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-03-1110-FOF-EQ ISSUED: October 6, 2003

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

On August 3, 2000, Cargill Fertilizer, Inc. (Cargill) petitioned this Commission for approval of an experimental program pursuant to Section 366.075, Florida Statutes, for the self-service wheeling of electricity between three locations within the service territory of Tampa Electric Company (TECO). On August 7, 2000, TECO responded that it did not object to providing self-service wheeling to Cargill on an experimental basis.

By Order No. PSC-00-1596-TRF-EQ, issued September 6, 2000, and consummated by Order No. PSC-00-1808-CO-EQ, issued October 3, 2000, in Docket No. 001048-EQ, the pilot program was approved on an experimental basis. This Commission ordered that the experiment be initially limited to two years or until TECO's next full rate case, whichever came first, to prevent the experiment from continuing indefinitely, thereby becoming a "permanent" program. TECO was also ordered to provide quarterly reports that identify the costs and revenues associated with this experimental program, and advised that the approval of this experiment could be revisited at any time if there appeared to be an adverse financial or reliability impact

to TECO's ratepayers. The docket was closed upon the issuance of the consummating order.

On August 16, 2002, Cargill filed a Petition for Permanent Approval of Self-Service Wheeling Program and Request for Expedited Treatment (Petition), along with a Motion to Continue Self-Service Wheeling of Waste Heat Cogenerated Power During Resolution of Petition for Permanent Approval. This docket was opened to process the Petition. Among other things, Cargill requested that the Petition be processed on an expedited basis due to the impending expiration of the pilot program and that it be afforded a hearing. By Order No. PSC-02-1451-PCO-EQ, issued October 21, 2002, we granted Cargill's request to continue the program on an interim basis, pending the resolution of its Petition, with the understanding that Cargill will indemnify the total negative impact on ratepayers during the interim period, if any, with a payment to flow through TECO's fuel adjustment clause. We also granted Cargill's request for expedited treatment and scheduled the matter directly for hearing.

Order No. PSC-02-1518-PCO-EQ, issued November 5, 2002, granted TECO's Motion to Hold the Procedural Schedule in Abeyance. The procedural schedule for this docket was temporarily suspended, including those dates pertaining to discovery. The parties were encouraged to proceed with mediation as soon as practicable after the Federal Energy Regulatory Commission (FERC) acted on TECO's tariff filing at the federal level. If the parties were unsuccessful in their attempts to mediate this matter, the discovery process would resume.

After FERC issued its ruling on TECO's federal tariff filing, the parties advised that they had attempted to settle the matter informally, albeit unsuccessfully. On February 24, 2003, the parties filed a Joint Motion to Hold the Procedural Schedule in Abeyance, in which they requested that the procedural schedule in this case be further abated for a reasonable period of time to enable the parties to allow time for further settlement discussions and mediation, if necessary. The Joint Motion was granted by Order No. PSC-03-0276-PCO-EQ, issued February 28, 2003, and a new hearing date was reserved in the event that a hearing would be needed after such settlement efforts were exhausted. A status conference with Commission staff was held on March 14, 2003, to discuss the

progress of the case, during which the parties agreed to continue informal settlement discussions before beginning formal mediation.

By Order No. PSC-03-0773-PCO-EQ, issued June 30, 2003, the parties were strongly encouraged to voluntarily avail themselves of the mediation program offered by this Commission in an effort to resolve this case. The parties were required to file a status report within ten days of the issuance date of the order, either jointly or separately, advising this Commission whether they have agreed to mediate this dispute on mutually acceptable terms. The order advised that if the parties were to fail to agree to mediate this dispute within the allotted time frame, this matter would be resolved through the formal hearing process.

Because the parties failed to agree to mediate this dispute on mutually acceptable terms, by Order No. PSC-03-0866-PCO-EQ, issued July 24, 2003, abeyance of the procedural schedule was lifted. The matter was definitively set for hearing on October 22, 2003, all then-outstanding discovery disputes were resolved, and the procedures governing the case were established.

By Order No. PSC-03-0909-PCO-EQ, issued August 7, 2003, the controlling dates for filing testimony set forth in Order No. PSC-03-0866-PCO-EQ were modified to allow Cargill additional time to file testimony after receiving TECO's responses to Cargill's Second Set of Discovery Requests. Order No. PSC-03-0866-PCO-EQ was reaffirmed in all other respects.

On July 30, 2003, TECO filed a Motion for Clarification of Order No. PSC-03-0866-PCO-EQ, requesting clarification that the Order permits all parties to file rebuttal testimony in this case. Alternatively, TECO requested that its testimony not be due until 15 days after Cargill fully answers discovery propounded by TECO with regard to Cargill's direct testimony. In its response to the Motion, Cargill requested a ruling that clearly delineates that the burden of proving adverse impact on the general body of ratepayers rests with TECO. By Order No. PSC-03-0945-PCO-EQ, issued August 20, 2003, TECO was not permitted to file rebuttal testimony. Its alternative request for an extension of time to file its testimony was denied due to time constraints. Moreover, the Order ruled that the burden of proof in this case rests with Cargill.

On September 2, 2003, Cargill timely filed a Motion for Reconsideration of the portion of Order No. PSC-03-0945-PCO-EQ related to the burden of proof ruling, along with a Request for Oral Argument on the Motion. TECO filed a response to the Motion on September 4, 2003. Oral argument was not granted, as we did not find that it would aid us in comprehending and evaluating the issues. We have jurisdiction pursuant to Chapter 366, Florida Statutes, including Sections 366.04, 366.05, and 366.051, Florida Statutes.

MOTION FOR RECONSIDERATION

Motion

In its Motion for Reconsideration (Motion), Cargill requests that we 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.

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its Order. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959) (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958)). A motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

By Order No. PSC-03-0945-PCO-EQ, Cargill's argument that TECO has the burden of proof in this case was rejected. Instead, the Order found that "[t]he burden of proof rests with Cargill, as it is the party asserting the proposition to be proved." Order No. PSC-03-0945-PCO-EQ at 3 (citing Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974), and Heim v. Heim, 712 So. 2d 1238 (Fla. 4th DCA 1998)).

In the Motion, Cargill argues that the ruling in Order No. PSC-03-0945-PCO-EQ overlooks or fails to consider important issues of law. First, according to Cargill, Section 366.051, Florida Statutes, specifically delineates which entity has the burden of proof. Section 366.051 provides, in relevant part, that:

> [p]ublic 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.

Moreover, Rule 25-17.008(1), Florida Administrative Code, entitled Conservation and Self-Service Wheeling Cost Effectiveness Data Reporting Format, provides that 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." Thus, the rule requires the analysis to be performed by the utility.

Cargill argues that pursuant to Section 366.051, Florida Statutes, and Rule 25-17.008(1), Florida Administrative Code, once a self-service wheeling request has been filed, a *prima facie* entitlement to the service is created unless the utility comes forward and demonstrates a significant adverse impact on other ratepayers. Cargill further argues that this is the only way the statute could possibly work because the utility is in possession of all the information needed to make such a showing. According to Cargill, 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.

Cargill argues that to follow the conclusion that Cargill has the burden of proof to its logical result would create an absurd result, and such absurd results cannot be attributed to the statute. For example, should the utility file no studies at all

concerning the impact of self-service wheeling on other ratepayers, the customer's request for self-service wheeling would 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. The only logical conclusion in this case is that the utility has the burden of producing and verifying its own costs.

Cargill further argues that the burden of proof ruling is inconsistent with Order No. PSC-03-0866-PCO-EQ, issued July 24, 2003, in this docket, wherein TECO was required to perform the Total Resource Test pursuant to an interrogatory propounded by Cargill. That Order found that "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." Order No. PSC-03-0866-PCO-EQ at 6. According to Cargill, that Order correctly recognized that the utility has the burden of proof. Cargill argues that Order No. PSC-03-0945-PCO-EQ is inconsistent with that prior ruling and overlooked that fact.

Finally, Cargill argues that the two cases cited in Order No. PSC-03-0945-PCO-EQ support placing the burden of proof on TECO. In Stewart Bonded Warehouse, Inc. v. 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. The Court overturned the grant of the certificate, and stated that the reconsideration decision had the effect of shifting the burden to the protesting movers. The Court noted the burden of going forward with evidence as to adverse impact rested with the protesting movers. Similarly, according to Cargill, it is the utility's burden in this case to show adverse impact on the general body of ratepayers.

With respect to Heim v. Heim, a marital 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. Cargill argues that like the statute at issue in Heim, the statute at issue in this case creates a presumption that self-service wheeling shall occur unless a showing to the contrary is made. According to Cargill, such a showing must be made by the utility.

Response

In its response to the Motion, TECO argues that Cargill has mistakenly equated TECO's obligation to provide information in the context of discovery with an assumption that TECO bears the burden of proof in this proceeding. In this proceeding, Cargill, not TECO, is asking this Commission to implement self-service wheeling on a permanent basis. The assertion inherent in Cargill's Motion that the burden shifts from Cargill to TECO simply because TECO may possess information that Cargill asserts is necessary in order for Cargill to justify its request for relief is patently absurd. The absurdity of this position is underscored by the fact that Cargill has availed itself of the discovery process in this proceeding to obtain much, if not all, of the essential information that it claims to be in TECO's sole possession. It is Cargill's obligation, as the moving party, to marshal the facts to the best of its ability in order to justify its request for relief.

TECO argues that Cargill's suggestion that its burden in this proceeding is merely to request self-service wheeling betrays a significant misunderstanding of the relevant statutes. Section 366.051, Florida Statutes, does not provide a basis for a claim of *prima facie* entitlement to self-service wheeling merely as the result of a request for such service. To the contrary, the statute makes it clear that entitlement to self-service wheeling is created only if and when the Commission determines that the provision of such service is not likely to result in higher cost electric service to the utility's general body of customers or adversely affect the adequacy or reliability of electric service to all customers. It is equally clear that this statute does not purport to assign the burden of proof, as Cargill suggests. The statute merely specifies the burden that must be met by the proponent of self-service wheeling.

Moreover, TECO argues that Cargill's use of the Heim v. Heim decision to support its alternative interpretation of Section 366.051 is seriously misleading since the Heim Court considered a statute that expressly created a presumption that property held by the parties as tenants by the entireties was a marital asset, and expressly placed the burden of proof on any party making a claim to the contrary.

TECO further argues that Cargill's contention that the burden of proof ruling is inconsistent with the Prehearing Officer's prior ruling in Order No. PSC-03-0866-PCO-EQ, which compelled TECO to respond to Cargill's discovery, is incorrect. The determination that TECO had to respond to the interrogatory did not turn on the question of whether TECO had the burden of proof in this proceeding. Instead, the Prehearing Officer determined that TECO was required to provide the requested information, independent of which party had the burden of proof, since the information was necessary in order for the Commission to evaluate the cost impact of Cargill self-service wheeling on ratepayers. A requirement that TECO provide necessary information in the discovery process does not suggest an obligation on TECO's part to justify Cargill's request for relief.

Finally, TECO states that it has provided the quarterly cost/benefit analyses associated with the two-year Cargill self-service wheeling experiment authorized by this Commission in Order No. PSC-00-1596-TRF-EQ, and that Cargill has a copy of these analyses. TECO has already responded to two rounds of Cargill discovery requests and is in the process of responding to a third round of requests. Therefore, Cargill's suggestion that it cannot sustain its burden of proof because the information that it needs is in TECO's sole possession does not ring true. TECO suggests that Cargill's apparent inability to justify the relief that it has requested is a function of a lack of merit rather than a lack of information.

Analysis and Ruling

For the reasons espoused by TECO, we disagree that the Prehearing Officer overlooked or failed to consider a point of fact or law in rendering his decision in Order No. PSC-03-0945-PCO-EQ concerning which entity bears the burden of proof in this case. The burden of proof in a Section 120.57 proceeding is upon the petitioner to go forward with evidence to prove the truth of the facts asserted in his petition. Florida DOT v. J.W.C. Co., Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981). The Florida DOT Court explains that

> [t]he term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of

> a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails.

Id. at 787.

Moreover, contrary to Cargill's assertion that the Stewart Bonded Warehouse decision supports placing the burden of proof on TECO, that Court found that "[w]hile the burden of going forward with the evidence as to the issue of adverse impact may shift in any particular case, the burden of proof remains on the applicant." 294 So. 2d at 317-18. (See also Florida Power Corp. v. Cresse, 413 So. 2d 1187, 1191 (Fla. 1982) (finding that the burden of proof in a Commission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates)).

It appears that Cargill is confusing the meaning of the term "burden of proof" with the burden of producing, or going forward with, the evidence. In the context of this case, the burden of producing evidence will shift from Cargill to TECO as the case progresses, to show that the self-service wheeling program should not be continued on a permanent basis because the charges, terms, and other conditions associated with the provision of the service are likely to result in higher cost electric service to its general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers. However, the burden of proof, or the obligation to establish the truth of the claim that the self-service wheeling program should be made permanent rests with Cargill, as the party asserting the affirmative of the issue.

For the foregoing reasons, Cargill's Motion for Reconsideration of Order No. PSC-03-0945-PCO-EQ is denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Cargill Fertilizer, Inc.'s Motion for Reconsideration of Order No. PSC-03-0945-PCO-EQ is denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 6th Day of October, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

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NOTICE OF 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.

Any party adversely affected by the Commission's final action in this matter may request 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 by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.