

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in rates by Florida  
Power & Light Company.

DOCKET NO. 080677-EI  
ORDER NO. PSC-09-0239-PCO-EI  
ISSUED: April 17, 2009

ORDER DENYING MOTION OF SOUTH FLORIDA HOSPITAL AND HEALTHCARE  
ASSOCIATION FOR ORDER ESTABLISHING DISCOVERY PROCEDURES

Background

On March 18, 2009, pursuant to Section 366.06, Florida Statutes (F.S.), and Rules 25-6.0425 and 25-6.043, Florida Administrative Code (F.A.C.), Florida Power & Light Company (FPL) filed a petition for approval of permanent increase in its base rates and charges. On March 20, 2009, Order No. PSC-09-0159-PCO-EI, Order Establishing Procedure (OEP), was issued for this proceeding. The OEP established discovery procedures as well as critical dates for the proceeding. Specifically, the filing date for intervenor testimony is July 16, 2009, the discovery deadline for utility direct testimony is August 17, 2009, and the discovery deadline for all other testimony is August 21, 2009. The administrative hearing will be held in this matter on August 24-28, August 31, and September 2-4, 2009.

The Office of Public Counsel (OPC), Florida Retail Federation, and I.B.E.W. System Council U-4 have been granted intervention in this proceeding. On March 16, 2009, South Florida Hospital and Healthcare Association (SFHHA) filed a petition to intervene which was granted by Order No. PSC-09-0216-PCO-EI. On March 20, 2009, SFHHA filed a Motion for Order Establishing Discovery Procedures (Motion). The Motion requests discovery deadlines and requirements that are different than those established by the OEP. On March 25, 2009, OPC filed its response in support of SFHHA's Motion, and on March 27, 2009, FPL filed its response in opposition to SFHHA's Motion.

SFHHA's Motion

SFHHA contends that the rate increase which FPL seeks, if approved, will likely raise the average total rates by 8 to 9 percent, and its average base rates by more than 20 percent. According to SFHHA, this rate increase will have a significant impact on the individual hospitals and healthcare-related entities that comprise SFHHA. SFHHA argues that because of the magnitude of FPL's requested rate increase and the resulting impact on FPL's customers, it is imperative that FPL's customers be afforded an adequate opportunity to perform a careful and thorough review, and to test FPL's allegations and supporting documentation. SFHHA asserts that with an August or September hearing and a July filing date for intervenor testimony, it is essential to have an efficient discovery process.

According to SFHHA, the Florida Rules of Civil Procedure are applicable to proceedings before the Public Service Commission. SFHHA asserts that of the available methods of

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discovery permitted by the Rules of Civil Procedure, the production of documents is the most important and represents a significant portion of the discovery requests in rate proceedings. SFHHA contends that Rule 1.350(a), Florida Rules of Civil Procedure (Fla.R.Civ.P.), states that any party may request any other party to produce and permit the party making the request to inspect and copy any designated documents that are in the possession, custody, or control of the party to whom the request is directed. SFHHA states that the same rule provides that each request for production of documents shall specify a reasonable time, place, and manner of making the inspection or performing the related acts, and that each response, which must be served within 30 days after service of the request, shall state that inspection and related activities will be permitted as requested unless the request is objected to. Rule 1.350(b) Fla.R.Civ.P. SFHHA concludes that Rule 1.350 does not explicitly require the responding party to send copies of the responsive documents to the requesting party, but rather allows the responding party to make copies of the requested documents available to the requesting party at a specified location for review in hard copy. SFHHA reports that in the 2005 rate case, FPL required intervenors to come to document repositories, either in Miami, Juno Beach or Tallahassee to review the documents during regular business hours. SFHHA argues that because there were thousands of pages of documents produced in response to discovery requests, this was an inefficient process.

SFHHA argues that because of the magnitude of the proposed rate increase, the complexity of the issues, the volume of documents that likely will be responsive to discovery request and the time period to conduct discovery, limiting access to FPL's documents in the manner set forth by the Florida Rules of Civil Procedure would hinder SFHHA's review. SFHHA states that professionals will be working on this case in excess of the normal working hours and will need access to the materials to allow them to work efficiently outside of regular business hours. SFHHA requests that an alternative discovery procedure be established. SFHHA requests that all non-voluminous documents (which SFHHA proposes as 250 pages or less) responsive to discovery requests be provided to the requesting party and other parties either by email or other electronic means or by sending hard copies via express courier service such as FedEx or UPS. SFHHA suggests that all voluminous documents continue to be produced in the manner consistent with Rule 1.350, Fla.R.Civ.P. Additionally, SFHHA requests that the response time for discovery be 20 days rather than 30 days, that objections to requests be made no later than 5 days from the date of the request, and that any motion to compel be filed no later than 5 days from the receipt of the objection.

SFHHA argues that its proposed discovery procedures will reduce the burden, expense, and delay associated with the discovery process. SFHHA contends that the production of documents electronically makes the discovery process more efficient and conserves both natural and economic resources.

#### OPC's Response to Motion

On March 25, 2009, OPC filed a response in support of SFHHA's Motion. In its response, OPC submits that SFHHA's proposals, or similar measures which use technology to increase procedural efficiency, are needed to cope with the magnitude and complexity of FPL's

filing. In addition, OPC asserts that since FPL holds all of the business and financial information intervenors need to prepare their cases, efficient and expeditious discovery procedures are critical to provide parties with due process. OPC also agrees with SFHHA that in this case, the standard for serving a response to discovery requests should be 20 days, rather than the 30 days allowed by the OEP.

### FPL's Response to Motion

On March 27, 2009, FPL filed a response in opposition to SFHHA's Motion. FPL states that its Petition for Rate Increase was filed on March 18, 2009, and was accompanied by the direct testimony of 19 witnesses and the Commission's Minimum Filing Requirements. FPL asserts that SFHHA's Motion seeks to deviate from the terms of the OEP issued in this docket, which require the parties to follow the Rules of Civil Procedure and to respond to discovery requests within 30 days for all but requests made after FPL files its rebuttal testimony.

FPL argues that the 30-day timeframe established by the OEP is consistent with the Rules of Civil Procedure as well as prior practice. FPL asserts that Rules 1.340 and 1.350, Fla.R.Civ.P. apply to this proceeding and to the timeframes for discovery. According to FPL, the same 30-day timeframe was used in FPL's last rate case as well as Tampa Electric Company's most recent rate proceeding. FPL contends that discovery was effectively propounded and responded to in those proceedings. FPL concludes that SFHHA has not provided any compelling reason to deviate from these rate case discovery parameters and therefore the OEP timeframes should be maintained.

FPL concurs with SFHHA that the volume of discovery expected to be produced in the proceeding is substantial. FPL asserts that a 30 day turn-around is particularly appropriate in this case because each party is allowed to serve up to 500 interrogatories and 500 requests for production. FPL reports that in its last rate case there were nine intervenors who combined served more than 1,846 discovery requests with 3,859 subparts. FPL states that it has already been served with a total of 376 interrogatories and requests for production of documents, with 602 subparts outstanding, from only two parties. FPL expects that more parties will intervene and there will continue to be multiple, overlapping discovery requests. FPL claims that given the broad scope of the proceeding and the time and resource-intensive effort required to respond to multiple sets of outstanding discovery, a compressed 20-day timeframe for discovery responses would be unreasonable.

FPL claims that SFHHA's request for a change in the manner in which documents are produced is significant. FPL states that it intends to make responsive documents available at its premises for inspection and copying. FPL argues that this is consistent with the express language of Rule 1.350, Fla.R.Civ.P. FPL asserts that although the rules allow a responding party to choose to send responsive documents directly to the requesting party, such practice cannot be expected and should not be required in a case where dozens of boxes of documents are anticipated to be produced. FPL asserts that a requirement to send documents would impose significant costs on FPL. FPL claims that those are costs that are not required by Florida law to be borne by FPL. FPL cites to the case of Evangelos v. Dachiel, 553 So. 2d 245 (Fla. 3d DCA

1989), which held that the expense associated with transporting records from the responding party's location to the requesting party's preferred location should have been borne by the requesting party. FPL contends that the several alternatives offered by SFHHA to produce documents each place an uncompensated burden on FPL. FPL claims the burden is in both financial terms and in terms of manpower, resources, and efforts. FPL concludes this would constrain FPL's ability to diligently search and respond to document requests within the 30-day time frame. Furthermore, FPL asserts that because it anticipated complying with the Florida Rules of Civil Procedure, it did not include costs of copying discovery responses in its rate case expense.

FPL offers an alternative to SFHHA's proposed discovery process. FPL states that it has contracted with a third-party vendor to perform electronic scanning of FPL's documents after FPL has gathered the documents for production. FPL proposes that SFHHA, as well as other intervenors, may request IKON (the third party vendor) to send a compact disc containing FPL's non-confidential documents responsive to each request. FPL states that the requesting party will be responsible for paying IKON the costs of the compact disc, the scanning, and the shipping, and has provided a list of the fee schedule IKON will charge. FPL states that it will continue to make the hard copies available for inspection within 30 days after receipt of the discovery request.

#### Analysis and Ruling

The Commission is limited by Section 366.06, F.S., in the amount of time it must review and rule on a petition for rate proceedings. The OEP is written to comply with statutorily-mandated timeframes while giving each party an adequate opportunity to prepare for the hearing through the discovery process. In this docket, the intervenors have 120 days prior to filing their testimony to conduct discovery; there is a total of 152 days to conduct discovery on FPL's direct and rebuttal case, with an additional 4 days to conclude their discovery on FPL's rebuttal testimony (rebuttal testimony is due on August 6, 2009). Even with the 30-day time-frame established by Florida Rules of Civil Procedure and the OEP, the intervenors could complete 5 rounds of discovery requests. The OEP permits each party to send 500 requests for documents and 500 interrogatories, as well as to depose the witnesses. Based on the number of intervenors, as well as the likelihood that Commission staff will seek its own discovery, FPL should be permitted the full 30 days established by the OEP and the Florida Rules of Civil Procedure to respond to discovery requests. Accordingly, SFHHA's request to shorten the response time for discovery requests, the filing of objections, and motions to compel is denied.


SFHHA has also requested that FPL provide the requesting parties with either hard copies or electronic copies of documents responsive to each request for documents. FPL has stated that it will provide those documents to the parties at the requesting party's expense or alternatively, the requesting party may view the documents at FPL's premises. The Florida courts have interpreted Rule 1.350, Fla.R.Civ.P., to require that when the financial burden of copying documents requested by a party is unreasonable or unduly burdensome, the requesting party shall bear the cost. (See Shering Corporation v. Thornton, 280 So. 2d 493 (Fla. 4th DCA 1973); Evangelos v. Dachiel, 553 So. 2d 245 (Fla. 3d DCA 1989); and Krypton Broadcasting of

Jacksonville, Inc. v. MGM-Pathe Communications Co., 629 So. 2d 852 (Fla. 1st DCA 1993)). The complexity of the case, the number of intervening parties, the amount and number of discovery requests from the various intervening parties, as well as the statutorily-mandated hearing timeframe makes SFHHA's suggested deviations from the standard requirements found in the Rules of Civil Procedure and the OEP unduly burdensome and unreasonable. FPL has offered a reasonable alternative for producing the documents which allows the requesting party to bear the costs of production. Accordingly, SFHHA's request that FPL provide the requesting parties with hard copies or electronic copies of documents responsive to discovery requests is denied.

Based on the foregoing, it is

ORDERED by Commissioner Katrina J. McMurrian, as Prehearing Officer, that South Florida Hospital and Healthcare Association's Motion for Order Establishing Discovery Procedures is denied.

By ORDER of Commissioner Katrina J. McMurrian, as Prehearing Officer, this 17th day of April, 2009.

  
KATRINA J. McMURRIAN  
Commissioner and Prehearing Officer

( S E A L )

LCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.