

ORIGINAL

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  
MOTION TO ESTABLISH HEARING DATES AND  
REVISED PROCEDURAL SCHEDULE**

Florida Power Light Company ("FPL") hereby responds to Okeechobee Generating Company's Motion to Establish Hearing Dates and Revised Procedural Schedule filed on December 23, 1999.

1. The proposed hearing dates of March 20-22, 2000 can be met if there is a prompt resolution of outstanding discovery disputes with OGC; however, unless those matters are resolved soon, the revised hearing dates will be at risk. FPL has pending two motions to compel discovery responses. OGC has responded, and those matters are ready for argument and ruling. FPC also has a pending motion to compel that is ready for argument and ruling. FPL met with OGC on December 7, 1999 and raised a number of concerns about OGC's discovery responses that had not yet been raised by motions to compel. FPL hoped to resolve these concerns through discussions with OGC rather than additional motions to the Prehearing Officer. However, nearly a month later FPL has not yet heard back from OGC regarding these issues. Therefore, FPL is filing today a third motion to compel. FPL needs the Commission to rule on all of its motions to compel, so that FPL can secure the information requested from OGC and then proceed to depose

OGC's witnesses and prepare its testimony. Unless there is a quick resolution of these outstanding discovery disputes, FPL cannot prepare adequately in time for the proposed hearing dates.

2. Since meeting with the Staff and OGC in late November and early December, FPL has consistently indicated that it needed at least one month after receiving complete responses to its outstanding discovery, including access to the models used by Dr. Nesbitt, to prepare its testimony. In early December when it appeared that outstanding discovery disputes could be resolved by early January, a schedule calling for intervenor testimony in early February and rebuttal testimony in late February seemed reasonable for a hearing to be held in March. Here we are in the first week of January and despite FPL's efforts to resolve the numerous inadequacies in OGC's discovery responses, FPL has not had access to the information it needs to prepare its case.

3. OGC's proposal for intervenors to file testimony on January 21, 2000 is not reasonable for the following reasons:

a. OGC filed its determination of need petition on September 24, 1999 seeking a determination of need "on some basis in addition to or in lieu of capacity needs," and under Rule 25-22.081(3), F.A.C. OGC should have filed with its petition "detailed analysis and supporting documentation of the costs and benefits." OGC failed to make this filing and thereby deprived the intervenors of necessary information about its proposed generating project.

b. When OGC filed its direct testimony a month later on October 25, 1999, it once again failed to provide the 'detailed analysis and supporting

documentation of the costs and benefits” required under Rule 25-22.081(3).

Instead, OGC filed verbose testimony from Dr. Nesbitt that contained very little other than summary results of runs he performed using his proprietary software.

The testimony raises more questions than it answers, requiring additional discovery from FPL.

c. Due to OGC’s failure to comply with Rule 25-22.081(3), FPL was forced to request through discovery the information OGC should have filed with its petition. In addition, FPL was forced to explore through discovery the myriad issues Dr. Nesbitt verbosely evades in his wordy. FPL made such discovery requests as soon as it was a party or shortly after an initial review of testimony. In its requests, FPL anticipated that confidentiality concerns could arise, and therefore asked that OGC provide proposed nondisclosure agreements acceptable to OGC for any information it claimed was confidential.

d. OGC initially responded by making wholesale objections to FPL’s discovery responses. Then OGC undertook to respond selectively to the discovery requests to which it had raised objections, confusing FPL as to whether or not the responses were complete. Moreover, OGC did not offer terms and conditions for disclosure of information withheld on confidentiality grounds. Despite repeated requests by FPL, OGC still has not offered any proposed disclosure terms for confidential data other than the Altos models (this would include data claimed to be confidential to PG&E Generating, ABB (OGC’s purported equipment vendor), and Gulfstream).

e. Due to OGC's failure to properly and completely respond to discovery, FPL has had to file three motions to compel. FPL has attempted to resolve these discovery disputes without involving the Prehearing Officer, but has been unsuccessful.

f. Two months to study testimony means nothing when OGC has failed to provide required documentation and supporting analyses or fully respond to discovery. OGC has chosen to hide behind a "black box" and claims of confidentiality when asked for the data that supports its petition and testimony. OGC's witnesses self-servingly tout the models used, but they fail to provide the models for FPL to review without onerous conditions that are inconsistent with the rules regarding discovery.

g. OGC makes much of the fact that it inundated FPL with 67 megabytes of nearly incomprehensible data in the form of Altos model inputs and outputs. This "data dump" contained both too little and too much to be useful. Too little, because OGC failed to provide the model used to develop the data, the models' user manuals (from which one could discern how the various files are linked and interrelated) or even a basic explanation of what the individual data represent. Too much because the sheer volume of data without any explanatory guide has resulted in countless hours of less than productive review. Having reviewed all these data, FPL still has a number of questions about how the model operates or even where to find information that is purported to be in OGC's data dump. Because of the inability to examine the model and the fact that the model inputs

and outputs are not self-explanatory without the model's users manuals, FPL has not been given a meaningful opportunity to prepare for trial.

h. Moreover, OGC abused its option of providing records in lieu of interrogatory answers by referring FPL to this data dump rather than providing answers to interrogatories. Not only is it not as easy for FPL to glean answers from this data dump as it is for OGC, it is virtually impossible for FPL to do so.

i. Much of the data that could be crucial to OGC's case -- unredacted fuel transportation contracts, analyses of the economic viability of the Project, the terms and conditions of equipment delivery, and the documentation supporting the performance parameters of the yet to be ordered or constructed equipment -- has been claimed to be confidential, and although OGC represented to FPL a month ago it was working to secure access to most of these documents for FPL, no access has yet been granted, nor have any terms for such access been proposed.

j. OGC's offer to provide FPL access to the Altos models under the terms prescribed in its motion for protective order is a cynical attempt to secure an undue trial advantage rather than a serious attempt to protect the intellectual property of Altos. This is more fully developed in FPL's response to OGC's untimely motion for a protective order. Of course, FPL refused conditions such as Altos supervision of FPL's consultants, the immediate provision to OGC of FPL's trial preparation materials and waiver of all objections to their admissibility, and the provision that restricted FPL from criticizing the Altos models outside of this proceeding. These conditions are not necessary to protect Altos' intellectual

property; they are intended to give OGC a trial advantage to which it is not entitled. FPL is willing to sign reasonable provisions necessary to protect Altos' intellectual property and to even pay a reasonable short-term licencing fee to Altos for its short-term use.

4. Simply stated, we are in the current situation because of the way OGC has handled its case. Because OGC's petition and discovery responses are incomplete, FPL cannot adequately prepare its testimony by January 21<sup>st</sup>. Before filing testimony FPL needs access to all the information requested, including confidential and proprietary data under reasonable terms, and needs a reasonable amount of time to review those materials.

5. Once FPL gets access to this information, it can file its testimony within four weeks. If that access can be arranged quickly, then the March 20-22 hearing date can be achieved. For instance, if FPL can be provided access to the Altos model and the answers to its outstanding discovery next week, FPL can file testimony by the second week of February. This would still allow OGC three weeks to file rebuttal testimony (one to two weeks more than utilities are typically given in Commission proceedings). Assuming discovery compliance next week, the schedule would look like this:

OGC Discovery Responses Provided	1/12/00
Intervenor/Staff Testimony	2/9/00
Rebuttal Testimony	3/1/00
Discovery cutoff	3/10/00
Prehearing statements	2/28/00

Prehearing Conference	3/1/00
Hearing	3/20-22/00
Post Hearing Briefs	4/12/00
Staff Recommendation	5/4/00
Agenda Conference	5/16/00

If it takes longer for FPL to gain access to the information it has requested, the additional time should be taken from OGC's time for filing rebuttal. In all events, before it can file its testimony FPL needs four weeks for its consultants to review the Altos model and the other outstanding discovery responses.

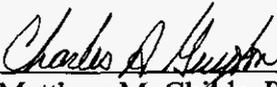
6. In summary, the schedule proposed by OGC will not afford FPL a meaningful opportunity to prepare for trial in light of the pending discovery disputes. Requiring FPL to file testimony as early as January 21<sup>st</sup> when as of today there are three extensive FPL motions to compel outstanding would be unreasonable. The discovery disputes need to be resolved and both the testimony filing dates should be scheduled later than OGC proposes. If the discovery disputes are resolved quickly, there is still adequate time to schedule testimony filing and preserve the proposed hearing date.

WHEREFORE, FPL respectfully requests that the Commission expedite its consideration of the outstanding motions to compel and give FPL four weeks from the date OGC provides

access to the various discovery matters under dispute to file its direct testimony.

Respectfully submitted this 5<sup>th</sup> day of January, 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this FPL's Response to Okeechobee Generating Company's Motion to Establish Hearing Dates and Revised procedural Schedule was served by Hand Delivery (\*) or mailed this 5th day of January, 2000 to the following:

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