

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-02-0099-PCO-EI
ISSUED: January 16, 2002

THIRD ORDER ON DISCOVERY MOTIONS

On January 9, 2002, Florida Power Corporation (FPC) filed an Expedited Motion to Compel requesting that the Prehearing Officer compel the Office of Public Counsel (OPC) to respond to FPC's First Set of Interrogatories and First Request for Production of Documents, or, in the alternative, grant FPC an extension of time to file rebuttal testimony up to and through February 11, 2002. OPC filed a response on January 11, 2002.

On January 9, 2002, FPC filed a Motion for Temporary Protective Order covering certain documents sought by OPC's Tenth Set of Requests for Production of Documents and Seventh Set of Interrogatories. On the same date, FPC filed another Motion for Temporary Protective Order concerning documents solicited by OPC's Request for Production of Documents No. 119. Then, on January 11, 2002, FPC filed a Motion for Temporary Protective Order pertaining to certain documents requested by OPC's Eleventh Set of Requests for Production of Documents and Eighth Set of Interrogatories. Finally, on January 14, 2002, FPC filed another Motion for Temporary Protective Order involving documents asked for by OPC's Twelfth Set of Requests for Production of Documents and Eighth Set of Interrogatories. OPC filed no response to the Motions for Temporary Protective Order described above.

On January 14, 2002, FPC filed a Motion for Extension of Time, requesting the Prehearing Officer grant FPC an extension of time in which to respond to certain of OPC's Ninth Set of Interrogatories and Twelfth Set of Requests for Production of Documents. More specifically, FPC requests an extension of time up to and through January 17, 2002, to respond to Interrogatories No. 133 and 143 and Request for Production No. 146. OPC filed no response to the Motion for Extension of Time.

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Rule 28-106.211, Florida Administrative Code, grants broad authority to the Prehearing Officer 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 upon this authority, and having considered the Motions and Responses, the rulings are set forth below.

FPC'S EXPEDITED MOTION TO COMPEL

FPC requests an order compelling OPC to respond fully to FPC's First Set of Interrogatories and First Request for Production of Documents, or, in the alternative, grant FPC an extension of time to file rebuttal testimony up to and through February 11, 2002. Additionally, FPC requests that this order be granted as quickly as possible, so that the requested due date can be met with as much notice as possible.

FPC served OPC with its First Set of Interrogatories and First Request for Production of Documents on December 18, 2001. These requests were aimed at discovering information about the witnesses who intend to offer testimony on behalf of OPC on or about January 18, 2002, the date established for the filing of intervenor testimony. FPC also stated that if the deadline for intervenor testimony is altered, then OPC should still respond to FPC's discovery requests on the date the intervenor's testimony is due. The deadline for OPC's testimony has now been changed to January 22, 2002, pursuant to Order No. PSC-02-0059-PCO-EI. Accordingly, FPC requests that OPC be compelled to respond to FPC's discovery requests on or by January 22, 2002.

On December 28, 2001, OPC filed written objections to FPC's discovery requests. Two of these objections necessitated FPC's motion to compel. OPC objected to the extent the discovery requested documents or information that did not exist on the date the discovery requests were served. Also, OPC objected to Interrogatory No.2(h) and Request for Production No. 9 to the extent they request documents or information not relied upon or not referred to by a witness.

FPC maintains that it is simply trying to obtain background information, prior testimony, exhibit back-up materials, work papers, and other items relating to the testimony of OPC's

witnesses contemporaneously with the filing of the testimony. FPC states that it filed these discovery requests far enough in advance of the deadline for intervenor testimony in order to have time to review the responses prior to filing its own testimony. If OPC is allowed any further time to respond fully to these requests, then FPC contends that its ability to adequately prepare its own rebuttal testimony will be seriously compromised. Additionally, FPC argues that reducing the time available even further will be a deprivation of FPC's due process right to a meaningful opportunity to be heard. See Duval County School Board v. Armstrong, 336 So.2d 1219, 1220 (Fla. 1st DCA 1976). FPC avows that due process requires that either OPC be required to respond to FPC's discovery requests at the same time OPC files testimony on January 22, 2002; or, if OPC is permitted to respond later, then FPC be given a similar extension of time in which to file its testimony.

FPC argues that OPC's objection to producing documents that did not exist on the date the discovery requests were served is completely without merit and unsupported by the Florida Rules of Civil Procedure. The expedited schedule of this proceeding necessitated FPC serving its discovery request concerning OPC's witnesses prior to the filing of intervenor testimony. FPC avers that these discovery requests put OPC on notice that it would need to compile those documents and information relevant to FPC's requests concurrently with the preparation of its testimony. Moreover, FPC argues that Rule 1.280 of the Florida Rules of Civil Procedure requires OPC to produce all documents and information responsive to FPC's requests in existence at the time the response is made, that is when the response is due. FPC contends that OPC has an obligation to supplement its responses if its responses were not complete when made. Binger v. King Pest Control 401 So.2d 1310 (Fla. 1981). FPC maintains that OPC's reading of the rule is illogical as it would create a perpetual window of time within which a party could hide otherwise discoverable information since a follow-up request would be required to capture those documents created between when a request was served and the response was due. Requests could continue ad infinitum, something FPC argues is clearly not intended by the rules of civil procedure.

FPC states that OPC did offer to provide responsive documents and information no later than one week following the filing of OPC's testimony. FPC declares that this concession is inadequate

under the current schedule, as it would give FPC six days to prepare rebuttal testimony.

Finally, FPC argues that it is entitled to know what OPC's witnesses reviewed in preparing their testimony, whether they referred to it, or relied on it specifically. For this reason, FPC has some concerns about OPC's objection to providing documents responsive to FPC's Interrogatory No. 2(h) and Request for Production No. 9. FPC does state it is not necessary for OPC to provide copyrighted material; rather, OPC need only identify any copyrighted items.

In response, OPC states that FPC's discovery requests asked OPC to identify and produce documents that did not exist on the date of service of the discovery requests. In fact, OPC maintains that many of the documents requested do not even exist now. OPC argues that the Florida Rules of Civil Procedure give parties thirty days to respond to discovery requests in order to allow parties time to formulate responses and gather responsive documents. This response time cannot be done on a changing landscape, according to OPC, otherwise the thirty day period would effectively become zero. OPC avers that FPC is attempting to deny OPC the thirty days provided by the Florida Rules of Civil Procedure.

Nevertheless, OPC states that it committed to provide documents related to its testimony to FPC no later than one week after the testimony was filed. In addition, OPC maintains that it told FPC it would not wait the full week if the documents could be gathered and prepared before that. OPC states it has already asked all of its witnesses to provide the associated workpapers, spreadsheets, materials, databases, etc., once their testimony is complete. Therefore, OPC argues that it is likely that FPC will receive the workpapers and other documents when OPC files testimony.

In regard to FPC's concern with OPC's objection to providing documents not relied on or referred to by OPC's witnesses, OPC states that FPC narrowed their request in an e-mail sent some hours after they filed the instant motion to compel. The e-mail states that "[A]ll FPC is really asking for here I [sic] for you to identify everything you gave them to review. . . ." With the

narrowing of the request, OPC states it will have no objection to providing the requested documents.

Upon review of the pleadings and consideration of the arguments, FPC's Motion to Compel responses to its First Set of Interrogatories and First Request for Production of Documents to OPC is granted in part. The discovery requests served by FPC on OPC solely request background information on OPC's witnesses. No significant hardship to OPC is created in asking OPC to formulate these discovery responses simultaneously with its testimony. Indeed, all the other parties upon whom FPC has served discovery are complying with its request to serve discovery responses at the same time testimony is filed by the party. OPC has been granted a de facto extension for responding to these discovery requests, since the date for filing its testimony has been extended to January 22, 2002, pursuant to Order No. PSC-02-0059-PCO-EI, issued January 7, 2002. In addition, FPC agrees that OPC can file its responses to the discovery requests on January 22, 2002, rather than January 18, 2002, which would have been the date the responses were originally due. Therefore, OPC is hereby compelled to provide responses to FPC's First Set of Interrogatories and First Request for Production of Documents by January 22, 2002.

No ruling is necessary on FPC's request that OPC be compelled to fully respond to FPC's Interrogatory No. 2(h) and Request for Documents No. 9. OPC stated that it has no objection to providing responsive documents subject to the narrowing of the request by FPC. Accordingly, there is no further dispute as to the responses to FPC's Interrogatory No. 2(h) and Request for Documents No. 9. Therefore, no ruling is required.

FPC'S MOTIONS FOR TEMPORARY PROTECTIVE ORDER

Motions filed January 9, 2002

On January 9, 2002, FPC filed two Motions for Temporary Protective Order, pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006(6), Florida Administrative Code. The first motion covers certain documents sought by OPC's Tenth Set of Requests for Production of Documents and Seventh Set of Interrogatories. FPC argues that OPC seeks confidential proprietary information relating to the combination of FPC's

business practices with those of Carolina Power & Light, which, if disclosed, would harm the competitive business of FPC and the interests of the ratepayers. The second motion concerns documents solicited by OPC's Request for Production of Documents No. 119. FPC argues that OPC seeks documents that contain personal customer and account information that the customer would not expect FPC to share with the public. Further, FPC maintains that it has handled the information as confidential with respect to the identities of customers and related personal customer information. FPC contends that if this information is disclosed it would invade the privacy of FPC's customers and make public customer information not otherwise published by FPC. In both motions, 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. Additionally, FPC requests that the Commission require OPC to provide FPC with notice of its intent to use these confidential documents in connection with the hearing.

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.

Specifically, Rule 25-22.006(c), Florida Administrative Code, states that if a party allows OPC to inspect or take possession of utility information, then that "utility may request a temporary protective order exempting the information from section 119.07(1), F.S."

Upon review of the pleadings and consideration of the arguments, FPC's Motions for Temporary Protective Order, filed on January 9, 2002, shall be granted in part. It appears that the material requested by OPC is proprietary confidential business information related to the combination of FPC's business practices with those of Carolina Power & Light, as well as personal customer and account information that the customer would not expect FPC to share with the public. Accordingly, this information will be granted temporary confidential status pursuant to Section 366.093(2), Florida Statutes, and Rule 25-22.006(6), Florida Administrative Code.

No ruling is necessary on FPC's request that OPC be ordered to provide FPC with notice of its intent to use these confidential documents in connection with the hearing. Order No. PSC-01-2114-PCO-EI, the Order Establishing Procedure, provides for a seven day notice requirement concerning the use of confidential information at hearing. As such, OPC is already required to provide FPC with seven days notice of its intent to use any confidential information at the hearing. Therefore, no ruling is required.

Motion filed January 11, 2002

On January 11, 2002, FPC filed a Motion for Temporary Protective Order, pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006(6), Florida Administrative Code. The motion covers certain documents sought by OPC's Eleventh Set of Requests for Production of Documents and Eighth Set of Interrogatories. FPC argues that OPC seeks documents that include confidential financial information and internal audit reports, which, if disclosed, would harm the competitive business of FPC and the interests of the ratepayers. 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. Additionally, FPC requests that the Commission require OPC to provide FPC with notice of its intent to use these confidential documents in connection with the hearing.

Upon review of the pleadings and consideration of the arguments, FPC's Motion for Temporary Protective Order, filed on January 11, 2002, shall be granted in part. It appears that the material requested by OPC is proprietary confidential business information that includes confidential financial information and internal audit reports. Accordingly, this information will be granted temporary confidential status pursuant to Section 366.093(2), Florida Statutes, and Rule 25-22.006(6), Florida Administrative Code.

For the reasons discussed above concerning FPC's Motions for Temporary Protective Order, filed January 9, 2002, no ruling is necessary on FPC's request that OPC be ordered to provide FPC with notice of its intent to use these confidential documents in connection with the hearing.

Motion filed January 14, 2002

On January 14, 2002, FPC filed a Motion for Temporary Protective Order, pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006(6), Florida Administrative Code. The motion covers certain documents sought by OPC's Twelfth Set of Requests for Production of Documents and Eighth Set of Interrogatories. FPC argues that OPC seeks documents that include: confidential financial information, confidential actuarial studies, confidential information relating to the business combination of FPC and Carolina Power & Light, confidential communications made in negotiations for insurance premiums, and information relating to security measures. FPC maintains that if this information was disclosed it would harm the competitive business of the company and the interests of the ratepayers, impact FPC's ability to obtain favorable insurance rates in the future, and jeopardize the safety of the company's employees, especially in light of the events of September 11, 2001. 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. Additionally, FPC requests that the Commission require OPC to provide FPC with notice of its intent to use these confidential documents in connection with the hearing.

Upon review of the pleadings and consideration of the arguments, FPC's Motion for Temporary Protective Order, filed on January 14, 2002, shall be granted in part. It appears that the material requested by OPC is proprietary confidential business information that includes: confidential financial information, confidential actuarial studies, confidential information relating to the business combination of FPC and Carolina Power & Light, confidential communications made in negotiations for insurance premiums, and information relating to security measures. 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.

For the reasons discussed above concerning FPC's Motions for Temporary Protective Order, filed January 9, 2002, no ruling is necessary on FPC's request that OPC be ordered to provide FPC with notice of its intent to use these confidential documents in connection with the hearing.

FPC'S MOTION FOR EXTENSION OF TIME

FPC requests an extension of time up to and through January 17, 2002, to respond to OPC's Interrogatory Nos. 133 and 143 and Request for Production No. 146, which are part of OPC's Ninth Set of Interrogatories and Twelfth Set of Requests for Production of Documents. OPC has not responded to this motion, but FPC's motion does indicate that OPC objects to the requested extension of time. Because of the time-sensitive nature of this issue, it is 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.

Upon review of the pleadings and consideration of the arguments, FPC's Motion for Extension of Time shall be granted. FPC's request is reasonable in light of the large volume of discovery requests that FPC has received, and the extension of time granted to OPC, pursuant to Order No. PSC-02-0059-PCO-EI, issued January 7, 2002, in which to file its testimony in this proceeding.

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Therefore, FPC must now respond to OPC's Interrogatory Nos. 133 and 143 and Request for Production No. 146 by January 17, 2002.

Based on the foregoing, it is

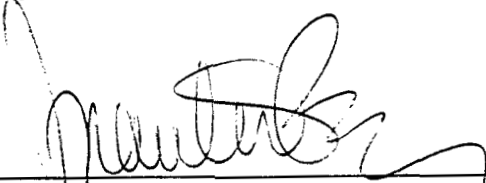
ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that the Expedited Motion to Compel filed by Florida Power Corporation is granted in part as discussed above. It is further

ORDERED that the Office of Public Counsel shall produce the documents discussed above by January 22, 2002. It is further

ORDERED that Florida Power Corporation's Motions for Temporary Protective Order, filed January 9, 2002, January 11, 2002, and January 14, 2002, are granted in part, as set forth in the body of this Order. It is further

ORDERED that Florida Power Corporation's Motion for Extension of Time is hereby granted.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 16th day of January, 2002.



BRAULIO L. BAEZ
Commissioner and Prehearing Officer

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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 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.