

ORIGINAL

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From: Tim Perry [tperry@mac-law.com]
Sent: Thursday, October 28, 2004 4:43 PM
To: Filings@psc.state.fl.us
Cc: Vicki Gordon Kaufman; Joe McGlothlin
Subject: Docket No. 040001-EI

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2. The filing is to be made in Docket No. 040001-EI, *In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor*;
3. The filing is made on behalf of the Florida Industrial Power Users Group;
4. The total number of pages is 17; and
5. Attached to this e-mail in Adobe format is the Florida Industrial Power Users Group's Motion for Protective Order.

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power
Cost Recovery Clause with Generating
Performance Incentive Factor.

Docket No. 040001-EI
Filed: October 28, 2004

FLORIDA INDUSTRIAL POWER USERS GROUP'S
MOTION FOR PROTECTIVE ORDER

The Florida Industrial Power Users Group (FIPUG), by and through its undersigned counsel, moves for a Protective Order ruling that FIPUG witnesses, Kerrick Knauth and Michael Vogt, are not required to answer certain questions posed to them during their depositions by counsel for Florida Power & Light Company (FPL) on October 26, 2004, and October 27, 2004, respectively. In support of its motion, FIPUG states:

1. On October 4, 2004, FIPUG submitted the prefiled testimony of Kerrick Knauth and Michael Vogt. In their prefiled testimony, Mr. Knauth and Mr. Vogt observed that FPL had not compared the 955 MW proposed UPS contracts with alternatives available in the wholesale market, including from their respective companies, and suggested that, as a result, the Commission is not in a position to gauge whether the proposed contracts (which do not provide for delivery until 2010) constitute the best available deal for the ratepayers.

2. During his deposition, counsel for FPL posed the following questions to Mr. Knauth:

Is Northern Star's compensating FIPUG for participation in this docket?¹

Is there any sort of contingency fee arrangement regarding FIPUG's participation in this docket whereby FIPUG would get paid a certain amount if it achieves a certain result?²

FPL posed similar questions to Mr. Vogt at his deposition the following day.³

¹ Knauth deposition at 50.

² *Id.* at 51.

³ Mr. Vogt's deposition was not available at the time of filing this pleading.

3. Counsel for FIPUG objected to these questions and directed Mr. Knauth and Mr. Vogt not to answer. FIPUG now requests that the Commission enter a Protective Order ruling that Mr. Knauth and Mr. Vogt are not required to answer these questions. FIPUG is entitled to such an order for the following reasons:

- (a) The questions are harassing and unreasonably annoying and oppressive;
- (b) The Commission has recognized, in conformity with rulings by a Florida court of law, that any arrangements for the funding of litigation are not discoverable and that an order requiring that such information be provided is a departure from the essential requirements of law. By definition, questions that seek information that is not subject to discovery are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, which is the standard that governs the scope of allowable discovery in courts and in Commission dockets. Rule 1.280(b), Florida Rules of Civil Procedure;
- (c) FPL posed similar questions to FIPUG in written discovery. FIPUG intends to object to that discovery on November 1, 2004. FPL essentially claims that it can preempt FIPUG's right to object to such questions and seek a ruling on its objections through the expedient action of posing the same questions in a deposition. Not only does FPL's litigation position ignore the fact that the questions, by their nature, constitute legitimate grounds for instruction not to answer, the tactics demonstrate that, with respect to these questions, FPL was conducting the depositions in bad faith.

3. Finally, in Order Nos. PSC-04-0498-PCO-EI and PSC-04-0547-PCO-EI, issued in Docket No. 031033-EI, in response to an analogous situation Chairman Baez articulated a standard of which — in light of the diversion from a consideration of the merits of its proposal that FPL is attempting to create with its questions — the Commission should remind FPL:

Finally, it should be made clear that the issues in this case will be decided on the merits based on the record evidence and argument put forward by the parties, regardless of what motivation may or may not lay behind the parties' litigation efforts.⁴

⁴ Order No. PSC-04-0498-PCO-EI at 4.

WHEREFORE, FIPUG requests that the Prehearing Officer enter a Protective Order ruling that FIPUG witnesses Knauth and Vogt are not required to answer the questions that were the subject of FIPUG's objections and instructions.

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER

I. The Questions That Were The Subject Of FIPUG's Instructions Not To Answer Violate The Permissible Scope of Discovery.

The questions in dispute squarely raise the subject of litigation funding. Florida's judiciary and, more recently, this Commission have addressed whether this subject falls within the permissible scope of discovery. The courts of law and the Commission have ruled that information relating to the funding of litigation is not discoverable. *Estate of Lisa McPherson vs. Church of Scientology Flag Service Organization, Inc.*, 815 So.2d 678 (Fla.2d DCA 2002). In the *McPherson* decision, Florida's Second District Court of Appeal protected the Estate from discovery questions relating to possible sources of litigation funding. Noting that discovery must be relevant to the subject matter of the case and must be reasonably calculated to lead to the discovery of admissible evidence, the Court concluded that questions relating to litigation funding did not meet this standard. The Court also observed that to require the Estate to answer such questions would enable the opposing party to assess whether it could outspend and outlast the other side by virtue of its greater financial resources — a consideration that is germane in this case, in which FPL has vast resources for which ratepayers, including FIPUG members, are the source. Finally, the Court found that the lower court's entry of a discovery order requiring production of documents related to this issue was a "departure from the essential requirements of law." *Id. See also, Liebrich vs. Church of Scientology Flag Service Organization, Inc.*, 816 So.2d 776 (Fla. 2d DCA 2003) (holding that discovery seeking information regarding who is

providing funds and in what amounts is irrelevant and not reasonably calculated to lead to admissible evidence).

A similar situation arose in Commission Docket No. 031033-EI, the Commission's review of Tampa Electric Company's (TECo) contractual arrangements with TECO Transport. In that case, TECo asserted that certain residential customers might be receiving funds from outside sources that included "one or more suppliers of coal or coal transportation services"⁵ who had an interest in the case. TECo moved to compel answers to discovery questions relating to the residential customers' possible sources of funding. The customers filed a motion for protective order. In his ruling, Chairman Baez denied outright TECo's motion to compel. In the order, he stated, *inter alia*:

To the extent Tampa Electric seeks to compel information concerning funding of the Residential Customers' litigation efforts, the decision in Estate of McPerson makes clear that *such information is not discoverable*. Finally, it should be made clear that the issues in this case will be decided on the merits based on the recorded evidence and arguments put forward by the parties, regardless of what motivations may or may not lay behind the parties' litigation efforts.⁶

Chairman Baez's order and rationale are completely applicable to this case. If anything, FPL's questions are even less supportable than TECo's. TECo purported to be concerned about possible anonymous interests. In this case, FIPUG is sponsoring the testimony of witnesses who say openly that providers of wholesale power employ them and that their comments are made from that perspective. FIPUG is sponsoring the testimony, as is its right, because FIPUG believes its members and other ratepayers benefit when wholesale competition is given an opportunity to bear on the choices made by the utilities that serve them.

⁵ Order No. PSC-04-0498-PCO-EI at 1.

⁶ Order No. PSC-04-0547-PCO-EI at 3, emphasis added.

**II. The Questions Are Harassing And Unreasonably Annoying
And Oppressive Within The Meaning Of Rule 1.310(d),
Florida Rules Of Civil Procedure.**

Rule 1.310 (d), Florida Rules of Civil Procedure, authorizes counsel for a deponent to object and instruct a witness not to answer questions that are “being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass or oppress the deponent or party. . . .” FPL’s questions regarding litigation funding fall into these categories.

Whether questions are unreasonably annoying or oppressive begins with an analysis of the legitimacy of the questions themselves. As the rulings by the Second District Court of Appeal and the Commission, cited above, establish, the information FPL seeks is NOT DISCOVERABLE. Therefore, for FPL to pursue this line of questions in a discovery deposition is unreasonably oppressive virtually by definition. Second, the questions seek information about FIPUG’s finances and financial arrangements, if any. A party’s financial situation is, by its very nature, a sensitive subject, for which any inquiry — *much less illegitimate ones* — are intrusive, unreasonably annoying, and unreasonably oppressive.

III. Under The Circumstances, FPL’s Questions Constitute Bad Faith.

FPL posed similar questions to FIPUG in the form of written discovery (see Attachment A). As it is entitled to do, FIPUG intends to object to these interrogatories and to defend those objections. FIPUG is entitled to a ruling on its objections related to its position that the questions exceed the proper scope of discovery. FPL posed similar questions in a deposition, and then argued that the rules governing a deposition did not permit counsel for FIPUG to instruct the witness not to answer. FPL conveniently overlooks the unreasonably annoying and oppressive nature of the questions themselves. More troubling is the “gotcha” nature of FPL’s argument. Essentially, FPL’s argument is: “never mind FIPUG’s objections that go to the permissible scope of discovery, we are in a deposition and you have to answer regardless.” FPL’s litigation

position is *wrong* because questions pertaining to financial matters that exceed the allowable scope of discovery are unreasonably annoying and oppressive, *period*. Furthermore, FPL's effort to circumvent or preempt FIPUG's procedural and due process rights to raise those objections is an abuse of the discovery vehicle and constitutes bad faith under the circumstances, a separate basis for instructing a witness not to answer questions during a deposition.

Conclusion

The questions to which FIPUG objected during the deposition of FIPUG witnesses Kerrick Knauth and Michael Vogt exceed the allowable scope of discovery. They constituted intrusive inquiries regarding FIPUG's litigation funding, a subject that is (a) irrelevant, (b) none of FPL's business and (c) as both the court and this Commission have ruled, not discoverable. For these reasons, they were unreasonably oppressive and annoying. FPL's attempt to preempt FIPUG's rights to object to improper discovery constitutes a bad faith effort to foreclose FIPUG's ability to defend against an illegitimate and illegal line of questioning. Perhaps most important of all, through these questions, FPL is attempting to require parties and this Commission to divert attention from the *merits* of FPL's 955 MW transaction, which is the issue before the Commission.

The Commission should enter a Protective Order ruling that Mr. Knauth and Mr. Vogt are not required to answer the questions to which FIPUG objects.

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ATTACHMENT A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power)
Cost Recovery Clause and Generating)
Performance Incentive Factor)
_____)

DOCKET NO. 040001-EI

DATED: October 12, 2004

**FLORIDA POWER & LIGHT COMPANY'S
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
TO THE FLORIDA INDUSTRIAL POWER USERS GROUP (NOS. 1-16)**

Pursuant to Rule 28-106.206, Florida Administrative Code and Rule 1.350, Florida Rules of Civil Procedure, Florida Power & Light Company ("FPL"), serves the following request for production of documents upon the Florida Industrial Power Users Group ("FIPUG"), and requests that responsive documents be produced pursuant to the timeframes established in the Commission's Order Establishing Procedure in the above-referenced docket.

DEFINITIONS

1. "You," "your" and/or "yourselves" means "FIPUG."
2. Unless the request states otherwise, "FIPUG" means the Florida Industrial Power Users Group, and any entity, attorney, employee, agent, representative, or other person acting or purporting to act on your behalf.
3. "Person" or "persons" means all natural persons and entities, including but not limited to: corporations, companies, partnerships, limited partnerships, joint ventures, trusts, estates, associations, public agencies, departments, bureaus, or boards.
4. "Document or documents" means "documents" as defined in Rule 1.350 of the Florida Rules of Civil Procedure. In addition, the words "document" or "documents" shall mean all writings, records, computer-stored information, or photographs in your possession, custody, care or control, which pertain directly or indirectly, in whole or in part, to any of the subjects

listed below, or which are themselves listed below as specific documents, including, but not limited to: contracts, agreements, correspondence, memoranda, notes, messages, e-mails, diaries, minutes, books, reports, charts, ledgers, invoices, computer printouts, computer discs, microfilms, video tapes, or tape recordings.

5. The term "documents" includes copies of documents, where the originals are not in your possession, custody, or control.

6. The term "documents" includes every copy of a document that contains handwritten or other notations or that otherwise does not duplicate the original or any other copy.

7. The term "documents" also includes any attachments or appendices to any document.

8. "Each" shall be construed to include the word "every" and "every" shall be construed to include the word "each." Similarly, "any" shall be construed to include "all," and "all" shall be construed to include "any."

9. "FPSC" means the Florida Public Service Commission.

10. "FPL" means Florida Power & Light Company.

11. "Members" means participants and partners, whether formal or informal, and includes membership at any level or commitment.

12. "Relate to" shall mean contain, discuss, describe or address.

13. "All" means all or any.

14. The singular of any word contained herein shall include the plural and vice versa; the terms "and" and "or" shall be both conjunctive and disjunctive; and the term "including" means "including without limitation."

INSTRUCTIONS

15. Scope of Production. In responding to this request to produce, produce all responsive documents, including any and all non-identical copies of each such document.

16. Manner of Objections and Inability to Respond. If you object to a part of a request and refuse to respond to that part, state your objection and answer the remaining portion of that request. If you object to the scope of a request and refuse to produce documents for that scope, state your objection and produce documents for the scope you believe is appropriate.

17. If any of the requests cannot be responded to in full after exercising due diligence to secure the requested documents, please so state and respond and produce documents to the extent possible, specifying your inability to respond further. If your response or production is qualified or limited in any particular way, please set forth the details and specifics of such qualification or limitation.

18. Privileged Information or Documents. In the event you wish to assert attorney/client privilege or the work product doctrine, or both, or any other claim of privilege, then as to such documents allegedly subject to such asserted privileges, you are requested to supply an identification of such documents, in writing, with sufficient specificity to permit the Prehearing Officer or Commission to reach a determination in the event of a motion to compel as to the applicability of the asserted objection, together with an indication of the basis for the assertion of the claim of attorney/client privilege or the work product doctrine, or any other claim of privilege. The identification called for by this instruction shall include the nature of the document (e.g., interoffice memoranda, correspondence, report, etc.), the sender or author, the recipient of each copy, the date, the name of each person to whom the original or any copy was

circulated, the names appearing on any circulation list associated with such document, and a summary statement of the subject matter of the document in sufficient detail to permit the Court to reach a determination in the event of a motion to compel.

19. Computer-Generated Documents. If a requested document is on computer or word processing disc or tape, produce an electronic copy of the document and a printout of the document.

20. Organization of Documents. With respect to the documents produced, you shall produce them as they are kept in the usual course of business, labeling them to correspond with each numbered paragraph of this Request in response to which such documents are produced. All pages now stapled or fastened together and all documents that cannot be copied legibly should be produced in their original form.

DOCUMENTS REQUESTED

1. Provide copies of any and all documents evidencing the identify of the members of FIPUG for the time period 2002 through 2004.

2. Provide copies of any and all documents evidencing the identity of any members of FIPUG, or affiliates of FIPUG members, that have engaged or currently engage in the business of selling power on the wholesale power market for the time period 2002 through 2004.

3. Provide copies of any and all documents evidencing any financial backing or compensation, in any form, provided to FIPUG, including FIPUG's counsel, during the period 2002 through 2004 by entities that engage in the business of selling power on the wholesale power market.

4. Provide copies of any and all documents evidencing any expenses or compensation of any type, including the financing of expert witness expenses, that were shared

between FIPUG and any entity that engages in the business of selling power on the wholesale power market during the period 2002 through 2004.

5. Provide copies of any and all documents evidencing any expenses, financing, or money that the law firm Moyle, Flannigan, Katz, Raymond & Sheean, P.A., or any member of that firm has provided or has agreed to provide to FIPUG.

6. Provide copies of any and all documents evidencing any expenses of any type, including the financing of expert witness expenses, that were shared between FIPUG or FIPUG's counsel and the law firm Moyle, Flannigan, Katz, Raymond & Sheean, P.A., or any member of that firm or representative of the merchant power industry.

7. Provide copies of any and all documents evidencing expenses shared or compensation provided, in any form, to FIPUG for the period 2002 through 2004, by an association, lobbying organization, or entity of any form that is involved in promoting the interests of entities that engage in the sale of electricity on the wholesale power market.

8. Provide copies of all documents evidencing the terms of your involvement in the engagement of Mr. David E. Dismukes, in Docket No. 040001-EI.

9. Provide copies of all documents evidencing the circumstances under which FIPUG agreed to co-sponsor the testimony of Mr. David E. Dismukes, in Docket No. 040001-EI.

10. Provide copies of all documents evidencing the terms of your engagement of Kerrick Knauth in Docket No. 040001-EI.

11. Provide copies of all documents evidencing the terms of your engagement of Michael F. Vogt in Docket No. 040001-EI.

12. Provide copies of any and all documents evidencing your relationship with the Calpine Corporation as it relates to Docket No. 040001-EI.

13. For each Witness who has submitted or will submit testimony on your behalf in Docket No. 040001-EI:

- a. Please produce all direct, rebuttal and/or sur-rebutal testimony filed with any Public Utility Commission or Public Service Commission, or the Federal Energy Regulatory Commission in the last five years relating to the same and/or similar topic on which the witness is filing testimony in this proceeding.
- b. Please produce all articles published or submitted for publication by the witness in the last five years on the same topic and/or a topic similar to the one that the witness is filing testimony on in this proceeding.
- c. Please provide the scope of the Witness' employment in Docket No. 040001-EI and the compensation for such service;
- d. Provide all documents supporting all opinions expressed by such Witness.

14. For each generation resource identified in the Direct Testimonies of Michael F. Vogt and Kerrick Knauth filed on your behalf in Docket No. 040001-EI as an alternative to the contracts with Southern Company for which FPL seeks approval in Docket No. 040001-EI, provide:

- a. all reports, studies, analyses and other documentation evidencing the availability of such generation resource to deliver power to FPL commencing in 2010;
- b. all reports, studies, analyses and other documentation evidencing how the generation resource is or will be financed;

- c. all reports, studies, analyses and other documentation evidencing the financial viability of the owner of the generation resource;
- d. all reports, studies, analyses and other documentation evidencing the ability of the owner(s) of such generation resource to secure transmission access and reservations sufficient to transmit the output of the generation resource to inter-ties with FPL.

15. For each solid-fuel generation resource that is identified in the Direct Testimonies of Michael F. Vogt and Kerrick Knauth filed on your behalf in Docket No. 040001-EI as an alternative to the contracts with Southern Company for which FPL seeks approval in Docket No. 040001-EI provide:

- a. all reports, studies, analyses and similar documentation evidencing the experience of the owner(s) of such generation resource in developing a solid fuel project to the point of commercial operation;
- b. all reports, studies, analyses and similar documentation evidencing the experience of the owner(s) of such generation resource in developing a solid fuel project to the point of commencing construction;
- c. all reports, studies, analyses and similar documentation evidencing the experience of the owner(s) of such generation resource in obtaining financing;
- d. all reports, studies, analyses and similar documentation evidencing the experience of the owner(s) of such generation resource in marketing the output of a solid fuel generating facility to a creditworthy buyer in the form of a long-term (greater than five years) purchase power agreement.

- e. all reports, studies, analyses and similar documentation evidencing the experience of the owner(s) of such generation resource in obtaining all necessary permitting for a solid fuel project, including the time frame within which such permitting was achieved;
- f. all reports, studies, analyses and similar documentation evidencing the experience of the owner(s) of such generation resource in obtaining zoning approvals for a solid fuel project.

16. Provide copies of any and all documents you identified or relied upon in your responses to FPL's First Set of Interrogatories.

Respectfully submitted this 12th day of October, 2004.

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By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Industrial Power Users Group's Motion for Protective Order has been furnished by electronic mail and U.S. Mail this 28th day of October, 2004, to the following:

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