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February 14, 2000

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
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Tallahassee, FL 32399

ORIGINAL

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Re: Docket No. 991462-EU

Dear Ms. Bayó:

Enclosed for filing please find an original and fifteen (15) copies of Florida Power & Light Company's Response to Okeechobee Generating Company's Motion to Compel Florida Power & Light Company to Respond to Discovery Requests in the above referenced docket.

Very truly yours,


Charles A. Guyton

MMC:ml

cc: Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination)
of Need for an Electrical Power) DOCKET NO. 991462-EU
Plant in Okeechobee County by)
Okeechobee Generating Company,) Filed: February 14, 2000
L.L.C.)

ORIGINAL

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE
TO OKEECHOBEE GENERATING COMPANY'S MOTION
TO COMPEL FLORIDA POWER & LIGHT COMPANY TO
RESPOND TO DISCOVERY REQUESTS**

Florida Power & Light Company (FPL), pursuant to Rule 28-106.206 of the Florida Administrative Code, hereby responds to Okeechobee Generating Company's (OGC's) Motion to Compel FPL to Respond to Discovery Requests, and states:

1. On November 5, 1999, OGC propounded its First Set of Interrogatories, (Nos. 1-85) First Requests for Admissions (Nos. 1-44) and First Request for Production of Documents (Nos. 1-26) upon FPL. FPL filed its objections to certain of OGC's discovery requests on November 15, 1999. On December 6, 1999, FPL responded to the vast majority of OGC's discovery requests, responding to 136 of OGC's 155 questions. On February 4, 2000, OGC moved to compel FPL to respond to certain discovery requests essentially arguing that:

- (i) OGC is entitled to discovery that is solely related to the issue of FPL's standing to intervene, notwithstanding the fact that the Commission has already rendered a decision on this previously uncontested issue¹ ;
- (ii) OGC is entitled to have FPL's attorneys make conclusions of law that have no more than a minimal factual component; and

¹ As discussed below, this issue is now moot because FPL has answered OGC's discovery and did not withhold any answers on this basis.

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- (iii) the burdensome, harassing and irrelevant nature of several of OGC's discovery requests should be ignored because FPL has not precisely quantified the burden imposed by OGC's requests.

As explained below, nothing in OGC's motion to compel provides a valid basis for these areas of discovery.

Discovery Directed to FPL's Standing

2. OGC has claimed that any subject matter even tangentially related to FPL's Petition to Intervene is fair game for discovery. OGC failed to realize, however, that the allegations in FPL's Petition were meant to demonstrate FPL's standing, an issue which OGC has not contested and which is conclusively established by the very allegations of OGC's petition. Thus, FPL properly objected to OGC's discovery along this line. In any case, however, this issue is now moot because FPL has not withheld any answers on this basis.² While FPL believes its objections were valid, it chose to be forthcoming and voluntarily answered OGC's questions, in order to effectuate the efficient disposition of this case.³ FPL is puzzled as to why OGC is now raising this issue and wasting both the Commission's and FPL's time on matters that are no longer in controversy. Nevertheless, as the issue has been raised, FPL will address the merits of OGC's arguments.

3. OGC has raised no objection to FPL's standing, although it did at one point move to strike certain allegations in FPL's Petition to Intervene. Finding that OGC did "not contest

² OGC's statement that FPL objected to "all of OGC's discovery" on relevancy grounds is extremely misleading. While FPL did pose a general objection to the relevancy of OGC's discovery, it only withheld no answers on this basis. The few instances where FPL refused to answer OGC's discovery questions were each based on the specific objections filed by FPL.

³ OGC does not identify which questions it seeks to "compel" FPL to answer; nor does OGC claim that any of FPL's answers were less than complete.

FPL's standing to intervene," the Commission properly determined that "the petition of . . . FPL to intervene in this proceeding should be granted" and so ordered on November 4, 1999. *Order Granting Petitions to Intervene and Denying Motion to Strike*, at 1; see also, *Builders and Contractors Ass'n of Brevard County, Inc. v. Florida Department of Community Affairs*, 585 So. 2d 465 (Fla. 1st DCA 1991) (standing in administrative proceedings is a statutory prerequisite, not a constitutional jurisdictional requirement; no showing is required to participate in an administrative proceeding if standing is not raised as an issue). OGC did not seek reconsideration or appeal of the Commission's decision to allow FPL to intervene within the allotted time limits.⁴ Thus, despite a clear opportunity to do so, OGC failed to raise any issue with respect to FPL's (or any other intervener's) standing. OGC's Motion to Compel does not contest FPL's argument that the discovery in question is relevant, if at all, only to the issue of FPL's standing. Having failed to raise the standing issue when it challenged FPL's Petition to Intervene, and having again failed to raise any challenge to the order granting intervention, OGC may not reopen the standing issue so as to gain access to otherwise irrelevant information.⁵

⁴ OGC had the right to seek reconsideration within 10 days pursuant to Rule 25-22.0376, F.A.C., and to seek interlocutory judicial review by the Florida Supreme Court. OGC did not pursue either remedy.

⁵ The cases cited by OGC do not hold otherwise. *Florida Audubon v. DER*, 1986 Westlaw 32870 (DEP 1986) involved a situation where a hearing officer attempted to add substantive evidentiary requirements for standing under section 403.412(5). The language cited by OGC was reversed by the agency, which found that a verified pleading was all that was required under that statute. *Florida Power Corp. v. DEP*, 1999 Westlaw 166086 (DEP 1999), involved a situation where standing was properly contested at the time intervention was sought and the hearing officer accordingly required proof of standing. And, OGC's final citation on this point, *Jacksonville Shippers v. DER*, 1987 Westlaw 62036 at *21 (DER 1987) refers to an exception to a recommended order filed by a party, not to language in either the hearing officer's recommended order or the agency's final order. The cited exception (challenging the petitioner's

4. Moreover, the very allegations in OGC's Petition establish FPL's standing and therefore no additional factual showing would be required even if OGC had timely raised the issue. OGC alleges, for example, that its project will interconnect with FPL's 230kV transmission line and will be located within FPL's service territory. OGC also claims that it will "displace approximately 4.3 million MWH of power produced by less efficient heavy oil-fired and gas fired generation units." The "less efficient" units alluded to presumably include FPL units, as FPL operates the majority of the generating capacity in the immediate area of the OGC plant. In other words, according to the allegations in its Petition, OGC intends to build a power plant in FPL's service territory, transmit the power from that facility over FPL's lines, and displace electric power generation from FPL's existing units. Any claim that FPL has no standing here is simply untenable, and contrary to the allegations in OGC's petition.⁶

5. OGC also fails to recognize that the Commission's own rules require notice of need determination petitions to the "principally affected" utilities, in recognition of the fact that such utilities may intervene in the need determination proceedings. *See* Rules 25-22.081(1) and 25-22.080(3), Florida Admin. Code. As the utility in closest proximity to the OGC plant site and over whose transmission infrastructure OGC plans to transmit power, FPL is clearly a

standing) was denied by the agency, ironically because the party that filed the exception had admitted facts (ownership of affected lands by its opponent) that were sufficient to confer standing and also failed to timely raise the standing issue. *Id.* at *2- *3.

⁶ The contention that if a similar test was applied to OGC's Petition it would not have to prove its allegations is, as OGC states, "absurd," but for reasons that OGC apparently fails to understand. First, FPL's standing has been determined in an order of the Commission, whereas OGC's petition is not the subject of any similar order. Second, FPL timely challenged OGC's petition, whereas OGC failed to raise any issue regarding FPL's standing. And, most importantly, FPL's Petition to Intervene obviously does not make OGC's case for it, as the allegations in OGC's petition do for purposes of FPL's standing.

principally affected utility and thus has its right to participate in this proceeding conferred by Commission rule.⁷

6. In sum, standing is a threshold test designed to insure that interveners have some substantial interest in a proceeding. FPL's standing has been conclusively established both by virtue of the very allegations in OGC's petition and by the standing rights conferred under the Commission's Rules. It is simply irrelevant to whether there are other, additional adverse effects to FPL (beyond those alleged in OGC's petition), unless of course, the allegations in OGC's petition are untrue. OGC has not offered to withdraw those allegations, and until it does, it should not be allowed to challenge FPL's standing.

Requests for Admissions Seeking Legal Opinions

7. FPL objected to OGC Requests for Admissions Nos. 8-11, 24, 26, and 27 because each question constitutes an improper attempt to extract a legal opinion from FPL. OGC's Motion to Compel contends that these requests for admissions seek the "application of law to fact," and are permissible pursuant to Florida Rule of Civil Procedure 1.370. However, the only "facts" contemplated by OGC's Requests are that FPL is an investor-owned public utility and that the proposed OGC facility is a merchant plant.⁸ Contrary to OGC's arguments, the interjection of such a minimal factual component into a generic legal question does not transform it into the sort of "application of law to fact" contemplated by Rule 1.370.

⁷ Section 120.52(12), Florida Statutes, confers standing to any party that either will have its substantial interests determined or is entitled to participate "as a matter of constitutional right, provision of statute, or provision of agency regulation." Thus, there is no need for a party "entitled to participate [by] provision of agency regulation" to also demonstrate a "substantial interest."

⁸ Obviously, neither of these issues is in dispute.

8. Under Florida case law as well as the opinions of this Commission, legal opinions are generally protected from discovery. *See In re Application for a Rate Increase in Lee County by Lehigh Utilities, Inc.*, 1992 Fla. PUC Lexis 1236, at *3 (1992) (finding that legal opinions are not appropriate for discovery); *Insurance Co. of N. Am. v. Noya*, 398 So. 2d 836, 837-38 (Fla. 5th DCA 1981) (holding that, absent showing that party seeking discovery is unable to obtain substantial equivalent of materials sought by other means without undue hardship, legal opinions and theories are outside the scope of discovery and not reachable by discovery process); *Panzer v. Johnson*, 384 So. 2d 58, 59 (Fla. 4th DCA 1980) (holding that trial court's order granting discovery of trial preparation materials still must protect against disclosure of legal opinions and theories of attorneys concerning litigation). *See also* Fla. R. Civ. P. 1.280(b)(3).

9. A review of OGC's requests demonstrates that contrary to the arguments in its Motion to Compel, OGC is, in fact, seeking nothing but pure legal opinions from FPL. For example, OGC Request No. 11 states, "With respect to FPL's separated wholesale sales, the Commission does not have jurisdiction over FPL . . ." This clearly calls for a conclusion of law, namely, whether the Commission has jurisdiction over the separated wholesale sales of an investor-owned utility. The fact that OGC used the term "FPL" rather than an "investor-owned utility" does not transform the generic legal question into one seeking the application of law to fact.

10. A similarly transparent attempt to make legal questions appear to be mixed questions of law and fact is found in OGC's other requests:

8. “With respect to its separated wholesale sales, FPL retains the right to sell power outside the State of Florida any time it is in the economic interest of FPL to do so.”
9. “With respect to FPL’s separated wholesale sales, the Commission does not have jurisdiction over FPL to prescribe uniform systems and classifications of accounts.”
10. “With respect to FPL’s separated wholesale sales, the Commission does not have jurisdiction over FPL to prescribe a rate structure.”
26. “FPL has an obligation to retain earnings or pay dividends to its shareholders.”
27. “OGC is not guaranteed a fair rate of return or an exclusive franchised service territory.”

Requests Nos. 8, 9, 10, and 26 ask for nothing but FPL’s legal opinion as to how the Florida Statutes and the Commission’s rules apply to investor-owned utilities. In each question the term “an investor-owned utility” could be substituted for “FPL” with no change in the substance of the question. Similarly, Request No. 27 asks for a general legal conclusion regarding merchant power producers. The fact that the question is phrased to refer to “OGC” is of no import. As in the questions regarding FPL, the term “a merchant power plant” could be substituted for the term “OGC” with absolutely no substantive change in the question.

11. The final question, No. 24, asks a hypothetical legal question with no factual component whatsoever:

“Merchant power plants not subject to the Florida Power Plant Siting Act (e.g., combustion turbines) are legal under current Florida law.”

Obviously, the question of whether some hypothetical activity is “legal” calls for a pure conclusion of law. FPL is simply puzzled as to how this question can, as OGC states, be read to call for “the application of law (the Florida Electrical Power Plant Siting Act) to fact

(combustion turbine merchant plants),” when no admission of any fact is requested.⁹ Apparently OGC does not recognize the distinction between a fact and a factual assumption.

12. Thus, elevating form over substance, OGC seeks to avoid the prohibitions on discovery of legal opinions by mere creative drafting. This Commission should not be swayed by OGC’s attempt to casually do away with well-established limitations on discovery of legal opinions, a principle deeply rooted in the protection of attorney mental impressions and attorney work product.

OGC’s Burdensome Requests to Produce

13. OGC has moved to compel responses to its Production Requests Nos. 4-7, 17, 21 and 23,¹⁰ which, as discussed below, each seek production of voluminous amounts of information that is, at best, only marginally relevant to this proceeding.

14. Requests Nos. 4-7 and 21 ask for:

4. All documents which relate to, mention or otherwise reflect on FPL contracting for energy in the wholesale market on an hourly basis during the last ten years.
5. All documents which relate to, mention or otherwise reflect on FPL contracting for energy in the wholesale market for more than one hour and less than one year during the last ten years.
6. All documents which relate to, mention or otherwise reflect on FPL contracting for capacity in the wholesale market on an hourly basis during the last ten years.

⁹ Obviously, OGC does not contend that its combustion turbine merchant power facility is not subject to the Power Plant Siting Act, or it would never have filed its Petition.

¹⁰ OGC also moved to compel a response to OGC’s Request for Production No. 14. FPL has determined that it will answer this question and therefore does not address it in this response.

7. All documents which relate to, mention or otherwise reflect on FPL contracting for capacity in the wholesale market for more than one hour and less than one year during the last ten years.
21. All documents which relate to, mention or otherwise reflect on FPL's wholesale sales in Florida or any of its affiliates.

(emphasis added). Cumulatively, these requests ask for every document in FPL's or its affiliates' possession even marginally related to purchases or sales of wholesale energy or capacity over the past five years.¹¹ There have been hundreds of thousands of transactions that would fall within the broad sweep of these requests. And, most of these transactions would have numerous related documents such as confirmations, invoices, contracts, internal and external correspondence, OASIS requests, transmission tags, Federal Energy Regulatory Commission (FERC) filings, accounting records and various regulatory reports. Thus, there would be several million responsive documents. Just assembling the documents could take several months, if not longer. FPL could not possibly comply with these requests within the time allotted. Indeed, it would be impossible for FPL to respond prior to the March 20-22 hearing dates established for this docket. Detailed compilations of FPL's wholesale sales are readily available to OGC on FPL's A schedules, filed monthly with the Commission. Those schedules are just as easily retrieved by OGC as by FPL. OGC's much more extensive "all documents" requests are incredibly burdensome, of dubious materiality, and could not possibly be meaningfully reviewed by OGC before trial, even if they could be compiled by FPL before then.

¹¹ Although the original requests utilized a 10-year time period, OGC's Motion to Compel suggests that the period be limited to 5 years. This Response will assume that the documents spanning this 5-year period are all that is now requested by OGC.

15. The fact that FPL has mentioned an impact to its prospective wholesale sales in its Petition to Intervene does not justify requiring FPL to compile every scrap of paper relating to its wholesale sales over a five year period, especially when OGC could gain sufficient information about the extent of FPL's wholesale sales activities from the publicly available documents, schedules and reports on file with the FERC and this Commission.

16. OGC's Request No. 17 asks for:

All documents which relate to, mention, or otherwise reflect on the recovery of generation costs when FPL purchases power.

Several hundred thousand documents are responsive to the Request, including contracts, fuel invoices, delivery requests, shipping orders, shipping receipts. The request would also include all FERC contracts, and most tariffs and rates filed with this Commission, along with numerous A and E schedules in the fuel adjustment docket, planning studies and contracts with qualifying facilities, and all of FPL's fuel adjustment clause filings, all of which are publicly available. Once again, there is simply no good reason to force FPL to compile such a large volume of documents when the information OGC wishes to gain could be acquired by OGC from available public documents.

17. Finally, Request No. 23 asks for:

All documents which relate to, mention, or otherwise reflect on the degree to which, if at all, the benefit of revenues from any wholesale sales made by FPL are credited to or flowed back to FPL's retail customers.

The scope of this request includes all documentation relating to every wholesale sale of any amount of electric power made by FPL throughout its history. The responsive documents would include the accounting entries and wholesale transaction records and invoices for hundred of


thousands of transactions. Once again, there is simply no justification for such broad requests. However, a more narrow quantification of such sales and credits is publicly available to OGC on A Schedules filed monthly with this Commission. It is just as easy for OGC as for FPL to retrieve this information.

18. In sum, OGC's requests are drafted to encompass millions of documents in the possession of FPL. OGC is fully capable of drafting discovery requests that are limited to the information it actually needs for purposes of litigation. The only logical conclusion from the overwhelming breadth of OGC's requests, which will result in a volume of documents being produced that OGC cannot possibly have the time or inclination to review, is that the requests were posed for pure harassment of FPL. In any case, OGC can gain the information it needs to evaluate FPL's wholesale sales activities in the records of the Commission and FERC. And, if OGC requires some non-public information from FPL, it can draft requests that are reasonably specific in light of the purpose and limited time frame of this litigation.

WHEREFORE, FPL requests that OGC's Motion to Compel FPL to Respond to Discovery Requests be denied in its entirety.

Respectfully submitted this 14th day of February 2000.

STEEL HECTOR & DAVIS, LLP


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served by Hand Delivery (*) or mailed this 14th day of February, 2000 to the following:

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