

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Petition for approval of early termination amendment to negotiated qualifying facility contract with Orlando Cogen Limited, Ltd. by Florida Power Corporation.

DOCKET NO. 90086-EQ

FILED: SEPTEMBER 19, 1997

STAFF'S OBJECTION TO ORLANDO COGEN LIMITED, LTD.'S NOTICE OF TAKING DEPOSITION DUCES TECUM OF PAUL STALLCUP AND KENNETH DUDLEY AND MOTION FOR PROTECTIVE ORDER

The Staff of the Florida Public Service Commission (Staff), pursuant to Rule 25-22.034, Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, by and through its undersigned attorney, hereby objects to Orlando Cogen Limited, Ltd.'s Notice of Taking Deposition Duces Tecum of Paul Stallcup and Kenneth Dudley. Staff requests that the Prehearing Officer issue a protective order relieving Mr. Stallcup and Mr. Dudley from the undue burden, oppression, and annoyance of appearing for the noticed depositions. As grounds therefor, Staff states:

ACK _____
AFA _____
APP _____
CAF _____
CMU _____
CTR _____
EAG _____
LEG _____
LIR 3 _____
OPR _____
RCL _____
SEC 1 _____
WAS _____
OTH _____

1. On October 1, 1996, Florida Power Corporation (FPC) filed a petition for approval of an early termination amendment to its Negotiated Contract with Orlando Cogen Limited, Ltd. (OCL), a qualifying facility. By Proposed Agency Action Order No. PSC-97-0086-FOF-EQ, issued January 27, 1997, the Commission denied FPC's petition. On February 17, 1997, FPC timely filed its Petition on Proposed Agency Action. Pursuant to this petition, this matter has

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been set for hearing before the Florida Public Service Commission (Commission).

2. On September 12, 1997, OCL filed its Notice of Taking Deposition Duces Tecum of Commission Staff members Paul Stallcup and Kenneth Dudley. In its notice, OCL requests that Mr. Stallcup and Mr. Dudley produce, at deposition, the following:

1. All documents, data compilations, memoranda, analyses or other written or electronically stored information used or relied upon by Kenneth Dudley or Paul Stallcup in support of or regarding the conclusion that the benefit of FPC's proposal that is the subject of this proceeding appears to be noticeably sensitive to the assumptions used in its cost-effectiveness analysis.

2. All documents, data compilations, memoranda, analyses or other written or electronically stored information used or relied upon by Kenneth Dudley or Paul Stallcup in support of or regarding the conclusion that the proposal that is the subject of this proceeding caused an excessive level of risk being placed on FPC's ratepayers should FPC's projections of future conditions prove to be inaccurate.

3. All documents, data compilations, memoranda, analyses or other written or electronically stored information used or relied upon by Commission Staff in preparing its December 26, 1996, memorandum entitled "Staff Recommendation," including the "alternative recommendation" and "alternative staff analysis," in this docket.

3. Pursuant to Rule 25-22.034, Florida Administrative Code, parties may obtain discovery through the means and in the manner provided in the Florida Rules of Civil Procedure. Rule 1.280(a), Fla.R.Civ.P., provides that parties may obtain discovery regarding any relevant matter, as long as the information sought appears to

be "reasonably calculated to lead to the discovery of admissible evidence." However, Rule 1.280(c), Fla.R.Civ.P., allows persons from whom discovery is sought to move for a protective order to protect them "from annoyance, embarrassment, oppression, or undue burden or expense"

4. Staff objects to the depositions of Mr. Stallcup and Mr. Dudley, as noticed by OCL, on the grounds that these depositions will cause an undue burden on Staff by impinging upon its role as an advisor to the Commission and that OCL, through these depositions, will improperly seek analyses from Staff on a pending matter and seek information irrelevant to this proceeding.

OCL'S DEPOSITIONS WILL RESULT IN UNDUE BURDEN ON STAFF

5. Pursuant to Rule 25-22.026(3), Staff's duty is to "represent the public interest and see that all relevant facts and issues are clearly brought before the Commission for its consideration." However, Staff is not a real party in interest in any proceeding before the Commission. South Florida Natural Gas Co. v. Public Service Commission, 534 So. 2d 695 (Fla. 1988). One of Staff's primary functions is to provide legal and technical advice on matters pending before the Commission. The Commission uses its staff to "test the validity, credibility, and competence of the evidence presented." South Florida Natural Gas, at 698.

6. Rule 25-22.033(5), Florida Administrative Code, prohibits a staff member who testifies in a case from discussing the merits of that case with any Commissioner during the pendency of that case. This prohibition extends to participating in the preparation of recommendations and at the agenda conference. Further, Section 120.66(1), Florida Statutes, permits only advisory staff members who do not testify on behalf of the Commission in a formal proceeding to communicate with the Commissioners. Staff has not filed testimony in this proceeding.

7. If OCL is permitted to depose Mr. Stallcup and Mr. Dudley and transcripts of those depositions are offered at hearing, Mr. Stallcup and Mr. Dudley would no longer be able to perform their advisory role in this proceeding because they would be excluded from further participation in analysis of the case and preparation of Staff's recommendation. It is clear that OCL intends to offer the deposition transcripts at hearing. In a pleading entitled Orlando Cogen Limited, Ltd.'s Response to Order No. PSC-97-1009-PCO-EQ/Direct Testimony and Exhibits and Motion to Present Live Testimony, filed September 10, 1997, OCL states that it intends to "either call Messrs. Stallcup and Dudley as witness, or offer all or portions of the transcript of their pending deposition by OCL" Further, OCL has applied for subpoenas duces tecum to compel the attendance of Mr. Stallcup and Mr. Dudley at hearing.

8. If OCL is permitted to depose Mr. Stallcup and Mr. Dudley, it would essentially be allowed to remove from participation in this docket those staff members who recommended denial of FPC's proposal in the underlying PAA proceeding. The Commission previously found such a result unacceptable. Order No. PSC-97-0425-PCO-WS, issued April 11, 1994, states:

If parties are allowed to subpoena non-testifying Staff members, any party could eviscerate Staff's ability to execute its advisory function by excluding those Staff members from further participation in the analysis and preparation of the Staff recommendation. Such a result is contrary to all common sense and reason.

OCL SEEKS INFORMATION IRRELEVANT TO THIS PROCEEDING

9. The document requests contained in OCL's notice of deposition make it clear that the intent of these depositions is to challenge Staff's analysis and conclusions in the alternate recommendation approved by the Commission in the underlying PAA proceeding. In addition, on page 2 of its Response to Order No. PSC-97-1009-PCO-EQ, OCL states that it intends to call Mr. Stallcup and Mr. Dudley as adverse witnesses and "conduct its inquiry of them in that capacity to establish the limitations on the alternative staff recommendation" authored by them in the underlying PAA proceeding. (Emphasis added.)

10. As stated above, one of Staff's primary functions is to provide legal and technical advice on matters pending before the

Commission. When this Commission or any other agency issues an order, whether based on the advice of its staff or otherwise, the order represents the decision of the agency. The order becomes the object for assault by appeal or petition for review. See, Home Shopping Network, Inc. v. GTE Corporation, et al., (Case No. 87014199-7, Fla. Cir. Ct., Pinellas County). The underlying advice and analysis of the agency's staff are irrelevant to subsequent proceedings.

11. Further, FPC's protest in this docket rendered the Commission's PAA Order a nullity and established a *de novo* proceeding. The analysis and impressions that led to Staff's recommendations in the underlying PAA proceeding are not relevant to this formal *de novo* proceeding. This proceeding is not designed for the parties to challenge Staff's recommendation in the underlying PAA proceeding; the party or parties seeking approval of the contract amendment bear the affirmative burden of proving that the amendment should be approved. Consistent with its advisory role in this formal proceeding, Staff has not reached any conclusions on this matter.

CONCLUSION

12. Decision makers have broad discretion in resolving discovery disputes and protecting against possible abuse of discovery procedures. See, Orlovitz v. Orlovitz, 199 So. 2d 97

(Fla. 1967). In deciding whether a protective order is appropriate in a particular case, courts must balance the competing interests that would be served by granting discovery or denying it. Rasmussen v. South Florida Blood Service, Inc., 500 So. 2d 533, 535 (Fla. 1987). The Commission's prehearing officer has the discretion to weigh the competing interests of the parties. Sugarmill Woods Civic Ass'n, Inc. v. Southern States Utilities, 687 So. 2d 1346, 1351 (Fla. 1st DCA 1997).

13. The Commission stated in Order No. PSC-97-0425-PCO-WS:

[W]hen the interest in full disclosure to a discovery request conflicts with a competing interest in non-disclosure, the decision-maker must balance the competing interests. When the public policy considerations of allowing non-testifying staff members' depositions to go forward are weighed against the lack of relevance of any information that might be elicited thereby, ... the balance clearly falls toward protecting the integrity of the governmental process.

The Commission has recognized Staff's interests and concerns raised in this objection in other orders protecting non-testifying members of Staff from depositions and requests for admissions. See Order No. PSC-94-1562-PCO-WS, issued December 14, 1994, in Docket NO. 930945-WS; Order No. PSC-95-0137-PCO-SU, issued January 27, 1995, in Docket No. 940963-SU; and Order No. 17910, issued July 27, 1987, in Docket No. 860960-WS.

14. Requiring Mr. Stallcup and Mr. Dudley to appear pursuant to OCL's notice of depositions will create an undue burden on Staff by removing those staff members from further participation in this

docket. In addition, it will be both oppressive and annoying, especially considering that the information sought by OCL is not relevant to this proceeding.

15. As stated above, Staff has not filed testimony in this proceeding. The deadline established for Staff testimony is September 24, 1997. If the parties' prefiled testimony does not provide an adequate record basis for comprehensive consideration of the matters at issue, Staff will timely file appropriate testimony to assure an adequate record. In the event Staff files testimony in this proceeding, discovery requests may be properly served upon those individuals who file testimony. In addition, OCL may request the documents listed in its notice of deposition through a public records request at any time.

WHEREFORE, the Staff of the Florida Public Service Commission requests that the Prehearing Officer issue a protective order relieving Paul Stallcup and Kenneth Dudley from the undue burden, oppression, and annoyance of appearing for deposition pursuant to Orlando Cogen Limited, Ltd.'s Notice of Taking Deposition Duces Tecum.

Respectfully submitted this 19th
day of September 1997.



WM. COCHRAN KEATING IV
Staff Counsel

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of early termination amendment to negotiated qualifying facility contract with Orlando Cogen Limited, Ltd. by Florida Power Corporation.

DOCKET NO. 961184-EQ

FILED: SEPTEMBER 19, 1997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one true and correct copy of Staff's Objection to Orlando Cogen Limited, Ltd.'s Notice of Taking Deposition Duces Tecum of Paul Stallcup and Kenneth Dudley and Request for Protective Order has been furnished by U.S. Mail or Hand Delivery (*) this 19th day of September, 1997, to the following:

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Certificate of Service
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