

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for
Determination of Need for an
Electrical Power Plant in
Okeechobee County by Okeechobee
Generating Company, L.L.C

DOCKET NO. 991462-EU
ORDER NO. PSC-00-0562-PCO-EU
ISSUED: March 17, 2000

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO COMPEL,
GRANTING MOTIONS FOR ENLARGEMENT OF TIME, AND GRANTING
MOTION FOR PROTECTIVE ORDER

I. BACKGROUND

On September 24, 1999, Okeechobee Generating Company, L.L.C. ("OGC"), filed a Petition for Determination of Need for an Electrical Power Plant. OGC proposes to construct a 550 megawatt natural gas-fired, combined cycle electrical power plant in Okeechobee County, Florida, to commence commercial operation in April 2003. An administrative hearing on OGC's petition is set for March 20-22, 2000. By Order No. PSC-99-2153-PCO-EU, issued November 4, 1999, Florida Power & Light Company ("FPL"), Florida Power Corporation ("FPC"), Tampa Electric Company ("TECO"), and the Legal Environmental Assistance Foundation, Inc. ("LEAF"), were granted leave to intervene in this docket.

On February 4, 2000, OGC filed motions to compel FPL, FPC, and TECO to respond to certain of OGC's discovery requests in this docket. Specifically, OGC filed: (1) a Motion to Compel FPL to respond to OGC's First Request for Admissions and First Request for Production of Documents; (2) a Motion to Compel FPC to respond to OGC's First Set of Requests for Admissions, First Set of interrogatories, and First Request for Production of Documents; and (3) a Motion to Compel TECO to respond to OGC's First Request for Admissions, First Set of Interrogatories, and First Request for Production of Documents.

On February 11, 2000, FPL and FPC each filed an unopposed Motion for Enlargement of Time to Respond to OGC's Motion to Compel. Both FPL and FPC requested additional time, up to and including February 14, 2000, to respond to OGC's motions to compel. On February 14, 2000, FPL and FPC filed responses to OGC's respective motions to compel, requesting that OGC's motions be denied in their entirety.

On February 11, 2000, TECO filed its response to OGC's motion to compel. In its response, TECO requests that the Commission

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"find and determine that such discovery requests are irrelevant to the disposition of this proceeding, overly burdensome and otherwise inappropriate."

This Order separately addresses each of OGC's motions to compel. Given that no party objects to either FPL or FPC's motions for enlargement of time as cited above, the motions for enlargement of time are hereby granted.

Unrelated to the motions to compel, OGC was required by Order No. PSC-00-0291-FOF-EU, issued February 11, 2000, to make available for in camera review a memorandum dated August 18, 1999, from Doug Egan to the department heads at PG&E Generating. On February 21, 2000, the document was inspected in camera by this Prehearing Officer. This Order provides a ruling on the discoverability of this document.

II. OGC's MOTION TO COMPEL FPL TO RESPOND TO DISCOVERY REQUESTS

In its motion, OGC specifically requests that FPL be compelled to respond to the following: (1) OGC's Requests for Admissions 8-11, 24, 26 and 27; (2) OGC's Requests to Produce 4-7, 17, 21 and 23 as modified; and (3) OGC's Request to Produce 14, as propounded.

A. General Objections

OGC states in its motion that FPL objects generally to all of OGC's discovery, alleging that the discovery is moot and irrelevant. OGC further states that FPL avers that because FPL has been granted intervention, OGC's discovery requests based on FPL's petition to intervene relate to matters no longer at issue in this proceeding. OGC contends that FPL's general relevance argument is without merit because, in its petition to intervene, FPL alleges numerous, unsubstantiated, adverse impacts resulting from the Okeechobee Generating Project ("the Project"). As a result, OGC contends that FPL has brought those issues within the fair inquiry of this proceeding. OGC cites Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathe Communications Co., 629 So.2d 852 (Fla. 1st DCA 1994), disapproved on other grounds, Allstate Insurance Co. v. Langston, 655 So.2d 91 (Fla. 1995), where the court found that discovery properly relates to all pleadings and was not limited to issues raised in an amended complaint. OGC argues, thus, that all matters raised by FPL in its petition to intervene are the proper subject of discovery.

OGC also argues that FPL must "prove up" at hearing the allegations of standing made in its petition to intervene. OGC asserts that while sufficient allegations of standing allow FPL to participate as a party in this proceeding, those allegations do not relieve FPL of the proofs necessary to maintain its standing. In support of this position, OGC cites Florida Audubon Society v. Department of Environmental Regulation, 1986 WL 32870 (Fla. Dep't Env'tl. Reg. 1986); Florida Power Corporation v. Department of Environmental Protection, 1999 WL 166086 (Fla. Dep't Env'tl. Protection 1999); and Jacksonville Shipyards, Inc. v. Florida Department of Environmental Regulation, 1987 WL 62036 (Fla. Dep't Env'tl. Reg. 1987). OGC further asserts that because FPL is a party in this proceeding, FPL is subject to all applicable rules, including the rules on discovery. In conclusion, OGC contends that FPL has the burden of going forward with evidence in support of the allegations contained in its petition to intervene and that OGC's discovery is designed to test the veracity of those allegations.

In its response to OGC's motion to compel, FPL states that the allegations in its petition to intervene were meant to demonstrate its standing, "an issue which OGC has not contested and which is conclusively established by the very allegations of OGC's petition." Additionally, FPL contends that this issue is now moot because it has not withheld any discovery responses on this basis. FPL argues that because OGC did not contest FPL's standing to intervene, failed to raise the standing issue when it challenged FPL's petition to intervene, and did not seek reconsideration or appeal of the Commission's decision to allow FPL to intervene, it is inappropriate to allow OGC to "reopen the standing issue so as to gain access to otherwise irrelevant information." FPL asserts that the cases cited in support of OGC's argument that FPL must prove up its allegations of standing at hearing do not allow OGC to "reopen" the standing issue.

The matters raised by FPL in its petition to intervene are relevant to the issues established in this case which relate to the introduction of capacity from OGC into the electric grid in Peninsular Florida, and are therefore the proper subject of discovery. In preparing for hearing, OGC must be allowed the opportunity to conduct discovery concerning these matters. Therefore, I find that FPL's general objections should be overruled. In making this finding, I do not rely upon OGC's arguments that FPL is required prove up at hearing its allegations of standing from its petition to intervene. I simply find that the matters raised by FPL in its petition to intervene are discoverable

because they are relevant to the issues generally established in this case.

B. Specific Objections

Requests for Admissions

In its motion, OGC states that FPL specifically objects to OGC's Requests for Admissions 8-11, 24, 26 and 27 on the grounds that they assert general conclusions of law. OGC maintains that these Requests for Admissions properly seek the application of law to fact and, thus, are expressly permitted under Rule 1.370, Fla.R.Civ.P., which provides:

A party may serve upon any other party a written request for the admission of the truth of any matters within the scope of rule 1.280(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact. (Emphasis added by OGC)

In its response to OGC's motion to compel, FPL asserts that these requests for admissions constitute an improper attempt to extract a legal opinion from FPL. FPL further asserts that the only facts contemplated by OGC's Requests for Admissions are that FPL is an investor-owned public utility and that the proposed OGC facility is a merchant plant. FPL contends that, contrary to OGC's arguments, "the interjection of such a minimal factual component into a generic legal question does not transform it into the sort of 'application of law to fact' contemplated by Rule 1.370." FPL further contends that pursuant to Florida case law and previous opinions of this Commission, legal opinions are generally protected from discovery.

OGC's Requests for Admissions 8-11 state:

8. With respect to its separated wholesale sales, FPL retains the right to sell power outside the State of Florida any time it is in the economic interest of FPL to do so.
9. With respect to FPL's separated wholesale sales, the Commission does not have jurisdiction over FPL to prescribe uniform systems and classifications of accounts.

10. With respect to FPL's separated wholesale sales, the Commission does not have jurisdiction over FPL to prescribe a rate structure.
11. With respect to FPL's separated wholesale sales, the Commission does not have jurisdiction over FPL to require electric power conservation by FPL.

OGC asserts that this Request for Admission seeks FPL's position regarding the application of law (the question of whether the Commission has jurisdiction) to fact (electric power conservation and separated wholesale areas). Additionally, OGC asserts that Requests for Admissions 8-10 pursue inquiries similar to that of Request for Admission 11.

FPL asserts that Request for Admission 11 calls for a conclusion of law concerning whether the Commission has jurisdiction over the separated wholesale sales of an investor-owned utility. FPL asserts that Requests for Admissions 8-10 similarly call for FPL's legal opinion as to how the Florida Statutes and Commission rules apply to investor-owned electric utilities.

OGC's Request for Admission 24 states:

24. Merchant power plants not subject to the Florida Electrical Power Plant Siting Act (e.g. combustion turbines) are legal under current Florida law.

OGC asserts that this Request for Admission seeks FPL's position regarding the application of law (the Florida Electrical Power Plant Siting Act) to fact (combustion turbine merchant plants).

FPL contends that this Request for Admission asks a hypothetical legal question with no factual component and, thus, calls for a pure conclusion of law. FPL asserts that OGC has not requested admission of any fact in this Request for Admission.

OGC contends that its Requests for Admissions 26 and 27 "relate to general policy and the regulatory compact--the exchange of an exclusive franchised service territory for the obligation to serve." These Requests for Admissions ask:

26. FPL has an obligation to retain earnings or pay dividends to its shareholders.

27. OGC is not guaranteed a fair rate of return or an exclusive franchised service territory.

OGC asserts that these Requests for Admissions do not seek legal opinions, but "attempt to create a fair comparison between retail-serving utilities and wholesale, merchant facilities." OGC maintains that these Requests for Admissions properly seek the truth of matters within the scope of Rule 1.280(b), Fla.R.Civ.P.

FPL responds by stating that Request for Admission 26 asks for FPL's legal opinion as to how the Florida Statutes and Commission rules apply to investor-owned utilities, and that Request for Admission 27 asks for a general legal conclusion regarding merchant power producers.

Upon consideration, I find that OGC's Requests for Admissions 8-11, 24, 26, and 27 are inappropriate requests for conclusions of law or legal opinions from FPL. FPL is correct that the only factual component of each request is that FPL is an investor-owned public utility and that the proposed OGC facility is a merchant plant. The name of any investor-owned public utility or merchant plant developer could be substituted for "FPL" and "OGC" in these requests without effectively changing the substance of any of the requests. Thus, as FPL argues, adding these "minimal factual components" to the generic legal conclusions contained in these requests does not make the requests any more appropriate under Rule 1.370, Fla.R.Civ.P., as applications of law to fact. I note that OGC's Request for Admission 24 contains no factual component whatsoever. Therefore, OGC's motion to compel responses to its Requests for Admissions 8-11, 24, 26, and 27 is denied.

Requests for Production of Documents

In its motion, OGC states that FPL objects to OGC's Requests to Produce 4-7 and 21 on the basis that they are overbroad, unduly burdensome, harassing, and unlikely to lead to the discovery of admissible evidence. OGC's Requests to Produce 4-7 and 21 ask FPL to produce:

4. All documents which relate to, mention or otherwise reflect on FPL contracting for energy in the wholesale market on an hourly basis during the last ten years.
5. All documents which relate to, mention or otherwise reflect on FPL contracting for energy in the

wholesale market for more than one hour and less than one year during the last ten years.

6. All documents which relate to, mention or otherwise reflect on FPL contracting for capacity in the wholesale market on an hourly basis during the last ten years.
7. All documents which relate to, mention or otherwise reflect on FPL contracting for capacity in the wholesale market for more than one hour and less than one year during the last ten years.
21. All documents which relate to, mention or otherwise reflect on FPL's wholesale sales in Florida or any of its affiliates.

OGC submits that these requests relate to FPL's wholesale sales, both separated and non-separated, that FPL has made it wholesale sales relevant in this proceeding by alleging that FPL will suffer direct injury if its wholesale sales are displaced by the Project. Further, OGC asserts that these requests seek information directly relevant to FPL's alleged adverse impacts and, therefore, do not amount to harassment. In response to FPL's argument that OGC's requests are overbroad, OGC agrees to modify its Requests to Produce 4-7 and 21 to limit the time period to the five years from 1995 through 1999.

In its motion, OGC also states that FPL objects to OGC's Requests to Produce 14, 17, and 23 as overbroad and unduly burdensome. These requests seek:

14. All documents which relate to, mention or otherwise reflect on whether uncommitted capacity may be included in the calculation of reserve margins for individual utilities, such as FPL.
17. All documents which relate to, mention or otherwise reflect on the recovery of generation costs when FPL purchases power.
23. All documents which relate to, mention or otherwise reflect on the degree to which, if at all, the benefit of revenues from any wholesale sales made by FPL are credited to or "flowed back" to FPL's retail electric customers.

OGC asserts that instead of arguing that the documents requested by OGC are not relevant to this proceeding, FPL argues that OGC's failure to limit the scope of the requests demonstrates harassment. OGC further asserts that FPL has not identified the amount, type, or content of the information it alleges would be burdensome to produce, and that FPL has the burden of quantifying the substantive support for its objections for the Commission. In response to FPL's argument that OGC's requests are overbroad, OGC agrees to modify its Requests to Produce 17 and 23 to limit the time period to the five years from 1995 through 1999.

In its response, FPL asserts that OGC's Requests to Produce 4-7, 17, 21, and 23, each seek production of voluminous amounts of information that is, at best, only marginally relevant to this proceeding. With respect to Requests to Produce 4-7 and 21, FPL states that these requests, even within the time span of five years, would include "hundreds of thousands of transactions" and that most of these transactions would have numerous related documents. FPL contends that assembling the documents could take several months and that FPL could not possibly comply with these requests within the time allotted. Additionally, FPL contends that detailed compilations of FPL's wholesale sales are readily available to OGC on FPL's A schedules, which are filed monthly with the Commission and are just as easily retrieved by OGC as by FPL.

With respect to Request to Produce 17, FPL states that its response would require the compilation of several hundred thousand documents, including numerous documents on file with the Federal Energy Regulatory Commission ("FERC") and the Commission that are publicly available. With respect to Request to Produce 23, FPL states that its response would require the compilation of all documentation relating to every wholesale sale of any amount of electric power made by FPL, including accounting entries, wholesale transaction records, and invoices for hundreds of thousands of transactions. FPL asserts that a more narrow quantification of the sales and credits sought in Request to Produce 23 is publicly available to OGC on FPL's A Schedules filed monthly with the Commission.

Upon consideration, I find that OGC's Requests to Produce 4-7, 17, 21, and 23, even as modified by OGC, are unduly burdensome. It appears that the compilation of documents responsive to such broad requests would be a massive undertaking for FPL. While these requests may seek documents relevant to this proceeding, they would create an undue burden on FPL. Therefore, OGC's motion to compel production of documents pursuant to its Requests to Produce 4-7,

17, 21, and 23 is denied. To the extent that documents responsive to Requests to Produce 17 and 23 are publicly available, FPL shall identify to OGC the specific documents or, if appropriate, the specific types of documents that are publicly available, and the public entity that has custody of each such document. FPL shall also identify to OGC the case or docket number under which each such document was filed. If a particular document was filed outside of a case or docket, FPL shall identify how that document was provided to or obtained by the public entity so as to provide OGC with information adequate to readily locate the document.

As to Request to Produce 14, FPL has not quantified how this request is overbroad or unduly burdensome and, therefore, has not adequately demonstrated that the request is overbroad or unduly burdensome. See, First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Assoc., 545 So.2d 502 (Fla. 1st DCA 1989). Therefore, OGC's motion to compel production of documents pursuant to its Request to Produce 14 is granted.

III. OGC's MOTION TO COMPEL FPC TO RESPOND TO DISCOVERY REQUESTS

In its motion, OGC specifically requests that FPC be compelled (1) to respond to OGC's Interrogatories 10-25 and 29-37, and OGC's Requests to Produce 4-9, 14, 21-23, 25, and 26, and (2) to specifically identify the documents responsive to OGC's Request to Produce 1-3, 10-12, 17-20, 24, 27, and 28.

A. General Objections

In its motion, OGC states that FPC objects generally to OGC's discovery requests on the basis that because OGC did not join FPC as a party, OGC has admitted that it does not intend to rely on discovery from FPC. OGC responds to FPC's objection by stating that it has no affirmative duty to join an entity as a party as a condition precedent to propounding discovery on that entity. Additionally, OGC asserts that it has the right to propound discovery on that entity once it has been granted party status. Accordingly, OGC contends that FPC cannot avail itself of the rights of a party (i.e., by propounding discovery on OGC) while at the same time selectively ignoring discovery requests on the basis that OGC did not join it as a party.

OGC asserts that FPC, in its petition to intervene, alleges numerous, unsubstantiated, adverse impacts resulting from the Project. As a result, OGC contends, FPC has brought those issues within the fair inquiry of this proceeding. OGC argues, thus, that

all matters raised by FPC in its petition to intervene are the proper subject of discovery. Further, OGC argues that FPC must "prove up" at hearing the allegations of standing made in its petition to intervene. OGC contends that FPC has the burden of going forward with evidence in support of the allegations contained in its petition to intervene and that OGC's discovery is designed to test the veracity of those allegations.

In its response to OGC's motion to compel, FPC states that OGC does not need discovery from FPC for this proceeding. FPC asserts that if OGC did need discovery from FPC for this proceeding, OGC would have joined FPC as an essential party to the proceeding. By failing to do so, FPC submits, OGC has admitted that no information or documents in FPC's custody are needed for this proceeding.

FPC further asserts that its petition to intervene has already been granted and is no longer at issue. FPC rejects OGC's argument that FPC must still "prove-up" its standing at the formal hearing on OGC's need petition, alleging that this argument is "legally baseless and, if accepted, would lead to an illogical and impractical application of the Commission's rules, would constitute a significant departure from longstanding Commission practice regarding intervention" and would potentially overwhelm Commission hearings with "collateral testimony and exhibits relating solely to the standing of numerous intervenors." FPC asserts that the cases cited in support of OGC's argument that FPC must prove up its allegations of standing at hearing are either distinguishable from this case or not authoritative.

The matters raised by FPC in its petition to intervene are relevant to the issues established in this case which relate to the introduction of capacity from OGC into the electric grid in Peninsular Florida, and are therefore the proper subject of discovery. In preparing for hearing, OGC must be allowed the opportunity to conduct discovery concerning these matters. Therefore, I find that FPC's general objections should be overruled. In making this finding, I do not rely upon OGC's arguments that FPC is required prove up at hearing its allegations of standing from its petition to intervene. I simply find that the matters raised by FPC in its petition to intervene are discoverable because they are relevant to the issues generally established in this case.

B. Specific Objections

Interrogatories

In its motion to compel, OGC states that FPC specifically objects to OGC's Interrogatories 10-25 and 29-37 on the basis that they are irrelevant, immaterial, argumentative, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in this proceeding. OGC argues that its Interrogatories are relevant to the issues in this proceeding because the majority of the questions track allegations of harm to FPC and issues identified by FPC from FPC's petition to intervene.

First, OGC cites the allegation in FPC's petition to intervene that states:

If the Commission were to accept OGC's position, therefore, FPC's obligations under long-standing Commission policy would change, and FPC's long-term planning will be detrimentally affected.

OGC asserts that, in response to this allegation, Interrogatories 10-13 ask a series of questions directly related to FPC's generation and transmission planning. Interrogatories numbers 10-13 ask:

10. Does FPC plan its transmission system taking into consideration the existing and planned transmission facilities of other utilities, cogenerators and independent power producers? If not, why not? If yes, why?
11. Does FPC plan its generation system taking into consideration the existing and planned generation facilities of other utilities, cogenerators and independent power producers? If not, why not? If yes, why?
12. How does FPC account for, plan or integrate the transmission facilities of other retail utilities, cogenerators and independent power producers into its planning processes if none of the transmission capacity or resources of those entities is directly committed to FPC?

13. How does FPC account for, plan or integrate the generation facilities of other retail utilities, cogenerators and independent power producers into its planning process if none of the generation resources of those entities is directly committed to FPC?

Next, OGC cites the allegation from FPC's petition to intervene that states:

Granting OGC's petition would fundamentally alter the role of public utilities under the pre-existing regulatory scheme and would thus impair FPC's substantial legal interests as a regulated retail utility.

OGC asserts that, in response to this allegation, Interrogatories 14, 15, and 19 relate to the role of public utilities under the pre-existing regulatory scheme and to FPC's legal interests as a regulated utility. These interrogatories ask:

14. Are other Florida utilities with generation facilities obligated to sell power to FPC? If the answer is yes, under what conditions are those utilities obligated to sell power to FPC?
15. Under what conditions is FPC required to sell power into the Florida grid? Under what conditions is FPC not required to sell power into the Florida grid?
19. Does FPC have an economic incentive to maximize returns when it makes wholesale sales?

OGC next cites the following items listed as Disputed Issues of Material Fact in FPC's petition to intervene:

Whether and to what extent the power produced by OGC's proposed "merchant plant" would be sold in Florida or outside the State.

Whether and to what extent retail utilities in the State would have any assurance of how, when, where, and on what terms OGC will market power in this State.

OGC asserts that Interrogatories 20-22 seek information related to those proposed issues, specifically regarding the manner in which

power is currently marketed inside and outside the State, to allow OGC to respond to the FPC's proposed Disputed Issues of Material Fact. These interrogatories ask:

20. What percentage of FPC's wholesale sales for the years 1995 through 1999 were made to utilities in Florida?
21. What percentage of FPC's wholesale sales for the years 1995 through 1999 were made to power marketers?
22. What percentage of FPC's wholesale sales for the years 1995 through 1999 were made to utilities outside Florida?

OGC cites another item listed in FPC's petition to intervene as a Disputed Issue of Material Fact:

Whether FPC's transmission facilities or the transmission grid in Peninsular Florida would ultimately be adversely affected by the project.

OGC asserts that Interrogatories 29-37 all relate to FPC's transmission facilities.

Finally, OGC states that FPC has the burden of affirmatively demonstrating the validity of its objections and asserts that FPC has provided no substantive support for its objections.

In its response, FPC contends that OGC's motion to compel must be denied because FPC has responded to each of OGC's discovery requests that arguably relates to FPC's standing. FPC lists OGC's Interrogatories 1-4 as examples of those it has provided a response to, stating that the remaining requests have absolutely no relationship to FPC's petition to intervene. FPC goes on to assert that its petition to intervene does not contain broad allegations that may open the door to the extensive discovery propounded by OGC. FPC contends that its petition to intervene contains three narrow and very specific reasons why FPC is entitled to participate in this proceeding, as follows:

First, FPC is entitled to participate in OGC's need proceeding to preserve, in this case, the question concerning the Commission's authority under existing law to approve OGC's merchant plant, presently on appeal to

the Florida Supreme Court in the Duke merchant plant case. Otherwise, as FPC explained, the Commission might render a ruling that proves to be contrary to law, and no stakeholder in the current regulatory framework would have standing to challenge the illegal decision;

Second, FPC is entitled to participate in OGC's need proceeding because OGC claimed that its merchant plant would meet the needs of Peninsular Florida utilities, including FPC. Indeed, OGC's own petition exhibits show that its merchant plant will displace FPC's power plants. Thus, unless OGC intends to disprove its own allegations, this alone makes FPC an indispensable party; and

Third, FPC is entitled to participate in OGC's need proceeding because a finding that OGC's uncommitted "merchant" plant capacity, as OGC claimed, can and should be counted toward the reserves available to Peninsular Florida utilities, including FPC, will constitute a derogation of long-standing Commission policy that only committed capacity can be counted towards reserves.

FPC alleges that OGC, in its motion to compel, "extracts words and phrases from FPC's Petition, takes them totally out-of-context, attaches groups of outstanding discovery requests to them, and then claims that FPC's mere use of these words and phrases gives OGC carte-blanche discovery rights." FPC concludes that OGC's motion to compel FPC's responses to Interrogatories 10-25 and 29-37 should be denied because they have no relationship to FPC's petition to intervene.

Upon consideration, I find that OGC's Interrogatories 10-25 and 29-37 are within the scope of discovery established by Rule 1.280, Fla.R.Civ.P., i.e., these interrogatories seek information that is reasonably calculated to lead to the discovery of admissible evidence. FPC has made no showing as to how any of these interrogatories are argumentative or unduly burdensome. Therefore, OGC's motion to compel FPC to respond to Interrogatories 10-25 and 29-37 is granted.

Requests for Production of Documents

In its motion to compel, OGC states that FPC specifically objects to OGC's Requests to Produce 4-9, 14, 21-23, 25, and 26 on the basis that they are irrelevant, immaterial, argumentative, unduly burdensome, and not reasonably calculated to lead to the

discovery of admissible evidence in this proceeding. OGC asserts that its Requests to Produce, like its Interrogatories, were derived from matters raised in FPC's petition to intervene and are therefore relevant to this proceeding.

First, OGC cites a passage from FPC's petition to intervene which states:

In this climate, FPC is uncertain of both how and if regulated retail load-serving utilities are supposed to co-exist with "merchant plants" in the existing regulatory environment.

OGC states that its Requests to Produce 4-7, 21, 23, 25, and 26 are relevant to FPC's allegations regarding the regulatory environment and the co-existence of merchant plants with retail load-serving utilities. OGC lists the following examples as being representative of the type of information OGC's Requests to Produce seek from FPC:

5. All documents which relate to, mention or otherwise reflect on FPC contracting for energy in the wholesale market for more than one hour and less than one year during the last ten years.
21. All documents which relate to, mention or otherwise reflect on the recovery of generation costs when FPC purchases power.
23. All documents which relate to, mention or otherwise reflect on FPC's power marketing arrangements or contracts that vary from the terms of filed tariffs.
25. All documents which relate to, mention or otherwise reflect on FPC's wholesale sales in Florida or any of its affiliates.
26. All documents which relate to, mention or otherwise reflect on FPC's development, ownership or operation of Merchant Power Plants in the United States.

OGC concedes that the ten year period required by Interrogatories 4-7 may be overly broad and agrees to reduce the time frame to the five year period from 1995 through 1999.

OGC asserts that Requests to Produce 8 and 9 directly relate to FPC's allegation that granting OGC's need determination petition would impair FPC's substantial legal interests as a regulated retail utility. As an example, OGC cites Request to Produce 9, which asks for:

9. All documents which relate to, mention or otherwise reflect on FPC's legal obligation to make adequate investment in generating capacity and provide adequate and reliable electric service.

OGC contends that FPC has failed to meet its burden of affirmatively demonstrating the validity of its objections. In support of its contention, OGC cites First City Developments, 545 So.2d 502 (Fla. 1st DCA 1989), which states that a party objecting to discovery as overbroad and burdensome is required to show that the volume of documents, number of man hours required in their production, or some other quantitative factor made it so.

In addition, OGC alleges that FPC's responses to OGC's Requests to Produce 1-3, 10-12, 17-20, 24, 27, and 28 are inadequate because FPC merely directs OGC to numerous documents in the public record. OGC maintains that it does not seek to require FPC to produce any information in the public domain, but, if specific public documents responsive to OGC's discovery requests exist, FPC should be directed to identify such documents with enough detail to allow OGC to retrieve the documents from the public record. OGC states that the burden of ascertaining the answer must be substantially the same for both parties, and that only FPC knows which portions of the public records support its responses to OGC's discovery requests.

In its response, FPC asserts that OGC's Requests to Produce 4-7 are unduly burdensome. FPC states that these requests collectively seek 10 years of hour-by-hour documentation of every wholesale capacity or energy contract entered into by FPC that was for less than one year. FPC contends that even though OGC now only seeks five years of this data, OGC's requests remains unduly burdensome. FPC maintains that to comply with OGC's requests, it "would have to spend an extraordinary number of hours collecting and reviewing forty-three thousand, three hundred and fifty hours of data to determine which, if any, of its wholesale sales reflected in the hourly data were for less than a year, and then produce that hourly material." Additionally, FPC maintains that its "wholesale sales are irrelevant to both its standing claims and OGC's need petition," and the "burdensomeness of this discovery far

outweighs any claim by OGC that it is entitled to these documents."

In response to OGC's contention that FPC was not specific in its responses to Requests to Produce 1-3, 10-12, 17-20, 24, 27, and 28, FPC counters that it specifically designated the documents it considered responsive to OGC's requests as certain public records from cases that OGC's counsel is intimately familiar with due to its participation in those cases. FPC claims that if OGC is not satisfied with FPC's responses, OGC could have made an effort to narrow its requests, but absent that, FPC is not obligated to narrow its responses.

Upon consideration, I find that OGC's Requests to Produce 4-9, 14, 21-23, 25, and 26 are within the scope of discovery established by Rule 1.280, Fla.R.Civ.P., i.e., these requests seek information that is reasonably calculated to lead to the discovery of admissible evidence. However, I find that OGC's Requests to Produce 4-7 and 25 are unduly burdensome.¹ It appears that the compilation of documents responsive to such broad requests would be a massive undertaking for FPC. While these requests may seek documents relevant to this proceeding, they would create an undue burden on FPC. Further, I find that OGC's Request to Produce 9 is, on its face, overbroad. Thus, requiring FPC to respond to this request would be unduly burdensome. Therefore, OGC's motion to compel production of documents pursuant to its Requests to Produce 4-7, 9, and 25 is denied.

As to Requests to Produce 8, 22, 23, and 26, FPC has not quantified how these requests are overbroad or unduly burdensome, and, therefore, FPC has not adequately demonstrated that these requests are overbroad or unduly burdensome. See, First City Developments, at 503. Further, these requests do not appear inappropriate on their face. Therefore, OGC's motion to compel production of documents pursuant to its Requests to Produce 8, 22, 23, and 26 is granted. Finally, to the extent that documents responsive to Request to Produce 21 are publicly available, FPC shall identify to OGC the specific types of documents that are publicly available and the public entities that have custody of those documents. This finding is consistent with the finding above

¹Although FPC does not make a showing as to how Request to Produce 25 is unduly burdensome, this finding is consistent with the finding above concerning OGC's Request to Produce 21 propounded on FPL, which is identical in substance.

concerning OGC's Request to Produce 17 propounded on FPL, which is identical in substance.

Based on the limited descriptions contained in the parties' pleadings, it appears that FPC has adequately identified the documents it represents to be responsive to OGC's Requests to Produce 1-3, 10-12, 17-20, 24, 27, and 28. However, to the extent it has not already done so, FPC shall identify to OGC the specific responsive documents or, if appropriate, the specific types of responsive documents that are publicly available, and the public entity that has custody of each such document. FPC shall also identify to OGC the case or docket number under which each such document was filed. If a particular document was filed outside of a case or docket, FPC shall identify how that document was provided to or obtained by the public entity so as to provide OGC with information adequate to readily locate the document.

IV. OGC's MOTION TO COMPEL TECO TO RESPOND TO DISCOVERY REQUESTS

In its motion, OGC specifically requests that TECO be compelled to respond to the following discovery requests: (1) OGC's Interrogatories 1-46; (2) OGC's Request for Admissions 1-43; and (3) OGC's Requests to Produce 1-3 and 8-25 as propounded, and 4-7 as modified.

A. General Objections

In its motion to compel, OGC contends that, as a party in this docket, TECO is subject to all applicable rules, including rules governing discovery. OGC states that TECO, instead of complying with OGC's discovery requests, has opted to stonewall by refusing to respond to a single discovery request. OGC asserts that TECO's refusal to respond is based on its erroneous belief that because it is not the applicant in this proceeding, no discovery is proper.

In addition, OGC asserts that TECO, in its petition to intervene, alleges numerous, unsubstantiated, adverse impacts resulting from the Project. As a result, OGC contends, TECO has brought those issues within the fair inquiry of this proceeding. OGC argues, thus, that all matters raised by TECO in its petition to intervene are the proper subject of discovery. Further, OGC argues that TECO must "prove up" at hearing the allegations of standing made in its petition to intervene. OGC contends that TECO has the burden of going forward with evidence in support of the allegations contained in its petition to intervene and that OGC's discovery is designed to test the veracity of those allegations.

In its response, TECO contends that OGC's assertion that TECO has the burden to "prove up" its allegations of standing in this proceeding is clearly incorrect. TECO goes on to state that it "is neither the applicant nor moving party in this proceeding ... not a respondent ... not joined as an indispensable party" and has "made no request to the Commission for affirmative relief nor ... made any discovery requests of OGC." Further, TECO states that OGC did not exercise its right to file a timely objection to TECO's petition to intervene. TECO maintains that its petition to intervene satisfied the requirements of Rule 28-106.205, Florida Administrative Code, in that Tampa Electric alleged that its substantial interests are subject to determination or will be affected through the proceeding." Further, TECO asserts that Florida Audubon Society v. Department of Environmental Regulation, cited by OGC, is not authoritative.

TECO also maintains that OGC's reliance upon Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathe Communications Co., 629 So.2d 852 (Fla. 1st DCA 1994), is misplaced, because, as TECO asserts:

The Court in the Krypton Broadcasting case was confronted with a breach of contract suit where the Defendant, the party allegedly in breach, had filed an answer, affirmative defenses and various counterclaims, thereby creating new issues. Since the Defendant had become the proponent of issues directly relevant to the breach of contract in question, reasonable discovery with regard to these new issues was deemed to be appropriate as a general matter. Nevertheless, the Court upheld the Defendant's objections to the discovery ... [and] ruled that the lower court order requiring the defendant to respond to the discovery requests was a substantial departure from the essential requirements of law.

TECO states that, unlike the defendant in the Krypton case, TECO has not declared itself to be the proponent of any particular issue in this proceeding and suggests that the details of its operations "are, at best, only remotely tangential to the real issues in this proceeding." In conclusion, TECO asserts that OGC's discovery requests have no reasonable relationship to the case at hand, are not relevant to the subject matter of this proceeding, and are clearly burdensome.

The matters raised by TECO in its petition to intervene are relevant to the issues established in this case which relate to the

introduction of capacity from OGC into the electric grid in Peninsular Florida, and are therefore the proper subject of discovery. In preparing for hearing, OGC must be allowed the opportunity to conduct discovery concerning these matters. Therefore, I find that TECO's general objections should be overruled. In making this finding, I do not rely upon OGC's arguments that TECO is required prove up at hearing its allegations of standing from its petition to intervene. I simply find that the matters raised by TECO in its petition to intervene are discoverable because they are relevant to the issues generally established in this case.

B. Specific Objections

Interrogatories

In its motion to compel, OGC argues in detail why each of its specific Interrogatories 1-46 is appropriate and why responses to these interrogatories should be compelled. In its response, TECO simply states that it stands by the objections it filed to OGC's interrogatories on November 15, 1999. Restating OGC's specific arguments and TECO's specific objections in this Order would be an unnecessarily time-consuming exercise. I have reviewed and considered all of OGC's specific arguments and TECO's specific objections in making the following findings.

TECO shall respond to OGC's Interrogatories 1-23, 26-30, and 32-46. Each of these interrogatories is relevant to matters put at issue by TECO's petition to intervene. TECO's assertions that certain of these interrogatories are burdensome or overly broad are not substantiated in its objections or in its response by any quantification of the alleged burden. See, First City Developments, at 503. Further, TECO's assertions that certain of these interrogatories are argumentative are not substantiated by its pleadings. TECO's assertions that certain of these interrogatories are vague and ambiguous are without merit. If, as asserted in TECO's objections, TECO's response to any particular interrogatory requires the disclosure of confidential information, TECO may seek an appropriate protective order for such information. TECO's bare assertion that its response to a particular interrogatory "might require the disclosure of confidential information," without even a description of what type of confidential information may be responsive, does not provide adequate support for a finding of confidentiality, much less a finding that TECO should not be compelled to respond to the interrogatory.

Interrogatories 22 and 23 arguably call for legal opinions as to the obligations of Florida generating utilities to sell power into the Florida grid. However, based on its daily operations, TECO should be well aware of its obligations to sell power into the grid, as well as the obligations of other Florida generating utilities to sell power to TECO. Thus, TECO should have no difficulty in responding to these interrogatories without resort to legal opinions from its counsel.

TECO shall not be compelled to respond to Interrogatories 24 and 25 as propounded. Because these interrogatories do not specify a time frame, they are essentially unanswerable. If OGC narrows its requests to a specific time frame, TECO shall respond to these interrogatories as appropriate.

TECO shall not be compelled to respond to Interrogatory 31. This interrogatory clearly requests the same type of information for which OGC itself has obtained protective treatment in this docket, i.e., the competitive plans of its affiliated companies to develop, own, or operate merchant plants outside of Florida. Disclosure of such information would harm the competitive interests of TECO's affiliates involved in the planning of such plants. However, to the extent that such plans have been publicly announced, TECO shall respond to the interrogatory with regard only to those publicly announced plans.

TECO shall respond to Interrogatory 32. Disclosure of the current ownership or operation of merchant plants by TECO's affiliates does not appear to create the competitive harms that are created under Interrogatory 31. However, to the extent that any TECO affiliate has an ownership interest in any merchant plant that is still in the planning stage and has not been publicly disclosed, TECO shall not be required to disclose the information requested in Interrogatory 32 with regard to such a plant.

Requests for Production of Documents

In its motion to compel, OGC argues in detail why each of its specific Requests to Produce 1-25 is appropriate and why responses to these requests should be compelled. In its response, TECO simply states that it stands by the objections it filed to OGC's requests on November 15, 1999. Restating OGC's specific arguments and TECO's specific objections in this Order would be an unnecessarily time-consuming exercise. I have reviewed and considered all of OGC's specific arguments and TECO's specific objections in making the following findings.

TECO shall respond to OGC's Requests to Produce 1-3, 9-19, and 22-25. TECO shall also respond to OGC's Request to Produce 21, as set forth below. Each of these requests is relevant to issues established in this case. TECO's assertions that certain of these requests are burdensome or overly broad are not substantiated in its objections or in its response by any quantification of the alleged burden. See, First City Developments, at 503. Further, TECO's assertions that certain of these requests are argumentative are not substantiated by its pleadings. If, as asserted in TECO's objections, TECO's response to any particular request requires the disclosure of confidential documents, TECO may seek an appropriate protective order for such documents. TECO's bare assertion that its response to a particular request "may require the disclosure of privileged, confidential or commercially sensitive information," without even a description of what type of privileged, confidential, or sensitive information may be responsive, does not provide adequate support for a finding of confidentiality, much less a finding that TECO should not be compelled to respond to the request.

TECO shall not be compelled to respond to OGC's Requests to Produce 4-7 and 20 are unduly burdensome.² It appears that the compilation of documents responsive to such broad requests would be a massive undertaking for TECO. While these requests may seek documents relevant to this proceeding, they would create an undue burden on TECO.

TECO shall not be compelled to respond to OGC's Request to Produce 8. This request calls for TECO to provide documents based on its legal conclusion concerning TECO's obligation to make investment in generating capacity and to provide adequate and reliable electric service. Further, this request appears to be overly broad.

TECO shall respond to OGC's Request to Produce 21 to the extent that there are responsive documents which relate to merchant plants whose development has been publicly disclosed.

²Although TECO does not make a showing as to how these Requests to Produce are unduly burdensome, this finding is consistent with the findings above concerning OGC's Requests to Produce 4-7 and 21 propounded on FPL, which are identical in substance.

To the extent that TECO identifies any public documents responsive to these requests, it shall identify to OGC the specific responsive documents or, if appropriate, the specific types of responsive documents that are publicly available, and the public entity that has custody of each such document. TECO shall also identify to OGC the case or docket number under which each such document was filed. If a particular document was filed outside of a case or docket, TECO shall identify how that document was provided to or obtained by the public entity so as to provide OGC with information adequate to readily locate the document.

Requests for Admissions

In its motion to compel, OGC argues in detail why each of its specific Requests for Admissions 1-43 is appropriate and why responses to these requests should be compelled. In its response, TECO simply states that it stands by the objections it filed to OGC's requests on November 15, 1999. Restating OGC's specific arguments and TECO's specific objections in this Order would be an unnecessarily time-consuming exercise. I have reviewed and considered all of OGC's specific arguments and TECO's specific objections in making the following findings.

TECO shall respond to OGC's Requests for Admissions 1-7, 12-20, 23, 25, and 28-43. Each of these requests is relevant to issues established in this case. TECO's assertions that certain of these requests are argumentative or ambiguous are not substantiated by its pleadings. Further, TECO's assertions that certain of these requests are improper because they call for "pure speculation" do not appear to be valid; facially, each of these requests properly calls for either an admission as to an opinion or an admission as to present conditions. TECO's assertions that certain of these requests address information already in the public record is not adequate grounds for its refusal to respond; responding to these requests does not require TECO to identify and compile such public records.

TECO shall not be compelled to respond to OGC's Requests for Admissions 8-11, 24, 26, and 27, because these requests call for legal opinions from TECO. As stated in the analysis above concerning identical requests for admissions propounded on FPL, the name of any investor-owned public utility or merchant plant developer could be substituted for "TECO" and "OGC" in these requests without effectively changing the substance of any of the requests. Thus, as stated above, adding these minimal factual components to the generic legal conclusions contained in these

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requests does not make the requests any more appropriate under Rule 1.370, Fla.R.Civ.P. I note that OGC's Request for Admission 24 contains no factual component whatsoever.

TECO shall not be compelled to respond to OGC's Requests for Admissions 21-22 as propounded. These requests appear to call for some speculation on TECO's behalf as to whether regulatory conditions will remain unchanged between now and the time OGC's proposed plant would be built.

V. IN CAMERA INSPECTION

By Order No. PSC-00-0291-FOF-EU, issued February 11, 2000, OGC was required to make available for in camera review a memorandum, dated August 18, 1999, from Doug Egan to the department heads of PG&E Generating. In its motion for protective order, dated January 18, 2000, OGC requested that this document be protected in its entirety from disclosure, claiming that it contains proprietary confidential business information the disclosure of which may harm the competitive interests of OGC and PG&E Generating. OGC stated that this document is responsive to certain document requests made by FPL and FPC.

In their responses to OGC's motion for protective order, FPL and FPC argued that OGC has not adequately described the document to enable FPL and FPC to determine whether it indeed contains proprietary confidential business information. In its response, FPL requested that the document be presented for an in camera review. OGC agreed to such a review, and on February 21, 2000, the document was inspected in camera by this Prehearing Officer.

Upon review of the document, I find that it does indeed contain proprietary confidential business information, the disclosure of which may harm the competitive interests of OGC and PG&E Generating. The document includes information concerning several of PG&E Generating's U.S. power plant projects along with general information concerning the status of each project as well as corporate strategy and plans. The document does not contain information specific to OGC's proposed power plant other than a brief statement concerning its status. Thus, FPL and FPC do not have a reasonable necessity for use of this document at hearing. Accordingly, this document shall be protected from disclosure in its entirety.

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Based on the foregoing, it is therefore

ORDERED by Commissioner E. Leon Jacobs, as Prehearing Officer, that Okeechobee Generating Company's Motion to Compel Florida Power & Light Company to Respond to Discovery Requests is granted in part and denied in part as set forth in the body of this Order. It is further

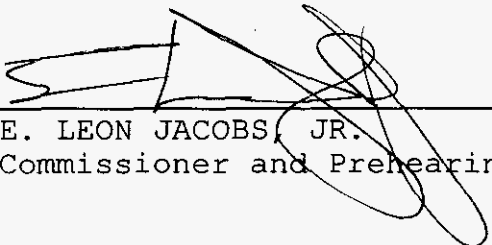
ORDERED that Okeechobee Generating Company's Motion to Compel Florida Power Corporation to Respond to Discovery Requests is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that Okeechobee Generating Company's Motion to Compel Tampa Electric Company to Respond to Discovery Requests is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that Florida Power & Light Company and Florida Power Corporation's Motion for Enlargement of Time to Respond to Okeechobee Generating Company's Motions to Compel, cited in Section I of this Order, are hereby granted. It is further

ORDERED that Okeechobee Generating Company's Motion for Protective Order as to the August 18, 1999, memorandum from Doug Egan to the department heads at PG&E Generating is hereby granted.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 17th Day of March, 2000.



E. LEON JACOBS, JR.
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, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 Records and Reporting, 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.