



Public Service Commission
-M-E-M-O-R-A-N-D-U-M-

DATE: September 26, 2002
TO: Division of the Commission Clerk and Administrative Services
FROM: Office of the General Counsel (Gervasi) *pg*
RE: Docket No. 020898-EQ - Petition by Cargill Fertilizer, Inc. for permanent approval of self-service wheeling to, from, and between points within Tampa Electric Company's service area.

Please file the attached letter from Vicki Gordon Kaufman, Esquire, dated September 25, 2002, in the docket file for the above-referenced docket.

RG/dm

cc: Division of Economic Regulation (Haff, E. Draper, Wheeler)

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Via Hand Delivery

September 25, 2002

Mr. Michael S. Haff
Division of Electric & Gas
Florida Public Service Commission
Room 200G - Gerald L. Gunter Building
Tallahassee, Florida 32399-0850

Re: Docket No. 020898-EQ



Dear Michael:

You previously sent Tampa Electric Company (TECo) an informal data request asking for an explanation as to why it believes that the provision of retail customer self-service wheeling would require a special agreement with FERC. TECo provided its position to on September 13, 2002. As you know from our meeting last week, Cargill disagrees with TECo's position on this issue and provides its enclosed analysis of the issue to you.

If you have any questions, please let us know.

Sincerely,

Vicki Gordon Kaufman
Vicki Gordon Kaufman

VGK:bae
Enclosure

Cc: James D. Beasley (by hand delivery)
Roseanne Gervasi (by hand delivery)

Cargill Fertilizer, Inc.'s
Response to Informal Data Request
Of Commission Staff
Docket No. 020898-EQ

Data Request:

2. A description of why [Cargill] believes that retail customer self-service wheeling would [not] require a transaction-specific Transmission Service Agreement to be filed at the Federal Energy Regulatory Commission.

Cargill Response:

Cargill wishes to address TECo's response to the Staff's September 4th data request. Cargill suggests that TECo's refusal to file a waiver or modify its FERC tariffs to implement a retail self-service wheeling (SSW) program should not be used as an excuse to kill the program.

In its response to the above data request, TECo states that in 1997 FERC determined that unbundled industrial self-service wheeling must be provided under a nondiscriminatory open access transmission tariff (OATT). *Washington Water Power Company*, 78 FERC 61,726 (1997). FERC has also determined that under §212(h) of the Federal Power Act, it has no authority to mandate self-service wheeling. *See, i.e., Suffolk County Electrical Agency*, 96 FERC P61, 349 (2001). The authority to order retail self-service wheeling is reserved to the states.

In August 2000, TECo and Cargill petitioned the Florida Commission to authorize a pilot study of self-service wheeling for Cargill. Order PSC-00-1596-TRF-EQ granted that authority under the provisions of §§ 366.051 and 366.075, Florida Statutes, and rule 25-17.0883, Florida Administrative Code. There was no retail tariff in place to establish

charges for this service. Thus, TECo complied with its understanding of the *Washington Water Power* case and provided the service under its OATT.

The two-year study period is now nearing expiration. On August 15, 2002, Cargill asked that the program be made permanent. Immediately after Cargill filed its petition, TECo “discovered” that its OATT requires that persons using the tariff must purchase ancillary services, which TECo supplies for a price. TECo says the ancillary service that it has been providing for the last two years does not conform to its OATT.¹

TECo alleges that it cannot go forward with the program, even on a temporary basis, until it amends its OATT, enters into a special contract with Cargill, or seeks a waiver of its own OATT requirements. It has refused to do any of these things and concludes that as a consequence the Florida Commission is compelled to deny Cargill’s request for SSW. TECo insists that prior FERC approval is required to continue the self-service wheeling program and that Cargill wants unbundled transmission service. In support of its position, TECo states that its OATT must recognize that retail competition is not permitted in Florida and that the Commission retains jurisdiction over the bundled service provided to Cargill. It further suggests that services under the OATT can be made available only in manner consistent with state law. Cargill stands ready to fully stipulate to these obvious propositions.²

¹ TECo has suddenly “realized” that FERC requirements present a problem as to the program’s continuance. However, during the almost two years that the self-service wheeling program has been in place, there have been no changes to FERC rules and regulations in this area (and TECo does not allege that there has been any change in circumstances in this regard). Rather, TECo states that it has “come to realize” that it would need FERC permission to continue the program. The timing of this “realization” – coming when Cargill has asked to continue the program – makes it somewhat suspect.

² TECo opines that a transaction-specific transmission service agreement must be filed with FERC. TECo relies on various FERC opinions that do not stand for the proposition

To the casual observer, it might appear that TECo is advising the Commission that it has no authority to fulfill the legislative mandate of § 366.051, Florida Statutes, unless TECo agrees to do so. More careful consideration makes it clear that this is exactly what TECo asserts. However, it is uncontroverted that it is this Commission, not the FERC, which has jurisdiction over the services investor-owned utilities provide to *retail* customers, like Cargill. *See*, §§ 366.03, 366.04, Florida Statutes. Florida is not a retail choice state where Cargill may pick among various suppliers. Cargill must either supply its own power or buy power from TECo and no one else. The Florida Statutes authorizing retail self-service wheeling in no way cede jurisdiction over retail transmission service to FERC, and federal law prohibits FERC from assuming such jurisdiction.

Section 366.051, Florida Statutes, (emphasis added), explicitly *requires* the provision of self-service wheeling to *retail* customers under the standards listed in the statute:

Public utilities *shall provide transmission* or distribution service to enable a *retail* customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location if the commission finds that the provision of this service, and the charges, terms and other conditions associated with the provision of this service are not likely to result in higher cost electric service to the utility's general body

for which TECo cites them. For example, *PJM Interconnection, L.L.C., et al.* 94 FERC P61,251, relates to amendments to PJM's Open Access Tariff dealing with the netting of station power and whether such arrangement constitutes a sale of electricity. In dicta, in a footnote, FERC stated that certain situations *may* involve the transmission of energy in interstate commerce, which might require *appropriate arrangements* for such service. Similar language is used in the Order Denying Rehearing, 95 FERC P61,333, where FERC states that a self supply situation *might* involve its jurisdiction and that arrangements *may* need to be made for transmission. Such dicta cannot be relied upon here, especially in view of this Commission's explicit jurisdiction over self-service wheeling.

of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers.

The Commission need look no further than its own enabling authority to dismiss TECo's arguments.

Cargill respectfully suggests that the "obstacle" TECo has attempted to put in Cargill's path is not a chicken and egg circumstance, in which TECo can refuse to lay the egg. If the Commission determines that retail SSW by Cargill is "not likely to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers", the Commission has the power to compel TECo to provide the service and to file at FERC the requisite contracts, tariff modifications or waiver requests needed to provide the service at a just, reasonable and nondiscriminatory price.³ The Legislature has placed authority over SSW in the hands of the Florida Commission. FERC has conceded that this is where the authority lies. TECo cannot usurp the Commission's jurisdiction by simply refusing to price the service and file the necessary tariffs.

There is an issue as to whether the fact that TECo has bundled its transmission service with ancillary retail services makes it necessary to file the tariff with the Florida Commission or FERC. This issue is one of many that have arisen from the market restructuring that has been taking place over the last few years. TECo referred to some FERC decisions on the subject in its September 13th discovery response. It contends that FERC probably has pricing jurisdiction. Cargill will defer to the Commission's judgment

³ If the Commission concludes that a transaction-specific agreement needs to be filed at FERC, it will find that Cargill already has an agreement in place and that the FERC has approved it. *See*, Qualifying Facility Transmission Agreement between Cargill Fertilizer, Inc. and Tampa Electric Company, issued October 5, 2001, Docket No. ER01-1896-002.

on whether it has authority over pricing retail SSW bundled with other retail services or whether pricing authority reposes with FERC, but the existence of this sub issue should not immobilize the Commission from making the decision the Florida Legislature empowers it to make -- a decision that FERC concludes it is powerless to address.

Finally, *even if* the Commission finds that the current TECo/Cargill agreement is not sufficient **and** that another agreement is required for Cargill to continue to receive SSW, it would appear to be a relatively simple matter for TECo to make the appropriate FERC filings.