BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Cargill Fertilizer, Inc. for permanent approval of self-service wheeling to, from, and between points within Tampa Electric Company's service area.	DOCKET NO. 020898-EQ ORDER NO. PSC-03-1065-PCO-EQ ISSUED: September 24, 2003

ORDER DENYING MOTION TO QUASH SUBPOENAS DUCES TECUM AND MOTION FOR PROTECTIVE ORDER

On September 17, 2003, Tampa Electric Company (TECO or utility) filed an objection to the Subpoenas Duces Tecum for Deposition (Subpoenas) served by Cargill Fertilizer, Inc. (Cargill) on Messrs. Barringer, Black, Bryant, and Ms. Jordan on September 12, 2003, and a request for the issuance of a protective order quashing the Subpoenas and establishing reasonable parameters for depositions in this proceeding. Cargill filed a response thereto on September 18, 2003.

In support of its filing, TECO states that Cargill advised TECO that Cargill wanted to question Mr. Barringer, TECO's Vice President and Controller, regarding general accounting matters, including the question of what level of expense was considered to be material, and regarding TECO's plans for future general rate cases. Further, Cargill wanted to depose Mr. Black, TECO's Senior Vice President - Power Generation, regarding a purchase power agreement between Cargill and "TPS Wholesale Marketing," that Mr. Black had allegedly executed on behalf of "TPS Wholesale Marketing." Finally, Cargill wanted to depose someone at TECO who was familiar with the operation of TECO's Open Access Transmission Tariff, as well as the Federal Energy Regulatory Commission's tariff pursuant to which Cargill self-service wheeling was provided. TECO advised Cargill that it intends to present one witness in this proceeding, Mr. William Ashburn, and that it would seek to identify the most knowledgeable individuals within the company to address the other deposition topics identified by Cargill.

TECO further states that it advised Cargill that it would produce Mr. Ron Donahey, TECO's Managing Director of Grid

Operations, to be deposed regarding the transmission issues that Cargill had identified. Cargill and TECO have agreed upon a date for Mr. Donahey's deposition. Regarding Mr. Black, TECO advised Cargill that it could not locate the contract about which Cargill wanted to question him, and that he probably would not be the most knowledgeable individual concerning the details of the transaction in question. TECO offered to identify and produce for deposition the person most familiar with the transaction in question if Cargill would fax to TECO a copy of the contract that would form the basis for its questions. To date, Cargill has not provided a copy of the contract.

Moreover, TECO states that it advised Cargill that Mr. Ashburn would be able to address the subject areas that Cargill identified as the planned subject matter for its deposition of Mr. Barringer. Mr. Ashburn has already been made available for deposition. TECO also suggested that Cargill could offer into evidence those portions of Mr. Barringer's July 29, 2003, deposition in Docket No. 030001-EI that it believed to be relevant to the matters at issue in this proceeding. Finally, TECO offered to respond on an expedited basis to any further interrogatories that Cargill might wish to propound on the subject matter.

TECO further states that Cargill has not disclosed the subject areas that Cargill wanted to address in depositions of Mr. Bryant and Ms. Jordan, thereby making it impossible to determine whether these individuals are the most knowledgeable with regard to the relevant topics.

Ms. Jordan's Subpoena demands the production of "Testimony and Exhibits filed by the deponent in FPSC Docket 020001-EI and 030001-EI and all Fuel Cost Projections for future years." There is no indication that Ms. Jordan's testimony in those dockets is relevant to this proceeding, nor does she develop fuel cost projections as part of her current job responsibilities. Moreover, Ms. Jordan has a prior commitment on September 25, 2003, and is unavailable for deposition on that date.

Mr. Bryant's Subpoena demands the production of "Work papers developing cogeneration conservation program including but not limited to cost of program, incentives provided, cost effectiveness of the program." TECO argues that Mr. Bryant has prepared no

analysis regarding the cost effectiveness of self-service wheeling or cogeneration. Mr. Bryant also has a prior commitment on September 25, 2003, and is unavailable for deposition on that date.

TECO argues that Cargill's Subpoenas as directed to Messrs. Barringer, Black, and Bryant, and Ms. Jordan are unreasonable, oppressive, and calculated to harass the individuals in question rather than to elicit relevant evidence. None of these four individuals are being offered as TECO witnesses in this proceeding and none have been involved in the provision of self-service wheeling to Cargill. In each case, the Subpoenas, if not quashed, would take these individuals away from otherwise pressing commitments with little or no reason to believe that relevant information will be adduced. TECO further argues that the information that Cargill seeks is institutional in nature. Cargill seeks information about TECO's corporate actions, practices and intentions rather than factual information about the actions or conduct of specific individuals. In this case, the institutional knowledge that Cargill seeks does not reside with the individuals that Cargill has subpoenaed.

TECO requests the issuance of a protective order quashing the Subpoenas at issue and compelling Cargill to cooperate with TECO to identify and promptly produce for deposition individuals who are knowledgeable with regard to relevant subject areas that Cargill wishes to examine through depositions in this proceeding. In the alternative, TECO requests an order compelling Cargill to reschedule the depositions of Mr. Bryant and Ms. Jordan in order to reasonably avoid conflicts with their prior scheduled commitments.

In its response, Cargill states that Messrs. Black, Barringer, and Bryant, and Ms. Jordan have information that is relevant to the subject matter of the pending action that is reasonably calculated to lead to the discovery of admissible evidence. Florida favors complete disclosure in discovery matters. AcandS, Inc. v. Askew, 597 So. 2d 895 (Fla. 1st DCA 1992).

Cargill argues that part of the information which the Commission will consider in this case involves the application of the tests and criteria set out in the pertinent statutes, rules, and Commission orders, including Order No. 24745, which incorporates this Commission's Cost Effective Manual for Demand

Side Management Programs and Self Service Wheeling Proposals. Application of these tests requires information that is available only from the utility. Thus, Cargill seeks to depose those TECO employees with information relevant to these and other topics at issue. Since the Commission has placed the burden of proof in this case on Cargill, it would be a denial of due process if Cargill cannot seek information from the TECO employees who possess information essential to the case.

Cargill further argues that the fact that a witness has had no involvement with the provision of self-service wheeling to Cargill does not mean discovery may not be conducted to obtain relevant information. Each of the depositions Cargill has noticed fall within the broad discovery scope of Rule 1.280, Florida Rules of Civil Procedure.

Cargill argues that each witness has information that is relevant or that may lead to the discovery of relevant information. Mr. Barringer is TECO's Controller. Cargill is entitled to inquire of him regarding TECO's position on materiality. Further, his knowledge as to TECO's future rate case plans is relevant to judge and evaluate the impact, if any, of the Cargill self-service wheeling program on ratepayers. Mr. Black is involved with TECO's wholesale purchases and sales. Cargill is entitled to seek information regarding how such purchases and sales are valued and how they relate to the benefits or detriments of self-service wheeling. Mr. Bryant filed testimony in the conservation docket indicating how TECO performs on the relevant DSM tests. Cargill is entitled to inquire of him to ascertain any differences or inconsistencies regarding the analysis applied to self-service wheeling, to which TECO is opposed, and to other DSM programs, for which TECO seeks approval. Ms. Jordan is routinely proffered as TECO's fuel witness in Docket No. 030001-EI. As recently as September 15, 2003, she filed testimony on TECO's projected fuel costs. Such fuel cost information and how TECO projects it for the fuel docket, while it apparently does not have such information available in this docket, is relevant to this matter.

Cargill further argues that TECO may not dictate to Cargill the type of discovery it may employ. TECO may not require Cargill to ask certain questions of certain witnesses and not of others. Cargill is entitled to select the witnesses it wants to depose.

The witnesses Cargill has noticed for deposition have relevant information and Cargill is entitled to depose them. The Commission decided the issues TECO raises here in Order No. PSC-99-0092-PHO-TP, issued in Docket No. 981052-TP, wherein the Commission required BellSouth Telecommunications, Inc., to produce certain witnesses for deposition "since each witness may provide testimony within the scope of discovery."

Cargill states that TECO's motion should be denied and that TECO should be required to produce the named individuals for deposition at the time and place noticed. With respect to TECO's note that Mr. Bryant and Ms. Jordan are unavailable for deposition on September 25, 2003, Cargill states that it will work with TECO to find a date that is convenient for those witnesses.

Upon consideration of the foregoing and being fully advised in the premises, TECO's Motion to Quash the Subpoenas of Messrs. Barringer, Black, Bryant, and Ms. Jordan and Motion for Protective Order are denied. I do not find that the taking of the depositions at issue creates an undue burden upon TECO, or that the depositions are being taken for the purposes of annoyance or harassment, from which TECO requires protection. Rule 1.280(b), Florida Rules of Civil Procedure, permits parties to "obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears likely to lead to the discovery of admissible evidence." It has been established that Cargill bears the burden of proof in this proceeding. Cargill shall be allowed the opportunity to avail itself of the broad scope of discovery afforded by Rule 1.280(b) to obtain the information it deems necessary to put on its case. The depositions of Messrs. Barringer and Black shall take place as scheduled, and the parties shall schedule a date and time that is convenient for the taking of the depositions of Mr. Bryant and Ms. Jordan.

It is noted that had the case schedule allowed, Cargill could have waited to determine whether to depose any of the four individuals in question until after the conclusion of the depositions of Messrs. Ashburn and Donahey, depending on whether any areas of questioning remained unexplored. However, the hearing

date is fast approaching. The time to engage in all remaining discovery activities is now.

Based on the foregoing, it is

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that Tampa Electric Company's Motion to Quash the Subpoenas of Messrs. Barringer, Black, Bryant, and Ms. Jordan, and Motion for Protective Order, are denied. The depositions of Messrs. Barringer and Black shall take place as scheduled, and the parties shall schedule a date and time that is convenient for the taking of the depositions of Mr. Bryant and Ms. Jordan.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 24th day of September, 2003.

RUDOLPH "RUDY" BRADLEY
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.