

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 020898-EQ

In the Matter of

PETITION BY CARGILL FERTILIZER,
INC. FOR PERMANENT APPROVAL OF
SELF-SERVICE WHEELING TO, FROM,
AND BETWEEN POINTS WITHIN TAMPA
ELECTRIC COMPANY'S SERVICE AREA.



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PROCEEDINGS: PREHEARING CONFERENCE

BEFORE: COMMISSIONER RUDOLPH "RUDY" BRADLEY
Prehearing Officer

DATE: Monday, October 6, 2003

TIME: Commenced at 1:30 p.m.
Concluded at 1:57 p.m.

PLACE: Betty Easley Conference Center
Room 152
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR
OFFICIAL FPSC REPORTER
(850) 413-6734

1 APPEARANCES:

2 HARRY LONG, JR., ESQUIRE, Ausley Law Firm, P. O. Box
3 111, Tampa, Florida 33601-0111, and JAMES BEASLEY, ESQUIRE,
4 and LEE WILLIS, ESQUIRE, Ausley Law Firm, P. O. Box 391,
5 Tallahassee, Florida 32302, appearing on behalf of Tampa
6 Electric Company.

7 JOHN MCWHIRTER, JR., ESQUIRE, McWhirter, Reeves,
8 McGlothlin, Davidson, Decker, Kaufman & Arnold, P.A., 400 North
9 Tampa Street, Suite 2450, Tampa, Florida 33601-3350, appearing
10 on behalf of Cargill Fertilizer, Inc.

11 ROSANNE GERVASI, ESQUIRE, and JENNIFER RODAN,
12 ESQUIRE, FPSC General Counsel's Office, 2540 Shumard Oak
13 Boulevard, Tallahassee, Florida 32399-0850, appearing on
14 behalf of the Commission Staff.

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P R O C E E D I N G S

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2 COMMISSIONER BRADLEY: Okay. My name is Rudy Bradley
3 and I'm the -- Commissioner Rudy Bradley, and I'm the
4 prehearing officer for this docket. The official docket number
5 is 020898-EQ in regards to TECO and Cargill Wheeling. As the
6 prehearing officer, I would like to call this prehearing
7 conference into order. Could I have the notice read, please.

8 MS. RODAN: This time and place has been set for
9 prehearing in Docket Number 020898-EQ, petition by Cargill
10 Fertilizer, Inc. for permanent approval of self-service
11 wheeling to, from, and between points within Tampa Electric
12 Company's service area.

13 COMMISSIONER BRADLEY: The next order of business is
14 to take appearances. TECO.

15 MR. LONG: Commissioner, Harry Long appearing on
16 behalf of Tampa Electric Company. And with me are Mr. Jim
17 Beasley and Lee Willis of the law firm of Ausley & McMullen.

18 COMMISSIONER BRADLEY: Thank you. Cargill.

19 MR. McWHIRTER: John McWhirter appearing on behalf of
20 Cargill. And the other lawyers are all mentioned in the
21 prehearing order prepared by staff.

22 COMMISSIONER BRADLEY: Is that sufficient, staff?

23 MS. GERVASI: Yes, sir.

24 COMMISSIONER BRADLEY: Okay. Staff.

25 MS. RODAN: Jennifer Rodan and Rosanne Gervasi on

1 behalf of the Commission.

2 COMMISSIONER BRADLEY: Thank you. Are there any
3 preliminary matters by any of the parties?

4 MS. GERVASI: We're not aware of any.

5 MR. McWHIRTER: This may be preliminary or it may
6 be --

7 COMMISSIONER BRADLEY: Just a minute. Turn your mike
8 on.

9 MR. McWHIRTER: One of the issues is Issue Number 4.
10 Do you want to talk about that now or wait, go through the rest
11 of the stuff?

12 COMMISSIONER BRADLEY: We will take that up as we go
13 through the order of business.

14 MR. McWHIRTER: Okay. No preliminary issues then.

15 COMMISSIONER BRADLEY: Okay. Thank you,
16 Mr. McWhirter.

17 It is my intent to proceed through the draft
18 prehearing order section by section, Mr. McWhirter and other
19 parties, in a fairly quickly manner, in a fairly quick manner.
20 If there are any questions or clarifications or changes or
21 whatever, please let me know. And with that, we will begin
22 going through the draft prehearing order. We will begin with
23 Section I, the conduct of proceedings.

24 MS. GERVASI: We're not aware of any changes,
25 Commissioner.

1 COMMISSIONER BRADLEY: Thank you. Section II, case
2 background.

3 MR. McWHIRTER: With respect to 2(a) -- well,
4 background, no, sir. Well, I don't know. No, sir. It's 4(a)
5 I'm concerned about.

6 COMMISSIONER BRADLEY: Okay. We'll get to that.

7 MS. GERVASI: There's one phrase on Page 4 of the
8 case background, Commissioner Bradley, that we have
9 highlighted, and we'll fill in the correct citation. The order
10 is being filed today.

11 COMMISSIONER BRADLEY: Okay. Thank you. Section
12 III, jurisdiction.

13 MS. GERVASI: No changes.

14 COMMISSIONER BRADLEY: Section IV, confidential
15 information.

16 MR. McWHIRTER: On 2(a) we want to announce that
17 there is confidential information contained in the pilot study
18 and in the, attached to the testimony of both Mr. Ashburn and
19 our witnesses, and we announce that we're going to use parts of
20 that confidential information.

21 COMMISSIONER BRADLEY: Okay. Mr. McWhirter, just for
22 the record, would you please identify yourself so that we can
23 get it on the record.

24 MR. McWHIRTER: Yes, sir. My name is John McWhirter.
25 And what I just said is with respect to Section IV-2(a) we're

1 required to give notice not later than seven days before the
2 hearing if we plan to use confidential information. And I
3 hereby give notice that we plan to use confidential information
4 contained in the reports and in the testimony.

5 COMMISSIONER BRADLEY: Thank you. TECO.

6 MR. LONG: Commissioner, we would intend to make use
7 of the same confidential information as it appears in the
8 testimony of Mr. Ashburn and the testimony of Mr. Fernandez and
9 Mr. Kordecki.

10 In addition, this may be an appropriate time to bring
11 up the question of the depositions that have been taking place.

12 COMMISSIONER BRADLEY: Not yet. We'll, we'll get to
13 that.

14 MR. LONG: Oh, okay. I just wanted to make the point
15 that there will be confidential information contained in those
16 depositions as well.

17 COMMISSIONER BRADLEY: Okay. Okay. Good. That's
18 acceptable. Did you get that? Staff?

19 MS. GERVASI: We have nothing further about the
20 confidentiality issues.

21 There are some confidentiality requests pending.
22 That's for a later section as well, and we'll have an order
23 drafted shortly for you on that.

24 COMMISSIONER BRADLEY: Okay. Thank you. The next
25 section is Section V, the posthearing procedures.

1 MR. McWHIRTER: We have no objection.

2 MR. LONG: Commissioner, can I ask a question in
3 clarification?

4 COMMISSIONER BRADLEY: Yes.

5 MR. LONG: Will you be expecting initial briefs and
6 reply briefs or one set of briefs?

7 COMMISSIONER BRADLEY: Suggestions, staff.

8 MS. GERVASI: I think that the order on procedure
9 contemplates that the briefs will all be filed on the same
10 date, that the posthearing briefs will be filed by both parties
11 on the same date and that staff will use those briefs as well
12 as the transcript, of course, to write a recommendation for the
13 panel's use.

14 COMMISSIONER BRADLEY: Okay. Yes, Mr. Long.

15 MR. LONG: Commissioner, given the complexity of some
16 of the issues, it may be useful to the Commission to have short
17 reply briefs from the parties filed simultaneously as well.

18 COMMISSIONER BRADLEY: Recommendation from staff.

19 MS. GERVASI: Commissioner, it's certainly within
20 your discretion to do that. I personally have not been privy
21 to that practice before. I've not seen that happen in any of
22 the hearings I've been involved in.

23 I think typically that the parties can argue
24 everything they want to argue in their initial brief, and that
25 usually suffices in my experience.

1 COMMISSIONER BRADLEY: In view of staff -- in view of
2 the fact that staff has just expressed the fact that they're
3 unfamiliar with your suggestion, I would, I will deny that.

4 But is there a problem with you presenting your
5 testimony in your posthearing procedures under the current
6 format?

7 MR. LONG: Commissioner, no. We're entirely prepared
8 to file a simultaneous brief. My point was simply that the
9 issues in the case are fairly complex and a reply brief may
10 help the Commission sort through some of the arguments that are
11 made in the initial briefs. But if the ruling is that that
12 would not be helpful, then we're fine with the existing
13 procedure.

14 COMMISSIONER BRADLEY: Okay. Thank you.

15 The next section is Section VI, prefiled testimony
16 and exhibits. Staff.

17 MR. McWHIRTER: Commissioner Bradley, we've taken
18 depositions --

19 COMMISSIONER BRADLEY: Just a minute.

20 MR. McWHIRTER: Oh, excuse me.

21 COMMISSIONER BRADLEY: Staff was going to respond.

22 MS. GERVASI: We don't have any changes,
23 Commissioner. I have a question. I just want to make sure
24 that we have the order of the witnesses listed correctly; if
25 that is the order in which the parties intend to call their

1 witnesses. Otherwise, we can change that before the prehearing
2 order is issued.

3 MR. McWHIRTER: I think that we'd probably rather put
4 Mr. Fernandez ahead of Mr. Kordecki.

5 MS. GERVASI: Thank you.

6 COMMISSIONER BRADLEY: Thank you. TECO.

7 MR. LONG: Commissioner, the order of our one witness
8 as it appears is satisfactory.

9 COMMISSIONER BRADLEY: Okay. Just one witness?
10 Mr. McWhirter, you were going to make a statement or ask a
11 question?

12 MR. McWHIRTER: Yes, sir. And it may come under --
13 no. I think it comes under the exhibits here. We've taken
14 depositions --

15 COMMISSIONER BRADLEY: Okay. We have a -- we are
16 going to get to exhibits, the exhibit section. If you can hold
17 your question or make your statement at that time --

18 MR. McWHIRTER: All right. Okay.

19 COMMISSIONER BRADLEY: -- I would appreciate it.

20 MR. McWHIRTER: All right.

21 COMMISSIONER BRADLEY: Section VII, order of
22 witnesses. We've covered that?

23 MS. GERVASI: Yes, sir. I believe so.

24 COMMISSIONER BRADLEY: Okay. Section VIII, basic
25 positions.

1 MS. GERVASI: We have no changes.

2 COMMISSIONER BRADLEY: Mr. McWhirter.

3 MR. McWHIRTER: This fairly states our position, sir.

4 COMMISSIONER BRADLEY: Okay. Mr. Long.

5 MR. LONG: No changes, Commissioner.

6 COMMISSIONER BRADLEY: Okay. Section IX, issues and
7 positions. Issue 1.

8 MS. GERVASI: No changes. And, Commissioner, I --
9 it's my understanding that there are no changes to Issues 1, 2
10 or 3. There may be some discussion with respect to Issue 4.

11 MR. McWHIRTER: That's correct. There's some debate
12 on Issue Number 4, Commissioner Bradley, with respect to the
13 language to be used. Staff has suggested the second paragraph
14 as opposed to the first.

15 My concern with the language in the first paragraph
16 is that it might appear that the cost-effectiveness tests that
17 are used for all conservation programs would preempt
18 consideration of the materiality of any increase in rates and
19 would preempt the consideration of the items contained in Issue
20 Number 2.

21 In a prehearing discussion with Mr. Long he stated,
22 and I agree, that as long as cost-effectiveness is given
23 parallel consideration with the items in 2 and 3, we don't have
24 any concern about whether you use the first paragraph or the
25 second paragraph. I was just fearful that the first paragraph

1 might preempt those other considerations. And with the
2 understanding that it doesn't, we're perfectly happy with any,
3 either one of the choices.

4 COMMISSIONER BRADLEY: Staff.

5 MS. GERVASI: And let me just say, Commissioner, that
6 the staff suggested the alternative approach which is the
7 second paragraph here as a compromise or in an effort to
8 resolve the matter, but we actually prefer the first paragraph
9 for the reason that it isolates cost and that was what we were
10 trying to get at. So we would support the wording the way it's
11 listed here first.

12 COMMISSIONER BRADLEY: So be it. Issue 5.

13 MS. GERVASI: No changes that I'm aware of to any of
14 the remaining Issues 5 through 8.

15 COMMISSIONER BRADLEY: 5 through 8.

16 MR. McWHIRTER: I think with respect to 5 a
17 stipulation would probably be in order.

18 COMMISSIONER BRADLEY: Well, Mr. McWhirter has
19 suggested a stipulation. What is TECO's position?

20 MR. LONG: Well, Commissioner, I think that we've
21 expressed our position in response to Issue 5. We don't think
22 that a stipulation is appropriate. I think in our response
23 we've indicated that we did not observe any reliability impacts
24 during the pilot program, but for a number of reasons we can't
25 be sure that there wouldn't be reliability impacts if

1 self-service wheeling were to be implemented on a permanent
2 basis, which is what the petitioner has requested. So on that
3 basis we would not be prepared to stipulate with regard to
4 permanent self-service wheeling.

5 COMMISSIONER BRADLEY: Okay. We'll keep Issue 5 on
6 the table then.

7 And we are in agreement as it relates to Issues 6,
8 7 and 8; is that correct?

9 MR. McWHIRTER: Correct.

10 MS. GERVASI: Yes, sir.

11 MR. LONG: Yes, Commissioner.

12 COMMISSIONER BRADLEY: Okay. Now we're going to get
13 into Section X, which is the exhibit list.

14 Mr. McWhirter, was that the area where you expressed
15 some concern previously?

16 MR. McWHIRTER: Yes, sir. If you want to go through
17 them one by one, that's fine with me. But the only real issue
18 I see is the depositions, and we had suggested that we might
19 use extracts of the depositions just to shorten the record.
20 Mr. Long says he wants to have the whole deposition in. I
21 don't have any problem with that just as long as they come in.

22 Now there's another aspect to it, and that is some of
23 the exhibits to the depositions were challenged. And we don't
24 have the depositions back yet, so it's a little bit hard to
25 deal with those challenges at this hearing, and we may be able

1 to reconcile them between ourselves. But I would guess that's
2 the only issue is how we're going to reconcile challenges to
3 the exhibit. Do you want to wait until the hearing and thrash
4 it out or do you want to do it in a prehearing posture?

5 COMMISSIONER BRADLEY: Staff?

6 MS. GERVASI: Since the exhibits are not in existence
7 yet to my knowledge, I think it's premature to try and resolve
8 it now. There's a possibility that we could resolve it though
9 before the start of the hearing once the exhibits are, are
10 known to everyone. If something is filed, we will attempt to
11 have an order issued and to have it resolved before the
12 hearing, if that's possible.

13 COMMISSIONER BRADLEY: Okay. Mr. Long.

14 MR. LONG: Commissioner, we could certainly file any
15 objections to deposition exhibits within two or three days
16 after getting the transcripts. We were advised by the reporter
17 that the transcripts that are, that are pending should be
18 available to the parties sometime this week. So I would think
19 by Tuesday of next week, assuming that we've gotten the
20 transcripts by Friday, we would be in a position to file any
21 objections that we might have with regard to transcript
22 exhibits.

23 COMMISSIONER BRADLEY: Staff, what would you
24 recommend?

25 MS. GERVASI: That sounds acceptable to us.

1 COMMISSIONER BRADLEY: Is that agreeable?

2 MR. McWHIRTER: Yes, sir.

3 COMMISSIONER BRADLEY: So be it. Section XI,
4 proposed stipulations.

5 MS. GERVASI: Evidently we have none, Commissioner,
6 and no changes to this section.

7 COMMISSIONER BRADLEY: Mr. Long.

8 MR. LONG: Just one point of clarification. The --

9 COMMISSIONER BRADLEY: Is that related to proposed
10 stipulations?

11 MR. LONG: Exhibits, Commissioner. I'm sorry. I
12 meant to mention this.

13 COMMISSIONER BRADLEY: Okay. Let's back -- let's
14 move back to Section X then, the exhibit list.

15 MR. LONG: In light of our agreement that we will
16 allow the deposition transcripts to be admitted into evidence,
17 we should probably list them with, with the exhibits in that
18 section.

19 COMMISSIONER BRADLEY: Staff?

20 MS. GERVASI: Yes, sir. We'll make the change to the
21 order.

22 COMMISSIONER BRADLEY: Mr. McWhirter, is that fine
23 with you?

24 MR. McWHIRTER: I'm not sure I understand what he
25 said.

1 MS. GERVASI: That we will reflect in the prehearing
2 order the deposition transcripts as being exhibits.

3 MR. McWHIRTER: Yes, that'll be fine.

4 COMMISSIONER BRADLEY: So be it then.

5 And I was on -- before we went back to Section X I
6 was on Section XI. And I've been informed that there are no
7 stipulations; is that correct?

8 MR. LONG: That's correct, Commissioner.

9 MR. McWHIRTER: Correct.

10 COMMISSIONER BRADLEY: Thank you. Thank you.

11 Section XII, pending motions.

12 MR. McWHIRTER: None from us.

13 COMMISSIONER BRADLEY: Mr. Long.

14 MR. McWHIRTER: Other than the motions on objections
15 to confidential information, et cetera, et cetera.

16 MR. LONG: Commissioner, there are no pending motions
17 at this time; however, there is a matter that may give rise to
18 a motion. This may be the appropriate place to raise it.

19 As you know, the petitioners filed their rebuttal
20 testimony last Friday, and we've had a brief opportunity to
21 review that testimony over the weekend. And upon review it
22 appears to us that it would be very useful to be able to depose
23 the two witnesses who filed rebuttal testimony in preparation
24 for the hearing.

25 These two witnesses also filed direct testimony, and

1 Tampa Electric has deposed both of them already with regard to
2 their direct testimony. However, it appears that in their
3 rebuttal testimony they have made new factual assertions that,
4 that need to be understood.

5 In the procedural order that, that you issued, you
6 admonished the parties to use discovery liberally to reduce the
7 amount of cross-examination that would have to take place at
8 the hearing itself. The nature of the issues raised in the
9 rebuttal testimony at first blush will require a fair amount of
10 questioning to understand the basis for the assertions. If, if
11 you would rather have us conduct this examination at the
12 hearing, we're certainly prepared to do that. But I'm
13 suggesting that it would certainly save the Commission's time
14 if we were allowed to conduct the deposition with regard to
15 this rebuttal testimony prior to the hearing.

16 COMMISSIONER BRADLEY: Staff.

17 MS. GERVASI: I would be interested to hear what
18 Mr. McWhirter has to say about that. I think I recall Cargill
19 having said previously or indicated that they would be opposed
20 to having a second deposition taken of their witnesses.

21 MR. McWHIRTER: Well, at the time that Mr. Long
22 suggested he was going to depose our witnesses, we said for
23 economy of time and efficiency we would prefer that you wait
24 until after the rebuttal testimony is in so that you can depose
25 them on the whole nine yards at one sitting rather than have

1 the people come back. I certainly don't want to prevent
2 Mr. Long from having full discovery. It's costly to us to
3 bring an expert witness in and pay the fee when we've offered
4 him and paid the fee the first time. So if Tampa Electric
5 wants to pick up the cost of having the second depositions, I
6 don't have any problem. I want him to find out everything he
7 possibly can about the case.

8 MR. LONG: Commissioner, the position we found
9 ourselves in was that we had to file rebuttal testimony by a
10 date certain. We could not file our rebuttal testimony without
11 having some discovery with regard to the petitioner's direct
12 testimony.

13 If we'd been in a position to wait and have a single
14 deposition with regard to their direct and rebuttal, we
15 certainly would have done that. But in order to get the
16 information that we needed to file our testimony on the dates
17 prescribed we had no choice but to move forward with
18 depositions with regard to their direct testimony.

19 And, as I said, the, the assertions that they have
20 made in their rebuttal testimony I think are significant and
21 will require some investigation. We don't have the opportunity
22 to do paper discovery given the timing. We didn't have time to
23 do that with regard to their direct testimony and we were
24 satisfied to obtain what, what evidence we needed through,
25 through depositions, and we're simply asking for the same

1 opportunity here.

2 COMMISSIONER BRADLEY: Staff, how do we resolve this
3 issue?

4 MS. GERVASI: Commissioner, I can tell you that
5 typically the Commission has allowed a second round of
6 depositions to take place after rebuttal comes in. And it's --

7 COMMISSIONER BRADLEY: At whose expense?

8 MS. GERVASI: At the expense of the party calling the
9 deposition.

10 COMMISSIONER BRADLEY: Okay. Mr. Long.

11 MR. LONG: Well, Commissioner Bradley, I would point
12 out that Cargill has deposed a number of Tampa Electric
13 witnesses.

14 COMMISSIONER BRADLEY: At whose expense?

15 MR. LONG: At Tampa Electric's expense. If we're
16 talking about paying for the reporter, we certainly have no
17 objection to paying the costs of the court reporter. But to
18 the extent that we're talking about paying for the time of
19 outside consultants, I think we have a real problem with that.

20 Cargill has deposed a number of witnesses who in
21 retrospect have really had nothing to do with this case and
22 really had nothing much to offer, and yet these people had to
23 take time from, from their busy schedule to sit through
24 depositions at Tampa Electric's expense.

25 Under the circumstances, Cargill is the moving party,

1 they're asking for the relief, and I think it's their burden to
2 make their witnesses available to explain their case.

3 Now we're happy to pay the costs of, of a court
4 reporter, we're happy to provide a venue for the deposition at
5 our expense, but beyond that I think it's Cargill's
6 responsibility as the moving party to make their experts
7 available for discovery at their cost.

8 COMMISSIONER BRADLEY: Staff.

9 MS. GERVASI: And I think that is, that is typically
10 the procedure that's employed, Commissioner.

11 COMMISSIONER BRADLEY: So be it.

12 MR. McWHIRTER: Can we tax costs later as you would
13 in normal civil procedure?

14 COMMISSIONER BRADLEY: Can you what?

15 MR. McWHIRTER: Tax costs later.

16 COMMISSIONER BRADLEY: I don't think that would be
17 appropriate.

18 MR. McWHIRTER: Beg your pardon?

19 COMMISSIONER BRADLEY: I don't think that would be
20 appropriate, would it? Tax costs?

21 MR. McWHIRTER: Yes, sir.

22 COMMISSIONER BRADLEY: No. We will just go with what
23 generally the procedure is and I'll go with staff's
24 recommendation.

25 Other pending matters.

1 MS. GERVASI: There are none at this time,
2 Commissioner, other than what is identified in the next
3 section, IX (sic.). There are some pending confidentiality
4 matters that we can clean up, I think, by -- in one order.
5 There are several pending confidentiality requests that we will
6 bring to you in the form of a draft order.

7 COMMISSIONER BRADLEY: The ones that were previously
8 mentioned?

9 MS. GERVASI: Yes, sir.

10 COMMISSIONER BRADLEY: Okay. Mr. Long.

11 MR. LONG: Commissioner, I have no other matters to
12 raise at this time.

13 COMMISSIONER BRADLEY: Mr. McWhirter.

14 MR. McWHIRTER: No, sir.

15 COMMISSIONER BRADLEY: Section X, rulings.

16 MS. GERVASI: Commissioner, we will add your ruling
17 about allowing a second round of discovery with respect to the
18 rebuttal testimony that was filed on Friday. I'm not aware of
19 any other rulings.

20 COMMISSIONER BRADLEY: Thank you. Is there anything
21 else before the prehearing officer at this time?

22 MR. McWHIRTER: No, sir.

23 MR. LONG: No, sir.

24 MS. GERVASI: None.

25 COMMISSIONER BRADLEY: Okay. Well, thank you for

1 your participation, and this prehearing conference is
2 adjourned.

3 (Prehearing Conference concluded at 1:57 p.m.)
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1 STATE OF FLORIDA)
2 COUNTY OF LEON)
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CERTIFICATE OF REPORTER

4 I, LINDA BOLES, RPR, Official Commission
5 Reporter, do hereby certify that the foregoing proceeding was
6 heard at the time and place herein stated.

7 IT IS FURTHER CERTIFIED that I stenographically
8 reported the said proceedings; that the same has been
9 transcribed under my direct supervision; and that this
10 transcript constitutes a true transcription of my notes of said
11 proceedings.

12 I FURTHER CERTIFY that I am not a relative, employee,
13 attorney or counsel of any of the parties, nor am I a relative
14 or employee of any of the parties' attorneys or counsel
15 connected with the action, nor am I financially interested in
16 the action.

17 DATED THIS 7th DAY OF OCTOBER, 2003.

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LINDA BOLES, RPR
FPSC Official Commission Reporter
(850) 413-6734