

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: SEPTEMBER 19, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (GERVASI) *per mail*
DIVISION OF ECONOMIC REGULATION (HAFF, E. DRAPER) *Edo*
MMS JB JZ JDS

RE: DOCKET NO. 020898-EQ - PETITION BY CARGILL FERTILIZER, INC. FOR PERMANENT APPROVAL OF SELF-SERVICE WHEELING TO, FROM, AND BETWEEN POINTS WITHIN TAMPA ELECTRIC COMPANY'S SERVICE AREA.

AGENDA: 10/01/02 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020898.RCM

CASE BACKGROUND

On August 3, 2000, Cargill Fertilizer, Inc. (Cargill) petitioned the 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 Commission approved the pilot program on an experimental basis. The 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"

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program. Thus, the experiment is scheduled to expire on September 30, 2002. The Commission also ordered TECO to provide quarterly reports that identify the costs and revenues associated with this experimental program, and ordered that the Commission could revisit the approval of this experiment 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 (Motion to Continue Self-Service Wheeling). Among other things, Cargill requests that the Petition be processed on an expedited basis due to the impending expiration of the pilot program and that the Commission afford Cargill a hearing.

In support of the Motion to Continue Self-Service Wheeling, Cargill filed the Affidavit of Roger Fernandez on August 23, 2002. Also on August 23, 2002, TECO filed a Motion for an Extension of Time in which to Respond to the Motion to Continue Self-Service Wheeling (Motion for Extension of Time). On August 30, 2002, TECO filed its Response to the Motion to Continue Self-Service Wheeling, as well as its Response to the Petition. On September 5, 2002, Cargill filed a Motion to Strike Conclusions not Supported in the Record (Motion to Strike), and on September 9, 2002, TECO filed its Response thereto.

This recommendation addresses the various motions that have been filed in the docket to date, including the Motion to Continue Self-Service Wheeling, and whether the Petition should be scheduled directly for hearing. The Commission has jurisdiction pursuant to Section 366.051, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should TECO's Motion for an Extension of Time in which to Respond to the Motion to Continue Self-Service Wheeling be granted?

RECOMMENDATION: Yes, the Motion for an Extension of Time should be granted.

STAFF ANALYSIS: In order to determine whether TECO's late-filed Response to Cargill's Motion to Continue Self-Service Wheeling should be considered, staff recommends that the Commission first address TECO's Motion for an Extension of Time in which to Respond to the Motion to Continue Self-Service Wheeling (Motion for Extension of Time).

On August 23, 2002, TECO filed its Motion for an Extension of Time in which to respond to Cargill's Motion, stating that it needed additional time in order to adequately respond to the Motion. Pursuant to Rule 28-106.204, Florida Administrative Code, a response to the Motion was due within seven days of the filing of the Motion, by August 23, 2002. TECO states that it has discussed the possibility of an extension of the response period with counsel for Cargill, and that counsel for Cargill has agreed to an extension to August 30, 2002, for the filing of TECO's response to the Motion with the understanding that TECO will not attempt to terminate the current program until the Commission has had an opportunity to rule on Cargill's Motion at the October 1, 2002, agenda conference. TECO requests that it be granted an extension until August 30, 2002, in which to file its response with that understanding.

Pursuant to Rule 28-106.204(5), Florida Administrative Code, "[m]otions for extension of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request." Because TECO has complied with this rule and has filed its Response on August 30, 2002, the date that the parties mutually agreed upon, staff recommends that TECO's Motion for Extension of Time should be granted and its Response to Cargill's Motion to Continue Self-Service Wheeling should be considered.

ISSUE 2: Should Cargill's Motion to Strike Conclusions not Supported in the Record be granted?

RECOMMENDATION: Cargill's Motion to Strike Conclusions not Supported in the Record need not be ruled upon, since the Uniform Rules of Procedure do not authorize a movant to reply to a response to a motion. If the Commission were to choose to consider this filing a Motion, staff would recommend that the Motion to Strike should be denied.

STAFF ANALYSIS: In order to determine whether Cargill's Motion to Strike Conclusions not Supported in the Record (Motion to Strike) should be considered in ruling on the Motion to Continue Self-Service Wheeling, staff recommends that the Commission also address this Motion prior to ruling on the Motion to Continue Self-Service Wheeling.

By this Motion to Strike, Cargill requests that the Commission strike Paragraph 4 of TECO's Response to Cargill's Motion to Continue Self-Service Wheeling because in that Paragraph, TECO asks the Commission to draw a final conclusion from disputed information concerning whether the self-service wheeling pilot program is cost effective, which information is not part of the record in this case. Cargill cites to Thorn v. Florida Real Estate Commission, 146 So. 2d 907, 910 (Fla. 2nd DCA 1962) ("...nothing can be treated as evidence which is not introduced as such..."), for the proposition that unless the quarterly reports submitted by TECO in this docket are the subject of sworn testimony, discovery and cross-examination, they are not evidence in the case and cannot form the basis for a decision on the Motion to Continue Self-Service Wheeling.

In its Response to the Motion to Strike, TECO argues that its evaluation of the quarterly reports prepared during the two-year experiment period indicates that the self-service wheeling has not been cost-effective, that Cargill has chosen to submit no evidence to the contrary, and that as the movant, Cargill has the burden of demonstrating that granting its request for interim relief will not result in harm to other ratepayers.

Cargill cites to Rule 28-206.204, Florida Administrative Code, as authority for filing its Motion to Strike, which rule requires that all requests for relief shall be by motion. However, although Cargill styles this filing as an initial motion, it is actually

responsive to TECO's Response to the Motion to Continue Self-Service Wheeling, and is thus in the nature of a Reply. Staff recommends that because the Uniform Rules of Procedure do not authorize a movant to reply to a response to a motion, it is unnecessary for the Commission to consider or to rule upon the Motion to Strike. See Order No. PSC-01-1930-PCO-EI, issued September 25, 2001, in Docket No. 010944-EI, in re: Complaint of South Florida Hospital and Healthcare Association, et al., against Florida Power & Light Company (finding that Rule 28-106.204(1) does not authorize the movant to reply to a response, and that the Commission has routinely refused to consider such replies).

It is within the Commission's discretion to consider this filing a motion rather than an unauthorized reply to a response. If the Commission chooses to do so, staff would recommend that the Motion to Strike should be denied. The Thorn case which Cargill uses to advance its position does not stand for the proposition that there is an evidentiary standard that must be met within pleadings filed prior to a hearing. In that case, the court found that "[a]dministrative officers, boards or commissions who are required to make a determination upon or after a hearing, . . . cannot act on their own information. All parties to such a hearing must be fully apprised of the evidence submitted or to be considered, and nothing can be treated as evidence which is not introduced as such. . . ." 146 So. 2d at 910 (emphasis added). No evidentiary record exists in this case due to the fact that no hearing has been held as of yet. Moreover, "[p]leadings are the allegations made by the parties to suit for the purpose of presenting the issue to be tried and determined. They are the formal statements by the parties of the operative as distinguished from the evidential, facts on which their claim or defense is based." Hart Properties, Inc. v. Slack, 159 So. 2d 236, 239 (Fla. 1963) (quoting Fla. Jur., Pleadings, Section 2). The Commission may consider all allegations raised in the motions and responses thereto that have been appropriately filed in this docket.

ISSUE 3: Should Cargill's Motion to Continue Self-Service Wheeling of Waste Heat Cogenerated Power During Resolution of Petition for Permanent Approval be granted?

RECOMMENDATION: No, the Motion to Continue Self-Service Wheeling should be denied.

STAFF ANALYSIS:

Motion to Continue Self-Service Wheeling

In the Motion, Cargill requests that until a final resolution is reached on its Petition, the self-service wheeling program remain in full force and effect. Cargill cites to Rule 28-106.204, Florida Administrative Code, as authority for its request. In support of the Motion, Cargill states that it is an industrial enterprise that uses waste heat to self-generate electricity at two industrial plants which have been classified as qualifying facilities (QFs) under the relevant state and federal regulations. Cargill also has one mining facility that does not generate electricity. These facilities are located within TECO's service area, and are being served by TECO under its Interruptible and Interruptible Standby Tariffs. By Order No. PSC-00-1596-TRF-EQ, the Commission approved an experimental self-service wheeling program for self-service wheeling among the three Cargill facilities in TECO's service territory. The program is scheduled to expire on September 30, 2002, and Cargill has requested that TECO continue the program, but TECO has refused. Because it is unlikely that the issues raised in the Petition will be finally resolved by September 30, Cargill requests that the program remain in place pending final resolution of the Petition.

Cargill states that the self-service wheeling program complies with the requirements of the pertinent Florida Statutes and the Commission's rules on the subject. Section 366.051, Florida Statutes, provides that utilities shall provide self-service wheeling unless there is a finding that it will result in materially higher costs for the general body of ratepayers. Cargill argues that no such finding has been made in this case. Further, Cargill has not had the opportunity to provide the Commission with its analysis of the reports filed during the pendency of the program. Cargill plans to do so during the hearing that it has requested in its Petition to be held in this case.

Finally, Cargill argues that if it cannot fully use its waste heat cogenerated power, it will be irreparably harmed, both operationally and economically. According to Cargill, TECO has indicated that it will be unable to serve Cargill from its own resources during portions of October and November, thus resulting in significant harm to Cargill.

Affidavit

In his Affidavit filed in support of the Motion, Mr. Fernandez, an employee of Cargill who is in charge of the pilot program, attests to Cargill's use of self-service wheeling to improve the efficiency of its operations, and states that the program is not harmful to other retail customers. He states that should the program not be continued pending a final decision on the Petition, the harm to Cargill will be significant. The program has allowed Cargill to coordinate outages among its two QF sites and one mine. Further, Cargill's use of electricity internally generated from waste heat reduces its exposure to high-priced power purchased from third parties on the spot market. According to Mr. Fernandez, Cargill's exposure to high buy-through costs and potential interruptions will be dramatically increased in October and November, 2002. During this time period, Cargill must reduce generation at its Bartow plant because its main boiler and one economizer have been failing and must be corrected. Mr. Fernandez states that this outage will occur simultaneously with an announced decrease in TECO's ability to serve its total load.

Further, Mr. Fernandez states that the positive or negative impact of the program on other ratepayers, if any, would not be materially significant to the general body of TECO's ratepayers. TECO's Mid-Point Summary of the program recognized that the monetary impact on other ratepayers "has been small and not significant." Mr. Fernandez believes that the program is beneficial to the general body of ratepayers because of Cargill's environmentally positive type of waste heat generation, and the increased power supply in TECO's territory at times of shortages.

Finally, Mr. Fernandez states that Cargill presented TECO with a draft petition for permanent approval of the program in February of this year in order to give the Commission ample time to process the petition, and that TECO and Cargill have continued to engage in discussions in an attempt to accommodate TECO's needs since that time. However, it was not until TECO filed its latest report, in

mid August, that Cargill was told that TECO had issues with the continuance of the program at the present time. Cargill's perhaps misplaced reliance on timely cooperation from TECO has resulted in the need for this 11th hour request for relief, since the pilot program is scheduled to end on September 30.

Response to Motion to Continue Self-Service Wheeling

In its Response, TECO requests that the Commission issue an order denying Cargill's request for interim relief in this proceeding. TECO suggests that self-service wheeling by Cargill has not been cost-effective and that it is therefore not in the best interests of the general body of ratepayers to continue this service. The benefit-to-cost ratio (BCR) calculated on the results of the quarterly analyses of the current self-service wheeling experiment period-to-date is 0.85, strongly indicating that the service is not cost-effective.

Further, TECO argues that Cargill has failed to identify any harm or damage that would justify granting the interim relief requested. In its capacity as a cogenerator, Cargill will suffer no detriment due to the absence of self-service wheeling. Neither the market nor the price paid for its as-available energy would be affected by the unavailability of self-service wheeling. In its capacity as a retail electric customer, Cargill has voluntarily selected interruptible electric service, presumably due to the savings achieved over subscribing to firm service. Cargill has accepted and enjoyed the relative savings associated with interruptible service. Therefore, Cargill cannot now reasonably argue that enduring the occasional interruptions that justify the savings in question or exercising the option to have TECO attempt to buy power in an effort to avoid interruption constitute adverse impacts that entitle Cargill to any particular or immediate relief in the form of self-service wheeling or otherwise. Even if occasional service interruptions or the obligation to pay for optional provision purchases was an adverse impact entitling Cargill to relief, self-service wheeling would not be an especially useful remedy. Thus far during the experiment period, only 13 percent of Cargill's self-wheeled energy has been scheduled and delivered during periods when optional provision purchases were being made on behalf of interruptible customers on TECO's system.

Finally, TECO argues that it has come to realize that some departures from the provisions of the Federal Energy Regulatory

Commission (FERC) jurisdictional Open Access Transmission Tariff (OATT) would be necessary in order to continue self-service wheeling, even on an interim basis, in a manner that recognizes that retail competition is not permitted under Florida law. These deviations from the OATT would have to be effectuated through a transaction-specific Transmission Service Agreement to be filed with FERC for approval. TECO submits that it would be a waste of time and resources to initiate the FERC filing process unless this Commission determines that self-service wheeling should continue.

Analysis and Recommendation

Cargill is an industrial enterprise that uses waste heat to self generate electricity. As such, it is not an entity regulated by this Commission. Cargill cites to Rule 28-106.204, Florida Administrative Code, as authority for its request to continue the self-service wheeling program on an interim basis. This Rule authorizes agency motion practice and procedure, but is silent on the Commission's authority to grant such interim relief to a non-regulated entity.

Section 366.075(1), Florida Statutes, authorizes the Commission to approve rates for any public utility on an experimental basis, and Section 366.075(2) permits the Commission to "extend the period designated for the test if it determines that further testing is necessary to fully evaluate the effectiveness of such experimental rates." Further, Section 366.051, Florida Statutes, requires public utilities to

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 [C]ommission 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.

Rule 25-17.0883, Florida Administrative Code, closely tracks the language of Section 366.051, Florida Statutes, and sets forth the methodologies for determining whether transmission service for self-service wheeling is likely to result in higher cost electric

service. Nevertheless, these statutory and rule provisions are silent on the Commission's authority to continue the time period designated for the test on an interim basis pending the Commission's decision on whether to permanently approve the experimental program.

Staff notes that Section 366.071, Florida Statutes, expressly authorizes the Commission to grant interim rate relief to a regulated utility during the pendency of a rate proceeding. Notably, Section 366.071(2)(a) requires that the difference between the interim rates and the previously authorized rates be collected under bond or corporate undertaking subject to refund with interest. Nevertheless, this is not a rate proceeding, nor is Cargill a regulated utility.

The Commission has also granted interim relief in the nature of emergency or temporary rates for water and wastewater utilities in certain circumstances outside of a rate proceeding, under its general ratemaking powers. See, e.g., Order No. PSC-97-0207-FOF-SU, issued February 21, 1997, in Docket No. 961475-SU, in re: Application for limited proceeding increase in wastewater rates by Forest Hills Utilities, Inc. (granting tariff request for emergency rates and finding that although Chapter 367, Florida Statutes, does not expressly authorize emergency rates, Section 367.011, Florida Statutes, provides that this Commission has exclusive jurisdiction over a utility's rates). Similarly, Section 366.04(1), Florida Statutes, provides that "the [C]ommission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service." Moreover, pursuant to Sections 366.05 and 367.121, Florida Statutes, the Commission's general powers over electric and water and wastewater utilities, respectively, include the power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility. However, in all such instances when the Commission has granted emergency interim relief, it has required the regulated utility to implement such emergency or interim rates subject to refund pending a final decision.

In the instant case, the regulated utility, TECO, suggests in its Response that the self-service wheeling by Cargill has not been cost-effective and that it is not in the best interests of the general body of ratepayers to continue this service. However, in his Affidavit in support of Cargill's Motion, Mr. Fernandez states

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that the positive or negative impact of the program on other ratepayers, if any, would not be materially significant to the general body of TECO's ratepayers.

If the Commission were to grant the interim relief requested by Cargill under its general powers over TECO's rates and charges, the Commission would lack the authority to require Cargill, as a non-regulated entity, to place its savings from the program subject to refund pending a final decision on its Petition. Therefore, if the Commission finds that it is not cost-effective for TECO's general body of ratepayers to continue the program on a permanent basis in ruling on Cargill's Petition at a later date, TECO's general body of ratepayers will not have been protected during the interim period. All aspects of the program, including cost-effectiveness, will be explored in this proceeding before a final ruling is made on the merits of the Petition. Based on staff's preliminary review of the seven quarterly reports submitted during the course of the program to date, it appears that the self-wheeling program may not be cost-effective.

Further, staff believes that TECO's argument that Cargill will suffer no harm or detriment which would justify granting the interim relief requested has merit. Cargill has voluntarily selected interruptible electric service, presumably due to the savings achieved over subscribing to firm service. As TECO points out, Cargill has accepted and enjoyed the relative savings associated with interruptible service. Cargill cannot now reasonably argue that enduring the occasional interruptions that justify the savings in question or exercising the option to have TECO attempt to buy power in an effort to avoid interruption constitute adverse impacts that entitle Cargill to immediate interim relief.

For the foregoing reasons, staff recommends that Cargill's Motion to Continue Self-Service Wheeling of Waste Heat Cogenerated Power During Resolution of Petition for Permanent Approval should be denied.

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ISSUE 4: Should Cargill's Request for Expedited Treatment of its Petition for Permanent Approval of Self-Service Wheeling Program be granted?

RECOMMENDATION: Yes, Cargill's Request for Expedited Treatment should be granted and the Petition for Permanent Approval of Self-Service Wheeling Program should be scheduled directly for hearing, thereby eliminating the PAA process, in order to reach a final decision on the merits of the Petition as soon as practicable.

STAFF ANALYSIS: In its Petition, Cargill seeks final approval from the Commission directing TECO to transmit power between two designated cogeneration sites located within TECO's service area under the provisions of Sections 366.051 and 366.075, Florida Statutes, and Rule 25-17.008, Florida Administrative Code. Cargill also requests that the Petition be processed on an expedited basis due to the impending expiration of the pilot program, and that Cargill be afforded a hearing.

In support of the Petition, Cargill states, among other things, that it will suffer material adverse operational and economic impact if it is unable to fully utilize its self-generated power in the future. According to Cargill, if the self-service wheeling program is allowed to expire, when TECO is unable to provide service from its own generation, it will purchase power on the spot wholesale market and transmit it to Cargill, often at prohibitive prices. Moreover, the reports which TECO was required to file during the pilot study period show that periodic transfers of power between Cargill's self-generation plants have no adverse impact on TECO's system reliability, and that the lost revenue to be shared with TECO's general body of ratepayers is not material.

In Response to the Petition, TECO suggests that based on the experience gained during the two-year self-service wheeling experiment, self-service wheeling by Cargill has not been cost-effective. TECO's quarterly analyses show that the impact of the self-service wheeling program on other ratepayers has been negative. Therefore, according to TECO, it is not in the best interests of the general body of ratepayers to continue this service. Moreover, TECO states that continuation of the self-service wheeling by Cargill would require certain waivers and/or approvals by FERC. TECO requests that the Commission deny Cargill's request for relief in this proceeding.

It appears to staff that there is a strong likelihood of a protest by either Cargill or TECO if the Commission were to propose a ruling on the merits of Cargill's Petition as a proposed agency action (PAA), regardless of whether the Commission were to propose that the Petition be granted or denied. It also appears that Cargill's request for expedited treatment has merit. The program is due to expire on September 30, 2002. In Issue 3, staff recommends that Cargill's Motion to Continue Self-Service Wheeling pending resolution of its Petition should be denied. If the Commission approves the recommendation on that issue, the experimental program will terminate and may or may not be implemented on a permanent basis at a later date, depending on the Commission's final decision on the merits of the Petition. Therefore, staff recommends that the Commission grant Cargill's Request for Expedited Treatment and schedule the matter directly for hearing, thereby eliminating the PAA process, in order to reach a final decision on the merits of the Petition as soon as practicable.

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ISSUE 5: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending a decision on the Petition for Permanent Approval of Self-Service Wheeling Program and Request for Expedited Treatment.

STAFF ANALYSIS: This docket should remain open pending a decision on the Petition for Permanent Approval of Self-Service Wheeling Program and Request for Expedited Treatment.