

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-02-0359-PCO-EI
ISSUED: March 15, 2002

ORDER GRANTING IN PART AND DENYING IN PART
PUBLIX SUPER MARKETS, INC.'S EXPEDITED MOTION TO COMPEL

On January 22, 2002, Publix Super Markets, Inc. (Publix) served Florida Power Corporation (FPC) with its Third Set of Interrogatories (Nos. 47-50). FPC filed Objections to Publix's Third Set of Interrogatories on January 28, 2002. On February 22, 2002, Publix filed a Motion to Compel FPC to answer Interrogatory numbers 47 and 48 from Publix's Third Set of Interrogatories. FPC responded to the Motion to Compel on March 6, 2002.

Interrogatory Nos. 47 and 48

Publix's Interrogatory No. 47 states:

Please identify the amounts which FPC has spent over the last five years for the following activities:

- a. Opposing merchant power plant siting and development in the State of Florida.
- b. Lobbying for legislative changes in Florida law relative to the siting and development of merchant power plants in the State of Florida.
- c. Participating in appellate proceedings on an Amicus Curie basis.
- d. Public relations and advertising of any type.
- e. Political Action Committees.

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FPC's Objection states:

FPC objects to this interrogatory and all sub-parts excluding sub-part (d) as irrelevant, immaterial and not reasonably calculated to lead to the discovery of admissible evidence. Such amounts are not reflected in the test year and are not included in rate base.

FPC's Response states:

- d. See MFR C-12. Advertising expenses are within the Energy Conservation, Customer Serv-Other/Base Rec, Sales Expense and General Advertising Expenses categories on MFR C-12.

Publix's Interrogatory No. 48 states:

For each of the amounts listed in your answer to Interrogatory 47, please indicate if these amounts are recovered or proposed to be recovered in FPC electric rates approved or authorized by the Florida Public Service Commission.

FPC's Objection states:

FPC objects to this interrogatory and all sub-parts excluding sub-part (d) as irrelevant, immaterial and not reasonably calculated to lead to the discovery of admissible evidence. Such amounts are not reflected in the test year and are not included in rate base.

FPC's Response states:

47(d) Energy Conservation advertising costs are a direct pass through to customers through the ECCR clause. The balance of advertising costs are in base rates except for image building which is excluded from Net Operating Income for surveillance reporting purposes.

Publix argues that FPC should be compelled to respond to Interrogatory Nos. 47, subparts (c), (d), and (e), and 48, insofar as it applies to subparts (c), (d), and (e), because the

information is directly related to Issue 74, which reads, "What is the appropriate amount of outside services expense to be allowed in operating expense for FPC?" Because the information requested in Interrogatories 47 and 48 is directly related to the amounts expended by FPC for outside services, Publix asserts that the requests are both relevant and material. In addition, Publix maintains that the information requested by Interrogatories 47 and 48 is crucial to the preparation by Publix for cross examination during the hearing for this proceeding. Without the requested information, Publix asserts that its ability to adequately cross examine witnesses will be compromised. Further, Publix argues that to allow FPC to withhold this information prior to the hearing would deprive Publix of its due process rights to a meaningful opportunity to adequately prepare for its hearings. Therefore, Publix affirms that due process requires FPC to be directed to respond to Publix Interrogatories 47 and 48, subparts (c), (d), and (e). Further, Publix submits that FPC's failure to properly respond to the interrogatories has been intended to prevent Publix from preparing for the final hearing. As such, Publix argues that sanctions are warranted to punish and deter FPC and others from engaging in discovery abuse in the future.

In response, FPC states that, notwithstanding its objection, it answered Interrogatories 47 and 48 to the extent that they requested information regarding costs that are included in the base rate. To that end, FPC provided information regarding advertising expenses for the historical period requested by Publix, as requested in subpart (d). In addition, FPC represents that since this Motion to Compel was filed, Publix has agreed to withdraw its request for more information regarding public relations expenditures, one part of subpart (d). As such, FPC argues that the question now before the Commission is whether FPC should be compelled to respond to subparts (c) and (e). In response to this reframed question, FPC asserts that it should not be compelled to further answer the remaining interrogatory subparts because the information Publix seeks is irrelevant to the issues in this proceeding.

FPC argues that all the information sought by Publix concerns costs recorded below the line that are not included in the test year, which are not being passed on to the retail customers. In addition, FPC maintains that Issue 74 does not provide a basis for

the relevance and materiality of the requested information. FPC's position on Issue 74 is that "All outside services expenses included in the Company's 2002 test year are appropriate." As such, FPC asserts that this is further evidence that the information requested by Publix is irrelevant and immaterial to this proceeding because the expenses are not included in the test year. In FPC's estimation, requiring FPC to provide information regarding below the line expenses would interject irrelevant material into an already complicated rate proceeding. In addition, FPC has already provided answers with regard to any advertising costs; thus, FPC avows that to require it to further answer subpart (d) would ask FPC to do the impossible or to provide information unnecessary to this proceeding.

Finally, FPC argues that it would be inappropriate to impose sanctions, even if the Commission does believe that the information Publix requests is relevant to this proceeding. FPC asserts that a party may raise objections to overbroad discovery requests and then make a good faith effort to answer those portions of the requests that the party believes are reasonable. See Florida Rules of Civil Procedure, 1.340(a) and 1.380(a). FPC avers that for sanctions to be warranted, the Commission would have to find that not only were FPC's objections totally unsupported, but that there was an element of bad faith in its answers. Here, to the contrary, FPC states that it made every effort to fully answer those interrogatories that were relevant to the issues in this proceeding. Therefore, FPC argues that sanctions should not be imposed for its failure to answer Interrogatories 47 and 48 to Publix's satisfaction.

Upon review of the pleadings and consideration of the arguments, Publix's motion to compel responses to Interrogatory Nos. 47 and 48 is granted as to subparts (c) and (e). Pursuant to Rule 1.280, Florida Rules of Civil Procedure, "parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action." FPC has neither claimed that a response to these discovery requests would violate a privilege, nor has FPC demonstrated that the information sought is not relevant to the subject matter of this proceeding. The responses to subparts (c) and (e) of Interrogatory No. 47, and the attendant response to Interrogatory No. 48, are relevant to the subject matter of this proceeding in order to determine the proper

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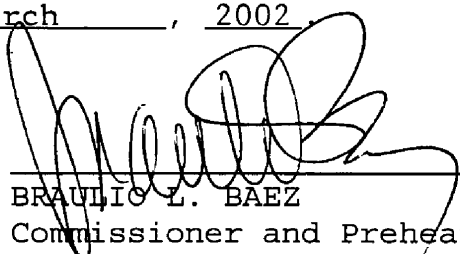
amount of expenses allowed in the net operating income for the test year. Publix's motion to compel responses as to subpart (d) of Interrogatory Nos. 47 and 48 is denied since FPC has already responded with regard to advertising expenses, and Publix has withdrawn its request as it relates to public relations expenses, which comprises the remainder of the request in subpart (d). Publix's request for sanctions is hereby denied. Therefore, FPC shall respond to Publix's Interrogatory Nos. 47 subparts (c) and (e), and 48, as it relates to subparts (c) and (e), by the close of business on March 18, 2002.

Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that Publix Super Markets, Inc.'s Expedited Motion to Compel is granted in part and denied in part as discussed above. It is further

ORDERED that Florida Power Corporation shall produce the documents discussed above by March 18, 2002.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 15th day of March, 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.