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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application of Cargill Fertilizer, Inc. to engage in self-service wheeling of waste heat cogenerated power to, from and between points within Tampa Electric Company's service area.

Docket No. 020898-EQ

Filed: September 2, 2003

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Cargill Fertilizer Inc.'s Motion for Reconsideration of a Portion of Order No. PSC-03-0945-PCO-EQ

Cargill Fertilizer, Inc. (Cargill), pursuant to rules 25-22.0376 and 28-106.204, Florida Administrative Code, files this Motion for Reconsideration of that portion of Order No. PSC-03-0945-PCO-EQ, related to the Prehearing Officer's ruling that the burden of proof rests with Cargill in this case. As grounds therefor, Cargill states:

I.

Introduction

In Order No. PSC-00-1596-TRF-EQ, issued on September 6, 2000, in Docket No. 001048-EQ, the Commission approved a twenty-four month pilot study to evaluate self-service wheeling (SSW) for Cargill between two self-generation sites. On August 16, 2002, Cargill petitioned the Commission for permanent approval of the SSW wheeling program. Though the program was set to expire on September 30, 2002, it was continued pending the outcome of this docket in Order No. PSC-02-1451-PCO-EQ.

Order No. PSC-03-0866-PCO-EQ, issued on July 24, 2003, set out the procedural dates to govern the activities in this case. Some dates were modified in Order No. PSC-03-0909-PCO-EQ, issued on August 7, 2003. Subsequently, Tampa Electric Company (TECo) filed a motion for "clarification" of Order No. PSC-03-0866-PCO-EQ, seeking "clarification" that it would be permitted to file two sets of testimony in this case.

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In response to TECo's motion, Cargill argued that the burden of proof in this matter rests with TECo. Cargill requested that the Prehearing Officer clearly delineate the party with the burden of proof.

The Prehearing Officer's ruling on the burden of proof issue is set out in full below:

> Cargill's argument that Tampa Electric has the burden of proof in this case is rejected. The burden rests with Cargill, as it is the party asserting the proposition to be proved. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974 and Heim v. Heim, 712 So.2d 1238 (Fla. 4th DCA 1998).

This ruling overlooks or fails to consider important issues of law and should be reconsidered.

II.

Standard for Motion for Reconsideration

The standard for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its 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); *Pingree v. Quaintance,* 394 So.2d 162 (Fla. 1st DCA 1981). In this instance, the Prehearing Officer overlooked several points of law that necessitate reconsideration.

III.

Basis for Reconsideration

The Prehearing Officer failed to consider and/or overlooked the following points which bear directly on the burden of proof in this case.

A.

The Statute Specifically Delineates the Burden of Proof

This case is explicitly governed by section 366.051, Florida Statutes. That statutory section

delineates which entity has the burden of proof. It provides:

> *Public utilities shall provide* transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location, if the commission finds that the provision of this service, and the charges, terms and other conditions associated with the provision of this service, are not likely to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers.[1]

Section 366.051 is clear. An electric utility *must provide* SSW upon request *unless* the Commission finds that provision of the service will adversely affect the general body of wholesale and retail ratepayers.

The Commission's rule on SSW is consistent with the statute. Rule 25-17.008(1), Florida Administrative Code, addresses SSW programs. Subsection (1) of the rule provides:

> This rule applies to *all* public utilities, as addressed by Section 366.051, F.S., *whenever* an evaluation of the cost effectiveness of a self-service wheeling proposal is required by the Commission.[2]

Thus, the Commission rule on the topic requires the analysis to be performed by the utility.

Therefore, once a SSW request has been filed, as was done by Cargill in this case, a prima facie entitlement to the service is created, *unless* the utility comes forward and demonstrates a significant adverse impact on other ratepayers. As discussed below, this is the only way the statute could possibly work because the utility, not the customer, is in possession of all the information needed to make such a showing. To find otherwise, would put the customer in the impossible position of attempting to disprove its own request via information that it does not possess.

To follow the conclusion that Cargill has the burden of proof in this case to its logical result would create a highly bizarre situation; such absurd results cannot be attributed to this statute. For example, what if the utility files no studies at all concerning the impact of SSW on other ratepayers?

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[1] Emphasis added.

Does the customer's request for SSW fail because the customer has the burden to prove no impact even though the utility, and only the utility, has the information to conduct the study? Or, what if the utility files an inaccurate or incomplete study regarding ratepayer impact? If the customer proves that the utility's study is faulty as to the future impact of the SSW program, does the application for SSW fail, even though the utility filed a faulty report? Or what if essential information necessary for a finding does not exist? Does the customer's request for SSW fail? All these examples demonstrate that the burden must rest with the utility.

In this case, TECo's future marginal fuel costs are an essential factor in determining the future impact of SSW on the general body of customers. It is critical that the Commission review and make a finding regarding those costs to assess the propriety of the SSW program. If marginal fuel prices are forecasted to go up, the program is beneficial to the general body of consumers; if they are projected to go down, the program is less beneficial. If the customer has the burden of proving a utility's future costs, the only avenue open to that customer is to ask the utility to supply its fuel cost forecasts.

Cargill did just that. It asked TECo for its future fuel forecasts.[3] In its objections to Cargill Interrogatory No. 24, TECo said it could not project its future fuel prices. Does the customer now have the burden to prove that TECo was in error when it said that it does not forecast fuel prices? If

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[2] Emphasis added.

[3] Cargill Interrogatory No. 24 states:

Provide a forecast, by month, for 2004 through 2013, for the following:
a. Monthly fuel clause revenue estimates applicable to the rate schedules referred to in Interrogatory No. 23 (a), (b), and (c) for Cargill's New Millpoint Plant, Ridgewood Master Plant and Hooker's Prairie Plant, respectively;
b. Number of hours that TECo projects it will purchase 3rd Party Optional Power for the rate schedules referred to in Interrogatory No. 23 (a), (b) and (c);
c. Estimated monthly on and off peak marginal fuel costs.

TECo responded: Tampa Electric objects to Interrogatory No. 24 (a)-(c) on the ground that it calls for the provision of estimated date that Tampa Electric does not have for the years 2004-2013 and cannot reasonably obtain for the years 2005 through 2013.

the customer proves this, does the customer have the further burden to show that there is a forecast and that the forecast shows rising prices? How could the customer ever make such a showing? The only logical conclusion in this case is that the utility has the burden of producing and verifying its own costs.

B.

The Burden of Proof Ruling is Inconsistent with the Prehearing Officer's Prior Order Requiring TECo to Perform the TRC Test

In Order No. PSC-03-0866-PCO-EQ, the Prehearing Officer compelled TECo to respond to a number of Cargill interrogatories to which TECo had objected. Among these was Interrogatory No. 18 which asked TECo to "[c]alculate the cost/benefit ratio of the Cargill self-service wheeling program using the Total Resource Test required in Order No. 24745. Explain in detail each of your inputs and calculations."

TECo objected to this request, stating: "Tampa Electric objects to Interrogatory No. 18 on the ground that the Company has not performed the requested analysis and has no obligation to do so *since it is not the moving party in this proceeding.*"[4] The Prehearing Officer ***rejected TECo's objection*** and required TECo to perform the Total Resource Test. Order No. PSC-03-0866-PCO-EQ at 5-6 (emphasis added) states:

> TECO should be required to perform the Total Resource Test and to present that analysis to assist the Commission in its determination in this matter.
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> . . .
>
> Rule 25-17.008(1), Florida Administrative Code, states, in relevant part, that it "applies to . . . all public utilities, as addressed by section 366.051, F.S., whenever an evaluation of the cost effectiveness of a self-service wheeling proposal is required by the Commission." Rule 25-17.008(2) states, in relevant part, that "[t]he purpose of this rule is to establish minimum filing requirements . . . for any self-service wheeling proposal made by a qualifying facility or public utility pursuant to Rule 25-17.0883."

[4] Emphasis added.

> In order to determine whether the self-service wheeling program at issue is likely to result in higher cost electric service to TECO's general body of ratepayers, this Commission requires an evaluation of the cost effectiveness of the program. *Rule 25-17.008(1) requires the public utility to provide the evaluation of the cost effectiveness of the program, regardless of the fact that the proposal to make the program permanent was made by Cargill.*

Thus, this Order correctly recognizes that the utility has the burden of proof, and requires TECo, not Cargill, to perform the Total Resource Test. Order No. PSC-03-0945-PCO-EQ, for which reconsideration is sought, is inconsistent with the Prehearing Officers' prior ruling. The Prehearing Officer overlooked that fact.

C.

The Cases Cited in the Order Support Placing the Burden of Proof on TECo

Order No. PSC-03-0945-PCO-EQ cites two cases in support of its conclusion that Cargill has the burden of proof in this case. However, those cases support the opposite conclusion.

The first case, *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315 (Fla. 1974), indicates that TECo has the burden of proof in this case. In *Bevis*, an application for a certificate of public necessity and convenience was denied for a household moving company. On reconsideration, the decision was overturned and the certificate was granted. Competing movers appealed the decision arguing that the certificate grant was not supported by competent substantial evidence.

The Court overturned the grant of the certificate because no new facts were before the agency to support the change in its decision. The Court stated that the reconsideration decision had the effect of shifting the burden to the protesting movers. Interestingly, the Court noted the burden of going forward with evidence as to adverse impact (from the granting of the certificate) rested with the protesting movers. Similarly, as the statute and rule discussed above make clear, it is the utility's burden in this case to show adverse impact on the general body of ratepayers.

The second case, *Heim v. Heim*, 712 So.2d 1238 (Fla. 4th DCA 1998), also indicates that the Prehearing Officer made a mistake of law in placing the burden on Cargill in this case. In *Heim*, in a martial dissolution case, the court construed a statute which created a presumption that real property acquired during a marriage was presumed to be a marital asset. The court found that the party seeking the court to rule otherwise had the burden to overcome this presumption.

Similarly, in this case, the statute at issue requires that SSW be provided by the utility *unless* it shows an adverse impact on ratepayers. That is, like the statute at issue in *Heim*, it creates a presumption that SSW *shall occur* unless a showing to the contrary is made. Such a showing must be made by the utility.

WHEREFORE, the Commission should reconsider that portion of Order No. PSC-03-0945-PCO-EQ which places the burden of proof on Cargill and find that TECo has the burden of proof in this case.

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CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing Cargill Fertilizer, Inc.'s Motion to Reconsideration of a Portion of Order No. PSC-03-0945-PCO-EQ has been furnished by (*) hand delivery or U.S. Mail on this 2nd day of September, 2003 to the following:

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