

ORIGINAL

MCWHIRTER REEVES
ATTORNEYS AT LAW

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:

TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

September 18, 2003

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 020898-EQ

Dear Ms. Bayo:

On behalf of Cargill Fertilizer, Inc. (Cargill), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ Cargill Fertilizer, Inc.'s Response to Tampa Electric Company's Objection to Subpoena Duces Tecum for Deposition, Motion to Quash and Motion for Protective Order.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copy to me. Thank you for your assistance.

RECEIVED & FILED

[Signature]
FPSC-BUREAU OF RECORDS

Sincerely,

Vicki Gordon Kaufman
Vicki Gordon Kaufman

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COMMISSION
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- JTH _____

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 18, 2003

**Cargill Fertilizer, Inc.'s Response to Tampa Electric Company's
Objection to Subpoena Duces Tecum for Deposition, Motion to Quash
And Motion for Protective Order**

Pursuant to rule 28-106.204, Florida Administrative Code, Cargill Fertilizer, Inc. (Cargill) responds to Tampa Electric Company's (TECo) Objection to Subpoena Duces Tecum for Deposition, Motion to Quash and Motion for Protective Order. TECo's refusal to produce the requested deponents should not be permitted and its motions should be denied.

1. Cargill seeks to take the depositions of Messrs. Black, Barringer, Bryant and Ms. Jordan. These TECo employees have information that "is relevant to the subject matter of the pending action" and is "reasonably calculated to lead to the discovery of admissible evidence."¹ Florida favors complete disclosure in discovery matters. *ACandS, Inc. v. Askew*, 597 So.2d 895 (Fla. 1st DCA 1992).

2. As the Prehearing Officer is aware, this matter involves Cargill's request that the self-service wheeling (SSW) program that it is currently engaged in with TECo be made permanent. Part of the information which the Commission will consider in this case involves the application of the tests and criteria set out in the pertinent statutes, rules and orders, including Order No. 24745, which incorporates this Commission's Cost Effectiveness Manual for Demand Side Management Programs and Self Service Wheeling Proposals (Manual). The Manual utilizes several tests, such as the

¹ Rule 1.280(b)(1), Florida Rules of Civil Procedure.

Ratepayer Impact Test (RIM) and the Total Resource Test (TRC), to assist the Commission in evaluating SSW programs. This same Manual is applicable to demand side management (DSM) programs and is presumably followed by TECo in its DSM filings with this Commission.

3. Application of these tests requires information that is available only from the utility. For example, the RIM test formula, set out on pages 26-28 of the Manual, requires input of information such as avoided generation, avoided transmission, net fuel savings, avoided unit fuel costs, and replacement fuel costs. This information is available only from TECo² and thus Cargill seeks to depose those TECo employees with information relevant to these and other topics at issue. Since the Commission has placed the burden of proof in this case on Cargill, it would be a denial of due process if Cargill cannot seek information from the TECo employees who possess information essential to the case.

4. The depositions Cargill has noticed are not for the purpose of harassment as TECo alleges but are for the purpose of obtaining information relevant to this case. TECo's attempt to narrowly limit discovery in this case is inappropriate and at odds with Florida law on the scope of discovery. The fact that a witness has had "no involvement with the provision of self-service wheeling to Cargill"³ does not mean discovery may not be conducted to obtain relevant information. Each of the depositions Cargill has noticed fall within the broad discovery scope of Rule 1.280. Each witness has information that is relevant or that may lead to the discovery of relevant information:

- **Ms. Jordan**⁴ is routinely proffered as TECo's fuel witness in Docket No. 030001-EI.

² For that reason, Cargill suggested that the burden of proof in this case to come forward with such information rests with TECo. The Prehearing Officer disagreed, Order No. PSC-03-0945-PCO-EQ, and his ruling was sustained by the panel in this case.

³ TECo motion at 8.

⁴ TECo notes that Ms. Jordan and Mr. Bryant are unavailable for deposition on September 25th; of course, Cargill will work with TECo to find a date that is convenient for these witnesses. That is not the issue; TECo has unilaterally refused to produce them at all.

As recently as September 15th, Ms. Jordan filed testimony on TECo's projected fuel costs. Such fuel cost information and how TECo projects it for the fuel docket, while it apparently does not have such information available in this docket, is relevant to this matter.

- **Mr. Barringer** is TECo's Controller. Cargill is entitled to inquire of him regarding TECo's position on materiality. The Manual specifically provides that the Commission shall consider the "*materiality* of any lost revenues indicated by the Rate Impact test."⁵ Further, Mr. Barringer's knowledge as to TECo's future rate case plans is relevant to judge and evaluate the impact, if any, of the Cargill SSW program on ratepayers.
- **Mr. Bryant**, as recently as last year, filed testimony in the conservation docket indicating how TECo performs the relevant DSM tests. Cargill is entitled to inquire of Mr. Bryant to ascertain any differences or inconsistencies regarding the analysis applied to SSW, to which TECo is opposed, and to other DSM programs, for which TECo seeks approval. Cargill is entitled to inquire of Mr. Bryant regarding the avoided unit and other inputs to the conservation tests TECo employs.
- **Mr. Black** is involved with TECo's wholesale purchases and sales and is often proffered as a witness on these matters before the Commission. Cargill is entitled to seek information regarding how such purchases and sales are valued and how they relate to the benefits or detriments of SSW.

5. The fact that Cargill may have inquired as to some of these topics in interrogatories *in*

⁵ Order No. 24745 at 33, emphasis added.

no way affects Cargill's right to pursue relevant discovery via deposition. TECo may not dictate to Cargill the type of discovery it may employ. TECo may not direct or control Cargill's discovery nor can it require Cargill to ask certain questions of certain witnesses and not of others.⁶ Cargill is entitled to select the witnesses it wants to depose.⁷ Nor may TECo offer a "corporate representative" pursuant to rule 1.310(6), Florida Rules of Civil Procedure, when Cargill has *specifically* named a deponent.⁸ The witnesses Cargill has noticed for deposition have relevant information and Cargill is entitled to depose them.

6. In *In re: Petition by Telephone Company of Central Florida, Inc. for resolution of items under dispute in resale agreement with BellSouth Telecommunications, Inc.*, Docket No. 981052-TP, Order No. PSC-99-0092-PHO-TP, the Commission decided the issues TECo raises here. In that case, BellSouth refused to produce certain employees for deposition because they were not scheduled to appear as witnesses in the case and because BellSouth claimed that questions of such witnesses could be answered by other witnesses BellSouth would provide.⁹ The Commission required BellSouth to produce the witnesses for deposition:

TCCF's motion to compel the depositions of Mr. Joe Baker and Mr. Mike Wilburn is granted since each witness may provide testimony within the scope of discovery.

Id. at 20.

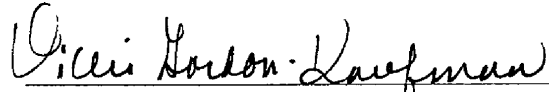
⁶ For example, it would appear that TECo would prefer that Cargill ask the questions it has planned for Mr. Barringer or Mr. Ashburn.

⁷ It is unlikely that TECo would voluntarily provide a witness that will provide Cargill with the evidence it needs to prove its case.

⁸ Rule 1.310(6) permits the party who is taking the deposition to request a corporate representative. The party subject to the deposition may not do that in lieu of producing the person noticed.

⁹ Because this matter was ruled upon in the Prehearing Order, Cargill has attached TCCF's motion to compel as Attachment 1 so that the Prehearing Officer may see the context of the ruling.

WHEREFORE, TECo's motion should be denied and it should be required to produce the named individuals for deposition at the time and place noticed.



John W. McWhirter, Jr.
McWhirter Reeves McGlothlin
Davidson Kaufman & Arnold, P.A.
400 North Tampa Street, Suite 2450
Tampa, Florida 33601-3350
Telephone: (813) 224-0866
Facsimile: (813) 221-1854

Vicki Gordon Kaufman
McWhirter Reeves McGlothlin
Davidson Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525
Facsimile: (850) 222-5606

Attorneys for Cargill Fertilizer, Inc.

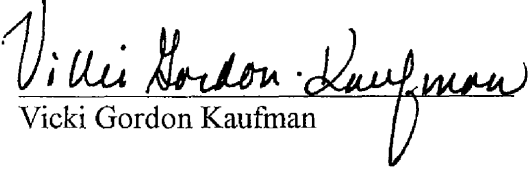
CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing Cargill Fertilizer, Inc.'s Response to Tampa Electric Company's Objection to Subpoena Duces Tecum for Deposition, Motion to Quash and Motion for Protective Order has been furnished by (*) hand delivery or U.S. Mail on this 18th day of September, 2003 to the following:

(*) Rosanne Gervasi
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

(*) James D. Beasley
Ausley & McMullen
227 South Calhoun Street
Post Office Box 391
Tallahassee, Florida 32302

Harry W. Long, Jr.
Tampa Electric Company
Post Office Box 111
Tampa, Florida 33601


Vicki Gordon Kaufman

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Telephone Company of)	
Central Florida, Inc. for resolution of)	Docket No. 981052-TP
items under dispute in resale agreement)	
with BellSouth Telecommunications, Inc.)	Filed: January 5, 1999
_____)		

**THE TELEPHONE COMPANY OF CENTRAL FLORIDA, INC.'S
MOTION TO COMPEL BELLSOUTH TELECOMMUNICATIONS, INC.
TO PRODUCE WITNESSES FOR DEPOSITION AND HEARING**

The Telephone Company of Central Florida, Inc. (TCCF), pursuant to rules 25-22.035 and 25-22.037, Florida Administrative Code, and rules 1.280 and 1.380, Florida Rules of Civil Procedure, hereby moves this Commission for an order compelling BellSouth Telecommunications, Inc. (BellSouth) to make certain witnesses available for deposition. As grounds therefor, TCCF states:

1. On January 4, 1999, counsel for TCCF advised counsel for BellSouth by letter (Attachment A) that TCCF wanted to take the depositions of certain BellSouth employees with knowledge of the matters at issue in this case. These witnesses are not scheduled to appear as witnesses for BellSouth in its case in chief, but have been listed by TCCF as adverse witnesses in its case in chief. See TCCF Prehearing Statement, filed December 21, 1998.

2. During a telephone conversation on January 5, 1999 to discuss scheduling of the depositions, BellSouth refused to make available Mr. Joe Baker and Mr. Mike Wilburn. BellSouth's reason for refusing to produce Mr. Baker and Mr. Wilburn for deposition is that BellSouth does not "understand" the need for TCCF to take these depositions because BellSouth believes that any questions appropriate for Mr. Baker and Mr. Wilburn can be answered by other BellSouth witnesses. BellSouth stated that its listed witnesses should be deposed first to see if

TCCF's questions can be answered by them. Understandably, BellSouth's efforts to manage TCCF's right to discovery was rejected.

3. The position taken by BellSouth is clearly contrary to the black letter rules of discovery. Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that a party may obtain discovery of any matter that is not privileged that is relevant to the subject matter of the litigation. As this Commission is well aware, the rules of discovery are broad and are to be liberally interpreted. Florida favors complete disclosure in discovery matters. *ACandS, Inc. v. Askew*, 597 So.2d 895 (Fla. 1st DCA 1992).

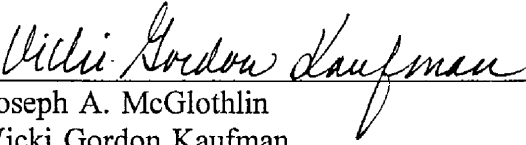
4. BellSouth cannot direct or control the discovery of TCCF nor can it require TCCF to ask certain questions of certain witnesses and not of others. It is undisputed that both Mr. Baker and Mr. Wilburn have been involved with the matters at issue in this docket and both of them have had direct contact with TCCF regarding the disputed issues. TCCF is entitled to depose them and to call them as witnesses at hearing.¹

5. Pursuant to the Procedural Order in this case, the discovery deadline is January 15. BellSouth will not make Mr. Baker and Mr. Wilburn available without order of this Commission. Therefore, TCCF has agreed to take their depositions by telephone on January 18 (or sometime prior to the hearing depending on their availability) if the Commission grants this motion.

WHEREFORE, TCCF moves this Commission for an order requiring BellSouth to produce Mr. Baker and Mr. Wilburn for deposition on January 18 (or some other mutually

¹ Because BellSouth would not agree to produce Mr. Baker and Mr. Wilburn, subpoenas both for their depositions and for their appearance at hearing have been issued.

agreeable time prior to hearing) and at the hearing in this matter on January 22.



Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Decker, Kaufman,
Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525

Attorneys for the Telephone Company
of Central Florida

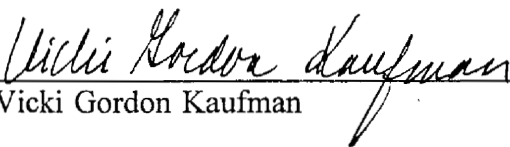
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the **Telephone Company of Central Florida, Inc.**'s foregoing **Motion to Compel** has been furnished by United States Mail, Hand Delivery (*) or fax (**) this **5th** day of **January, 1999**, to the following:

June McKinney*
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

Mary K. Keyer**
BellSouth Telecommunications, Inc.
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, Georgia 30375

Nancy B. White
c/o Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301



Vicki Gordon Kaufman

MCWHIRTER REEVES
ATTORNEYS AT LAW

TAMPA OFFICE:
400 N. TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P.O. BOX 3350, TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:
TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

January 4, 1999

VIA FAX

Mary K. Keyer
General Attorney
BellSouth Telecommunications, Inc.
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, Georgia 30375

Re: TCCF Arbitration

Dear Mary:

TCCF would like to depose the following BellSouth personnel regarding the above matter:

Susan Arrington
Jerry Hendrix
Marcus Cathey
Ronald Pate
Mike Wilburn
Joe Baker

Since the discovery cut-off in this case is January 15, please call me as soon as possible so we can work out an agreeable schedule.

Sincerely,



Vicki Gordon Kaufman

VGK/pw

cc: Andrea K. Welch

ATTACHMENT A