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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Filed: January 5, 2000

FLORIDA POWER CORPORATION'S RESPONSE TO OKEECHOBEE GENERATING COMPANY'S FIRST MOTION FOR PROTECTIVE ORDER

Florida Power Corporation ("FPC"), pursuant to Rule 28-106.204 of the Florida Administrative Code, hereby responds to Okeechobee Generation Company's ("OGC") First Motion for Protective Order by joining in FP&L's Response to this motion , and further requesting that the Commission exercise its inherent authority to allocate the costs of discovery between OGC and FPC in a reasonable manner as set forth in detail below:

On November 12, 1999, FPC moved to compel OGC to produce the Altos Management Partners and Marketpoint Inc., (hereinafter collectively "Altos") NARE and NARG models (the "Models"), the outputs of which OGC has relied on for support of a substantial number of the critical allegations set forth in its "merchant plant" need petition. Prior to filing its Motion to Compel, FPC made several attempts to negotiate with OGC's counsel for reasonable access to the Models. However, FPC was informed, at that time, that OGC could not produce the Altos Models because OGC neither licensed or owned the Models. OGC then informed FPC that in order to gain access to the Models needed to cross examine OGC's key need witness, Dr. Dale Nesbitt, FPC would have to enter into a one-year licensing arrangement with Altos at a cost of \$85,000.00. FPC then moved to compel OGC to provide FPC with reasonable access to these critical Models or to withdraw Dr. Nesbitt's testimony, a position well supported by the law recited in FPC's Motion to Compel.

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FPSC-RECORDS/REPORTING

FPC is willing, as it always has been, to pay a reasonable fee for access to the Altos Models and to enter into a reasonable confidentiality agreement to protect any of Altos' intellectual property concerns. However, the proposal attached to OGC's Motion for Protective Order – first provided to FPC's counsel on December 7, 1999 – although seemingly conciliatory, is nothing more than a thinly veiled attempt by OGC to gain an unfair advantage in this litigation. For the same reasons identified in FP&L's Response to OGC's First Motion for Protective Order ("FP&L's Response), in which FPC joins, FPC rejected OGC's proposal, and now requests that this Commission exercise its discretion to allocate the costs of discovery between and amongst the parties by requiring OGC to make the models available to FPC for a reasonable fee, which per industry standards FPC estimates to be between \$ 9,000.00 and \$17,000.00 dollars.

FPC's request is based on information gathered through inquiries of the software companies whose proprietary models FPC uses in its own integrated resource planning. Notably, even before FPC received OGC's Exhibit A proposal, FPC made inquiries of those companies to determine and estimate what a reasonable fee for limited access for discovery purposes only or a short-term non-commercial use license of the Altos Models might be. As set forth in the attached affidavit of Michael Rib, FPC's Director of Resource Planning, each of the companies contacted by FPC – New Energy Associates and Henwood Energy Services – indicated that they offer limited licenses or per-project licenses for parties wishing to use their models only for purposes of litigation or regulatory proceedings. For example, New Energy Associates offers limited licenses on a per-month basis for approximately 20% of its annual license fee. Likewise, Henwood Energy Services offers similar per-project licensing for significantly less than their usual annual license fee. Personnel at each of these companies indicated that such short-term

arrangements to accommodate litigation or regulatory settings are well known to them and common in venues across the Country.

On reviewing OGC's proposal, FPC, like FP&L, immediately offered to pay the \$9,000.00 fee suggested in OGC's proposal for consultant's access to the Models at the Commission as a reasonable non-commercial use licensing fee for giving the parties' consultants access to the Models in this litigation. OGC rejected this counter-proposal.

OGC's prompt rejection of FPC's counter-offer (which is substantially identical to FP&L's counter-offer) is simply an attempt by OGC to utilize the Models as leverage against the parties to gain an unfair advantage in this litigation by trying to force as a pre-condition to access the disclosure of both testifying and non-testifying experts, the disclosure of all work-product, and a stipulation to the admissibility of the parties' work product in this proceeding. FPC is entitled to reasonable access to these Models without being forced to waive its work product privilege.

The Commission should not force FPC or the other parties to submit to OGC's oppressive tactics. To the contrary, the Commission should exercise caution realizing the potential precedential effects its ruling on this might have in subsequent Commission proceedings, and exercise its discretion by adopting the industry standard and requiring OGC and Altos to make the models available to FPC via payment of a limited licensing or per-project licensing fee similar to those available through other software modeling companies in the industry. As demonstrated above, based on the inquires made by FPC, FPC believes that a reasonable per-project licensing fee for non-commercial use here would be \$ 9,000.00 to \$17,000.00. FPC realizes that Altos may not be prepared to conform to industry standards in this regard. However, this Commission has the discretion to and should allocate to OGC any excess

amount demanded OGC's chosen testifying consultant (over and above \$9,000 - \$17,000), as a reasonable allocation of the cost of discovery between the parties to this proceeding. This result will ensure fairness in this proceeding as well as in future proceedings involving the same or similarly situated parties.

Wherefore, FPC requests that this Commission exercise its discretion to govern discovery and allocate the reasonable costs and expenses thereof by entering an Order requiring OGC to take necessary steps (including payment of any additional fees) to deliver the Altos Models to FPC in exchange for a fee between \$ 9,000.00 and \$17,000.00, the execution of a licensing agreement (which permits use of the Models by FPC's consultants only for purposes of this proceeding), and the execution of an agreed protective order restricting use of the Models to this proceeding.

Respectfully submitted,

FLORIDA POWER CORPORATION



GARY L. SASSO
Florida Bar No. 622575
JILL H. BOWMAN
Florida Bar No. 057304
Carlton, Fields, Ward,
Emmanuel, Smith & Cutler, P.A.
Post Office Box 2861
St. Petersburg, FL 33731
Telephone: (727) 821-7000
Telecopier: (727) 822-3768

JAMES A. McGEE
Senior Counsel
FLORIDA POWER CORPORATION
P.O. Box 14042
St. Petersburg, Florida 33733
Telephone: (727) 820-5184
Facsimile: (727) 820-5519

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FLORIDA POWER CORPORATION'S RESPONSE TO OKEECHOBEE GENERATING COMPANY'S FIRST MOTION FOR PROTECTIVE ORDER has been furnished by facsimile and U.S. Mail to Robert Scheffel Wright and John Moyle as counsel for Okeechobee Generating Company and via U.S. Mail to all other following counsel of record this 5th day of January, 2000.



Attorney

COUNSEL OF RECORD:

Robert Scheffel Wright
John T. LaVia
Landers & Parsons, P.A.
310 West College Avenue
Tallahassee, FL 32301
Phone: (850) 681-0311
Fax: (850) 224-5595
Attorneys for Okeechobee Generating
Company, L.L.C.

John Moyle
Moyle Flanigan, Katz, et al.
210 S. Monroe Street
Tallahassee, FL 32301
Phone: (850) 681-3828
Fax: (850) 681-8788
Attorneys for Okeechobee Generating
Company, L.L.C.

Sanford L. Hartman
Okeechobee Generating Company, L.L.C.
PG&E Generating Company
7500 Old Georgetown Road
Bethesda, MD 20814
Phone: (301) 280-6800
Fax:

Matthew M. Childs
Charles A. Guyton
Steel Hector
215 South Monroe Street, Ste. 601
Tallahassee, FL 32301-1804
Telephone: (850) 222-2300
Fax: (850) 222-7150
Attorneys for Florida Power & Light Company

Sean J. Finnerty
PG&E Generating Company
One Bowdoin Squaren Road
Boston, MA 02114-2910

Regional Planning Council #07
Douglas Leonard
P.O. Drawer 2089
Bartow, FL 33830
Phone: (941) 534-7130
Fax: (941) 534-7138

Michelle Hershel
Post Office Box 590
Tallahassee, FL 32302
Phone: (850) 877-6166
Fax: (850) 656-5485
Attorney for Florida Electric Cooperative
Assoc.

Department of Environmental Protection
Scott Goorland
2600 Blairstone Road
Tallahassee, FL 32399-2400
Phone: (850) 487-0472

Kenneth Hoffman/John Ellis
Rutledge Law Firm
Post Office Box 551
Tallahassee, FL 32302-0551
Phone: (850) 681-6788
Fax: (850) 681-6515
Attorneys for City of Tallahassee

Florida Industrial Cogeneration Association
c/o Richard Zambo, Esq.
598 Sw Hidden River Avenue
Palm City, FL 34990
Phone: (561) 220-9163
Fax: (561) 220-9402

Legal Environmental Assistance
Foundation, Inc.
Gail Kamaras/Debra Swin
1114 Thomasville Road, Ste. E
Tallahassee, FL 32303
Phone: (850) 681-2591
Fax: (850) 224-1275

Paul Darst
Department of Community Affairs
Division of Local Resource Planning
2740 Centerview Drive
Tallahassee, FL 32399-2100
Phone: (850) 488-8466
Fax: (850) 921-0781

Myron Rollins
Black & Veatch
Post Office Box 8405
Kansas City, MO 64114
Phone: (913) 458-7432
Fax: (913) 339-2934

James Beasley/Lee Willis
Ausley Law Firm
Post Office Box 391
Tallahassee, FL 32302
Phone: (850) 224-9115
Fax: (850) 222-7560
Attorneys for Tampa Electric Company

Florida Power & Light Company (Miami)
William G. Walker, III
9250 W. Flagler Street
Miami, FL 33174
Phone: (305) 552-4327
Fax: (305) 552-3660

Ms. Angela Llewellyn
Tampa Electric Company
Regulatory and Business Strategy
Post Office Box 111
Tampa, FL 33601-0111
Phone: (813) 228-1752
Fax: (813) 228-1770

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

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AFFIDAVIT OF MICHAEL RIB

BEFORE ME, the undersigned authority duly authorized to administer oaths, personally appeared Michael D. Rib ("Affiant"), who being first duly sworn, on oath deposes and says that:

1. I am over the age of 18 years old and have been authorized by Florida Power Corporation to give this affidavit in the above styled proceeding.
2. I am currently employed by Florida Power Corporation as its Director of Resource Planning. My department uses a variety of forecast and/or cost production computer models to assist it in developing business forecasts and analyzing unit dispatch and maintenance schedules. FPC is currently using *Proscreen* and *Prasym*, licensed respectively from New Energy Associates and Henwood Energy Services.
3. I am familiar with the pre-filed testimony of Dr. Dale Nesbitt in this case and his reliance on computer models owned by Altos Management Partners and Marketpoint, Inc., (hereinafter, collectively "Altos"), I am also aware that Altos is demanding that FPC, in order to review Dr. Nesbitt's work, enter into a one-year licensing agreement with Altos, which would cost approximately \$ 85,000.00.
4. Believing the demanded price for a limited non-commercial use of the Altos models to be quite high, my department contacted both New Energy Associates and Henwood Energy Services to discuss their policies for licensing software for limited use in litigation or regulatory proceedings to companies (or their consultants) who would not normally license the software for routine commercial use.

5. Both companies indicated that they provide limited use license options and will also provide consulting assistance as needed for these situations.

6. More specifically, New Energy Associates indicated that they offer their software for short-term license on a per-month basis for roughly 20% of the annual licensing fee, plus some training and support.

7. Similarly, Henwood Energy Services indicated that they offer per-project or per-study licensing also at significantly less than its annual licensing fee.

8. Both companies indicated that such per-project or short-term licensing was common in the industry in such situations. Both companies require licensing arrangements and confidentiality protections as would be expected.

9. Further affiant sayeth not.

Dated the 5th day of January, 2000.

Michael D. Rib

(Signature)

Michael D. Rib

(Printed Name)

Address:

Director of Resource Planning
Florida Power Corporation
263 - 13th Avenue, S.
St. Petersburg, FL 33701-5511

THE FOREGOING INSTRUMENT was sworn to and subscribed before me this 5th day of January, 2000 by Michael D. Rib. He is personally known to me, or has produced his driver's license, or his _____ as identification.

Patricia K. Fellman

(Signature)

Patricia K. Fellman

(Printed Name)

(AFFIX NOTARIAL SEAL)

NOTARY PUBLIC, STATE OF Florida

(Commission)



(Serial Number)