

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In Re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C.

DOCKET NO. 99-1462-EU FILED: OCTOBER 26, 1999

RECORDS AND REPORTING

OKEECHOBEE GENERATING COMPANY'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO FLORIDA POWER CORPORATION'S MOTION TO EXPEDITE DISCOVERY AND MOTION FOR ALTERNATE EXPEDITED DISCOVERY SCHEDULE

Okeechobee Generating Company, L.L.C. ("OGC"), the petitioner in the above-styled docket, pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby respectfully submits this response and memorandum of law in opposition to Florida Power Corporation's ("FPC") Motion to Expedite Discovery ("FPC's Motion to Expedite"), which was filed with the Commission on October 19, 1999. As explained herein, FPC's Motion to Expedite should be denied and OGC's alternate discovery schedule should be adopted.

SUMMARY

FPC's Motion to Expedite should be denied because FPC's discovery schedule is unreasonable. FPC's Motion to Expedite is procedurally flawed and should be denied on that basis. Moreover, FPC is not yet a party to this proceeding. Accordingly, FPC's interrogatories,

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requests to produce and requests for admissions are not authorized by Commission rules or the Florida Rules of Civil Procedure ("FRCP"). A motion to expedite responses to unauthorized discovery is legally deficient and should be denied on its face. As a reasonable

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accommodation, OGC moves the Commission for an alternate discovery schedule requiring that discovery be served by hand delivery, facsimile transmission, or express courier service, and that responses to discovery propounded by parties be served within 20 days following receipt of the requests.

ARGUMENT

I. FPC HAS NO VALID BASIS FOR THE UNREASONABLE RESPONSE TIME IT REQUESTS IN ITS MOTION TO EXPEDITE.

FPC requests that OGC serve complete responses (i.e., not just objections as provided in the Order Establishing Procedure) to FPC's first round of discovery no later than October 29, 1999, i.e., within 10 days of service of the discovery requests. FPC offers no valid basis for this hyper-expedited discovery schedule and FPC's Motion to Expedite should accordingly be denied.

As a preliminary matter, if FPC becomes a party to this proceeding, it will be as an intervenor. The Commission's Rule 25-22.039, F.A.C., clearly provides that "[i]ntervenors take the case as they find it." See also National Wildlife Federation, Inc. v. Glisson, 531 So. 2d 996 (Fla. 1st DCA 1988). As an intervenor, under Commission Rule 25-22.039, F.A.C., FPC is not authorized to dictate the discovery process or to otherwise tailor the discovery process to its liking. Rather, the discovery process should proceed in an

ordered and reasonable fashion as set forth in the Commission's rules and the scheduling order in this docket.

FPC argues that because this proceeding is "on an extremely accelerated schedule," FPC "cannot participate meaningfully" without an expedited discovery schedule. In the first place, the schedule established by the Commission is neither extremely nor unusually accelerated. FPC's argument is suspect. The Commission has set OGC's need determination hearing for December 6-8, 1999, based on the timeframes prescribed by the Commission's rules. As a regular participant in need determination proceedings, FPC is well aware that all need determination proceedings proceed in accordance with these timeframes. If these timeframes are not convenient for FPC to participate in OGC's need determination proceeding, then FPC has the option of reallocating its resources in a more efficient manner or simply withdrawing its Petition to Intervene.

FPC next argues that it needs an expedited discovery schedule so that it can have time to propound two rounds of discovery on OGC. FPC has no legal right to obtain multiple rounds of discovery. Accordingly, FPC's desire to inundate OGC with multiple rounds of discovery cannot form a legitimate basis for its Motion to Expedite. Moreover, had FPC really wanted two rounds of discovery, it could have petitioned to intervene shortly after OGC filed its need determination petition and served its discovery shortly thereafter. FPC is no

stranger to need proceedings for merchant power plants, and FPC in fact managed to prepare its first round of discovery based only on the petition and exhibits filed by OGC on September 24, 1999.

Lastly, FPC argues that OGC will not be prejudiced by the hyper-expedited discovery schedule it requests. OGC respectfully disagrees. OGC is fully prepared to comply with reasonable discovery deadlines. However, the unreasonable deadlines requested by FPC will prejudice OGC.

II. FPC'S MOTION TO EXPEDITE SHOULD BE DENIED BECAUSE IT IS PROCEDURALLY DEFECTIVE.

FPC's Motion to Expedite also fails to comply with Uniform Rule 28-106.204(3), F.A.C. which provides:

[m]otions other than a motion to dismiss shall include a statement that the movant has conferred with all other parties of record and shall state as to each party whether the party has any objection to the motion.

FPC's Motion to Expedite contains no such certification and FPC did not contact OGC's counsel prior to filing its Motion to Expedite either to confirm OGC's position on the motion or to attempt to arrange a mutually agreeable discovery schedule. Accordingly, FPC's Motion to Expedite is procedurally defective and should be denied.

III. FPC'S DISCOVERY REQUESTS ARE NOT AUTHORIZED BY THE FLORIDA RULES OF CIVIL PROCEDURE.

FPC is not a party to this proceeding. Notwithstanding that fact, on October 19, 1999, FPC served OGC's counsel by facsimile with

FPC's Motion to Expedite Discovery along with FPC's First Set of Interrogatories (consisting of 7 interrogatories); FPC's First Request for Production of Documents (consisting of 31 requests to produce); and FPC's First Request for Admissions (consisting of 61 requests for admission). As authority for propounding its interrogatories, FPC relies on Rule 1.340, FRCP (entitled "Interrogatories to Parties"); for its requests to produce, FPC relies on Rule 1.350, FRCP; and for its requests for admissions, FPC relies on Rule 1.370(a), FRCP. Nothing in Rules 1.340, 1.350¹, or 1.370(a), FRCP, the Uniform Rules of Procedure, or the Commission's rules authorizes a non-party such as FPC to propound discovery on OGC in this case.

Because FPC is not a party to this proceeding, its discovery requests are premature and therefore, improper. Accordingly, FPC's Motion to Expedite responses to its improper discovery requests is legally deficient and should be denied.

Even so, in an effort to be reasonable and accommodate the orderly progress of this proceeding, OGC will, subject to FPC's pending petition to intervene being granted, treat FPC's discovery requests as having been filed on October 19. Thus, if FPC is granted intervention before November 8, OGC will respond on that date, i.e.,

¹Rule 1.350(c), FRCP, states that Rule 1.350, FRCP, does not preclude an independent action for production of documents against a non-party. Rule 1.350(c), FRCP, is not applicable here.

twenty days after OGC received FPC's discovery requests. If FPC is granted intervention on or after November 8, OGC will respond within 2 business days following receipt of notice of the Commission's order granting FPC's intervention.

OGC'S MOTION FOR AN ALTERNATE EXPEDITED DISCOVERY SCHEDULE

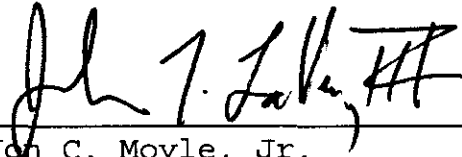
In an effort to be reasonable and to accommodate the putative intervenors' discovery needs in this case, OGC respectfully moves the Commission for an alternate expedited discovery schedule. OGC proposes that all discovery be served by hand delivery, facsimile transmission, or express courier service and that all responses to discovery requests made by parties (including any responses by FPC or the other putative intervenors to any discovery propounded by OGC) be served by hand delivery, facsimile transmission, or express courier delivery on the 20th day following receipt of the discovery requests. OGC believes that this proposed schedule is more than reasonable and will give participants in this docket an adequate opportunity to conduct meaningful discovery. This 20 day discovery response is the middle ground between the timeframe parties are usually given to respond to discovery, 30 days, and the unrealistic timeframe sought by FPC, 10 days. In addition, this proposed schedule is consistent with expedited discovery procedures implemented by the Commission in other cases. See In Re: Determination of the Cost of Basic Local Telecommunications Service Pursuant to Section 362.025, Florida

Statutes, 98 FPSC 6:332, 333 (Order No. PSC-98-0813-PCO-TP) (adopting a discovery response time of 20 days).

Counsel for OGC have discussed this proposed alternate expedited discovery schedule with Commission Staff and counsel for the putative intervenors and report the following responses. The Staff supports expedited discovery but takes no position with regard to either motion. LEAF and TECO do not object to the alternate schedule proposed by OGC. FPL & FPC object to OGC's alternate discovery schedule.

WHEREFORE, OGC respectfully requests that the Commission deny FPC's request for an expedited discovery schedule and grant OGC's request for an alternate discovery schedule applicable to all discovery requests in this docket.

Respectfully submitted this 26th day of October, 1999.



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CERTIFICATE OF SERVICE
DOCKET NO. 991462-EU

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 26th day of October, 1999.

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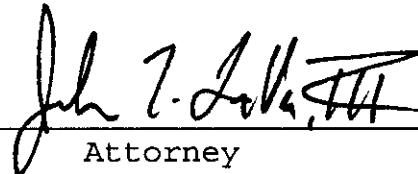
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