through a structured process based on objective criteria) to determine recommended merit increases. Moreover, the Company regularly uses the same tool, the percentage suggested by the employee's "coach" and the merit budget established by the compensation department, in analyzing wage increase factors. Thus, all three factors relevant to determining whether the Company's merit budget was an established practice regularly expected by its employees have been met here.

The Company's 2015 and 2016 merit budget processes consisted of the performance of annual employee evaluations and granting merit-based wage increases, utilizing discretion based on its merit budget process of supervisory reviews and categories of grades that each supervisor was required to give. Such an approach meant, however, that the Company's merit raises "were not completely discretionary because they were based on fixed criterion of merit." See *Daily News of Los Angeles*, 315 NLRB at 1236 (wage increases were based a calculus from a "merit matrix" based on performance ratings and salary ranges).

Under the circumstances, the Company's failure to implement the annual merit budget processes in December 2014 and 2015 by refusing to grant merit raises to unit employees at its Sarasota Division constituted an unlawful unilateral change to the established terms and conditions of their employment in violation of Section 8(a)(5) and (1) of the Act.

In *United Rentals, Inc.*, Members Liebman and Kirsanow adopted the judge's finding that such an unlawful unilateral change by an employer also violates Section 8(a)(3), while Member Schaumber found it unnecessary to pass on that issue since it would not materially affect the remedy. Member Liebman's concurrence was based solely on the discriminatory nature of the unilateral change, while Member Kirsanow's relied on the commission of independent Section 8(a)(1) violations as evidence of animus. 349 NLRB at 855, fn. 17.

The Liebman and Kirsanow tests for establishing a 8(a)(3) violation were met here since Sinkler was coercively interrogated by Patterson, a manager directly involved in the implementation of the 2015 merit budget process. In addition, after employees voted overwhelmingly for union representation, the Company sent employees a memorandum in December 2014 expressing disappointment in the result and announcing changes to their terms and conditions of employment. As a result, the Company proceeded to deprive Sinkler and other unit employees merit increases in December 2014 and 2015 while awarding them to unrepresented employees.

Under the circumstances, the Company also discriminated against unit employees in violation of Section 8(a)(3) and (1) by failing to give them merit raises in December 2014 and 2015, while continuing to do so for unrepresented employees.

### III. The Company's Failure to Provide Information

The complaint also alleges that the Company violated Section 8(a)(5) of the Act by failing and refusing to provide information relating requested by the Union verbally on May 8, documented in an email on May 11, and repeated in an email on May 13, 2015. The Company contends that the information

sought—the high, low, and average 2015 merit raise percentages awarded to nonunit employees in the Tampa Peoples Gas Division—was irrelevant.

An employer is obliged to provide information that is needed by its employees' bargaining representative for the proper performance of its duties and the employer should respond as promptly as circumstances allow. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435–436 (1967); See also *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993), and *Woodland Clinic*, 331 NLRB 735, 737 (2000). Information regarding terms and conditions of employment is presumed relevant but nonunit requests must be more precise. In *Re West Penn Power 20 Co.*, supra at 597 (citing *FMC Corp.*, 290 NLRB 483, 489 (1988)); See also *Ohio Power Co.*, 216 NLRB 987, 991 (1975) (information pertaining to subcontractors, i.e., nonunit employees, in the collective-bargaining agreement was relevant for the union to interpret and determine whether there was a grievance relating to that clause). The union has the burden, albeit rather low, of demonstrating the relevance of the requested information and the union's theory must be reasonably specific. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1099 (1st Cir. 1981). See also *Dahl Fish Co.*, 279 NLRB 1084, 1102 (1986) (information regarding employees at a different factory deemed relevant under the circumstances) and *Dodger Theatricals Holdings, Inc. & Its Successor Dodger Theatricals, Ltd. & Actors Equity Assn.*, 347 NLRB 953, 967 (2006) (the standard only requires a showing of probability that the desired information is relevant and it would be of use to the Union in carrying out its statutory duties and responsibilities).

The Tampa Division's wage information was a reasonable gauge for the Union's consideration in negotiating for an appropriate wage increase for unit employees in the Sarasota Division since they all fell under the umbrella of the Tampa Electric Company's annual merit process for all of its entities. Moreover, the union's demand alluded to the Company's apparent reference to the limited value in the wage increase information it provided for the 4 nonunit employees in the Sarasota Division. Thus, the Union's rationale for the request—using the information as a gauge in negotiating wage increases for unit members—was reasonable and satisfied the very low burden that the union bore. Under the circumstances, the Company violated Section 8(a)(5) and (1) of the Act by refusing to provide the requested wage data to the union's representative.

### CONCLUSIONS OF LAW

1. Respondent Tampa Electric Company, d/b/a TECO Peoples Gas is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, AFL-CIO, Local Union 108 is a labor organization within the meaning of Section 2(5) of the Act and serves as the labor representative of Respondent's employees in the following bargaining unit:

All full-time and regular part-time utility coordinators, senior utility technicians, utility technicians and apprentice technicians employed by the Employer at its facility in Sarasota, Florida excluding all other employees, professional, ware-

house and office clerical employees, engineers, managers, guards and supervisors as defined in the Act.

3. Respondent coercively interrogated employee Robert Sinkler on September 5, 2014, about his sympathies and interests, as well as those of other employees, for union representation in violation of Section 8(a)(1) of the Act.

4. Respondent promised employee Robert Sinkler a wage increase in order to encourage him to abandon his support for union representation in violation of Section 8(a)(1) of the Act.

5. By eliminating annual merit raises due in December 2014 and 2015 for employees in the bargaining unit without first notifying the Union and giving it an opportunity to bargain, and by attributing that unilateral change to employees' terms and conditions to their Union representation, the Respondent violated Sections 8(a)(5), (3), and (1) of the Act.

6. By failing and refusing to furnish wage increase information for the Respondent's Tampa Division requested by the Union on May 11, 2015, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

#### ORDER

The Respondent, Tampa Electric Company, d/b/a TECO Peoples Gas, Sarasota, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Promising employees wage increases or other benefits to encourage them to abandon their support for International Brotherhood of Electrical Workers, AFL-CIO, Local Union 108 (the Union) or any other union.

(c) Eliminating annual merit raises or making other changes to the terms and conditions of employment of employees in the following bargaining unit, without first notifying the Union and giving the Union the opportunity to bargain:

All full-time and regular part-time utility coordinators, senior utility technicians, utility technicians and apprentice technicians employed by the Employer at its facility in Sarasota, Florida excluding all other employees, professional, warehouse and office clerical employees, engineers, managers, guards and supervisors as defined in the Act.

(d) Eliminating your annual merit wage increases because

<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

you selected the Union as your exclusive collective-bargaining representative.

(e) Failing and refusing to furnish merit wage increase information requested by the Union which is relevant and necessary to its duties as labor representative of the Sarasota Division's unit employees.

(f) In any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of a request by the Union, furnish the merit raise information requested by the Union on May 11, 2015.

(b) Make employees in the bargaining unit whole for any loss of earnings and other benefits incurred as a result of the Respondent's elimination of their annual merit wage increases for the years 2015 and 2016, with interest, to the extent the Respondent has not already done so.

(c) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

(d) Compensate employees in the above unit for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(e) On request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for employees in the bargaining unit.

(f) Within 14 days after service by the Region, post at its facility in Sarasota, Florida, copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 5, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 28, 2016

<sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities, or other employees' union activities or sympathies.

WE WILL NOT promise you wage increases or other benefits to encourage you to abandon your support for International Brotherhood of Electrical Workers, AFL-CIO, Local Union 108 (the Union) or any other union.

WE WILL NOT eliminate annual merit raises or make other changes to the terms and conditions of employment of our employees in the following bargaining unit, without first notifying the Union and giving the Union the opportunity to bargain with us:

All full-time and regular part-time utility coordinators, senior utility technicians, utility technicians and apprentice technicians employed by the Employer at its facility in Sarasota, Florida excluding all other employees, professional, warehouse and office clerical employees, engineers, managers, guards and supervisors as defined in the Act.

WE WILL NOT eliminate your annual merit raises because you selected the Union as your exclusive collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make our employees in the above unit whole for any loss of earnings and other benefits incurred as a result of our elimination of their annual merit raises for the years 2015 and 2016, with interest, to the extent we have not already done so.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate employees in the above unit for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days of request by the Union, furnish the merit raise information requested by the Union on May 11, 2015.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

TAMPA ELECTRIC COMPANY D/B/A TECO PEOPLES  
GAS