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August 25, 2003

VIA HAND DELIVERY

Blanca S. Bayo, Director  
Division of Records and Reporting  
Betty Easley Conference Center  
4075 Esplanade Way  
Tallahassee, Florida 32399-0870

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 Response to Tampa Electric Company's Motions to Compel Responses to Interrogatories and Production of Documents and Motion for Protective Order.

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

RECEIVED & FILED  
*IN*  
FPSC-BUREAU OF RECORDS

Sincerely,

*Vicki Gordon Kaufman*  
Vicki Gordon Kaufman

AUS \_\_\_\_\_  
CAF \_\_\_\_\_  
CMP \_\_\_\_\_  
COM \_\_\_\_\_  
CTR \_\_\_\_\_ VGK/bae  
ECR \_\_\_\_\_ Enclosure  
GCL \_\_\_\_\_  
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DOCUMENT NUMBER-DATE  
McWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, KAUFMAN & ARNOLD, P.A. 07901 AUG 25 8

FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Application of Cargill Fertilizer, Inc.  
to engage in self-service wheeling of waste  
heat cogenerated power to, from and  
between points within Tampa Electric  
Company's service area.

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Docket No. 020898-EQ

Filed: August 24, 2003

**CARGILL FERTILIZER, INC.'S RESPONSE TO TAMPA ELECTRIC COMPANY'S  
MOTIONS TO COMPEL RESPONSES TO INTERROGATORIES AND  
PRODUCTION OF DOCUMENTS AND MOTION FOR PROTECTIVE ORDER**

Cargill Fertilizer, Inc. (Cargill), pursuant to rule 28-106.204, Florida Administrative Code, and rule 1.28(c), Florida Rules of Civil Procedure, files its response to Tampa Electric Company's (TECo) Motion to Compel Responses to Interrogatories and Motion to Compel Production of Documents, and Motion for Protective Order.<sup>1</sup> TECo's motions should be denied and Cargill's motion should be granted. In support therefore, Cargill states:<sup>2</sup>

**Introduction**

1. TECo served Cargill with its First Set of Interrogatories and First Request for Production of Documents on August 1, 2003. Cargill filed its objections to TECo's discovery on August 11, 2003. On August 18, 2003, TECo filed motions seeking to compel Cargill to respond to TECo's interrogatories and document requests. TECo's motions are without merit and should be denied.

**Interrogatories**

2. TECo's Interrogatory No. 1 states:

In the three-year period prior to Cargill's initiation of self-service wheeling:

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<sup>1</sup> TECo also filed a Motion to Compel Responses to Request for Admissions. Cargill will respond to all of TECo's requests for admissions; therefore, TECo's motion is moot.

<sup>2</sup> Through TECo filed separate motions as to each type of discovery request, Cargill responds in this single pleading.

DOCUMENT NUMBER-DATE

07901 AUG 25 8

FPSC-COMMISSION CLERK

- a) How much uncommitted energy was generated at each of Cargill's generators (i.e. Bartow [Ridgewood] and Riverview [Millpoint]); and
- b) To whom did Cargill sell the uncommitted energy and how much energy was sold to each such party annually?

Cargill objects to this interrogatory on the basis that it requests proprietary, trade secret information. Cargill will provide its total self-generation after TECo executes an appropriate confidentiality agreement. Such an agreement was provided to TECo on August 20<sup>th</sup> but has not been executed by TECo. It is unduly burdensome to make the 43,000 manual calculations required to separate "uncommitted energy" from the sales to Progress Energy Florida.<sup>3</sup> Cargill does not know which generator produced the electricity sold to Progress Energy Florida. The best source for this information is available to TECo from the records of its deliveries from Cargill to Progress Energy Florida.

3. Cargill further objected to this interrogatory because TECo has much more complete and specific information than Cargill. TECo has a meter on each of Cargill's cogeneration units and handles the transmission of all power sold by Cargill to Progress Energy Florida. Cargill objects to a make work project that requires it to spend considerable time and limited resources to replicate TECo data.<sup>4</sup>

4. TECo's motion appears to be based on its contention without clarification that it cannot "conclusively" gather this information from its meters. TECo has the total output from each meter; this is all Cargill has. TECo has the records of all energy delivered to Progress Energy Florida; the only thing TECo lacks is the price paid for the energy. It is not entitled to delve into Progress Energy price information without Progress Energy's consent.

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<sup>3</sup> Affidavit of Roger Fernandez, Attachment A.

<sup>4</sup> See Cargill General Objection No. 3, where Cargill stated that it objected to any interrogatory to the extent the information sought "is available to TECo" or "already in TECo's possession."

5. TECo's Interrogatory No. 2 states:

In the first two full years after Carill began self-service wheeling:

- a) How much uncommitted energy was generated at each of Cargill's generators (i.e. Bartow [Ridgewood] and Riverview [Millpoint]); and
- b) To who did Cargill sell the uncommitted energy and how much energy was sold to each such party annually?

TECo's argument regarding Interrogatory No. 2 is the same as its argument for Interrogatory No. 1. Cargill's response is the same as well and Cargill's argument in paragraphs 2 – 4 is incorporated herein by reference.

6. TECo's Interrogatory No. 10 states:

From the beginning of self-service wheeling experiment to the present, please identify by date and duration each unplanned outage of Cargill's electric generation facilities location in Tampa Electric's service territory that resulting (sic) in under-deliveries or changes to schedules for self-service wheeling?

As an initial matter, the information sought in this interrogatory is irrelevant. According to TECo's motion to compel it is seeking evidence that Cargill is "gaming" the system to the detriment of TECo's customers. Cargill has no control over unplanned outages; therefore, it can't use such outages to game the system. This information cannot lead to the discovery of relevant evidence. Cargill will make its total operating records available to an authorized representative of TECo to review at reasonable times so that it may satisfy itself as to this allegation, but it is unduly burdensome to ask Cargill to undertake a monumental data retrieval to gather information that it doesn't keep in the ordinary course of business based on TECo's unfounded and unjustified incidental theory. Cargill does not maintain records that correlate unplanned outages to the schedules for self-service wheeling.<sup>5</sup> These outages along with numerous other circumstances, such as the notice of a probable

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<sup>5</sup> Affidavit of Roger Fernandez, Attachment A.

risk of interruption by TECo, lake of rock, reduced activity in one or more sulfuric acid plants, planned maintenance and a variety of other factors, govern the need for self-service wheeling.

7. A basic tenet of discovery is that information sought must be relevant or reasonably calculated to lead to the discovery of admissible evidence.<sup>6</sup> TECo fails to specify how information on unplanned outages is relevant. TECo's interrogatory is nothing more than an impermissible "fishing expedition."<sup>7</sup> When TECo's lack of a coherent explanation of why it needs this information is juxtaposed against the burden to provide it, it is clear that this request must be denied.

8. Further, Cargill objected to Interrogatory No. 10 as unduly burdensome. Rule 1.280(c), Florida Rules of Civil Procedure, provides that parties must be protected from harassment in the discovery process as well as from undue burden or expense. In *Travelers Insurance Company v. Salido*, 354 So.2d 963 (Fla. 3rd DCA 1978), the court held a discovery request to be unduly burdensome where the responding party's files were not centrally located and preparation of a response would require the examination and review of thousands of files. The court noted that the doubtful relevance of the request made it so unduly burdensome as to be oppressive.<sup>8</sup> In *Caterpillar Industrial, Inc. v. Keskes*, 639 So.2d 1129 (Fla. 5th DCA 1994), the court held that a discovery request that would require a three-day search, at a minimum, was unduly burdensome.

9. Given the tenuous relevance of the information sought, Interrogatory No. 10 imposes an undue burden on Cargill. To respond to this interrogatory, Cargill would be required to collect this information from voluminous operating records and compare this information to numerous self-

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<sup>6</sup> Rule 1.280(b), Florida Rules of Civil Procedure, *Allstate Ins. Co. v. Langston*, 655 So.2d 91, 94 (Fla. 1995) ("Discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence") (citations omitted).

<sup>7</sup> See, *Toyota Motor Corporation v. Greene*, 483 So.2d 130 (Fla. 1st DCA 1986) ("Interrogatories cannot be used as a fishing expedition undertaken in hope that some cause of action might be discovered.")

<sup>8</sup> *Salido* at 964.

service wheeling schedules. This process would require the attention of the superintendent of utilities and the sulfuric acid plant operators, taking them away from their normal duties.<sup>9</sup>

10. TECo's Interrogatory No. 13 states:

What is Cargill Fertilizer's cost per ton to manufacture Diammonium Phosphate and the other products produced at its Riverview (Millpoint) and Bartow (Ridgewood) facilities? Of that cost per ton, what percent is the cost of electricity purchased from Tampa Electric? Please separate by plant and by rate and exclude the impacts of self-service wheeling.

As discussed above, a basic tenet of discovery is that information sought must be relevant or reasonably calculated to lead to the discovery of admissible evidence. Further, a primary purpose of pretrial discovery is "to 'discover' evidence relevant and pertinent to the triable issues pending before the court. . . ." <sup>10</sup> Interrogatory No. 13 is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Interrogatory No. 13 requests information pertaining to Cargill's cost to manufacture its products at its Riverview and Millpoint facilities. Cargill manufacturing costs is not an issue in this case nor is it the subject of any allegation in this proceeding. It is totally unrelated to whether the provision of self-service wheeling to Cargill results in higher cost electric service or affects the adequacy and reliability of electric service. The information requested by Interrogatory No. 13 will neither inform TECo nor the Commission as to whether the standards for approval of self-service wheeling have been met. Again, TECo alleges this information "may shed light" on costs and benefits. That is, it speculates that something interesting or useful to it may be contained in such information. However, that does not meet the standard for a motion to compel.<sup>11</sup>

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<sup>9</sup> Affidavit of Roger Fernandez, Attachment A.

<sup>10</sup> *Jones v. Seaboard Coast Railroad Company*, 297 So.2d 861, 863 (Fla. 2nd DCA 1974).

<sup>11</sup> See *Grooms v. Distinctive Cabinet Designs*, 846 So.2d 652, 656 (Fla. 2nd DCA 2003) (quashing an order compelling discovery where the party seeking discovery failed to establish a connection between the discovery and the issues in the case.); *Langston*, 655 So.2d at 94 (Fla. 1995) ("Discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence") (citations omitted).

11. Further, Interrogatory No. 13 seeks highly confidential proprietary, trade secret information. This closely guarded information is of no relevance to TECo in this docket and is simply designed to harass Cargill.

12. Interrogatory No. 15 asks:

What is the average cost per ton to produce Diammonium Phosphate in Florida and the United States:

Interrogatory No. 15 seeks proprietary, trade secret information. Cargill will respond to TECo's interrogatory provided TECo first executes and appropriate confidentiality agreement. Such an agreement was provided to TECo on August 20<sup>th</sup>, but it has not executed it.

13. TECo has moved to compel Cargill to respond to Interrogatory No. 17. Cargill will provide a response; therefore, TECo's motion is moot as to this request.

#### **Production Requests**

14. Request for Production No. 1 seeks:

Provide all invoices presented to parties that purchased Uncommitted Energy from Cargill fro January 1, 1997, through the present date.

Cargill has objected to this request on the grounds that it requires Cargill to tell what its wholesale customers pay for electricity. Lakeland Electric is the only customer that receives invoices. Cargill cannot release such information without Lakeland's consent. Just as TECo closely guards information regarding wholesale transactions do others engaged in such transactions and such information cannot be released without he consent of both parties.<sup>12</sup>

15. Request for Production No. 8 asks:

Provide all documents that relate to the unplanned energy outages identified by Cargill in response to Tampa Electric Interrogatory No. 10.

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<sup>12</sup> Affidavit of Roger Fernandez, Attachment A.

Cargill objected to TECo's request as burdensome, oppressive and unduly time-consuming to respond. Cargill's response on the burdensomeness of this request is the same as its argument in response to Interrogatory No. 10 above; therefore, paragraphs 7 – 8 are incorporated herein by reference. Given the tenuous relevance of the tenuous relevance of the information sought by Interrogatory No. 10, Request for Production No. 8 imposes an undue burden on Cargill. To respond to this interrogatory would be burdensome and require an inordinate amount of time and attention of Cargill employees.<sup>13</sup>

16. Request for Production No. 14<sup>14</sup> asks:

Provide all documents that relate to the unplanned energy outages identified by Cargill in response to Tampa Electric Interrogatory No. 19.

Interrogatory 19 asks Cargill to identify any documents that relate to the scheduling and or use of self-service wheeling by Cargill. Cargill objected to TECo's request as burdensome, oppressive and unduly time-consuming to respond. Cargill incorporates the burdensomeness argument made above by reference. As explained in the attached affidavit of Roger Fernandez, Request for Production No. 14 imposes an undue burden and expense on Cargill.<sup>15</sup> Pursuant to rule 1.280(c), Florida Rules of Civil Procedure, Cargill should not be required to respond to this document request.

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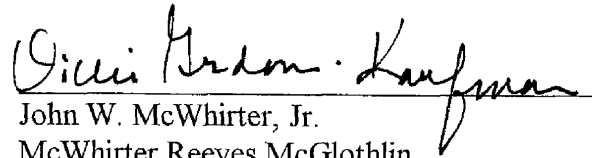
<sup>13</sup> Affidavit of Roger Fernandez, Attachment A.

<sup>14</sup> In its Motion to Compel, TECo incorrectly quoted Production Request No. 12. Therefore, it is unclear whether TECo actually intends to compel production of documents sought by Request for Production No. 14. Cargill does not object to responding to Request for Production No. 12. However, Cargill does object to responding to Request for Production 14.

<sup>15</sup> Affidavit of Roger Fernandez, Attachment A.



**WHEREFORE**, TECo's Motion to Compel Responses to Interrogatories and Motion to Compel Production of Documents should be denied, and Cargill's Motion for Protective Order should be granted.



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Attorneys for Cargill Fertilizer, Inc.

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Application of Cargill Fertilizer, Inc.  
to engage in self-service wheeling of waste  
heat cogenerated power to, from and  
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Docket No. 020898-EQ

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**AFFIDAVIT OF ROGER FERNANDEZ**

STATE OF FLORIDA  
COUNTY OF HILLSBOROUGH

I, Roger Fernandez being first duly sworn, do hereby depose and state as follows:

1. I am employed by Cargill Fertilizer, Inc. ("Cargill"), I hold the position of Superintendent of Utilities at Cargill Fertilizer, 8813 Highway 41 South, Riverview, Florida 33569. I have no assistants.

2. I have reviewed carefully Interrogatories No. 1, 2, 10 & 13 and Requests for Production of Documents Nos. 1, 8 and 14 that Tampa Electric Company ("TECo") served on Cargill in this docket.

3. I can make our generator production records available for review by TECo, but it will require at least 43,000 manual calculations to answer interrogatories No.1a and 2a. The answer requires first a determination of the amount of energy sold to PEF each hour of the day for five years and then a manual calculation to segregate this energy from the remaining energy produced by Cargill and a determination of the generator that produced the power. I estimate that it will take at least a week to make the manual calculations. We have no records that will indicate which generator produced the power delivered to PEF. My other duties preclude me from taking the time to perform these calculations. Requiring Cargill to respond to these discovery requests would impose a severe burden on Cargill's limited resources. The effort that

would be necessary to respond to the discovery requests even without identifying specific generation would detract seriously from my ability to perform the business functions for which I am responsible.

4. Interrogatory No. 10 asks:

From the beginning of the self-service wheeling program to the present, please identify by date and duration each unplanned outage at Cargill's electric generation facilities located in Tampa Electric's service territory that resulting [sic] in underdeliveries or changes to schedules for self-service wheeling

Request for Production No. 8 asks for the documents underlying the response to this interrogatory. TECo's meters record the times when the generators are not operating. I do not have the time available to perform my other duties and also review the operating records of four generators for a two year period to ascertain whether a generator outage was planned for maintenance or some other operating reason, was due to temporary generator failure or whether an outage was related to the available steam from sulfuric acid plants or generator malfunction. We will make our operational logs available for review at reasonable times so that TECo can determine whether an outage was planned or unplanned and enable its authorized representative to fully explore the written notations to work out its malicious imputation that Cargill may be "gaming" TECo's transmission system to the detriment of consumers. We maintain no records that match generator outages to wholesale sales or schedule changes and cannot supply this information.

5. Interrogatory 13 asks for total phosphate production costs. These costs are highly confidential trade secrets that have no relation to the impact of Cargill SSW on TECo's general body customers. We deem the question to be a form of harassment designed to discourage Cargill from going forward with our request for SSW because to do so will expose our trade

secrets to competitors. Self-generation has enabled Cargill to avoid the vast majority of electrical purchases. Cargill will provide the number of tons of Diammonium Phosphate and other products produced at Riverview and Bartow without detailing our production costs under the protection of confidentiality. TECo can calculate the amount we paid it for electricity and ancillary services for each ton we produce. We believe the amount we pay Progress Energy for electricity used for phosphate rock mining in its service territory and shipped to Riverview and Bartow for processing is a trade secret along with other production costs.

6. Request for production No. 1 seeks the invoices Cargill bills for the power it sells in the wholesale market. Lakeland Electric is the only buyer that requested invoices. I don't have permission to produce these invoices from the buyer. Lakeland may also buy wholesale power from TECo. We will provide these documents only if the Commission compels us to provide the information after due notice to Lakeland Electric.

7. Request for Production No. 14 asks:

Provide all Documents that relate to the unplanned outages identified by Cargill in response to Tampa Electric Interrogatory No. 19.

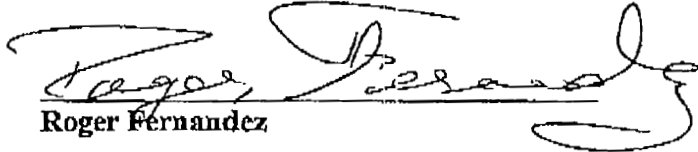
Cargill has sent this information to TECo every day since it began to sell power to third parties. The request does not identify a time period. It is unreasonable and unduly burdensome to supply the same information again.

8. I have spent approximately 40 hours to date preparing responses to TECo discovery. Altogether, I estimate that the interrogatories and document requests will impose requirements of about 120 hours of my time that is needed to perform critical business functions. This is in addition to the time that it will take for me and other Cargill employees to furnish the information we have not objected to. The cumulative burdens and costs associated with the

interrogatories and the requests for production of documents would disrupt my ability to conduct normal business functions.

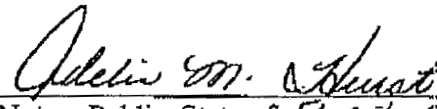
I declare that the foregoing is true and correct based on my knowledge, information, and belief.

**FURTHER AFFIANT SAYETH NAUGHT.**

  
Roger Fernandez

**SWORN TO AND SUBSCRIBED** before me this 25th day of August 2003 by Roger Fernandez, who (  ) is personally known to me; or (  ) who has presented \_\_\_\_\_ as identification.



  
Notary Public, State of Florida, County of Hillsborough  
Commission Number: DD125386  
My Commission expires: September 20, 2006

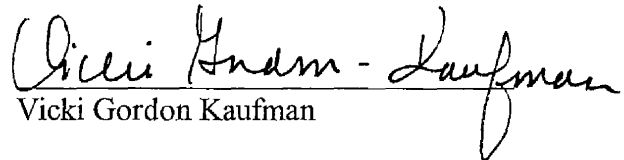
**CERTIFICATE OF SERVICE**

**I HERBY CERTIFY** that a true and correct copy of the foregoing Cargill Fertilizer, Inc.'s Response to Tampa Electric Company's Motion to Compel Responses to Interrogatories and Production of Documents and Motion for Protective Order has been furnished by (\*) hand delivery or U.S. Mail on this 25<sup>th</sup> day of August 2003 to the following:

(\*) Rosanne Gervasi  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399

(\*) James D. Beasley  
Ausley & McMullen  
227 South Calhoun Street  
Post Office Box 391  
Tallahassee, Florida 32302

Harry W. Long, Jr.  
Tampa Electric Company  
Post Office Box 111  
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Vicki Gordon Kaufman