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Subject: OPC'S RESPONSE TO FPL'S MOTION FOR LEAVE TO SUBMIT COMMENTS ON RAJIV KUNDALKAR'S MOTION TO QUASH OPC'S DEPOSITION
Attachments: OPC'S RESPONSE TO FPL'S MOTION FOR LEAVE TO SUBMIT COMMENTS ON RAJIV KUNDALKAR'S MOTION TO QUASH OPC'S DEPOSITION.pdf

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b. Docket No. 110009-EI

In re: Nuclear Cost Recovery Clause

c. Documents being filed on behalf of the Office of Public Counsel

d. There are a total of 8 pages.

e. The document attached for electronic filing is **OPC'S RESPONSE TO FPL'S MOTION FOR LEAVE TO SUBMIT COMMENTS ON RAJIV KUNDALKAR'S MOTION TO QUASH OPC'S DEPOSITION SUBPOENA.**

Thank you for your attention and cooperation to this request.

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DOCUMENT NUMBER-DATE
03147 MAY-5 =
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause.	DOCKET NOS: 110009-EI FILED: May 5, 2011

OPC'S RESPONSE TO FPL'S MOTION FOR LEAVE TO SUBMIT COMMENTS ON RAJIV KUNDALKAR'S MOTION TO QUASH OPC'S DEPOSITION SUBPOENA

Pursuant to Rule 28-106.204, Uniform Rules of Procedure, the Citizens of the State of Florida, through the Office of Public Counsel ("OPC"), respond in opposition to Florida Power & Light Company's ("FPL") Motion for Leave to Submit Comments on Pending Motion to Quash Subpoena.

BACKGROUND

On March 29, 2011, OPC served a deposition subpoena on Mr. Rajiv Kundalkar, FPL's former Vice President of Nuclear Uprates. On April 12, 2011, Counsel for Mr. Kundalkar filed a Motion to Quash the subpoena. FPL was served a copy of the Motion to Quash like every other party. OPC responded to the Motion to Quash three days later on April 15, 2011. On May 3, 2011, FPL filed its Motion for Leave to submit "comments" on the Motion to Quash.

ARGUMENT

1. FPL's Motion

The Prehearing Officer should deny FPL's motion. The pending Motion to Quash and the response of OPC to the Motion to Quash define a discovery dispute between Mr. Kundalkar, on the one hand, and OPC, on the other. In fact, at page 1 of its motion, FPL acknowledges that the

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matter is a "...dispute between OPC and Mr. Kundalkar." However, in its motion FPL claims a "substantial interest" (FPL motion, at page 1) in the issue, as though it is attempting to create "standing" and thereby justify "intervening" in the "dispute between OPC and Mr. Kundalkar." FPL got it right the first time. As his counsel has emphasized, Mr. Kundalkar is no longer an employee of FPL; the dispute to be resolved is between Mr. Kundalkar and OPC. More precisely, the issue is whether Mr. Kundalkar has demonstrated that OPC's deposition subpoena is invalid—a matter that FPL loses sight of in its pleading.

Even if one were to assume, for the sake of argument, that FPL has an interest in the discovery dispute, FPL's pleading should be rejected as unauthorized and untimely. The Model Rules authorize a motion and a response to the motion. The response must be filed within seven days of the service of the motion. Rule 28-106.204, *Uniform Rules of Procedure*. The rules do not permit the movant to reply to a response, and the rules certainly do not authorize "comments" (FPL must strain even to find a name for its proposed pleading) by a party who chose not to respond to the motion. Again, under the assumption (for the purpose of argument only) that FPL has an interest in the discovery dispute, FPL (as a party who received timely and proper service of the Motion to Quash) was required to respond to the Motion to Quash within the seven day time frame established by governing rules of procedure.

Finally, the rationale that FPL offers as its "substantial interest" does not support its request. FPL says its sole purpose in "weighing in" on the Motion to Quash is to protect against the possibility that a "protracted debate" (FPL motion, page 1) over the discovery dispute may delay a ruling on its pending petition for approval of a 2012 NCRC factor. Yet, FPL waited for three weeks after the Motion to Quash was filed before expressing its desire to submit "comments;" this step by itself could potentially prolong the time frame required for a resolution

of the issue. (OPC responded to the Motion to Quash within three days instead of the seven allowed by rule, precisely to facilitate a resolution of the dispute.) Plus, even if the Prehearing Officer were to allow FPL to submit "comments," they would not shorten the time devoted to the Prehearing Officer's consideration of and ruling on the Motion to Quash; in fact, by layering "comments" onto the pending Motion to Quash and responses thereto, FPL could create the opposite effect. The complete absence of any relationship between the "comments" and the purported goal of shortening the time frame occupied by the dispute over OPC's deposition subpoena belies FPL's professed motivation in seeking the opportunity to "weigh in" on the Motion to Quash.

The Commission should have an institutional concern beyond the specifics of this matter with respect to FPLs attempted "end run" around the governing rules of procedure. Beyond being an untimely response to the Motion to Quash, the error in procedure is compounded by the filing of a pleading that addressed both the Motion to Quash and OPC's Response. If the attempt is allowed to stand here, FPL, or any future litigant who might seek to use this unauthorized device, would be afforded a "super party" status. Aside from being patently unfair, this extra round of response would give rise to the needless consumption of additional administrative resources by spurring additional rounds of motions to respond and responsive comments (as the Citizens rightfully request herein).

2. OPC's contingent response to FPL's proposed comments

For the reasons stated above, the Prehearing Officer should deny FPL's request. In the event that, notwithstanding OPC's objections, the Prehearing Officer decides to allow and consider the comments attached to FPL's motion, basic principles of due process would require that OPC be given an opportunity to respond to the comments. Rather than awaiting a ruling on

FPL's motion, and in an effort to avert the prolonging of the debate that FPL ironically and counterproductively would otherwise accomplish through its pleading, OPC will respond to the comments here, with the obvious understanding that this response will be rendered moot and unnecessary if the Prehearing Officer denies FPL's motion.

In numbered paragraphs 1 and 2 of the proposed comments, FPL begins by telling the Prehearing Officer what it "expects" Mr. Kundalkar would say in a deposition, and proceeds to characterize the prefiled testimony of its witnesses. Here, FPL is inappropriately using the occasion of the Motion to Quash OPC's subpoena to advance its testimony and positions in the case. The comments are inappropriate to a ruling on the procedural propriety of the subpoena (and do nothing to shorten the time necessary to resolve that issue—the sole "interest" that FPL claimed in its motion). Even if the Prehearing Officer grants FPL's motion for leave, he should disregard FPL's predictions and its self-serving touting of testimony.

In Paragraph 2, FPL observes that FPL consultant and witness John Reed (who concluded that FPL should have updated testimony in 2009 to reflect the best, most current cost information) states in testimony that he discerned no imprudently incurred 2009 costs. From there, FPL argues that any finding and conclusion that FPL should have but did not update testimony on the costs of completing the uprate somehow should not matter—in other words, a "no harm, no foul" theory. The Prehearing Officer should ignore the assertion. First, FPL treats Mr. Reed's opinion as to whether FPL incurred imprudent costs as though it is dispositive of the issue.[1] It is not. In fact, from OPC's perspective, the genesis of the decision to defer FPL 2009 issues was Staff's concern that missteps by nuclear uprate managers may have led to imprudent

[1] FPL treats Mr. Reed's statement that he found no imprudent costs as dispositive, but disputes Mr. Reed's conclusion that FPL's witness should have updated testimony on the estimate of the cost of completing the uprate project.

costs, and Staff's request for more time to evaluate that possibility—a request that OPC supported when it was made.

Next, one must distinguish between the question of whether certain costs were imprudently incurred, on the one hand, and the issue of whether FPL was straightforward with the Commission and parties with respect to the obligations imposed on petitioning utilities by Rule 25-6.0423, F.A.C., on the other. In other words, regardless of whether the Commission finds a basis for disallowing costs as imprudently incurred, the circumstances give rise to a separate issue: as a separate and distinct matter, and if the facts warrant, the Commission could determine that FPL willfully withheld the best, most current information on a subject required by the Commission's rule, and should be penalized accordingly.

In numbered paragraph 3, FPL echoes the assertion of Mr. Kundalkar, to the effect that OPC should pose its questions on the subjects of its inquiry to the witnesses that FPL is sponsoring. Tellingly, FPL's comments resemble the Motion to Quash in another particular: nowhere in its "comments" on the Motion to Quash does FPL discuss the applicability of the *Administrative Procedure Act*, the Florida Rules of Civil Procedure promulgated by the Supreme Court of Florida, the Uniform Rules of Procedure that govern agency proceedings, the Commission's rule on subpoenas, or the form for subpoena that the Commission provides to parties.[2] Instead, FPL ignores the statutes and rules that establish the legal landscape that governs the disposition of the Motion to Quash, and would simply presume, or have the Prehearing Officer presume, to tell OPC whom OPC may depose and the sequence in which OPC should schedule those depositions. There is a reason why FPL's "comments" avoid the standards. FPL's suggestion that OPC should be required to "exhaust" other sources before

[2] At pages 3-4, FPL refers briefly to the "necessity" argument and the "legal and policy issues" in the Motion to Quash. OPC has addressed the fallacies of those arguments fully in its response to the Motion to Quash.

seeking to depose the witness who sponsored the testimony that is the center of an issue flies in the face of, and is overwhelmed by, the broad discovery rights a party possesses under the standard that the Supreme Court of Florida created, that the Florida Legislature applied to Commission proceedings, and that the Model Rules implement. OPC is entitled to broad discovery rights, subject to the requirement that the discovery be reasonably calculated to lead to the discovery of admissible evidence.[3] OPC is in the process of exercising those rights. OPC's subpoena and notice are clearly and reasonably intended to lead to the discovery of admissible evidence. Neither parties nor nonparties have the right to impede, much less *steer,* the manner in which OPC pursues legitimate discovery. There simply is no requirement that OPC "exhaust" the witnesses put forward by FPL before subpoenaing an individual who was deeply involved in matters that are the subject of an active docket and whom OPC wishes to depose. Rather than articulate its discovery rights in further detail here, OPC refers to and incorporates by reference OPC's Response to the Motion to Quash, filed on April 15, 2011.

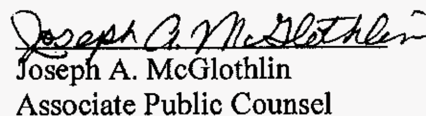
CONCLUSION

FPL's untimely motion and unauthorized comments are rife with argumentative and self-serving assertions regarding substantive issues pending in the full case; FPL devotes the bulk of its efforts to rehearsing the arguments for its final brief in the case. Further, FPL presents its comments in a manner that implies the Prehearing Officer should quash the subpoena because FPL is right on the merits of pending issues. Aside from the fact that the matters to which FPL refers are at issue, its assertions are not germane to the question of whether the Motion to Quash

[3] In an FPSC case cited by OPC in its response to the Motion to Quash, the Prehearing Officer said her role in ruling on a discovery dispute required her to ". . . take the broadest view as to the potential for eliciting information that will lead to the discovery of admissible evidence." Order No. PSC-94-0425-PCO-WS, issued in Docket No. 93880-WS on April 11, 1994.

has demonstrated the deposition subpoena is invalid. As to the reason FPL cited for "weighing in," the motion and comments do nothing to shorten the time necessary to resolve the discovery dispute created by the Motion to Quash; if anything, they have the potential to prolong it. The motion and comments ignore the statutes, rules of court, and agency rules that provide OPC, with broad, expansive discovery rights -- to which FPL's groundless effort to dictate to OPC the scope, manner and sequence of OPC's discovery must yield. The "comments" are unauthorized, FPL's request is untimely, and the "substantial interest" that FPL cites is spurious on its face. The motion should be denied; if it is granted, the comments should be ignored as inconsequential to the decision on the Motion to Quash.

J. R. Kelly
Public Counsel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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing OPC'S RESPONSE TO FPL'S MOTION FOR LEAVE TO SUBMIT COMMENTS ON RAJIV KUNDALKAR'S MOTION TO QUASH OPC'S DEPOSITION SUBPOENA has been furnished by electronic mail and/or U.S. Mail on this 5th day of May, 2011, to the following:

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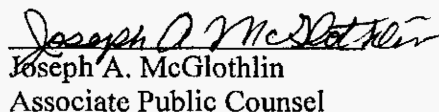

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