

ORIGINAL

RECEIVED-FPSC

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

NOV 13 AM 11:33

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
FILED: NOVEMBER 13, 1998

RECORDS AND REPORTING

PETITIONERS' RESPONSE TO FLORIDA POWER & LIGHT COMPANY'S MOTION FOR PROTECTIVE ORDER, FPL GROUP'S MOTION FOR PROTECTIVE ORDER, AND FPL ENERGY, INC.'S MOTION FOR PROTECTIVE ORDER, AND REQUEST FOR EXPEDITED RULING

The Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., (collectively referred to herein as the "Petitioners" or the "Joint Petitioners") pursuant to Uniform Rule 28-106.204, Florida Administrative Code, hereby respond to the motions for protective orders filed herein by Florida Power & Light Company ("FPL"), FPL Group, and FPL Energy, Inc. The Joint Petitioners also request an expedited ruling on the matter. In support of this response, Petitioners say:

1. On November 4, 1998, Petitioners filed their Notices of Taking Deposition of FPL, FPL Group, and FPL Energy, Inc. (the

"Notices") setting the depositions of FPL's, FPL Group's, and FPL Energy, Inc.'s corporate representative for the morning of

The Petitioners propounded notices of taking the corporate representative depositions of FPL, FPL Group, and FPL Energy, Inc. Each of these entities filed a virtually identical motion for protective order in response to the Petitioners' Notices. For convenience and administrative efficiency, the Petitioners are responding to the three motions in this one pleading. The three FPL entities are referred to collectively herein as "FPL and its Affiliates."

ACK
AFA
APP
DAF
DMU
DTR
AG
EG
IN
PC
CH
EC
AS
TH

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

12730 NOV 13 1998

001076

FPSC-RECORDS/REPORTING

November 16, 1998, or at other mutually convenient times. On November 10, 1998, FPL and its Affiliates filed their Motions for Protective Order in which they raised both general and specific grounds in support of their requests that the Commission enter a protective order prohibiting Petitioners from deposing FPL's and its Affiliates' corporate representatives. As the moving parties, FPL and its Affiliates have the burden of demonstrating their entitlement to the requested protective orders. As set forth below, they have failed to meet their burden. Neither the general grounds nor the specific grounds in the motions have merit; thus, FPL's and its Affiliates' motions for protective orders should be denied and each of these entities should be required to make available for deposition a corporate representative competent to answer for them as to the subjects listed in the Notices.

FPL's and Its Affiliates' General Objections are Without Merit

2. First, FPL and its Affiliates assert that Petitioners' attempt to depose their corporate representatives "is a fishing expedition which serves no other purpose than harassment or annoyance." They further assert that "fishing expeditions are not countenanced as proper discovery." While Petitioners surely agree that "fishing expeditions" are not within the scope of discovery allowed by the Florida Rules of Civil Procedure ("F.R.C.P."), Petitioners strongly disagree with FPL's and its Affiliates' characterization of the noticed deposition of their corporate representatives as a fishing expedition. By intervening in this proceeding, FPL became a full party, with all

the rights and responsibilities of a party. One of these clear responsibilities is to make available to Petitioners an individual who can explain the allegations made by FPL in its Petition to Intervene<sup>2</sup> and the positions taken by FPL on the issues in this proceeding. FPL's and its Affiliates' efforts to avoid providing corporate representatives to address these issues is nothing more than a poorly disguised attempt to hide the ball. As demonstrated below, the issues identified in the Notices are relevant to the subject matter of this need determination proceeding and the information sought by Petitioners is reasonably calculated to lead to the discovery of admissible evidence within the scope of discovery allowable under rule 1.280(b), F.R.C.P.<sup>3</sup> See Amente v. Newman, 653 So. 2d 1030, 1032 (Fla. 1995); In Re: Petition to Determine Need for Electric Power Plant in St. Marks, Wakulla County, by City of Tallahassee, 97 FPSC 4:10 (Order No. PSC-97-0365-PHO-EM (allowing discovery that "is reasonably calculated to lead to the discovery of admissible evidence").

3. Next, FPL and its Affiliates assert that the "stated purpose" of the subject depositions is for them "to give testimony."<sup>4</sup> From this, FPL and its Affiliates conclude that

---

<sup>2</sup>Though the Commission has allowed FPL to intervene in this proceeding, it is well-settled that FPL retains the burden of proving up its allegations that it is substantially affected, and that it thus has standing to participate in this proceeding.

<sup>3</sup>Uniform Rule 28-106.206, F.A.C., specifically makes Rule 1.280, F.R.C.P., applicable to this proceeding.

<sup>4</sup>Rule 1.310(b)(6), F.R.C.P., provides that a corporation shall designate a person to testify on its behalf. Thus,

the depositions are not proper because the "testimony cannot be used" in this proceeding due to time restrictions set forth in the Commission's procedural orders in this case.<sup>5</sup> FPL's and its Affiliates' assertions are based on a blatant mischaracterization of the stated purpose of the subject depositions. As clearly set forth in the Notices, rather than being limited to giving testimony, the actual stated purpose of the depositions of these corporate representatives is for

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.

Rule 1.330(a)(2), F.R.C.P., provides that the deposition of a person designated under Rule 1.310(b)(6), F.R.C.P., to testify on behalf of a corporation may be used by an adverse party "for any purpose."<sup>6</sup> Petitioners are clearly adverse parties as to FPL in this proceeding, and the F.R.C.P. clearly allows the use of the subject depositions for any allowable purpose. Moreover, in

---

Petitioners' use of the phrase "give testimony" in the Notice is consistent with the requirements of Rule 1.310(b)(6), F.R.C.P.

<sup>5</sup> FPL and its Affiliates also argue that Petitioners should have taken these depositions prior to the time for filing prefiled testimony. However, FPL did not become a party to this proceeding until the Commission issued its order on October 8, 1998, well after September 28, 1998, the date on which Petitioners' prefiled testimony was due. Moreover, three of the specific subjects listed in the Notices address issues raised by FPL in this case. The Petitioners objected to the inclusion of these issues, which were only allowed into the proceeding by decision of the Prehearing Officer at the Prehearing Conference on November 5, 1998.

<sup>6</sup> One such allowable purpose, under Rule 1.330(a), F.R.C.P., is to offer the deposition into evidence "as though the witness were then present and testifying."

their prehearing statement filed with the Commission on November 2, 1998, Petitioners put FPL and its Affiliates on notice and preserved all rights

to use [the deposition of FPL's corporate representative], either in part or in [its] entirety, as evidence at trial (as well as for other purposes allowed under the Florida Rules of Civil Procedure.)

Petitioners' Prehearing Statement at 2 (emphasis supplied).

4. FPL and its Affiliates next argue that requiring them to comply with the Notices would constitute annoyance, undue burden, and harassment, and that it will prejudice FPL by limiting its discovery and trial preparation.<sup>7</sup> This argument is a red herring. As noted above, FPL elected to intervene in this proceeding. If the burden of preparing for this hearing becomes too great, FPL can simply withdraw its petition to intervene. Moreover, FPL has found enough time to propound to Petitioners more than 240 written interrogatories, including subparts, and more than 100 requests to produce; and to depose the majority of Petitioners' testifying witnesses and at least one witness who will not testify. Surely, FPL can find time for one or more depositions<sup>8</sup> on specific issues which are highly relevant to this

---

<sup>7</sup>In making this argument, FPL asserts that it sought an expedited discovery schedule which was effectively denied by no ruling and ultimately denied at the Prehearing Conference. What FPL fails to point out is that Petitioners have voluntarily complied with an expedited discovery schedule that provided responses to FPL only six days later than requested by FPL.

<sup>8</sup> Before filing the Notices, the Petitioners suggested to FPL that it might be desirable for FPL and its Affiliates to provide one representative to answer for all three entities to whom the Petitioners issued deposition notices.

proceeding. Petitioners' intention in requesting the subject deposition is not to harass FPL and its Affiliates; rather, Petitioners merely seek to discover FPL's and its Affiliates' positions on issues that are relevant to this proceeding, and on several issues that FPL itself has introduced in this proceeding.

5. Lastly, FPL and its Affiliates argue that Petitioners should not be allowed to seek information from FPL's affiliates. FPL and its Affiliates cite no case law in support of this proposition that discovery from a party's affiliate is per se improper. In this case, the requested information from FPL's affiliates is reasonably calculated to lead to the discovery of admissible information and FPL's and its Affiliates objections are without merit. The positions of FPL's affiliates -- FPL Group and FPL Energy, Inc. -- are entirely relevant to informing the Commission as to the various policy implications and considerations surrounding said issues. To permit FPL (the actual party intervenor in this docket) to escape providing its affiliates' positions on these issues would allow FPL (and its Affiliates) to hide the corporate ball via a corporate structural shell game, and the Commission should not allow such subterfuge. FPL and its Affiliates' Specific Objections are Without Merit

6. The Notices set forth nine subject areas on which Petitioners intend to depose FPL and its Affiliates' corporate representatives. FPL and its Affiliates argue that six of these subject areas are irrelevant to the proceeding. FPL and its Affiliates are wrong. For the following reasons, each of these six subject areas requests information that is relevant and

reasonably calculated to lead to the discovery of admissible evidence:

a. The Notices request that FPL and its Affiliates designate a corporate representative to testify regarding "the status of merchant power plants in states other than Florida." FPL and its Affiliates argue that this issue is not within the scope of this proceeding, is not within the Commission's jurisdiction, and is not a required element that Petitioners must prove in this case. FPL and its Affiliates also argue that there are other means for Petitioners to discover this information. FPL and its Affiliates miss the point. Since no merchant plants exist in Florida, it is appropriate to look to other states in which merchant plants do exist for information regarding the effects of such facilities, if any, on existing utilities. This is particularly true in light of FPL's allegations in its Memorandum of Law Supporting Motion to Dismiss Joint Petition ("FPL's Memorandum of Law") that granting the requested need determination will lead "to a proliferation of power plants and their environmental impacts." FPL's Memorandum of Law at 51-52. Since FPL has alleged in papers filed in this proceeding that granting Petitioners' requested determination of need could lead to a proliferation of plants, it is clearly relevant to inquire from FPL and its Affiliates whether that allegation is based on their experience with merchant plants in other states. The Petitioners have no other means of determining FPL's and its Affiliates' positions on this issue other than to ask them.

b. The Notices request that FPL and its Affiliates

designate a corporate representative to testify regarding "FPL'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". FPL and its Affiliates argue that this issue is irrelevant to this proceeding and that Petitioners have propounded a similar interrogatory. Once again, FPL and its Affiliates miss the point. First, in its Memorandum of Law, FPL argues that allowing Petitioners to proceed would in effect give EWGs special status, thus creating potential equal protection concerns for QFs and investor-owned utilities. FPL's memorandum of Law at 52. Clearly, FPL should be required to provide a corporate representative to be deposed on issues related to FPL's ownership of QFs and EWGs as it relates to FPL's perceived equal protection concerns. More importantly, FPL's, or its affiliate's, participation in wholesale power markets through the ownership of QFs or EWGs is highly relevant to the policy issues posed in this proceeding and is reasonably calculated to lead to the discovery of admissible evidence. Lastly, FPL and its Affiliates offer absolutely no case law supporting its assertion that it is improper for Petitioners to both propound an interrogatory and seek deposition testimony on the same issue.

c. The Notices request that FPL designate a corporate representative to testify regarding "retail and wholesale competition in the electric industry." FPL and its Affiliates



argue that the issue is beyond the Commission's jurisdiction and is irrelevant. However, FPL devotes a substantial portion of Mr. Steinmeier's (its only witness') testimony to discussing competition in the electric power industry. (See Direct Testimony of William Steinmeier at 26-27 and 29-32.) Information obtained by Petitioners through the requested corporate depositions is, or certainly may be, appropriate rebuttal testimony to Mr. Steinmeier. Clearly, FPL regards at least wholesale competition as a relevant issue, and the Petitioners -- and the Commission -- are entitled to know FPL's, and its Affiliates', positions on this issue.<sup>9</sup>

d. The Notices request that FPL and its Affiliates designate a corporate representative to testify regarding "the status and development of wholesale power markets in Florida and in states other than Florida." FPL and its Affiliates argue that this issue is irrelevant and beyond the Commission's jurisdiction. For the reasons set forth in subparagraphs a. and b. above, the status of wholesale electric power markets in Florida and in other states is relevant to this proceeding, as well as to all policy issues in the case, and is calculated to lead to the discovery of admissible evidence.

---

<sup>9</sup> As to retail competition, the Petitioners simply want to ask FPL and its Affiliates whether open wholesale competition, including merchant power plants operating as wholesale utilities, can and does exist in states and in power markets where retail competition does not exist. If FPL, as the party intervenor in this case, is willing to stipulate to this, the Petitioners would have no questions of FPL and its Affiliates regarding retail competition in other states (unless other deposition testimony of the corporate representatives precipitated such questions as follow-up).

e. The Notices request that FPL and its Affiliates each designate a corporate representative to testify regarding "FPL's and any of its affiliates' involvement in, and participation in, wholesale electric power markets in Florida and in states other than Florida." FPL and its Affiliates once again argue that this matter is irrelevant and beyond the Commission's jurisdiction. As stated in the preceding subparagraphs, the status of wholesale electric power markets in Florida and in other states is relevant to the Commission's deliberations regarding the policy issues in this case, and FPL's and its Affiliates' involvement in those wholesale electric power markets is well within the scope of allowable discovery under the F.R.C.P.

f. The Notices request that FPL and each of its Affiliates designate a corporate representative to testify regarding "FPL's and any of FPL's affiliates' sales of electric energy, or sales of capacity and energy, at market based rates or negotiated rates." FPL and its Affiliates raise similar objections to this issue as to the prior five issues, and, for the reasons set forth in the preceding subparagraphs, they are wrong. This subject area is relevant to the policy issues in this proceeding and is reasonably calculated to lead to admissible evidence.

7. Lastly, FPL and its Affiliates concede that three of the subject areas Petitioners identified in the Notices (items 6, 7 and 8) are matters that FPL itself has "placed at issue in this proceeding." However, FPL and its Affiliates argue that Petitioners should not be allowed to depose their corporate representatives on these issues because FPL "has already filed

testimony on each of those topics" and FPL's policy witness, William Steinmeier, can be deposed on these issues. Neither of these grounds is a sufficient basis to avoid the subject deposition. First, if the Commission were to adopt the argument that the filing of testimony obviates the need for further discovery on an issue, no depositions of testifying witnesses would ever occur. This is utter nonsense; Petitioners must be allowed an opportunity to inquire as to the basis of FPL's positions just as FPL is being given the opportunity to depose all of Petitioners' witnesses, even though each of Petitioners' witnesses has sponsored prefiled testimony. Secondly, Mr. Steinmeier is neither an employee nor an officer of FPL, nor of any of FPL's Affiliates, and, thus is not in a position to speak as FPL's (or any Affiliate's) corporate representative on the very issues that FPL has placed into this proceeding, unless FPL and its Affiliates first formally designate him as their corporate representative pursuant to Rule 1.310(b)(6), F.R.C.P.<sup>10</sup> Moreover, fundamental fairness requires that FPL and its Affiliates provide a corporate representative to be deposed on issues that FPL insisted, over Petitioners' objections, be included in this proceeding.

#### Request for Expedited Ruling

8. The Notices set the depositions of FPL's and its Affiliates' corporate representatives for November 16, 1998,

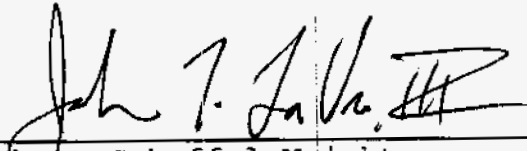
---

<sup>10</sup>FPL and its Affiliates may designate Mr. Steinmeier as their corporate representative only if he is qualified to respond to all of the subject areas designated in the Notices.

beginning at 9:30 a.m. Pursuant to the Commission's Order Establishing Procedure in this proceeding, all discovery must be completed by November 19, 1998. Accordingly, Petitioners request that the Commission rule on this matter prior to November 16, 1998, or alternatively, extend the time during which FPL's and its Affiliates' corporate representatives may be deposed beyond November 19, 1998.

WHEREFORE, the Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Power Company Ltd., L.L.P., respectfully request that the Commission issue, on an expedited basis, an order DENYING FPL's, FPL Group's, and FPL Energy, Inc.'s motions for protective orders, and requiring these entities to designate a corporate representative to testify on the subject areas identified in the Notices of Taking Deposition.

Respectfully submitted on this 13th day of November, 1998.



---

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  
Tallahassee, Florida 32302  
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 13th day of November, 1998:

Leslie J. Paugh, Esquire\*  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Gunter Building  
Tallahassee, FL 32399

Gail Kamaras, Esquire  
LEAF  
1114 Thomasville Road  
Suite E  
Tallahassee, FL 32303-6290

Charles A. Guyton, Esquire\*  
Steel Hector & Davis  
215 South Monroe Street  
Suite 601  
Tallahassee, FL 32301

Gary L. Sasso, Esquire  
Carlton, Fields et al  
P.O. Box 2861  
St. Petersburg, FL 33733

William G. Walker, III  
Vice President, Regulatory Affairs  
Florida Power & Light Co.  
9250 West Flagler St.  
Miami, FL 33174

Lee L. Willis, Esquire  
Ausley & McMullen  
P.O. Box 391  
Tallahassee, FL 32302

William B. Willingham, Esquire  
Michelle Hershel, Esquire  
FL Electric Cooperatives Assoc., Inc.  
P.O. Box 590  
Tallahassee, FL 32302

Terry L. Kammer, COPE Director  
System Council U-4, IBEW  
3944 Florida Blvd., Suite 202  
Palm Beach Gardens, FL 33410

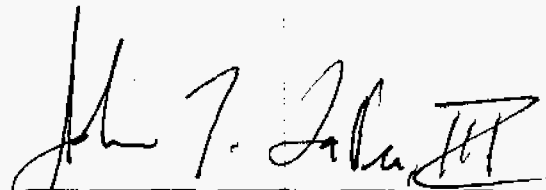
Susan D. Ritenour  
Asst. Secretary & Asst. Treasurer  
Gulf Power Company  
One Energy Place  
Pensacola, FL 32520-0780

John Schantzen  
System Council U-4, IBEW  
3944 Florida Blvd., Suite 202  
Palm Beach Gardens, FL 33410

Jeffrey A. Stone, Esquire  
Beggs & Lane  
P.O. Box 12950  
Pensacola, FL 32576-2950

J. Roger Howe, Esquire  
Office of Public Counsel  
111 W. Madison Ave., Room 812  
Tallahassee, FL 32399-1400

Jon Moyle, Jr.  
Moyle Flanigan Katz  
210 South Monroe Street  
Tallahassee, FL 32301

  
\_\_\_\_\_  
Attorney

001088