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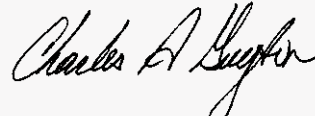
**Re: Docket No. 991462-EU**

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") in Docket No. 991462-EU are the original and fifteen (15) copies of FPL's Response to Okeechobee Generating Company's Motion for Continuance and Revised Procedural Schedule.

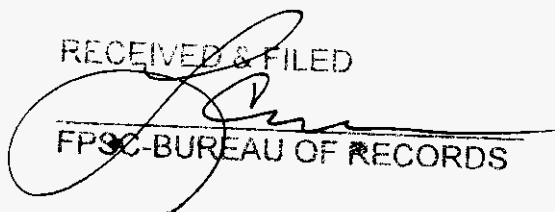
If you or your staff have any questions regarding this filing, please contact me.

Very truly yours,



Charles A. Guyton

Enclosure  
cc: Parties of Record  
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APP \_\_\_\_\_  
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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: March 14, 2000
L.L.C.	)	

**FLORIDA POWER & LIGHT COMPANY'S  
RESPONSE TO OKEECHOBEE GENERATING  
COMPANY'S MOTION FOR CONTINUANCE AND  
REVISED PROCEDURAL SCHEDULE**

Florida Power Light Company ("FPL") hereby responds to Okeechobee Generating Company's Motion For Continuance and Revised Procedural Schedule filed on March 13, 2000, one week before the scheduled trial. In summary, OGC has admitted to the Commission that it has failed to analyze the OGC unit in its prefiled case. All of OGC's modeling runs relied upon in OGC's petition and in the testimony of many of OGC's witnesses, including its primary witness, Dr. Dale Nesbitt fail to address the OGC unit because Dr. Nesbitt failed to include the OGC in his modeling analysis. This is not a mere "discrepancy" as blithely misrepresented in OGC' motion. This is fundamental failure to address any impact associated with the OGC facility, and, thus, a total failure to prove either the need for or the cost-effectiveness of the OGC unit. The Commission should not be considering whether to grant a continuance. The Commission should be summarily denying the petition for failure to present a prima facie case based upon OGC's admission in its motion. What the Commission really should be considering is the extent to which OGC should be assessed the costs and fees incurred by the intervenors in this case as a direct result of OGC's failure to reasonably inquire as to whether the allegations in its petition and the evidence it was proffering supported the allegations of its petition. As a result

of OGC's lack of diligence, the intervenors have had to undertake extensive efforts and considerable expense to expose OGC's failure to even analyze what was asserted to have been analyzed, much less even to make a prima facie case. The case should not be continued. The petition should be summarily denied and the Commission should consider whether costs and fees should be assessed against OGC. In support of this response, FPL states:

### **Background**

1. In its statement of Background in its motion, OGC has omitted a number of salient facts that the Commission should consider. FPL will provide the supplemental information that should be considered by the Commission.

2. The Commission's rule governing the content of need petitions very clearly addresses the necessary contents of a need petition such as OGC's where the applicant is premising its need filing in whole or in part on a basis other than a capacity need, and OGC's need petition failed to comply with this requirement:

If a determination of need is sought on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.

Rule 25-22.080, Florida Administrative Code. OGC's petition did not include the required detailed analyses and supporting documentation. OGC did not even include the major assumptions. None of the model runs constituting the detailed analyses and the supporting inputs and outputs constituting the supporting documentation were filed. Instead, the petition and petition exhibits had broad descriptions of the models employed (not of the runs performed but of the models employed) and very summary information from the model runs themselves. Because of OGC's failure to meet the requirements of Rule 25-22.080(3), F.A.C., FPL was

forced to request through discovery the detailed information that should have been filed as part of OGC's petition.

2. FPL's efforts to secure through discovery answers to questions about OGC's modeling were consistently frustrated by OGC's tactics of providing partial and incomplete responses or refusing to answer questions. Time does not permit a full development of OGC's misconduct, but several examples are illustrative.

3. A series of interrogatories, FPL's Second Set, were posed to OGC on November 2, 1999, shortly after FPL was granted intervention and could initiate discovery. Although clearly posed to OGC about allegations in their petition, OGC objected that they were posed to OGC's experts and were improper discovery and refused to answer. FPL moved to compel, and the Prehearing Officer correctly ruled on February 11, 2000 that the answers must be provided. Order No. PSC-00-0029-PCO-EU. To this day, four and a half months after the interrogatories were posed to OGC, FPL still does not have responses to those interrogatories (FPL dropped some of the interrogatories due to the passage of time and the intervening availability of some of the modeling data, but the ones not dropped are still unanswered).

4. FPL also asked a series of document production requests designed to secure all the model runs relied upon by OGC and Dr. Nesbitt as well as all inputs and outputs relied upon. In response, OGC forwarded to FPL a zip disk supposedly containing all the model inputs and outputs. However, when FPL's consultants undertook to review of the information on the disk, some steps in the analysis and essential model inputs were missing, leaving a number of unanswered questions that FPL should be able to answer through access to Dr. Nesbitt's model runs.

5. Moreover, OGC declined to provide the model upon which its witness Dr. Nesbitt relied except under unreasonable terms and conditions. FPL was forced to file another motion to compel and ask the Prehearing Officer to provide FPL access to the models underlying the OGC case under reasonable terms and conditions. The Prehearing Officer did compel the production of the models, finding OGC's terms unreasonable and providing access under more reasonable terms. Order No. PSC-00-0029-PCO-Eu, issued February 11, 2000.

6. Despite the order requiring FPL's FPC's access to the model no later than February 15, 2000, OGC was able to frustrate and delay FPL's access to the models until February 28, 2000. OGC could not make its expert available as soon as contemplated by the order for training and installation of the model. Confronted with a choice of either trying to secure a ruling that OGC was in violation of the order or agreeing to an alternative schedule, FPL agreed to an alternative schedule that delayed its access to the models. Once training was complete on February 22nd, FPL's and FPC's consultants were ready for access to the models. OGC further delayed access by insisting upon terms in personal and corporate guaranty contracts that were unreasonable and went beyond what the Prehearing Officer ordered. Three more business days were lost due to negotiations (once again FPL had the untenable decision of trying to involve the Prehearing Officer and face further delay or trying to negotiate terms). Ultimately, the terms of the adhesion contracts insisted upon by Dr. Nesbitt (Dr. Nesbitt insisted upon contracts rather than guaranties as specified by the Prehearing Officer's order) were so demanding that FPC's consultants opted out of reviewing the model. FPL's consultants, to gain access to models that should have been available months earlier, agreed to these unreasonable terms, such as a term requiring them to pay as much as twice the model licensing fee in the event of a breach of the

contract. Thus, due to OGC's conduct FPL's consultants were denied access to the models up until three weeks before trial and ten days before their testimony was due.

7. During the training sessions held on February 21 and 22, 2000, OGC's consultants revealed that OGC had not provided all the model inputs and outputs in its earlier discovery responses. They also disclosed that they relied upon information from other model runs that had not previously been mentioned in testimony or discovery responses (Specifically, they had relied upon Altos model runs from the earlier Duke New Smyrna case to develop power imports from Southern into Florida, but they could not remember which year's data had been used and they did not provide the runs; also, they revealed that they relied upon transmission data from a model named GE MAPS, but no model runs had been or were provided). At least ten input and output files were identified during the training session as files that had not been provided in response to discovery. FPL requested that they be provided at the discovery session. Most but not all were provided at the training session, four months after they should have been provided. However, several files were not provided in the training session, and FPL's access to these input and output files was further delayed until FPL actually secured access to the models a week later. Access to the other models used by Dr. Nesbitt and the model runs from the Duke case still has not been provided.

8. OGC's attempt to frustrate FPL's consultants access to the Altos models continues. OGC was supposed to provide access to the models at Altos' California offices in a secure room. Instead, it was provided in PG&E's California offices in a non-secure room. While FPL acknowledges that the PG&E site was more accessible to FPL's consultants, the site was not hospitable for work. No access to telephones was made available. However, more importantly,

the room was not secure. The first night the model was left to run, the computer was unplugged, causing FPL's consultants to lose one of the precious few days available for running analyses prior to having to prepare testimony. More recently someone besides FPL's consultants have been using the computers during the absence of FPL's consultants (concerned about the possibility that PG&E might attempt to access the computers to improperly review what FPL's consultants were doing, FPL's consultants arranged the room and the computers to evidence whether any tampering or unauthorized review was being undertaken).

9. During training FPL's consultants were misled about the models. They were told the models should take 4 to 6 hours to run to replicate an OGC run. The models were very unstable and required three times as much time to run. FPL's consultants were led to believe that with training they could run the Altos models and replicate the results. After the training and an inability to replicate results, Altos personnel admitted that they were the only ones that could run the models so that they would converge. In training FPL's consultants were led to believe that the results of the Dr. Nesbitt's runs could be replicated, but it was subsequently learned in deposition that the runs could not be replicated because there was no documentation of some of the initial setting of the models. During training, Altos used versions of the models that were different than the version Dr. Nesbitt relied upon in his testimony and different than the version installed upon the computer to which FPL's consultants were given access. During training FPL's consultants were told they have access to the models User's Manual. The User's Manual actually provided was for a version of the model that was different than the version of the model to which access was granted. All these efforts to hide the pea are documented in Dr. Sosa's testimony.

10. What OGC fails to tell you in its motion is that it has participated in an extensive pea and shell game, frustrating reasonable access to the models and data underlying their testimony. Despite that, FPL persisted, at enormous expense and frustration. FPL finally gained access to the models and most of the input data. In seven working days, FPL's consultants revealed that the entire OGC case is a fraud.

#### **OGC's Motion Misrepresents Facts**

11. OGC would have the Commission believe that its consultants discovered several "discrepancies" in model input data and that they want time to correct these "discrepancies." From FPL's perspective, there are at least two serious misrepresentations in these assertions.

12. First, the omission of the OGC unit from all the modeling analyses performed for this case is not a "discrepancy." Even Mr. Blaha, one of OGC's consultants, acknowledged it was more than a discrepancy; it was an error. It is an error of omission so fundamental that it places OGC in the position of having (a) misrepresented the fundamental facts in its petition, (b) failed to present a prima facie case.

13. Second, it strains credulity for OGC to suggest as they did in their motion that it was Altos personnel that discovered the "discrepancies" OGC acknowledges in its motion. It was FPL's consultants who discovered those egregious, fundamental omissions and mistakes. FPL brought the omissions to OGC's attention in the deposition of Dr. Nesbitt and Mr. Blaha the day after FPL filed testimony documenting the omission of the OGC unit from OGC's analysis. Initially, Mr. Blaha volunteered that Martin unit 4 has been omitted from their analysis, and he had fortuitously discovered the omission the night FPL's testimony documenting the omission of



OGC was filed. A day and a half later Mr. Blaha reluctantly admitted in deposition that it was the OGC unit, not Martin 4 that he had omitted from the GC analysis.

#### **The Grounds OGC Has Not Raised For Continuance**

14. It is important to understand that OGC is not alleging that it has not been afforded adequate time to prepare rebuttal testimony. It is important that OGC has not alleged that it has insufficient time to conduct discovery of FPL's witnesses (OGC has canceled two scheduled depositions this week, apparently betting that its continuance will be granted). It is important to understand that OGC has not alleged that it cannot adequately prepare for trial. OGC has alleged no prejudice to OGC if it proceeds to trial. Instead, all OGC alleges is a need "to perform a more comprehensive review of the model run and data that were used by Altos..." OGC should have conducted its due diligence and review of the model and run before they filed their petition relying upon it and before they filed Dr. Nesbitt's testimony. Due to OGC's lack of diligence, OGC has seriously misrepresented the facts in both its petition and testimony. They have caused FPL to incur hundreds of thousands of dollars of expense to expose their negligence. Now that their fundamental error of leaving their own unit out of their analysis is exposed and their case is demonstrated to be a fraud, they ask for more time "to perform a more comprehensive review of the model run and data..." OGC has not offered a basis for continuance. What they have admitted is a basis for summary denial of their petition.

#### **OGC Asks For Far More Than A Continuance**

15. Although it styles its motion as a request for a continuance and revised procedural schedule, in the body of the motion OGC asks the Commission for far more relief, without ever demonstrating why such relief should be granted. OGC asks for (a) leave to withdraw testimony

of Dr. Dale Nesbitt, (b) leave to submit revised testimony and exhibits addressing the need for and the economic impact of the OGC Project (note that this request is not limited to filing testimony by Dr. Nesbitt, (c) leave to file an amended petition (although it is not now addressing how the petition will be amended, (d) leave to use an entirely new (updated) model, providing all inputs and output data within one week of filing revised testimony, (e) that access to the new model be had on the same terms and conditions as the earlier model (FPL does not take issue with the terms set forth by the Prehearing Officer but will resist repeated attempts by OGC and Dr. Nesbitt to require unreasonable terms in the guaranties), (f) leave to treat all outstanding interrogatories and production requests as having been posed with respect to the revised testimony and supplying answers within one week of filing revised testimony, and (g) leave to work with the Staff and the Prehearing Officer (not the parties) to establish a revised procedural schedule.

16. OGC should not be allowed to withdraw Dr. Nesbitt's testimony now that it has been revealed that it fundamentally misrepresents the analysis performed (or failed to be performed) by Dr. Nesbitt. Given OGC's admission about Dr. Nesbitt's omission of the OGC unit from his analyses, the case should be summarily denied, for Dr. Nesbitt's purported analysis was the sole basis for establishing that the OGC unit was needed and cost-effective. Simply stated, if you failed to analyze the unit, you failed to prove its need or cost-effectiveness. The errors committed cast tremendous doubt about the reliability of Dr. Nesbitt and his work product, particularly when OGC is already predicting that "the revised analysis will show substantively the same results as the previous analyses...." Dr. Nesbitt should not have his testimony withdrawn as if his egregious mistakes and spurious conclusions never happened.

17. OGC should not be given the opportunity six months after filing its petition and five months after filing its direct case to substantially revise its direct case, when the only reason given is that a few days ago it discovered some “discrepancies” and a more thorough review of the model should be conducted. OGC should have done its due diligence before it filed its case, not after the intervenors have fully developed their responsive case. Allowing OGC a “redo” by filing revised testimony is fundamentally unfair.

18. The Commission should make no attempt to address whether OGC may be given leave to amend until it is informed of how OGC intends to amend and the parties are given an opportunity to respond. OGC cannot amend without leave, and the Commission has no business entertaining an amendment that has not even been presented to it.

19. OGC should not be allowed to revise its analysis using an entirely new model. FPL has invested massive resources in understanding how the existing model works (or, more accurately in this case, does not work). If OGC were allowed to update its analysis using a entirely new model to which FPL has had no prior access, then every aspect of FPL’s case preparation regarding the model to date would be wasted effort. It is unconscionable for OGC to propose a new black box at this point given that FPL has expended tremendous resources to debunk the existing black box analysis.

20. If the motion were granted and OGC were allowed to use a new black box, FPL’s access should be readdressed. The terms to which it was essentially forced to agree to gain any access to the model (the terms of the guaranties insisted upon by Dr. Nesbitt) are totally unreasonable and should not be the basis for access to the new model. Dr. Nesbitt has made every effort to frustrate access to his model under the guise of proprietary concerns. In

retrospect, it looks more like Dr. Nesbitt just wants to avoid a critical review. After all, if it is opened up to critical review, it might be discovered that he made a mistake, like the long list OGC acknowledges in their motion.

21. If revised testimony were filed, in addition to the discovery responses that OGC offers to make, FPL should be allowed additional interrogatories and requests for production. FPL used most of its allotted interrogatories trying to fill in the blanks arising from OGC failing to file sufficient data with its petition. It should not be prejudiced by its diligence, particularly since its diligence has shown the OGC case to be a sham.

22. Finally, OGC should not be given the unilateral opportunity to establish schedule in consultation with the Staff and the Prehearing Officer as suggested in OGC's motion. FPL has substantial interests being determined in this proceeding and should have every opportunity afforded OGC to participate in rescheduling.

#### **Applicable Law**

23. FPL agrees that the Prehearing Officer may grant a continuance for good cause shown. Good cause has not been shown. All that OGC has offered is that it needs time "to perform a more comprehensive review of the model run and data that were used by Altos." This is not good cause. OGC should have performed such a review not only before filing its infirm petition, but also before filing its infirm testimony. OGC's lack of diligence is hardly good cause shown.

22. While discretion rests in the Prehearing Officer to grant continuances, the standard for judging the exercise of such discretion is (1) whether the denial of the continuance creates an injustice to the movant, (2) whether the cause of the request for the continuance was

unforeseeable by the movant and not the result of dilatory practices, and (3) whether the opposing party would suffer prejudice or inconvenience as a result of a continuance. Lee v. Lee, 2000 WL 196648 (Fla. App. 1 DCA, Feb. 21, 2000). Denial of continuance would not create an injustice to the movant. OGC has pressed for a speedy trial and further delay creates more of an injustice than proceeding to trial. The cause for the continuance, OGC's errors and omissions in its petition and testimony, were foreseeable and should have been caught before now by OGC if it had been diligent. FPL and FPC would be harmed by the delay. They are prepared to go to trial and expose the OGC case as a sham, and that opportunity would be removed by granting the motion.

23. OGC also argues that a continuance should be granted "where it will provide an appropriate opportunity to try a case on its merits." That is not the case here. The merits of OGC's case are ready for trial. It left out its own unit in running its analyses. There are no merits to this case. If a continuance and the other relief were granted, it would not be to try the case on its merits but to change the merits of OGC's case.

24. Finally, OGC cites Order No. PSC-99-0511-PCO-EG for the proposition that the Commission has granted continuance on the basis of the need to conduct discovery and to complete a computer-based technical analysis. That is accurate as far as it goes; what OGC fails to do is disclose (a) that it was an intervenor asking for a continuance based upon the need for discovery, not the applicant or petitioner, (b) and it was not to replace an existing computer based analysis offered by the movant, but to perform computer analyses responsive to those performed by the petitioner. OGC does not need a continuance to conduct discovery. The review it purports to do is of its own analysis, not something offered by the opposition. OGC seeks a

continuance not to perform an initial computer analysis responsive to the petitioner's case but to supplant its own infirm analysis. The case cited by OGC does not in any way support its argument. It is a misleading citation.

### **FPL Is Seriously Prejudiced By The Requested Relief**

25. In its motion OGC states, completely without discussion or documentation, that the requested continuance (and other relief) will not prejudice any party. FPL has already been prejudiced by OGC's persistent efforts to keep the Altos models from it for timely and complete review. However, now that FPL's persistence has shown the OGC case to be all smoke and mirrors - the OGC unit was not analyzed at all - OGC moves for relief that will make all of FPL's previous efforts wasted effort. FPL will be seriously prejudice by the relief requested for at least three reasons.

26. FPL would be prejudiced by OGC having the benefit of a "redo" or a "do over." OGC has already presented one case. By their own admission in their motion, they omitted their own unit from their analysis. In other words, their case is not about OGC at all, it is about 500 MW of existing utility capacity. However, by proceeding to the eve of trial with their admittedly infirm case, OGC has the full benefit of FPL's trial strategy. FPL has concluded its discovery, has filed its testimony, has identified issues, and has shown its hand as to how it intends to try its case. By floating its trial balloon, OGC has learned the position of its opposition without even fully disclosing its underlying analysis. Upon realizing that s proof is insufficient, OGC asks that it be allowed to retire its trial balloon and launch another. This is a gross disadvantage to FPL and an advantage that OGC should not be awarded, particularly since this all evolves from OGC's initial lack of diligence.

27. Second, FPL has expended vast resources in trying to expose that OGC's case a sham. It has been successful. It has been so successful that OGC is prepared to withdraw its core testimony rather than subject it to cross examination. Faced with the exposure that its case is a fraud, OGC asks to refile its analysis, making much of FPL's expenditure of resources up to this point wasted effort. OGC proposes to redo testimony shown to be infirm. OGC proposes to redo analyses documented to be infirm. More significantly, OGC proposes to use a new set of models that FPL has not been exposed to. FPL will not be able to use what it has learned to date. All its considerable efforts to date will largely be irrelevant, if OGC is allowed to update analyses and use new models. FPL would be severely prejudiced if OGC were allowed to take action that makes FPL's prior efforts wasted and irrelevant.

28. Finally, FPL, despite the unreasonable schedule it has faced as well as the efforts of OGC to hide its analysis, is ready to go to trial. FPL is ready to expose OGC and Dr. Nesbitt. The Commission is already in a position "to fairly evaluate the merits of OGC's petition." It has none because its it was not analyzed in the fashion represented by its lawyers and its witnesses. FPL has shown that and is prepared to show that at trial. It is OGC that does not want the Commission "to fairly evaluate th merits of OGC's petition." Instead, they want to change the petition, change the facts and then have the Commission and the parties address their moving target. It would be manifestly unfair, with the record fully developed (except for rebuttal testimony from OGC due Thursday) not to evaluate the merits of OGC's petition based on the record before the Commission. This case is ready for trial or summary disposition. granting a continuance and the other relief requested would be a travesty, a gross miscarriage of justice.

## Summary

The highly touted analysis supposedly performed by Dr. Nesbitt has not been performed. Dr. Nesbitt has not performed analyses with and without the OGC unit and captured the resulting wholesale price suppression benefits and savings to Florida customers. Instead, Dr. Nesbitt ran analyses that measured the purported wholesale price suppression of 500 MW of existing utility generation. Dr. Nesbitt's failure to analyze the OGC at all was exposed in testimony filed with the Commission on March 9, 2000. See the prefiled testimony of Dr. Sosa and Dr. Landon. It was further confirmed in the depositions of Dr. Nesbitt and Mr. Blaha. Now, OGC has admitted in its motion that it has failed to analyze its own unit in its case.

OGC's case should be summarily denied for its self-admitted failure to analyze its own unit. Every model run proffered by OGC and discussed by Dr. Nesbitt fails to analyze the OGC unit. The core of OGC's case - the Altos model runs - which are used to demonstrate not only cost-effectiveness, but also economic need for the OGC unit, show nothing about the OGC unit because the OGC unit was omitted from the runs. The case offered by OGC has been shown to fall short of even a prima facie case of need for the OGC unit. The Commission should summarily deny the need petition based upon OGC's admission in its motion.


If the case is not summarily denied, it should be tried on the record before the Commission. A continuance and the other relief requested by OGC is improper given the current status of the case. Allowing OGC to withdraw and substitute testimony to correct a fundamental problem of proof reasonably discernable if OGC had simply performed due diligence would prejudice the intervenors. The intervenors have persevered through OGC's myriad attempts to hide their analyses. They have now shown the OGC case to be fundamentally infirm. Despite



the paucity of time afforded them for review, they are ready for trial and to expose OGC and Dr. Nesbitt. OGC knows that, and they ask not only for more time but also to change the fundamental aspect of their case. They ask that the case up until now be treated as a trial balloon. They want to withdraw their infirmities but keep the advantages of having seen virtually all of the intervenors' trial strategy. They want to rerun their analysis, making most of the intervenors enormous expenditure of resources to date wasted effort and irrelevant.

OGC should not be allowed to prevail. Their petition should be summarily denied. If not, OGC should face the choice of trying an infirm case of their own making or withdrawing their petition and considering whether to refile. OGC's motion should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this FPL's Response to Okeechobee Generating Company's Motion to Establish Hearing Dates and Revised procedural Schedule was served by Hand Delivery (\*) or mailed this 14th day of March, 2000 to the following:

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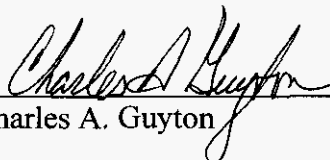
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