BEFORE THE PUBLIC SERVICE COMMISSION

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| In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee. | DOCKET NO. 060635-EU<br>ORDER NO. PSC-07-0032-PCO-EU<br>ISSUED: January 9, 2007 |

ORDER DENYING EMERGENCY REQUEST FOR ORAL ARGUMENT AND MOTION TO COMPEL, AND GRANTING MOTION FOR PROTECTIVE ORDER

On September 19, 2006, the Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee (Applicants) filed a petition for a determination of need for a proposed electrical power plant in Taylor County pursuant to Section 403.519, Florida Statutes, and Rule 25-22.080, Florida Administrative Code (F.A.C.). By Order No. PSC-06-0819-PCO-EU, issued October 4, 2006, the matter was scheduled for a formal administrative hearing to be held on January 10, 2007. Intervention was granted to Natural Resources Defense Council (NRDC) by Order No. PSC-06-0971-PCO-EU, issued November 21, 2006.

NRDC propounded both its First and Second Sets of Interrogatories on the Applicants on December 11 and 12, 2006, respectively. The Applicants filed Objections to both NRDC's First and Second Sets of Interrogatories on December 26, 2006. On January 2, 2007, NRDC filed a Motion to Compel and an Emergency Request for Oral Argument, requesting an order requiring the Applicants to respond to NRDC's First Set of Interrogatories, Nos. 24 and 25, and Second Set of Interrogatories, Nos. 5 and 6. Also on January 2, the Applicants filed a Motion for Protective Order and Response in Opposition to NRDC's Motion to Compel.[1] On January 3, NRDC filed a Reply to the Applicants' Response in Opposition, which in part addressed arguments raised in the Applicants' Response, and in part withdrew NRDC's request to compel answers to NRDC's Second Set of Interrogatories, Nos. 5 and 6. This order addresses the remainder of NRDC's Motion to Compel, concerning its First Set of Interrogatories, Nos. 24 and 25.

Arguments of the Parties

NRDC's First Set of Interrogatories, Nos. 24 and 25, provide as follows:

> Interrogatory 24: Please provide a CO2 sensitivity analysis similar to Ex. (MP-5) which uses the same parameters for electricity demand growth, same amount of nuclear capacity and same amount of energy produced by renewables or other non-emitting sources as that used in Ex. (MP-2).

[1] The Applicants' Motion for Protective Order is filed pursuant to Rule 1.280(c), Fla.R.Civ.P., addressing protective orders in the context of general provisions regarding discovery, which is distinct from Rule 25-22.006(6), F.A.C., addressing protection of proprietary confidential business information in Commission proceedings.

Interrogatory 25: Please provide a low fuel sensitivity study similar to Ex. (MP-4) which also includes CO2 emissions allowances as stated on Ex. (MP-5).

The Applicants filed specific objections to these interrogatories on the basis that they would improperly require the Applicants to perform a study, that does not currently exist, to support NRDC's view of the case.

NRDC's Position

In its Motion to Compel, NRDC notes that the Applicants did not object on the grounds of relevance, and contends that Interrogatory Nos. 24 and 25 are directly relevant to the issue of appropriate evaluation of CO2 emission allowances in the economic analysis of the Taylor Energy Center (TEC) unit. In order to answer Interrogatory No. 24, NRDC states that the Applicants would be required to run the Hill & Associates' proprietary PRISM model using the same parameters used in the development of Applicants Witness Preston's Exhibit (MP-2), the Applicants' Base Case, to produce CO2 emission allowances. In order to answer Interrogatory No. 25, NRDC states the Applicants would be required to run the PRISM model to provide a low fuel sensitivity study using the same parameters as that found in Preston's Exhibit (MP-4), which also includes CO2 emissions allowances as stated on Mr. Preston's Exhibit (MP-5). NRDC contends that because the PRISM model is proprietary, NRDC has no access to it and no means of preparing these studies itself.

NRDC contends that similar types of sensitivity studies were requested by Commission Staff, to which the Applicants did not object.[2] NRDC argues that the Commission must compel the Applicants to answer its interrogatories in order to satisfy requirements of fairness and due process.

Finally, NRDC notes that the Applicants did not object to the cost of preparation of the additional studies, and NRDC contends that any additional costs to provide its requested studies, when compared to what has already been incurred to prepare the need determination application, is so small as to be de minimus. Further, NRDC argues that basic fairness and due process require that all parties be treated alike.

In conclusion, NRDC argues that the information it requests is relevant to identified issues in the case, is necessary to fully develop the record, cannot be otherwise produced by NRDC, and is in the same posture as the information requested and supplied to Staff without objection. Therefore, NRDC requests that this Commission require the Applicants to answer its First Set of Interrogatories, Nos. 24 and 25, as soon as possible but no later than Friday, January 5, 2007.

[2] The Applicants answered Staff Interrogatory No. 74 on December 7, 2007, and Staff Interrogatory Nos. 101 and 102 on January 2, 2007.

Applicants' Position

In their Response in Opposition to NRDC's Motion to Compel, the Applicants argue that Florida law is clear that a party may not be required to produce documents which it does not have and which are not shown to exist. The Applicants distinguish a number of cases cited by NRDC in support of its Motion to Compel, arguing that discovery cannot be used to require preparation of a document; rather, it is limited to production of those already in existence. The Applicants contend that the Commission has consistently applied this principle in utility cases and cite a number of cases for that proposition.

The Applicants argue that answering NRDC's Interrogatories Nos. 24 and 25 would require them to conduct analysis and modeling using proprietary software, which would require a significant commitment of time and resources, including developing new runs of the PRISM model with different inputs. The Applicants believe that NRDC's assertions that it has no access to fuel forecast and production cost modeling software and no means of preparing these analyses are unfounded and exaggerated, because the modeling software used by the Applicants is commercially available, and that there are consultants available with the expertise to conduct the modeling requested by NRDC. To the extent that NRDC wishes to pursue its case, the Applicants contend that it must do so at its own expense and effort.

The Applicants further argue that NRDC's production requests place unreasonable, "eleventh-hour timing" demands on the Applicants' witnesses in light of the current time frame established by Order Establishing Procedure No. PSC-06-0819-PCO-EU [the deadline for completing discovery is January 3, 2007; the hearing is scheduled for January 10, 2007].

With respect to responses provided to Staff interrogatories that required additional or new analysis (similar to that required in response to NRDC's interrogatories), the Applicants note that the provision of responses to interrogatories from Staff does not waive any objections to interrogatories from other parties. The Applicants further contend that most of Staff's discovery requests were sent out early in the case, which afforded sufficient time for a courtesy response. In addition, the Applicants indicate that most of Staff's requests did not require extensive time and manpower effort in response by the Applicants, but rather involved simple changes to the analyses already prepared by the Applicants. In contrast, NRDC's Interrogatories Nos. 24 and 25 require time-intensive analysis including the development of new assumptions and the conduct of new iterative studies.

For these reasons, the Applicants request that the Commission grant their Motion for Protective Order and deny NRDC's Motion to Compel.

Ruling

Because I do not find oral argument necessary to comprehend and evaluate these discovery disputes, which have been adequately argued in the parties' pleadings, NRDC's Emergency Request for Oral Argument is denied.

On January 3, 2007, NRDC filed a Reply to the Applicants' Response in Opposition, which in part amended NRDC's request to compel answers to only Nos. 24 and 25 from NRDC's First Set of Interrogatories and withdrew NRDC's request with respect to Nos. 5 and 6 from its Second Set of Interrogatories. However, the Reply also provided argument addressing points raised in the Applicants' Response. Neither the Uniform Rules nor our rules contemplate a reply to a response to a motion, and as such those arguments need not be considered.

Rule 1.350, Florida Rules of Civil Procedure, provides that a party may request documents that are in the possession, custody, or control of the party to whom the discovery request is directed. The applicable law is sufficiently clear that discovery cannot be used to require preparation of a document, and the Commission has declined to compel parties to answer such discovery requests.

For example, Order No. PSC-92-0819-PCO-WS, issued August 14, 1992, in Docket No. 920199-WS,[3] addressed a utility's objections to discovery requests by the Office of Public Counsel (OPC) because the solicited projections went beyond the calendar test year, were not known and quantifiable, and were not relevant nor reasonably calculated to lead to the discovery of admissible evidence. OPC argued that the utility's objection to this information was based on its misunderstanding of the interim nature of the test year approval decision, that the appropriateness of the test year was anticipated to be an issue in the case, and that matters probative of that issue were within the scope of permissible discovery. The Commission found:

> Although OPC makes a cogent point, I cannot agree that the utility should be required to produce information or answer questions based on information which is not presently in existence. I think the utility's objection can be subdivided into three categories: projections, estimates, and anticipated occurrences. Therefore, if an interrogatory or document request solicits a projection or estimate and the projection or estimate has already been prepared by the utility for its own purposes, the utility shall answer the discovery. However, if the discovery solicits a projection or estimate and the projection or estimate does not exist, the utility need not answer the discovery.

(Emphasis added).

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[3] In re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by Southern States Utilities, Inc.; Collier County by Marco Shores Utilities (Deltona); Hernando County by Spring Hill Utilities (Deltona); and Volusia County by Deltona Lakes Utilities (Deltona).

Order No. PSC-99-0708-PCO-WS, issued April 13, 1999, in Docket No. 950495-WS,[4] also addressed a utility's objection to an OPC interrogatory because, as with another interrogatory at issue, it exceeded the scope of the proceeding. Furthermore, the utility noted that it was not required to "create new documents, undertake new analyses, or create new studies or reports." OPC responded that, as with the prior interrogatory, it was only asking for information pertaining to the water and wastewater utilities at issue in the docket. OPC additionally stated that it sought only relevant information which was already known to the utility. The Commission held:

> As with [the prior interrogatory], I find that the information requested is reasonably calculated to lead to admissible evidence on the proper methodology for the calculation of used and useful percentages for the transmission, distribution, and collection facilities; therefore, OPC's request is appropriate. See Calderbank, 435 So. 2d at 379. However, the utility shall not be required to create new documents, undertake new analysis, or create new studies or reports. See Order No. PSC-92-0819-PCO-WS, issued August 14, 1992, in Docket No. 920199-WS. If the requested information does not already exist, or is not already known to the utility, it shall simply so state in its response.

(Emphasis added).

I have examined the case law, the Commission precedent, and the procedural rules referenced by the parties in their pleadings. Based upon my review and consideration of the pleadings, I find that NRDC's Motion to Compel shall be denied, and the Applicants' Motion for Protective Order is granted with respect to NRDC's Interrogatory Nos. 24 and 25.

Based on the foregoing, it is

ORDERED by Commissioner Katrina J. Tew, as Prehearing Officer, that Natural Resource Defense Council's Emergency Request for Oral Argument is denied. It is further

ORDERED that the NRDC's Motion to Compel is denied. It is further

ORDERED that the Applicants' Motion for Protective Order is granted, with respect to Interrogatory Nos. 24 and 25, of NRDC's First Set of Interrogatories to the Applicants.

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[4] In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. For Orange-Osceola Utilities, Inc. In Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.

By ORDER of Commissioner Katrina J. Tew, as Prehearing Officer, this 9th day of January, 2007.

KATRINA J. TEW
Commissioner and Prehearing Officer

(SEAL)

JSB

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 Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, 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.