

**Diamond Williams**

---

**From:** ROBERTS.BRENDA [ROBERTS.BRENDA@leg.state.fl.us]  
**Sent:** Monday, June 20, 2011 3:28 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** Anna Williams; Blaise N. Huhta; Bryan Anderson; James M. Walls; James W. Brew; Jessica Cano (Jessica.Cano@fpl.com); John Burnett; John McWhirter; John Moyle; Keino Young; Ken Hoffman; Matthew Feil (mfeil@gunster.com); Mitchell S. Ross; Paul Lewis; Randy B. Miller; Vickie Gordon Kaufman (vkaufman@kagmlaw.com); Wade Litchfield; White, Karen  
**Subject:** E-filing (Dkt. No. 110009-EI)  
**Attachments:** 110009.response to motion for stay.sversion.doc

Electronic Filing

a. Person responsible for this electronic filing:

Joseph A. McGlothlin, Associate Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
Tallahassee, FL 32399-1400  
(850) 488-9330  
mcglothlin.joseph@leg.state.fl.us

b. Docket No. 110009-EI

In re: Nuclear Cost Recovery Clause.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 6 pages.

e. The document attached for electronic filing is OPC's Response to Rajiv Kundalkar's Motion for Stay.  
(See attached file: 110009.response to motion for stay.sversion.doc)

Thank you for your attention and cooperation to this request.

Brenda S. Roberts  
Office of Public Counsel  
Telephone: (850) 488-9330  
Fax: (850) 488-4491

DOCUMENT NUMBER-DATE

04226 JUN 20 =

FPSC-COMMISSION CLERK

6/20/2011

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Nuclear Cost Recovery  
Clause.

DOCKET NOS: 110009-EI  
FILED: June 20, 2011

**OPC'S RESPONSE TO RAJIV KUNDALKAR'S MOTION FOR STAY**

Pursuant to Rule 28-106.206, F.A.C., the Citizens of the State of Florida, through the Office of Public Counsel, respond in opposition to Rajiv Kundalkar's Motion for a stay of Order No. PSC-11-0246-PCO-EI ("Order")<sup>1</sup>, and state:

1. In the Motion to Stay, Counsel for Mr. Kundalkar tries again to characterize his client as having no connection with the matters pending before the Commission in this docket. However, in the thoroughly reasoned Order in which he denied the Motion to Quash the subpoena for deposition, the Prehearing Officer correctly determined that Mr. Kundalkar, who sponsored testimony that is at the core of the deferred matters pending before the Commission in an active docket, occupied a role that was and is central, singular and unique. Order, at pages 9-10.

2. The *reasons* underlying the Prehearing Officer's decision to deny Mr. Kundalkar's Motion to Quash are important in the context of Mr. Kundalkar's Motion for Stay. As Counsel for Mr. Kundalkar noted in his motion, Rule 25-22.061(2), F.A.C. provides that the Commission shall apply the following criteria to his motion for stay:

- (a) Whether the petitioner has demonstrated a likelihood of success on the merits on appeal;
- (b) Whether the petitioner has demonstrated a likelihood of sustaining irreparable harm if the stay is not granted; and

---

<sup>1</sup> In Order No. PSC-11-0246-PCO-EI, the Prehearing Officer denied Mr. Kundalkar's Motion to Quash the subpoena for deposition that OPC served on March 29, 2011. As part of OPC's ongoing case preparation, on June 17, 2011 OPC served a second subpoena for deposition on Mr. Kundalkar, together with a Notice of Deposition scheduling the deposition for June 29, 2011 in West Palm Beach, Florida.

DOCUMENT NUMBER-DATE

04226 JUN 20 =

FPSC-COMMISSION CLERK

(c) Whether the delay in implementing the order will likely cause substantial harm or be contrary to the public interest if the stay is granted.

A discussion of each of these points follows.

**Mr. Kundalkar's likelihood of success on appeal is poor**

3. OPC submits that a comparison of Mr. Kundalkar's contentions with governing legal principles leads to the conclusion that his likelihood of success on appeal is remote. The Prehearing Officer's disposition of the motion to quash was correct for reasons that go beyond the particular facts of this case. To resist a discovery deposition, Mr. Kundalkar formulated arguments that directly contradict governing rules of practice and that, followed to their logical conclusions, would have turned the Commission's discovery and hearing processes on their heads. A ruling that the subpoena was deficient because it did not specify subject areas necessarily would have meant that all subpoenas issued by the Commission have been deficient, because the Commission's form for subpoena (like that contained in the Florida Rules of Civil Procedure) does not require such information.

4. Similarly, if applied generally, a ruling that the subpoena should be quashed because one of OPC's issues has not yet been formally approved for inclusion<sup>2</sup> would upend the Commission's logical and orderly hearing process in all cases, because (of course) issues are not formalized and finalized until after parties have had the opportunity to conduct discovery.

---

<sup>2</sup> FPL filed testimony of witness Art Stall in Docket nos. 100009-EI and 110009-EI and Armando Olivera in Docket no. 110009-EI specifically to address the matters that OPC has identified as an issue. Further, in its response to the Motion to Quash, OPC pointed out that as FPL's Vice President-Uprates, Mr. Kundalkar was actively involved in FPL's relationship with its principal contractor, FPL's development of cost estimates, prudence of FPL's expenditures, and FPL's presentations to the Commission—all of which are the subject of the Commission's ongoing review in light of the deferral of all FPL-related issues in the last hearing cycle. In addition, OPC believes Mr. Kundalkar's testimony in Docket no. 090009-EI gave rise to Issue 3B that Staff identified in 2010 and that was preserved, deferred and carried over to Docket No. 110009-EI. Issue 3B reads, "Should any FPL rate case type expense associated with the 2010 Nuclear Cost Recovery Clause hearing be removed?"

5. It should have come as no surprise, therefore, that Mr. Kundalkar's chief arguments have been rejected by the judiciary (see *Hames v. City of Miami Firefighters' and Police Officers' Trust*, 980 So.2d 1112 (Fla. App., 3d DCA, 2008), cited by OPC in its Response to the Motion to Quash) and by the Commission's own precedent (the *Cargill* ruling, Order No. PSC-03-1065-PCO-EQ, cited in the Order).

6. In short, Mr. Kundalkar's arguments are without support, illogical, and would, if adopted as the Commission's standard procedure, create a disjointed and unworkable hearing process. Because of the demonstrable absence of merit in—indeed, frivolity of—Mr. Kundalkar's effort to resist the subpoena for deposition, OPC submits he has little chance of prevailing on appeal.

**Mr. Kundalkar cannot demonstrate irreparable harm**

7. The second criterion of the rule is whether the petitioner has demonstrated a likelihood of sustaining irreparable harm if the stay is not granted. The "harm" facing Mr. Kundalkar is that posed by being required to participate in a discovery deposition regarding matters in which he was closely involved and which are the subjects of an active evidentiary proceeding. The discovery deposition will be conducted pursuant to Florida's Rules of Civil Procedure, which contain protective provisions that a deponent can invoke in the event the deposition process is abused. This is hardly the type of "harm" that would warrant the stay that he requests. Cases in which the subject of a subpoena for deposition succeeded in persuading a reviewing court to stay the deposition have turned on whether the lower tribunal departed from the essential requirements of law. Specifically, the court reviewed whether the deposition was related to information that was relevant to the proceeding in which it was being conducted. The cases have involved such matters as efforts to discover details of the deponent's personal finances in

situations in which they were not germane to the proceeding in which the deposition was taking place. See *Gibson v. Progress Bank of Florida*, 54 So.3d 1058 (Fla. App., 2d DCA, 2011); *Capco Properties, LLC, v. Monterey Gardens of Pinecrest Condominium*, 982 So.2d 1211 (Fla. App., 3d DCA, 2008). Such issues are not present in this matter, and such rationales are not applicable to, situations (such as the facts of this case) in which the deposition is related to relevant information and clearly calculated to lead to the discovery of admissible evidence. As OPC has shown, the proceeding before the Commission involves the relationship between FPL and its primary contractor, the development of cost estimates by FPL, expenditures by FPL, and presentations by FPL's witnesses to the Commission—all of which are activities that Mr. Kundalkar was actively and integrally involved as Vice President-Nuclear Uprates and as the witness who testified on behalf of FPL on subjects that are still pending before the Commission.

**A stay would be adverse to the public interest**

8. The third criterion is whether the delay in implementing the order will likely cause substantial harm or be contrary to the public interest if the stay is granted. Here, the answer is “yes.” If the stay is granted, and lasts during appellate proceedings to review the Order denying the motion to quash, then OPC's opportunity to depose Mr. Kundalkar prior to the evidentiary hearing scheduled for August 10, 2011, much less the discovery cutoff of August 1, 2011, will have been thwarted by the passage of time. In fact, it is clear on the face of Mr. Kundalkar's motion to stay that he hopes the delays during judicial review will enable him to avoid being deposed.<sup>3</sup> Such delaying tactics are indeed inimicable to the public interest. In view of the absence of merit to Mr. Kundalkar's arguments and the absence of irreparable harm, OPC submits the “remedies” suggested by Mr. Kundalkar—such as proceeding without the deposition

---

<sup>3</sup> The Prehearing Officer should note that, when arguing that a stay of the deposition would occasion no harm because FPL “has several able witnesses available,” Mr. Kundalkar is attempting to resurrect an argument that he lost in the Order on his Motion to Quash Subpoena (See Motion to Stay, at page 7, numbered paragraph 13).

or spinning issues into separate proceedings while awaiting the outcome of his appeal—are not warranted by the circumstances. Indeed, rather than proceeding in the absence of the deposition, as Mr. Kundalkar proposes, OPC submits the more logical and compelling option under the circumstances of this proceeding would be to stay the cost recovery process as it relates to FPL until Mr. Kundalkar’s efforts to avoid the deposition have been finally resolved.

For the foregoing reasons, the Commission should deny Mr. Kundalkar’s Motion to Stay.

J. R. Kelly  
Public Counsel

s/ Joseph A. McGlothlin  
Joseph A. McGlothlin  
Associate 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

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and foregoing OPC's Response to Rajiv Kundalkar's Motion for Stay has been furnished by electronic mail and/or U.S. Mail on this 20th day of June, 2011, to the following:

John T. Burnett/Alexander Glenn  
Progress Energy Service Company, LLC  
P.O. Box 14042  
St. Petersburg, FL 33733-4042

John McWhirter, Jr.  
c/o McWhirter Law Firm  
Florida Industrial Power Users Group  
PO Box 3350  
Tampa, FL 33601

Keino Young/Anna Williams  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Mr. Paul Lewis, Jr.  
Progress Energy Florida, Inc.  
106 East College Ave, Suite 800  
Tallahassee, FL 32301-7740

Vicki G. Kaufman/Jon C. Moyle, Jr.  
Florida Industrial Power Users Group  
118 North Gadsden Street  
Tallahassee, FL 32301

Mr. Wade Litchfield  
Florida Power & Light Company  
215 South Monroe St., Suite 810  
Tallahassee, FL 32301-1859

Matthew R. Bernier  
Carlton Fields Law Firm  
215 South Monroe St., Suite 500  
Tallahassee, FL 32301-1866

J. Michael Walls/Blaise N. Huhta  
Carlton Fields Law Firm  
P.O. Box 3239  
Tampa, FL 33601-3239

Randy B. Miller  
White Springs Agriculture  
Chemicals, Inc  
P.O. Box 300  
White Springs, FL 32096

Karen S. White, Staff Attorney  
c/o AFCESA-ULFSC  
139 Barnes Drive, Suite 1  
Tyndall AFB, FL 32043-5319

Bryan J. Anderson/Jessica Cano  
Florida Power and Light Company  
700 Universe Blvd  
Juno Beach, FL 33418

James W. Brew/F. Alvin Taylor  
1025 Thomas Jefferson St. NW, 8<sup>th</sup>  
Flo, West Tower  
Washington, DC 20007

Ken Hoffman  
Florida Power & Light Company  
215 S. Monroe St., Suite 810  
Tallahassee, FL 32301

Matthew Feil  
Gunster Law Firm  
215 South Monroe, Suite 601  
Tallahassee, FL 32301

Rajiv S. Kundalkar  
11591 Buckhaven Ln.  
West Palm Beach, FL 33412-1607

s/ Joseph A. McGlothlin  
Joseph A. McGlothlin  
Associate Public Counsel