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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Determination of )  
Need for an Electrical Power Plant in ) DOCKET NO. 99-1462-EU  
Okeechobee County by Okeechobee )  
Generating Company, L.L.C. ) FILED: November 30, 1999

OKEECHOBEE GENERATING COMPANY'S RESPONSE  
TO FLORIDA POWER & LIGHT COMPANY'S 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") Motion to Compel OGC to Respond to Discovery Requests ("FPL's Motion to Compel"). As explained herein, FPL's Motion to Compel should be denied. In support of this response, OGC says:

ARGUMENT

FPL's Motion to Compel can be separated into five categories: 1) a general request that OGC be compelled to respond to discovery requests with confidential, proprietary business information; 2) a request that OGC be compelled to produce documents and computer models underlying Dr. Dale M. Nesbitt's testimony; 3) a request for OGC to identify and produce privileged documents; 4) a request for OGC to respond to interrogatories directed to Dr. Dale M. Nesbitt; and 5) a request that OGC identify public documents responsive to certain of FPL's discovery requests. OGC will address each category separately in this response.

AFA \_\_\_\_\_  
APP \_\_\_\_\_  
CAF \_\_\_\_\_  
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EAG 11/30/99  
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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE  
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FPSC-RECORDS/REPORTING

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

By way of background, on November 2, 1999, FPL served OGC with its First Set of Interrogatories (Nos. 1-61), Second Set of Interrogatories (Nos. 62-71), First Request for Production of Documents (Nos. 1-36), and Second Request for Production of Documents (Nos. 37-60) (hereinafter collectively referred to as "FPL's Discovery Requests"). On November 12, 1999, OGC timely objected to certain of FPL's Discovery Requests on the basis that the requests called for the production of documents containing confidential, proprietary business information. On November 16 and 17, 1999, OGC responded to FPL's Discovery Requests.<sup>1</sup> OGC produced to FPL all documents responsive to FPL's requests to produce that do not contain confidential, proprietary business information<sup>2</sup> or privileged documents and responded to FPL's interrogatories without disclosing confidential, proprietary business information. In addition to producing documents and responding to interrogatories, OGC also provided FPL with a log specifically describing certain documents that OGC was not producing

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<sup>1</sup>The Commission's Order Establishing Expedited Discovery Schedule specifically provides that the expedited discovery schedule shall not apply if the Commission grants FPL's (or Florida Power Corporation's) request for a stay. On November 16, 1999, the Commission granted the requests for stay. Accordingly, the 14-day expedited discovery schedule is no longer applicable. Nonetheless, in the spirit of cooperation, OGC responded to FPL's Discovery Requests based on the expedited discovery schedule.

<sup>2</sup>As 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 November 16 and 17, 1999.

and explaining why OGC was not producing those documents. Lastly, OGC provided FPL with a draft confidentiality agreement pertaining to certain documentation of and relating to the models used by OGC's expert, Dale M. Nesbitt, Ph.D..

In its 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 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.<sup>3</sup> 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

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<sup>3</sup>Rule 25-22.006(6)(a), F.A.C., provides that a party may request a protective order limiting discovery of confidential, proprietary business information.

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, 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).

FPL next argues that OGC's confidentiality objections are deficient because OGC has failed to "identify and describe each document withheld." OGC is somewhat puzzled by FPL's argument on this point. Attached hereto as Exhibit A is a log that OGC provided in response to FPL's requests to produce which clearly identifies the documents that OGC has identified as containing confidential, proprietary business information. Thus, contrary to FPL's assertion, OGC's responses to FPL's requests to produce are not "deficient"--FPL has already been provided with the log of confidential documents it

requests in its Motion to Compel.

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. OGC also provided FPL with a log identifying the documents that OGC has withheld. The Commission's Order Establishing Procedure and applicable rules require nothing more.

**II. ABSENT FPL'S PAYMENT OF THE APPLICABLE LICENSING FEES, PRODUCTION OF COMPUTER MODELS CONSTITUTING ALTOS MANAGEMENT PARTNERS' INTELLECTUAL PROPERTY CANNOT BE COMPELLED.**

In its Motion to Compel, FPL is seeking to compel OGC to produce the documents and computer models underlying the testimony of OGC's witness Dr. Dale M. Nesbitt. As explained below, FPL's Motion to Compel should be denied because: a) OGC is not in possession, custody, or control of the Altos Models; b) OGC has already agreed to provide FPL copies of the underlying written documentation of the models, except for the executable code of said models and the user's manual that includes that code (hereinafter "Documentation of the Altos Models"), subject to a confidentiality agreement; c) OGC has provided all of the inputs and outputs of all modeling analyses performed by Altos to FPL in electronic format (Excel spreadsheets); d) Altos Management Partners ("Altos") has agreed to provide FPL executable

copies of the NARE and NARG Models subject to MarketPoint, Inc.'s standard licensing fees; and e) FPL has not demonstrated that it is entitled to copies of the Altos Models without paying the standard licensing fees.

The Altos North American Regional Electric Model ("the NARE Model" or simply "NARE") and the Altos North American Regional Gas Model ("the NARG Model" or simply "NARG") (collectively referred to as the "Altos Models") are models that are designed and operate in a software platform called MarketPoint™. The MarketPoint™ software is owned by MarketPoint, Inc. Altos licenses the MarketPoint™ software from MarketPoint, Inc. Altos owns the NARE and NARG Models, but Altos does not own the code for the MarketPoint™ software. Neither OGC nor any affiliate of OGC licenses either the MarketPoint™ software or the NARE or NARG Models. (An affiliate of OGC, PG&E Gas Transmission, has licensed an older version of the NARG Model--not the version used to support Dr. Nesbitt's testimony--in the past).

FPL's basic position is that OGC should be compelled to produce the Altos Models, presumably at no cost to FPL, because FPL needs the Altos Models to prepare its case. There are several fatal flaws in FPL's position. First, Rule 1.350(a), Florida Rules of Civil Procedure, only requires a party to produce documents in its "possession, custody or control." As stated above, OGC is not a licensee to the Altos Models, and has never received copies of the

Altos Models.<sup>4</sup> OGC has never had possession, custody or control of the Altos Models and thus cannot be compelled to produce the Altos Models. See Cost of Local Services, 98 FPSC at 10:47-48.

Second, even if OGC had possession, custody or control of the Altos Models, which it does not, FPL's argument that the Altos Models are being withheld fails because Altos has agreed to provide FPL with executable copies of the Altos Models if FPL pays the standard licensing fees. Apparently, this is not good enough for FPL; rather, FPL wants the Altos Models for free. FPL has cited no authority for the proposition that Altos and OGC must subsidize FPL's costs of completing discovery and the Commission should deny FPL's Motion to Compel.

In support of its argument that OGC should be required to produce the Altos Models, FPL cites several cases arising in federal court. FPL's reliance on these cases is misplaced. Most tellingly, not one of the cases cited by FPL stands for the proposition that a party seeking discovery must be provided copies of a computer model that constitutes a testifying expert's intellectual property without paying the applicable licensing fees. In fact, in Williams v. E. I. duPont de Nemours & Co., 119 F.R.D. 648, 651 (W.D. Ky. 1987), one of the cases relied on by FPL, the court specifically refused to compel

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<sup>4</sup>OGC does have custody of the Documentation of the Altos Models. OGC and Altos have agreed to produce to FPL the Documentation of the Altos Models subject to a standard confidentiality agreement, in fact, the same confidentiality agreement that FPL executed in the Duke New Smyrna need determination proceeding. OGC is not required to do anything more.

production of a licensed computer model known as "Statpac". The court concluded that the party seeking discovery could simply purchase "Statpac" from the model's vendor. Id.

In Cost of Local Service, a Commission order cited by FPL in its Motion to Compel, this Commission recently addressed the issue of whether a third party should be compelled to divulge a computer database that constituted that third party's intellectual property in a Commission proceeding in which the computer database supported the testimony of one of the party's witnesses. In ruling that the motion to compel should be denied in part and granted in part, Prehearing Officer Jacobs did not require the third party to produce copies of the computer database constituting the third party's intellectual property. Cost of Local Service, 98 FPSC 10:47-48. Rather, Prehearing Officer Jacobs held that the party seeking discovery should have "reasonable access to review the information in question." Id. at 48. OGC and Altos have more than met this standard. Just as in the Duke New Smyrna need determination proceeding, FPL will be provided reasonable access to the Altos Models during Dr. Nesbitt's deposition. In addition, OGC has agreed to provide FPL copies of the Documentation of the Altos Models subject to a reasonable confidentiality agreement and, most importantly, Altos has agreed to allow FPL to license the Altos Models if FPL pays the standard licensing fees. Clearly, OGC has provided FPL "reasonable access" to the Altos Models.



The view that the Altos Models constitute Altos' intellectual property and should not be produced without payment of the applicable licensing fees is consistent with Commission practice. The investor-owned utilities frequently utilize proprietary models such as PROMOD, PROSCREEN and WESCOUGER, just to name a few, to support testimony in Commission proceedings. OGC is not aware of a single case wherein the Commission required an investor-owned utility to produce an executable copy of any of these computer models without first requiring payment of the applicable licensing fees by the party seeking the models. In fact, based on inquiry of Nassau Power Corporation's ("Nassau Power") counsel in FPSC Docket No. 910816-EQ, the Nassau I need determination case, it is the undersigned counsel's understanding that Nassau Power attempted to obtain the PROMOD program from FPL in connection with that case, but that its efforts were resisted by FPL on the grounds that Nassau Power lacked the requisite license or licenses. In that instance, Nassau Power was unable to obtain PROMOD without paying Energy Management Associates' ("EMA") normal licensing fees but was able, upon payment to EMA at that time the proprietor and vendor of PROMOD, to obtain runs of the PROMOD model specified by Nassau Power but performed by EMA. Thus, requiring Altos to provide FPL executable copies of the Altos Models without requiring FPL to pay the Altos licensing fees will represent a departure from Commission practice and set precedent with regard to other intellectual property such as PROMOD, PROSCREEN, WESCOUGER, and any other licensed models.

In summary, FPL's Motion to Compel production of the Altos Models should be denied. OGC and Altos have agreed to provide the Altos Models and the Documentation for the Altos Models subject to a reasonable confidentiality agreement and payment of the standard licensing fees as applicable. Thus, FPL has been provided reasonable access to the Altos Models—neither the rules of discovery nor any case law cited by FPL requires anything more.

**III. OGC SHOULD NOT BE COMPELLED TO RESPOND TO FPL'S  
DISCOVERY REQUESTS WITH ATTORNEY-CLIENT PRIVILEGED  
COMMUNICATIONS OR ATTORNEY WORK PRODUCT.**

A. Requests to Produce

OGC objected to several of FPL's requests to produce on the grounds that the requests seek documents protected by the attorney-client privilege and that the requests seek documents containing work product.<sup>5</sup> In its Motion to Compel, FPL requests that OGC identify the privileged documents. FPL also seeks to compel OGC to produce the privileged documents.

With regard to identification of the privileged documents, counsel for OGC had previously reached an agreement in principle with counsel for Florida Power Corporation ("FPC") that neither OGC nor FPC would be required to furnish logs of documents containing privileged communications. OGC recently learned that FPL's counsel is not

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<sup>5</sup>The privileged documents fall into two general categories: 1) direct written communications between OGC's counsel and OGC staff, which are absolutely privileged, and 2) documents prepared by OGC's counsel that contain the mental impressions of OGC's counsel, which FPL claims it is not seeking.

willing to enter into a similar agreement. Accordingly, no later than Tuesday, December 7th, OGC will provide FPL with a log identifying documents responsive to FPL's requests to produce that are either attorney-client privileged communications or that contain attorney work product.<sup>6</sup>

With regard to FPL's attempt to compel OGC to produce privileged documents, OGC strongly renews its objections. Despite FPL's protestations to the contrary, FPL's Motion to Compel asks that OGC be forced to disclose to FPL attorney-client privileged communications and the mental impressions of OGC's attorneys. FPL has no valid basis for its requests and its Motion to Compel must be denied.

B. Interrogatories

Consistent with the Order Establishing Procedure, OGC timely objected to interrogatories Nos. 59 and 60 on the basis that the responses may have required OGC to disclose privileged information. However, in preparing its responses to interrogatories Nos. 59 and 60, OGC fully responded without divulging privileged information. Accordingly, FPL's Motion to Compel is moot.

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<sup>6</sup>OGC expects FPL to provide a similar log in response to OGC's pending discovery requests.

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

Rule 1.280(b)(4)(A), Florida Rules of Civil Procedure ("F.R.C.P."),<sup>7</sup> 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 Motion to Compel, FPL improperly seeks to obtain responses to interrogatories Nos. 62-70 beyond the specifically enumerated information allowed by Rule 1.280(b)(4)(A), F.R.C.P., and, thus, FPL's Motion to Compel must be denied.

In an attempt to circumvent Rule 1.280(b)(4)(A), F.R.C.P., FPL argues that OGC "itself" (as opposed to OGC's expert, Dr. Dale M. Nesbitt) should be compelled to respond to interrogatories Nos. 62-70. FPL's argument should be rejected. Interrogatories Nos. 62-70 seek specific factual information concerning the Altos Models that can only be provided by Dr. Dale M. Nesbitt, OGC's expert witness. For example, interrogatory No. 62 states:

For each of the Altos Management Partners model runs relied upon by OGC and its witnesses in this proceeding, identify by FRCC regions the generating units owned by Florida utilities or under firm contract to Florida utilities, and for each such generating unit state the following information:

- (a) the minimum and maximum generation capacity,
- (b) the heat rate at all load points (or at least at minimum operation, most efficient operation and maximum operation),
- (c) the ramp rates (time to get the unit up and running),
- (d) the start up costs.

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<sup>7</sup>Uniform Rule 28-106.206, F.A.C., makes Rule 1.280(b)(4)(A), F.R.C.P., specifically applicable to this proceeding.

Clearly the facts FPL seeks in this interrogatory are facts underlying the Altos Models known only by Dr. Nesbitt.<sup>8</sup> As such, OGC is not required to respond. FPL will have ample opportunity to seek a response to these interrogatories when it deposes Dr. Nesbitt.

**V. OGC SHOULD NOT BE REQUIRED  
TO PRODUCE PUBLIC DOCUMENTS.**

At pages 15-16 of its Motion to Compel, FPL complains that OGC has not specifically identified documents responsive to its Production Requests Nos. 40, 46, 47, and 59. These requests ask OGC to identify "all data, analyses, computations, computer models and other documents relied upon" by OGC's witnesses Ronald L. Vaden and Gerard C. Kordecki

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<sup>8</sup>In its Motion to Compel, FPL appears to assert that OGC should be able to answer interrogatories that OGC asserts are answerable only by OGC's expert, Dr. Nesbitt, FPL's argument appears to be that OGC "was under a duty to independently investigate the factual basis for the allegations in its Petition, and should therefore be able to answer based on that investigation." FPL then attempts to support its argument by citation to the procedural rules that require a party or its attorney to make a reasonable inquiry as to the allegations in pleadings. This argument doesn't wash, however: OGC properly relied on Dr. Nesbitt's testimony and exhibits, and OGC's counsel properly inquired of Dr. Nesbitt, and of his colleague Michael C. Blaha, as to the factual basis for Dr. Nesbitt's testimony as it relates to the allegations in OGC's Petition for Determination of Need. Neither the Uniform Rules of Administrative Procedure nor the Rule of Civil Procedure require more. Moreover, case law clearly establishes that to meet the reasonable inquiry standard, parties may rely on the opinions of their experts. See, e.g., Coffey v. Healthtrust, 1 F. 3d 1101 (10<sup>th</sup> Cir. 1993). OGC also notes that most of the information sought by FPL's Second Set of Interrogatories has already been furnished to FPL in electronic format on the ZIP disk containing all of the inputs and outputs of the model runs performed in support of Dr. Nesbitt's testimony and exhibits. Finally, OGC notes that FPL has available to it legitimate, authorized means of discovering the information it seeks from OGC, i.e., requests for production of documents (which have been thoroughly answered as to Dr. Nesbitt's testimony and exhibits, except for the proprietary models that are the subject of another section of this response), and the depositions of Dr. Nesbitt and Mr. Blaha. FPL's efforts to obtain this information via interrogatories are simply unauthorized and, accordingly, improper.

in reaching their respective conclusions: (1) that if the Okeechobee Generating Project is not constructed, the impact will be higher electric costs being imposed on Peninsular Florida ratepayers (Kordecki); (2) that it is unlikely that the Project will export power outside of Florida (Kordecki, Vaden); and (3) other conclusions in their testimonies. OGC properly responded that Mr. Vaden and Mr. Kordecki relied on certain testimony filed by Dr. Dale Nesbitt in the instant case and in FPSC Docket No. 981042-EM, and on other documents published by the Public Service Commission, the FRCC, Florida utilities, and other sources.

It is functionally impossible for OGC to identify all responsive documents to these broad requests. Mr. Vaden has been an active participant in the Florida electric utility industry for nearly 13 years, and Mr. Kordecki has been an active participant in the Florida electric utility industry for nearly 35 years. Accordingly, their knowledge and their conclusions have been informed by the numerous--dozens if not hundreds of--documents relating to Peninsular Florida electric costs, need for power, operations, exports, reliability, and related topics that each has reviewed in his respective career.

Recognizing this limitation, OGC responded appropriately, identifying utility ten-year site plans, Public Utilities Fortnightly generation cost data (a substantial volume of which has been furnished to FPL in response to its production requests), and publications of the Commission and the FRCC. Attempting to identify all responsive

documents that have informed Mr. Vaden's and Mr. Kordecki's conclusions would be unduly burdensome because it would involve having each witness attempt to reconstruct all such documents that he has reviewed in his career. Without waiving its objections, but in an effort to expedite this proceeding, OGC will furnish FPL a reasonable list of more recently published documents responsive to these requests by December 7, 1999.

### CONCLUSION

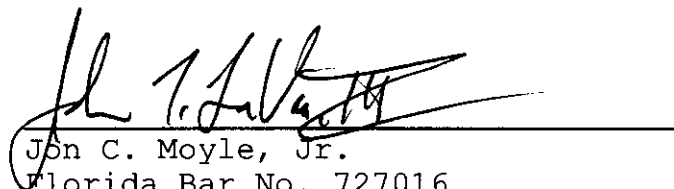
In the conclusion of its Motion to Compel, FPL accuses OGC of everything from "employing dilatory tactics"<sup>9</sup> to "carefully" segregat[ing] key information in an obvious effort to thwart discovery".<sup>10</sup> For the record, OGC strongly objects to FPL's unsubstantiated and untrue accusations. The Commission should not be fooled by FPL's strident, but misplaced, assertions. For the reasons set forth above, FPL's Motion to Compel should be denied in its entirety.

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<sup>9</sup>As noted above, contrary to FPL's accusation of dilatory tactics, OGC has repeatedly employed measures to expedite its responses to FPL's Discovery Requests including hand delivering documents responsive to FPL's request to produce, instead of merely making the documents available for inspection, and responding to FPL's Discovery Requests on an expedited basis even though it was no longer required to do so.

<sup>10</sup>Contrary to FPL's assertion, OGC has complied in good faith with FPL's Discovery Requests and has most assuredly not segregated any information to thwart discovery. FPL should tread lightly when making false accusations concerning intentional efforts to thwart discovery.

Respectfully submitted this 30th day of November, 1999.



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**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 (\*), facsimile transmission (\*\*), or by United States Mail, postage prepaid, on the following individuals this 30th day of November, 1999.

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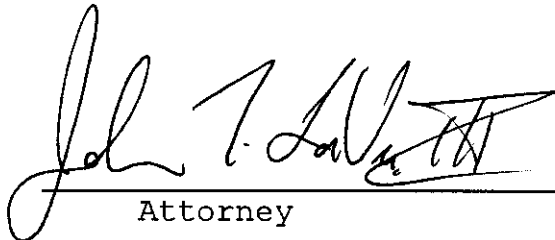
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In Re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C., FPSC Docket No. 991462-EU

Log of Documents Not Produced In Response to FPC's First Request for Production

<u>Document No.</u>	<u>Brief Description</u>	<u>Reason Not Produced</u>
FPC1-0003	Memo from Doug Egan to PG&E Gen Dept. Heads, 8/18/99	Confidential, proprietary business information
FPC1-0005 to 0017	Correspondence from and materials regarding GulfStream gas pipeline, 2/23/99 and other undated materials	Confidential, proprietary business information; subject to confidentiality agreement between PG&E Gen and GulfStream
FPC1-0019 to 0091	Correspondence from and materials regarding GulfStream gas pipeline, various dates	Confidential, proprietary business information; subject to confidentiality agreement between PG&E Gen and GulfStream
FPC1-0114	Letter from John Long to Norman Karloff re: gas transportation to future PG&E Gen power plant, 1/21/99	Confidential, proprietary business information
FPC1-0175 to 0179	Correspondence from and materials regarding GulfStream gas pipeline, 10/5/99	Confidential, proprietary business information; subject to confidentiality agreement between PG&E Gen and GulfStream
FPC1-0728 to 0734	Correspondence and materials from ABB, 6/8/99 and internal notes, undated	Confidential, proprietary business information
FPC1-0780	E-mail memo from Dale Nesbitt to Schef Wright, Esq., 8/24/99	Attorney work product



FPC1-0784	E-mail memo from Jack Hawks to Jon Moyle, Jr., Esq., 12/11/98	Attorney-client privilege
FPC1-0785 to 0786	E-mail memo from Alan Slepian, Esq. to Sean Finnerty, 6/1/99	Attorney-client privilege
FPC1-0788	E-mail memo from Sanford Hartman, Esq. to Sean Finnerty, 7/10/99	Attorney-client privilege
FPC1-0789 to 0792	E-mail memo from Stephen Greene to Sanford Hartman, Esq., et al., 5/26/99	Attorney-client privilege
FPC1-0809	E-mail memo from Dale Nesbitt to Schef Wright, Esq., et al., 10/18/99	Attorney work product
FPC1-0818	E-mail memo from Dale Nesbitt to Sean Finnerty, 6/23/99	Confidential, proprietary business information

Note: Additional documents not being produced, and the reasons therefor, are indicated on the responses to the respective production requests.