

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Northeast Florida Telephone)
Company d/b/a NEFCOM against South-)
eastern Services, Inc. for failure to pay)
intrastate access charges pursuant to)
Northeast Florida's tariffs and for violation)
of Section 364.16(3)(a), Florida Statutes.)
_____)

Docket No. 060083-TP

Referral by the Circuit Court of Baker)
County, Florida to determine whether or not)
Southeastern Services, Inc. is legally)
responsible for payment to Northeast)
Florida Telephone for originating intrastate)
access charges under Northeast Florida)
Telephone's Public Service Commission)
approved tariff for the long distance calls)
provided by Southeastern Services, Inc. as)
as alleged in the Amended Complaint.)
_____)

Docket No. 060296-TP

Filed: July 24, 2006

**NORTHEAST FLORIDA TELEPHONE COMPANY D/B/A NEFCOM'S
MOTION FOR RECONSIDERATION**

Northeast Florida Telephone Company, d/b/a NEFCOM ("Northeast Florida"), by and through its undersigned counsel, and pursuant to Rule 25-22.0376, Florida Administrative Code, hereby files this Motion for Reconsideration of portions of Order No. PSC-06-0606-PCO-TP. In support of this Motion, Northeast Florida states as follows:

I. Introduction

Docket No. 060083-TP was opened to address Northeast Florida's Complaint against Southeastern Services, Inc. ("SSI") for SSI's alleged failure to pay intrastate access charges pursuant to Northeast Florida's tariffs. Docket No. 060296-TP was opened to address a referral by the Circuit Court of Baker County to determine whether or not SSI is legally responsible for payment to Northeast Florida for originating intrastate access charges under Northeast Florida's

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tariff, as alleged in Northeast Florida's Amended Complaint. As the Petitioner in both actions, Northeast Florida bears the burden of proof in these proceedings. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 788 (Fla. 1st DCA 1981); Environmental Trust v. State, Department of Environmental Protection, 714 So.2d 493, 498 (Fla. 1st DCA 1998).

By Order No. PSC-06-0506-PCO-TP, issued June 14, 2006, the Commission consolidated these dockets. On July 12, 2006, the Prehearing Officer assigned to these dockets issued Order No. PSC-06-0606-PCO-TP (the "Order Establishing Procedure" or "OEP") which set forth the controlling dates governing the key activities of the case, including the dates for the parties to file testimony in advance of the final administrative hearing. The OEP, however, is contrary to basic principles of established law because it fails to provide the complaining party bearing the burden of proof, Northeast Florida, with the sole opportunity to file rebuttal testimony rebutting the positions and defenses of the Respondent, SSI. Instead, the OEP provides for all parties to file direct testimony and exhibits simultaneously and provides a subsequent date for all parties to file rebuttal testimony and exhibits. Thus, in this instance, the Prehearing Officer overlooked several points of law that necessitate reconsideration.¹

II. Standard for Motion for Reconsideration

The standard for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 162 (Fla. 1st DCA 1981).

¹ In addition, the OEP contains two different dates for the prehearing conference. Specifically, a prehearing conference date of November 20, 2006 is listed on page 6 of the OEP and a prehearing conference date of November 27, 2006 is listed on page 10 of the OEP.

III. Basis for Reconsideration

The Prehearing Officer failed to consider and/or overlooked the following points of law in issuing the Order Establishing Procedure:

A. The OEP Incorrectly Scheduled All Parties to File Direct Testimony and Exhibits Simultaneously

The OEP issued in this docket is flawed in that both Northeast Florida and SSI are scheduled to file their direct testimony and exhibits simultaneously. As the petitioning party who bears the burden of proof in this proceeding, Northeast Florida should be allowed to file its direct case and exhibits first, followed by SSI's responsive case and its defenses, and then Northeast Florida alone should be allowed to file its rebuttal testimony in response to SSI's testimony. Past Commission procedure has been to follow this sequential format of filing testimony in "complaint" proceedings. Instead, the OEP issued in these dockets follows a simultaneous filing schedule which has traditionally been used by the Commission in "generic" dockets.

For example, the Order Establishing Procedure issued in Docket No. 000061-EI, which was opened to address a complaint filed by Allied Universal Corporation against Tampa Electric Company, properly scheduled the Complainant, Allied, to file its direct testimony and exhibits first, followed by the Respondent, Tampa Electric Company's, direct testimony, followed by Intervenors and Staff testimony, and finally ending with the Complainant only filing rebuttal testimony and exhibits. (*See*, Order No. PSC-00-0392-PCO-EI at 7, attached hereto as Exhibit "A").

The Commission practice of sequential filing of testimony in complaint dockets is further evidenced through course materials distributed by Richard D. Melson, the Commission's former General Counsel, as part of his lecture at the 2004 Pat Dore Administrative Law Conference.

Mr. Melson's lecture was entitled, "Hearings Before the Florida Public Service Commission." Under the discussion related to prefiled testimony, Mr. Melson's course materials state, "Depending on the nature of the case, prefiled direct testimony may be filed simultaneously (e.g. generic policy-making docket) or **sequentially (e.g. complaint docket).**" (Page 5.3 of Course Materials, attached hereto as Exhibit "B").

Further evidence that rebuttal testimony should be part of sequentially filed testimony is found in Charles W. Ehrhardt's *Florida Evidence, 2005 Edition*:

Rebuttal evidence is offered **after the defense** has rested its case and is directed to refuting the evidence introduced by the defendant, unless the court exercises its discretion under section 90.612(1) to permit further proof. (Footnotes omitted and emphasis supplied).

Charles W. Ehrhardt, Section 612.5 Rebuttal Testimony, at 587.

B. The OEP Incorrectly Allows SSI to File Rebuttal Testimony

The OEP issued in this docket is further flawed by the fact that both parties are allowed to file rebuttal testimony. Allowing SSI to file rebuttal testimony inappropriately provides SSI, the defending party, two chances to present its argument and defenses. As the petitioner in this docket who bears the burden of proof, Northeast Florida alone should be allowed to file rebuttal testimony.

Florida case law addressing the principles underlying rebuttal testimony most often occur within the context of a civil or criminal proceeding and therefore refer to a "plaintiff" or "defendant." For example, the oft-cited case of Driscoll v. Morris, 114 So.2d 314, 315 (3rd DCA 1959), provides the following explanation regarding rebuttal testimony:

Generally speaking, rebuttal testimony **which is offered by the plaintiff** is directed to new matter brought out by evidence of the defendant and does not consist of testimony which should have properly been submitted by the plaintiff in his case-in-chief. It is not the purpose of rebuttal testimony to add additional facts

to those submitted by the plaintiff in his case-in-chief unless such additional facts are required by the new matter developed by the defendant. (Citations omitted and emphasis supplied).

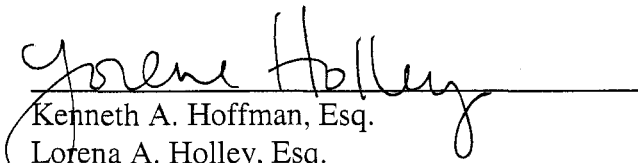
Applied to the instant dockets, as the complaining party, Northeast Florida would occupy the position as the plaintiff and SSI would occupy the position as the defendant. Thus, the general definitions of rebuttal testimony confirm that as the plaintiff or complainant in these proceedings, Northeast Florida alone should be entitled to file rebuttal testimony.

Commission precedent confirms the basic principle that the complaining party who bears the burden of proof in the docket should be the only party allowed to file rebuttal testimony. In Order No. PSC-03-0945-PCO-EQ, issued August 20, 2003, in Docket No. 020898-EQ, 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, the Prehearing Officer ruled on a motion for clarification filed by TECO directed at the Order Establishing Procedure that had been issued in the docket. Through its motion, TECO was requesting that the Prehearing Officer confirm that all parties would have the opportunity file rebuttal testimony in the proceedings. In denying TECO's motion, the Prehearing Officer stated, "Cargill has the burden of proof in this case, and in such circumstances the Commission generally does not allow all parties to file rebuttal testimony." (See, Order at 3, attached hereto as Exhibit "C"). The Prehearing Officer further stated, "[t]he burden of proof rests with Cargill, as it is the party asserting the proposition to be proved." (Order at 3, citing Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974), and Heim v. Heim, 712 So.2d 1238 (Fla. 4th DCA 1998)).

Counsel for Northeast Florida has conferred with counsel for SSI and is authorized to represent that SSI objects to this Motion.

WHEREFORE, for the foregoing reasons, Northeast Florida Telephone Company d/b/a NEFCOM respectfully requests that the Commission reconsider the portions of Order No. PSC-06-0606-PCO-TP that authorize all parties to simultaneously file direct testimony and exhibits and rebuttal testimony and exhibits, and establish new sequential testimony filing dates that provide for Northeast Florida to first file its prefiled direct testimony and exhibits, followed by SSI's filing of its prefiled direct testimony and exhibits, and then followed by Northeast Florida only filing its prefiled rebuttal testimony and exhibits. Northeast Florida further requests that the inconsistent dates listed in the Order Establishing Procedure for the prehearing conference be corrected.

Respectfully submitted,



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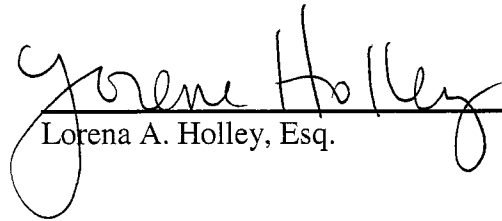
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to the following this 24th day of July, 2006:

Suzanne Fannon Summerlin, Esq.
Suzanne Fannon Summerlin, P.A.
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Tallahassee, FL 32309

Jason Fudge, Esq.
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
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Lorena A. Holley, Esq.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Allied
Universal Corporation and
Chemical Formulators, Inc.
Against Tampa Electric Company
for violation of Sections
366.03, 366.06(2) and 366.07,
F.S., with respect to rates
offered under
commercial/industrial service
rider tariff; petition to
examine and inspect
confidential information; and
request for expedited relief.

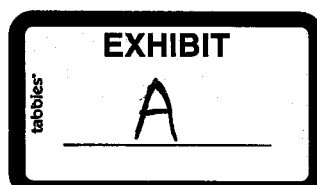
DOCKET NO. 000061-EI
ORDER NO. PSC-00-0392-PCO-EI
ISSUED: February 23, 2000

ORDER ESTABLISHING PROCEDURE AND RESPONDING TO COMPLAINANT'S
MOTION FOR EXPEDITED RESPONSES TO DISCOVERY REQUESTS

On January 20, 2000, Allied Universal Corporation and Chemical Formulators, Inc. (Allied/CFI) filed a complaint against the Tampa Electric Company (TECO). The complaint alleges that TECO discriminated against Allied/CFI by failing to offer Allied/CFI the same rate offered to a competitor under TECO's Commercial Industrial Service Rider (CISR) Tariff. The complaint also alleges that a TECO employee colluded with the competitor of Allied/CFI in setting rates. Allied/CFI requested that the docket be expedited to minimize damages it is suffering which result from the alleged discriminatory treatment. Accordingly, a hearing is scheduled for April 5, 2000.

This Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

The scope of this proceeding shall be based upon the issues raised by the parties and Commission staff (staff) up to and during the prehearing conference, unless modified by the Commission. The hearing will be conducted according to the provisions of Chapter 120, Florida Statutes, and all administrative rules applicable to this Commission.



On February 7, 2000, Allied/CFI filed a Motion for Expedited Responses to Discovery Requests. Allied/CFI asked that TECO respond to its first set of interrogatories and production requests within 15 days of the date of service, instead of the standard 45. Allied/CFI also asked that it be granted leave to take a deposition within 24 days of service of the complaint on TECO, instead of the standard 30 days.

On February 14, 2000, TECO filed its Response to Allied/CFI's Motion for Expedited Responses to Discovery Requests. TECO's position was that Allied/CFI's suggested schedule was unreasonable. TECO further contended that Allied/CFI sought confidential information which TECO should not be required to provide at all. Having considered Allied/CFI's request and TECO's response, I find that discovery responses shall be expedited as set forth in the part of this order that addresses discovery procedures.

Also filed on February 14, 2000, was TECO's Objection and Motion for Protective Order Pertaining to Notice of Deposition and Request for Production. In this filing TECO argues that Allied/CFI seeks to discover confidential information and requests that I issue a protective order to prevent discovery of that information. TECO also states that, if one of its representatives is deposed, TECO will instruct that representative not to answer any questions regarding information that TECO deems confidential. Allied/CFI has not yet responded to this filing. The time for filing a response has not yet run. An order disposing of TECO's motion will be issued after the response period.

Discovery

When discovery requests are served and the respondent intends to object to or ask for clarification of the discovery request, the objection or request for clarification shall be made within ten days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes.

The hearing in this docket is set for April 5, 2000. Unless authorized by the Prehearing Officer for good cause shown, all discovery shall be completed by March 29, 2000. All interrogatories, requests for admissions, and requests for production of documents shall be numbered sequentially in order to facilitate their identification. The discovery requests will be numbered sequentially within a set and any subsequent discovery requests will continue the sequential numbering system. Pursuant to Rule 28-106.206, Florida Administrative Code, unless

subsequently modified by the Prehearing Officer, the following shall apply: interrogatories, including all subparts, shall be limited to 100, and requests for production of documents, including all subparts, shall be limited to 100.

In support of its Motion for Expedited Responses to Discovery Requests, Allied/CFI states that the subjects of its first set of interrogatories and production requests are narrow, and an expedited response is needed in order to conduct its future discovery requests, so that it can be prepared for the hearing on April 5. With respect to Allied/CFI's request to conduct a deposition within 24 days of serving the complaint on TECO, Allied/CFI states that testimony from this first deposition is needed only to identify and confirm the existence of documents requested in the first request for production.

Rule 28-106.206, Florida Administrative Code, allows a Prehearing Officer to order expedited discovery responses. Granting the Motion would require TECO's submissions to be made by February 17, 2000, and for the deposition to occur on the same day. The Complaint was mailed to on TECO January 20, 2000, and the discovery requests were hand delivered to TECO on February 2, 2000.

As the complainant, Allied/CFI, bears the burden of proof, Allied/CFI must be prepared to affirmatively prove its case by April 5, 2000. Given the hearing date, I find that discovery should be expedited, but not to the extent requested by Allied/CFI. TECO must be given a reasonable amount of time to respond.

Accordingly, I find that responses to all discovery requests shall be provided within 20 days after service. Given that both Allied/CFI and TECO are represented by local counsel, all requests shall be served via hand delivery. Responses shall be provided via hand delivery or facsimile transmission. TECO shall respond to Allied/CFI's first set of interrogatories and production requests by the close of business on the fifth business day following the issuance of this order. Allied/CFI's request to conduct a deposition on February 17, 2000 in order to obtain testimony on the existence of and identification of the documents is denied. Allied/CFI may conduct a deposition at any reasonable time at least five days after the issuance of this order.

Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section

119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time period set forth in Section 366.093, Florida Statutes.

Diskette Filings

See Rule 25-22.028(1), Florida Administrative Code, for the requirements of filing on diskette for certain utilities.

Prefiled Testimony and Exhibits

Each party shall prefile, in writing, all testimony that it intends to sponsor. Such testimony shall be typed on 8 ½ inch x 11 inch transcript-quality paper, double spaced, with 25 numbered lines, on consecutively numbered pages, with left margins sufficient to allow for binding (1.25 inches).

Each exhibit intended to support a witness' prefiled testimony shall be attached to that witness' testimony when filed, identified by his or her initials, and consecutively numbered beginning with 1. All other known exhibits shall be marked for identification at the prehearing conference. After an opportunity for opposing parties to object to introduction of the exhibits and to cross-examine the witness sponsoring them, exhibits may be offered into evidence at the hearing. Exhibits accepted into evidence at the hearing shall be numbered sequentially. The pages of each exhibit shall also be numbered sequentially prior to filing with the Commission.

An original and 15 copies of all testimony and exhibits shall be prefiled with the Director, Division of Records and Reporting, by the close of business, which is 5:00 p.m., on the date due. A copy of all prefiled testimony and exhibits shall be served by mail or hand delivery to all other parties and staff no later than the date filed with the Commission. Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony.

Prehearing Statement

All parties in this docket shall file a prehearing statement. Staff will also file a prehearing statement. The original and 15 copies of each prehearing statement shall be prefiled with the Director of the Division of Records and Reporting by the close of business, which is 5:00 p.m., on the date due. A copy of the prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission. Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position. Such prehearing statements shall set forth the following information in the sequence listed below.

- (a) The name of all known witnesses that may be called by the party, and the subject matter of their testimony;
- (b) a description of all known exhibits that may be used by the party, whether they may be identified on a composite basis, and the witness sponsoring each;
- (c) a statement of basic position in the proceeding;
- (d) a statement of each question of fact the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;
- (e) a statement of each question of law the party considers at issue and the party's position on each such issue;
- (f) a statement of each policy question the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;
- (g) a statement of issues that have been stipulated to by the parties;
- (h) a statement of all pending motions or other matters the party seeks action upon;

- (i) a statement identifying the parties' pending requests or claims for confidentiality; and
- (j) a statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore.

Prehearing Conference

Pursuant to Rule 28-106.209, Florida Administrative Code, a prehearing conference will be held on March 17, 2000, at the Betty Easley Conference Center, 4075 Esplanade Way, Tallahassee, Florida. Any party who fails to attend the prehearing conference, unless excused by the Prehearing Officer, will have waived all issues and positions raised in that party's prehearing statement.

Prehearing Procedure: Waiver of Issues

Any issue not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the issuance of the prehearing order shall demonstrate that: it was unable to identify the issue because of the complexity of the matter; discovery or other prehearing procedures were not adequate to fully develop the issue; due diligence was exercised to obtain facts touching on the issue; information obtained subsequent to the issuance of the prehearing order was not previously available to enable the party to identify the issue; and introduction of the issue could not be to the prejudice or surprise of any party. Specific reference shall be made to the information received, and how it enabled the party to identify the issue.

Unless a matter is not at issue for that party, each party shall diligently endeavor in good faith to take a position on each issue prior to issuance of the prehearing order. When a party is unable to take a position on an issue, it shall bring that fact to the attention of the Prehearing Officer. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain "no position at this time" prior to hearing and thereafter identify its position in a post-hearing statement of issues. In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue. When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement.

Document Identification

Each exhibit submitted shall have the following in the upper right-hand corner: the docket number, the witness's name, the word "Exhibit" followed by a blank line for the exhibit number and the title of the exhibit.

An example of the typical exhibit identification format is as follows:

Docket No. 000061-TI
J. Doe Exhibit No. _____
Cost Studies for Minutes of Use by Time of Day

Controlling Dates

The following dates have been established to govern the key activities of this case.

1)	Complainant's direct testimony and exhibits	March 6, 2000
2)	Respondent's, Tampa Electric Company's, direct testimony	March 16, 2000
3)	Intervenors' direct testimony and exhibits	March 16, 2000
4)	Staff's direct testimony and exhibits, if any	March 20, 2000
5)	Rebuttal testimony and exhibits (complainant)	March 27, 2000
6)	Prehearing Statements	March 10, 2000
7)	Prehearing Conference	March 17, 2000
8)	Hearing	April 5, 2000
9)	Briefs	April 26, 2000

Use of Confidential Information At Hearing

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 366.093, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding. Any party wishing to use any proprietary confidential business information, as that term is defined in Section 366.093(3), Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute. Failure of any party to comply with the seven-day requirement described above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.

When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material. Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so. At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

Post-Hearing Procedure

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a

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party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

Based upon the foregoing, it is

ORDERED by Commissioner E. Leon Jacobs, Jr., as Prehearing Officer, that the provisions of this Order shall govern this proceeding unless modified by the Commission.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 23rd Day of February, 2000.

/s/ E. Leon Jacobs, Jr.
E. LEON JACOBS, JR.
Commissioner and Prehearing Officer

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

MKS

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.

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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.

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, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 Records and Reporting, 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.

**HEARINGS BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

Richard D. Melson
PSC General Counsel
September, 2004

Disclaimer: The views expressed in this course material are those of the author, and do not necessarily reflect those of the Florida Public Service Commission.

I. AGENCY

A. The Florida Public Service Commission (PSC or Commission) is a legislative agency headed by a collegial body of five Commissioners. [§§ 350.001, 350.01(1), F.S.]

B. Commissioners are appointed by the Governor for a four-year term subject to confirmation by the Senate. Appointees are selected from a list of nominees prepared by the Public Service Commission Nominating Council. [§ 350.031, F.S.]

C. Until 1980, the PSC employed Hearing Examiners who heard many cases and made recommendations to the full Commission, which took final agency action. [See § 350.01(5), F.S.]

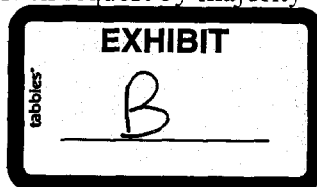
D. In 1980, the PSC lost its Hearing Examiners and, like other agencies, was required to send cases not heard by the agency head to the Division of Administrative Hearings to be heard by an administrative law judge. [§§ 120.57(1)(a), 350.125, F.S.]

II. ASSIGNMENT OF CASES

A. Under Section 350.01(5), (7), F.S., the Chairman of the Commission has authority to assign cases for hearing to either:

1. The full Commission,
2. A panel of two or more Commissioners,
3. A single Commissioner acting as a hearing officer, or
4. DOAH, for assignment of an administrative law judge.

B. A majority of the Commission may determine that the full Commission will sit in any proceeding. If a party requests that a particular case be assigned to the full Commission, the Commission must rule on such request by majority vote. [§350.01(6), F.S.]



C. In practice:

1. Cases of statewide impact and cases in which policy is likely to be developed are assigned for hearing to the full five-member Commission.

2. Routine cases are typically assigned to a panel of three (or occasionally two) Commissioners.

3. A limited number of fact-intensive disputes between a utility and a consumer are referred to DOAH.

4. A single Commissioner is rarely assigned to act as a hearing officer. This has typically occurred in non-controversial cases with tight statutory deadlines.

D. When a case is assigned for hearing to either the full Commission or a panel of Commissioners, one Commissioner is designated as the Prehearing Officer.

E. The Prehearing Officer handles procedural aspects of the case, including scheduling, discovery issues, issuance of prehearing orders, conduct of the prehearing conference, issuance of confidentiality rulings and the like.

1. A Prehearing Officer's orders are subject to review by the full Commission (or the full panel assigned to the case) via a motion for reconsideration filed within 10 days after the order is issued. [Rule 25-22.0376, F.A.C.]

2. The Prehearing Officer does not handle any motions that would dispose of the case, such as motions to dismiss and motions for summary final order. These are presented to the full Commission/full panel for ruling.

F. Ultimate control of the Commission's calendar resides in the Chairman, who must approve any oral argument, hearing, and decision dates.

III. PREHEARING PROCEDURES

A. Under the authority of Rule 28-106.211, F.A.C., the Prehearing Officer issues an Order Establishing Procedure which typically includes:

1. Increased limits on number of interrogatories and document production requests;
2. Shortened timeframe for responding to discovery;
3. Case schedule, including dates for prehearing conference and final hearing and deadlines for:

- a. Prefiled testimony

- b. Prehearing statements
 - c. Discovery cut-off
 - d. Post-hearing briefs
4. List of proposed issues in the case:
- a. In some cases, issues result from a staff-moderated issue identification conference.
 - b. If parties cannot agree on the issues to be heard, the Prehearing Officer ultimately resolves the dispute.
5. Procedures for handling of confidential information.
- a. Tip: If your case involves confidential information, be sure to learn the procedures and customs that are designed to prevent inadvertent disclosure of that information during the public hearing. If in doubt, consult the PSC General Counsel's office for guidance.
 - b. The standard order on procedure requires the parties to notify the Prehearing Officer at least seven days prior to the hearing if they intend to use confidential information. This notification is generally provided at the prehearing conference.

✓ B. Prefiled testimony

1. Written testimony is submitted in question and answer form. Deadlines are typically well in advance of the hearing.
- a. Tip: By custom, depositions are generally conducted only after all testimony has been filed.
2. Must comply with formatting requirements of the Order Establishing Procedure, including line numbers and minimum 1-1/2" inch left margin.
- a. Tip: Use a .pdf file for distributing hard copies of final testimony to ensure that your witness has the same page and line numbers as everyone else in the room.
3. Prefiled exhibits are attached and labeled with witnesses initials, e.g. RDM-1.
- a. Tip: Be sure to comply with requirements of Order Establishing Procedure regarding page numbering of exhibits. The Commissioners do not like to hunt to find unnumbered pages.
4. Depending on the nature of the case, prefiled direct testimony may be filed simultaneously (e.g. generic policy-making docket) or sequentially (e.g. complaint docket).

5. Depending on case, one or more parties may be allowed to submit prefiled rebuttal testimony and/or surrebuttal testimony.

C. Prehearing statements

1. Typically required to be filed shortly after the final round of testimony has been filed.
2. Must include:
 - a. Party's position on each issue.
 - b. List of witnesses.
 - c. List of exhibits (except cross-examination exhibits).
 - d. Identification of pending motions and requests for confidentiality.
 - e. Identification of any stipulations.
 - f. Objections to qualifications of any witness.
 - g. Other items required by Order Establishing Procedure.

D. Prehearing conference

1. Typically held 1-2 weeks before final hearing.
2. Conducted by Prehearing Officer.
3. Involves review of draft prehearing order that includes:
 - a. Overall witness list and proposed order of appearance.
 - b. Overall exhibit list.
 - c. List of issues and parties' positions on each issue.
4. If necessary, Prehearing Officer hears argument and rules on outstanding motions.
5. Results in issuance of a Prehearing Order that serves as the roadmap for the hearing and lets the other Commissioners know what the case is about.

IV. HEARING

A. Chaired by Chairman (if s/he is assigned to the panel hearing the case) or else the most senior Commissioner on the panel – not necessarily the Prehearing Officer

B. Hearings have very tight time schedules for the amount of material to be covered.

C. Order of hearing

1. Staff counsel reads notice of hearing.

2. All counsel enter appearances.

3. Commission hears any preliminary matters.

4. Any stipulated exhibits identified and admitted.

a. PSC staff frequently obtains stipulation to put large volume of discovery responses and many deposition transcripts in the record.

5. Opening statements, if any – generally 5-10 minutes per party, rarely as much as 20 minutes.

6. Witnesses sworn en masse.

7. Witnesses take stand in order listed in Prehearing Order – in most cases a witness with both direct and rebuttal testimony takes the stand only once pursuant to agreement reached at the prehearing conference.

a. Preliminary questions to identify witness.

(1) Tip: The Commission typically does not formally rule on the qualifications of an expert witness. Unless a party's prehearing statement indicated an objection to a witness' qualification, the Commission presumes that each witness is competent to express the opinions contained in his or her prefiled testimony.

b. Witness confirms correctness of prefiled testimony.

(1) "If I asked you the same questions today that were in your prefiled testimony, would your answers be the same?"

(2) "I ask that Mr. Blank's prefiled testimony be inserted into the record as though read."

- (a) The court reporter will insert a photocopy of the prefiled testimony at this point in the transcript.
- c. Prefiled exhibits identified – exhibits are not admitted until the witness is ready to leave the stand.
- d. Witness provides a brief (usually 5 minute or less) summary of his or her testimony.
 - (1) Must be limited to material in prefiled testimony – cannot use summary to introduce “new” evidence.
- e. Witness is tendered for cross-examination. Witnesses are instructed to answer “yes” or “no,” then explain. Cross typically proceeds in the following order:
 - (1) Friendly parties.
 - (2) Adverse parties.
 - (3) PSC staff counsel.
 - (a) One of the staff’s roles is to ensure there is a complete record for the Commissioners to consider. At some point in the hearing, staff counsel may ask questions that all parties consider “unfriendly” in order to build a complete record.
 - (4) Commissioners (although Commissioners may interject at any time).
- f. Redirect examination, if any.
- g. Exhibits are moved into record and witness is excused.
- 8. Closing arguments, if any.
 - a. Closing arguments are rarely used in PSC cases unless the Commission intends to vote from the bench at the conclusion of the hearing.
- 9. Confirmation of transcript due dates and briefing dates.
- 10. Hearing adjourned.
- D. Unique challenges resulting from PSC hearing procedures.
 - 1. Prefiled testimony puts a premium on preparing case well in advance.
 - 2. Prefiled testimony makes it difficult to get updated information into the record.

3. Commissioners read the prefiled testimony but hear only the brief summaries and cross-examination, thus making it difficult to paint a picture of your direct case.

V. POST-HEARING

A. Parties must file a post-hearing statement of issues and positions.

1. Short statement of position on each issue must not exceed 50 (sometimes 75) words as set by Order Establishing Procedure.

2. Failure to file a post-hearing statement of position on an issue constitutes a waiver of that position.

B. Parties are permitted to file proposed findings of fact and conclusions of law, but by custom most parties simply file what is called a post-hearing brief.

1. Organized by issue.

2. Includes short statement of position for each issue followed by a discussion of evidence which supports that position.

C. Each party's post-hearing filing is limited to 40 pages unless the Commission has expanded the page limit in a particular case.

D. Staff reviews briefs and prepares a written staff recommendation.

1. Includes each party's position on each issue.

2. Includes staff analysis of each issue.

E. Commission (or panel) considers staff recommendation and votes on each issue in the sunshine at an agenda conference.

1. Regular agenda conferences are normally held on the 1st, 3rd and 5th Tuesdays of each month. Major cases are occasionally decided at a special agenda conference.

2. Only staff and Commissioners can participate.

3. Parties can observe.

F. Staff reduces Commission's decision to a written order.

G. Parties have 15 days to move for reconsideration. [Rule 25-22.060, F.A.C.]

1. High standard – is there something the Commission overlooked or failed to consider.

2. A timely petition for reconsideration tolls the time for appeal until an order on reconsideration is issued – at least as to some parties and issues. [Fla.R.App.Pro. 9.020(h)]

H. Appeals of cases relating to rates or service of electric, gas and telephone utilities are filed in the Florida Supreme Court. Other appeals are heard by the 1st District Court of Appeal. [Fla.Const. Art. V, §3(b)(2); §350.128, F.S.]

VI. UNIQUE PROCEDURAL RULES

A. PSC is generally subject to Uniform Rules of Procedure.

B. The Administration Commission has granted the PSC a number of exceptions to the Uniform Rules. The exceptions are listed in Rule 25-40.001, F.A.C.

C. PSC specific procedural rules are codified in Chapter 25-22.

D. PSC specific rules include:

1. Agenda conference participation rule (Rule 25-22.021, F.A.C.) and oral argument rule (Rule 25-22.058, F.A.C.). The PSC is in the process of updating and clarifying these rules.

a. Parties can participate at agenda conferences prior to final hearing.

b. Parties must request oral argument in order to be heard on motions for reconsideration.

c. Parties cannot participate at agenda conference on the merits of the case after final hearing.

2. Number of copies of filings are specified by Rule 25-22.028, F.A.C.

a. The PSC's web site contains guidelines for electronic filing of many documents in word processing or Adobe format.

3. Intervention is governed by Rule 25-22.039, F.A.C.

a. Petitions for leave to intervene are allowed up to five days before the final hearing. This contrasts with a 20-day cut-off under the Uniform Rules.

b. Intervenors take the case as they find it.

c. Tip: Because of rules regarding prefiled testimony and prehearing statements, late intervention may limit the intervenor's role to cross-examination of witnesses and submission of post-hearing filings.

4. Reconsideration is allowed.
 - a. Rule 25-22.0376, F.A.C., governs reconsideration of non-final orders
 - b. Rule 25-22.060, F.A.C., governs reconsideration of final orders
 - c. Under appellate rules, time for appeal is tolled by a permitted and timely motion for reconsideration. [Fla.R.App.Pro. 9.020(h)]

5. PSC has a Proposed Agency Action procedure in Rule 25-22.029, F.A.C., to provide a point of entry on matters initially decided without the benefit of a hearing.

6. Confidentiality procedures to implement PSC-specific statutory exemptions from the public records law are contained in Rule 25.22.006, F.A.C.

VII. UNIQUE STATUTORY PROVISIONS

A. Section 120.80(13)(a) – Agency statements that relate to electric utility cost-recovery clauses or mechanisms are exempted from the APA’s rulemaking requirements.

B. Section 120.80(13)(b) – When a proposed agency action (PAA) order is protested, the hearing may only address the issues in dispute. All other aspects of the order not in dispute are “deemed stipulated.”

1. PSC is in a rulemaking process to adopt a protest / cross-protest procedure for PAA orders.

C. Section 120.80(13)(c) – The PSC is exempted from the time requirements of Section 120.60(1) when issuing a license.

D. Section 120.80(13)(d) – In implementing the federal Telecommunications Act of 1996, the PSC can use procedures consistent with that Act rather than normal Chapter 120 procedures.

E. Section 120.80(13)(e) – Appellate jurisdiction over PSC decisions that implement the Telecommunications Act of 1996 shall be consistent with that Act. Appeals involving federal issues typically are reviewed by complaint in the U.S. District Court for the Northern District of Florida.

F. Section 120.80(13)(f) – Special statutory provisions relating to interim rate increases prevail over contrary provisions in Chapter 120.



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.

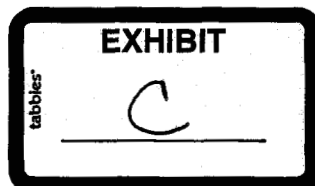
DOCKET NO. 020898-EQ
ORDER NO. PSC-03-0945-PCO-EQ
ISSUED: August 20, 2003

ORDER PROVIDING CLARIFICATION OF ORDER NO. PSC-03-0866-PCO-EQ,
AS MODIFIED BY ORDER NO. PSC-03-0909-PCO-EQ

On July 30, 2003, Tampa Electric Company (Tampa Electric) filed a Motion for Clarification of Order No. PSC-03-0866-PCO-EQ, the order establishing procedure, requesting that the Prehearing Officer confirm that all parties will have the opportunity to file rebuttal testimony, pursuant to that Order. In the alternative, Tampa Electric requests that the Prehearing Officer move the date it is required to file testimony rebutting Cargill Fertilizer, Inc.'s (Cargill) direct testimony to 15 days after Cargill fully answers discovery propounded by Tampa Electric with regard to Cargill's direct testimony. On August 5, 2003, Cargill responded opposing Tampa Electric's Motion for Clarification of Order No. PSC-03-0866-PCO-EQ.

Rule 28-106.211, Florida Administrative Code, grants broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case" Based upon this authority, and having considered the Motion and Response, the rulings are set forth below.

Tampa Electric seeks an order clarifying that Order No. PSC-03-0866-PCO-EQ permits all parties to file rebuttal testimony. The date for filing rebuttal testimony in Order PSC-03-0866-PCO-EQ was subsequently modified, along with the dates for both parties filing direct testimony, by Order No. PSC-03-0909-PCO-EQ, the first order modifying procedure, issued August 7, 2003. The date for filing rebuttal testimony was moved from September 24, 2003, to October 1, 2003. Each of Tampa Electric's arguments, Cargill's responses, and the attendant rulings are addressed separately below.



DOCUMENT NUMBER - DATE

07692 AUG 20 03

FPSC-COMMISSION CLERK

Tampa Electric's Motion

Based on the procedural schedule set forth in Order PSC-03-0866-PCO-EQ, as modified by Order PSC-03-0909-PCO-EQ, Tampa Electric requests confirmation of its understanding that all parties are free to file rebuttal testimony rebutting previously filed direct testimony. Tampa Electric states that if the Commission's expectation is that it will file both direct testimony and rebuttal to Cargill's direct testimony on the same date, then it requests a modification to the procedural schedule. Tampa Electric asserts that it anticipates Cargill will present testimony and exhibits that will require examination through discovery in order to be properly understood. According to Tampa Electric, it will not be in a position to rebut Cargill's direct testimony unless a reasonable opportunity for discovery is permitted.

Cargill's Response

Cargill responds that it opposes Tampa Electric's Motion for Clarification of Order No. PSC-03-0866-PCO-EQ. Cargill argues that allowing Tampa Electric to respond to its direct testimony twice would be a "most unusual procedure," giving Tampa Electric two opportunities to put on its case. Cargill states that it disagrees that the Order is unclear or justifies a new procedure for dealing with prefiled testimony. Cargill asserts that the clarification Tampa Electric seeks is violative of Cargill's due process rights. In response to Tampa Electric's argument that it will not have sufficient time to propound discovery and prepare its testimony if not permitted to file rebuttal testimony, Cargill states that this case has been pending for approximately one year and Tampa Electric has had ample opportunity to propound discovery and will continue to have that opportunity. Cargill requests that the Prehearing Officer clearly delineate that the burden of proving adverse impact on the general body of ratepayers rests with Tampa Electric, if it takes this position, since the statute and implementing regulations, as well as the Order in this docket, demonstrate that this is the correct posture of the case. Although Tampa Electric claims it must have completed discovery before it can file its testimony, Cargill argues that all the relevant information is already in Tampa Electric's possession. Cargill asserts that if the Prehearing Officer rules that Cargill has the burden of proof in this case, it should not be required to file its testimony until

15 days after it has received complete discovery responses from Tampa Electric as to all its outstanding discovery with respect to information required by the Commission's Cost-Effectiveness Manual.

Rulings on Tampa Electric's Motion

Upon review of the pleadings and consideration of the arguments, Tampa Electric's argument that all parties have the opportunity to file rebuttal testimony pursuant to Order No. PSC-03-0866-PCO-EQ, modified by Order No. PSC-03-0909-PCO-EQ, is rejected. As will be discussed below, Cargill has the burden of proof in this case, and in such circumstances the Commission generally does not allow all parties to file rebuttal testimony. Tampa Electric's request that its testimony not be due until 15 days after Cargill fully answers discovery propounded by Tampa Electric with regard to Cargill's direct testimony is denied due to the time constraints in this case. Pursuant to Order No. PSC-03-0909-PCO-EQ, Tampa Electric's direct testimony must be filed by September 17, 2003.

Rulings on Cargill's Response

Cargill's argument that Tampa Electric has the burden of proof in this case is rejected. The burden of proof rests with Cargill, as it is the party asserting the proposition to be proved. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974) and Heim v. Heim, 712 So.2d 1238 (Fla. 4th DCA 1998). Cargill's request that its testimony not be due until 15 days after it has received complete discovery responses from Tampa Electric as to all its outstanding discovery with respect to information required by the Commission Cost-Effectiveness Manual is denied. Pursuant to Order No. PSC-03-0909-PCO-EQ, Tampa Electric must respond to Cargill's Second Set of Discovery by August 20, 2003. Order No. PSC-03-0909-PCO-EQ also directed Cargill's direct testimony to be filed by September 3, 2003. Thus, Cargill's direct testimony will not be due until 14 days after it has received Tampa Electric's responses to its Second Set of Discovery.

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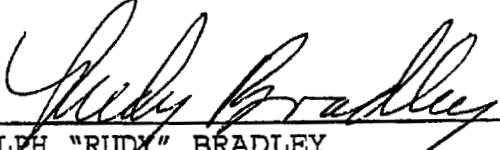
It is therefore,

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that Tampa Electric may not file rebuttal testimony on October 1, 2003, pursuant to Order No. PSC-03-0909-PCO-EQ. It is further

ORDERED that the burden of proof in this case rests with Cargill. It is further

ORDERED that Order Nos. PSC-03-0866-PCO-EQ and PSC-03-0909-PCO-EQ are reaffirmed in all other respects.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 20th day of August, 2003.



RUDOLPH "RUDY" BRADLEY
Commissioner and Prehearing Officer

(S E A L)

JAR

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

ORDER NO. PSC-03-0945-PCO-EQ
DOCKET NO. 020898-EQ
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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.

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.