

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 SUPPLEMENTAL MOTION TO COMPEL RESPONSES TO FPL'S FIRST AND SECOND SETS OF INTERROGATORIES AND FIRST AND SECOND REQUESTS FOR PRODUCTION OF DOCUMENTS**

Florida Power Light Company ("FPL"), pursuant to Rule 28-106.206 of the Florida Administrative Code ("F.A.C.") and Florida Rule of Civil Procedure 1.380, supplements its November 23, 1999, Motion to Compel Okeechobee Generating Company, LLC ("OGC") to Respond to Discovery Requests, and states:

1. On November 2, 1999, FPL propounded its First Set of Interrogatories (Nos. 1-61), Second Set of Interrogatories (Nos. 62-71), First Request for Production of Documents (Nos. 1-36) and Second Request for Production of Documents (Nos. 37-60) to OGC. On November 12, 1999, OGC filed separate responses to each of these discovery requests, objecting to the majority of FPL's discovery efforts.

2. On November 23, 1999, FPL filed a Motion to Compel Okeechobee Generating Company, LLC to Respond to Discovery Requests. It has since come to FPL's attention that additional discovery issues relating to FPL's First and Second Sets of Interrogatories and First and Second Requests for Production require resolution by the Prehearing Officer. Specifically, FPL requests that the Prehearing Officer compel OGC: (1) to disclose any documents or information responsive to FPL's discovery requests that are in the custody or control of OGC's

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corporate parent and/or affiliates, and (2) for each FPL discovery request to which OGC referred FPL to the materials produced in response to FPL Request No. 5, to identify the specific documents or portions of computer file(s) within that response that relate to the question posed by FPL.

#### **Information and Documents in the Custody of OGC's Affiliate Companies**

3. In its responses to FPL Requests for Production Nos. 36, 43 and 52, OGC indicates that it withheld certain unspecified "PG&E Internal Analyses" from FPL. Based on OGC's responses to other FPL discovery requests, FPL suspects that additional unidentified documents or information in the custody of OGC's parent or affiliates may also have been withheld. For example, FPL Interrogatory No. 14 asks OGC to identify "all analyses performed by or on behalf of OGC or OGC's affiliates which demonstrated the 'long term economic viability' of the project." OGC's response to this request simply referred FPL to the limited Altos modeling data provided to FPL in response to its Production Request No. 5. There is a strong probability that additional responsive analyses exist and that some or all of these are within the custody or control of PG&E Generating, Inc. ("PG&E Generating"), OGC's parent company, or another affiliate of OGC. It is highly unlikely that PG&E Generating would have made the decision to go forward with the nearly \$200 million OGC project without first conducting any internal analysis of the project's economic viability.

4. OGC may not refuse to answer FPL's discovery requests merely because the responsive information is in the custody of OGC's affiliates, rather than OGC itself. *Medivision of E. Broward County, Inc. v. Department of HRS*, 488 So. 2d 886, 888 (Fla. 1<sup>st</sup> DCA 1986). Such a practice would be particularly egregious with respect to information held by PG&E

Generating. OGC is a wholly-owned subsidiary of PG&E Generating, created for the sole purpose of owning the proposed power plant that is the subject of this proceeding.<sup>1</sup> In essence, OGC is PG&E Generating's alter ego in Florida. OGC and PG&E Generating have acted together to seek certification of the proposed project and must assume the responsibilities of a single entity along with the advantages. *See, Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos.*, 99 F.R.D. 309 (N.D. Ga. 1983). OGC and PG&E Generating should not be allowed to structure their affairs to segregate, and thereby conceal, relevant information. *Medivision*, 488 So. 2d at 888; *American Honda Motor Corp., Inc. v. Votour*, 435 So. 2d 368, 369 (Fla. 4<sup>th</sup> DCA 1983).

5. It is evident from OGC's petition and direct testimony that OGC is acting together with and on behalf of PG&E Generating. Five of OGC's nine direct witnesses are employed by PG&E Generating (Karloff: Manager of Fuel Procurement; Clayton: Director, Power System Assessment; Sullivan: Vice President, Engineering; Lehner: Director of Operations - Northeast; Finnerty: Manager, Project Development). From their testimony it is clear that PG&E Generating, not OGC, is developing and will manage and operate the Project and that OGC is merely the business entity, wholly owned by PG&E Generating, that will own the facility:

a. According to PG&E Generating's Mr. Finnerty, the overview witness, PG&E Generating, not OGC, is developing and will operate the Project (Direct Testimony, at 7- 8). Mr. Finnerty testifies that PG&E Generating, not OGC, will finance the Project: "PG&E Generating is confident of its ability to finance the

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<sup>1</sup> PG&E Generating is itself a wholly-owned subsidiary of PG&E Corporation, which also owns PG&E Energy Services and PG&E Energy Trading. For the reasons set forth herein, responsive documents and information in the custody or control of these OGC affiliate companies (or their subsidiaries) must be disclosed to FPL.

Okeechobee Generating Project. . . .” (*Id.* at 14). Mr. Finnerty believes the Project will be economically viable because of “PG&E Generating’s experience in providing competitively priced energy and capacity to the wholesale market.” (*Id.*)

b. According to PG&E Generating’s Mr. Lehner, he is responsible for “planning and support with respect to operations and maintenance issues for: (1) preparation of permit and license applications . . . , (2) engineering, construction and operational agreements . . . , (3) plant design, (4) equipment selection, and (5) plant startup and mobilization of the [OGC] plant’s O&M staff.” (Direct Testimony, at 3)

c. According to PG&E Generating’s Mr. Sullivan, his department “is responsible for the overall design and engineering of projects for PG&E Generating,” including the OGC project, and he has “supervisory responsibility for all aspects of the [OGC Project’s] design.” (Direct Testimony, at 1, 3)

d. According to PG&E Generating’s Mr. Clayton, his role is to “provide technical assistance to the PG&E Generating project teams involved in . . . the development of new generating plants” (Direct Testimony, at 1), and specifically “to provide technical assistance to the project team involved in the development of the Okeechobee Generating Project.” (*Id.* at 4). He testifies that he developed the scope of work for the Project’s transmission impact study performed by GE “for PG&E Generating” (*Id.* at 3), that PG&E Generating, not OGC, contacted FPL for information to perform a transmission impact study (*Id.* at 13), and that

PG&E Generating “will work with affected utilities to remedy” any transmission violations caused by the project’s operation.

e. According to PG&E Generating’s Mr. Karloff, his role is to “provide fuel supply expertise to support the electric development group of PG&E Generating,” and he is primarily responsible for developing the fuel supply strategy for the OGC Project. (Direct Testimony, at 1) When asked about potential delays in Gulfstream’s pipeline permitting and construction, Mr. Karloff responds that PG&E Generating is confident that the pipeline will be constructed but that if necessary, PG&E Generating could obtain alternative gas transport.

(*Id.* at 10)

6. Because of the inexorable link between OGC and PG&E Generating, the Commission should direct OGC to produce all documents responsive to FPL’s discovery requests, regardless of whether they are in the custody of OGC’s affiliate companies. *Medvision*, 488 So. 2d at 888. OGC should also be required to amend its interrogatory responses to include any responsive information within the custody or control of PG&E Generating or other OGC affiliates. FPL notes that information responsive to its Interrogatories Nos. 14, 15, 18, 19, 20, 35, 36, 40, 41, and 60, and Production Requests Nos. 14, 15, 16, 17, 21, 25, 36, 43, 44, 45, and 52, may be within the custody or control of PG&E Generating or other affiliates of OGC. OGC should be compelled to amend its responses to these discovery requests (and any others) to the extent that it has withheld information in the custody or control of OGC’s parents or affiliates.

**Responses that Refer to Diskette Produced in  
Response to FPL Production Request No. 5**

7. In response to FPL's Request for Production No. 5, OGC provided FPL with a computer "Zip" disk containing approximately 67 megabytes of spreadsheets and other numerical data. This data, which when printed amounts to an 18-inch high stack of documents, is not organized in a way that it is readily discernable to FPL or its consultants. Neither FPL nor its consultants are familiar with the models used to develop this information, and no operating manual explaining the model's inputs and output reports has been provided. OGC extensively relied upon this "data dump" to respond to FPL's Interrogatories Nos. 14, 32, 33, 35, 36, 40, 41, 89 and 90, and Production Requests Production Nos. 7, 12, 13, 14, 15, 16, 17, 18, 28, 29, 32, 33, 36, 37, 41, 43, 44, 45, 48 and 60, despite the fact that these FPL discovery requests inquired about a variety of specific subjects ranging from the environmental impacts of the project, to fuel delivery issues, to the project's economic viability. For each of these diverse questions, OGC refers FPL to the full 67 megabytes of data, with no guidance whatsoever as to which documents on the disk are responsive to each particular question asked by FPL.

8. The Florida Rules of Civil Procedure allow a party to respond to interrogatories by specifying the records from which the answers may be ascertained, but only so long as the burden of ascertaining the answers is substantially the same for either party. Fla.R.Civ.P. 1.340(c). This is clearly not the case here, where only OGC knows which specific computer files relate to each of FPL's interrogatories. Rule 1.340(c) further requires that OGC's response be "in sufficient detail" to allow FPL to discern the answer or else "identify a person . . . who will be available to assist the interrogating party in locating and identifying the records." To date,

OGC has not complied with either requirement. OGC should not be permitted to vaguely refer FPL to a large volume of data, organized in such a way that only OGC can understand, and leave FPL to sift through the data in an attempt to divine answers to its questions. This is the practical equivalent of not responding at all. OGC should therefore be required to amend its responses to identify the specific documents and computer files on the Zip disk that answer each of FPL's interrogatories.

9. Similarly, with respect to FPL's production requests, the producing party has a burden to produce the specific material requested, rather than dumping voluminous irrelevant items onto the requesting party along with the documents actually sought.<sup>2</sup> *See, Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73 (D. Mass. 1976). (A party must search its records for the specific documents responsive to a production request). OGC's response to FPL's Requests are unacceptable because OGC could easily have separately produced the information responsive to each of FPL's requests or could have organized its consolidated response in a manner that would allow FPL to discern which documents are relevant to particular requests.

**FPL's Efforts to Resolve  
This Discovery Dispute**

10. FPL has attempted to resolve this discovery dispute without involving the Prehearing Officer, but its efforts have been to no avail. FPL met with OGC's counsel at their

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<sup>2</sup> A party may typically produce business records in the manner that they are kept in the ordinary course of business. However, FPL understands that the "Zip" disk was compiled specifically in response to FPL's and FPC's discovery requests, so this exception does not apply. Moreover, a party may not use the "ordinary course" exception to produce a large volume of irrelevant data in response to a production request. *Kozlowski*, 73 F.R.D. at 77. Nor may a party keep its records in a disorganized manner to frustrate discovery. *Id.* at 76-77. Thus, any responses that refer to the materials on the "Zip" disk must specify the computer files that are responsive to the particular request at issue. *See also, Alliance to End Repression v. Rockford*, 75 F.R.D. 441 (N.D. Ill. 1979).

office the entire afternoon of December 7, 1999, expressing concerns about each discovery request that FPL felt OGC had not fully addressed in its response or objection. FPL's counsel was told that OGC would attempt to respond by the following Friday, December 10, or the following Monday, December 13. FPL followed up that meeting with a December 10, 1999, letter to OGC's counsel supplementing the concerns FPL voiced at the December 7, 1999 meeting. A copy of that letter is attached. The only response FPL has received to FPL's myriad inquiries is a verbal statement by one of OGC's attorneys that Mr. Blaha, one of OGC's consultants, was formulating more detailed responses identifying where, within the data dump provided in response to Request for Production No. 5, files might be located that would answer specific questions posed by FPL. After nearly one month, FPL has still not received those supplemental responses and has heard nothing from OGC regarding the provision of PG&E Generating documents and information that are responsive to FPL's discovery requests. Almost a month has passed since FPL met with OGC. Two months have passed since FPL posed its discovery requests, and six weeks have passed since OGC should have properly responded but failed to do so. FPL needs the information requested to prepare its case. FPL can wait no longer for OGC to respond. Therefore, FPL had no choice but to ask the Prehearing Officer to intervene and require OGC to honor its discovery responsibilities.

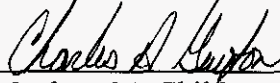
11. WHEREFORE, FPL requests that the Commission enter an Order compelling OGC to:

- (i) Disclose any documents or information responsive to FPL's discovery requests that are in the custody or control of OGC's corporate parent and/or affiliates, and
- (ii) Identify the particular portions of computer file(s) provided in response to FPL



Production Request No. 5 that answer the other FPL discovery requests to which OGC responded by referring FPL to OGCs response to Production Request No. 5.

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 First and Second Sets of Interrogatories and First and Second Requests for Production of Documents was served by Hand Delivery (\*) or mailed this 5th day of January, 2000 to the following:

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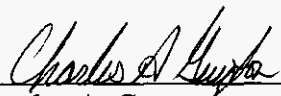
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