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# CARLTON FIELDS

ATTORNEYS AT LAW

ONE PROGRESS PLAZA
200 CENTRAL AVENUE, SUITE 2300
ST. PETERSBURG, FLORIDA 33701-4352

MAILING ADDRESS:
P.O. BOX 2861, ST. PETERSBURG, FL 33731-2861
TEL (727) 821-7000 FAX (727) 822-3768

November 12, 2001

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

**VIA FEDERAL EXPRESS**

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light
Docket No: 000824-EI

Dear Ms. Bayo:

Florida Power Corporation ("FPC" or the "Company") is filing herewith are the original and fifteen (15) copies of Florida Power Corporation's Response to OPC's First Motion to Compel and disc.

We request you acknowledge receipt and filing of the above by stamping the additional copy of this letter and returning it to me in the self-addressed, stamped envelope provided.

If you or your Staff have any questions regarding this filing, please contact me at (727) 821-7000.

Very truly yours,

Gary L. Sasso

jc

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| **In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light** | Docket No. 000824-EI<br><br>Submitted for filing:<br>November 13, 2001 |

## RESPONSE TO OPC'S FIRST MOTION TO COMPEL

Florida Power Corporation ("FPC") responds to the Office of Public Counsel's "OPC") First Motion to Compel as follows:

### Background

OPC has served FPC with a number of requests for production of documents. OPC's first request was dated September 18, 2001. FPC responded to this first request on October 23, 2001, indicating that it would make an extensive production of documents, which it has done. FPC also raised a number of objections, largely as a protective matter, to make clear that FPC would oppose discovery outside the bounds of the issues in this case. The fact is, however, FPC has produced all discovery relevant to the issues raised in this case, including the issues framed by OPC in its motion to compel.

OPC makes much ado about the state rules governing discovery. But it is an article of faith in state and federal court litigation that the parties must exhaust informal efforts to resolve discovery disputes before filing a motion to compel. Had OPC explored the issues raised in its motion informally with FPC, OPC would have learned that it already has what it says it needs. To the extent OPC could identify any relevant information that we have not provided, FPC would have been glad to discuss the issue in

an attempt to reach a workable resolution without wasting the Commission's time and resources with unnecessary motions and arguments over discovery..

In this connection, OPC has now filed a motion to compel arguing that FPC has waived its privilege objections because FPC has "refused" to identify documents withheld on grounds of privilege, pointing to FPC's objections stating that FPC objects to any instructions by OPC that purport to expand the Company's obligations under the discovery rules. But had OPC simply requested that we identify such documents, we would have obliged, and in fact FPC has now provided OPC with that information.

OPC also moves that the Commission order FPC to produce documents in the "possession, custody or control of Florida Progress Corporation, Progress Energy, Inc., and Progress Energy Service Company, LLC." Needless to say, most of the documents in the possession of those entities have nothing to do with this rate case. FPC said in response to OPC's requests that FPC would produce documents held by these entities to the extent relevant to this rate case, and FPC has done so. The basis for OPC's motion is its perception that it has received a "dearth" of documents. But the quantity of available, relevant materials is not a proper basis for a motion to compel. The fact is, FPC has produced the responsive, relevant documents, and neither FPC nor the affiliated entities have further responsive documents relevant to issues in this rate case.

Finally, OPC requests that FPC be ordered to produce all documents responsive to requests #8 and #9, relating to the acquisition adjustment. Again, FPC has already produced the relevant documents. OPC simply misunderstands the basis of FPC's request for an acquisition adjustment in seeking a further production of documents. We cannot manufacture documents to satisfy OPC's request.

We now address each of these grounds in greater detail.

**1. FPC has not waived its claims of privilege**

OPC claims that FPC has waived any claims of privilege because FPC has "refused" to identify the documents it claims are privileged. OPC's motion is based on a false premise. FPC has not "refused" to identify documents withheld on grounds of privilege. All FPC did was object to OPC's "instructions" at the beginning of its document request to the extent that such instructions purported to expand FPC's obligations under the state discovery rules. FPC has never "refused" to adhere to those obligations. In fact, FPC expressly stated in its written responses that it would comply with the applicable rules of procedure.

Upon reviewing OPC's Motion to compel, counsel for FPC immediately provided the identification requested of the sole document withheld on grounds of attorney-client privilege and work product: namely, an internal analysis by the FPC legal department of decisions concerning acquisition adjustments in various jurisdictions. (See Exh. A, identifying this document.) Moreover, FPC had already produced to OPC the very decisions that FPC analyzed, which arguably went well beyond FPC's obligations in discovery. Ordinarily, opposing parties are expected to perform their own research. Thus, OPC's motion to compel was utterly unnecessary and could have been avoided by a good faith effort to resolve this so-called dispute before filing a motion to compel.

The fact that FPC did not provide this information at the time it raised its objections is of no moment. It is customary in litigation before the state courts and before this Commission for litigants to provide privilege logs after objections are made upon request, as FPC did in this case. In fact, a party often is not in a position even to

identify particular privileged documents at the time objections must be stated. FPC's outside and in-house counsel, who collectively have practiced before this Commission for over 20 years, can recall no instance in any electric utility proceeding where a party was accused of waiving the attorney-client privilege because a privilege log, or similar identification of privileged documents, was not provided contemporaneously with objections. And our research has identified no such instance. In fact, in most proceedings, the parties dispense completely with the formality of exchanging such information.

Citizens' reliance on TIG Insurance Corp. of America v. Johnson, 26 Fla. L. Weekly D2493 (Fla. 4th DCA October 26, 2001) is misplaced. In that case, the party asserting a privilege had actually and persistently refused to identify the documents it claimed were exempt from disclosure for over a year and had never indicated any willingness to identify those documents at any time. The appellate court found that the trial court had not departed from the essential requirements of law, under those specific facts, by compelling production of the disputed documents. In the present case, FPC has in fact identified the single document it claimed was privileged shortly after serving its response to OPC's request to produce.

Further, it is well established that a "waiver of the attorney-client privilege and work-produce privileges is not favored in Florida." TIG Ins. Corp. of America, 2000 WL 1230805 (citing Liberty Mut. Ins. Co. v. Lease Am., Inc., 735 So. 2d 560, 562 (Fla. 4th DCA 1999)). In fact, in Eastern Air Lines, Inc. v. United States Aviation Underwriters, 716 So. 2d 340 (Fla. 3rd DCA 1998), the court refused to find a waiver of privilege even though Eastern had been "recalcitrant" in providing discovery and a privilege log.

Because Eastern had not violated any court order and had produced a revised privileged log a week before a hearing on a motion to compel, the court found that ordering production of the documents was an unduly harsh discovery sanction. Likewise, there is no proper basis to find a waiver in this case.

**2. FPC should not be required to produce additional documents from affiliates**

In seeking an order to compel FPC to produce responsive documents from affiliated companies, OPC argues that these entities have documents relevant to issues in this rate case because FPC has put into issue an acquisition adjustment and certain allocated costs. (OPC mischaracterizes the nature of the acquisition adjustment FPC requests by calling it an effort to recover expenditures for "goodwill" and to obtain a rate increase. OPC is wrong in both respects, but we need not digress into a discussion on the merits to address OPC's request for discovery.) The fact is, FPC represented in its response to OPC's request for production of documents that it would produce documents from affiliated companies to the extent relevant to the issues in this rate case, and FPC has done just that. So OPC's argument proves nothing except that the Commission should order FPC to produce what it has already provided.

The real basis for OPC's argument is that it has received a "dearth" of documents. But one person's dearth is another person's avalanche, and from FPC's perspective we have produced a great deal of relevant information relating to both the acquisition adjustment and the allocation of costs. Perhaps if OPC conducted an informal discussion with counsel for FPC to identify more precisely what OPC thinks it needs but does not have, the parties could come to some understanding. Instead, OPC has launched its motion to compel, demanding in the abstract what FPC believes it has already produced

or is in the process of producing in response to subsequent requests and what it is in the process of supplementing through additional testimony and exhibits on November 15.

FPC certainly does object to OPC's requests to the extent that OPC is seeking discovery that ranges far beyond the issues in this case. See e.g., Allstate Ins. Co. v. Langston, 655 So. 2d 91, 93 (Fla. 1995) ("Discovery in civil cases must be relevant to the subject matter of the case . . . ."). While OPC makes limited arguments in support of its motion to compel, some of its actual discovery requests range far beyond the rationale OPC advances in its motion. Thus, FPC should not be forced to respond when OPC can offer nothing more than generalized justifications for its requests. See Calderbank v. Cazares, 435 So. 2d 377, 378 (Fla. 5th DCA 1983) (stating that if a logical connection between the information sought and evidence possibly relevant to the case is "not readily apparent, the questioner should make it apparent by pointing out to the court his reasoning processes based upon facts and inferences"; otherwise discovery should be denied). See also Edward J. DeBartolo Corp. v. Petrin, 497 So. 2d 936, 937-38 (Fla. 5th DCA 1986) (quashing overly broad discovery requests).

For example, in its third request, OPC asks that Florida Progress Corporation, Progress Energy, and Progress Energy Service, produce documents showing "variances between actual and projected expenses, revenues, or income during the years 2000 and 2001." These documents could not possibly shed light on what synergies were generated by the merger, or how Progress Energy's service company allocates costs to FPC. FPC has provided and will continue to provide (notably through testimony and exhibits to be filed November 15) ample information about costs and benefits of the merger and the allocation of costs for which recovery is sought in this proceeding. OPC's requests

range far beyond the issues in this case, however, and OPC has simply not met its burden of demonstrating that all of its requests are permissible and reasonable. They are most certainly neither.

Finally, requiring FPC to produce such documents would impose an undue burden on the Company and divert it from pursuing more important, pertinent efforts that advance the goals of this rate case, given the schedule that the Commission has mandated and the volume of requests served by OPC. This is an unusual rate case; FPC did not choose the time to initiate the case by filing a petition and testimony. Rather, the Commission directed the Company to file MFRs and testimony and set a strict and ambitious timeline for the Company to prepare its remaining submissions. In the face of an already difficult task of meeting the Commission's deadlines, FPC has diligently responded to OPC's numerous document requests, each asking for broad categories of documents. To require FPC now to coordinate a search for documents of affiliated companies when those documents are not even relevant to the issues in this rate case would put an unreasonable burden upon FPC and those affiliated companies and would not result in the discovery of documents actually useful to OPC or the Commission in deciding the issues in this case.

**3. FPC should not be compelled to respond further to requests #8 and #9**

As we have described, FPC most certainly does not object to providing information related to the allocation and realization of the merger savings. In actuality, FPC has already produced the documents responding to these requests. What FPC objects to providing is irrelevant information relating to cost savings for non-regulated entities or Carolina Power & Light Company ("CP&L"), an entity not regulated by this

Commission. It is important to understand that what cost savings, if any, these companies may experience due to the merger have not been factored into the cost savings for which recovery is sought in these proceedings.

We have very specifically identified the amount of synergies that FPC is expected to achieve as a result of the merger. It should be understood that the projected total synergy figure amounts to a stretch goal established by Progress Energy, based on the fairness opinions rendered during the merger and published to shareholders in publicly disseminated and filed documents (available to OPC). To be conservative, FPC has assumed that this goal can and will be achieved and has based its proposed acquisition adjustment on its commitment to achieving its share of these synergies. (If FPC fails to do so, under its proposal the Company will not, to that extent, be able to recover acquisition costs. So the Company is bearing the risk that the target is too aggressive.)

To the extent that these projected synergies consist of cost reductions made possible by the merger, these are documented by confidential "60-day reports," which FPC has already shared with Commission Staff and which FPC is freely producing in discovery in this case. These reports specifically produced in response to document request item 4 satisfy items 8 and 9 of OPC's requests. Progress Energy has projected that these costs savings will be shared half and half between the two, roughly comparable utilities, and FPC has prepared its budget with this target in mind. It will thus be incumbent upon FPC to achieve that level of cost savings in actual operation. The analysis is as fundamental as that, and OPC should not expect to see box loads of documents discussing it. FPC is producing its budgets and budget testimony, and it has prepared and filed extensive MFRs representing its most detailed analysis of its financial

profile. We cannot manufacture other analyses to satisfy OPC's appetite for more extensive materials. See Scales v. Swill, 715 So. 2d 1059, 1060-61 (Fla. 5th DCA 1998) (stating that discovery requests cannot be used to compel the production of nonexistent documents); Balzebre v. Anderson, 294 So. 2d 701, 702 (Fla. 3d DCA 1974) (order compelling response to request to produce was "too broad in that a party may not be required to produce documents which it does not have and which are not shown to exist").

To the extent that total projected synergies from the merger consist of expected revenue enhancement resulting from the merger, again these synergies are also financial targets or aspirations established by Progress Energy and assigned to unregulated businesses (relating, e.g., to merchant development). These synergies are unrelated to this proceeding: FPC has not asked for recognition of them in proposing its acquisition adjustment. Instead, the Company has netted synergy savings allocated to FPC against acquisition costs allocated to FPC. In any event, there is no backup documentation for these revenue projections other than the fairness opinions incorporated in public reports issued in connection with the merger, and corroborated in this case by the 60 day reports and Dr. Cicchetti's analysis, which have been provided to OPC.

Given the recent economic downturn, FPC is at some risk that it will not achieve the synergy targets established at the inception of the merger. But FPC has worked them into its budgets that the Company is discussing and providing in this case. And the Company will assume the risk that its synergy targets may be set too high. (Based on the aforementioned 60 day reports, however, and staffing reductions to date, FPC has been on track to achieve projected cost savings.)

## Conclusion

In sum, OPC has been given massive amounts of information in the form of the MFRs, testimony, and exhibits FPC is filing and has filed in this case and in the form of documents and interrogatory answers provided in response to OPC's extensive discovery requests. While FPC has made formal objections in an abundance of caution, to protect against discovery demands that may be calculated to extend far beyond the issues in this rate case, the fact is FPC has been forthcoming with all materials that OPC actually can articulate a rationale to receive in its motion to compel. To the extent OPC faults FPC for not providing even more information, OPC's criticisms are misplaced.

Accordingly, OPC's motion to compel should be denied, and OPC should be directed to attempt to work with FPC informally in the future to determine whether requested materials exist and to attempt to reach an understanding about the production of such materials.

Respectfully submitted,

James A. McGee
FLORIDA POWER CORPORATION
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (727) 820-5184
Facsimile: (727) 820-5519

Gary L. Sasso
James Michael Walls
Jill H. Bowman
W. Douglas Hall
CARLTON FIELDS, P. A.
Post Office Box 2861
St. Petersburg, FL 33731
Telephone: (727) 821-7000
Facsimile: (727) 822-3768
Attorneys for Florida Power Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of foregoing has been furnished via U.S. Mail to the following this 13th day of November, 2001.

Mary Anne Helton, Esquire **
Adrienne Vining, Esquire
Bureau Chief, Electric and Gas
Division of Legal Services
Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
Phone: (850) 413-6096
Fax: (850) 413-6250
Email: mhelton@psc.state.fl.us

Jack Shreve, Esquire
Public Counsel
John Roger Howe, Esquire
Charles J. Beck, Esquire
Deputy Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison St., Room 812
Tallahassee, FL 32399-1400
Phone: (850) 488-9330
Attorneys for the Citizens of the State of Florida

Daniel E. Frank
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2415
Telephone: (202) 383-0838
Counsel for Walt Disney World Co.

Russell S. Kent, Esq.
Sutherland Asbill & Brennan LLP
2282 Killearn Center Blvd.
Tallahassee, FL 32308-3561
Telephone: (850) 894-0015
Counsel for Walt Disney World Co.

Thomas A. Cloud, Esq.
Gray, Harris & Robinson, P.A.
301 East Pine Street, Ste. 1400
P.O. Box 3068
Orlando, FL 32801
Phone: (407) 244-5624
Fax: (407) 244-5690
Attorneys for Publix Super Markets, Inc.

Attorney