

ORIGINAL  
AUSLEY & McMULLEN

ATTORNEYS AND COUNSELORS AT LAW

227 SOUTH CALHOUN STREET  
P.O. BOX 391 (ZIP 32302)  
TALLAHASSEE, FLORIDA 32301  
(850) 224-9115 FAX (850) 222-7560

September 17, 2003

HAND DELIVERED

Ms. Blanca S. Bayo, Director  
Division of Commission Clerk  
and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

RECEIVED-FPSC  
03 SEP 17 AM 9:55  
COMMISSION  
CLERK

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 Territory; FPSC Docket No. 020898-EQ

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Tampa Electric Company's Objection to Subpoena Duces Tecum for Deposition, Motion to Quash and Motion for Protective Order.


Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,

  
James D. Beasley

RECEIVED & FILED

  
FPSC-BUREAU OF RECORDS

- AUS \_\_\_\_\_ JDB/pp
- CAF \_\_\_\_\_ Enclosure
- CMP \_\_\_\_\_
- COM 3 \_\_\_\_\_
- CTR \_\_\_\_\_ cc: All Parties of Record (w/enc.)
- ECR \_\_\_\_\_
- GCL \_\_\_\_\_
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DOCUMENT NUMBER-DATE

08815 SEP 17 8

FPSC-COMMISSION CLERK

# ORIGINAL

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition By Cargill Fertilizer, Inc. ) Docket No. 020898-EQ  
for permanent approval of self-service wheeling )  
to, from and between points within Tampa Electric ) Filed: September 17, 2003  
Company's service territory )

### **TAMPA ELECTRIC COMPANY'S OBJECTION TO SUBPOENA DUCES TECUM FOR DEPOSITION, MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER**

Pursuant to Rules 1.280(c) and 1.410 (c) and (e), Florida Rules of Civil Procedure, and Rules 28-106.204 and 28-106.206, Florida Administrative Code, Tampa Electric Company ("Tampa Electric" or "Company") hereby objects to the Subpoenas Duces Tecum For Deposition ("Subpoenas") served by Cargill Fertilizer, Inc. ("Cargill") on Messrs. Black, Barringer, Bryant and Ms. Jordan on September 12, 2003, and requests that this Commission issue a protective order quashing the Subpoenas and establishing reasonable parameters for depositions in this proceeding. As discussed below, the Subpoenas are not calculated to lead to the discovery of admissible evidence. Instead, these Subpoenas served by Cargill are unreasonable and oppressive, purely designed for purposes of annoyance and harassment and were directed to individuals who are not witnesses in this proceeding and who have had no involvement in Cargill's efforts to obtain self-service wheeling. In support whereof, Tampa Electric says:

1. By letter dated August 29, 2003, counsel for Cargill advised Tampa Electric as follows:

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

*Cargill would like to take the depositions of all witnesses who file testimony on TECo's behalf. We would also like to schedule the depositions of Mr. Black, Mr. Barringer, and the TECo employee(s) in charge of scheduling transmission service to the extent they do not prefile testimony. We would like to schedule these depositions the week of September 22<sup>nd</sup>, so please provide me with availability so I may send out the notices.*

2. On September 9, 2003, Tampa Electric advised counsel for Cargill that Tampa Electric would fully cooperate with Cargill's request for depositions by identifying and producing for deposition, within the time frame requested by Cargill, the most knowledgeable person available to address the subject matter that Cargill wished to cover. In an effort to identify the most knowledgeable Tampa Electric personnel, counsel for Tampa Electric asked counsel for Cargill to identify the subject areas that Cargill wished to address in depositions.
3. Counsel for Cargill, John McWhirter, stated that Cargill wanted to question Mr. Barringer, TECO Energy's V.P. and Controller, with regard to general accounting matters, including the question of what level of expense was considered to be material. Mr. McWhirter also indicated that Cargill wanted to question Mr. Barringer with regard to Tampa Electric's plans for future general rate cases. Mr. McWhirter mentioned that the latter issue had been addressed in a July 29, 2003 deposition given by Mr. Barringer in Docket No. 030001-EI.
4. Mr. McWhirter stated further that Cargill wanted to depose Mr. Black, TECO Energy's Senior V.P.—Power Generation, with regard to a purchase power agreement between Cargill and "TPS Wholesale Marketing" that Mr. Black had allegedly executed on behalf of "TPS Wholesale Marketing." Finally, Mr. McWhirter indicated that Cargill wanted to

depose someone at Tampa Electric who was familiar with the operation of Tampa Electric's Open Access Transmission Tariff as well as the FERC tariff pursuant to which Cargill self-service wheeling was provided.

5. Counsel for Tampa Electric advised Counsel for Cargill that its current intention was to present one witness in this proceeding, Mr. William Ashburn and, in keeping with Cargill's request, that Mr. Ashburn could be available for deposition on either September 22<sup>nd</sup> or September 23<sup>rd</sup> or during the week of September 29. Tampa Electric further advised Cargill that it would seek to identify the most knowledgeable individuals within the company to address the other deposition topics identified by Cargill.
6. On September 10, 2003, Counsel for Tampa Electric contacted Mr. McWhirter to advise Cargill that Tampa Electric would produce Mr. Ron Donahey, Tampa Electric's Managing Director of Grid Operations, to be deposed with regard to the transmission issues that Cargill had identified. Cargill and Tampa Electric agreed that Mr. Donahey would be deposed on September 24<sup>th</sup>. With regard to Mr. Black, Cargill was advised that Tampa Electric could not locate the contract about which Cargill wanted to question Mr. Black and that, in any event, Mr. Black probably would not be the most knowledgeable individual with regard to the details of the transaction in question. In addition, Tampa Electric pointed out that Mr. Black has not been involved with the provision of self-service wheeling to Cargill. Instead, Tampa Electric offered to identify and produce for deposition the person most familiar with the transaction in question if Cargill would fax to Tampa Electric a copy of the contract that would form the basis for its questions. To date, Cargill has not provided a copy of the contract in question. With regard to Mr. Barringer, Tampa Electric advised Cargill that Mr. Ashburn would be

able to address, during his deposition, the subject areas that Cargill identified as the planned subject matter for its deposition of Mr. Barringer. In fact, Tampa Electric pointed out that Mr. Ashburn would be sponsoring Tampa Electric's responses to the interrogatories that Cargill had propounded to Tampa Electric on the topics in question.<sup>1</sup> Tampa Electric also pointed out that Cargill could offer into evidence those portions of Mr. Barringer's July 29<sup>th</sup> deposition in Docket No. 030001-EI that it believed to be relevant to the matters at issue in this proceeding. Finally, Tampa Electric offered to respond on an expedited basis to any further interrogatories that Cargill might wish to propound with regard to the subject matter addressed in its Interrogatory Nos. 17 and 40. Under the circumstances described above, Tampa Electric advised Cargill that depositions of Messrs. Black and Barringer were not likely to lead to the discovery of relevant evidence and were otherwise unnecessary in light of Tampa Electric's willingness to promptly produce knowledgeable witnesses for deposition on the subject areas of interest to Cargill.

7. Counsel for Cargill, Mr. McWhirter, responded that Cargill had the right to depose anyone that it chose and that Cargill did not have to reveal to

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<sup>1</sup> Cargill Interrogatory No. 17 asks: *When TECO's accountants prepare financial statements, what level of expense is considered "material"?* Tampa Electric responded on August 8, 2003 as follows: *An item is material if its inclusion or omission would influence or change the judgment of a reasonable person. It is immaterial, therefore, irrelevant if its inclusion or omission would have no impact on a decision maker. It is difficult to provide firm guides in judging when a given item is or is not material because materiality varies both with relative amount (the size of the item relative to the size of other items) and with relative importance (the nature of the item itself).*

Cargill Interrogatory No. 40 asks: *TECO's base rates were last set in 1993. It has not had a general rate case since that time. When does TECO anticipate it will have its next full rate case?* Tampa Electric will respond on September 25, 2003, when responses to Cargill's Third Set of Interrogatory Nos. 38-45 are due.

Tampa Electric the subject matter that it wanted to address in depositions. Mr. McWhirter then added Mr. Bryant and Ms. Jordan to the list of individuals that Cargill wished to depose. He refused to disclose 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 were the most knowledgeable with regard to the relevant topics. Tampa Electric reiterated its willingness to promptly identify and produce knowledgeable witnesses for deposition, just as it had done in the case of Mr. Donahey, if Cargill would identify the subject areas that it wished to address. Mr. McWhirter replied that unless Tampa Electric agreed to produce Messrs. Black, Barringer and Bryant and Ms. Jordan for deposition, Cargill would simply notice their depositions on a date of Cargill's choosing and Tampa Electric could then file its objections with the Commission.

8. Rule 1.280 (c), Florida Rules of Civil Procedure states, in pertinent part:

*Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; ...*

9. Rule 1.410 (c), Florida Rules of Civil Procedure provides, in pertinent part:

***For Production Of Documentary Evidence.*** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein, but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive.....

10. Tampa Electric respectfully submits that Cargill's Subpoenas Duces Tecum For Deposition as directed to Messrs. Black, Barringer and Bryant and Ms. Jordan are unreasonable, oppressive and calculated to harass the individuals in question rather than to elicit relevant evidence. None of the individuals in question are being offered as Tampa Electric witnesses in this proceeding and none of these individuals 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.

11. In the case of Mr. Black, the Subpoena demands the production of:

*"Copies of any "must buy" contract including all amendments and regulatory approvals thereof between Tampa Electric and any affiliated unregulated power producer or marketing company. Copy of contract with Cargill Fertilizer Inc. for purchase of as available power for Tampa Electric and for Tampa Electric Marketing."*

12. As stated above, it is unlikely that Mr. Black would be conversant with the details of the subpoenaed documents, to the extent that any such documents exist. As noted above, Cargill has, thus far, refused to provide Tampa Electric with a copy of the Cargill/Tampa Electric/TPS Wholesale Marketing contract that Mr. Black allegedly executed and

Tampa Electric has been unable to locate such an agreement. Mr. Black's current and past areas of responsibility do not include responsibility for power marketing or power purchases. Therefore, it is difficult, if not impossible, to understand what relevant and useful information Cargill expects to obtain from deposing Mr. Black with regard to the indicated subject matter. Cargill's refusal to work with Tampa Electric to identify a witness who would be able to respond to Cargill's questions on this topic simply underscores Cargill's bad faith and lack of genuine interest in obtaining information.

13. In the case of Mr. Barringer, the Subpoena demands the production of:

*“TECo Energy Form 10K filed with the United States Securities And Exchange Commission Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2002 and Form 10 Q for the period ending June 30, 2003 and the Proxy statement issued for the 2003 annual TECO Energy stockholders meeting.”*

14. First, there is no indication of how Tampa Electric's SEC disclosure forms are relevant to the issue of whether Cargill self-service wheeling should be made permanent. To the extent that Cargill's earlier representations are true and it is interested in questioning Mr. Barringer with regard to the issue of what constitutes a material impact and the question of Tampa Electric's future plans for a general rate case, Mr. Ashburn, who will be sponsoring this subject matter as a witness in this proceeding, has already been made available for deposition. Cargill has already inquired as to these matters in discovery and has either already received or will receive responses



from Tampa Electric on these issues. Under these circumstances, deposing Mr. Barringer on these same issues is unnecessarily redundant and constitutes an abuse of the discovery process.

15. In the case of Ms. Jordan, the Subpoena demands the production of:

*Testimony and Exhibits filed by the deponent in FPSC Docket 020001-EI & 030001-EI and all Fuel Cost Projections for future years.*

16. As is the case with Messrs. Black and Barringer, Ms. Jordan has had no involvement with the provision of self-service wheeling to Cargill. In addition, there is no indication that Ms. Jordan's testimony in the above-mentioned dockets is relevant to this proceeding. Finally, Ms. Jordan does not develop fuel cost projections as part of her current job responsibilities. That work is done elsewhere in the Company. Therefore, her ability to contribute useful, relevant information in this proceeding is questionable, at best. Once again, Cargill has made it clear by its actions that it is not interested in working with Tampa Electric to identify the most knowledgeable witness to address the matters at issue. In any event, as noted above, Cargill chose the date for Ms. Jordan's deposition arbitrarily. Ms. Jordan has a prior commitment on September 25<sup>th</sup> that cannot be modified and she is, therefore, unavailable for deposition on that date.

17. In the case of Mr. Bryant, the 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."*

18. Once again, Cargill has arbitrarily elected to depose an individual who has had no involvement in the provision of Cargill self-service wheeling. Furthermore, Mr. Bryant has prepared no analysis with regard to the cost effectiveness of self-service wheeling or cogeneration. In addition, Tampa Electric has already provided in response to Cargill Interrogatory No. 20 the Commission-approved expenses that it has incurred to facilitate cogeneration from 1981 through 2002. Under these circumstances, it is doubtful that Mr. Bryant can offer any additional useful, relevant information. In any event, as noted above, Cargill chose the date for Mr. Bryant's deposition arbitrarily. Mr. Bryant has a prior commitment on September 25<sup>th</sup> that cannot be modified and he is, therefore, unavailable for deposition on that date. Given Cargill's unwillingness to describe the subject areas that it wants to examine, it is difficult, if not impossible, for Tampa Electric to identify a knowledgeable witness for deposition.
19. Although Cargill has chosen to subpoena specific individuals in this instance, the information that it seeks is institutional in nature. In other words, Cargill is seeking information about Tampa Electric'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. Tampa Electric's offer to cooperate with Cargill in identifying knowledgeable witnesses is

entirely consistent with the procedure set forth in Rule 1.310, Florida Rules Of Civil Procedure, for resolving the kind of discovery impasse created by Cargill's arbitrary selection of deponents.

20. Rule 1.310 (b)(6), FRCP, states, in relevant part, that:

*In the notice a party may name as the deponent a public or Private Corporation, a partnership or association, or a governmental agency, and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to do so, to testify on its behalf and may state the matters on which each person designated shall testify. The persons so designated shall testify about matters known or reasonably known or reasonably available to the organization....*

21. While the procedure of Rule 1.310 (b)(6) does not require that a company rather than specific employees be named in the notice of deposition, that procedure certainly represents a more reasonable approach than the one chosen by Cargill where, as in this case, institutional information is sought from individuals other than identified Company witnesses.
22. Cargill's arbitrary choice of Messrs. Black, Barringer, Bryant and Ms. Jordan as deponents in this proceeding is not calculated to yield useful information. As explained above, to the extent Cargill has informed Tampa Electric as to the information sought, Cargill appears to be seeking information from the wrong individuals and is unwilling to cooperate with Tampa Electric to identify and depose the individuals who are most knowledgeable with regard to the subject matter that Cargill wishes to examine. As the result of Cargill's intransigence,

useful depositions that could have been scheduled during the week of September 22<sup>nd</sup> will now be delayed while Cargill attempts to enforce its presumed right to depose anyone it chooses, regardless of whether or not the deponent has knowledge of relevant subject matter.

WHEREFORE, Tampa Electric requests a protective order:

- a) Quashing the Subpoenas and directing that Messrs. Black, Barringer, Bryant and Ms. Jordan not be deposed; and
- b) Compelling Cargill to cooperate with Tampa Electric in following the procedure outlined in Rule 1.310(b)(6), FRCP, 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; or
- c) In the alternative, compelling Cargill to reschedule the depositions of Mr. Bryant and Ms. Jordan in order to reasonably avoid conflicts with their prior scheduled commitments.

DATED this 17<sup>th</sup> day of September, 2003.

Respectfully Submitted,

HARRY W. LONG JR.  
Assistant General Counsel – Regulatory  
Tampa Electric Company  
P.O. Box 111  
Tampa, Florida 33601  
(850) 228-1702

and

LEE L. WILLIS  
JAMES D. BEASLEY  
Ausley & McMullen  
Post Office Box 391  
Tallahassee, FL 32303  
(850) 224-9115

By: James D. Beasley

ATTORNEYS FOR TAMPA ELECTRIC COMPANY

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Objection to Subpoena Duces Tecum for Deposition, Motion to Quash and Motion for Protective Order, filed on behalf of Tampa Electric Company, has been furnished by hand delivery (\*) or U. S. Mail on this 17<sup>th</sup> day of September 2003 to the following:

Ms. Rosanne Gervasi\*  
Staff Counsel  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Mr. John W. McWhirter, Jr.  
McWhirter, Reeves, McGlothlin,  
Davidson, Kaufman & Arnold, P.A.  
400 North Tampa Street, Suite 2450  
Tampa, FL 33601-3350

Ms. Vicki Gordon Kaufman\*  
Mr. Joseph A. McGlothlin  
Mr. Timothy J. Perry  
McWhirter, Reeves, McGlothlin,  
Davidson, Kaufman & Arnold, P.A.  
117 South Gadsden Street  
Tallahassee, FL 32301

  
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ATTORNEY