

**Eric Fryson**

**From:** Woods, Monica [WOODS.MONICA@leg.state.fl.us]  
**Sent:** Thursday, September 06, 2012 4:56 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** Rehwinkel, Charles; Mcglothlin, Joseph; Christensen, Patty; Kelly, JR; Merchant, Tricia; Noriega.Tarik; 'glenfede@yahoo.com'; 'Brian P. Armstrong, Esq.'; Caroline Klancke; 'Charles Milsted'; 'Dan Larson'; 'John Moyle (jmoyle@moylelaw.com)'; 'John T. Butler (John.Butler@fpl.com)'; 'John T. LaVia (jlavia@gbwlegal.com)'; 'John W. Hendricks'; Keino Young; 'Ken Hoffman (Ken.Hoffman@fpl.com)'; 'Kenneth L. Wiseman'; 'Larry Nelson'; 'Linda S. Quick'; 'Lisa M. Purdy'; 'Mark F. Sundback'; 'Peter Ripley'; 'Qyang Ha'; 'Schef Wright (schef@gbwlegal.com)'; 'Thomas Saporito'; 'Vickie Gordon Kaufman (vkaufman@moylelaw.com)'; 'W. Rappolt'; 'Wade Litchfield'; 'White, Karen'; 'William C. Garner, Esq.'; 'Maria.Moncada@fpl.com'  
**Subject:** OPC's MOTION FOR CLARIFICATION AND/OR RECONSIDERATION OF ORDER NO. PSC-12-0440-PCO-EI  
**Attachments:** OPC's MOTION FOR CLARIFICATION AND-OR RECONSIDERATION OF ORDER NO. PSC-12-0440-PCO-EI.pdf

## Electronic Filing

a. Person responsible for this electronic filing:

Charles J. Rehwinkel, Deputy Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
Tallahassee, FL 32399-1400  
(850) 488-9330  
REHWINKEL.CHARLES@leg.state.fl.us

b. Docket No. 120015-EI

In re: Petition for rate increase by Florida Power & Light Company

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

d. There are a total of 10 pages.

e. The document attached for electronic filing is: OPC's MOTION FOR CLARIFICATION AND/OR RECONSIDERATION OF ORDER NO. PSC-12-0440-PCO-EI. Thank you for your attention and cooperation to this request.

Monica R. Woods  
Administrative Assistant  
Office of Public Counsel  
Phone #: 488-9330  
Fax# :487-6419

DOCUMENT NUMBER-DATE

06046 SEP-6 2012

FPSC-COMMISSION CLERK

9/6/2012

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for rate increase by Florida  
Power & Light Company

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Docket No: 120015-EI

Filed: September 6, 2012

**OPC's MOTION FOR CLARIFICATION AND/OR RECONSIDERATION OF  
ORDER NO. PSC-12-0440-PCO-EI**

The Citizens of the State of Florida, through the Office of Public Counsel ("OPC" or "Citizens"), move this Commission, pursuant to Rule 25-22.0376, Florida Administrative Code, to clarify Order No. PSC-12-0440-PCO-EI ("Second OEP") or, in the alternative, to reconsider the Second OEP. In support, the Citizens state as follows:

1. OPC believes that, in authorizing certain data requests as part of the Second OEP, the Chairman intended that the data requests would be served on, and responded to by, FPL and the other signatories to the purported settlement agreement that is the subject of a pending Joint Motion For Approval. This understanding is consistent with the following fundamental considerations: (1) "data requests" are not discovery, Instead, they are a form of informal inquiry that is specific to the Commission's jurisdiction over, and ability to require information from, utilities subject to its jurisdiction. The Commission has no such jurisdiction over OPC; (2) while OPC has objected to, and continues to object to, the parallel proceeding on what it views as a spurious agreement, the stated purpose of the parallel proceeding is to consider Joint Movants' document. OPC has no burden to provide information that signatories could attempt to use to support the purported settlement. Clarification to confirm OPC's understanding that the intent of the Second OEP was not to subject OPC to an obligation to respond to data requests from the signatories will render OPC's alternative Motion for Reconsideration unnecessary.

DOCUMENT NUMBER-DATE

06046 SEP-6 2012

FPSC-COMMISSION CLERK

2. If and to the extent the Second OEP purports to subject OPC to the requirement that it respond to data requests during the actual litigation and post-hearing briefing stage of the hearing (and the preparation for, and conduct of, the hearings in Docket No. 120009-EI—Nuclear Cost Recovery Proceeding), the Commission should reconsider and recede from the Second OEP. The Commission committed fundamental legal and factual error in asserting that it could create and improve on OPC a data request mechanism half-way through the proceeding which had the unintended result of enabling parties like FPL to use it to harass OPC while OPC is actively and diligently involved in litigating the rate case as contemplated by the Prehearing Orders<sup>1</sup>.
  
3. The OPC's limited Motion for Reconsideration does not seek to engage in a discussion about the legitimacy of the Commission even entertaining the purported settlement under the circumstances of its creation and submittal. However, for preservation of the record in the hearing on the March 19, 2012 Petition of FPL, OPC notes that it has advanced arguments in opposition to the FPL stipulation and its consideration in oral motions, arguments and pleadings since August 16<sup>th</sup>. The OPC reaffirms and reserves all arguments and objections raised in those submittals and do not waive them by this narrow Motion for Reconsideration<sup>2</sup>.

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<sup>1</sup> Order No. PSC-12-0143-PCO-EI, issued March 26, 2012 is the Order Establishing Procedure ("OEP") and Order No. PSC-12-0428-PHO-EI, issued August 17, 2012 is the Prehearing Order. Together these orders are the fundamental orders upon which the OPC has relied in allocating resources and planning for the conduct of the hearing.

<sup>2</sup> See Joint Initial and Preliminary Response to Motion to Suspend Hearing by the Office of Public Counsel and the Florida Retail Federation (August 16, 2012); Response of Office of Public Counsel and Florida Retail Federation to Joint Motion to Suspend Hearing (August 17, 2012); Oral Argument on August 20, 2012 (Hearing TR 15-32); Response of Office of Public Counsel to the Motion for Approval Submitted by FPL/SFHHA/FIPUG/FEA (August 22, 2012); Office of Public Counsel's Motion to Dismiss the Settlement Submitted by FPL /SFFHA/FIPUG/FEA or

4. The mistake(s) that provides the basis for reconsideration are that (1) the Commission failed to recognize that it lacks the legal authority to impose the obligation on OPC to respond to the data request mechanism intended for regulated entities; (2) the data request mechanism has not time or opportunity to meaningfully object and does not comport with the rudiments of due process applicable to OPC; (3) the Commission lacks the legal authority to delegate its power to obtain information (from a utility) via data requests to a utility or any other party, and as a result such “data requests” cannot be used by one private party to compel OPC to provide “data” regarding a purported settlement to which it is not a signatory and to which it is opposed; (4) “discovery-like” data requests sent by a proponent of the purported settlement to the OPC are irrelevant in a parallel proceeding in which evidence is neither allowed nor contemplated; (5) the Commission failed to comprehend the disruptive and burdensome impact of allowing FPL – with a known and participating staff in the Docket of at least 12 attorneys -- to serve data requests on the Public Counsel while all OPC’s available and very limited resources are devoted to preparing for and litigating the hearing, briefing it, preparing for the NCRC hearing and then litigating and briefing that case.

5. The fundamental error assigned to the Second OEP is found in the second ordered paragraph:

ORDERED that the parties shall respond to data requests as set forth more specifically in the body of this order.

6. To the extent that this directive is intended to affirmatively mandate the OPC to respond to discovery in the form of any data requests at all, much less in five days or less, the

Commission lacks authority to do so. The corollary portion in the body of the order which must also be reconsidered and receded from reads:

Consistent with prior considerations of settlement agreements, our staff and the parties will be permitted a limited time to ask data requests. Parties are directed to respond to data requests within five days or less. Parties are limited to 100 data requests. Information gathered by data request must be completed prior to the date set by the Commission to consider the Settlement Agreement. Information obtained through data requests may be used by the parties in their oral arguments and by staff in advising the Commission. No information obtained through data requests may be used during the evidentiary proceeding in this docket.

7. To the extent the Commission was directing its own staff to engage in limited information gathering, the data mechanism and five day turnaround is completely understandable. To the extent the Commission seeks to enable non-signatories to inquire of signing parties who have an interest in getting Commission approval of their self-negotiated deal, and hence have an incentive to cooperate in a hastily conceived and otherwise unlawful “discovery-like process”, the process is understandable. However, to the extent that the Second OEP purports to impose an obligation on OPC (and other non-signatories) who have no reason to voluntarily submit to “data requests” at all, much less under impossible working conditions, while sacrificing a holiday break, and in aid of FPL meeting its burden of proof to have its purported settlement approved, its authorization is not recognized in the law.
  
8. The Florida Rules of Civil Procedure do not contemplate the tribunal spontaneously creating, *ab initio*, a “quasi-discovery” mechanism in a hearing where no evidence is to be taken and with no notice or opportunity to be heard on the mechanism itself. The Commission’s citation to Rule 28-106.211, Florida Administrative Code, on “discovery”

is misplaced and further error. The Rule does contemplate the presiding officer issuing orders to “effectuate discovery” (designed to lead to admissible *evidence*) pursuant to the Florida Rules of Civil Procedure. In this case, the discovery cut-off has passed, data requests do not constitute “discovery,” and no evidence is to be taken by the Commission in whatever consideration it may give to the August 15<sup>th</sup> stipulation that FPL filed. Rule 1.280(b)(1), Florida Rules of Civil Procedure provide that:

In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*

[Emphasis added]

As a matter of law no discovery can be had, the reference to Rule 28-106.211, Florida Administrative Code is misplaced, and reliance on it as authority to require data request responses from the OPC is in error.

Even in the circumstances contemplated by the cited Rule, an order “effectuating discovery” must assumedly come from a need by the agency or tribunal or a stated need to avail a party seeking to conduct discovery accompanied by a request for acceleration in responses. The Commission has stated it does not intend to take evidence and has denied a motion to reconsider that procedural ruling. Hearing TR at 4647. FPL and the other signatories did not request the ability to seek discovery. The Second OEP expressly

prohibits an evidentiary hearing. As a matter of law, data requests cannot lead to evidence and thus are irrelevant – especially insofar as facilitating any burden FPL would have to meet to show that a stipulation that the OPC did not participate in is in the public interest.

9. Furthermore, the lack of explicit ability of the OPC to effectively provide meaningful objection to the questions in the data requests is a fatal flaw in the Second OEP. The absence of a meaningful opportunity to object does not comport with the minimum requirements of due process. Genuine discovery is subject to the protection of Rule 1.280(c), Florida Rules of Civil Procedure, which provides for access to protective orders to protect a party from annoyance, embarrassment, oppression or undue burden or expense. The data request mechanism exists in law and Commission practice for the sole purpose of discharging the Commission's own powers to compel a public utility to produce records and information. See, Order No. PSC-12-0371-PCO-WU, issued July 18, 2012, In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.<sup>3</sup> Under those legitimate circumstances for the Commission's own exercise of its statutorily granted powers such a rudimentary due process protection need not be applied in the standard 5-7 day turnaround that frequently accompanies staff data requests. However, for a party like the OPC that is not regulated by or subject to the records productions powers of the Commission, some level of due process in discovery is required but not afforded by the Second OEP.

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<sup>3</sup> The analogous provisions for purposes of electric utilities is Sections 366.04(2)(f) and 366.05(9), Florida Statutes.

10. The Second OEP also is an unlawful delegation of the Commission's authority to compel utilities to produce records pursuant to Sections 366.04(2)(f) and 366.05(9), Florida statutes. The Commission and only the Commission can conduct such informal information gathering under the authority that the Legislature has granted only to the Commission. It is well settled that in the absence of statutory authority, a public officer cannot delegate his powers, even with the approval of the court. *State v. Inter-American Center Authority*, 84 So. 2d 9, 13-14 (Fla. 1955). The Commission cannot delegate its own document production powers to a private entity to use it in asking another party for information in an attenuated version of the unlawful delegation. Thus, the availing to FPL or another private entity of the data request mechanism with a grant of up to 100, with a response mandate of "five days or less" is an unlawful delegation and otherwise arbitrary and capricious and an abuse of discretion. This is a legal error and requires that the data request aspect of the Second OEP be reconsidered and receded from as it relates to the OPC.

11. The Commission should further find as a basis for reconsideration that it overlooked the hardship and undue burden the data request mechanism would place on the OPC. The stipulation among the small group of intervenors has already injected a significant amount of continuing disruption into the OPC workload even without the data request obligation. From 5:00 pm on August 15, 2012 until late Sunday August 19th, and even up through the morning of the scheduled hearing on August 20th, the OPC was required to devote significant attorney time (3-4 attorneys for 5 days entailing spending upwards of 100 man-hours) just on procedural issues related solely to the surprise filing of the stipulation. Critical hearing preparation time was lost, requiring OPC attorneys to shift final preparation to evening hours during the hearing – even as FPL sought to have

witnesses taken out of order to return to South Florida to prepare for a storm (Isaac) that ultimately struck New Orleans. OPC accommodated this request with difficulty. Against this background, the Commission issued the Second OEP on day six (August 27<sup>th</sup>) of the hearing. On the very next day, FPL eagerly announced on the record at 7:05 pm (Hearing TR 3639) that “we do have some initial discovery that we are serving tonight on Office of Public Counsel reflective of that order” [referring to the Second OEP].

12. FPL then served what can be described as harassing, attack *interrogatories* – not even data requests – with a demand that they be answered under oath in five days. Predictably, the five days (assuming Wednesday service ) encompassed the remaining three days of the hearing (which went until 7:00 pm and 12:30 am on Wednesday and Thursday) and the three day Labor Day weekend. Rather than even look like it intended to facilitate the information gathering process that was no doubt intended by the Commission, FPL chose to turn the data request process into a vindictive weapon designed to distract OPC in its resource-stretched state and harass it night, day, weekend and holiday.<sup>4</sup> FPL’s illustrative, abusive conduct shows the key mistake of fact and/or law that requires reconsideration of and retreat from the data request to OPC aspect of the Order.

13. The primary burden imparted by the Second OEP is that it has interjected undue burden into a very tight procedural schedule that had been carefully worked out over months of discussions. This schedule revision had seen the NCRC hearing moving from August 6-

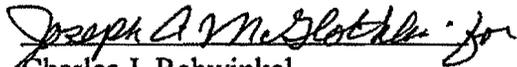
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<sup>4</sup> In a letter dated September 4, 2012, OPC informed FPL that its interrogatories were unauthorized and of no effect. However, in light of the fact that OPC’s request for clarification and objections to the Second OEP had not been filed at the time, in the spirit of cooperation pending the ruling on this Motion, OPC voluntarily directed FPL to OPC’s positions on certain significant provisions concerning the terms of the purported settlement in the public record.

10, 2012 (during critical last week before the true March 19<sup>th</sup> petition hearing discovery cutoff date of August 13<sup>th</sup>) into the September 10-13, 2012 time slot while extending the brief in Docket 120015-EI from September 14<sup>th</sup> to September 21<sup>st</sup>.<sup>5</sup> Concurrently, the same schedule adjustments contemplated a September 5, 2012 hearing date in the NCRC to accommodate FPL witness' schedule. Needless to say the OPC is stretched to the maximum in a very critical 30 day stretch between now and the October 1, 2012 brief deadline in the NCRC hearing. There being only so many hours in a day, mandating OPC to be at FPL or any other party's disposal to respond to questions imposes an undue hardship, whether it is legally authorized or not.

For the above reasons, Citizens request that the Commission (a) confirm that the obligation to respond to data request contained in the Second OEP does not apply to OPC (b) alternatively, reconsider the Second OEP and delete any reference to obligating the OPC to respond to data requests related to consideration of the August 15, 2012 stipulation between FPL/SFHHA/FEA.

Respectfully Submitted,

  
Charles J. Rehwinkel  
Deputy Public Counsel

Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
Tallahassee, FL 32399-1400  
(850) 488-9330

Attorney for the Citizens of the  
State of Florida

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<sup>5</sup> See Order No. PSC-12-0439-PCO-EI, Issued August 27, 2012.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and foregoing OPC's MOTION FOR RECONSIDERATION OF ORDER NO. PSC-12-0440-PCO-EI has been furnished by hand delivery on this 6<sup>th</sup> day of September, 2012, to the following:

Caroline Klancke  
Keino Young  
Florida Public Service  
Commission  
Office of the General Counsel  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

John T. Butler  
Ken Hoffman  
R. Wade Litchfield  
Florida Power & Light Company  
700 Universe Boulevard  
Juno Beach, FL 33408-0420

Larry Nelson  
312 Roberts Road  
Nokomis, FL 34275

Vickie Gordon Kaufman  
Jon C. Moyle  
c/o Moyle Law Firm  
118 North Gadsden Street  
Tallahassee, FL 32301

Kenneth L. Wiseman  
Mark F. Sundback  
J. Peter Ripley  
Andrews Kurth LLP  
1350 I Street, NW, Suite 1100  
Washington, DC 20005

Glen Gibellina  
7106 28<sup>th</sup> Street East  
Sarasota, FL 34243

Karen White  
Federal Executive Agencies  
c/o AFLOA/JACL-ULFSC  
139 Barnes Drive, Suite 1  
Tyndall Air Force Base, FL 32403

Robert Scheffel Wright  
John T. LaVia  
Gardner Law Firm  
1300 Thomaswood Drive  
Tallahassee, FL 32308

John W. Hendricks  
367 S. Shore Drive  
Sarasota, FL 34234

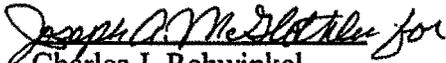
Thomas Saporito  
6701 Mallards Cove Rd., Apt. 28H  
Jupiter, FL 33458

Quang Ha/ Paul Woods/ Patrick  
Ahlm  
28100 Bonita Grande Drive, Suite  
200  
Bonita Springs, FL 24135

Linda S. Quick  
SFHHA  
6030 Hollywood Blvd, Suite 140  
Hollywood, FL 33024

J. Martin Hayes  
106 East College Avenue  
Suite 1200  
Tallahassee, FL 32301

William C. Garner  
Brian P. Armstrong  
Nabors, Giblin & Nickerson, P.A.  
1500 Mahan Drive, Suite 200  
Tallahassee, FL 32308

  
Charles J. Rehwinkel  
Deputy Public Counsel