

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-03-0773-PCO-EQ
ISSUED: June 30, 2003

ORDER DENYING MOTION TO CONVENE MEDIATION AND REQUIRING PARTIES
TO FILE STATUS REPORT WITHIN TEN DAYS REGARDING THEIR INTENT TO
MEDIATE DISPUTE ON A VOLUNTARY BASIS, DENYING MOTION TO LIFT THE
PROCEDURAL ABATEMENT AND TO ESTABLISH PROCEDURAL SCHEDULE,
AND DENYING, WITHOUT PREJUDICE, MOTION TO COMPEL TAMPA ELECTRIC
COMPANY TO RESPOND TO OUTSTANDING DISCOVERY
AND REQUEST FOR ORAL ARGUMENT

Background

Order No. PSC-02-1518-PCO-EQ, issued November 5, 2002, granted Tampa Electric Company's (TECO) 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. That Order also found that Cargill Fertilizer, Inc.'s (Cargill) Motion for Order Compelling Expedited Discovery filed October 18, 2002, did not need to be ruled upon at that time. If the parties were unsuccessful in their attempts to mediate this matter, the discovery process would resume, at which time Cargill could respond to TECO's objections to Cargill's discovery requests filed on October 24, 2002.

After FERC issued its ruling on TECO's federal tariff filing, the parties advised this Commission that they had attempted to settle this matter informally, albeit thus far, unsuccessfully. The parties requested that the Commission convene an informal status conference to address the topic of formal mediation. 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

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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 all procedural dates scheduled in this docket were temporarily suspended. The parties were strongly encouraged to continue their efforts to settle this case, either informally or through formal mediation, and a new hearing date of October 22, 2003, was reserved in the event that a hearing is needed after such settlement efforts are 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.

Motion to Convene Mediation, Lift the Procedural Abatement, Compel TECO to Respond to Outstanding Discovery, and Establish Procedural Schedule

Motion to Convene Mediation

On May 30, 2003, Cargill filed a Motion to Convene Mediation, Lift the Procedural Abatement, Compel TECO to Respond to Outstanding Discovery, and Establish Procedural Schedule, as well as a Request for Oral Argument on the Motion to Compel.¹ In its Request for Mediation, Cargill states that the parties have attempted for some time to engage in informal settlement discussions to resolve this case, and that although such discussions have been useful, they have not resulted in resolution. Therefore, Cargill requests mediation.

In its Response filed June 6, 2003, TECO states that the parties have been continually engaged in intensive settlement discussions which appear to have resulted in the resolution of all but a few well-defined issues, as opposed to the extensive list of

¹By letter dated May 27, 2003, Cargill advised our General Counsel that there is a stalemate in the settlement discussions in this case, and requested that the dispute be scheduled to go forward after discovery issues are resolved.

issues now proposed by Cargill for formal mediation.² TECO states that it does not view mediation as an extension of the litigation process, nor as a "dress rehearsal" for litigation. Instead, TECO views mediation as an alternative to litigation that is useful only if the parties are willing to put aside their respective litigation positions in search of a negotiated solution.

According to TECO, given the significant time and effort already expended by the parties and the success achieved thus far, mediation, as a formal extension of the settlement process, makes sense only if it can be focused on the few issues left unresolved by the informal settlement process. To adopt a needlessly broader scope for formal mediation would be a senseless waste of the Commission's and the parties' valuable time and resources. TECO states that it is willing to support a focused and limited mediation effort to address the differences that remain unresolved, and, in addition, to include a discussion of an alternative to self-service wheeling proposed by TECO to Cargill in December of last year. However, if Cargill now wishes to pursue mediation with a focus on its proposed litigation position, the parties and the Commission would be better served by simply reinstating the procedural schedule and allowing Cargill an opportunity to meet its burden of proof in this proceeding.

Motion to Compel

In its Motion to Compel TECO to Respond to Discovery, Cargill states that on October 14, 2002, Cargill served its First Set of Interrogatories (Nos. 1-22) and its First Request for Production of Documents (Nos. 1-6) on TECO. On October 16, 2002, Cargill served its First Request for Admissions (Nos. 1-7) on TECO. Because Order No. PSC-02-1518-PCO-EQ held the procedural schedule in abeyance, TECO has not responded to any of Cargill's discovery. According to Cargill, TECO has objected to numerous of the discovery requests and much of the information that Cargill seeks through discovery is in the sole possession of TECO. Cargill argues that it must have

²In its May 27, 2003, letter, Cargill sets forth a list of ten issues that it believes mediation should cover, and states that additional issues will undoubtedly arise when Cargill's expert is asked to opine on the subject.

this information in order to prepare its case. Cargill discusses each of TECO's objections to the discovery and argues why the objections should be rejected and TECO should be required to respond to all of the discovery.

Further, Cargill argues that while it seeks to mediate this matter, it should not be put in the untenable position of having engaged in good faith efforts to settle this case only to find itself unable to adequately prepare its litigation case in the event mediation proves unsuccessful. To adequately prepare, Cargill must have sufficient time to analyze all the information it has sought from TECO, seek follow up information, if necessary, and incorporate the information in its testimony. Therefore, Cargill requests an Order of this Commission which convenes formal mediation, lifts the procedural abatement, compels TECO to respond to outstanding discovery, and establishes a procedural schedule so that the date that Cargill is required to file its direct testimony be no earlier than 15 days after TECO fully answers the discovery propounded by Cargill or is relieved from the obligation to do so.

In its Response, TECO argues that if mediation is to be pursued, then Cargill's Motion to Compel should be denied on the ground that it is premature. The Commission's willingness to hold the procedural schedule in abeyance was based, in part, on the recognition that the status quo will be maintained by merit of TECO's continued provision of self-service wheeling to Cargill pending a final Commission decision on Cargill's request for permanent self-service wheeling service, and Cargill's undertaking to compensate ratepayers for any net cost associated with self-service wheeling during this interim period.

According to TECO, since both Cargill and ratepayer interests are protected, there is no reason to reinstate the procedural schedule until the settlement/mediation process has run its course. Nevertheless, in the event that the procedural schedule is reinstated, TECO reiterates its objection to certain of the discovery requests propounded by Cargill, but does not object to Cargill's request that its direct testimony in this proceeding be filed 15 days after TECO has provided its responses to the discovery previously propounded by Cargill in this proceeding.

Request for Oral Argument

In its Request for Oral Argument, Cargill states that this case concerns the continuation of Cargill's self-service wheeling program and the continued fuel and conservation benefits that flow from it. According to Cargill, critical information used to calculate such benefits is in TECO's sole possession, and oral argument on the Motion to Compel will assist the Commission in evaluating and understanding the critical nature of this information to Cargill's due process right to adequately prepare its case.

In its Response, TECO states that Cargill's Request for Oral Argument on its Motion to Compel should be denied because the issues raised thereby are relatively straightforward and do not appear to warrant setting time for oral argument. However, TECO requests to be allowed to participate in the oral argument should Cargill's request be granted.

Ruling

The parties are commended for the progress they have apparently made thus far and for their continued efforts to settle this case. In addition, the parties are strongly encouraged to voluntarily avail themselves of the mediation program offered by this Commission. However, the mediation program is available on a strictly voluntary basis. See Section 120.573, Florida Statutes, and Rule 28-106.111, Florida Administrative Code. Therefore, Cargill's Motion to Convene Mediation is denied.

Based on their stated positions, it does not appear that the parties have mutually agreed upon the issues to be mediated in this matter. Although it appears that the parties have reached common ground with respect to some of the issues, they do not agree on what the scope of the mediation should be. If the parties can voluntarily agree to mediate this dispute on terms that are acceptable to both parties, mediation will be made available upon the mutual, unconditional request of the parties.³ The parties

³It is noted that during the process of mediation, any party may request to review information in the possession of any other

shall file a status report within ten days of the issuance date of this order, either jointly or separately, advising this Commission whether they have mutually agreed to mediate this dispute. If the parties are unable to articulate a voluntary willingness to go forward with mediation on mutually acceptable terms within the allotted time frame, this matter will be resolved through the formal hearing process.

Further, Cargill's Motion to Lift the Procedural Abatement and to Establish the Procedural Schedule is premature, and it is therefore denied. If the parties are unable to reach a full settlement of the issues in dispute in this case, either through mediation or through continued informal settlement discussions, and it becomes clear that a hearing must take place, a procedural schedule will be established at that time. Cargill's Motion to Compel TECO to Respond to Outstanding Discovery and Request for Oral Argument on the Motion to Compel are also premature. The Motion to Compel and Request for Oral Argument are therefore denied without prejudice to refile if this case is not mediated or settled and it becomes necessary to conduct a hearing. The currently scheduled hearing date of October 22, 2003, will be rescheduled if it proves not to allow sufficient time for Cargill to file its direct testimony at least 15 days after TECO fully answers the pending discovery propounded by Cargill or is relieved from the obligation to do so.

Based on the foregoing, it is

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that Cargill Fertilizer, Inc.'s Motion to Convene Mediation is denied. It is further

ORDERED that the parties shall file a status report within ten days of the issuance date of this order, either jointly or separately, advising this Commission whether they have mutually agreed to mediate this dispute. If the parties are unable to articulate a voluntary willingness to go forward with mediation on mutually acceptable terms within the allotted time frame, this

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party, subject to a non-disclosure agreement, if deemed necessary.

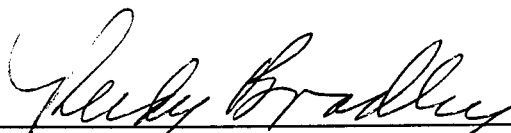
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matter will be resolved through the formal hearing process. It is further

ORDERED that Cargill Fertilizer, Inc.'s Motion to Lift the Procedural Abatement and to Establish Procedural Schedule is denied. It is further

ORDERED that Cargill Fertilizer, Inc.'s Motion to Compel Tampa Electric Company to Respond to Outstanding Discovery and Request for Oral Argument are denied without prejudice.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 30th day of June, 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.

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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.