

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.

DOCKET NO. 000824-EI
ORDER NO. PSC-01-2267-PCO-EI
ISSUED: November 19, 2001

ORDER ON DISCOVERY MOTIONS

On September 18, 2001, the Office of Public Counsel (OPC) served its First Request for Production of Documents (Nos. 1-19) on Florida Power Corporation (FPC), to which FPC responded on October 23, 2001. FPC also filed a Motion for Protective Order related to the documents produced in its response. On November 2, 2001, OPC filed its First Motion to Compel regarding the documents sought in its First Request. FPC responded to OPC's First Motion to Compel on November 13, 2001, and requested oral argument.

Additionally, on November 7, 2001, FPC filed a Motion for Temporary Protective Order covering certain documents sought by OPC's Third Request for Production of Documents (Nos. 29-76) and OPC's Second Set of Interrogatories (Nos. 18-48). OPC filed a Response in Partial Opposition to FPC's Motion for Temporary Protective Order on November 9, 2001.

OPC also filed a Motion to Require FPC to Produce Documents in Tallahassee on Due Date on November 13, 2001. Finally, FPC has filed two Consented Motions for Extensions of Time to Respond on November 13 and 14, 2001.

Under Rule 28-106.211, Florida Administrative Code, I have broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case" Based on this authority, I make the rulings set forth below.

I. OPC'S FIRST MOTION TO COMPEL

OPC raises three separate issues in its First Motion to Compel. OPC first argues that FPC waived any claim to privilege

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regarding the documents it failed to identify in response to OPC's First Request for Production of Documents when it failed to identify the document for which it seeks privilege as required by Rule 1.280(b)(b), Florida Rules of Civil Procedure. Next, OPC argues that FPC should be ordered to provide responsive documents from Florida Progress Corporation, Progress Energy, Inc., and Progress Energy Service Company, LLC, as OPC originally requested. Finally, OPC seeks production of additional documents responsive to its Request Nos. 8 and 9. Each of OPC's arguments, FPC's response, and my ruling thereon shall be addressed separately below.

Privilege

OPC argues that FPC waived any protection for privileged documents related to OPC's First Request for Production of Documents because FPC did not comply with Rule 1.280(b)(5), Florida Rules of Civil Procedure. Pursuant to Rule 1.280(b)(5):

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . , the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

OPC argues that FPC specifically refused to identify the nature of the documents withheld due to privilege, even though FPC is required to do so by the Florida Rules of Civil Procedure. According to OPC, FPC's refusal to identify the documents is tantamount to a waiver of privilege and FPC should be required to produce all documents withheld based upon privilege. Alternatively, OPC contends that if a waiver is not found, then FPC should be ordered to produce the documents for an *in camera* inspection in order to determine if privilege vests.

FPC responds it did not "refuse" to identify documents withheld on grounds of privilege. FPC asserts that it expressly stated in its written responses that it would comply with the applicable rules of procedure and never "refused" to adhere to those obligations. FPC states that after reviewing OPC's Motion to

Compel, it immediately provided the identification requested of the only document withheld, which was an internal analysis of decisions on acquisition adjustments in various jurisdictions that was withheld on attorney-client and work product grounds. Also, FPC contends that OPC's Motion to Compel was "utterly unnecessary" and could have been avoided by a good faith effort to resolve this dispute.

According to FPC, Commission practice is to require privilege logs only "upon request," as FPC did in this instance. Further, FPC could find no such instance where a party was accused of waiving attorney-client privilege because a privilege log was not provided contemporaneously with objections. FPC argues most parties dispense entirely with the formality of exchanging such information.

FPC states that it identified the single document it claimed was privileged upon reviewing OPC's motion. Additionally, FPC avows it is well established that a "waiver of the attorney-client privilege and work-product privileges is not favored in Florida." TIG Ins. Corp. of America, 2000 WL 1230805 (citing Liberty Mutual Ins. Co. v. Lease Am., Inc., 735 So.2d 560, 562 (Fla. 4th DCA 1999)). FPC asserts that there is no basis to find a waiver of privilege in this case.

Having reviewed the pleadings and considered the arguments raised therein, I find that OPC's request for a finding that FPC had waived its privilege shall be denied. According to FPC, it timely described the document at issue after reviewing OPC's motion. Based on FPC's description, the document appears to validly fall within the attorney-client or attorney work product privilege; therefore, I do not believe that an in camera inspection is necessary. While I do not make a finding of waiver in this instance, the parties should take note that I read Rule 1.280(b)(5), Florida Rules of Civil Procedure, as requiring a description of the document for which a privilege is asserted at the time the discovery response is due. In the future, FPC, and all other parties, shall provide a privilege log at the time the discovery response is due, regardless whether such a request is individually made by a party.

Production of Additional Documents from Affiliated Companies

OPC argues that FPC should be compelled to provide documents from Florida Progress Corporation, Progress Energy, Inc., and Progress Energy Service Company, LLC, as set forth in OPC's First Request. OPC maintains that Progress Energy, Inc. seeks reimbursement from Florida utility customers for a portion of the stock premium it paid to acquire all of the stock of Florida Progress Corporation in the form of an acquisition adjustment. OPC also argues that Progress Energy Service Company, LLC is a service company formed by Progress Energy, Inc., to provide services to Florida Power Corporation and other affiliates, and a portion of its costs is included in FPC's forecasted test year. Therefore, OPC argues that all three affiliates must respond to discovery in this proceeding.

According to OPC, FPC is "acting as one" with its parent corporation and service affiliates in this case. OPC avers that a subsidiary may be compelled to obtain documents from a parent company or affiliate for discovery based upon three factors previously identified by the Commission: (1) the corporate structure; (2) the non-party's connection to the transaction at issue; and, (3) the degree to which the non-party will benefit from an outcome favorable to the corporate party to the litigation. Order No. PSC-01-1725-PCO-EI, Docket No. 010827-EI, issued August 23, 2001. See Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127, 130 (D. Del. 1986). OPC argues that this case easily meets the test laid out above. There is a complex web of financial relationships among FPC and the affiliates in this case. The MFRs detail the monetary connections and benefits between the affiliates and FPC: \$19.6 million from Carolina Power & Light for transmission/distribution support, customer service management, gas & oil supply, nuclear management, and power trading; Progress Energy Service Company provides \$11.37 million in financial services, \$50.743 million for information technology, \$2 million for facilities management, and \$36.971 million for administrative services; and \$6.826 million from Progress Telecommunications for wide area network services. Accordingly, OPC contends that FPC should be compelled to provide all responsive documents in the possession, custody, or control of Florida Progress Corporation, Progress Energy, Inc., and Progress Energy Service Company, LLC

related to OPC's First Request for Production of Documents.

FPC responds that it provided all documents from affiliated companies that were relevant to the issues in this rate case. FPC avows that the real basis for OPC's argument is that it has not received enough documents, while FPC maintains it has produced a great deal of relevant information relating to the allocation of costs and the acquisition adjustment. Indeed, FPC argues that OPC is demanding in the abstract what FPC believes it has already produced or is in the process of producing in response to subsequent requests.

FPC objects to OPC's requests for documents that range far beyond the issues in this case. See Allstate Insurance Co. v. Langston, 655 So.2d 91 (Fla. 1995). FPC maintains it should not be forced to respond to OPC requests when OPC offers nothing more than generalized information to justify its requests. See Calderbank v. Cazares, 435 So.2d 377 (Fla. 5th DCA 1983) (discovery should be denied if the logical connection between the information sought and evidence possibly relevant to the case is not obvious); See also Edward J. DeBartolo Corp. v. Petrin, 497 So.2d 936 (Fla. 5th DCA 1986). FPC provides an example of what it deems an irrelevant request. In its third request, OPC asks that Florida Progress Corporation, Progress Energy, and Progress Energy Service produce documents showing "variances between actual and projected expenses, revenues, or income during the years 2000 and 2001." FPC contends that these documents could not illuminate the synergies generated by the merger, or how Progress Energy's service company allocates cost to FPC. FPC maintains that OPC's requests range far beyond the issues in this case, and OPC has not met its burden of demonstrating that all its requests are permissible and reasonable.

Lastly, FPC argues that requiring it to coordinate a search for documents of affiliated companies when those documents are not relevant to the issues in this rate case would put an unreasonable burden on FPC and those affiliated companies. Additionally, from FPC's perspective, it would not result in the discovery of documents actually useful to OPC or the Commission in deciding the issues in this case.

Having reviewed the pleadings and considered the arguments, I find that OPC's motion to compel the production of documents

related to FPC's affiliates, Florida Progress Corporation, Progress Energy, Inc., and Progress Energy Service Company, LLC, as set forth in OPC's First Request, shall be granted. I find that OPC's request meets the test for the production of documents from a company's affiliate or parent company, as set out in Order No. PSC-01-1725-PCO-EI. Accordingly, FPC shall produce the documents requested by the close of business on Friday, November 30, 2001.

Requests #8 and #9

OPC's Request No.8 states:

Please provide each document in your possession, custody or control related to the cost savings realized or expected from the merger for any of the businesses mentioned in the prefiled direct testimony of Dr. Vander Weide at page 4, line 22, through page 5, line 10.

FPC's Response states:

FPC objects to this request as irrelevant, immaterial, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. FPC has provided the total gross cost savings figures anticipated by the collective companies identified by Dr. Vander Weide. FPC has also provided a detailed analysis of the cost-savings that will be derived from FPC and broken it down by source in Mr. Myers pre-filed testimony at page 15. The remainder of the cost savings that are not attributable to FPC are irrelevant to this proceeding as it occurs in connection with non-regulated entities or CP&L, which is not regulated by this Commission.

OPC's Request No. 9 states:

Please provide each document in your possession, custody or control discussing, analyzing or evaluating the allocation of actual or expected cost savings from the merger among or between any of the companies affiliated or related to Progress Energy, Inc.

FPC's Response states:

FPC will produce documents responsive to this request for FPC by making them available at the offices of Carlton Fields in St. Petersburg, Florida at a time convenient to the parties. As to the other non-regulated companies affiliated or related to Progress Energy, Inc., FPC objects to this request as irrelevant, immaterial, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. FPC has provided the total gross cost savings figures anticipated by the companies related to Progress Energy Inc. FPC has also provided a detailed analysis of the cost-savings that will be derived from FPC and broken it down by source in Mr. Myers pre-filed testimony at page 15.

OPC argues that the documents sought in requests 8 and 9 are important in determining whether the FPC affiliated companies have fairly allocated "synergy" savings to FPC from the merger. OPC asserts that FPC refuses to provide information related to the entire allocation and sharing process among all companies affiliated with FPC, and that requesting this information is reasonable and necessary.

OPC contends that the utility need not have actual possession of documents related to affiliates to be deemed in control of them. See Order No. PSC-01-1444-PCO-EI, issued July 5, 2001, in Docket No. 010001-EI, citing *In re Folding Carton Antitrust Litigation*, 76 F.R.D. 420 (N.D. Ill. 1977). Further, OPC argues that the Commission has compelled regulated utilities to produce affiliate documents and information reasonably calculated to lead to the discovery of admissible evidence in the underlying proceedings. See Order No. PSC-92-0819-PCO-WS, issued August 14, 1992; Order No. PSC-96-0822-PCO-WS, issued June 25, 1996; and Order No. PSC-96-0182-PCO-PU, issued February 8, 1995. OPC argues that FPC should be compelled to produce documents related to its affiliates as it is in control of these documents.

OPC argues that the entire entity of merged companies purportedly realized synergies as a result of the merger. In its Request numbers 8 and 9, OPC seeks information about the synergies

among the companies and the fair allocation of such synergies. OPC maintains that this information is crucial in determining if the sharing and allocation of cost savings from the merger are reasonable.

FPC responds that it objects to being forced to provide irrelevant information related to cost savings for non-regulated entities. FPC explains that the any cost savings these companies may experience due to the merger have not been factored into the cost savings for which recovery is sought in these proceedings. FPC contends that it has very specifically identified the amount of synergy that it is expected to achieve as a result of the merger. This total is a stretch goal established by Progress Energy and disseminated in public documents available to OPC. FPC maintains that if it fails to meet this goal, the company will not, to that extent, be able to recover acquisition costs, so FPC is bearing the risk of not meeting this target.

FPC argues that the confidential "60-day reports" produced for document request number 4 satisfy items 8 and 9 as well. These reports document the cost reductions made possible by the projected synergies. FPC stresses that it will be incumbent upon FPC to achieve the projected level of cost savings. FPC maintains that OPC should not expect voluminous documents discussing cost reductions due to the synergies beyond these "60-day reports." FPC avers that it cannot manufacture other analyses to satisfy OPC. See Scales v. Swill, 715 So.2d 1059, 1060-1061 (Fla. 5th DCA 1998) (discovery requests cannot be used to compel the production of nonexistent documents); Balzebre v. Anderson, 294 So.2d 701, 702 (Fla. 3d DCA 1974) (party cannot be required to produce documents it does not have and are not shown to exist).

FPC contends that these synergies are financial targets established by Progress Energy and assigned to unregulated businesses which are unrelated to this proceeding as FPC has not asked for recognition of them in the proposed acquisition adjustment. Therefore, FPC argues that it should not be forced to provide documents either unrelated to this proceeding or nonexistent.

Having reviewed the pleadings and considered the arguments, I find that OPC's motion to compel complete responses to its Requests

Nos. 8 and 9 shall be granted. The discovery permissible under the rules of civil procedure is broad. Pursuant to Rule 1.280(b)(1), Florida Rules of Civil Procedure, "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." I find that the information sought by FPC may lead to the discovery of admissible evidence. Therefore, FPC shall respond to OPC's requests by the close of business on November 30, 2001.

II. FPC'S REQUEST FOR ORAL ARGUMENT

When it filed its response to OPC's First Motion to Compel on November 13, 2001, FPC also filed a separate request for oral argument on the motion pursuant to the Commission's Rules and Section 366.071, Florida Statutes. Because the pleadings summarized above in Part I were sufficiently clear, and given the need to expeditiously resolve this matter, I find that oral argument is not appropriate or time efficient. Therefore, FPC's Request for Oral Argument is denied.

III. FPC'S MOTIONS FOR TEMPORARY PROTECTIVE ORDER

On October 23, 2001, FPC filed a Motion for Temporary Protective Order, pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006(6), Florida Administrative Code, covering certain documents sought in discovery by OPC in its First Set of Requests for Production of Documents (Nos. 1-19). On November 7, 2001, FPC filed another Motion for Temporary Protective Order covering certain documents sought in discovery by OPC in its Third Set of Requests for Production of Documents (Nos. 29-76) and its Second Set of Interrogatories (Nos. 18-48). OPC filed a Response in Partial Opposition to FPC's Motion for Temporary Protective Order on November 9, 2001.

Both of FPC's Motions state substantially the same grounds for requesting the protective order and therefore can be considered together. FPC argues that OPC seeks confidential proprietary information relating to the merger of Florida Progress and its subsidiaries with Carolina Power & Light, as well as information related to internal business audits (the latter statement is only alleged in the Motion filed October 23, 2001). FPC asserts that if

this information were disclosed it would harm the competitive business of the company or the interests of the ratepayers and the company. FPC seeks protection for these documents and objects to providing confidential, proprietary business information, but will provide documents responsive to OPC's Requests as long as these documents can be marked confidential and are not publicly disclosed. FPC also requests that the Commission require any party to provide FPC with notice of its intent to use such confidential documents in connection with the hearing no later than 60 days prior to the hearing date.

OPC responds that it partially objects to FPC's Motion for Temporary Protective Order. In particular, OPC objects to the 60 day notice provision requested by FPC. OPC argues that Order No. PSC-01-2114-PCO-EI, the Order Establishing Procedure, sets forth a procedure for using confidential information at hearing. The Order Establishing Procedure requires parties to notify the Prehearing Officer and all parties of record of their intent to use information claimed to be confidential by no later than the time of the prehearing conference, or if not known at that time, no later than seven days prior to the beginning of the hearing. OPC contends that this procedure has been used successfully in numerous hearings and balances the interests of the parties. OPC asserts that FPC's Motions provide no reason to deviate from this established procedure; indeed, the proposed 60 day notice would be unduly burdensome to OPC and could lead to excessive numbers of documents being identified for use at hearing in order to preserve the right to use them.

Section 366.093(2), Florida Statutes, directs that all records produced pursuant to a discovery request for which proprietary confidential status is requested shall be treated by any party subject to public records law as confidential and exempt from the public records law, Chapter 119.07(1), Florida Statutes. Rule 25-22.006(6), Florida Administrative Code, codifies the Commission's policy protecting confidential information from public disclosure during the discovery process in a manner that is not overly burdensome to both parties. Rule 25-22.006, in pertinent part, states:

(6)(a) In any formal proceeding before the Commission, any utility or other person may request a protective

order protecting proprietary confidential business information from discovery. Upon a showing by a utility or other person and a finding by the Commission that the material is entitled to protection, the Commission shall enter a protective order limiting discovery in the manner provided for in Rule 1.280, Florida Rules of Civil Procedure. The protective order shall specify how the confidential information is to be handled during the course of the proceeding and prescribe measures for protecting the information from disclosure outside the proceeding.

Having reviewed the pleadings and considered the arguments, I find that FPC's Motions for Temporary Protective Orders shall be granted in part and denied in part. I find that FPC has demonstrated that the material requested by OPC is proprietary confidential business information relating to the merger of Florida Progress and its subsidiaries with Carolina Power & Light, as well as internal business audits. Accordingly, this information will be granted confidential status pursuant to Section 366.093(2), Florida Statutes, and Rule 25-22.006(6), Florida Administrative Code.

However, I find the 60 day notice requirement requested by FPC to be unduly burdensome and directly in opposition to Order No. PSC-01-2114-PCO-EI, the Order Establishing Procedure. Therefore, those portions of FPC's motion that seeks the imposition of a 60 day notice requirement are denied. FPC has shown no compelling reason to deviate from the seven day notice requirement concerning the use of confidential information at hearing, as set out in Order No. PSC-01-2114-PCO-EI.

IV. OPC'S MOTION TO REQUIRE FPC TO PRODUCE DOCUMENTS IN TALLAHASSEE ON DUE DATE

OPC filed a Motion to Require FPC to Produce Documents in Tallahassee on Due Date, on November 13, 2001. FPC has not responded to this motion. Because of the time-sensitive nature of this issue, I find it necessary to rule on OPC's motion prior to receiving a response from FPC, as is contemplated in Rule 28-106.204(1), Florida Administrative Code.

According to OPC, under FPC's current practice it may take up to two weeks past the due date for OPC to take possession of discovery. Because of the pressing time constraints in this case, OPC seeks a procedure under which OPC can take possession of discovery in Tallahassee on the date on which it is due.

Having reviewed the pleading and considered OPC's arguments, I find that OPC's motion shall be granted. I find OPC's request to be reasonable. On a prospective basis, FPC shall be required to produce all discovery in Tallahassee on the date upon which it is due. I understand that there may be limited instances where the amount of discovery produced is so voluminous that it would be unduly burdensome for FPC to produce the discovery in Tallahassee. If that is the case, the parties shall work out a mutually agreeable arrangement prior to the due date so that the party requesting the discovery may review the material on the date it is due.

V. FPC'S CONSENTED MOTIONS FOR EXTENSIONS OF TIME TO RESPOND

On November 13 and 14, 2001, FPC filed Motions for Extensions of Time to Respond. OPC did not respond to either motion, and FPC has relayed that OPC has no objection to the motions. In these motions, FPC seeks my approval for extensions of time to respond to discovery.

While I applaud the parties reaching a mutually agreeable due date for responding to discovery requests out of time, I find that it is not necessary to seek permission from me to do so. If the parties feel some type of Commission notification is beneficial, the parties may notify staff counsel either verbally or through some electronic means. Accordingly, I shall make no ruling on either of FPC's Motions for Extensions of Time to Respond.

Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that the First Motion to Compel filed by the Office of Public Counsel is denied in part and granted in part as discussed above. It is further

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ORDERED that Florida Power Corporation shall produce the documents discussed above in Part I by November 30, 2001. It is further

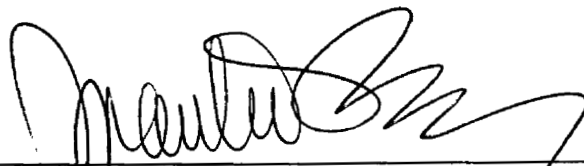
ORDERED that Florida Power Corporation's Request for Oral Argument is denied. It is further

ORDERED that Florida Power Corporation's Motions for Temporary Protective Order, filed October 23, 2001, and November 7, 2001, are granted in part and denied in part, as set forth in the body of this Order. It is further

ORDERED that the Office of Public Counsel's Motion to Require FPC to Produce Documents in Tallahassee on Due Date is granted as discussed above. It is further

ORDERED that no ruling is necessary on Florida Power Corporation's Motions for Extensions of Time to Respond.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 19th day of November, 2001.



BRAULIO L. BAEZ
Commissioner and Prehearing Officer

(S E A L)

MAH/AEV

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 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.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.

DOCKET NO. 000824-EI

FILED:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing _____ was furnished to the following by U.S. Mail, on this _____ day of _____, 20__.

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