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September 5, 2002

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
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COMMISSION
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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 Motion to Strike Conclusions not Supported in the Record.

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

Sincerely,

Vicki Gordon Kaufman
Vicki Gordon Kaufman

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MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN & ARNOLD, P.A.

DOCUMENT NUMBER - DATE
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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Cargill Fertilizer, Inc.
For permanent approval of self-service
Wheeling to, from, and between points
Within Tampa Electric's service area.

Docket No. 020898-EQ

Filed: September 5, 2002

**CARGILL FERTILIZER, INC.'S MOTION TO STRIKE CONCLUSIONS NOT
SUPPORTED IN THE RECORD**

Cargill Fertilizer, Inc. (Cargill), pursuant to rule 28-206.204, Florida Administrative Code, moves to strike paragraph 4 of Tampa Electric Company's (TECo) Response to Cargill's Motion to allow it to continue its self-service wheeling program (Response) while the Commission considers whether the program meets the standards for permanent approval. Paragraph 4 of TECo's Response asks the Commission to draw a final conclusion from disputed information that is not part of the record in this case when it makes the decision whether to temporarily extend the current study period until the all the evidence is submitted and evaluated. As grounds therefore, Cargill states:

1. Cargill generates electricity from waste heat at two locations. In September 2000, the Commission authorized a pilot study to see if it would harm other customers for Cargill to transmit self-generated electricity between the two Cargill plants over TECo wires. On August 16, 2002, Cargill filed two pleadings in this matter. The first was Cargill's Motion to maintain the status quo (Motion) until the two-year pilot study was completed and evaluated. Cargill supported this Motion with an affidavit by Mr. Roger Fernandez explaining the adverse consequences of a preemptory termination of the program.

2. Cargill's second pleading was the Petition of Cargill for Permanent Approval of the Self-Service Wheeling Program (Petition). This Petition asks the Commission to

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consider the results of the two-year study and permanently approve the self-service wheeling program.

3. The Case Assignment and Scheduling Record (CASR) in this case contemplates that these matters will be decided on two tracks. Cargill's Motion to maintain the status quo pending review of the evidence will be considered by the Commission on October 1, 2002. The Commission Staff proposes to dispose of the request for permanent approval by a Proposed Agency Action (PAA) on October 15, 2002.

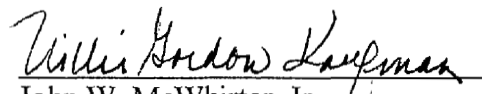
4. In paragraph 4 of its Response to Cargill's Motion, TECo refers to "quarterly analyses" filed in Docket No. 001048-EQ. This is a docket that the Commission closed more than a year ago.¹ TECo then asks the Commission to draw final conclusions from the reports. The reports are not part of the record of this proceeding. The reports omit material facts. More importantly, the "analyses" were prepared solely by TECo. Cargill vigorously disputes the self-serving conclusions TECo draws from its "analyses."

5. Unless and until these "analyses," referred to in paragraph 4 of TECo's Response, are the subject of sworn testimony, discovery and cross-examination before the Commission, they are not evidence in this case and cannot form the basis for a decision on Cargill's Motion. Cargill has had no opportunity to respond to the reports in the context of this docket and will be unduly prejudiced if they are relied upon. The "analyses" are (at this juncture in the case) inappropriate "extra record" evidence. *See, i.e., Thorn v. Florida Real Estate Commission*, 146 So.2d 907, 910 (Fl. 2d DCA 1962) (... "nothing can be treated as evidence which is not introduced as such. . . ."). Thus, paragraph 4 of TECo's Response should be stricken and not considered in ruling on Cargill's Motion.

¹ This docket was closed on October 3, 2000 in Order No. PSC-00-1808-CO-EQ.

6. Further, the "analyses" TECo refers to in paragraph 4 constitute the basis for material disputes of fact between Cargill and TECo regarding the self-service wheeling program.² Cargill is adversely affected by the interpretation that TECo unilaterally gives to this disputed off-the-record evidence. The reports, and any discussion concerning them between TECo and Staff without including Cargill, would be inappropriate for consideration in this docket. Staff cannot and should not rely upon incomplete and disputed evidence when it makes its recommendation on Cargill's Motion. The Commission, in ruling on Cargill's Motion, may not rely upon or consider the incomplete and disputed reports.

WHEREFORE, Cargill requests that the Commission strike paragraph 4 of TECo's Response to Cargill's Motion.


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Attorneys for Cargill Fertilizer, Inc.

² See paragraph 9 of Cargill's Petition. Additionally, in paragraph 5 of its Motion, Cargill states that it "has not had the opportunity to provide the Commission and Staff with its analysis of the reports filed during the pendency of the program. It will do so during the hearing in this case. . . ."

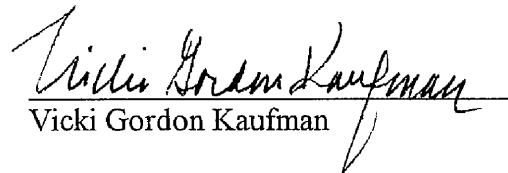
CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing Cargill Fertilizer, Inc.'s Motion to Strike Conclusions Not Supported in the Record has been furnished by (*) hand delivery on this 5th day of September, 2002 to the following:

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