

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In Re: Petition for Determination of)
Need for an Electrical Power Plant in)
Okeechobee County by Okeechobee)
Generating Company, L.L.C.)

DOCKET NO. 991462-EU
RECORDS AND REPORTING
FILED: December 13, 1999

OKEECHOBEE GENERATING COMPANY'S RESPONSE TO
FLORIDA POWER AND LIGHT COMPANY'S MOTION FOR
LEAVE TO PROPOUND ADDITIONAL INTERROGATORIES

Okeechobee Generating Company, L.L.C., ("OGC") pursuant to Uniform Rule 28-106.204, Florida Administrative Code, and the Order Establishing Procedure, hereby respectfully submits this response to Florida Power & Light Company's ("FPL") Motion for Leave to Propound Additional Interrogatories upon OGC ("FPL's Motion to Propound Additional Interrogatories"). As explained herein, FPL's Motion to Propound Additional Interrogatories should be denied. In support of this response, OGC says:

BACKGROUND

On November 2, 1999, FPL served OGC with its first set of interrogatories (Nos. 1-61) and its second set of interrogatories (Nos. 62-71). On November 12, 1999, FPL served OGC with its third set of interrogatories (Nos. 72-118) and its fourth set of interrogatories (Nos. 119-199). In total, FPL has propounded on OGC 196 numbered interrogatories.¹ Included within the 196

- AFA _____
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG 3
- LEG 2
- MAS 3
- OPC _____
- RRR _____
- SEC 1
- WAW _____
- OTH _____

¹The discrepancy between the numbers assigned by FPL to the interrogatories (1-199) and the actual number of interrogatories (196) is the result of several numbering errors made by FPL.

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numbered interrogatories, FPL has identified an additional 47 subparts for a total of 243 interrogatories. Also included within the 196 numbered interrogatories are over 50 subparts that FPL has not specifically labeled. Thus, FPL has actually propounded nearly 300 interrogatories on OGC, including all subparts.

The Order Establishing Procedure in this case clearly limits the number of interrogatories to 200, "including all subparts." FPL did not seek leave from the Prehearing Officer prior to propounding the unauthorized interrogatories. Rather, FPL simply served them on OGC, causing OGC to expend significant time and resources in counting, reviewing and ultimately objecting to the unauthorized interrogatories.

FPL's flood of interrogatories represent a clear and willful violation of the Order Establishing Procedure.² In its Motion to Propound Additional Interrogatories, FPL's only explanation for violating the Order Establishing Procedure is that the "expedited discovery schedule" affected FPL's ability to "sequence" its interrogatories, therefore causing FPL "to send more interrogatories than it would have required if time had been available for sequenced discovery." OGC fails to see how an expedited discovery schedule affected FPL's ability to count to 200. The Commission should recognize that FPL's attempt to

²FPL concedes that, counting subparts, it has exceeded 200 interrogatories.

propound excessive interrogatories in plain violation of the Order Establishing Procedure represents yet another example of a continuing pattern of harassment of OGC. For these reasons and the reasons stated below, the Commission should deny FPL's Motion to Propound Additional Interrogatories.

ARGUMENT

Rule 1.340, Florida Rules of Civil Procedure ("FRCP"),³ limits the number of interrogatories that may be served on a party to 30, including subparts. This limitation on the number of interrogatories applies in all civil proceedings in Florida, including complex, multi-party litigation, unless otherwise ordered by the presiding officer upon a showing of good cause.

In this case, in the Order Establishing Procedure, the Prehearing Officer increased the number of interrogatories a party may propound on another party to 200, including all subparts--a nearly seven-fold increase over the number of interrogatories authorized by Rule 1.340, FRCP. The 200-interrogatory limit contained in the Order Establishing Procedure is fully consistent with the interrogatory limit established by the Commission in recent need determination proceedings. See, e.g., In re: Petition by City of Lakeland for Determination of Need for McIntosh Unit 5 and Proposed Conversion from Simple to Combined Cycle, 99 FPSC

³FPL has acknowledged that Rule 1.340, FRCP, applies to this proceeding.

1:602 (Order Establishing Procedure) (hereinafter "City of Lakeland") (establishing limit of 200 interrogatories); In re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P., 98 FPSC 9:4 (Order Establishing Procedure) (hereinafter "Duke New Smyrna") (also establishing limit of 200 interrogatories) and FPL offers no good cause to deviate from this established Commission precedent. In fact, FPL actively participated in the Duke New Smyrna case and, even under similarly tight time frames in that proceeding, did not exceed the 200 interrogatory limit.

In its Motion to Propound Additional Interrogatories, FPL asks the Commission to grant FPL leave to serve an additional 200 interrogatories (for a total of 400) on OGC. FPL offers no explanation for how it chose the number 400--rather, FPL raises several arguments in support of its alleged need to serve more interrogatories. All of FPL's arguments are without merit.

FPL first argues that because this case is "complex" it needs to serve additional interrogatories on OGC. This is not a valid basis for expanding the number of interrogatories that may be propounded. First, this case is no more complex than other need determination proceedings in which the Commission has consistently limited the number of interrogatories to 200. See, e.g., City of

Lakeland, 99 FPSC at 1:603; Duke New Smyrna, 98 FPSC at 9:5, a similar need determination proceeding in which FPL propounded 111 numbered interrogatories to Duke Energy New Smyrna Beach Power Company and 43 to the Utilities Commission, City of New Smyrna Beach, Florida. Second, in other recent cases that clearly involve complex issues, the Commission has limited the number of interrogatories to fewer than 200. For example, in In re: Generic Investigation into the Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida, 99 FPSC 4:468 (Order Establishing Procedure) (hereinafter the "Reserve Margin Docket"), the Commission limited the number of interrogatories a party may serve on another party to 100. The Reserve Margin Docket involved many complex issues and many more parties than this docket, yet the Commission determined that 100 interrogatories were sufficient.

FPL next states that it needs to propound additional interrogatories on OGC's expert witnesses. As OGC indicated in its objections to FPL's interrogatories, the flood of interrogatories that FPL has already directed towards OGC's expert witnesses are not authorized by the Florida Rules of Civil Procedure and additional interrogatories directed to OGC's experts would similarly be improper. Rule 1.280(b)(4)(A), FRCP, specifically provides that "discovery of facts known and opinions held by experts . . . may be obtained only as follows:"

(A)(i) By interrogatories a party may require any other party to identify each person whom the other

party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the ground of each opinion.

FPL's continued disregard for the limitations on interrogatories to experts set forth in this Florida Rule of Civil Procedure represents nothing more than a poorly disguised attempt by FPL to harass OGC. Apparently, FPL hopes to obstruct OGC's case preparation by making OGC's experts respond to hundreds of unauthorized interrogatories. By doing this, FPL would, if successful, also greatly increase OGC's costs by requiring OGC to pay for countless hours of its expert witnesses' time in order to respond to the unauthorized interrogatories.

The Commission should reject FPL's harassing tactics and deny its Motion to Propound Additional Interrogatories. OGC has already agreed to make its expert witnesses available for deposition (multi-day, if necessary) and FPL will have ample opportunity to conduct all the discovery of expert witnesses allowed by the Florida Rules of Civil Procedure in those depositions. (In fact, OGC has offered to provide a two-day training session by its economic expert witness in Tallahassee at no direct cost to FPL, and to make OGC's expert's models reasonably available to FPL at no cost to FPL.)

FPL next argues that OGC's petition and prefiled testimony are

"vague" and "incomplete,"⁴ thus FPL should be allowed to propound more interrogatories on OGC. FPL is grasping at straws in making this argument. First, if FPL believed that OGC's petition was "vague," it should have moved for a more definite statement. FPL chose not to file such a motion and FPL has now waived its right to do so. See Rule 1.140(e)(h), FRCP (providing that a motion for more definite statement must be filed within 20 days or is waived). Second, in denying FPL's motion to dismiss in this case, the Commission clearly rejected FPL's arguments that OGC's petition for determination of need failed to meet the applicable pleading requirements. FPL's attempt to argue perceived pleading deficiencies as a purported basis for expanding the number of interrogatories in this case represents an improper attempt to argue issues that the Commission has decided.

Lastly, FPL contends that it should be allowed to propound additional interrogatories because OGC is allegedly obstructing FPL's discovery efforts. OGC respectfully disagrees with FPL's accusations. FPL fails to note in its Motion to Propound Additional Interrogatories that OGC has: (a) provided FPL with copies of documents it produced rather than requiring FPL to inspect those documents where they are kept in the normal course of

⁴FPL also asserts that OGC has provided "very little detailed supporting information" to FPL. Apparently, FPL does not consider the over 50 megabytes of supporting data that OGC has already produced to FPL to be "detailed" enough.

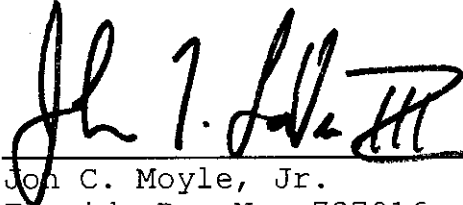
business; (b) offered to provide technical assistance to FPL with regard to accessing the extensive modeling data OGC has already provided to FPL; (c) offered to provide FPL reasonable access to the Altos Models at no cost to FPL; and (d) responded to FPL's first and second sets of discovery requests on an expedited basis, even though it was not required to do so. Apparently, FPL views legitimate discovery disputes as obstructionism.⁵ FPL is wrong. OGC has cooperated and continues to cooperate with FPL's legitimate discovery requests.

CONCLUSION

Nearly four weeks after FPL propounded approximately 100 unauthorized interrogatories in clear violation of the Order Establishing Procedure in this case, FPL now seeks to have the Commission issue an after-the-fact order legitimizing its actions. The Commission should reject FPL's attempt to circumvent the Order Establishing Procedure. FPL has failed to demonstrate good cause for expanding the number of interrogatories in this case and the Commission should therefore deny FPL's Motion to Propound Additional Interrogatories on OGC.

⁵FPL probably also views OGC's legitimate objections to those of FPL's interrogatories exceeding the 200 interrogatory limit as obstructionism. FPL is again wrong.

Respectfully submitted this 13th day of December, 1999.



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CERTIFICATE OF SERVICE
DOCKET NO. 991462-EU

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 13th day of December, 1999.

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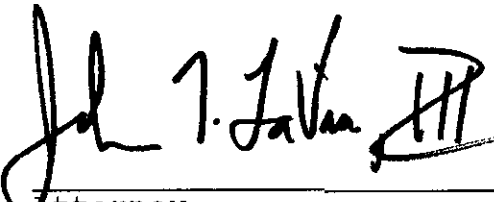
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