BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear cost recovery clause.	DOCKET NO. 110009-EI ORDER NO. PSC-11-0246-PCO-EI ISSUED: June 3, 2011

ORDER DENYING MOTION TO QUASH SUBPOENA AND NOTICE OF DEPOSITION AND GRANTING MOTION TO QUASH CROSS NOTICES OF DEPOSITION

Background

On March 29, 2011, an Order Establishing Procedure was issued in Docket No. 110009-EI.[1] On March 29, 2011, the Office of Public Counsel (OPC) served a subpoena and notice for deposition on Mr. Rajiv Kundalkar (Mr. Kundalkar). Subsequently, related cross deposition notices were filed by Florida Industrial Users Group (FIPUG) and Commission Staff (Staff) on April 7, 2011, and April 8, 2011, respectively. On April 12, 2011, counsel for Mr. Kundalkar filed a Motion to Quash Subpoena and Notices of Deposition (Motion) served by the OPC, FIPUG, and Staff. OPC filed a response to the Motion on April 15, 2011 and on April 18, 2011, FIPUG filed a response to the Motion. Florida Power & Light Company (FPL) and the Federal Executive Agencies (FEA) did not file responses to the Motion. On May 3, 2011, the Commission issued a Notice that the Prehearing Officer would hear oral arguments on the Motion and Responses to the Motion on May 10, 2011. On May 3, 2011, FPL filed a Motion for Leave to file Comments. However, that Motion was subsequently denied on May 19, 2011. (Oral Argument TR. 10). However, FPL was permitted to present oral argument on Mr. Kundalkar's Motion. On May 10, 2011, oral argument was held on Mr. Kundalkar's Motion. Mr. Kundalkar, FPL, OPC, and FIPUG presented oral arguments.

Mr. Kundalkar's Motion

Mr. Kundalkar contends that Section 350.123, Florida Statutes (F.S.), states that "the Commission may . . . issue subpoenas and compel the attendance of witnesses . . . and other evidence necessary for the purpose of any investigation or proceeding." (Motion p. 5). He asserts that OPC's subpoena fails to meet the necessity requirement under Section 350.123, F.S. Mr. Kundalkar argues that he is not employed by or a paid contractor or consultant to FPL or any affiliate of FPL; he has no role in the business or operations of FPL or any affiliate of FPL; he has no access to the non-public operational or business information of FPL; he has not participated in any way in the current year's or prior year's nuclear cost recovery (NCR) dockets; he did, while in the employ of FPL in September 2009, testify before the Commission in Docket No. 090009-EI, the NCR proceeding for that year; however, his testimony was consistent with FPL's position in the case and was based on supporting information from FPL and input of its

[1] Order No. PSC- PSC-11-0179-PCO-EI, issued March 29, 2011, in Docket No. 110009-EI, In re: Nuclear cost recovery clause.

employees, management and consultants; and he possesses substantially the same or identical personal knowledge of information regarding Docket No. 090009-EI as other individuals still employed by or working for FPL. (Motion pp. 3 and 4).

Mr. Kundalkar also asserts that the Commission has a "surfeit" of able witnesses and will have a considerable record before it to test the validity and veracity of FPL's cost information from 2009, to assess the reasonableness and prudence of those costs, and to make any cost adjustments the Commission deems warranted. (Motion p. 4). For example, Mr. Terry Jones, an FPL Vice President, Mr. John Reed, CEO of Concentric, and, Mr. Art Stall, a consultant to NextEra Energy, Inc. (FPL's parent) and previous president of FPL Group Nuclear. Mr. Kundalkar contends that Mr. Stall's prefiled testimony, based on personal knowledge, directly addresses what and when FPL knew about Extended Power Uprate (EPU) costs at the time of the September 2009 hearing. (Motion p. 4). Thus, his deposition is not necessary and the subpoena should be quashed because it fails to meet the necessity requirement pursuant to Section 350.123, F.S.

In support of his position, Mr. Kundalkar cites Order No. PSC-95-1134-PCO-WS, issued September 11, 1995, in Docket No. 950495-WS, In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. (the Sugarmill Order). Mr. Kundalkar contends the current subpoena is devoid of any scope and provides no foundation whatsoever for its necessity, thus it must be quashed as done in the Sugarmill Order. (Motion p. 6). He argues that in the Sugarmill Order, a Commission staff member was subpoenaed for deposition by a party, Sugarmill Woods. Commission staff filed a motion to quash and for a protective order. The prehearing officer expressly declined to address any unique status or privilege held by Commission staff, and ruled as follows:

> Neither Sugarmill's Notice of Deposition nor the accompanying subpoena describe the area of inquiry to be explored in deposition, thus making it impossible to determine whether the area of inquiry would be relevant to the subject matter of this proceeding or could lead to the discovery of any admissible evidence. For this reason, the subpoena is hereby quashed. Having made the determination to quash the subpoena on the grounds of deficiency, no further ruling on Staff's Motion and issues raised therein is necessary.

Mr. Kundalkar argues that, consequently, similarly open-ended types of subpoenas served in this case must also be quashed. (Motion p. 6). Therefore, the Commission cannot overlook the necessity requirement of Section 350.123, F.S., and must reject any urging, no matter how subtle, to the contrary. (Motion p. 6).

Mr. Kundalkar also contends that his Motion should be granted because sound public policy favors quashing the subpoena. (Motion p. 8). Mr. Kundalkar asserts that failure to quash the Subpoena opens the door for any party to subpoena any private citizens to harass and inconvenience them unnecessarily. (Motion p. 9). Mr. Kundalkar cites the appeals court decision

that resulted from the Sugarmill Order as precedent for this position.[2] Mr. Kundalkar argues this Commission must balance competing interests, similar to the competing interests balanced in Sugarmill Order,[3] and quash OPC's subpoena. Mr. Kundalkar asserts that failure to do so will result in tactical decisions on who to subpoena among a party or Commission's former employees. Thus as a matter of public policy, the intrusion on a private citizen of this state posed by the Commission subpoena power is outweighed by the interests of such persons in being left alone, particularly where, as demonstrated here, adequate means exist and other witnesses with the same information are available for the Commission to capture necessary data and execute its duties. (Motion p. 10).

Also, Mr. Kundalkar contends that his Motion should be granted because OPC's subpoena fails to meet the basic legal requirements under Section 120.569, F.S. Mr. Kundalkar asserts that the subpoena was not lawfully issued in accordance with Section 120.569(2)(k)1, F.S., because it does not meet the necessity requirement of Section 350.123, F.S., and has no legitimate purpose other than to harass and inconvenience him. Moreover, Mr. Kundalkar argues that the Subpoena as written is limitless (open-ended), and amounts to "the worst kind of fishing expedition." (Motion p. 11). Mr. Kundalkar asserts that the subpoena does not state the subject area of the possible field of inquiry. In addition, he did not prefile testimony in the case currently before the Commission, and he has no authority regarding this matter or in the affairs of FPL since he retired. Also, because the subpoena is open-ended, it is a blank check for irrelevant material and therefore improper pursuant to Section 120.569(2)(k)1, F.S. As interpreted in the Sugarmill Order, the subpoena should be quashed. (Motion p. 12).

Mr. Kundalkar also argues that the subpoena should be quashed because it serves no necessary or lawful purpose under Chapters 350 and 366, F.S. Mr. Kundalkar contends that the purpose of this docket is to address reasonable and prudent costs pursuant to Section 366.93, F.S. The Commission has only those powers expressly granted by the Legislature, and these powers do not include prosecutorial or contempt powers. If the Commission does not accept any pertinent part of FPL's testimony or evidence in this docket, the Commission's appropriate recourse is with FPL and possible adjustment of the NCR factors. Therefore, the Commission should look to FPL and its witnesses for information pertinent to this docket, not to him, a private citizen, who does not have any additional information outside the prefiled testimonies of FPL's witnesses.

OPC's Response

In response to Mr. Kundalkar's Motion, OPC argues that the Motion should be denied. OPC contends that a nonparty person may object to appearing at a deposition is no basis upon which to exclude that person from the scope of legitimate discovery. (OPC's Response p. 4). Moreover, the Commission's discovery practice is governed by rules that provide a broad scope of discovery, and those rules specifically contemplate subpoenas to nonparty witnesses. (OPC's

[2] Sugarmill Woods Civic Association, Inc. v. Southern States Utilities, 687 So. 2d 1346 (Fla. 1st DCA 1997).
[3] The prehearing officer declined to find the existence of a privilege, but analyzed the public policy foundations for the claim that attorney and the subpoenaed Commission staff members should not be required to participate in the depositions.

Response p. 4) OPC asserts that the rules establishing depositions as a tool that are available to a party conducting discovery do not distinguish between persons who are parties and those who are non-parties, nor do they distinguish between non-party persons who object to a subpoena and those who do not object. (OPC's Response p. 5). Moreover, the Commission does not have the authority to establish a policy of categorizing the applicability of discovery rules to non-parties on the basis of their willingness or unwillingness to appear. (OPC's Response p. 5).

OPC contends that Section 120.569(2)(f), F.S., and Rule 28-106.206, Florida Administrative Code (F.A.C.), both dictate that discovery should be effectuated in accordance with the Florida Rules of Civil Procedure. The Florida Rules of Civil Procedure provide for the deposition of any person as one tool with which to pursue the broad scope of discovery. (OPC's Response p. 7).[4] OPC asserts that a person who is not a party does not bring himself or herself within the scope of discovery established by the Florida Rules of Civil Procedure by volunteering to do so, and a nonparty who objects to a deposition does not escape the scope of the rule by virtue of an objection. (OPC's Response p. 7).

OPC argues that the Motion should also be denied because Mr. Kundalkar is not a bystander to this year's Nuclear Cost Recovery Clause proceeding. (OPC's Response p. 8). OPC contends that the matters for which he had responsibility or to which he testified are currently pending before the Commission in an active docket. (OPC's Response p. 8). OPC asserts that Mr. Kundalkar was actively involved in developing or overseeing the development of the estimates of the cost of completing the uprate project. He held responsibility for preparing or overseeing the preparation of revisions to the estimates that occurred between the time he submitted prefiled testimony in May 2009 and the time he sponsored that prefiled testimony without change in September 2009. He was at the center of the circumstances and events that are pending before the Commission as a result of the deferral of the 2009 FPL issues. Thus, Mr. Kundalkar's role is singular and unique, and the fact that he retired following his testimony renders his knowledge no less discoverable than does the fact that his job description changed after he submitted his May 2009 prefiled testimony. (OPC's Response p. 8).

OPC also argues that Mr. Kundalkar's Motion should be denied because failure to do so would "turn the existing, well established discovery scheme in Florida on its head." (OPC's Response p. 9). OPC contends that Mr. Kundalkar's interpretation as it relates to the "necessity" requirement of Section 350.123, F.S., is incorrect. OPC asserts Section 350.123, F.S, must be read together with Section 120.569(2)(f), F.S., in a manner that will harmonize and give effect to both statutes. (OPC's Response pp. 10-11). OPC contends that Section 120.569(2)(f), F.S., makes available to a party to a proceeding of an agency governed by the Administrative Procedure Act the means of discovery available to the courts and in the manner provided in the Florida Rules of Civil Procedure. (OPC's Response p.11). OPC asserts that in these rules of court, the Supreme Court of Florida has prescribed broad, liberal discovery rights. (OPC's Response p. 11).

[4] OPC cites Rules 1.280 and 1.310, Fla. R. Civ. P., for this position.

OPC contends that when the breadth of the scope of permissible discovery prescribed by the Florida Supreme Court, and adopted by reference by the Legislature, is properly taken into account, it is evident that the Florida Legislature intended neither Section 350.123 nor Section 120.569(2)(f), F.S., to establish the Commission as a limiting, restrictive gatekeeper to the discovery process. (OPC's Response p. 11). Rather, the role of the Presiding Officer in Section 120.569(2)(f), F.S., and of the Commission in Section 350.123, F.S., is to effectuate the prescribed liberal scope of discovery. (OPC's Response p. 11). OPC asserts that the term "may" in Section 350.123, F.S., is used in the sense of a conferring of power on the Commission — the power to ensure and enforce the prescribed scope of discovery, both in investigations initiated by the Commission and in adjudicatory proceedings. (OPC's Response p. 11). Moreover, the construction of Section 350.123, F.S., is analogous to the phrases "presiding officer has the power" and "to effect discovery," which accomplish the same end in Section 120.569(2)(f), F.S. (OPC's Response p. 11). OPC contends that under this logical and harmonious construction, a subpoena is necessary within the meaning of Section 350.123, F.S., if it is required to enable the Commission to obtain the full breadth of information it needs to conduct an investigation, or for a party conducting discovery in a different type of proceeding to realize the full scope of discovery afforded by the Florida Rules of Civil Procedure. Thus, this result is necessary to harmonize Section 350.123, F.S., with the portion of the Administrative Procedure Act that clearly imports the liberal rules of discovery promulgated by Florida's judiciary into agency proceedings, including those of the Commission. (OPC's Response p. 11).

OPC also argues that the Motion should be denied because its subpoena of Mr. Kundalkar is legally valid. OPC contends that the argument that the subpoena is unreasonably broad in scope or required the production of irrelevant material is incorrect and should be rejected. OPC asserts the consistent with Rule 25-22.045, F.A.C., it obtained a subpoena form supplied by the Office of Commission Clerk, and completed the form by providing the information required by the form. (OPC's Response p. 12). OPC contends that the form of subpoena supplied by the Commission does not require or contemplate a description of the anticipated lines of questions. (OPC's Response p. 12). Also, the subpoena does not require Mr. Kundalkar to produce any documents. (OPC's Response p. 13). Moreover, the subpoena is not open-ended, because as Commission knows well, parties may identify issues up to and until the date of the Prehearing Conference in a docket. (OPC's Response p. 14). OPC also cited several cases as precedent for the position that its subpoena is not unreasonably broad in scope.[5] Therefore, Mr. Kundalkar's Motion should be denied.

FIPUG Response

In response to Mr. Kundalkar's Motion to Quash, FIPUG adopts the arguments made by OPC in its response to Mr. Kundalkar's Motion. (FIPUG's Response p. 2). Also, FIPUG contends that should the Commission grant the Motion, accepting the argument that Mr. Kundalkar is now a private citizen, and does not want to be deposed, the ruling would hamstring

[5] Hames v. City of Miami Firefighters' and Police Officers' Trust, 980 So.2d 1112 (Fla. 3d DCA 2008); Order No. PSC-03-1065-PCO-EQ, issued in Docket No. 020898-EQ on September 24, 2003, In re: Petition by Cargill Fertilzer, Inc. for payment approval of self-service wheeling to, from, and between points within Tampa Electric Company's service area.

the ability of a litigant, such FIPUG or OPC, to present its case by compelling attendance of witnesses. (FIPUG's Response p. 1). FIPUG asserts that the ability of a litigant to present its case by compelling witnesses is a fundamental tenet of jurisprudence. (FIPUG's Response p. 1). Quashing the subpoena because a non-party does not want to testify runs afoul of Section 120.569, F.S., which governs the handling of cases involving disputed issues of fact. Id., at 1. FIPUG contends that in Section 120.569(2)(f), F.S., the Legislature expressly recognizes a party's ability to obtain discovery. FIPUG asserts that the only express limitation on discovery efforts exists when a party seeks discovery from an employee or member of the Legislature regarding legislative matters. (FIPUG's Response p. 2). Moreover, the statute indicates members of the Legislature or legislative employees are subject to discovery and compelled testimony so long as the matter does not involve legislative matters. (FIPUG's Response p. 2). Thus, Section 120.569(2)(f), F.S., clearly shows that the Legislature knows how to limit discovery. In addition, FIPUG argues that a search of the statutes will not reveal any similar legislative provision to suggest a non-party witness with relevant information does not have to respond to a subpoena merely because he or she does not want to provide testimony. (FIPUG's Response p. 2). To allow a non-party witness to decide whether or not to testify, based on the convenience, whims or desires of such a witness, would "wrongfully shove Lady Justice down a treacherous path." (FIPUG's Response p. 2). Therefore, the Motion should be denied.

FPL Response

As stated previously, FPL did not file a response to Mr. Kundalkar's Motion to Quash. However, the company was permitted to present oral argument at the May 10, 2011, proceeding. FPL argues the decision whether or not to require Mr. Kundalkar to appear for deposition is premature. FPL contends that OPC should be required to pursue information from the company and its witnesses before it can demonstrate to the Commission that it has met the necessity requirement of Section 350.123, F.S. (Oral Argument TR. 20-21). FPL further asserts that the relief OPC is suggesting, based upon the issues it intends to pursue, are not within the Commission's jurisdiction. (Oral Argument TR. 21). FPL contends that the Commission is a creation of the Legislature and the Florida Statutes, and the powers and duties of the Commission are only those conferred expressly or impliedly by statute. (Oral Argument TR. 22). Moreover, the Commission is authorized by Section 366.095, F.S., to penalize entities under its jurisdiction found to have refused to comply with or have willfully violated any Commission rule, order, or statutes. However, that authority is not applicable to the NCRC. (Oral Argument TR. 22).

Analysis and Ruling

Having reviewed the parties' filings and oral argument, the applicable Florida Statutes and Commission rules, and the relevant case law, Mr. Kundalkar's Motion to Quash the Subpoena and Notices of Deposition is denied. However, I encourage OPC, FIPUG, and any other party to the FPL portion of the docket, to first depose the available FPL witnesses, and depending on whether any areas of questioning remain unexplored, to then depose Mr. Kundalkar. My ruling is premised on the following analysis stated below.

Section 350.123. F.S. provides that:

> The commission may administer oaths, take depositions, issue protective orders, issue subpoenas and compel the attendance of witnesses and the production of books, papers, documents and other evidence necessary for the purpose of any investigation or proceeding. Challenges to, and enforcement of, such subpoenas and orders shall be handled as provided in s. 120.569.

However, as pointed out by OPC, the Commission does not have a separate set of rules that define a Commission-specific discovery practice. Thus, the Commission is governed by the Administrative Procedure Act, the Uniform Rules of Procedure, and in relation to discovery matters, the Florida Rules of Civil Procedure.

Section 120.569(2)(f), Florida Statutes, provides:

> The presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure.

Similarly, Rule 28-106.206 of the Uniform Rules of Procedure, which applies to Commission proceedings, states:

> After commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanctions in accordance with the Florida Rules of Civil Procedure, except contempt.

Rule 1.280, Fla. R. Civ. P., provides in pertinent part:

> (a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise and under subdivision (c) of this rule, the frequency of use of these methods is not limited, except as provided in rule 1.200, 1.340, and 1.370.
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> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
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> (1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the

> claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It 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.

Rule 1.310, Fla. R. Civ. P. entitled "Depositions Upon Oral Examination," provides, in pertinent part:

> (a) When Depositions May Be Taken. After commencement of the action any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition within 30 days after service of the process and initial pleading upon any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in rule 1.410. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.
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> (b) Notice; Method of Taking; Production at Deposition.
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> (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced under the subpoena shall be attached to or included in the notice.

However, discovery without limit may not be obtained.[6] Rule 1.280(c), Fla. R. Civ. P., states:

> Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the

[6] Order No. PSC-94-1562-PCO-WS, issued December 14, 1994, in Docket No. 930945-WS, In re: Investigation into Florida Public Service Commission Jurisdiction over Southern States Utilities, Inc. in Florida, at 2.

> time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

Therefore, as summarized by OPC, the Commission's practice is governed, statutorily, by provisions that establish broad discovery rights in accordance with the Florida Rules of Civil Procedure, and in that context provide that a deposition can be taken of any person (including a nonparty witness) as a tool with which to pursue the broad scope of discovery. However, said discovery has its limits and cannot be for annoyance, embarrassment, oppression, or undue burden or expense that justice requires.[7] Thus, a balancing test must be used under certain circumstances.

The balancing test that must be used under these facts and circumstances is the litigants' right to pursue full discovery with the deponent's, a nonparty, right to protection against annoyance, embarrassment, oppression, or undue burden or expense that justice requires. Here, I find that the test favors the litigants (OPC, FIPUG, and the other parties to the FPL portion of the docket). As expressed below, the characterization of Mr. Kundalkar as a "private citizen" does not accurately reflect his involvement in this matter. Mr. Kundalkar's personal knowledge and impressions due to his direct involvement in the development certain facts at issue, leads towards satisfying the "necessary" requirement; thus, I find that Mr. Kundalkar can be deposed.

Mr. Kundalkar's testimony could be important in this year's NCRC hearing. In his managerial and regulatory roles, Mr. Kundalkar was at the center of the circumstances and events that are pending before the Commission as a result of the deferral of the 2009 FPL issues.[8] He held the position of Vice President of Nuclear Power Uprates at FPL. In that capacity, Mr. Kundalkar was actively involved in developing, or overseeing the development of, the estimates of the cost of completing the uprate project. In addition, Mr. Kundalkar held responsibility for preparing or overseeing the preparation of revisions to the estimates that occurred between the time he submitted prefiled testimony in May 2009 and the time he sponsored that prefiled

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[7] Order No. PSC-94-1562-PCO-WS, at 3; Dade County Medical Association v. Hlis, 372 So. 2d 117, 121 (Fla. 3d DCA 1979).

[8] Issue 17 states: "Should the Commission find that for the year 2009, FPL's project management, contracting, and oversight controls were reasonable and prudent for the Turkey Point Units 6 & 7 project and the Extended Power Uprate project?"

testimony without change in September 2009. Therefore, I agree with OPC that Mr. Kundalkar's role is singular and unique, thus I find his deposition is necessary under Section 350.123, F.S.

Mr. Kundalkar argues that the subpoena is completely open-ended and on this basis alone, the Subpoena must be quashed, as was done in the Sugarmill Order. However, I find the Sugarmill Order to Quash to be limited to the facts and circumstance of that particular case, and not the facts and circumstances of the present case. Like the Sugarmill Order, the Prehearing Officer in this instance possesses broad discretion in granting or refusing discovery motions. Orlowitz v. Orlowitz, 199 So. 2d 97 (Fla.1967). Here, the facts and circumstances, favors the position supported by OPC and FIPUG. I do not find that the subpoena is open-ended. This is the discovery phase of the case, and per Rule 1.280(b)(1), Fla. R. Civ. P:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It 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.

Moreover, there is a more persuasive Commission case that favors denying Mr. Kundalkar's Motion, Order No. PSC-03-1065-PCO-EQ, issued September 24, 2003, in Docket No. 020898-EQ, In re: Petition by Cargill Fertilizer, Inc. (Cargill) for permanent approval of self-service wheeling to, from, and between points within Tampa Electric Company's (TECO) service area (the TECO Order). In the TECO Order, the Prehearing Officer denied TECO's Motion to Quash Subpoenas Duces Tecum of several of its employees after Cargill served subpoenas duces tecum for deposition on the employees. The bases for TECO's objections were that Cargill had not disclosed the subject areas that Cargill wanted to explore with the witnesses, that none of the individuals were being offered as TECO witnesses, and that the subpoenas were "unreasonable, oppressive, and calculated to harass the individuals in question." The Prehearing Officer found that the subpoenas fell within the broad standards of discovery prescribed by Rule 1.280(b), Fla. R. Civ. P, and denied TECO's motion to quash the subpoenas.[9] Similarly, in his Motion, Mr. Kundalkar argues that the subpoena is open-ended because it does not disclose the subject areas OPC wants to address, thus, amounting to a fishing expedition, OPC should direct its discovery to the individuals whom FPL intends to call as witnesses, and that OPC's subpoena constitutes harassment. Thus, similar to the Prehearing Officer's ruling in the TECO Order, I find Mr. Kundalkar's arguments fail because the subpoena is necessary under 350.123, F.S., and falls within the broad standards of discovery prescribed by Rule 1.280(b), Fla. R. Civ. P.

As previously noted, Mr. Kundalkar argues that the subpoena fails to satisfy the requirements of Section 120.569(2)(k)1, F.S., because it was not lawfully issued when it did not

[9] Order No. PSC-03-1065-PCO-EQ, at 5.

meet the "necessity" requirement of Section 350.123, F.S., and that it is unreasonably broad in scope because the subpoena as written is limitless and vague. For the reasons stated above, I find that the subpoena meets the necessity requirements of Section 350.123, F.S.; thus, it satisfies the lawful requirement of Section 120.569(2)(k)1, F.S. Therefore, Mr. Kundalkar's Motion is denied.

Also, I find that the subpoena is not limitless and vague; thus, it is not unreasonably broad in scope and satisfies the requirement of Section 120.569(2)(k)1, F.S. First, the subpoena is for a deposition upon oral examination only, and his argument that "any open-ended subpoena like the one here is a blank check for irrelevant material and is therefore improper," is without merit. Mr. Kundalkar has not been asked to bring or produce any documents for the deposition. Second, his argument that the subpoena is invalid because "it has no stated topics or issues, no check sheet, no boundaries, and creates the impression that anything is fair game" and "the Commission has yet to ruled on the propriety or dimension of the tentative issues OPC identified; so the relevance of anything sought through the subpoena for that issue cannot be properly determined at this time" is also without merit. This is the discovery phase of this proceeding, and as stated in the rules above, the Florida Rules of Civil Procedure allows for a broad discovery standard. Moreover, the Commission's Order Establishing Procedure, which governs issue identification and other procedural matters, allows parties to identify issues up to and until the date of the Prehearing Conference in a docket. Thus, formulation of issues is a critical reason for the parties to conduct discovery and conduct depositions.

As stated above, Mr. Kundalkar also argues that the subpoena should be quashed because it serves no necessary or lawful purpose under Chapters 350 and 366, F.S. Having found that the subpoena is necessary based on the analysis above; Mr. Kundalkar's Motion is denied. However, as stated previously, OPC, FIPUG, and any other party to the FPL portion of the docket are encouraged to first depose the available FPL's witnesses, and depending on whether any areas of questioning remained unexplored, then depose Mr. Kundalkar.

Mr. Kundalkar also contends that the cross-notices to the deposition are not subpoenas, and were not properly served as subpoenas, and do not have the legal force and effect of subpoenas. Moreover, for this proposition he cites Rules 1.310 and 1.410, Fla. R. Civ. P. Mr. Kundalkar is correct in his legal interpretation of the Florida Rules of Civil Procedure as it relates to this argument. However, as FIPUG alluded at the oral argument on the Motion, to which Mr. Kundalkar agreed, it has been a long-standing practice in Commission proceedings for parties to simply cross-notice the deposition in order to ask questions. (Oral Argument TR. 42).[10] However, just because it is long-standing practice does not mean that it is legally correct. Thus, I find that the cross-notices are not a valid form of subpoena, and thus they shall be quashed in this instance. However, this decision should not discourage parties from cross-noticing depositions as an administratively efficient practice, in the absence of an objection such as is present in this case.

[10] Mr. Kundalkar also agreed with FIPUG's statement about the Commission's long-standing practice regarding cross-notices and stated "as the subpoena goes, so will go the cross-notices....as your ruling on OPC, so goes your ruling on the FIPUG notice." (Oral Argument TR. 42).

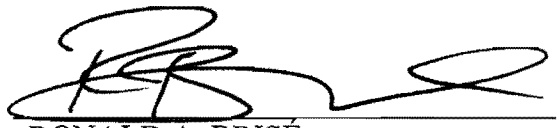
Based on the foregoing, it is

ORDERED by Commissioner Ronald A. Brisé, as Prehearing Officer, that Mr. Rajiv Kundalkar's Motion to Quash the Office of Public Counsel's Subpoena and Notice of Deposition is denied. It is further

ORDERED that Mr. Rajiv Kundalkar's Motion to Quash Florida Industrial Users Group's and Commission Staff's Cross Notices for Deposition is granted.

ORDERED that Florida Power & Light Company's Motion for Leave to file Comments is denied in its entirety.

By ORDER of Commissioner Ronald A. Brisé, as Prehearing Officer, this 3rd day of June, 2011.



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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; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, 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.