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December 21, 1999

Blanca S. Bayó, Director
Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, FL 32399-0850

By Hand Delivery

RE: Docket No. 991462-EU

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company (FPL) are the original and fifteen (15) copies of FPL's Motion To Compel Okeechobee Generating Company, LLC To Respond To FPL's Third and Fourth Sets of Interrogatories And Third Request For Production Of Documents.

If you or your Staff have any questions regarding this filing, please contact me at 222-2300.

Very truly yours,



Charles A. Guyton

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In re: Petition for Determination)
of Need for an Electrical Power)
Plant in Okeechobee County by)
Okeechobee Generating Company,)
LLC)
_____)

DOCKET NO. 991462-EU

Filed: December 21, 1999

**FLORIDA POWER & LIGHT COMPANY'S (FPL'S) MOTION TO
COMPEL OKEECHOBEE GENERATING COMPANY, LLC TO RESPOND TO
FPL'S THIRD AND FOURTH SETS OF INTERROGATORIES AND
THIRD REQUEST FOR PRODUCTION OF DOCUMENTS**

Florida Power Light Company (FPL), pursuant to Rule 28-106.206 of the Florida Administrative Code (F.A.C.) and Florida Rule of Civil Procedure 1.380, moves to compel Okeechobee Generating Company, LLC (OGC) to respond to FPL's Third and Fourth Sets of Interrogatories and Third Request for Production of Documents, and states:

1. On November 12, 1999, FPL propounded its Third Set of Interrogatories (Nos. 72-118), Fourth Set of Interrogatories (Nos. 119-199) and Third Request for Production of Documents (Nos. 61-67) to OGC. On November 22, 1999, OGC filed its objections to each of these sets of discovery requests, objecting to the majority of the requests contained therein. OGC's various objections are based on one of two theories: (1) that certain information requested is "confidential, proprietary business information"; and (2) that FPL cannot question OGC about matters that are the subject of expert testimony. Based on these objections, OGC has refused to respond to FPL Interrogatories Nos. 82 and 118-199, and has apparently withheld information responsive to FPL Interrogatories Nos. 83, 89, 90, 91, 92, 96 and 97 and FPL Production Request No. 65.

2. OGC raised identical objections to FPL's First and Second Sets of Interrogatories and First and Second Requests for Production of Documents, and FPL extensively addressed those

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objections in its November 23, 1999, Motion to Compel Okeechobee Generating Company, LLC to Respond to Discovery Requests (hereinafter "November 23, 1999, Motion to Compel"). The arguments raised in that motion are equally applicable to OGC's latest discovery objections; FPL therefore incorporates by reference herein the arguments raised in that motion.

Confidentiality Objections

3. OGC objects to FPL Interrogatories Nos. 82, 83, 89, 90, 91, 92, 96 and 117 and FPL Request for Production No. 65 by asserting (in conclusory form) that they call for disclosure of "confidential, proprietary business information" and OGC need only "attempt" a response "to the extent possible" with non-confidential and non-proprietary information or documents. OGC has refused to answer FPL Interrogatories Nos. 82 and 118 on this basis, and also apparently withheld information responsive to FPL Interrogatories Nos. 83, 89, 90, 91, 92, 96 and 97 and Production Request No 65. FPL therefore moves to compel OGC to respond to these discovery requests.

4. OGC does not claim that the information requested by FPL is not directly relevant to the ultimate issues in this proceeding. Nor does OGC otherwise allege that the requested information is not needed by FPL. Instead OGC takes the position that responsive information and documents may be entirely withheld based on mere allegations of confidentiality, regardless of their relevance or importance to FPL in this case. This position is indefensible; OGC cannot refuse to disclose information based on a mere conclusory legal opinion that such information is entitled to a confidentiality privilege. To the contrary, section 366.093(2), Florida Statutes, Rule 1.280(c) of the Florida Rules of Civil Procedure, and Rules 25-22.006 and 28-106.206, F.A.C., require a party seeking to limit discovery of confidential business information to demonstrate good cause for entry

of a protective order, a burden OGC has not even attempted to meet.¹ *See also, Eastern Cement Co. v. Department of Env'tl. Reg.*, 512 So. 2d 264 (Fla. 1st DCA 1987) (limitations on disclosure of confidential information may be entered only "after a resisting party has shown good cause for a protective order"); *Goodyear Tire & Rubber v. Cooney*, 359 So. 2d 1200 (Fla. 1st DCA 1978).

5. OGC has not filed for a protective order, nor do its written objections demonstrate good cause for withholding discovery. For each discovery request objected to on confidentiality grounds OGC merely states, in conclusory form, that the request "seeks . . . confidential, proprietary business information." Clearly, this is insufficient. OGC must demonstrate -- i.e., state a factual basis for finding -- that the documents and information withheld constitute "confidential information" under Rule 25-22.006(1)(a) or "a trade secret or other confidential, research, development or commercial information" under Fla. R. Civ. P. 1.280(c)(7). It is not enough merely to state a conclusory legal opinion about the privileged status of the information. *See, Auto Owners, Inc. v. Totaltape, Inc.*, 13 F.R.D. 199, 201-02 (M.D. Fla. 1990) (a party asserting a discovery privilege must demonstrate a factual basis for that assertion); Fla. Stat. § 366.093(2) (requiring "a showing" of confidential information status); *see, e.g., Showa Denko America, Inc. v. Hopkins*, 586 So.2d 65 (Fla. 2d DCA 1991) (motion for protective order accompanied by a

¹ Rule 25-22.006(1)(a) defines "confidential information" by reference to section 366.093, Florida Statutes, which in subs. (3) defines that term as "information . . . which is owned or controlled by [a] person or company, is intended to be and is treated . . . as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed . . ." That statute directs the Commission to enter orders limiting disclosure on confidentiality grounds only "[u]pon a showing by a utility or other person and a finding by the commission that discovery will require the disclosure of proprietary confidential business information." Fla. Stat. § 366.093(2). Thus, for discovery to be limited, the objecting party must, as a threshold matter, show that the information meets the test for confidentiality set forth in section 366.093(3).

supporting affidavit explaining why documents were confidential trade secrets). Ultimately, the determination of whether specific documents and information constitute protected trade secrets or confidential business information must be made by the Commission in light of all pertinent facts. *Becker Metals Corp. v. West Florida Scrap Metals*, 407 So.2d 380 (Fla. 1st DCA, 1981). That review is impossible when mere conclusory justification for withholding responses is given.

6. FPL further notes that while written discovery objections have in some cases been treated as the equivalent of a motion for protective order, the burden of showing good cause for withholding discovery responses remains on the objecting party.² *First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Ass'n, Inc.*, 545 So.2d 502 (Fla. 4th DCA 1989). Regardless of the title of the confidentiality claim, the movant must state a factual basis and demonstrate good cause for withholding discovery. *See, id; Auto Owners*, 135 F.R.D. at 201-02. Such explanatory information is necessary for the Commission to carry out its duty to “weigh the importance of protecting the claimant's secret against the interests in facilitating the trial” and thereby decide whether to compel disclosure of the information. *Fortune Personnel Agency of Ft. Lauderdale, Inc. v. Sun Tech, Inc. of South Florida*, 423 So.2d 545, 547 n. 6 (Fla. 4th DCA. 1982).

² In its response to FPL's November 23, 1999, Motion to Compel, OGC points out that certain cases have treated objections to burdensome interrogatories as the equivalent of a motion for protective order. OGC misses the point of FPL's argument. FPL is not interested in how OGC titles its assertion of confidentiality. The key issue raised by FPL is that OGC must demonstrate good cause for withholding information on confidentiality grounds. None of OGC's written objections even comes close to meeting this requirement. Thus, to the extent OGC wishes its written objections to be treated as its motion for protective order, they are insufficient because they do not demonstrate good cause for withholding discovery responses.

7. FPL also suspects that OGC has once again failed to properly identify all documents and information withheld.³ Therefore, FPL again notes that it is not sufficient for OGC to vaguely state that “confidential, proprietary” information has been withheld. All responsive information withheld, whether in the custody of OGC or its corporate affiliates,⁴ must be described in sufficient detail for FPL to evaluate the factual basis for OGC’s confidentiality claim.

**Objections to Interrogatories as “Beyond the Scope of
Discovery Permitted of Testifying Experts”**

8. OGC objects to, and refuses to answer, FPL Interrogatories Nos. 118-199, claiming that they go “beyond the scope of discovery permitted of testifying experts by the Florida Rules of Civil Procedure.” FPL recognizes that many of these questions, unlike those in FPL’s Second Set of Interrogatories, seek clarification regarding statements made by OGC experts in their direct testimony. However, answers to these questions should nevertheless be compelled. Such an order would significantly further the disposition of this case and result in a clearer understanding of OGC’s positions by FPL and the Commission. OGC’s case is based extensively on the testimony

³ Contrary to OGC’s statements in its Response to FPL’s November 23, 1999, Motion to Compel, OGC has previously failed to identify documents withheld to FPL. For example, in its responses to FPL Requests for Production Nos. 36, 43 and 52, OGC indicated that certain “internal PG&E analyses” and other vaguely identified documents were withheld. To date, OGC has not identified the specific documents withheld to FPL. The only log of confidential documents provided to FPL related to the documents OGC withheld in response to Florida Power Corporation’s First Request for Production. (A copy of this log is attached to OGC’s November 30, 1999, Response to FPL’s Motion to Compel.) This log does not identify a single document OGC withheld from its responses to FPL Requests Nos. 36, 43, and 52.

⁴ See, *Medivision of E. Broward County, Inc. v. Department of HRS*, 488 So.2d 886 (Fla. 1st DCA 1986) (discovery responsibilities extend to information in the custody of a party’s corporate parents and affiliates).

of expert witnesses. That testimony, like the allegations in OGC's petition, is often vague and lacking supporting factual detail.⁵ That vagueness required FPL to propound numerous interrogatories to fill in the gaps in OGC's petition and testimony.⁶ OGC now objects to those questions precisely because they relate to its petition and prefiled testimony, claiming that FPL must seek such information only by deposition. FPL intends to depose OGC's expert witnesses. However, responses to FPL's interrogatories will allow FPL to learn about the bases for the witnesses' testimony in advance of these depositions, which will likely result in shorter, less complex, and far more meaningful depositions. Moreover, the complex subject matter addressed in the questions at issue is more appropriately addressed through prepared written responses rather than immediate verbal answers. Thus, the information FPL may obtain at deposition is likely to be a poor substitute for interrogatory responses.

9. Rule 1.280(b)(4) allows a presiding officer to authorize a party to seek "further discovery" from its opponent's experts by whatever means he deems appropriate. To the extent

⁵ Under Rule 25-22.081(3), F.A.C., OGC was required to provide "detailed analysis and supporting documentation of the costs and benefits." That detailed information was not provided in either the petition and exhibits or OGC's prefiled testimony. As a result of these deficiencies, FPL was forced to propound interrogatories, many of which OGC has refused to answer, to compel OGC to disclose information that OGC should have voluntarily provided.

⁶ Often this was done, for purposes of clarity and efficiency, by referring to the pertinent statements in OGC's petition or pre-filed testimony. OGC's response has been to uniformly object to any question that makes even a passing reference to its petition or prefiled testimony, even if such a question would clearly have been proper absent such a reference. For example, OGC objected, and refused to answer, all but one question in FPL's Second Set of Interrogatories, despite the fact that none of those questions were directed to OGC experts. *See, Allstate Ins. v. Boecher*, 733 So.2d 933, 1000 (Fla. 1999) (holding that Rule 1.280(b)(4) does not apply to discovery sought from a party and ordering that the rule be amended to prevent it from being cited for that proposition).

that any of FPL's interrogatories are held to be governed by Rule 1.280(b)(4), FPL submits that the Prehearing Officer should exercise his discretionary authority to require OGC to answer. Such an order would also be authorized by Rule 28-106.211 as an order "necessary to effectuate discovery, to prevent delay, and to promote the just, speedy and inexpensive determination of all aspects of the case. . . ." and Rule 28-106.206 as an order entered "to effectuate the purposes of discovery and to prevent delay. . . ." Thus, the Prehearing Officer has authority to enter an order requiring OGC to have its experts respond and such an order should be entered for the reasons previously discussed.

10. FPL has consulted with counsel for most of the other parties of record. OGC objects to this motion. FPC and LEAF do not object to this motion. FPL has been unable to reach TECO's counsel.

Conclusion

11. For the reasons discussed above and in FPL's November 23, 1999, Motion to Compel, OGC's objections to FPL's discovery requests should be overruled and OGC compelled to answer FPL's discovery requests. FPL has conferred with counsel for all parties regarding this motion. Counsel for OGC objects to this Motion. Counsel for Florida Power Corporation and LEAF have no objection. Staff counsel takes no position. Counsel for TECO was not available.

WHEREFORE, FPL requests that the Commission enter an Order compelling OGC to answer each interrogatory and production request in FPL's Third and Fourth Sets of Interrogatories and Third Request for Production of Documents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this FPL's Motion to Compel Okeechobee Generating Company, LLC to Respond to FPL's Third and Fourth Sets of Interrogatories and Third Request for Production of Documents was served by Hand Delivery (*) or mailed this 21st day of December, 1999 to the following:

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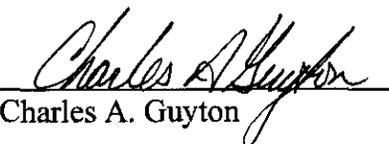
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