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**ORIGINAL**  
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NOV 13 PM 3:30

RECORDS AND  
REPORTING

November 13, 1998

HAND DELIVERED

Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P.  
FPSC Docket No. 981042-EU

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Tampa Electric Company's Motion for a Protective Order.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning same to this writer.

Thank you for your assistance in connection with this matter.

RECEIVED & FILED

Sincerely,

FPSC-BUREAU OF RECORDS

*James D. Beasley*  
James D. Beasley

- MCK \_\_\_\_\_
- NFA 2
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- DMU \_\_\_\_\_
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- SEC 1
- WAS \_\_\_\_\_
- OTH \_\_\_\_\_

JDB/pp

Enclosures

cc: All parties of record (w/enc.)

DOCUMENT NUMBER-DATE

12756 NOV 13 98

FPSC-RECORDS/REPORTING

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition for Determination )  
of Need for an Electrical Power Plant in )  
Volusia County by the Utilities )  
Commission, City of New Smyrna Beach, )  
Florida, and Duke Energy New Smyrna )  
Beach Power Company Ltd., L.L.P. )  
\_\_\_\_\_ )

DOCKET NO. 981042-EU  
FILED: November 13, 1998

**TAMPA ELECTRIC COMPANY'S  
MOTION FOR A PROTECTIVE ORDER**

Pursuant to Fla. Admin. Code Rules 28-106.204 and 28-106.206, and Rule 1.280(c), Fla. R. Civ. P., Tampa Electric Company ("Tampa Electric" or "the company") moves the Commission for the entry of a protective order and, as grounds therefor, says:

**I. As to All Discovery Sought in the Notice of Taking Deposition**

1. On November 9, 1998 at approximately 5:00 p.m. Petitioners, Utilities Commission, New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd, L.L.P., delivered to counsel for Tampa Electric a Notice of Taking Deposition of Tampa Electric, the corporate entity, ("the Notice") which requested the company to designate a corporate representative or representatives to give testimony on a broad range of open-ended topics on the last day for discovery in this proceeding. Rule 1.310(b) requires a party desiring to take the deposition of any person to give reasonable notice in writing. Petitioners' Notice to Tampa Electric is not reasonable, particularly in view of the scope of the broadly stated subjects listed in the Notice. Had Petitioners wanted to inquire at this late date in this proceeding about a succinct factual matter a different result might be warranted. That is not the case here. Lengthy treatises could be written on the broad areas listed in the Notice. Petitioners have simply waited

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too late to reasonably ask Tampa Electric to produce as yet unidentified witnesses to address a multitude of broadly worded issues on the last day for discovery.

2. Attempting to respond to the eleventh hour, overly broad requests set forth in the Notice would clearly cause Tampa Electric undue burden and expense and a request to do so amounts to harassment.

3. The deposition noticed by Petitioners is a fishing expedition which serves no purpose other than harassment and annoyance. A fishing expedition is not proper discovery. City of Miami v. FPSC, 226 So.2d 217 (Fla. 1969).

4. The deposition cannot be used for cross-examination or witness impeachment because Tampa Electric has filed no testimony in this proceeding. Under these circumstances conducting a deposition would serve no useful purpose.

5. Under Fla. R. Civ. P. Rule 1.280(c) the above deficiencies in the Notice warrant the issuance of an order that the discovery sought therein not be had at all, and Tampa Electric respectfully requests a ruling to that effect.

## **II. As to Items 1-5 and 9**

6. The information listed in Items 1-5 and 9 in the Notice is totally irrelevant to the subject matter of the pending action and, therefore, is beyond the scope of permissible discovery under Fla. R. Civ. P. Rule 1.280(b)(1). Discovery must be relevant to the subject matter of the proceeding and reasonably calculated to lead to the discovery of admissible evidence. Much of what Petitioners seek from Tampa Electric is not relevant to this proceeding. The focus of this proceeding is a narrow one – whether there is a need for the proposed power plant and other matters within the Commission's jurisdiction which may be affected by a determination of need. The irrelevant topics requested in the Notice are set forth below:

Item 1: (The status of merchant power plants in states other than Florida)

Tampa Electric's Response: The status of merchant plants in other states (whatever that means) has no relevance at all to the need for the power plant Petitioners are proposing in this proceeding. Just because some unidentified "status" with respect to merchant plants may or may not exist in another state has nothing whatsoever to do with whether Petitioners propose a power plant is needed in Florida. The information requested in Item 1 has nothing to do with any of the issues contained in Staff's Final List of Issues in this docket, dated November 6, 1998, which was issued following the Prehearing Conference. In any event, there are other means by which Petitioners can discover the status of merchant plants outside Florida without harassing Tampa Electric. The status of merchant plants elsewhere is not a required element of proof in Petitioners' case and has not been put at issue by Tampa Electric.

Item 2: (TECO's or any of its affiliate's, direct or indirect ownership interests in "qualifying facilities," within the meaning of the Public Utilities Regulatory Policies Act, or in "exempt wholesale generators," within the meaning of the Energy Policy Act of 1992 and the Public Utility Holding Company Act of 1935.)

Tampa Electric's Response: This information, likewise, is totally irrelevant to any issue contained in Staff's Final List of Issues. Whether Tampa Electric or any affiliate owns QFs or EWGs is totally irrelevant and immaterial to this proceeding. Certifying need for the proposed power plant will in no way be affected by Tampa Electric's or its affiliates' ownership of such facilities and Tampa Electric or its affiliates ownership of such facilities is not a matter a subject to Commission jurisdiction. As such, the requested

information is beyond the scope of admissible evidence under Fla. R. Civ. P. Rule 1.280(b)(1) and will not lead to relevant information.

Item 3: (retail and wholesale competition in the electric power industry)

Tampa Electric's Response: This information, likewise, is irrelevant to any issue contained in Staff's Final List of Issues. Neither retail nor wholesale competition in the electric power industry are matters at issue in this proceeding. These are matters clearly beyond the Commission's scope of jurisdiction and beyond the scope of this proceeding. Consequently, requiring Tampa Electric to respond to questions in this broad area represents nothing more than harassment. The requested information is beyond the scope of admissible discovery under Fla. R. Civ. P. Rule 1.280(b)(1) and will not lead to relevant information.

Item 4: (the status and development of wholesale electric power markets in Florida and in states other than Florida)

Tampa Electric's Response: Item 4, likewise, is irrelevant to the issue set forth in Staff's Final List of Issues. This Commission has no jurisdiction regarding wholesale electric power markets in Florida or outside of Florida. The status and development of wholesale power markets are matters beyond not only the Commission's jurisdiction but also the subject of this case which turns upon the need for a proposed power plant. The requested information is beyond the scope of permissible discovery under Fla. R. Civ. P. Rule 1.280(b)(1) and will not lead to relevant information. If Petitioners are interested in the status and development of wholesale electric markets, other means are available besides seeking Tampa Electric's views. This subject is not a necessary or proper part of Petitioners' proof in this case.

Item 5: (TECO's and any of its affiliates' involvement in, and participation in, wholesale electric power markets in Florida and in states other than Florida)

Tampa Electric's Response: This request, likewise, pertains to matters beyond the Commission's jurisdiction, i.e., wholesale electric power markets whether in Florida or outside this state. Such matters are not related to any of the issues involved in this proceeding. They are irrelevant and beyond the scope of permissible discovery under Fla. R. Civ. P. Rule 1.280(b)(1).

**III. As to Items 6, 7, 8 and 10**

7. Tampa Electric has filed no testimony in this proceeding. Consequently, as stated earlier with regard to all of the listed items, the answers to questions relating to the categories of information described in Items 6, 7, 8 and 10 could not be used in cross-examination or to impeach witnesses who don't exist. Providing a corporate representative to answer these questions would be a useless exercise and would serve no purpose other than harassment to the prejudice of the company. This deposition should not be permitted.

8. Pursuant to the Uniform Rules of Procedure Tampa Electric has conferred, or attempted to confer, with all other parties of record in this docket relation to this Motion. Set forth below in an indication as to each party whether the party has an objection to the Motion:


STAFF: does not object; FECA: does not object; FPC: could not reach; FPL: does not object; GULF POWER: does not object; LEAF: does not object; PETITIONERS: object.

WHEREFORE, Tampa Electric requests the issuance of a protective order that discovery not be had at all. The information sought in Items 1, 2, 3, 4, 5 and 9 of the Notice irrelevant to the subject matter of this proceeding. With respect to all items in the Notice, Tampa Electric has

filed no testimony in this proceeding. Answers to deposition questions could not be used in conducting cross-examination or impeaching witnesses that don't exist. Under these circumstances the deposition would be a useless exercise and should not be permitted.

DATED this 13<sup>th</sup> day of November, 1998.

Respectfully submitted,



LEE L. WILLIS  
JAMES D. BEASLEY  
Ausley & McMullen  
Post Office Box 391  
Tallahassee, Florida 32302

ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Protective Order, filed on behalf of Tampa Electric Company, has been furnished by hand delivery (\*) or U. S. Mail on this 13<sup>th</sup> day of November, 1998 to the following:

Ms. Leslie Paugh\*  
Ms. Grace Jaye\*  
Staff Counsel  
Division of Legal Services  
Florida Public Service Commission  
2549 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Mr. Gary Sasso  
Carlton, Fields Law Firm  
P. O. Box 2861  
St. Petersburg, FL 33731

Ms. Kelly J. O'Brien, Manager  
Duke Energy Power Services, LLC  
5400 Westheimer Court  
Houston, TX 77056

Ms. Michelle Hershel  
Florida Electric Cooperatives  
Association, Inc.  
P. O. Box 590  
Tallahassee, FL 32302

Mr. Charles A. Guyton  
Steel Hector & Davis  
215 South Monroe Street  
Suite 601  
Tallahassee, FL 32301-1859

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

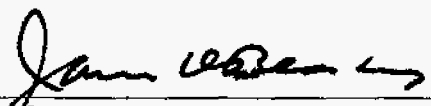
Mr. Steven G. Gey  
College of Law  
Florida State University  
Tallahassee, FL 32306

Mr. Robert Scheffel Wright  
Mr. John T. LaVia, III  
Landers & Parsons, P.A.  
P. O. Box 271  
Tallahassee, FL 32302

Mr. Ronald L. Vaden  
Utilities Director  
Utilities Commission  
City of New Smyrna Beach  
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New Smyrna Beach, FL 32170-0100

Ms. Gail Kamaras, Director  
Legal Environmental Assistance  
Foundation, Inc.  
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Tallahassee, FL 32302-6290

Mr. Jeffrey Stone  
Beggs & Lane  
P. O. Box 12950  
Pensacola, FL 32576

  
\_\_\_\_\_  
ATTORNEY