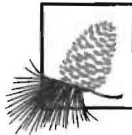


ERIC ASH  
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REPLY TO: TALLAHASSEE

September 4, 2001

Via Hand Delivery

Public Employees Relations Commission  
Records Clerk  
2549 Shumard Oak Boulevard  
Tallahassee, Florida 32399

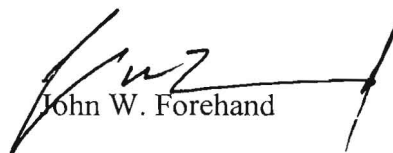
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COMMISSION  
CLERK

Re: *In Re: Territorial Dispute Between West Florida Electrical Cooperative Association, Inc. and Gulf Power Company in Washington County, Florida, Docket No. 010441-EU*

Dear Sir or Madam:

We represent Florida Gas Transmission Company ("FGT"), which is not a party to the above styled action, but has been served with a subpoena by West Florida Electrical Cooperative Association. Attached for filing are FGT's original Motion to Quash Subpoena or for Protective Order, Memorandum in Support of said Motion, and Motion for Expedited Consideration. Fifteen (15) copies are also provided as required. Should you have any questions regarding these filings, or this matter, please contact me.

Sincerely,

  
John W. Forehand

Motion to Quash = 109447-01  
Memorandum = 109448-0  
Motion for Expedited = 109449-0

Legal - 1 (each)  
Comm - 3 (each)  
SEC - 1 (each)

Done 9/13/01

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ORIGINAL

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Territorial Dispute Between  
West Florida Electrical Cooperative  
Association, Inc. and Gulf Power  
Company in Washington County,  
Florida.

Docket No.: 010441-EU

Date Filed: September 4, 2001

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**MEMORANDUM IN SUPPORT OF MOTION TO  
QUASH SUBPOENA OR FOR PROTECTIVE ORDER**

Florida Gas Transmission Company ("FGT"), files this Memorandum in Support of its contemporaneously filed Motion to Quash Subpoena or for Protective Order, and states:

Background

The Public Service Commission is authorized by Section 350.123, Florida Statutes, to issue subpoenas compelling the attendance of witnesses and the production of documents. That same statutory section provides that any challenge to, or action to enforce, a subpoena shall be handled as provided in Section 120.569, Florida Statutes. Section 120.569(k), Florida Statutes, provides that any person subject to a subpoena may request that the presiding officer having jurisdiction over the matter invalidate the subpoena on grounds that it "was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material."

In an administrative proceeding such as this one, the Uniform Rules of Procedure also provide the recipient of a subpoena with the opportunity to file a motion to quash or limit the subpoena. Fla. Admin. Code R. 28-106.212. The Florida Rules of Civil Procedure provide

additional authority for the recipient of a subpoena to seek protection from oppressive and unduly burdensome discovery requests. Fla. R. Civ. P. 1.280(c) & 1.410(e).

- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMP \_\_\_\_\_
- COM \_\_\_\_\_
- CTR \_\_\_\_\_
- ECR \_\_\_\_\_
- LEG \_\_\_\_\_
- OPC \_\_\_\_\_
- PAI \_\_\_\_\_
- RGO \_\_\_\_\_
- SEC \_\_\_\_\_
- SER \_\_\_\_\_
- OTH \_\_\_\_\_

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On August 27, 2001, FGT's registered agent was served with a Subpoena for Deposition Duces Tecum by West Florida Electrical Cooperative Association, Inc. ("WFEC"). WFEC is a party to the above styled proceeding, FGT is not. The Subpoena seeks to compel FGT to perform two acts: 1) to produce documents for inspection; and 2) to produce FGT officers, directors, managing partners, or other persons, to provide deposition testimony on FGT's behalf regarding certain topics.

No authority is cited for the requested document production. Rule 1.310(b)(6), Florida Rules of Civil Procedure, is cited as the basis for the requested designation of a corporate representative. FGT has filed a Motion to Quash Subpoena or for Protective Order and objects to the subpoena as being oppressive, unduly burdensome, unreasonably broad, seeking irrelevant information not reasonably calculated to lead to the discovery of admissible evidence, and issued without legal authority

### Argument

#### I. Document Request

Typically, a request for production of documents to a non-party such as is contained in the WFEC subpoena would be initiated through Rule 1.351 of the Florida Rules of Civil Procedure. *RBES, L.C. v. Santana*, 770 So. 2d 277 (Fla. 3<sup>rd</sup> DCA 2000). That rule provides for document production by non-parties without resort to setting the deposition of a records custodian. Only if another party or the recipient of the subpoena objects to the production request would a subpoena duces tecum requiring production at the deposition of a records custodian be employed. *Med Surge Discounters, Inc. v. 171000 Canada, Inc.*, 698 So. 2d 640 (Fla. 4<sup>th</sup> DCA 1997). It does not appear that WFEC made an attempt to comply with the provisions of Rule 1.351.

The basis for WFEC's decision to disregard Rule 1.351 may lie in the fact that the procedure outlined by that rule requires notice to all other parties of intent to serve a non-party with a records production subpoena at least ten (10) days prior to the date the subpoena is served. Given that the prehearing conference in this matter was held on August 30, 2001, and the matter is set for final hearing beginning September 19, 2001, it is likely that WFEC determined that there was not sufficient time to comply with the requirements of Rule 1.351. Indeed, rather than observing the ordinary thirty (30) day time period provided by the Florida Rules of Civil Procedure for responding to document production requests, *see* Fla. R. Civ. P. 1.350, WFEC served FGT with a subpoena that permits only eight working days to produce the requested documents.

The Subpoena seeks to compel FGT to produce the following documents by September 7, 2001:

All documents, correspondence, e-mails, memos, contracts, and all other data whether in writing or any electronic format, involving, connected with, or any way related to West Florida Electrical Cooperative Association, Inc., Gulf Power Company, Florida Gas Transmission, Inc., Gulf Power Company [sic] and Enron Compression Services Company, as those matters relate to Florida Gas Transmission's Station 13, and the new equipment and services to be provided at Station 13-A in Washington County, Florida, from 1995 to date, including, but not limited to, the providing of electric services, compression services, or any other service between and among WFEC, GPC, ECS, and FGT.

FGT objects to this portion of the subpoena on three grounds: 1) it is so vague as to place an undue burden on FGT to determine what documents are requested; 2) the limited time provided for response to the document request is oppressive and places an undue burden on FGT; and 3) it is so vague as to deprive FGT of the opportunity to identify and move to protect confidential documents

1. Vagueness

The request fails to specify which documents must be produced. Not only does the request not identify specific documents, it provides little to no guidance as to the category and type of documents that must be produced. Instead, the request places the burden on FGT to determine which documents in its possession involve, are connected with, or relate to, the subjects listed. In essence, WFEC seeks to require FGT to open a substantial portion of its corporate records for a “fishing expedition.” While WFEC might be permitted to “fish” in the records of an opposing party, or to require an opposing party to make a determination of what documents are relevant to the issues presented in the litigation, it is wholly unreasonable and oppressive to so burden a non-party.

2) Timeliness

Compliance with the WFEC’s document request would require an excessive number of employee hours to review FGT’s files with little to no guidance as to what documents are responsive to the request. FGT would then have to pull the responsive documents and prepare them for travel to the location designated for production. It is likely that the vast majority, if not all, of the documents WFEC seeks are maintained outside of the State of Florida and, arguably, beyond the jurisdiction of a Public Service Commission subpoena. *See Fla. R. Civ. P. 1.410(e) & (g).*

Given the breadth of the document request it is unlikely that FGT could complete the work required to comply with the subpoena even in the thirty (30) days ordinarily permitted for filing a response to document production requests. It would be impossible to comply with WFEC’s production request in the eight working days granted by the subpoena. Such an unreasonable time frame is oppressive and unduly burdensome.

3) Confidential Documents

The unlimited nature of WFEC's request undoubtedly seeks disclosure of documents containing confidential and trade secret information. It is true that the Public Service Commission has established a procedure for protecting such documents. Fla. Admin. Code R. 25-22.006(6). However, without some guidance as to the specific documents WFEC believes must be produced, it is impossible for FGT to identify those documents that need protection. As a result, FGT is deprived of its right to seek protection of documents requested by WFEC.

The abusive nature of the document request portion of the subpoena can be placed in perspective by outlining exactly what would be required to comply. In order to comply with the subpoena, FGT must, prior to September 7, 2001: a) determine, with no guidance from the subpoena, which documents WFEC seeks; b) review every document arguably within the scope of the subpoena to determine which documents may comply; c) determine which documents contain confidential or trade secret information; d) draft and file a Motion for Protective Order to protect those documents which contain confidential or trade secret information; and e) prepare those documents responsive to the subpoena for transport from out of state to the designated location.

To the extent that WFEC may argue that if the subpoena is quashed it will be unable to obtain the documents it actually does desire prior to the date of the final hearing, that, frankly, is its own doing. WFEC has waited until the eleventh hour to seek this production, ignored established rules for non-party document production, failed to communicate with FGT personnel or counsel to craft a reasonable request, and failed to state with any specificity the documents it actually seeks, choosing instead to ask FGT to produce virtually all of its corporate documents related to these compressor stations.

## II. Corporate Designation

The subpoena cites Rule 1.310(b)(6), Florida Rules of Civil Procedure, as authorization for WFEC's request that FGT designate a corporate representative to be deposed on the following topics:

[A]ll contracts, documents, transactions, and communications between and among Florida Gas Transmission Company, Gulf Power Company, Enron Compression Services Company, and West Florida Electric Cooperative Association, Inc. regarding or in anyway related to Florida Gas Transmission's Station 13 and the additional service and/or equipment identified by FGT as Station 13-A from 1995 to date.

FGT objects to this portion of the subpoena on three grounds: 1) the failure to specifically identify topics for the deposition places an undue burden on FGT to identify appropriate officers, directors, or employees for designation as corporate representatives; 2) there is no statute or rule authorizing WFEC to require FGT to designate corporate representatives for deposition; and 3) the failure to specifically identify topics for deposition deprives FGT of the opportunity to identify and move to protect information of a confidential nature that may be the subject of inquiry.

### 1. Vagueness

WFEC's request for designation of corporate representatives by FGT provides no guidance as to what specific topics WFEC wishes to explore in the proposed deposition. Rather, the unlimited designation of topics contained in the subpoena would require FGT to produce virtually every officer, director, or employee that has ever worked on the planning, implementation, or operation of Station 13 or Station 13-A. This is the very situation that Rule 1.310(b)(6) seeks to prevent by requiring the subpoena to "designate with reasonable particularity the matter on which examination is requested." Fla. R. Civ. P. 1.310(b)(6).

WFEC has failed to make such a designation. Rather, WFEC seeks to speak to one or more FGT representatives about every conceivable issue that may have arisen in relation to Stations 13 or 13-A, and FGT's dealings with a host of listed corporations. Placing this type of burden on a party opponent may be permissible, but is wholly unreasonable with respect to a non-party.

2. Lack of Authorization

Indeed, placing any burden on a non-party corporation to designate a corporate representative is not authorized by statute or rule. The rule relied upon by WFEC, Rule 1.310(b)(6), provides only that in a notice of deposition a party may require a corporate entity to designate a representative for the purposes of deposition testimony. *See Fla. R. Civ. P. 1.310(b)(6)*("In the notice a party may . . ."). The rule does not authorize the use of a subpoena to require a corporate non-party to designate a representative. This omission is critical, because while a party to a proceeding may be compelled to testify at a deposition solely through issuance of a notice, a subpoena is required to compel the testimony of a non-party. *Anderson Investments Co. LTD, v. Lynch*, 540 So. 2d 832, 833 (Fla. 4<sup>th</sup> DCA 1988)("[A] person who is not a party to a pending lawsuit must be served with a subpoena before being required to appear for deposition."). FGT is not a party to this proceeding and its officers, directors, and employees may only be compelled to testify at a deposition by subpoena.

At first glance the failure of Rule 1.310(b)(6) to specifically authorize the use of a subpoena to require designation of a corporate representative may appear immaterial. However, a review of the provisions of Rule 30(b)(6) of the Federal Rules of Civil Procedure, on which Florida's Rule 1.310(b)(6) is modeled, reveals the significance of this omission. Rule 30(b)(6) reads in part:



A party may *in the party's notice and in a subpoena* name as the deponent a public or private corporation . . . . In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf . . . . *A subpoena shall advise a non-party organization of its duty to make such a designation.* (emphasis added).

By its plain language the Federal Rule permits a party to subpoena a corporate non-party and require the non-party to designate a corporate representative for purposes of deposition. Florida's Rule 1.310(b)(6) is virtually identical to Federal Rule 30(b)(6), except that the first sentence of Rule 1.310(b)(6) omits any reference to subpoenas, reading: "In the *notice* a party may name as the deponent a public or private corporation . . ." (emphasis added), and Rule 1.310(b)(6) omits completely that sentence of Rule 30(b)(6) which specifically refers to subpoenas served on non-parties.

The clear implication from comparison of these two rules is that the drafters of Florida's Rule 1.310(b)(6) intentionally omitted any authorization for issuing a subpoena to a corporate non-party which requires the designation of a corporate representative for purposes of deposition testimony. There exists no other rule or statute authorizing such action.

Rather, in Florida, the appropriate procedure for seeking discovery from a corporate non-party is to request inspection of the corporation's records through Rule 1.351 of the Florida Rules of Civil Procedure, and then, using those documents or other appropriately obtained discovery information, to specifically identify those individuals employed by the corporation whose testimony may be necessary and subpoena those individuals directly pursuant to Rule 1.310 of the Florida Rules of Civil Procedure.

Rather than follow this procedure, at this late date WFEC seeks to compel the deposition testimony of non-parties not by direct subpoena, but by subpoena to a corporation for which they work or are officers or directors. The fact that WFEC undoubtedly desires to speak to

individuals connected with FGT that work and reside outside the State of Florida and are beyond the jurisdiction of a Public Service Commission subpoena must have played into the decision to attempt this end-run of established discovery procedures. There are, of course, procedures by which WFEC could have a subpoena issued by the Public Service Commission domesticated in the state in which the individuals it desires to depose reside. The domesticated subpoena could then be properly served on those individuals and they would be required to appear for a deposition and provide testimony, which in turn could be submitted in the final hearing of this matter. However, WFEC has waited until there is not enough time to complete that process. Instead, WFEC attempts to obtain jurisdiction over these non-parties by subpoenaing yet another non-party which is their employer. This is simply not an appropriate or permissible method of discovery. Absent the service of a subpoena on each FGT officer, director, or employee to be deposed, WFEC has no authority to command their presence at a deposition.

### 3. Confidential Information

Further, even if there were authorization for the corporate designation portion of the subpoena, WFEC may well seek to depose FGT personnel on topics that are confidential in nature and that would properly be made the subject of a motion for protective order. However, the vague and unlimited nature of WFEC's designation of topics renders it impossible for FGT to specifically identify what subjects may be addressed at the proposed deposition, and prevents FGT from filing the appropriate motion for protective order.

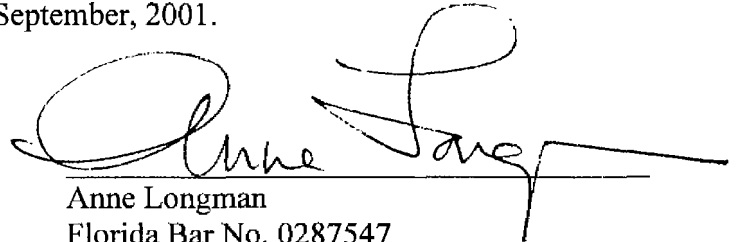
### III. Conclusion

The document request portion of the subpoena is vague, oppressive, clearly places an impermissible burden on FGT, seeks to permit a "fishing expedition" of FGT's corporate documents without any suggestion that relevant material may be obtained, and goes well beyond

the permissible scope of discovery to a non-party. The corporate designation portion of the subpoena is vague, oppressive, unduly burdensome, and unauthorized by statute or rule.

For the reasons stated above, the document request portion of the subpoena must be quashed, or a protective order entered prohibiting enforcement of the subpoena or requiring WFEC to state specifically which FGT documents it seeks to review, and the corporate designation portion of the subpoena must be quashed and WFEC required to serve a subpoena on each individual officer, director, or employee of FGT it seeks to depose.

Respectfully submitted this 4th day of September, 2001.



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Florida Bar No. 0287547  
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served via United States Mail and facsimile transmission to John H. Haswell, Chandler, Lang, Haswell & Cole, P.A., 211 N.E. 1<sup>st</sup> Street, Gainesville, Florida 32602, and Frank E. Bondurant, Post Office Box 854, Marianna, Florida 32447, this 4th day of September, 2001.

