

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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: November 5, 1999)

OKEECHOBEE GENERATING COMPANY'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO EXTEND TESTIMONY DEADLINE

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 Extend Testimony Deadline ("FPL's Motion for Extension of Time"), which was filed with the Commission on November 1, 1999. As explained herein, FPL's Motion for Extension of Time should be denied and all intervenors' testimony (including FPL's) should remain due on November 8, 1999.

INTRODUCTION

FPL has styled its most recent filing a "Motion to Extend Testimony Filing Deadline." However, because FPL has asked that the intervenors be granted leave to file their testimony on various dates ranging from approximately November 25, 1999 to December 16, 1999, depending on the Prehearing Officer's ruling regarding the time for responding to discovery requests and on granting FPL's intervention, FPL's request amounts to a de facto motion for continuance under any scenario. The Commission should issue an order summarily rejecting FPL's request and making it clear that any testimony filed in this

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proceeding by the intervenors must be filed in compliance with the Procedural Order, (i.e.) on November 8, 1999.

Moreover, FPL's Motion for Extension of Time represents the most recent in a long line of non-meritorious filings by FPL and FPC, the only purpose of which is to delay OGC's need determination proceeding. The Commission must not countenance FPL's continuing pattern of employing dilatory tactics in this case. OGC has been forced to needlessly expend significant time and funds responding to FPL's seemingly endless stream of questionable requests. In addition, the Commission has been forced to expend its finite resources addressing FPL's requests. The question presented is who sets the time frames for this case to be prepared and presented? Is it the Prehearing Officer, who is guided by Commission Rule 25-22.080 F.A.C.,? Is it the petitioner, who is seeking action from the Commission on its need determination petition? Or is it FPL and FPC, Intervenors, who legally take the case as they find it?

OGC submits that the Prehearing Officer controls this case and that everyone has been given ample notice of the applicable dates in this proceeding. OGC filed its testimony on the date established by the Prehearing Officer's Order Establishing Procedure. The Intervenors should be required to file their testimony in the same fashion as OGC, on the date that it is due! Fair is fair. Counsel for OGC inquired of counsel for FPL as to whether additional time might be needed solely for FPL's anticipated economic witness, and

whether the remaining testimony, if any, could be filed on time. This was "not possible" pronounced counsel for FPL. FPL's continued attempts to stall this merchant plant need determination case should not be tolerated, particularly when one considers that FPL is busily announcing its own merchant projects around the country on a regular basis. Accordingly, the Commission should make clear to FPL that the deadlines in the Order Establishing Procedure will apply.

ARGUMENT

I. FPL HAS NO VALID BASIS FOR REQUESTING THAT THE COMMISSION EXTEND THE TIME FOR INTERVENORS TO FILE TESTIMONY IN THIS PROCEEDING.

FPL requests that the Commission grant an extension of time until sometime between November 25, 1999 and December 16, 1999 (based on FPL's intervention having been granted by order dated November 4, 1999), for the intervenors to file testimony in this case. FPL offers no valid basis for this deviation from the time frames set forth in the Order Establishing Procedure issued in this case on October 13, 1999, and FPL's Motion for Extension of Time should accordingly be denied.

As a preliminary matter, FPL is an intervenor in this proceeding. 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) (stating that intervention shall be "in subordination to, and in recognition of, the propriety of the main proceeding."). 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 Order Establishing Procedure in this docket.

Also, as a preliminary matter, OGC notes that the Commission's Order Establishing Procedure, which sets the deadline of November 8, 1999, for intervenors to file testimony, was issued on October 13, 1999. Thus, FPL was aware of the November 8, 1999, deadline for filing testimony nearly three weeks prior to filing its Motion for Extension of Time. FPL offers no explanation in its Motion for Extension of Time as to why it sat on its hands during this period of time. OGC can only conclude that this delay is further evidence of FPL's pattern of attempting to stall this proceeding.

FPL argues that the schedule for this case is "extremely accelerated and abbreviated." FPL is wrong; 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 standard time frames prescribed by the Commission's rules for a need determination proceeding. As a regular participant in need determination proceedings, FPL is well aware that all need determination proceedings proceed in accordance with these time frames. If these time frames 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 been prejudiced because the Commission did not immediately rule on its Petition to Intervene. First, as FPL conceded in previous filings in this matter, FPL waited nearly two weeks¹ to file its Petition to Intervene, that is nearly identical to the petition to intervene FPL filed in the Duke New Smyrna case. If FPL had been more diligent in seeking intervention, perhaps its intervention would have been granted earlier. Second, FPL could have sought an expedited ruling by the Commission on its Petition to Intervene. FPL chose not to do so. Third, FPL could have moved for leave to propound discovery to OGC prior to its being granted intervenor status.² Once again, FPL chose not to do so. Fourth, FPL, like its fellow intervenor Florida Power Corporation ("FPC"), could simply have propounded discovery to OGC subject to its petition to intervene being granted. OGC is on the record as agreeing

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

²The Commission should not be fooled by FPL's claim that it could not prepare discovery prior to being granted intervenor status. In fact, on November 2, 1999, FPL served OGC with 71 interrogatories (many of which include subparts) and 60 requests to produce. Obviously, FPL had previously prepared the discovery requests.

to treat discovery as served when it was actually served and to respond in the time allowed, provided that the propounder was granted intervention in the meantime. Again, FPL chose not to pursue this opportunity to expedite its claimed need for discovery while accommodating the orderly progress of this case. FPL's inaction was its prerogative, of course, but it pursued this course at its own peril. In short, much of FPL's claimed difficulty with the allegedly compressed time frames in this proceeding is attributable to FPL's own inaction and failures to pursue the opportunities available to it. The Commission should not reward FPL's lack of diligence.

FPL next asserts that "[d]iscovery is necessary for FPL to have a meaningful opportunity to file testimony." OGC disagrees with FPL's assertion. First, as previously stated, the discovery schedule in this proceeding is the standard discovery schedule utilized by the Commission in need determination proceedings. See, e.g., In Re: Joint Petition for Determination of Need for an Electric 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., PSC Docket No. 981042-EM, Order No. PSC-98-1183-PCO-EM (Order Establishing Procedure). The schedule provided FPL and other intervenors in the Duke New Smyrna case ample opportunity to prepare for hearing just as it provides FPL ample opportunity to prepare for hearing in this proceeding. Second, the discovery schedule in this

proceeding fully complies with the requirements of Chapter 120, F.S.³ FPL will have had an opportunity to complete extensive discovery prior to the hearing in this case. Chapter 120, F.S., due process, and principles of fundamental fairness require nothing more. FPL is not entitled as a matter of right to discovery prior to filing its testimony in this proceeding.

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 again 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 and the timing of the filing of its site certification application is irrelevant to this proceeding. 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

³Section 120.57(1)(b), F.S., establishes the specific procedural rights and safeguards applicable to administrative proceedings. Nothing in Section 120.57(1)(b), F.S., states that FPL must be allowed any particular amount of discovery prior to filing its testimony. Rather, the law provides that each party shall have an opportunity "to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence" Fla. Stat. § 120.57(1)(b).

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, 1999.⁴

FPL also asserts that it needs an extension of time to file testimony to allow FPL to conduct additional discovery concerning OGC's computer models.⁵ In making this argument, FPL concedes 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. However, FPL argues that FPL will be "seeing some

⁴As 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.

⁵FPL's claim that OGC's computer models have not been "critically reviewed by any Regulatory Commission" 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.

of the computer models for the first time" because one of the witnesses⁶ testifying in this case allegedly admitted in the Duke New Smyrna case that he did not provide all the information responsive to FPL's discovery request in that case. FPL's argument is wholly without merit. 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. Accordingly, FPC was given a full opportunity to conduct discovery concerning Dr. Nesbitt and his computer models in the Duke New Smyrna case and, in fact, conducted extensive discovery. Thus, FPL should require significantly less time, not more time, to prepare testimony rebutting those models in this case. The fact that FPL apparently did not fully understand Dr. Nesbitt's models in the Duke New Smyrna case does not equate to a failure to provide discovery responses.

With regard to FPL's allegation that Dr. Nesbitt withheld information in the Duke New Smyrna case concerning his computer models, OGC simply points out that FPL attempted to strike portions of Dr. Nesbitt's testimony based on its belief that information was withheld. FPL's motion to strike was summarily denied. Duke New Smyrna, Transcript of Proceeding at 824.

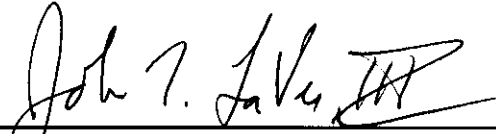
⁶Presumably, FPL is referring to Dr. Dale Nesbitt.

Lastly, FPL argues that OGC will not be prejudiced by FPL's request for extension of time for the intervenors to file testimony. OGC respectfully disagrees. As noted above, FPL is really seeking a continuance of OGC's need determination hearing. OGC will be prejudiced by such a continuance and strongly opposes FPL's continuing efforts to delay the hearing.

II. PURSUANT TO THE ORDER ESTABLISHING PROCEDURE IN THIS PROCEEDING, THE DEADLINE FOR INTERVENORS TO FILE TESTIMONY SHOULD REMAIN NOVEMBER 8, 1999.

FPL is seeking an extension of time until sometime between November 25 and December 16, 1999, for intervenors to file testimony in this proceeding. For the reasons stated above, FPL's Motion for Extension of Time should be denied. Moreover, in denying FPL's Motion for Extension of Time, the Commission should make clear that FPL's Motion for Extension of Time did not toll the time for filing testimony in this proceeding and that the intervenors' testimony, if any, must be filed no later than November 8, 1999. The Order Establishing Procedure set the ground rules by which this case will be prepared. OGC has prepared its case in compliance with these rules and FPL (and the other intervenors) should likewise be made to adhere to these same rules.

Respectfully submitted this 5th day of November, 1999.



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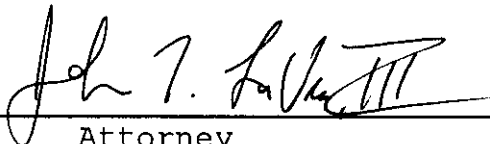
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