

STEEL ■  
HECTOR  
■ DAVIS™

ORIGINAL

Steel Hector & Davis LLP  
215 South Monroe, Suite 601  
Tallahassee, Florida 32301-1804  
850.222.2300  
850.222.8410 Fax  
www.steelhector.com

February 21, 2000

Charles A. Guyton  
850.222.3423

Jon C. Moyle, Jr., Esq.  
Moyle, Flannigan, Katz,  
Kollins, Raymond & Sheehan, P.A.  
The Perkins House  
118 North Gadsden Street  
Tallahassee, FL 32301

**By Hand Delivery**

**Re: Docket No. 991462-EU**

Dear Mr. Moyle:

Enclosed please find Florida Power & Light Company's Objections to Okeechobee Generating Company's Second Request for Production of Documents (Nos.27-32) in Docket No. 991462-EU.

Very truly yours,



Charles A. Guyton

Enclosure

AFA \_\_\_\_\_  
APP \_\_\_\_\_  
CAF \_\_\_\_\_  
CMU \_\_\_\_\_  
CTR \_\_\_\_\_  
EAG 9/46  
LEG 2/16  
MAG 5  
OPC \_\_\_\_\_  
RFR \_\_\_\_\_  
SEC 1  
VAV \_\_\_\_\_  
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DOCUMENT NUMBER-DATE

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Miami West Palm Beach Tallahassee Naples Key West London Caracas São Paulo Rio de Janeiro Santo Domingo  
FPSC-RECORDS/REPORTING

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, L.L.C. ) Filed: February 21, 2000  
\_\_\_\_\_)

**Florida Power & Light Company's Objections to  
Okeechobee Generating Company's Second Request  
For Production of Documents (Nos. 27-32)**

Florida Power & Light Company (FPL) , hereby files its objections to Okeechobee  
Generating Company LLC's (OGC's) Second Request for Production of Documents (Nos. 27-  
32) to FPL as follows:

**General Objections**

1. FPL objects to the request that documents be produced to Landers & Parsons, P.A., 310 West College Avenue, Tallahassee, Florida 32301. FPL is required only to produce documents at a reasonable time, place, and manner.
2. FPL objects to any production request that calls for the production of documents protected by the attorney-client privilege, the work-product doctrine, the accountant-client privilege, the trade-secret privilege, or any other applicable privilege or protection afforded by law, whether such privilege or protection appears at the time response is first made to these requests or is later determined to be applicable based on the discovery of documents, investigation, or analysis. FPL in no way intends to waive any such privilege or protection.
3. FPL objects to these production requests to the extent they seek production of the materials of FPL's non-testifying experts and consultants that were not used in the formulation of

FPL's expert testimony. While Florida case law generally supports disclosure of experts' materials used in developing testimony, the same is not true for materials used by non-testifying experts for litigation consultation with trial counsel.<sup>1</sup> The Florida Rules of Civil Procedure expressly preclude discovery of information held or developed by non-testifying experts:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in rule 1.360(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Fla. R. Civ. P. 1.280(b)(4)(B). The law is clear that the materials of experts who will not testify at trial are strictly protected from discovery, absent a showing of exceptional need, such as where the party seeking discovery has no access to comparable materials.<sup>2</sup> As OGC has access to its Altos models and can conduct all the model runs it wishes on that platform, there is no basis to

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<sup>1</sup> *Centex-Rooney Const. Co. v. SE Broward Joint Venture*, 697 So.2d 987 (Fla. 4<sup>th</sup> DCA 1997). The protection for non-testifying experts' materials applies both to "outside" consultants and to employees of a party that are directed by that party's legal department or outside attorneys "to perform specific tasks to help them defend the lawsuit." *Shell Oil Refinery v. Shell Oil Co.*, 132 F.R.D. 437, 442 (E.D.La. 1990).

<sup>2</sup> *Centex-Rooney*, 697 So.2d at 988 (materials of non-testifying expert not discoverable where opponent could hire its own experts to produce similar materials); *Wackenhut Corp. v. Crant-Heisz Enterprises, Inc.*, 451 So.2d 900, 902 (Fla. 2<sup>d</sup> DCA 1984) (non-testifying expert's materials were privileged work-product and non discoverable); *Horne v. K-Mart Corp.*, 558 So.2d 1079, 1080 (Fla. 4<sup>th</sup> DCA 1990) (record of testing and evaluation performed by non-testifying expert not discoverable, absent showing that "it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means"); *Hartford Fire Ins. Co. v. Pure Air*, 154 F.R.D. 202 (N.D. Ind. 1993) (non-testifying expert's report not discoverable where all parties had access to their own experts and could compile equivalent information); *Inspiration Consol. Cooper Co. v. Lumbermens Mutual Ins. Co.*, 60 F.R.D. 205 (D.C.N.Y. 1993) (communication between non-testifying experts and trial counsel not discoverable).

claim that it has an exceptional need for the analyses produced by FPL's experts for purposes of consulting with FPL's trial counsel.<sup>3</sup>

4. FPL objects to any production request that seeks the production of confidential proprietary business information and/or the compilation of information that is considered confidential proprietary business information.

5. FPL further objects to these production requests and any definitions or instructions that purport to expand FPL's obligations under applicable law.

6. FPL objects to any production request that requires the production of "all" or "each" as it cannot give assurances, even after a good faith and reasonably diligent attempt, that "all" or "each" responsive document will be found. Indeed, it may well be impossible to assure compliance with the exercise of reasonable diligence.

7. FPL incorporates by reference all of the foregoing general objections into each of its specific objections set forth below as though pleaded therein.

#### **Specific Objections**

8. FPL objects to Request No. 27 on the grounds that it improperly seeks production of materials used or generated by FPL's non-testifying experts that were not relied upon in formulating FPL's expert testimony. FPL also objects to this Request on the grounds that it seeks confidential, proprietary business information and materials protected by the work-product

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<sup>3</sup> FPL's expert testimony will not be based on any computer models, other than the Altos models and certain analyses of Altos modeling data. FPL will provide OGC at the time it files its testimony the Altos model runs and analyses relied upon by its testifying experts in formulating their testimony, along with the related model inputs and outputs. Unless and until such testimony is filed, it is the trial preparation material of non-testifying experts. This information is more than sufficient for OGC to critically evaluate the opinions of FPL's testifying experts.

doctrine and/or the attorney-client privilege. FPL will attempt to answer this Request to the extent possible with non-privileged, non-confidential materials.

9. FPL objects to this Request No. 28 on the grounds that it improperly seeks documents that relate to, mention, or reflect upon computer models runs that were not used in formulating FPL's expert testimony. FPL also objects to this Request on the grounds that it seeks confidential, proprietary business information and materials protected by the work-product doctrine and/or the attorney-client communications privilege. FPL will attempt to answer this Request to the extent possible with non-privileged, non-confidential materials.

10. FPL objects to this Request No. 29 on the grounds that it improperly seeks materials that relate to, mention, or reflect upon computer models runs prepared by FPL's non-testifying experts that were not used in formulating FPL's expert testimony. FPL also objects to this Request on the grounds that it seeks confidential, proprietary business information and materials protected by the work-product doctrine and/or the attorney-client communications privilege. FPL will attempt to answer this Request to the extent possible with non-privileged, non-confidential materials.

11. FPL objects to Request No. 30 on the grounds that it seeks materials protected by the work-product doctrine and/or the attorney-client communications privilege. FPL also objects to this Request on the grounds that it seeks confidential, proprietary business information. FPL will attempt to answer this Request to the extent possible with non-privileged, non-confidential materials.


12. FPL objects to Request No. 32(c) on the grounds that it seeks materials protected by the work-product doctrine and/or the attorney client communications privilege. FPL also

objects on the grounds that this Request seeks confidential, proprietary business information. FPL will attempt to answer this Request to the extent possible with non-privileged, non-confidential materials.

13. FPL objects to Request No. 32(e) on the grounds that it seeks confidential, proprietary business information and materials protected by the work-product doctrine and/or the attorney-client communications privilege. FPL also objects to this Request on the grounds that it seeks materials used or generated by FPL's non-testifying experts that were not used in formulating FPL's expert testimony. FPL will attempt to answer this Request to the extent possible with non-privileged, non-confidential materials.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP  
200 South Biscayne Boulevard, Suite 4000  
Miami, Florida 33131-2398  
Telephone (305) 577-7000  
Facsimile (305) 577-7001

By:   
John T. Butler, P.A.  
Gabriel E. Nieto

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of FPL's Objections to Okeechobee Generating Company's Second Request for Production of Documents (Nos. 27-32) was served by U.S. Mail or hand delivery (\*) this 21st day of February, 2000 to the following:

W. Cochran Keating, Esq. \*  
Legal Division  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Room 370  
Tallahassee, FL 32399-0850

Lee L. Willis, Esq.  
James D. Beasley, Esq.  
Ausley & McMullen  
P.O. Box 391  
Tallahassee, FL 32302

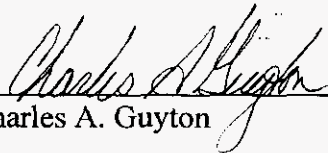
James A. McGee, Esq.  
Florida Power Corp.  
P.O. Box 14042  
St. Petersburg, FL 33733

Robert Scheffel Wright, Esq. \*  
John T. LaVia, III, Esq.  
Landers & Parsons, P.A.  
310 West College Avenue  
Tallahassee, FL 32301

Gary L. Sasso, Esq.  
Carlton Fields, et al.  
P.O. Box 2861  
St. Petersburg, FL 33733

Jon Moyle, Esq. \*  
Moyle, Flanigan, Katz, Kollins,  
Raymond & Sheehan, P.A.  
The Perkins House  
118 North Gadsden Street  
Tallahassee, FL 32301

Gail Kamaras, Esq.  
Debra Swim, Esq.  
LEAF  
1114 Thomasville Road, Suite E  
Tallahassee, FL 32303

  
\_\_\_\_\_  
Charles A. Guyton