

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO. 080677-EI

In re: 2009 depreciation and dismantlement study by Florida Power & Light Company.

DOCKET NO. 090130-EI

ORDER NO. PSC-09-0564-PCO-EI

ISSUED: August 19, 2009

ORDER GRANTING MOTION TO COMPEL DEPOSITION

On November 17, 2008, Florida Power & Light Company (FPL) filed a test year letter, as required by Rule 25-6.140, Florida Administrative Code (F.A.C.), notifying this Commission of its intent to file a petition in the Spring of 2009 for an increase in rates effective January 1, 2010. Pursuant to the provisions of Chapter 366, Florida Statutes (F.S.), and Rules 25-6.0425 and 25-6.043, F.A.C., FPL filed the petition for an increase in rates on March 18, 2009. The Order Establishing Procedure (OEP) was issued March 20, 2009, and set forth the guidelines for the conduct of this docket, including discovery procedures and deadlines.¹ Mr. Richard Unger filed a Petition for Leave to Intervene on August 13, 2009. That petition is pending at this time.

On August 7, 2009, FPL filed Notice of Taking Deposition (Deposition Notice) of SFHHA's President, Linda Quick, for Wednesday, August 19, 2009. The deposition notice states that the deposition may take place telephonically. On August 12, 2009, SFHHA filed Objections to FPL's Notice of Taking Deposition (Objection). FPL filed a Motion to Compel Deposition of Ms. Quick on August 13, 2009 (Motion to Compel). On August 14, 2009, SFHHA filed its Response to FPL's Motion to Compel Deposition of Linda Quick, Motion to Quash and Motion for protective order (Motion to Quash). On August 18, 2009, FPL filed a Re-Notice of Taking Deposition (Deposition Re-Notice) of Ms. Quick to take place at a later date and time than originally scheduled.

SFHHA's Objection

In its Objection, SFHHA asserts that the proposed deposition of Ms. Quick is not calculated to lead to the discovery of admissible evidence. SFHHA contends that the Deposition Notice fails to describe or otherwise provide any detail about the proposed deposition, and that SFHHA's communications with FPL regarding the subject matter of the deposition have revealed that no information adduced at the deposition would fall within the scope of the issues identified and agreed to by the parties. SFHHA states that the activities and/or decisions by SFHHA's members are not at issue in this proceeding and, therefore, are irrelevant. As such, SFHHA insists that the proposed deposition is unreasonably broad in scope, particularly because Ms. Quick is not an expert witness, nor has she sponsored any testimony in this proceeding.

¹ Order No. PSC-09-0159-PCO-EI. This order set the Discovery Deadline for All Other Discovery, except Utility Direct Testimony, as August 21, 2009.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

According to SFHHA, FPL has not shown why a deposition of Ms. Quick is necessary or that the information it seeks cannot be gained from another source without undue burden or hardship. Instead, SFHHA recommends that FPL direct such discovery to the three expert witnesses it has made available for deposition. In sum, SFHHA asserts that the deposition is unnecessary and would produce irrelevant and immaterial information in contravention of Sections 120.569(2)(g) and 120.569(2)(k)1., F.S.

SFHHA further states that it objects to the deposition to the extent that it would require the disclosure of information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege or protection afforded by law. SFHHA contends that the deposition is unreasonable, oppressive, and designed as a fishing expedition and for purposes of annoyance and harassment. SFHHA claims that the proposed deposition would cause harm by taking Ms. Quick away from other commitments with no reason to believe that relevant information will be obtained. SFHHA supports its contention that the proposed deposition would impose an undue burden on SFHHA by noting that it has responded to 50 interrogatories and 35 production of document requests propounded by FPL. SFHHA states that the cumulative effect of the discovery sought by FPL in this proceeding makes its request for the deposition overly burdensome.

FPL's Motion to Compel

In its Motion to Compel, FPL asserts that the information sought to be obtained through the deposition of Ms. Quick is relevant, admissible, reasonably calculated to lead to admissible evidence, and intended to assist FPL in the preparation of its case and for purposes of cross examination of SFHHA's outside consultants. FPL claims that it scheduled this deposition to explore with Ms. Quick the alleged impacts of FPL's proposed rate increase on the SFHHA members, along with other matters related to the hospital and health care industry including costs, electric consumption, and the like. FPL maintains that these matters are relevant, material, and discoverable and that they are an appropriate subject of the deposition. According to FPL, the deposition is not intended to elicit irrelevant and immaterial information in contravention of Sections 120.569(2)(g) and 120.569(2)(k)1.²

FPL acknowledges that SFHHA has submitted the pre-filed testimony of three outside paid consultants, but notes that SFHHA has offered no testimony of any of its members. FPL asserts that these outside consultants are not in a position to speak for SFHHA regarding its internal operations, as such operations are beyond the limited scope of their knowledge as consultants. According to FPL, fairness requires that FPL have the opportunity to question an appropriate representative of SFHHA to better understand the true or perceived impacts on the member organizations, the manner in which they conduct their businesses, particularly in areas

² Section 120.569(2)(g), F.S., provides that irrelevant, immaterial, or unduly repetitious evidence shall be excluded from evidence in administrative hearings, while all other evidence reasonably relied upon by reasonably prudent persons shall be included. Section 120.569(2)(k)1., F.S., provides that any person subject to a subpoena may request the presiding officer to invalidate the subpoena on the ground that it is unreasonably broad in scope, or requires production of irrelevant material.

that parallel FPL, along with other matters that are uniquely within the province of the actual intervenor rather than its paid, outside consultants.

With respect to SFHHA's objections based upon the attorney-client privilege, the work product doctrine, relevance, and the like, FPL maintains that while some of these objections might require counsel to give instructions to Ms. Quick during the course of the deposition or to work out a process for handling confidential information, they do not justify blocking the deposition in its entirety. FPL contends that these arguments go to the weight of the evidence obtained at the deposition and the potential admissibility or use of that evidence at the hearing, but not to the propriety of taking the deposition. FPL insists that while these arguments may ultimately form the basis of evidentiary rulings at the hearing, they do not support SFHHA's position that the deposition should be disallowed.

According to FPL, SFHHA's claim that its effort to take the deposition of an SFHHA representative is oppressive, burdensome, and for purposes of annoyance and harassment is unsupported by the record. In support of this contention, FPL notes that it has answered thousands of discovery requests and produced 9 FPL employees for lengthy depositions. Accordingly, FPL asserts that it should have the right to take a single deposition of a representative of SFHHA, which has been one of the most active intervenors in this case. Finally, FPL states that neither the Florida Rules of Civil Procedure (Fla. R. Civ. P.) nor the Commission Rules require that deposition subject matter be specified in the notice.

SFHHA's Motion to Quash

In addition to the arguments raised in its Objection, SFHHA states that to the extent FPL seeks information about the rate impact on its individual member hospitals, FPL already has access to information such as the costs incurred by and the electric consumption of the hospitals. SFHHA claims that with information already in its possession, FPL can easily determine the impact of the proposed rate increase on the hospitals. SFHHA also contends that the costs incurred by intervening parties are not relevant to the determination of whether the rate increase proposed by FPL is fair, just and reasonable. SFHHA asserts that Ms. Quick is not in a position to evaluate the specific impact of FPL's rate proposal upon its individual hospitals, which did not intervene individually in this proceeding. Accordingly, SFHHA requests that this Commission deny FPL's Motion to Compel, quash FPL's Notice of Deposition directed to Ms. Quick, and enter an order protecting Ms. Quick from the proposed deposition.

Legal Standard

The scope of discovery under the Florida Rules of Civil Procedure is broad. Rule 1.280(b)(1), Fla. R. Civ. P., provides that a party may obtain discovery regarding any matter relevant to the subject matter of the pending action. Furthermore, Rule 1.310(a) Fla. R. Civ. P., states that the testimony of any person, including a party, may be taken by deposition. It is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Rule 1.280(c), Fla. R. Civ. P., states that for good cause shown, the Commission can

enter any order to protect a party from annoyance, embarrassment, oppression, or undue burden, as justice requires. Additionally, any person subject to a subpoena may request that the presiding officer invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material, pursuant to Section 120.569(2)(k)1., F.S.

The Commission has broad discretion in resolving discovery disputes. In making its determination whether to allow discovery, the Commission has generally balanced the litigant's right to pursue full discovery with the deponent's right to be protected from oppressive or unduly burdensome discovery.³

Analysis & Ruling

Upon consideration of the foregoing, as well as the oral arguments and responses to questions at the prehearing conference, FPL's Motion to Compel the deposition of Ms. Quick is granted.

FPL has asked that Ms. Quick be made available by phone; therefore, while the deposition may be inconvenient, it does not appear to create an undue burden upon SFHHA, given its intervention and positions in this case. Although SFHHA states that it has responded to 50 interrogatories and 35 production of document requests propounded by FPL, it is neither unreasonable nor unusual for parties to conduct depositions in addition to serving written discovery. Accordingly, SFHHA has failed to demonstrate facts which support its allegations of harassment and undue burden.

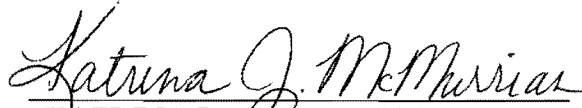
As referenced above, Florida Rules of Civil Procedure permit parties to: (i) obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action; and (ii) depose any person, including a party. Since FPL bears the burden of proof in this proceeding, it should be allowed the opportunity to avail itself of the broad scope of discovery afforded by these rules to obtain information reasonably likely to lead to admissible evidence.

Based on the foregoing, it is

ORDERED by Commissioner Katrina J. McMurrian, as Prehearing Officer, that Florida Power and Light Company's Motion to Compel Deposition of Linda Quick is granted.

³ See, e.g. Order No. PSC-94-1562-PCO-WS, issued December 14, 1994, in Docket No. 930945, In re: Investigation into Florida Public Service Commission Jurisdiction over SOUTHERN STATES UTILITIES, INC. in Florida.

By ORDER of Commissioner Katrina J. McMurrian, as Prehearing Officer, this 19th
day of August, 2009.


KATRINA J. McMURRIAN
Commissioner and Prehearing Officer

(S E A L)

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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.