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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 29 1999

RECORDS AND REPORTING

OKEECHOBEE GENERATING COMPANY'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO EXPEDITE DISCOVERY

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 & Light Company's ("FPL") Motion to Expedite Discovery ("FPL's Motion to Expedite"), which was filed with the Commission on October 22, 1999. As explained herein, FPL's Motion to Expedite should be denied.

SUMMARY

FPL's Motion to Expedite should be denied because FPL's discovery schedule is unreasonable. Moreover, FPL's grounds for expediting discovery are meritless. As a reasonable accommodation, OGC previously moved 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. FPL's failure to pursue

discovery at this time, on the terms that OGC has offered to agree to on the record, is at its own peril. The Commission should grant

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OGC's pending motion for an alternate expedited discovery schedule.

ARGUMENT

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

FPL requests that OGC serve responses by hand delivery or courier within 10 days of service of the discovery requests. FPL offers no valid basis for this hyper-expedited discovery schedule and FPL's Motion to Expedite should accordingly be denied.

As a preliminary matter, if FPL 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., FPL 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.

FPL argues that because the schedule for this case is "extremely accelerated and abbreviated", FPL will be "denied a meaningful opportunity to prepare for trial" without an expedited discovery schedule. FPL is wrong. In the first place, the schedule established by the Commission is neither extremely accelerated nor abbreviated. 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, FPL is well aware that all need determination proceedings proceed in accordance with these timeframes. If these timeframes are not convenient for FPL to participate in OGC's need determination proceeding, then FPL has the option of reallocating its resources in a more efficient manner or simply withdrawing its Petition to Intervene. FPL is not a necessary party to this proceeding.

FPL next implies that it has somehow been prejudiced because OGC "declined" to agree to its intervention. There are several flaws in FPL's position. First, OGC is under no legal obligation to "agree to FPL's intervention." In fact, OGC did not agree to FPL's Petition to Intervene because, as OGC set forth in its Motion to Strike Portions of FPL's Petition to Intervene, FPL's Petition to Intervene is replete with improper legal argument that should be stricken. Second, as FPL concedes in its Motion to Expedite, FPL waited nearly two weeks¹ to file its Petition to Intervene that is nearly identical² to the petition to intervene FPL filed in the Duke New Smyrna case. If FPL had been more diligent in seeking

¹In fact, OGC's counsel informed FPL that OGC had filed its Petition for Determination of Need on the day the petition was filed.

²FPL euphemistically uses the term "modestly enhanced" to describe the differences between its Petition to Intervene in this case and the petition to intervene FPL filed in the Duke New Smyrna case.

intervention, perhaps its intervention would have been granted by this time.

FPL next argues that because OGC has not yet filed its site certification application, and did not file prefiled testimony at the same time it filed its Petition for Determination of Need, FPL will somehow be prejudiced without an expedited discovery schedule. FPL's argument is without merit. While an affirmative determination of need by the Commission is a condition precedent to the site certification process, the reverse is not true. OGC is under absolutely no legal obligation to file its site certification application in conjunction with its Petition for Determination of Need. Indeed, OGC could not legally file its site certification application prior to filing its Petition for Determination of Need. Similarly, no Commission rule or statute requires OGC to file supporting testimony in conjunction with its Petition for Determination of Need. Rather, the Order Establishing Procedure in this docket established the deadline for the filing of direct testimony in this proceeding. OGC fully complied with the Order Establishing Procedure by filing the direct testimony in support of its Petition for Determination of Need on October 25, 1999.³

FPL next argues that it needs an expedited discovery schedule so it can have time to propound "follow up" discovery on OGC. FPL

³As a courtesy to FPL, OGC served FPL by hand delivery with copies of the prefiled testimony on October 25, 1999, the same day the testimony was filed with the Commission.

has no legal right to obtain multiple rounds of discovery. Accordingly, FPL's desire to inundate OGC with multiple rounds of discovery cannot form a legitimate basis for its Motion to Expedite.

FPL also asserts that it needs an expedited discovery schedule to allow FPL to explore OGC's computer models.⁴ In making this argument, FPL fails to note that in the Duke New Smyrna need determination proceeding, FPL previously conducted extensive discovery concerning the same computer models used by OGC in this case. Accordingly, FPL has a significant headstart on discovery

⁴FPL's claim that OGC's computer models have only been subject to "cursory review by [a] regulatory body" is inaccurate. As explained in Dr. Dale Nesbitt's direct testimony, both of the two key computer models used to prepare the estimates presented in OGC's petition, exhibits, and testimony were originally part of a larger modeling system known as the Generalized Equilibrium Modeling System or "GEMS". During 1980 and 1981, the Energy Information Administration ("EIA") of the U.S. government expended in excess of \$1 million with Oak Ridge National Laboratories to validate the GEMS model. In effect, EIA subjected the GEMS model to a comprehensive professional peer review in order to ensure that it was operating correctly and was appropriate for EIA's intended needs. Moreover, the Altos North American Regional Gas Model has been used extensively to support cases and testimonies filed before various regulatory bodies, including the FERC, the California Energy Commission, the California Public Utilities Commission, the National Energy Board of Canada, and the Economic Regulatory Administration of the U.S. The Altos North American Regional Electric Model has been used in formal proceedings only before this Commission, but, as noted above, FPL had an adequate opportunity to conduct discovery on this model in the Duke New Smyrna case. In that case, Dr. Nesbitt was made available for two days of depositions, much of which was spent with FPL's attorneys literally looking over Dr. Nesbitt's shoulder at the working model and its results on Dr. Nesbitt's computer screen, and also in which FPL was furnished with a literal boxful of documentation on the models, as well as diskettes containing the NARE Model's results.

regarding OGC's computer models and thus should require significantly less time to complete its discovery concerning these models. FPL's argument that it needs follow-up discovery is not persuasive.

Lastly, FPL 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 FPL will prejudice OGC.

Consistent with its pattern of behavior throughout this docket, FPL appears to be attempting to create yet another procedural roadblock to allowing this case to be heard within the timeframes prescribed by the Commission's rules. In this case, FPL is apparently trying to fabricate another excuse for delay -- here, that it hasn't had an adequate opportunity to conduct discovery. The Commission should reject FPL's efforts.

FPL sat on its hands for nearly two weeks while preparing its Petition to Intervene, which is nearly identical to the petition to intervene that it filed in the Duke New Smyrna case last year. FPL also did not ask OGC whether OGC would be willing to treat discovery as served, contingent on FPL's being granted intervention. Rather, FPL asserts that "absence of a ruling on intervention forecloses FPL from beginning discovery." OGC is on record as agreeing to treat discovery from putative intervenors as served when actually served,

and as agreeing to respond to the same within 20 days of service, contingent only on such putative intervenors being granted intervention within such 20 days (or within two business days following the issuance of a Commission order granting them intervention). FPL's inaction is its prerogative, of course, but it pursues this course at its own peril. In short, much of FPL's claimed difficulty with the allegedly compressed timeframes in this proceeding is attributable to FPL's own inaction and failures to pursue the opportunities available to it.

II. ANY EXPEDITED DISCOVERY SCHEDULE SHOULD APPLY EQUALLY TO ALL PARTIES.

In its Motion to Expedite, FPL requests that only OGC be required to adhere to an expedited discovery schedule. Presumably, according to FPL's view of the world, it and the other putative intervenors would be under no obligation to respond to any discovery propounded by OGC on an expedited basis.⁵ FPL's position is patently unreasonable. If the Commission adopts an expedited discovery schedule in this proceeding, that schedule should apply to all parties equally, including OGC and the putative intervenors.

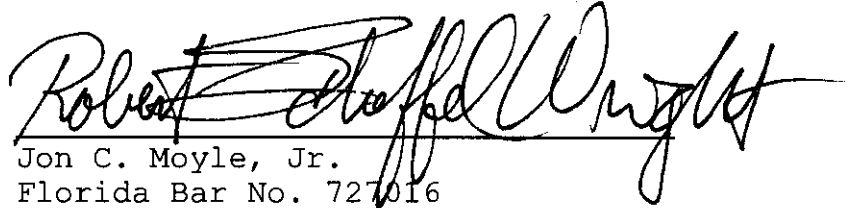
III. THE COMMISSION SHOULD ADOPT OGC'S ALTERNATE DISCOVERY SCHEDULE.

In an effort to be reasonable and to accommodate the putative

⁵When OGC's counsel asked FPL's counsel if FPL would agree to a mutually applicable 20-day discovery response time, FPL's counsel stated that FPL was not able to agree to provide its responses on a 20-day basis.

intervenors' discovery needs in this case, on October 26, 1999, OGC filed its motion for an alternate expedited discovery schedule in this proceeding. To wit, OGC proposed 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. 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 time parties are usually given to respond to discovery, 30 days, and the unrealistic timeframe sought by FPL (and 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). The Commission should grant OGC's pending motion for an alternate expedited discovery schedule applicable to all discovery requests in this docket.

Respectfully submitted this 29th 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 (*), facsimile transmission (**) or by United States Mail, postage prepaid, on the following individuals this 29th day of October, 1999.

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