

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination)	
of Need for an Electrical Power)	DOCKET NO. 991462-EU
Plant in Okeechobee County by)	
Okeechobee Generating Company,)	Filed: January 5, 2000
L.L.C.)	

**FLORIDA POWER & LIGHT COMPANY'S
 RESPONSE TO OKEECHOBEE GENERATING
 COMPANY'S FIRST MOTION FOR PROTECTIVE ORDER**

Florida Power Light Company (FPL), pursuant to Rule 28-106.204 of the Florida Administrative Code, hereby responds to Okeechobee Generating Company's First Motion for Protective Order, and states:

1. On November 2, 1999, FPL propounded its First Request for Production of Documents (Nos. 1-36) and Second Request for Production of Documents (Nos. 37-61) to OGC. Several of these requests asked OGC to produce the models and analyses relied upon for specific allegations in its Petition. On November 12, 1999, OGC objected to these discovery requests, claiming that they sought disclosure of "confidential, proprietary business information." On November 16 and 17, 1999, OGC served its responses to FPL's First and Second Requests for Production of Documents. For each of the Requests described above, OGC identified as responsive, but did not produce, the Altos Management Partners (Altos) NARE and NARG models (collectively "the Altos Models") discussed in OGC's First Motion for Protective Order. On November 23, 1999, FPL filed a Motion to Compel, seeking, amongst other things, to require OGC to produce the Altos models.

2. On December 7, 1999, counsel for OGC, FPL and Florida Power Corporation (FPC) met to discuss outstanding discovery concerns, including FPL's and FPC's requests for

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access to the Altos Models. At that meeting, OGC offered to make the Altos Models available on terms identical to those outlined in Exhibit "A" to OGC's First Motion for Protective Order.

3. While FPL is in favor of open access to the Altos Models for all parties and Commission Staff and does not object to the models being made available at the Commission, there is no reason that OGC and Altos cannot, consistent with established industry practice, offer a short-term, limited-use license to FPL at a reasonable cost. Having such access is the best and most efficient way for FPL to evaluate the models to prepare for trial. Accordingly, in a December 14, 1999, letter to OGC's counsel FPL presented an alternative proposal for disclosure of the Altos models, in which FPL offered to pay Altos a reasonable licensing fee of \$9,000 for a short-term, limited-use license and to take appropriate security measures to protect Altos intellectual property, such as returning all model runs to Altos at the close of this proceeding (rather than during its pendency, as OGC would require) and agreeing to use the model only for purposes of this case. (A copy of that letter is attached as Exhibit "A".) On December 20, 1999, counsel for OGC advised counsel for FPL that it would discuss FPL's proposal with OGC and promptly respond to FPL. No response ever came. Instead, on December 23, 1999, OGC filed its Motion for Protective Order, which essentially asks the Commission to implement the terms and conditions OGC proposed to FPL and FPC on December 7, 1999.

4. FPL's alternative proposal was reasonable and fair to both OGC and Altos. Despite OGC's rhetoric, this was not intended to be a "fire-sale" purchase of the Altos Models. In fact, the \$9,000 figure was derived from OGC's and Altos' proposed terms and conditions, which require FPL to pay Altos \$9,000 (40 hours of professional time at \$225 per hour) to

oversee FPL's use of the Altos Models at the Commission.¹ The \$9,000 offer also represents a fair adjustment to the proposed \$85,000 purchase price for full one-year access to the models, to reflect the short term (i.e., 2 months as opposed to 12), limited-use (i.e., only for purposes of this proceeding) nature of the license FPL wished to purchase. And, as discussed below, the \$9,000 figure is consistent with what other model vendors charge for similar short-term, limited-use licenses to their models.

5. FPL remains willing to pay a reasonable license fee for short-term access to the Altos Models at FPL's offices. OGC argues that FPL has previously refused to provide intervenors with access to models on which it has relied, absent payment of licensing fees to the owners of those models. However, OGC fails to realize that FPL's consultants, unlike Altos, offer limited term licenses so that parties may purchase the right to use a model for a particular proceeding without being extorted a full-year's license fee for a model for which they have no ongoing use. For example, Henwood Energy Services, Inc. (Henwood) offers unlimited one-year use of a model similar to the Altos Models for an annual license fee of \$80,000 to \$120,000. Unlike Altos however, Henwood also offers short-term project-specific licenses for \$10,000 to \$25,000 that cover a period of 3 months for a particular project.² Moreover, offering such licenses is a common industry practice. Based on the relative prices of the Henwood and Altos' Models, FPL submits that a reasonable price for a short-term, limited-use license to the Altos Models would be in the range of \$8,000 to \$17,000.

¹ Under FPL's proposed terms, such oversight would not be necessary and the \$9,000 would therefore be pure profit for Altos.

² FPL will file an affidavit of Matthew P. Harris of Henwood setting forth these facts under separate cover by January 7, 2000.

6. FPL recognizes that Altos has voiced concerns about the security of its models. However, these concerns can easily be addressed by Altos programming its model to cease functioning at the expiration of FPL's short-term license. This approach is common in the software industry and has been used for Henwood's short-term model licenses. The same protective measure could easily be implemented by Altos. Alternatively, Altos could install the software on three laptop computers, which FPL would purchase. Using the security features included with Microsoft Windows NT, Altos could prevent any unauthorized copying of the models.³ The computers would be made available to Altos at the conclusion of this proceeding for removal of their software. FPL would also turn over to Altos at the conclusion of this proceeding all model runs conducted by FPL or its consultants.

7. If Altos is not willing to provide a short-term a license to its models, OGC should be required to either bear the incremental cost of purchasing a full license for FPL or withdraw its testimony relying upon the Altos Models. OGC chose to rely on Altos extensively in its petition and prefiled testimony, knowing full well that other parties could not readily evaluate its allegations without access to Altos' models. It is OGC's responsibility to ensure that Altos provides meaningful access to the models on reasonable terms.

8. FPL strongly favors the approach of requiring a reasonably-priced, short-term license to the models to be provided. However, if the Commission decides to adopt OGC's general approach of providing far more limited access to the models at a specific location, it

³ Unauthorized copying of copyrighted materials is a crime, punishable by up to 5 years imprisonment. 17 U.S.C. § 506. Surely OGC does not suggest that FPL would deliberately copy Altos copyrighted materials if it was given access to them for purposes of this proceeding.

should, at the very least, refuse to impose the four aspects of OGC's proposal that are particularly unreasonable and onerous:

- (i) Requiring FPL to turn over, and waive evidentiary objections to, all work-product and trial preparation materials based on the models;
- (ii) Requiring FPL's consultants' use of the models to be supervised by Altos, and
- (iii) Requiring FPL never to criticize the validity of the models, even in future proceedings before the Commission.
- (iv) Limiting access solely to computers located at the Commission, rather than allowing parties the option to view the models at Altos' offices in San Jose, California.

9. In its December 14, 1999, letter FPL informed counsel for OGC of FPL's objections to these unreasonable aspects of OGC's proposal. FPL noted that OGC's proposed oversight and work-product disclosure requirements and restrictions on criticism of the Altos Models constituted an unwarranted intrusion into FPL's trial preparation and free speech. FPL also noted that these requirements were improperly designed to benefit OGC and Altos in this and future Commission proceedings (e.g., by allowing OGC access to FPL's trial preparation materials and limiting FPL's participation in future proceedings involving the models), rather than to protect Altos' and Marketpoint's intellectual property. As previously mentioned, OGC never responded to FPL's concerns and, apparently unwilling to negotiate on these issues, simply filed its motion for protective order. As discussed below, each of these four requirements is unreasonable and should therefore not be adopted by the Commission.

10. OGC's proposed condition that FPL turn over all of its model runs during the course of this proceeding and waive evidentiary objections to their use at trial would require FPL to disclose the work-product of both its testifying and non-testifying experts.⁴ While Florida case law generally supports disclosure of testifying experts' trial preparation materials, the same is not true for that of non-testifying experts. *See Peck v. Messina*, 523 So.2d 1154 (Fla. 2d DCA 1988); *Mims v. Casademont*, 464 So.2d 643 (Fla. 3d DCA 1985). The Florida Rules of Civil Procedure generally preclude discovery of information held or developed by non-testifying experts, absent a showing of exceptional need. Fla.R.Civ.P. 1.280(b)(4)(B) ("A party may discover facts known or opinions held by an expert . . . who is not expected to testify only . . . upon a showing of exceptional circumstances . . .") OGC would circumvent this rule by requiring FPL to disclose all work product based on the models, regardless of whether it was produced by FPL's non-testifying expert or its attorneys or its own employees.

11. OGC's proposal to have Altos "supervise" FPL's use of the models would also circumvent the above limitations on discovery by allowing Altos personnel to look over the shoulder of FPL's experts as they examine the Altos Models and conduct alternative model runs. By so doing, OGC and Altos would be privy to the mental impressions of FPL's attorneys and experts regarding the models. No justification is given for this substantial invasion of FPL's trial preparation. OGC is simply trying to force concession of these substantial litigation advantages as a condition of FPL gaining access to the models upon which OGC bases its entire case. In

⁴ Under OGC's proposed terms the model runs are returned not to Altos, but to OGC. Certainly this requirement is not meant to safeguard Altos' intellectual property. Similarly, the required stipulation as to the admissibility of such materials cannot possibly be designed to protect Altos. These provisions are a transparent attempt by OGC to secure litigation advantages as a condition of its compliance with discovery requests.

other words, OGC is attempting to force FPL to choose between revealing its otherwise privileged trial preparation materials and consenting to their admissibility, or being denied the opportunity to adequately review the basis for the key assertions in OGC's Petition.

12. There is also no reasonable basis for requiring FPL to agree never to "badmouth" or criticize the Altos models outside of this proceeding. FPL notes that this is the second time the Altos models have been used to support the application of a proposed merchant plant within FPL's service territory.⁵ It is certainly conceivable that the models would be used in future proceedings for a similar purpose, or for other purposes adverse to FPL. By curtailing FPL's ability to comment on the validity of the Altos Models, Altos will essentially guarantee a "free ride" for its models in such future dockets and in so doing substantially limit FPL's ability to exercise the right to participation in government decisionmaking guaranteed by the Administrative Procedure Act and the due process provisions of the Florida and United States Constitutions.

13. Finally, there is no reason that OGC and Altos cannot provide access to the Altos Models at Altos' San Jose offices, in addition to providing access at the Commission. As OGC acknowledges in its motion (at 14), this was the very approach taken by the Commission in the *Cost of Local Service* decision. 98 FPSC 10:47-48. FPL's consultants are located in California, as is Altos. There is nothing served by forcing FPL's consultants to travel across the country to view a model that could just as easily (if not more so) be made available in their home state.

⁵ See *Joint Petition for Determination of Need for an Electric Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach and Duke Energy New Smyrna Beach Power Company, Ltd.*, 99 FPSC 3:401.

Contrary to OGC's assertions, it would be far easier and far less costly for FPL's consultants to review the models at Altos' offices.

14. OGC relies extensively on the *Cost of Local Service*, 98 FPSC 10:47-48 as justification for imposing these onerous restrictions on FPL's access to the Altos Models; however, nothing in that decision supports such restrictions. In *Cost of Local Service*, the Commission required AT&T to provide access to a consultant's proprietary model at the consultants' offices. While the decision generally supports the idea of providing access to computer models at the Commission (and at Altos' offices), it certainly does not stand for the proposition that a party may be required to disclose, and consent to the admissibility of, its trial preparation materials as a condition of such access or be forced to agree never to challenge the validity of a model in future proceedings. These aspects of OGC's proposal are, to the knowledge of FPL and its attorneys, unprecedented in Commission (or any other) proceedings. In fact, in *Cost of Local Service* the parties reviewing the computer models were expressly "allowed to remove with them any analytical notes, charts, or graphs that they produce[d]" with no mention of such materials having to be made available to AT&T or its consultants. 98 FPSC 10:48. FPL is entitled to access to the Altos Models without OGC's onerous requirements.


15. As an alternative to these restrictions and to protect Altos' intellectual property rights, the Commission should instead require FPL to: (1) turn over all model runs at the close of this docket, and (2) have all outside consultants sign a reasonable confidentiality agreement requiring them to limit access to the Models to that required for purposes of litigation and not to disclose of the information gained thereby outside of this proceeding. Subject to these

conditions, FPL and its consultants should be granted full access to the Altos Models at both the Commission and at Altos' San Jose, California offices.

WHEREFORE, FPL requests that the Commission order OGC to secure a short-term license to the Altos models for FPL's use in this proceeding at a cost to FPL not to exceed \$17,000 or else withdraw all testimony based on the Altos models.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this FPL's Supplemental Motion to Compel Responses to FPL's Response to Okeechobee Generating Company's First Motion for Protective Order was served by Hand Delivery (*) or mailed this 5th day of January 2000 to the following:

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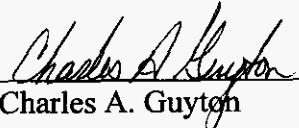
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January 5, 2000

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Division of Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, FL 32399

RE: DOCKET NO. 991462-EU

Dear Ms. Bayó:


Enclosed for filing please find an original and fifteen (15) copies of Florida Power & Light Company's Response to Okeechobee Generating Company's First Motion For Protective Order, Response to Okeechobee Generating Company's Motion To Establish Hearing Dates And Revised Procedural Schedule and Supplemental Motion to Compel Responses To FPL's First and Second Sets Of Interrogatories And First And Second Requests For Production Of Documents.

Very truly yours,



Charles A. Guyton

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CMU _____ Enclosure
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