

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: May 30, 2003

**CARGILL FERTILIZER, INC.'S MOTION TO CONVENE MEDIATION,
LIFT THE PROCEDURAL ABATEMENT,
COMPEL TAMPA ELECTRIC COMPANY TO RESPOND TO OUTSTANDING
DISCOVERY, AND ESTABLISH PROCEDURAL SCHEDULE**

Cargill Fertilizer, Inc. (Cargill), pursuant to rule 28-106.204, Florida Administrative Code, files its Motion to Convene Mediation, Lift the Procedural Abatement, Compel Tampa Electric Company (TECo) to respond to the Cargill's outstanding discovery¹, and establish a procedural schedule. In support thereof, Cargill states:

**I.
Introduction**

1. On September 6, 2000, the Commission approved a pilot self-service wheeling program for the wheeling of electricity between three Cargill locations within TECo's service territory.²
2. On August 16, 2002, Cargill filed a petition to make the self-service wheeling program permanent and to continue the program in effect pending the final resolution of this proceeding.
3. On October 9 and 16, 2002, Cargill requested that the Commission convene mediation in this matter. TECo was willing to proceed with mediation but claimed that at that time it was not in a position to mediate as it had a request pending before the Federal Energy

¹ Including its First Request for Admissions (Nos. 3, 5), First Set of Interrogatories (Nos. 4-6, 18, 20, 22) and First Request for Production of Documents (Nos. 1, 3), to which TECo has objected.

² Order No. PSC-00-1596-TRF-EQ, consummated by Order No. PSC-00-1808-CO-EQ, issued October 3, 2000.

Regulatory Commission (FERC) seeking needed waivers from the FERC related to its ability to comply with Cargill's request.

4. On October 21, 2002, the Commission granted Cargill's motion to continue the self-service wheeling program pending final resolution of Cargill's petition for permanent approval.³

5. On October 22, 2002, TECo filed a motion to hold the procedural schedule in abeyance to await the FERC order and to pursue mediation. The Commission entered an order holding the schedule, including all discovery, in abeyance to permit the parties to mediate the matter after the receipt of the FERC's decision.⁴ At the time the order abating the proceedings was entered, Cargill had numerous discovery requests outstanding, some of which had been objected to by TECo.

6. The FERC approved the changes TECo requested on November 14, 2002 in Docket No. ER03-27. Since November 14, 2002, the parties have engaged in informal settlement discussions. On February 7, 2003, Cargill filed a letter with this Commission requesting formal mediation, as it appeared that the parties would be unable to reach agreement on an informal basis. TECo indicated its willingness to mediate. On February 28, 2003, Order No. PSC-03-0276-PCO-EQ was entered further abating the proceedings.

7. On March 14, 2003, Staff convened a status conference to discuss the progress of the case. Substantive issues were discussed and the parties agreed that additional time for informal settlement talks, before formal mediation, might prove fruitful. Such discussions have

³ Order No. PSC-02-1451-PCO-EQ.

⁴ Order No. PSC-02-1518-PCO-EQ.

been on-going since that time, but it appears that the parties are at an impasse. Therefore, Cargill requests that mediation be scheduled.⁵

8. In addition, this case is currently set for hearing on October 23, 2003, though no other procedural dates have yet been established. To have the necessary information to prepare for hearing, discovery must begin. TECo must be required to respond to all outstanding discovery, including that to which it objects.⁶

9. Thus, Cargill asks the Prehearing Officer to require TECo to respond to all outstanding discovery within seven (7) days of an order on this motion, including providing full and complete responses to all discovery to which TECo has previously objected. In addition, Cargill requests that the procedural schedule to be established require that the date that Cargill is required to file its direct testimony be no earlier than 15 days after TECo **fully** answers the discovery propounded by Cargill or is relieved from the obligation to do so.⁷

III.

Request for Mediation

10. The parties have attempted for some time to engage in informal settlement discussions to resolve this case. Though such discussions have been useful, they have not resulted in resolution. This Commission has often encouraged parties to engage in mediation as an efficient, cost-effective way to settle disputes. Thus, Cargill requests mediation in this case.

⁵ On May 27, 2003, Counsel for Cargill informed Commission General Counsel, Harold McLean, of the impasse and requested mediation. Cargill included a proposed list of mediation issues.

⁶ Depending on how quickly the discovery dispute is resolved, the hearing date may have to be further rescheduled.

⁷ When Cargill made the same request in its Motion for Order Compelling Discovery, filed on October 18, 2002, TECo responded that it had no objection to this aspect of Cargill's request.

IV.

Motion to Compel TECo to Respond to Discovery

11. On October 14, 2002, Cargill served its First Set of Interrogatories (Nos. 1-22) and its First Request for Production of Documents (Nos. 1-6) on TECo. On October 16, 2002, Cargill served its First Request for Admissions (Nos. 1-7) on TECo.

12. The Prehearing Officer entered Order No. PSC-02-1518-PCO-EQ, Order Granting Motion to Hold Procedural Schedule in Abeyance. Therefore, TECo has not responded to any of Cargill's discovery. Some of the information sought is not subject to dispute, but has not been provided due to the abeyance. However, TECo did object to numerous requests

13. Much of the information Cargill seeks, and which it must have to prepare its case, is in the sole possession of TECo. It is not information which Cargill can develop or secure from any other source. Therefore, it is critical that it receive answers to its discovery.

14. As to the discovery requests to which TECO objected, each objection is discussed below. For the reasons set forth below, TECo's objections should be rejected and TECo should be required to respond to all of Cargill's discovery.

Requests for Admissions

15. Request for Admission No. 3 asks TECo to admit the following:

Line 5 of TECo's quarterly "Impact of Cargill Self-Service Wheeling (SSW) Pilot" shows a reduction in Conservation Cost Charges collected from Cargill. Admit that TECo projects that it saves \$12,536,000 in fuel costs as a result of conservation programs and that SSW reduces TECo's fuel cost.

TECo's response states:

Tampa Electric objects to Request for Admission No. 3 on the grounds that the request has no temporal element and, therefore is vague, ambiguous and otherwise unintelligible.

16. The \$12 million number in Cargill's request comes directly from TECo's own filing in Docket No. 020002-EG. In Exhibit HTB-2, attached to the prefiled testimony of Howard T. Bryant, filed on October 4, 2002, TECo, at page 10, includes an exhibit entitled "Fuel Cost Impact of Conservation and Load Management Programs on Interruptible Customers, January 1, 2003 through December 31, 2002. The exhibit shows that TECo claims fuel benefits for the period of \$12,536,000. Thus, in its filing, TECo itself sets the "temporal element" at calendar year 2003. Cargill simply asks TECo to confirm its own number filed with this Commission.

17. Request for Admission No. 5 asks TECo to admit the following:

Admit that TECo proposes to charge its retail customers \$945,190 during calendar year 2003 to promote emergency generation at firm commercial and industrial facilities in order to reduce weather-sensitive peak demand.

TECo's response states:

Tampa Electric objects to Request for Admission No. 5 on the ground that the request is vague and ambiguous with regard to its reference to "emergency generation."

18. The term "emergency generation", used in Cargill's request, is a term TECo used. As with the prior request, this admission request is taken directly from a TECo document -- Schedule C-5, page 8 of 16 of Exhibit HTB-2, attached to the October 4, 2002 testimony of Howard T. Bryant filed in Docket No. 020002-EG. That document is a description of TECo's various conservation programs. As to its conservation program entitled "Standby Generator" TECo states that "[t]his is a program designed to utilize the **emergency generation** capacity at firm commercial/industrial facilities in order to reduce weather-sensitive peak demand."⁸ The same exhibit shows that TECo expects to expend \$945,190 for this program in 2003. Cargill just asks TECo to admit the truthfulness of its own documents.

⁸ Emphasis added.

Interrogatories

19. Interrogatory No. 4 states:

Provide TECo's actual marginal fuel cost for each hour during the period specified in Interrogatory No. 3 [October 1, 2000-September 30, 2002].

TECo's response states:

Tampa Electric objects to Interrogatory No. 4 on the ground that the requested hourly marginal fuel cost information is proprietary, commercially sensitive information that Cargill, as a competitor of Tampa Electric in the wholesale power market, could use to the detriment of Tampa Electric's ratepayers.

Interrogatory No. 5 states:

For each hour during the seven study quarters, when both Cargill self-service wheeling and optional power purchase provisions were in effect, provide TECo's actual marginal fuel cost.

TECo's response states:

Tampa Electric objects to Interrogatory No. 5 on the ground that the requested hourly marginal fuel cost information is proprietary, commercially sensitive information that Cargill, as a competitor of Tampa Electric in the wholesale power market, could use to the detriment of Tampa Electric's ratepayers.

Interrogatory No. 6 states:

For each hour during the seven study quarters, when Cargill engaged in self-service wheeling, but interruptions or optional power purchase provisions were *not* in effect, provide TECo's actual marginal fuel cost.

TECo's response states:

Tampa Electric objects to Interrogatory No. 6 on the ground that the requested hourly marginal fuel cost information is proprietary, commercially sensitive information that Cargill, as a competitor of Tampa Electric in the wholesale power market, could use to the detriment of Tampa Electric's ratepayers.

20. Interrogatory Nos. 4-6 seek information regarding TECo's marginal fuel cost.

Such information is critical to an analysis of the costs and benefits of the self-service wheeling program. TECo does not contend that this information is not relevant or that it is information that Cargill can secure from another source. And in fact, TECo is the only repository of

marginal fuel cost information. Rather, TECo objects to providing the information because it says it is proprietary, commercially sensitive information that could be used to the detriment of retail ratepayers.

21. As this Commission is well aware, parties in litigation before the Commission, and the Commission itself, often receive and protect confidential information. In fact, the Commission has a very thorough set of rules relating to the processing of confidential information that is intended to protect the information from disclosure outside a particular proceeding or limit its disclosure only to parties.⁹ Further, parties often enter into non-disclosure agreements and such agreements clearly specify for what purposes the information may be used.

22. TECo cannot refuse to produce information critical and relevant to this case simply because it deems it proprietary. TECo must produce the information and may then file the appropriate request for confidential protection and obtain a non-disclosure agreement from Cargill.

23. TECo's claim that Cargill competes with TECo in the wholesale power market and could use the information to the detriment of retail ratepayers must be rejected for several reasons. First, as noted above, to the extent that a non-disclosure agreement is entered into between the parties, such agreement will appropriately limit the ways in which any confidential information may be used. It is typical for such agreements to note that confidential information may only be used in the context of the proceeding in which it is requested. TECo's objection assumes that such an agreement will be violated.

24. Second, to suggest that the amount of power that Cargill sells in the wholesale market could in any way affect retail ratepayers to their detriment is specious at best. The

⁹ See rule 25-22.006, Florida Administrative Code.

minute amount of power Cargill sells, in relation to TECo's sales, could have no impact or effect on TECo's activities.

25. Interrogatory No. 18 states:

Calculate the cost/ benefit ratio of the Cargill self-service wheeling program using the Total Resource Test required in Order No. 24745. Explain in detail each of your inputs and calculations.

TECo's response states:

Tampa Electric objects to Interrogatory No. 18 on the ground that the Company has not performed the requested analysis and has no obligation to do so since it is not the moving party in this proceeding.

26. Order No. 24745 in Docket No. 891324-EU adopts rule 25-17.008, Florida Administrative Code, "Conservation and Self-Service Wheeling Cost Effectiveness Data Reporting Format." The order, the rule, and the Manual adopted by the rule contemplate the application of both the Rate Impact Test and the Total Resource Test by the utility to self-service wheeling programs. In regard to self-service wheeling, the Order provides that "[a]llowing the application of *both* the Rate Impact Test and the Total Resource Test properly sets forth a neutral reporting format for the Commission to utilize flexibility in its determination."¹⁰

27. The rule itself provides, in part, that it applies to all *utilities* "whenever an evaluation of the cost effectiveness of a self-service wheeling program is required by the Commission."¹¹ The rule further states that the Commission adopts and incorporates by reference the "Florida Public Service Commission Cost Effectiveness Manual for Demand Side Management and Self-Service Wheeling Proposals." The Manual states that "[t]he Rate Impact and Total Resource tests *used for self-service wheeling projects* are similar to those used for conservation and load control programs."¹² The Manual contains a specific section (section III)

¹⁰ Order No. 24745 at 2, emphasis added.

¹¹ Rule 25-17.008(1), Florida Administrative Code.

¹² Manual at 3, emphasis added.

devoted entirely to self-service wheeling. It prescribes two tests for self-service wheeling, which the utility is required to conduct -- the rate impact test (see pp. 15-18) and the total resource test (see pp. 19-22).

28. Thus, TECo's response to this interrogatory -- that it has not performed the Total Resource Test and is not required to do so since it is not the moving party -- is disingenuous at best. The self-service wheeling rule *requires* TECo to perform the Total Resource Test. If it has not done so, as the rule requires, it should be required to do so now and present that analysis to assist the Commission in its determination in this matter, as the rule requires. TECo has all the information in its possession needed to conduct the test and the rule puts the responsibility for doing so with the utility.

29. Interrogatory No. 20 states:

How much has TECo charged customers to promote industrial cogeneration since 1980?

TECo's response states:

Tampa Electric objects to Interrogatory No. 20 on the ground that the requested information is not relevant to the matters raised in this proceeding.

30. Contrary to TECo's claim this information is relevant to the issues in this case. Cargill has expended resources and funds on cogeneration facilities. Apparently, TECo believes that industrial cogeneration, such as that in which Cargill is engaged, is a good idea since it has a conservation program that promotes industrial cogeneration and since it charges retail customers for the cost of such a program. However, TECo now refuses to provide self-service wheeling so that Cargill may effectively use the cogeneration that TECo has promoted (at least in part as the result of a program for which ratepayers have been charged). Thus, the amount TECo has charged ratepayers for this program is relevant to this case.

31. Interrogatory No. 22 states:

What is the sum TECo calculates customers have derived from the conservation surcharge it imposes on customers to enable it to promote industrial cogeneration?

TECo's response states:

Tampa Electric objects to Interrogatory No. 22 on the grounds that the interrogatory is vague, ambiguous and otherwise unintelligible.

32. To the extent TECo has objected because it cannot understand the request, Cargill states that it is seeking to elicit how much money retail customers have saved due to what they have expended on TECo's program to promote industrial cogeneration. That is, retail ratepayers pay a conservation surcharge to promote industrial cogeneration (one of TECo's conservation programs). Cargill's interrogatory seeks to find out how much ratepayers have saved due to that program.

Production Requests

33. Production Request No. 1 states:

All worksheets, spreadsheets, backup materials and calculations supporting the figures included in the schedule entitled "Impact of Cargill Self-Service Wheeling (SSW) Pilot" contained in each of the seven (7) Quarterly Reports provided to the Commission.

TECo's response states:

Tampa Electric objects to Document Request No. 1, to the extent that such request would require the disclosure of hourly marginal fuel cost data, on the ground that the requested hourly marginal fuel cost information is proprietary, commercially sensitive information that Cargill, as a competitor of Tampa Electric in the wholesale power market, could use to the detriment of Tampa Electric's ratepayers.

34. Cargill incorporates herein the argument it has made as to alleged confidential information above in regard to Interrogatory Nos. 4-6 (see ¶s 19 - 24 above). TECo may not refuse to provide information simply because it claims it is confidential.

35. However, even more important is the fact that TECo has relied, and upon information and belief will continue to rely upon, its quarterly filings related to the impact of the

Cargill self-service wheeling pilot. A critical input to these quarterly filings is marginal fuel cost. TECo cannot argue on the one hand that the Cargill program is not cost-effective based on its quarterly filings and at the same time refuse to provide the information upon which that opinion is based. Failure to provide this information to Cargill would deprive it of due process as it attempts to prepare for the hearing in this matter.

36. Production Request No. 3 states:

All documents related to the calculation of the Total Resource Test for the self-service wheeling program.

TECo's response states:

Tampa Electric objects to Document Request No. 3 on the ground that the Company has not performed the requested analysis and has no obligation to do so since it is not moving party in this proceeding.

37. Cargill adopts and incorporates its argument above related to Interrogatory No. 18 (see ¶s 25 – 28, above). The order, rule and Manual applicable to self-service wheeling require TECo to perform the Total Resource Test. TECo should perform the test and then provide the underlying analysis and documents.

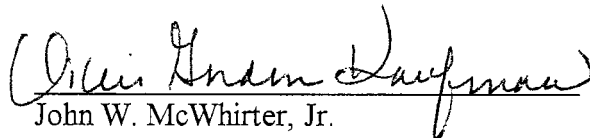
38. While Cargill seeks to mediate this matter, it should not be put in the untenable position of having engaged in good faith efforts to settle this case (since November 2002) only to find itself unable to adequately prepare its litigation case in the event mediation proves unsuccessful.¹³ To adequately prepare, Cargill must have all the information it has sought from TECo and it must have it in sufficient time to analyze it, seek follow up information (through additional written discovery or depositions), if necessary, and incorporate the information in its testimony.

¹³ As the Commission is well aware, discovery disputes can consume several months of time, especially if reconsideration is sought.

39. Cargill has contacted counsel for TECo in regard to this Motion. Counsel for TECo will file a response upon receipt and review of this Motion.

WHEREFORE, Cargill requests that the Commission enter an order which:

1. Convenes formal mediation;
2. Lifts the procedural abatement;
3. Compels TECo to respond to outstanding discovery;
4. Establishes a procedural schedule so that the date that Cargill is required to file its direct testimony be no earlier than 15 days after TECo **fully** answers the discovery propounded by Cargill or is relieved from the obligation to do so; and,
5. Grants such other relief as is necessary.



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CERTIFICATE OF SERVICE

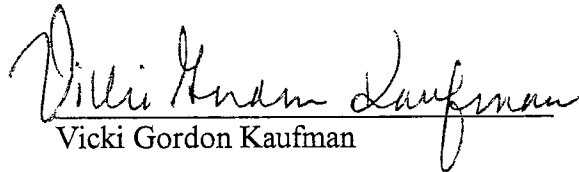
I HERBY CERTIFY that a true and correct copy of the foregoing Cargill Fertilizer, Inc.'s Motion to Convene Mediation, Lift the Procedural Abatement, Compel Tampa Electric Company to Respond to Outstanding Discovery, and Establish Procedural Schedule has been furnished by (*) hand delivery or U.S. Mail this 30th day of May, 2003 to the following:

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