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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-EPD  
FILED: MARCH 17, 2000  
RECORDS AND REPORTING

OKEECHOBEE GENERATING COMPANY'S RESPONSE  
TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO STRIKE  
CERTAIN STATEMENTS IN THE TESTIMONY OF SEAN J. FINNERTY  
AND CERTAIN STATEMENTS IN THE EXHIBITS TO  
OKEECHOBEE GENERATING COMPANY'S PETITION

Okeechobee Generating Company, L.L.C. (OGC), pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C.) hereby respectfully submits its response to Florida Power & Light Company's Motion to Strike Certain Statements in the Testimony of Sean J. Finnerty and Certain Statements in the Exhibits to Okeechobee Generating Company's Petition (FPL's Motion to Strike). As explained more fully herein, FPL's Motion to Strike should be denied because the subject portions of Mr. Finnerty's testimony and the Exhibits to the Petition do not constitute testimony beyond the expertise of the witness and are not prohibited opinion testimony. In support of its response, OGC says:

The Subject Portions of Sean J. Finnerty's  
Prefiled Testimony Do Not Constitute  
Testimony Beyond the Expertise of the Witness

1. On October 25, 1999, OGC filed with the Florida Public Service Commission (Commission) the testimony of Sean J. Finnerty. As described in his testimony, Mr. Finnerty has 8 years of experience in the electric power industry. Mr. Finnerty is the

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Project Manager for the Okeechobee Generating Project (the Project). In that capacity he is responsible for managing all aspects of the development of the Project, including, but not limited to, activities related to the engineering, procurement, and construction contract and coordination and oversight of efforts to secure all necessary regulatory and permit approvals for the Project. The purpose of Mr. Finnerty's testimony is to describe PG&E Generating and its business interests, the OGC Project, and the expected operations and availability of the Project, as well as the anticipated capital costs, financing structure and financial viability of the Project. Based on his experience and knowledge of this Project, Mr. Finnerty offers testimony regarding various factors that went into the development and structure of this Project (and that would affect the development and structure of any such project. He makes numerous statements about such things as regulatory and policy issues, cost-effectiveness of this merchant power plant within Florida's generation mix, and the reliability and environmental benefits of the Okeechobee Generating Project within Florida.

2. In its Motion to Strike, FPL argues that numerous portions of Mr. Finnerty's testimony should be stricken because he lacks the requisite expertise from which to make these statements. FPL is wrong--the subject portions of Mr. Finnerty's testimony do not represent inappropriate expert opinion. Rather, Mr. Finnerty, the Project Manager and the PG&E Manager for Project Development, offers the subject testimony to inform the Commission of his view of the scope, benefits and attributes of the Project. Moreover,

much of the subject testimony involves pure issues of fact or mixed issues of fact and informed opinion regarding the status of generating capacity in the State of Florida. OGC offers the following specific responses to FPL's Motion to Strike Mr. Finnerty's testimony:

a. FPL moves to strike a number of passages from Mr. Finnerty's testimony on the grounds that they constitute opinions and conclusions on issues of electric power planning, economics, and environmental science which Mr. Finnerty is not qualified to render based on a lack of expertise. In fact, FPL mischaracterizes the deposition testimony of Mr. Finnerty when it asserts that Mr. Finnerty has no expertise from which to make or sponsor the statements at issue. Mr. Finnerty is very clear that he has 8 years of experience in the electric industry; that he followed the Duke New Smyrna case closely and knows the factual findings of the Commission in that case; and that he is the Project Manager for the Project and, in that capacity, he is responsible for managing all aspects of the development of the Project, including, but not limited to, activities related to the engineering, procurement, and construction contract, and the coordination and oversight of efforts to secure all necessary regulatory and permit approvals for the Project. The purpose of his testimony is to describe PG&E Generating and its business interests, the Project, and the expected operations and availability of the Project, as well as the anticipated capital costs, financing structure and financial viability of the Project. Based on his experience and knowledge of this Project, Mr. Finnerty offers testimony regarding various

factors that went into the development and structure of this Project or any such project. The numerous statements he makes about such things as regulatory and policy issues, cost-effectiveness of this merchant power plant within Florida's generation mix, and the reliability and environmental benefits of the Okeechobee Project within Florida constitute a mix of fact testimony and inferences which Mr. Finnerty has drawn and opinions he has formed based on that fact testimony and his experience in the industry.

b. In the challenged passages, Mr. Finnerty simply makes factual statements concerning his understanding of the Project and the factors that went into the decision to develop the Project. Just because Mr. Finnerty or the person examining Mr. Finnerty in his deposition uses the word "opinion," does not magically transform his every statement into an expert opinion. FPL again mischaracterizes the deposition testimony when it asserts that Mr. Finnerty "by his own admission" is not qualified to render these "opinions." It is undisputed that Mr. Finnerty is not an expert in electric system planning and reliability or economics. However, FPL incorrectly states that Mr. Finnerty testified that he is "not testifying as an expert" in this proceeding. A review of the deposition testimony at pages 57 and 58 attached hereto makes it clear that Mr. Finnerty was simply acknowledging that he was not testifying as an expert in relationship to one particular statement

at page 7 of his pre-filed testimony. FPL's attempt to take this one statement wholly out of context should be rejected.

3. Mr. Finnerty's testimony speaks to factual and policy issues, not to specific issues solely within the purview of an expert. FPL relies on the wrong section of the Florida Evidence Code when it focuses on Section 90.702, Florida Statutes, and it misquotes the specific terms of that section. First, FPL asserts that Section 90.702 "requires that any person giving opinion testimony be qualified by 'knowledge, skill, experience, training or education' to make the proffered opinion." In fact, Section 90.702 says "If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion . . . ." (Emphasis supplied). Section 90.702 does not require that every time the word "opinion" is used, the witness must be qualified as an expert.

4. Even assuming for the sake of argument that Mr. Finnerty is not qualified by his experience and knowledge to make the statements FPL challenges, then Section 90.701, clearly authorizes the expression of opinions by lay witnesses. Pursuant to that section, a non-expert witness may testify in terms of inferences or opinions if the witness's use of inferences and opinions will not mislead the trier of fact to the prejudice of the objecting party.

It can hardly be argued that the Commission, as the trier of fact, would be misled by Mr. Finnerty's mixed fact and opinion statements. Mr. Finnerty is the project manager for the merchant plant in this proceeding. As such, Mr. Finnerty plays a crucial role in managing all aspects of the development of the Project. OGC submits that the subject testimony from Mr. Finnerty in his role as project manager will assist the Commission in determining the issues in this proceeding.

5. Procedurally, FPL's Motion to Strike is premature because it seeks to preclude the Commission from hearing Mr. Finnerty's testimony and any appropriate voir dire before deciding the weight it is to be given. FPL is attempting to challenge the competency of Mr. Finnerty to offer opinion testimony. A motion to Strike is not the appropriate vehicle for challenging a witness's competency. Rather, FPL should be made to conduct voir dire before the Commission so that the Commission, in its role as trier of fact, can determine the issues.

6. The Commission historically has not required strict adherence to express tendering of expert witnesses as a predicate to admitting their testimony. As succinctly stated in PSC-95-0576-FOF-SU:

Often in technical hearings before the Commission, party witnesses have particular expertise in their fields, as evidenced by their credentials contained in their prefiled testimony. . . .

In practice, these witnesses are often not formally tendered as expert witnesses at hearing. For example, at the hearing in this docket, neither [party's] technical witness was formally tendered as an expert.

As illustrated in that Order, the appropriate way to raise a question about the opinion testimony of a witness is to challenge the expertise at hearing or to voir dire the witness at hearing. It is not appropriate to take statements at deposition out of context as a justification to strike testimony before the trier of fact has an opportunity to weigh the expertise of the witness.

7. It is well settled that the Commission is not bound by the rules of evidence in conducting hearings. The rules of evidence are designed to assist a lay jury in its duties as the trier of fact. Where, as here, the trier of fact has substantial expertise in the subject matter at issue in the hearing, strict adherence to the rules of evidence is not necessary. Certainly strict adherence to the rules of evidence would be inappropriate when it serves to strike testimony before it even comes before the trier of fact. The common practice, and the appropriate disposition of FPL's Motion to Strike, is to allow the testimony to get to the Commission at hearing, to allow the Commission to consider appropriate objections prior to the admission of the testimony, and to allow the Commission, except in the most blatant circumstances, to admit the testimony and give it the weight it believes is due.

8. Most significantly, Mr. Finnerty's challenged statements are actually fact-based testimony with which FPL disagrees. However that disagreement is not a valid basis for striking the

subject passages. To grant FPL's Motion to Strike would be to improperly invade the province of the Commission to weigh the testimony in its function as trier of fact. For the foregoing reasons, FPL's Motion to Strike the seventeen statements of Mr. Finnerty in his prefiled testimony and portions of the Exhibits he sponsored should be denied.

The Subject Exhibit SJF-5 of Sean J. Finnerty's  
Prefiled Testimony Should Not Be Stricken

9. On October 25, 1999, OGC filed with the Commission the testimony of Sean J. Finnerty. As described in his testimony, Mr. Finnerty is the Project Manager for the Okeechobee Generating Project. One of the factors considered in the decision to seek a need determination for this Project was the acknowledged declining trend in Peninsular Florida's reserve margins. As Mr. Finnerty states on page 7, lines 8-15, of his prefiled testimony, Exhibit SJF-5 is a composite exhibit which is an excerpt from the Commission Staff's documents issued on September 16, 1999, as part of the Ten-Year Site Plan Workshop. Mr. Finnerty testifies that the documents (a) depict declining trends in Peninsular Florida's reserve margins and (b) project the large amount of firm load that would not be served should a Christmas 1989 low temperature event occur. This declining trend was one of the factors that supported the decision to develop the Okeechobee Project.

10. Specifically, the documents that comprise SJF-5 have a substantial history of having been before the Commission in other



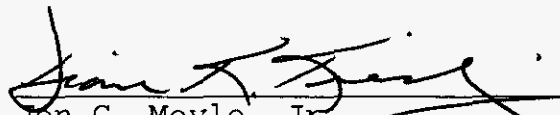
proceedings. The documents first were before the Commission as part of the direct testimony of Tom Ballinger, appearing on behalf of Staff, in Docket No. 981890-EU, Generic Investigation Into the Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida. That testimony and those exhibits were prefiled and were before the Commission as part of the record in that investigation prior to the resolution of that investigation by stipulation approved by the Commission. The same documents were again before the Commission in the 1999 Ten-Year Site Plan Workshop. Specifically, they were part of the Commission Staff's Document filed therein and distributed to the parties at the September 16, 1999 workshop. Additionally Staff relied on those documents and incorporated interpretive results of many of those documents in the staff comments found throughout the Review of Electric Utility 1999 Ten-Year Site Plans, Volume 1: Review and Analysis, filed December 1999.

11. FPL and the Peninsular Florida investor-owned utilities had an opportunity to rebut these documents in Docket No. 981890-EU. They filed extensive rebuttal testimony in this regard and this rebuttal was acknowledged in the Ten-Year Site Plan Review. The Commission implicitly considered these documents in issuing the Ten-Year Site Plan Review, and to suggest, as FPL has in its Motion to Strike, that the documents are untested opinion of an unknown Commission staff member is specious. While FPL may disagree with the Commission Staff about the adequacy of the reserve margins in Peninsular Florida, Mr. Finnerty's inclusion of these documents as an exhibit to his testimony is not inappropriate and should not be

stricken. Clearly Mr. Finnerty considered the declining trends in Peninsular Florida's reserve margins, as reflected in these Staff-produced documents. FPL can appropriately put on evidence to disprove the factual accuracy of these Staff documents in its case in chief, but it should not be able to strike the documents by the instant motion. The foundation for these documents is found in the Commission's own record in the above-referenced dockets.

WHEREFORE, OGC respectfully requests that the Commission deny FPL's Motion to Strike in its entirety.

Respectfully submitted this 17th day of March, 2000.



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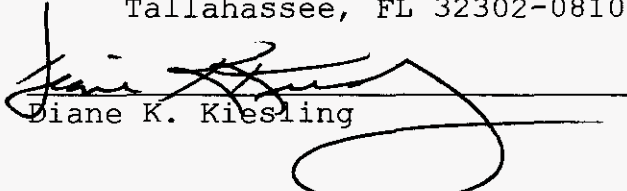
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1           A     Primarily it would be Dr. Nesbitt.

2           Q     I am going to follow up. Does that mean you  
3 sponsor it in part or does that mean Dr. Nesbitt  
4 sponsors the second paragraph?

5           A     Second paragraph would be a result of  
6 Dr. Nesbitt's analysis, so he would sponsor that.

7           Q     Okay. The first full paragraph on page 71,  
8 do you sponsor that?

9           A     That would be Dr. Nesbitt.

10          Q     You sponsor any of subsection C on page 71?

11          A     The first sentence, paragraph C.

12          Q     Anything else?

13          A     No, I do not.

14          Q     Okay. We have gone through the pages that  
15 you list. Are there any other pages of narrative in  
16 the petition exhibit that you don't list that you  
17 sponsor?

18          A     I don't believe so.

19          Q     Okay. When you state at page 7 of the  
20 petition exhibit that the project will contribute  
21 meaningfully to reliability of power supply system in  
22 the Peninsular Florida, that's not an expert opinion as  
23 a system planner; is it?

24          A     No, it's not.

25          Q     And when you say that the project will

1 contribute meaningfully to lower the cost of  
2 electricity generation, that's not an expert opinion as  
3 an economist?

4 A No, it's not.

5 Q Is it an expert opinion?

6 A It's not -- I am not testifying as an  
7 expert.

8 Q Mr. Finnerty, bear with me, I am trying to  
9 make sure now that I have established what you are  
10 sponsoring.

11 A Take your time.

12 Q At page 59 of the petition exhibit you have  
13 a sentence there that I understand you are sponsoring  
14 now that says: As a merchant plant, the project will  
15 provide power with no risk to Florida electric  
16 customers.

17 What do you mean by no risk to Florida  
18 electric customers?

19 A They will not be obligated to absorb any  
20 costs of this facility, nor will they be put at the  
21 risk that this plant will not be available when it is  
22 obligated or the power -- the operator of this project  
23 will not be available when it is committed to them.

24 Q Let's look at the first aspect of that lack  
25 of risk.