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ORIGINAL

November 2, 2001

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COMMISSION
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Blanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 000824-EI

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of
Citizens' First Motion to Compel. A diskette in Word format is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter
and return it to our office.

Sincerely,

Charles J. Beck
Deputy Public Counsel

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power)
Corporation's earnings, including)
effects of proposed acquisition of)
Florida Power Corporation by)
Carolina Power & Light)

Docket No. 000824-EI
Filed November 2, 2001

CITIZENS' FIRST MOTION TO COMPEL

The Citizens of Florida, by and through Jack Shreve, Public Counsel file this motion to compel.

Background

On September 18, 2001, Citizens served our first set of requests for production of documents on FPC. FPC filed its responses and objections on October 23, 2001. This motion requests the Prehearing Officer to issue an order denying certain objections made by FPC and requiring FPC to produce those documents withheld on account of those objections.

FPC waived its claims of privilege

Consistent with Rule 1.280(b)(5) of the Florida Rules of Civil Procedure, the first instruction included in Citizens' request for documents stated the following:

If any document is withheld under any claim of privilege, please furnish a list identifying each document for which privilege is claimed, together with the following information: date, sender, recipients, recipients of copies, subject matter of the document, and the basis upon which such privilege is claimed.

FPC responded as follows:

FPC objects to the instructions calling upon FPC to provide designated information regarding any documents withheld from production. FPC will comply with its obligations under applicable rules of procedure..... FPC objects to any request that calls for the production of documents protected by the attorney-client privilege, the work product doctrine, the accountant-client privilege, the trade secret privilege, or any other applicable privilege or protection afforded by law, whether such privilege or protection appears at the time the response is first made to these requests or is later determined to be applicable based on the discovery of documents, investigation or analysis. FPC in no way intends to waive any such privilege or protection.

While FPC claimed no waiver of any such privilege or protection, its actions do just that.

FPC's objections based on claims of privilege ignore Rule 1.280(b)(5), Florida Rules of Civil Procedure, which provides that when a party responds to a discovery request with a claim of privilege, the party "shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Rule 28-106.206, F.A.C., makes Rule 1.280(b)(5) of the Florida Rules of Civil Procedure directly applicable to this proceeding. Citizens' discovery instructions requiring FPC to identify documents withheld on account of a claim of privilege merely implement the provisions of the Florida Rules of Civil Procedure; FPC, in response, specifically refused to identify such documents, even though it is required to do so by the Florida Rules of Civil Procedure.

FPC's refusal to identify the documents amounts to a waiver of the privilege. For example, in *Tig Insurance Corporation of America v. Johnson*, 26

Fla. L. Weekly D2493 (Fla. 4th DCA October 26, 2001), Tig Insurance Corporation refused to identify the documents that it claimed to be privileged, just as FPC has done here. The Court noted that Florida Rule of Civil Procedure 1.280(B)(5) is identical to Federal Rule of Civil Procedure 26(b)(5) and that it is appropriate to rely on federal decisions to interpret our rule. The Advisory Committee Notes to the federal rule state "[t]o withhold such notice is contrary to the rule, subjects the party to sanctions under rule 37(b)(2) and may be viewed as a waiver of the privilege or protection." In *Tig Insurance Corporation*, the trial court ordered the company to produce the withheld documents. The Fourth District Court of Appeal couldn't determine from the record whether the trial court ordered the documents produced because the documents weren't privileged or because it found a waiver. The appellate court assumed that the trial court found a waiver and concluded that the lower court's ruling was not a departure from the essential requirements of law, thus leaving the trial court's opinion intact.

Citizens request the Prehearing Officer to order FPC to produce all documents withheld based on their claim of privilege. Such an order is entirely appropriate in this case because our discovery request specifically asked the company to identify such documents, and FPC refused to do so even though it is required to make the disclosure under the Florida Rules of Civil Procedure.

Alternatively, if the Prehearing Officer does not find a waiver, the Prehearing Officer could order the documents produced for an *in camera* inspection of documents so that the Prehearing Officer may determine which documents are in

fact privileged.¹ A final possibility would be to order FPC to identify the documents withheld and identify the basis for each claim of privilege, but this remedy would simply reward FPC for violating the rules of procedure. Such a remedy would allow FPC to disregard the rules of procedure and then be rewarded for it by delaying production of documents for weeks. Under the circumstances of this case, the most appropriate remedy is to find a waiver and order FPC to immediately produce all withheld documents.

FPC Must Provide Responsive Documents From Florida Progress Corporation, Progress Energy, Inc., and Progress Energy Service Company, LLC

In our requests for production of documents, Citizens included Florida Progress Corporation, Progress Energy, Inc., and Progress Energy Service Company, LLC as companies that should provide documents in their possession, custody or control responsive to the requests. Citizens included the following rationale in the requests:

¹ *Southern Bell Telephone and Telegraph Company, v. J. Terry Deason, et. al.*, 632 So.2d 1377 (Fla. 1994) sets forth the criteria for determining whether a communication is subject to the attorney-client privilege in a corporate setting: (1) the communication would not have been made but for the contemplation of legal services; (2) the employee making the communication did so at the direction of his or her corporate superior; (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services; (4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

The party claiming the attorney-client privilege carries the burden of proof to demonstrate that the documents meet the criteria for the privilege. In addition, *Southern Bell* makes it clear that claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny in order to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery. See order no. PSC-01-1725-PCO-EI issued in docket no. 010827-EI on August 23, 2001.

" In this case, Progress Energy, Inc., seeks reimbursement from Florida utility customers for an allocated portion of the stock premium it paid to acquire all of the stock of Florida Progress Corporation. Florida Progress Corporation and Progress Energy, Inc., must therefore respond to discovery in this case served on the utility Florida Power Corporation. See *American Honda Motor Company Inc., v. Votour*, 435 So. 2d 368 (Fla. 4th DCA 1983); *Medivision of East Broward County v. Dep't of Health and Rehabilitative Services*, 488 So. 2d 886, 887-888 (Fla. 1st DCA 1986); *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 130 (D. Del. 1986); *Order Granting in Part Motion to Compel, Requiring In Camera Review, and Denying Request for Oral Argument*, order no. PSC-01-1725-PCO-EI issued August 23, 2001, docket 010827-EI. Progress Energy Service Company, LLC is a service company formed by Progress Energy, Inc., to provide administrative, management, financial, and corporate services for Florida Power Corporation and other affiliates. An allocated portion of its costs is included the utility's forecasted test year. It, too, must respond to discovery requests in this docket.

In its response and objections, FPC stated the following:

"FPC objects to the definition of "FPC", "you", "your" or the "Company" as including Florida Progress Corporation, Progress Energy, Inc., and Progress Energy Service Company, LLC. FPC does not have an obligation under the rules to produce materials in the hands of these companies, but FPC agrees to do so in any event to expedite discovery, to the extent such documents are relevant to the issues in this case [underlining included in FPC's objection]. FPC reserves the right to decline to produce any materials that are not pertinent to the issues in the case. FPC further objects to the definition of "FPC" , "you", "your" or the "Company" to the extent it includes third parties whose documents are not within its possession, custody, or control."

From the dearth of documents provided by Florida Progress Corporation, Progress Energy, Inc., and Progress Energy Service Company, LLC in response to the requests for documents, it appears that FPC decided that responsive documents from these companies are not relevant or pertinent, and therefore did not provide responsive documents, without specifically disclosing that it was withholding responsive documents from these companies.

It is hard to imagine a more compelling case for requiring Florida Power Corporation to provide responsive documents from the named affiliates. The regulated utility -- Florida Power Corporation -- is actually asking the Commission to keep rates more \$50 million per year higher than would otherwise be justified solely in order to reimburse its holding company for a large portion of the amount it spent on goodwill. And it wants the Commission to keep rates \$50 million per year higher for 15 years, for a total of more than three quarters of a billion dollars.²

In requesting these higher rates, Florida Power Corporation is "acting as one" with its parent corporation and service affiliates in this case. See *Order Granting in Part Motion to Compel, Requiring In Camera Review, and Denying Request for Oral Argument*, order no. PSC-01-1725-PCO-EI issued August 23, 2001, docket 010827-EI. In this recent decision, the Prehearing Officer stated that "Whether a subsidiary may be compelled to obtain documents from a parent company or affiliate for discovery depends on consideration of three factors: 1) the corporate structure; 2) the non-party's connection to the transaction at issue; and, 3) the degree to which the non-party will benefit from an outcome favorable to the corporate party to the litigation. See Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127, 130 (D. Del. 1986). With respect to the first factor, "[w]hether a subsidiary is wholly or partially owned by the parent, the overlap of directors,

² See MFR schedule C-3c, where the company includes an "operating expense" acquisition adjustment of \$55.441 million. Even after adding this \$55.441 million expense, the company forecasts a 13.2% return on equity, which is far in excess of a fair return on equity in today's environment of record low interest rates. FPC proposes to provide a credit of \$5 million per year for 15 years without otherwise reducing rates. Direct testimony of Mark A. Myers, page 4, lines 1-3; direct testimony of Charles Cicchetti, page 43, lines 9-11.

officers, and employees, or the financial relationship between the corporations all aid in the analysis of control.” Afros at 131. With respect to the second factor, courts focus on the degree to which the non-party participated in the transaction at issue, and how relevant the requested documents are to the litigation. See id. at 131-2. With respect to the third factor, if the non-party will receive a benefit from the litigation, that fact must be weighed along with others in determining control. See id. at 132.” Order PSC-01-1725-PCO-EI at 5.

Those factors are easily met in this case. There is a complex web of financial relationships among the companies in this case. MFR schedule C-60 (Transactions with Affiliated Companies), for example, shows \$19.6 million from Carolina Power & Light included in the test year for transmission/distribution support, customer service management, gas & oil supply, nuclear management, and power trading. \$11.37 million from Progress Energy Service Company is included in the test year for financial services; \$50.743 million for information technology; \$2 million for facilities management; and \$36.971 million for administrative services. \$6.826 million from Progress Telecommunications is included in the test year for wide area network services. All of these payments to affiliates included in the test year are but a backdrop to the request to have utility customers reimburse the parent company for purchasing goodwill.

Citizens therefore request the Prehearing Officer to order FPC to provide all responsive documents in the possession, custody or control of Florida Progress Corporation, Progress Energy, Inc., and Progress Energy Service

Company, LLC. This applies to all of the requests in Citizen's first set of requests for production of documents.

FPC Should Produce All Documents Responsive to Requests #8 and #9

Determining whether the Florida Power Corp. affiliated companies have fairly allocated "synergy" savings to Florida Power Corp. from the merger is critically important in this case. In an unprecedented request, Florida Power Corp. is asking this Commission to approve rates higher than normally set under rate of return regulation so that utility ratepayers can reimburse Progress Energy, Inc., for most of the goodwill it purchased allocable to the utility. It wants the excess rates of more than \$50 million per year kept in place for 15 years, to transfer in excess of three quarters of a billion dollars to Progress Energy, Inc.

FPC, however, objects to providing information related to the allocation and realization of the merger savings. Requests #8 and #9, along with FPC's objections, follow:

Request 8: Please provide each document in your possession, custody or control related to the cost savings realized or expected from the merger for any of the businesses mentioned in the prefiled direct testimony of Dr. Vander Weide at page 4, line 22, through page 5, line 10.

FPC's Response: FPC objects to this request as irrelevant, immaterial, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. FPC has provided the total gross cost savings figures anticipated by the collective companies identified by Dr. Vander Weide. FPC has also provided a detailed analysis of the cost-savings that will be derived from FPC and broken it down by source in Mr. Myers pre-filed testimony at page 15. The remainder

of the cost savings that are not attributable to FPC are irrelevant to this proceeding as it occurs in connection with non-regulated entities or CP&L, which is not regulated by this Commission.

Request #9: Please provide each document in your possession, custody or control discussing, analyzing or evaluating the allocation of actual or expected cost savings from the merger among or between any of the companies affiliated or related to Progress Energy, Inc.

FPC's Response: FPC will produce documents responsive to this request for FPC by making them available at the offices of Carlton Fields in St. Petersburg, Florida at a time convenient to the parties. As to the other non-regulated companies affiliated or related to Progress Energy, Inc., FPC objects to this request as irrelevant, immaterial, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. FPC has provided the total gross cost savings figures anticipated by the companies related to Progress Energy Inc. FPC has also provided a detailed analysis of the cost-savings that will be derived from FPC and broken it down by source in Mr. Myers pre-filed testimony at page 15.

Citizens request the Prehearing Officer to order FPC to provide all responsive documents to these requests, including not only those directly in its possession, but also those documents in the possession, custody or control of Florida Progress Corporation, Progress Energy, Inc., and Progress Energy Service Company, LLC as well.

Order no. PSC-01-1444-PCO-EI issued July 5, 2001, provides a discussion of Commission policy regarding such discovery requests.³ In that

³ The order has this to say about the claim from the utility that it did not have access to documents in the possession of affiliates: "Third, TECO's contention that it does not have access to this information, and thus does not control this information, is not compelling. As previously recognized by this Commission, a party need not have actual possession of documents to be deemed in control of them. (Order No. PSC-94-0571-CFO-WU, issued May 13, 1994, citing In re Folding Carton Antitrust Litigation, 76 F.R.D. 420 (N.D.Ill. 1977).) In Order No. PSC-94-0571-CFO-WU, the prehearing officer compelled from a regulated utility the production of non-regulated affiliates' tax returns relevant to the subject matter of that proceeding. This

case FIPUG had asked TECO to identify each firm contract to purchase capacity and energy to which TECO or any affiliate is or was a purchasing party for the period 1999-2002, along with certain information about the contracts. TECO objected on a variety of grounds, including irrelevance, overbreadth, and not having possession of information related to its affiliates. The Prehearing Officer ordered the company to provide the requested information, finding the request reasonably calculated to lead to the discovery of admissible evidence and relevant to the docket. In particular, the Prehearing Officer found that the information could conceivably indicate that TECO was purchasing power at more or less favorable prices and terms than that at which an affiliate was purchasing power at a given time during the period specified in the interrogatory.

That reasoning applies equally well to this case. The entire entity of merged companies purportedly realize synergies as the result of the merger. Requests #8 and #9 seek information about the synergies among the companies and the fair allocation of such synergies. FPC refuses to provide information related to the total picture, insisting that Citizens should only see the result of the allocation and sharing among the companies. It is completely reasonable and necessary to ask for information related to the entire allocation and sharing process, particularly since FPC's request for an extra amount in excess of \$50 million per year is premised upon these synergies. The Commission and

Commission has similarly compelled from regulated utilities the production of other affiliate documents and information reasonably calculated to lead to the discovery of admissible evidence in the underlying proceedings. (See, e.g., Order No. PSC-92-0819-PCO-WS, issued August 14, 1992; Order No. PSC-96-0822-PCO-WS, issued June 25, 1996; and Order No. PSC-96-0182-PCO-PU, issued February 8, 1995 (compelling from Peoples Gas System the production of non-regulated affiliate information to TECO).

Citizens can not determine whether the sharing and allocations of cost savings from the merger to the regulated utility are reasonable without seeing how the sharing, allocation, and realization of such savings was spread among all of the companies.

WHEREFORE, Citizens request the Prehearing Officer to deny the objections to discovery made by FPC discussed in this motion and order FPC to produce all documents withheld on account of such objections.

Respectfully submitted,

JACK SHREVE
PUBLIC COUNSEL



Charles J. Beck
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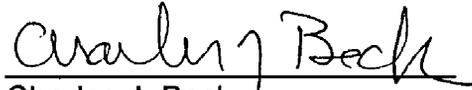
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Attorney for Florida's
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**CERTIFICATE OF SERVICE
DOCKET NO. 000824-EI**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 2nd day of November, 2001.



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