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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  
REC'D AND REPORTING  
FILED: November 22, 1999

OKEECHOBEE GENERATING COMPANY'S RESPONSE  
TO FLORIDA POWER CORPORATION'S MOTION TO COMPEL

Okeechobee Generating Company, L.L.C. ("OGC"), pursuant to Uniform Rule 28-106.204, Florida Administrative Code, and the Order Establishing Procedure, as revised, hereby respectfully submits this Response to Florida Power Corporation's ("FPC") Motion to Compel OGC to Respond to Certain Discovery Requests ("FPC's Motion to Compel"). As explained herein, FPC's Motion to Compel should be denied. In support of this response, OGC says:

ARGUMENT

FPC's Motion to Compel can be separated into four categories: 1) a general request that OGC be compelled to produce all documents containing confidential, proprietary business information; 2) a request that OGC be compelled to produce documents and computer models underlying Dr. Dale M. Nesbitt's testimony; 3) specific requests for OGC to produce documents over OGC's specific objections; and, 4)

specific requests for OGC to respond to FPC's requests for admissions over OGC's specific objections. OGC will address each category separately in this response.

- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_
- EAG 2
- LEG 3
- MAS \_\_\_\_\_
- OPC \_\_\_\_\_
- PAI \_\_\_\_\_
- SEC 1
- WAW \_\_\_\_\_
- OTH \_\_\_\_\_

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*[Signature]*  
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

**I. OGC SHOULD NOT BE COMPELLED TO PRODUCE DOCUMENTS CONTAINING  
CONTAINING CONFIDENTIAL, PROPRIETARY BUSINESS INFORMATION**

By way of background, on October 29, 1999, OGC timely objected to a number of FPC's requests to produce on the basis that the requests called for the production of documents containing confidential, proprietary business information. On November 8, 1999, OGC timely responded to FPC's requests to produce.<sup>1</sup> OGC produced to FPC all documents responsive to FPC's requests that do not contain confidential, proprietary business information. In addition to producing documents, OGC also provided FPC with a log specifically describing certain documents that OGC was not producing and explaining why OGC was not producing those documents.<sup>2</sup> Lastly, OGC provided FPC with a draft confidentiality agreement pertaining to certain documentation of and relating to the models used by OGC's expert, Dale M. Nesbitt, Ph.D..

In its Motion to Compel, FPC first asserts that OGC cannot withhold documents responsive to FPC's requests to produce based on the objection that the documents contain confidential, proprietary business information business information. There are several flaws in

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<sup>1</sup>As a courtesy to FPC, rather than merely making the responsive documents available for inspection, OGC provided copies of the documents directly to FPC via express courier service for delivery on November 9, 1999.

<sup>2</sup>FPC states in its Motion to Compel that based on conversations with OGC's counsel, FPC believes that OGC's log is incomplete. Those conversations included an agreement in principle that neither OGC or FPC would be required to furnish logs of attorney-client communications.

FPC's assertion.

First, there is nothing procedurally improper with objecting to requests to produce documents on the basis that the documents contain confidential, proprietary business information. In fact, Rule 1.280(c), Florida Rules of Civil Procedure, specifically provides that a party may seek a protective order, establishing that "a trade secret, or other confidential research, development or commercial information not be disclosed, or be disclosed in a designated way . . . ." Moreover, objecting to discovery requests that seek confidential, proprietary business information, is wholly consistent with established Commission precedent. See In re Determination of the Cost of Basic Local Telecommunications Service Pursuant to Section 364.025, Florida Statutes, 98 FPSC 10:44 (hereinafter "Cost of Local Service") (wherein AT&T objected to the production of documents on the basis that the documents contained proprietary information). Interestingly, in this docket, FPC itself has objected to discovery propounded by OGC on the basis that the discovery requests seek "confidential, proprietary business information." See FPC's Objections to OGC's First Request for Production of Documents (filed November 15, 1999). Both OGC's and FPC's objections are procedurally proper.

Second, nothing in the Order Establishing Procedure requires that OGC simply produce to FPC all documents to which it has a valid objection. Rather, the Order Establishing Procedure provides that if

a party provides information pursuant to a discovery request that contains confidential, proprietary information, the party may request confidential treatment of that information. If OGC is compelled to produce any confidential, proprietary business information, it will seek confidential treatment of that information.

FPC next argues that OGC should be compelled to produce confidential, proprietary business information because OGC is seeking to build a merchant plant allegedly "not subject to regulation by this Commission,"<sup>3</sup> and thus, this proceeding will be the only opportunity for the Commission to evaluate OGC's underlying assumptions and data. Because of the merchant nature of the Okeechobee Generating Project, and especially considering the fact that the Project imposes no financial or operating risk on any retail utilities' captive ratepayers, OGC doubts the need for the Commission to conduct evaluations of assumptions and data, underlying the Project beyond what has already been furnished to the Commission (and to FPC in OGC's document production.) Moreover, OGC's concern is not with the Commission's reviewing data and assumptions, but with the potential disclosure of competitively sensitive, confidential, proprietary business information to FPC, which perceives itself as a competitor to OGC.

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<sup>3</sup>As an electric utility, OGC is clearly subject to Commission regulation. See In re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County, Florida by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 99 FPSC 3:401 (hereinafter Duke New Smyrna).

FPC also argues that because OGC has the burden of proof in this proceeding, OGC should be required "to lay open" its plans, contracts, communications, and the like. In essence, FPC is arguing that the party with the burden of proof in a proceeding is not entitled to raise valid objections to improper discovery requests. FPC cites no legal authority for this proposition, and FPC's attempt to circumvent the rules of discovery should be rejected. OGC's obligations to respond to discovery requests are the same as any other party in this proceeding, no more and no less.

In sum, OGC properly objected to those of FPC's requests to produce that call for confidential, proprietary business information. OGC then provided all documents in its possession or control responsive to FPC's requests that do not contain confidential, proprietary business information and a log identifying the documents that OGC has withheld on that basis. FPC has failed to demonstrate that OGC improperly withheld any documents and, thus FPC's Motion to Compel should be denied.

**II. ABSENT FPC'S PAYMENT OF THE APPLICABLE LICENSING FEES,  
OGC SHOULD NOT BE COMPELLED TO PRODUCE COMPUTER MODELS  
CONSTITUTING ALTOS MANAGEMENT PARTNERS' INTELLECTUAL PROPERTY.**

In its Motion to Compel, FPC is seeking to compel OGC to produce the documents and computer models underlying the testimony of OGC's witness Dr. Dale M. Nesbitt. As explained below, FPC's Motion to Compel should be denied because: a) OGC is not in possession, custody, or control of the Altos Models; b) OGC has already agreed to provide

FPC copies of the underlying written documentation of the models, except for the executable code of said models and the user's manual that includes that code (hereinafter "Documentation of the Altos Models"), subject to a confidentiality agreement; c) OGC has provided all of the inputs and outputs of all modeling analyses performed by Altos to FPC in electronic format (Excel spreadsheets); d) Altos Management Partners ("Altos") has agreed to provide FPC executable copies of the NARE and NARG Models subject to MarketPoint, Inc.'s standard licensing fees; and, e) FPC has not demonstrated that it is entitled to copies of the Altos Models without paying the standard licensing fees.

The Altos North American Regional Electric Model ("the NARE Model" or simply "NARE") and the Altos North American Regional Gas Model ("the NARG Model" or simply "NARG") (collectively referred to as the "Altos Models") are models that are designed and operate in a software platform called MarketPoint(TM). The MarketPoint(TM) software is owned by MarketPoint, Inc. Altos licenses the MarketPoint(TM) software from MarketPoint, Inc. Altos owns the NARE and NARG Models, but Altos does not own the code for the MarketPoint(TM) software. Neither OGC nor any affiliate of OGC licenses either the MarketPoint(TM) software or the NARE or NARG Models. (An affiliate of OGC, PG&E Gas Transmission, has licensed an older version of the NARG Model-not the version used to support Dr. Nesbitt's testimony-in the past)

FPC's basic position is that OGC should not be allowed to "withhold" the Altos Models. There are several fatal flaws in FPC's position. First, Rule 1.350(a), Florida Rules of Civil Procedure, only requires a party to produce documents in its "possession, custody or control." As stated above, OGC is not a licensee to the Altos Models, and has never received copies of the Altos Models.<sup>4</sup> OGC has never had possession, custody or control of the Altos Models and thus cannot be compelled to produce the Altos Models. See Cost of Local Services, 98 FPSC at 10:47-48.

Second, even if OGC had possession, custody or control of the Altos Models, which it does not, FPC's argument that the Altos Models are being withheld fails because Altos has agreed to provide FPC with executable copies of the Altos Models if FPC pays the standard licensing fee. Apparently, this is not good enough for FPC; rather, FPC wants the Altos Models for free. FPC has cited no authority for the proposition that Altos and OGC must subsidize FPC's costs of completing discovery and the Commission should deny FPC's Motion to Compel.

In support of its argument that OGC should be required to produce the Altos Models, FPC cites several cases arising in federal court and one California case. FPC's reliance on these cases is misplaced.

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<sup>4</sup>OGC does have custody of the "Documentation of the Altos Models". OGC and Altos have agreed to produce to FPC the Documentation of the Altos Models subject to a standard confidentiality agreement, in fact, the same confidentiality agreement that Florida Power & Light Company executed in Duke New Smyrna. OGC is not required to do anything more.

Most tellingly, not one of the cases cited by FPC stands for the proposition that a party seeking discovery must be provided copies of a computer model that constitutes a testifying expert's intellectual property without paying the applicable licensing fees. In fact, in Williams v. E. I. duPont de Nemours & Co., 119 F.R.D. 648, 651 (W.D. Ky. 1987), one of the cases relied on by FPC, the court specifically refused to compel production of a licensed computer program known as "Statpac". The court concluded that the party seeking discovery could simply purchase "Statpac" from the model's vendor. Id.

In Cost of Local Service, this Commission recently addressed the issue of whether a third party should be compelled to divulge a computer database that constituted that third party's intellectual property in a Commission proceeding in which the computer database supported the testimony of one of the party's witnesses. In ruling that the motion to compel should be denied in part and granted in part, Prehearing Officer Jacobs did not require the third party to produce executable copies of the computer database constituting the third parties' intellectual property. Cost of Local Service, 98 FPSC 10:47-48. Rather, Prehearing Officer Jacobs held that the party seeking discovery should have "reasonable access to review the information in question." Id. at 48. OGC and Altos have more than met this standard. Just as in Duke New Smyrna, FPC will be provided reasonable access to the Altos Models during Dr. Nesbitt's deposition. In addition, OGC has agreed to provide FPC copies of the Documentation

of the Altos Models subject to a reasonable confidentiality agreement and, most importantly, Altos has agreed to allow FPC to license the Altos Models if FPC pays Altos' standard licensing fee. Clearly, OGC has provided FPC "reasonable access" to the Altos Models.

The view that Altos Models constitute Altos' intellectual property and should not be produced without payment of the applicable licensing fees is consistent with Commission practice. The investor-owned utilities frequently utilize proprietary models such as PROMOD, PROSCREEN and WESCOUGER, just to name a few, to support testimony in Commission proceedings. OGC is not aware of a single case wherein the Commission required an investor-owned utility to produce an executable copy of any of these computer models without first requiring payment of the applicable licensing fee. Thus, requiring Altos to provide FPC executable copies of the Altos Models without requiring FPC to pay the Altos licensing fees will represent a departure from Commission practice and set precedent with regard to other intellectual property such as PROMOD, PROSCREEN and WESCOUGER and any other licensed models.

Lastly, recently in litigation styled Metropolitan Dade County, et al. V. Florida Power Corporation, et al., (United States District Court, Southern District of Florida, (Case No. 96-0594-Civ-Lenard) between FPC and Dade County in federal district court in Miami, Dade County requested that FPC produce copies of computer models used by FPC to model its generating system and databases used in such modeling, including the models known as PROMOD, PROSCREEN and

WESCOUGER. In its response to Dade's request to produce, FPC objected to production of the computer models "until such time as [Dade County and its co-plaintiff] demonstrate they have obtained the appropriate and necessary licenses."<sup>5</sup> FPC's objection was valid in that case and OGC's objection is equally valid in this proceeding.

In summary, FPC's Motion to Compel production of the Altos Models should be denied. OGC and Altos have agreed to provide the Altos Models and the Documentation for the Altos Models subject to a reasonable confidential agreement and standard licensing fee. Neither the rules of discovery nor any case law cited by FPC requires anything more.

**III. FPC'S MOTION TO COMPEL WITH REGARD TO OGC'S SPECIFIC OBJECTIONS TO FPC'S REQUESTS TO PRODUCE IS MOOT.**

A. FPC's Request to Produce No. 2.

OGC objected to this request because it is vague. However, in its response, OGC provided FPC with all responsive documents in accordance with a reasonable interpretation of the request. Accordingly, FPC's Motion to Compel with regard to request to produce No. 2 is moot--OGC has produced the requested documents.

B. FPC's Requests to Produce Nos. 9, 10 and 23.

OGC objected to these requests as being overbroad and burdensome

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<sup>5</sup>Licenses for PROMOD and PROSCREEN typically cost in the range of \$100,000 (or more) per year. In the above-referenced litigation, the plaintiffs were required to pay a license fee for WESCOUGER (which was needed to replicate certain generation dispatch modeling runs used by FPC determining the payments that were in dispute in the litigation) in excess of \$50,000 for 6 months.

because they requested numerous public documents readily available to FPC. However, in its response, OGC provided FPC with all responsive documents that are not public documents readily available to FPC. In its Motion to Compel, FPC concedes that "OGC need not reproduce publicly filed documents." Accordingly, FPC's Motion to Compel with regard to requests to produce Nos. 9, 10 and 23 is moot--OGC has produced the requested documents.

C. FPC's Requests to Produce Nos. 13 and 14.

OGC objected to these requests as being overbroad (in that they seek public documents readily available to FPC) and as seeking attorney-client privileged communications (in that they request all documents "mentioning" communications with Commission staff). However, in its responses, OGC provided FPC with all documents responsive to these requests that are not public documents readily available to FPC and that do not contain attorney-client privileged communications. In its Motion to Compel, FPC concedes that OGC need not "produce documents that are already part of the public record." FPC further states in its Motion to Compel that it has "no intent to invade the privilege between OGC and its counsel concerning any issue." Accordingly, FPC's Motion to Compel with regard to requests to produce Nos. 13 and 14 is moot--OGC has produced the requested documents other than those that are publicly available and those that are protected by the attorney-client privilege or attorney work product doctrine.

D. FPC's Request to Produce No. 22.

OGC objected to this request as vague. However, in its response, OGC provided FPC with all documents responsive to this request. Accordingly, FPC's Motion to Compel with regard to request to produce No. 22 is moot--OGC has produced the requested documents.

**IV. FPC'S MOTION TO COMPEL RESPONSES TO RESPONSES FOR ADMISSIONS NOS. 29, 30, 41, 42, 43, 44 AND 55 SHOULD BE DENIED.**

A. FPC's Requests for Admission Nos. 29 and 30.

OGC objected to these requests for admissions on the basis that OGC has no independent knowledge of what Florida utilities are "projecting" or "planning" to do. More specifically, OGC is prepared to admit that Florida utilities' have published plans and projections indicating that those utilities intend to add the new capacity referenced in the requests; however, OGC cannot admit or deny, and cannot be made to admit or deny, what a third party subjectively plans or projects to do.

B. FPC's Requests for Admission 41, 42, 43 and 44.

OGC objected to these requests for admissions on the basis that PG&E is not a party to this proceeding. Rule 1.370(a), Florida Rules of Civil Procedure, limits a party to serving requests for admissions "on any other party." (Emphasis added). Clearly PG&E is not a party to the proceeding and OGC cannot be charged with knowledge of PG&E's future plans or status. Accordingly, FPC's Motion to Compel should be denied.

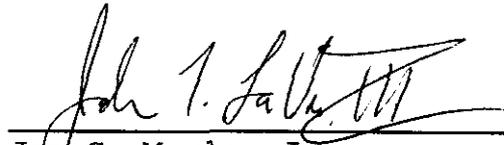
C. FPC's Request for Admission No. 55

OGC objected to this request for admission on the grounds that it is vague, argumentative and a compound statement. OGC renews its objection.

**CONCLUSION**

For the reasons set forth above, FPC's Motion to Compel should be denied in its entirety.

Respectfully submitted this 22nd day of November, 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 22nd day of November, 1999.

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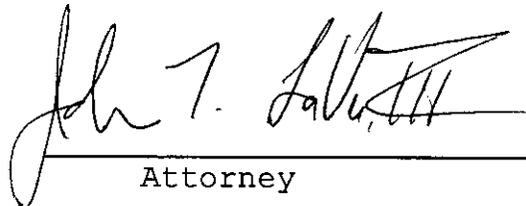
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