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By Hand Delivery

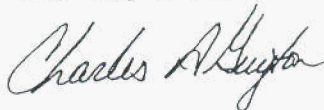
**In re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.  
Docket No. 981042-EM**

Dear Ms. Bayó:

Enclosed please find the original and fifteen (15) copies of FPL Energy Inc.'s Motion for Protective Order in Docket No. 981042-EM.


If you or your staff have any questions regarding this transmittal, please contact me at 222-2300.

Very truly yours,



Charles A. Guyton

ACK \_\_\_\_\_  
AFA 2  
APP \_\_\_\_\_  
    Enc.  
CAF \_\_\_\_\_  
    cc: Counsel for all parties of record  
CMU \_\_\_\_\_  
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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition for Determination of Need )  
for an Electrical Power Plant in Volusia County )  
by the Utilities Commission, City of New Smyrna )  
Beach, Florida, and Duke Energy New Smyrna )  
Beach Power Company Ltd., L.L.P. )

DOCKET NO. 981042-EM

DATE: November 10, 1998

FPL ENERGY INC.'S MOTION FOR PROTECTIVE ORDER

Pursuant to Rule 1.280(c), Florida Rules of Civil Procedure and Rules 28-106.204 and 28-106.206, Florida Administrative Code, FPL Energy, Inc. moves the Florida Public Service Commission ("Commission") for a protective order that the deposition of FPL Energy, Inc. noticed in the notice attached as Attachment A not be had. As grounds for this motion, FPL states:

1. The deposition noticed by the petitioners of FPL Energy, Inc. is a fishing expedition which serves no purpose other than harassment and annoyance. Broad discovery requests well beyond the scope of the proceeding constitute fishing expeditions. Fishing expeditions are not countenanced as proper discovery. See, City of Miami v. Florida Public Service Commission, 226 So.2d 217 (Fla.1969). Pursuant to Florida Rules of Civil Procedure Rule 1.280(c), the Commission may enter an order protecting FPL Energy, Inc. from discovery that is an annoyance or an undue burden. As set forth more fully in the remainder of this motion, the deposition noticed for FPL Energy, Inc. is an annoyance and an undue burden which would serve no purpose other than harassment.

2. The stated purpose of the deposition is for FPL Energy, Inc. "to give testimony." Under the Commission's procedural orders in this case, such testimony cannot be used. The Commission's Order Establishing Procedure requires that all testimony and exhibits be prefiled: "Each party shall prefile, in writing, all testimony that it intends to sponsor." Order No. PSC-98-1183-PCO-EM at 3. The Commission's Second Procedural Order sets forth the dates for pre-filing testimony. The petitioner's direct testimony was due by September 28, 1998 and their rebuttal testimony was due on October 28, 1998. Order No. PSC-98-1221-PCO-EM. If the testimony sought by the petitioners were allowed, it could not be filed with the Commission, for the time for filing testimony by the petitioners has come and gone. The petitioners could have noticed FPL Energy, Inc.'s deposition before the time for filing their testimony so that it could have been prefiled as required by Commission rule, but they chose not to do so. The petitioners should not be rewarded for their oversight and delay when this matter was entirely within their control. Even though the Florida Rules of Civil Procedure authorizes the taking of depositions of corporate representatives, that rule does not supersede the Prehearing Officer's mandate in this case that testimony must be prefiled. The testimony sought cannot be filed with the Commission and used; therefore, the purpose of taking the deposition is harassment.

3. The deposition should not be had because much of the scope of the deposition is well beyond the scope of this proceeding and the jurisdiction of the Commission. Discovery must be relevant to the subject matter of the proceeding and reasonably calculated to lead to the discovery of admissible evidence. Rule 1.280(b)(1), Florida Rules of Civil Procedure. Much of what the petitioners seek to solicit FPL Energy, Inc.'s testimony about is not relevant to this proceeding. This proceeding has a narrow focus under state law of whether there is a need for the proposed

power plant (either by a particular utility {FPL's position} or by Peninsular Florida {the petitioners' position}) and other matters within the Commission's jurisdiction which may be affected by a determination of need. The following matters included in the notice of deposition all fall outside the scope of this proceeding and are not relevant.

- a. The notice seeks FPL Energy, Inc.'s testimony as to "the status of merchant power plants in states other than Florida." The status of merchant plants outside of Florida is simply not within the scope of this proceeding. The status of merchant plants outside of Florida is not an element that the petitioners are required to prove as part of their direct case, and it is not a matter that is rebuttal to FPL's policy witness. The Commission has no jurisdiction over the status of merchant plants outside of Florida. There are other means available for the petitioners to discover the status of merchant plants outside of Florida without asking FPL Energy, Inc.'s knowledge. Indeed, the petitioners have already filed testimony of questionable relevance addressing this very matter. FPL Energy, Inc.'s knowledge of the status of merchant plants outside of Florida is a matter beyond the jurisdiction of the Commission and beyond the scope of this proceeding. It is not a required element of proof in the petitioners' case, and it is not put at issue by FPL's testimony. It simply is not relevant to this proceeding, and a deposition for this purpose should not be allowed.
- b. The notice seeks FPL Energy, Inc.'s testimony as to 'FPL Energy, Inc.'s, or any of its affiliate's, direct or indirect ownership interests in "qualifying facilities," within the meaning of the Public Utility Regulatory Policies Act, or in "exempt

wholesale generators,” within the meaning of the Energy Policy Act of 1992 and the Public Utility Holding Company Act of 1935.’ Whether FPL Energy, Inc. or its affiliates own QFs and EWGs is wholly irrelevant and immaterial to this proceeding, the focus of which is whether the proposed power plant is needed and the impact of determining need on other matters within the Commission’s jurisdiction. So what if FPL Energy, Inc. or its affiliates had such ownership? That fact would not affect the alleged need for the proposed plant. Certifying need for the proposed plant would in no way affect FPL Energy, Inc.’s or its affiliates’ ownership of such facilities, and FPL Energy, Inc.’s or its affiliates’ ownership of such facilities is not a matter subject to the Commission’s jurisdiction. Moreover, neither FPL, FPL Energy, Inc. nor any other FPL Energy, Inc. affiliate has not even been identified by the petitioners as an entity to which it intends to sell capacity and energy. Depositions which seek to solicit testimony about matters beyond the scope of the Commission’s jurisdiction and the scope of this proceeding are irrelevant and immaterial and constitute harassment.

- c. The notice seeks FPL Energy, Inc.’s testimony as to “retail and wholesale competition in the electric power industry.” Neither retail nor wholesale competition in the electric power industry are matters at issue in this proceeding. If retail competition is a matter at issue in this proceeding, then Duke New Smyrna has misrepresented its intent regarding the use of its proposed plant. The Florida Legislature has chosen not to delegate to the Commission jurisdiction over retail electric competition and has created a regulatory scheme in which such

competition is not allowed. A matter clearly beyond the Commission's jurisdiction is certainly beyond the scope of this proceeding. Therefore, it is irrelevant. Similarly, the Florida Legislature has not given the Commission a mandate to regulate wholesale electric power competition, and Congress has preempted the Commission's ability to regulate such competition. Consequently, this matter is also irrelevant to this proceeding. Taking FPL Energy, Inc.'s deposition as to matters beyond the Commission's jurisdiction serves no purpose other than harassment.

- d. The notice seeks FPL Energy, Inc.'s testimony as to "the status and development of wholesale electric power markets in Florida and in states other than Florida." The Commission has no jurisdiction regarding wholesale electric power markets in Florida or outside of Florida. The Commission's jurisdiction is limited to consideration of the provision of retail electric service within Florida and the proposed power plants necessary to provide such service. Thus, the status and development of wholesale power markets are matters beyond not only the Commission's jurisdiction but also the case before the Commission, which turns upon the need for a proposed power plant. Moreover, there are other means available to the petitioners to discover the status and development of wholesale electric power markets rather than seeking FPL Energy, Inc.'s views. This matter is not a necessary or proper part of the petitioners' burden of proof or a matter which could be used in impeachment or rebuttal to FPL. It is irrelevant, and the deposition should not be permitted.

- e. The notice seeks FPL Energy, Inc.'s testimony as to "FPL Energy, Inc.'s and any of its affiliates' involvement in, and participation in, wholesale electric power markets in Florida and in states other than Florida." Once again, this inquiry goes to matters that are beyond the Commission's jurisdiction (wholesale electric power markets, wholesale markets in states other than Florida, FPL Energy, Inc.'s affiliates' participation in wholesale power markets, FPL Energy, Inc.'s participation in wholesale power markets). More importantly, none of those matters are at issue in this proceeding and are not relevant to the Commission's ultimate determination of whether the proposed power plant is needed to provide retail service in Florida.
- f. The notice seeks FPL Energy, Inc.'s testimony as to "FPL Energy, Inc.'s and any of FPL Energy, Inc.'s affiliates' sales of electric energy, or sales of electric capacity and energy, at market-based rates or negotiated rates." Once again, these are matters that have no relevance to whether the proposed power plant is needed, and they go beyond the Commission's jurisdiction. Even if FPL Energy, Inc. had authorization to sell at market based or negotiated rates, that fact does not affect the need for the proposed power plant in the least. It does not establish need for the plant. It does not show the plant to be cost-effective. FPL Energy, Inc. has not even been identified as an entity to which the plant's output is intended to be sold. A deposition on this topic would not be relevant to the proceeding or likely lead to admissible evidence. Consequently, the deposition serves only the purpose of harassment and should not be permitted.

4. There are three matters within the notice which relate to matters that FPL has placed at issue in this proceeding. See items 6., 7., and 8. in the notice. However, FPL has already filed testimony on each of those topics. Moreover, Mr. Steinmeier, the witness presented by FPL to address those matters, has been noticed for his deposition on November 17. Deposing a corporate representative of FPL Energy, Inc. to address the same issues serves no purpose. Even the FPL Energy, Inc.'s designee took a position at odds with FPL or Mr. Stenmeier, it could not be used to impeach either of those witnesses. FPL Energy, Inc. is a separate corporate entity and it is not a party to this proceeding. Given that the deposition of FPL Energy, Inc.'s corporate representative could not be used to impeach FPL or its witness and that FPL Energy, Inc. is not a party to this proceeding, taking the deposition of FPL Energy, Inc.'s corporate representative is harassment.

5. Much of the information sought from FPL Energy, Inc. is information about FPL Energy, Inc. affiliates and is not information as to FPL Energy, Inc.. FPL Energy, Inc. affiliates are separate corporations. It would impose an undue burden on FPL Energy, Inc. to be called to provide testimony as to any of the affiliate activities inquired about by the petitioners. Moreover, only FPL, and not FPL Energy, Inc., is a party to this proceeding. Any position taken by FPL Energy, Inc. would not be proper rebuttal or impeachment of FPL. FPL Energy, Inc. should not be made to testify as to its activities or the activities of its affiliates.




WHEREFORE, FPL Energy, Inc. respectfully moves the Commission to enter a protective order that the deposition of FPL Energy, Inc. as noticed in the notice attached as Attachment A not be had.

Respectfully submitted,

Steel Hector & Davis LLP  
Suite 601, 215 S. Monroe St.  
Tallahassee, Florida 32301

Attorneys for FPL Energy, Inc.

By:   
Charles A. Guyton

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of FPL Energy Inc.'s Motion for Protective Order in Docket No. 981042-EM was served by Hand Delivery (when indicated with an \*) or mailed this 10 day of November, 1998 to the following:

Leslie J. Paugh, Esq.\*  
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Ausley & McMullen  
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Utilities Commission  
City of New Smyrna Beach  
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P.O. Box 2861  
St. Petersburg, FL 33733

By: Charles A. Guyton  
Charles A. Guyton

TAL/26462-1

**ATTACHMENT A**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition for }  
Determination of Need for an } DOCKET NO. 981042-EM  
Electrical Power Plant in Volusia }  
County by the Utilities Commission, } FILED: NOVEMBER 4, 1998  
City of New Smyrna Beach, Florida, }  
and Duke Energy New Smyrna Beach }  
Power Company Ltd., L.L.P. }  
\_\_\_\_\_ }

PETITIONERS' NOTICE OF TAKING DEPOSITION OF  
FPL ENERGY, INC.

Petitioners, Utilities Commission, New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., pursuant to Uniform Rule 28-106.206, Florida Administrative Code, and Rule 1.310(b)(6), Florida Rules of Civil Procedure, hereby give notice of taking the deposition of FPL Energy, Inc. ("FPL Energy"), and request that FPL Energy designate a corporate representative to give testimony on the following subjects:

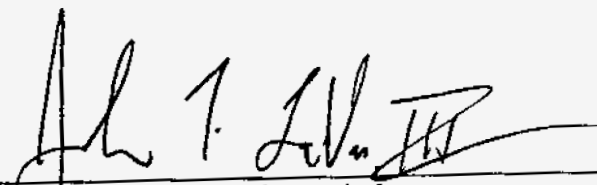
1. the status of merchant power plants in states other than Florida;
2. FPL Energy's, or any of its affiliate's, direct or indirect ownership interests in "qualifying facilities," within the meaning of the Public Utilities Regulatory Policies Act, or in "exempt wholesale generators," within the meaning of the Energy Policy Act of 1992 and the Public Utility Holding Company Act of 1935;
3. retail and wholesale competition in the electric power industry;

4. the status and development of wholesale electric power markets in Florida and in states other than Florida;
5. FPL Energy's and any of its affiliates' involvement in, and participation in, wholesale electric power markets in Florida and in states other than Florida;
6. the impact of the development of merchant plants on stranded costs (and stranded benefits) of (a) FPL Energy and (b) state-regulated, retail-serving utilities generally;
7. the effect of the construction and operation of merchant power plants on FPL Energy's and other retail-serving Florida utilities' obligation to plan for and provide electric service;
8. the effect of the construction and operation of merchant power plants on FPL Energy's and other retail-serving Florida utilities' ability to seek future determinations of need for electrical power plants; and
9. FPL Energy's and any of FPL Energy's affiliates' sales of electric energy, or sales of electric capacity and energy, at market-based rates or negotiated rates.

The deposition of FPL Energy's corporate designee will be taken at the offices of Steel Hector & Davis, L.L.P., 215 South Monroe, Suite 601, Tallahassee, Florida 32301, or at a mutually convenient location on November 16, 1998 at 11:30 a.m., or at another mutually convenient time and place, and will continue from day to day until completed.

This deposition is being taken for purposes of discovery, for use at trial, or for any other purpose allowed under the Florida Rules of Civil Procedure, the Rules of the Florida Public Service Commission, and the Florida Uniform Rules of Procedure.

Please govern yourselves accordingly.



---

Robert Scheffel Wright  
Florida Bar No. 966721  
John T. LaVia, III  
Florida Bar No. 853666  
LANDERS & PARSONS, P.A.  
310 West College Avenue (ZIP 32301)  
Post Office Box 271  
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Telephone (850) 681-0311  
Telecopier (850) 224-5595

Attorneys for the Utilities Commission,  
City of New Smyrna Beach, Florida,

and

Duke Energy New Smyrna Beach Power  
Company Ltd., L.L.P.

CERTIFICATE OF SERVICE  
DOCKET NO. 981042-EM

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (\*) or by United States Mail, postage prepaid, on the following individuals this 4th day of November, 1998:

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