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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. 99-462-EU) FILED: JANUARY 4, 2000

OKEECHOBEE GENERATING COMPANY'S RESPONSE TO FLORIDA POWER & LIGHT COMPANY'S SECOND MOTION TO COMPEL

Okeechobee Generating Company, L.L.C. ("OGC"), pursuant to Uniform Rule 28-106.204, Florida Administrative Code, and the Order Establishing Procedure, as revised, hereby respectfully submits this Response to Florida Power & Light Company's ("FPL") Second Motion to Compel OGC to Respond to FPL's Third and Fourth Sets of Interrogatories and Third Request for Production of Documents ("FPL's Second Motion to Compel"). As explained herein, FPL's Second Motion to Compel should be denied. In support of this response, OGC says:

ARGUMENT

FPL's Second Motion to Compel can be separated into two categories: 1) a general request that OGC be compelled to respond to discovery requests with confidential, proprietary business information; and 2) a request for OGC to respond to interrogatories directed to OGC's expert, Dr. Dale M. Nesbitt. OGC will address each category separately in this response.

I. OGC SHOULD NOT BE COMPELLED TO DIVULGE CONFIDENTIAL, PROPRIETARY BUSINESS INFORMATION.

By way of background, on November 12, 1999, FPL served OGC with its Third Set of Interrogatories (Nos. 72-118), Fourth Set of

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Interrogatories (Nos. 119-199), and Third Request for Production of Documents (Nos. 61-67) (hereinafter collectively referred to as "FPL's Discovery Requests"). On November 22, 1999, OGC timely objected to certain of FPL's Discovery Requests. On December 13, 1999, OGC timely responded to FPL's Discovery Requests. OGC produced to FPL all documents responsive to FPL's requests to produce that do not contain confidential, proprietary business information¹ or privileged documents and responded to FPL's interrogatories without disclosing confidential, proprietary business information.

In its Second Motion to Compel, FPL makes the procedural argument that OGC's objections to FPL's Discovery Requests are not a substitute for filing a motion for protective order and that OGC must therefore respond to FPL's Discovery Requests. There are several flaws in FPL's procedural argument.

First, nothing in the Order Establishing Procedure requires that OGC file a motion for protective order with regard to confidential, proprietary business information. Rather, the Order Establishing Procedure only requires that OGC file objections to FPL's Discovery Requests within ten days of service of the requests--precisely what OGC did in this case.

Second, contrary to FPL's assertions, nothing in Commission Rule

¹As a courtesy to FPL, rather than merely making available for inspection the documents responsive to FPL's requests to produce, OGC provided copies of the documents directly to FPL via hand delivery on December 14, 1999.

25-22.006, F.A.C., requires that OGC file a Motion for Protective Order (as opposed to filing written objections) to seek protection of confidential, proprietary business information.² In fact, objecting to discovery requests that seek confidential, proprietary business information is wholly consistent with established Commission precedent. See In re: Determination of the Cost of Basic Local Telecommunications Service Pursuant to Section 364.025, Florida Statutes, 98 FPSC 10:44 (hereinafter "Cost of Local Service") (wherein AT&T objected to the production of documents on the basis that the documents contained proprietary information). Interestingly, in this docket, FPL itself has objected to discovery propounded by OGC on the basis that the discovery requests seek "confidential, proprietary business information." See FPL's Objections to OGC's First Request for Production of Documents Nos. 1-26, First Set of Interrogatories (1-85) and First Request for Admissions (1-44) (filed November 15, 1999). Both OGC's and FPL's objections are procedurally proper.

Lastly, as FPL concedes in its Second Motion to Compel, the case law makes clear that filing written objections to discovery requests is an acceptable substitute for a motion for protective order. See Slatnik v. Leadership Housing Systems of Florida, Inc., 368 So. 2d 79, 80 (Fla. 4th DCA 1979); see also Cabrera v. Evans, 322 So. 2d 559 (Fla. 2d DCA 1975).

²Rule 25-22.006(6)(a), F.A.C., provides that a party may request a protective order limiting discovery of confidential, proprietary business information.

The interrogatories to which OGC has objected because they seek confidential, proprietary business information ask for two types of such confidential information: detailed project cost information (Interrogatory No. 82 regarding specific cost of capital information and Interrogatory No. 83 regarding detailed development cost information) and information regarding the terms and conditions of the business arrangement between OGC and Gulfstream Natural Gas System (Interrogatories Nos. 89-92, 96-97, and 118 and Production Request No. 65).³ With respect to detailed project cost information, OGC has objected to providing such information because its disclosure to FPL would be directly adverse to OGC's competitive, economic interests in its future business activities in Florida and directly adverse to the business activities of OGC's affiliates in other venues, where those affiliates are direct business competitors of affiliates of FPL, primarily FPL Energy and its affiliates. Disclosure of OGC's detailed project cost information would give FPL an unfair and undue advantage in future negotiations with OGC and in future negotiations with potential wholesale customers of OGC.

The terms and conditions of the business arrangement between OGC and Gulfstream are set forth in a contract identified as the Precedent Agreement. (A redacted copy of the Precedent Agreement has already

³OGC has fully answered Interrogatories Nos. 89 and 97 except for specific information regarding the business arrangement between OGC and Gulfstream and has fully answered Interrogatory No. 96. Production Request No. 65 is essentially the document request counterpart of Interrogatory No. 118.

been furnished to FPL.) The disclosure of the terms and conditions of the Precedent Agreement would be directly adverse to the competitive economic interests of both OGC and Gulfstream. The information sought by FPL relates to (1) the conditions precedent to the execution of a definitive firm gas transportation agreement between OGC and Gulfstream, (2) pricing of the firm gas transportation service to be provided by Gulfstream to OGC, and (3) other service options. This information is extremely sensitive, confidential, and proprietary business information to both OGC and Gulfstream. The conditions precedent are individually negotiated between Gulfstream and each of its customers, such as OGC. Other service options are likewise provisions that are individually negotiated between Gulfstream and each of its customers. Because the conditions precedent and the other service options are individually negotiated items, they reflect the business strategies of both OGC and Gulfstream. Disclosure of these strategies would be adverse to both OGC and Gulfstream.

Finally, pricing terms are perhaps the most sensitive of all terms of such agreements. Disclosure would be adverse to OGC's interests for the same reasons noted above: it would give FPL an unfair and undue advantage over OGC in negotiations for power purchases from OGC and in negotiations by FPL for sales to other potential wholesale customers of OGC. Disclosure on even a limited basis (e.g., to FPL only) would be adverse to Gulfstream's interests because it would similarly give FPL an undue advantage in negotiations

with Gulfstream for gas transportation service. If the information were to be divulged to other entities than FPL, it would be even more deleterious to Gulfstream's interests because it would directly impair Gulfstream's bargaining position with other potential gas transportation customers (e.g., Florida Power Corporation or Tampa Electric Company, both of whom are parties to this proceeding) and impair Gulfstream's competitive position with respect to competing gas pipeline companies.

In sum, OGC properly objected to those of FPL's Discovery Requests that call for confidential, proprietary business information. OGC then responded by answering the interrogatories without relying on confidential, proprietary business information, and by providing all documents in its possession or control responsive to FPL's requests to produce that do not contain confidential, proprietary business information. The Commission's Order Establishing Procedure and applicable rules require nothing more.

II. FPL'S ATTEMPT TO COMPEL OGC'S EXPERT WITNESS TO ANSWER WRITTEN INTERROGATORIES SHOULD BE REJECTED.

As a preliminary matter, in its Second Motion to Compel, FPL fails to note that OGC objected to FPL's entire Fourth Set of Interrogatories (Nos. 119-199) because they exceed the number of interrogatories, including subparts, authorized by the Order Establishing Procedure in this case. FPL did not seek authorization

from the Commission prior⁴ to propounding the unauthorized interrogatories on OGC and, thus, OGC is under no obligation to respond to the unauthorized interrogatories. Accordingly, FPL's attempt to compel responses to unauthorized interrogatories is procedurally improper and should be denied. FPL must first properly propound its Fourth Set of Interrogatories before it can attempt to compel responses to those interrogatories.

Rule 1.280(b)(4)(A), F.R.C.P., which is made specifically applicable to this proceeding by Uniform Rule 28-106.206, Florida Administrative Code, provides as follows:

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b) (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) By interrogatories a party may require any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed in accordance with rule 1.390 without motion or order of court.

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

⁴On December 6, 1999, FPL filed its Motion for Leave to Propound Additional Interrogatories. OGC responded in opposition to this motion on December 13, 1999.

1. The scope of employment in the pending case and the compensation for such service.
2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.
3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.
4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(4)(C) of this rule concerning fees and expenses as the court may deem appropriate.

(Emphasis supplied.) Rule 1.280(b)(4)(A), Florida Rules of Civil Procedure ("F.R.C.P."), limits the discovery of facts known and opinions held by testifying expert witnesses that may be obtained through written interrogatories to certain specifically enumerated information. In its Second Motion to Compel, FPL does not, and cannot, argue that the limitation on written discovery in Rule 1.280(b)(4)(A), F.R.C.P., does not apply in this proceeding. Rather, FPL requests that the Prehearing Officer exercise his "discretionary authority" under Rule 1.280(b)(4)(A), F.R.C.P., to order "further discovery" from OGC's expert witness. There are several flaws in

FPL's argument.

First, FPL has failed to state a legitimate basis for requiring OGC's expert witness to respond to FPL's improper interrogatories. FPL asserts that it requires this extraordinary discovery from OGC's expert witnesses to allow FPL to conduct "far more meaningful depositions." FPL's Second Motion to Compel at 6. OGC respectfully suggests that FPL will be able to conduct meaningful depositions based on the over 63 megabytes (encompassing thousands of pages) of data that OGC has already provided in response to FPL's discovery requests. OGC further suggests that FPL's attempt to require OGC's experts to respond to the unauthorized and improper flood of interrogatories represents clear harassment of OGC and its expert witnesses. Requiring OGC's experts to respond to hundreds of interrogatories⁵ will unavoidably interfere with OGC's preparation for the final hearing in this case.

Second, FPL's citation to the provision of Rule 1.280(b)(4) that allows a presiding officer to permit "further discovery" is an incomplete citation. Rule 1.240(b)(4), F.R.C.P., authorizes the presiding officer to order further discovery by other means subject to Rule 1.280(b)(4)(C), F.R.C.P. Rule 1.280(b)(4)(C), F.R.C.P., provides:

Unless manifest injustice would result, the court
shall require that the party seeking discovery

⁵FPL is seeking leave to propound a total of 400 interrogatories.

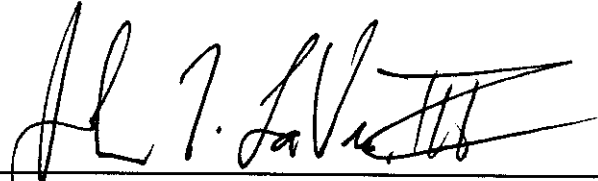
pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and concerning discovery from an expert obtained under subdivision (b)(4)(A) of this rule the court may require, and concerning discovery obtained under subdivision (b)(4)(B) of this rule shall require, the party seeking discovery to pay the other party a fair part of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Thus, if FPL's motion to compel OGC's expert witnesses to respond to unauthorized written interrogatories is granted, FPL must pay the expert witnesses' fees for responding to the subject interrogatories. For answers to these interrogatories, which relate to the Altos Electric and Gas Models, those fees would include the total number of hours required to respond to the interrogatories multiplied by the applicable hourly rate of the responding Altos personnel, plus any additional costs that may be involved. Nowhere in its papers has FPL agreed to pay these costs.

CONCLUSION

For the reasons described above, FPL's Second Motion to Compel should be denied in its entirety. However, if the Commission elects to order that additional written discovery be allowed of OGC's expert witnesses, the Commission should order FPL to pay the expert witnesses' reasonable fees and costs for responding to the additional discovery.

Respectfully submitted this 4th day of January, 2000.



Jon C. Moyle, Jr.
Florida Bar No. 727016
Moyle Flanigan Katz Kolins
Raymond & Sheehan, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, Florida
Telephone (850) 681-3828
Telecopier (850) 681-8788

and

Robert Scheffel Wright
Florida Bar No. 966721
John T. LaVia, III
Florida Bar No. 853666
LANDERS & PARSONS, P.A.
310 West College Avenue (ZIP 32301)
Post Office Box 271
Tallahassee, Florida 32302
Telephone (850) 683-0311
Telecopier (850) 224-5595

Attorneys for Okeechobee Generating
Company, L.L.C.

CERTIFICATE OF SERVICE
DOCKET NO. 991462-EU

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 4th day of January, 2000.

William Cochran Keating, IV, Esq.*
Florida Public Service Commission
2540 Shumard Oak Boulevard
Gunter Building
Tallahassee, FL 32399

Lee L. Willis, Esq.
James D. Beasley, Esq.
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302

Matthew M. Childs, Esq.*
Charles A. Guyton, Esq.*
Steel Hector & Davis
215 South Monroe Street
Suite 601
Tallahassee, FL 32301
(Florida Power & Light)

Mr. Paul Darst
Dept. of Community Aff.
Division of Local
Resource Planning
2740 Centerview Drive
Tallahassee, FL 32399

William G. Walker, III
Vice President, Regulatory Aff.
Florida Power & Light Company
9250 West Flagler Street
Miami, FL 33174

Mr. Scott A. Goorland
Florida Dept. of
Environmental Protection
3900 Commonwealth Blvd.
MS 35
Tallahassee, FL 32399

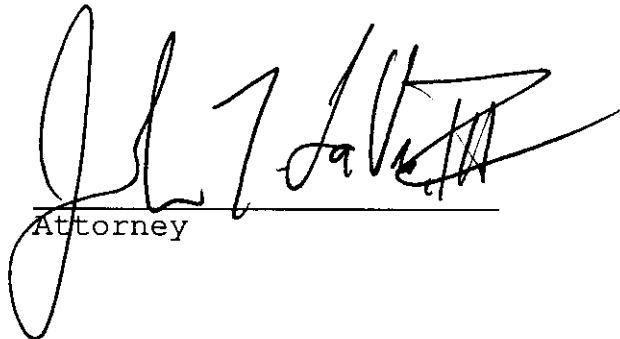
Gail Kamaras, Esq.
Debra Swim, Esq.
LEAF
1114 Thomasville Road
Suite E
Tallahassee, FL 32303-6290

Ms. Angela Llewellyn
Administrator
Regulatory Coordination
Tampa Electric Company
Post Office Box 111
Tampa, FL 33601-2100

Gary L. Sasso, Esquire
Carlton Fields
One Progress Plaza
200 Central Avenue, Ste. 2300
St. Petersburg, FL 33701
(Florida Power Corporation)

James A. McGee, Esq.
Florida Power Corporation
P.O. Box 14042
St. Petersburg, FL 33733

Harry W. Long, Jr.
Tampa Electric Company
P.O. Box 111
Tampa, FL 33601



Attorney