

**ORIGINAL**

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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  
Filed November 27, 2001

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COMMISSION CLERK

**FLORIDA POWER CORPORATION'S RESPONSE  
TO CITIZENS' SECOND MOTION TO COMPEL**

Florida Power Corporation ("Florida Power" or the "Company") opposes Public Counsel's ("OPC") second motion to compel relating to its Fifth Set of Interrogatories numbers 103 and 104 and its request to strike certain general objections made to OPC's Sixth Request for Production of Documents as follows:

Florida Power's responses to OPC's Fifth Set of Interrogatories and Sixth Request for Production of Documents are not due until December 6, 2001. However, in accord with the Commission's order governing procedure in this proceeding Florida Power filed objections to this discovery within the required time-frame. Thus, OPC's motion (made at this point in time) is necessarily made in a vacuum and addresses only Florida Power's objections – not the adequacy of its intended responses.

Specifically, OPC has moved to compel Florida Power to provide responses to OPC interrogatories number 103 and 104. OPC has also improperly moved to strike certain general objections made by Florida Power in connection with its Sixth Request for Production of Documents. As demonstrated in detail below, OPC's motion as to each of these items should be denied.

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Interrogatory number 103

OPC has moved to compel Florida Power to respond to interrogatory number 103, which states as follows:

103. For Florida Power Corporation provide a schedule for each month of the years 2000, 2001, and 2002 showing the total number of employees, separately showing the employee counts by management and non-management. In addition, show the salary amounts for the management and non-management groupings. Please also indicate for each grouping the dollar amount of salary that was or will be capitalized. Please use actual numbers where available; otherwise please use your most recent forecast data. Please also show the forecasted data for 2003, but for 2003 please only provide data for the year in total rather than on a month by month basis.

In making its objections only, FPC indicated in relevant part as follows:

FPC objects to this interrogatory as unduly burdensome to the extent it requests FPC to develop categorical information not currently utilized by FPC. Specifically, FPC does not have information responsive to this interrogatory for “management and non-management groupings.”

Florida Power’s objection in this regard is perfectly appropriate and most certainly not the proper basis of a motion to compel. Florida Power has not refused to provide the requested information entirely. Florida Power has simply objected to preparing information in a format not used by Florida Power in the normal course of business. In responding to interrogatories, Florida Power is only required to provide information in the hands of the Company not to create information it doesn’t otherwise track or keep as a usual business practice.

Moreover, if OPC had waited for Florida Power’s response it would have learned that OPC already has all of the historical information (in the format it is kept in by Florida Power) it is requesting in the confidential monthly operating reports delivered to OPC several weeks ago. In addition, OPC would have learned that Florida Power

intended to provide its 2002 forecast information in the form and manner in which that information exists – which is all that Florida Power can be required to do. Florida Power does not have this information for 2003. Indeed, it would be unduly burdensome to require Florida Power to develop information in a format other than the format in which it is maintained or develop information that Florida Power does not have. Specifically, someone would have to go employee by employee and break out this information on a managerial, non-managerial basis.

Thus, OPC's motion to compel Florida Power to respond to interrogatory number 103 was, at best, premature and based on the foregoing should certainly be denied.

Interrogatory number 104

OPC has moved to compel Florida Power to respond to interrogatory number 104 which states as follows:

104 For Progress Energy, Inc. and each of its subsidiaries or affiliates (excluding Florida Power Corporation) provide a schedule showing for each month of the years 2000, 2001, and 2002 the total number of employees, the related total salary amounts and dollar amount of the salary that was or will be capitalized. Please also provide this data for the year 2003.

In response, Florida Power objected as follows:

FPC objects to this request as irrelevant, immaterial, and not reasonably calculated to lead to the discovery of admissible evidence.

Florida Power is correct and OPC's motion to compel on this item should be denied as well.

Florida Power should not be required to gather the requested affiliate employee and salary information. The only information relevant to this proceeding is the allocation

(if any) of employees or salary by other companies to Florida Power that is included in Florida Power's test year forecast. Florida Power has provided detailed information concerning these allocations and the methodology used for determining it.

As its rationale for requesting this information, OPC claims that the "test year contains a host of charges from such affiliates" and that if "such affiliates" expect to undergo changes "in the levels of employees during the test year, then the charges included in the test year may not reflect a reasonable level of charges on a going forward basis." OPC is just plain wrong. Evidently, OPC has a fundamental misunderstanding of how allocations contained in the 2002 test year were derived.

Apart from Progress Energy Services, the employee and salary allocations to Florida Power coming from other affiliates is related directly to a service being provided by a person or persons employed by that affiliate. Regardless of the expected or unexpected changes in total employee head-count in these companies, Florida Power will continue to require these services and the services will continue to be provided by an employee or employees of the other company. The only question for this proceeding is whether the cost of those services are reasonable. This evaluation is no different than if Florida Power hired some third-party consultant to perform services for the Company (such as operate a particular power plant). OPC certainly would not be asking for the employee headcount and salary figures for the consulting company, because it would not be probative of anything. The same is true here.

In short, this information is, at best, probative of nothing and may even be misleading, thus, Florida Power should not be required to provide it.

In connection with the service company, Florida Power actually has provided and intends to continue to provide this information. Thus, OPC's motion to compel a response to interrogatory number 104 should be denied.

### General Objections

OPC's motion to compel also contains an improper request that the Commission strike (without basis or necessity) several general objections made by Florida Power to its Sixth Request for Production of Documents. However, OPC has not specifically asked the Commission to compel the production of any document or documents as a result of "striking" Florida Power's objections. Rather, OPC asks the Commission to strike general objections in the abstract, failing to even indicate which (if any) requests OPC feels the objections impact. Such a request is not permissible under the rules governing discovery in this matter.

The Florida Rules of Civil Procedure do not contemplate the striking of objections to discovery requests. To the contrary, a motion to strike is only permitted to be directed at pleadings. Specifically, Rule 1.140(f) states that "[a] party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time. (emphasis added) And, Rule 1.150 provides for a motion to strike a sham pleading. Rule 1.100(a) specifically and narrowly defines pleadings as follows:

**(a) Pleadings.** There shall be a complaint or, when so designated by a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a crossclaim if the answer contains a crossclaim; a third-party complaint if a person who is not an original party is summoned as a third-party defendant; and a third-party answer if a third-party complaint is served. If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it,

the opposing party shall file a reply containing the avoidance. No other pleadings shall be allowed. (emphasis added).

Thus, there is no authority for the striking of objections to discovery requests and OPC's request should be denied on this basis alone.

The appropriate course of action, of course, is for OPC to move to compel documents (if any) being withheld as it has done before. As explained above, however, OPC has not even requested that documents be compelled in connection with its motion. Moreover, Florida Power has not even objected to the individual document requests (numbers 101-107) and intends to respond to each of them on December 6, 2001. Thus, there is nothing to compel, and (although Florida Power's general objections are both necessary and appropriate as explained below) these matters are not ripe for the Commission's consideration in this context.

Finally, Florida Power's general objections are both necessary and appropriate to preserve Florida Power's rights and clarify its obligation under existing law and the rules and orders governing discovery in this proceeding. Indeed, OPC created the need for the very objections it complains about by setting forth lengthy instructions and definitions that are either unnecessary (because they simply ask Florida Power to comply with discovery obligations already imposed by law), or objectionable (because they purport to expand Florida Power's obligations). Not knowing how OPC's instructions and definitions might be interpreted, Florida Power had no choice but to frame appropriate objections. These objections are made "only to the extent that" the instructions and definitions purport to expand Florida Power's obligations under applicable law and the rules governing procedure. Moreover, Florida Power's objections also contain direct

statements that Florida Power will comply with the rules. Florida Power should not be required to do more and OPC's request in this regard should be denied.

Finally, OPC complains about Florida Power's objection to the definition of Florida Power contained in the definitions and instruction. In this connection, Florida Power has simply objected to being defined as something greater than Florida Power. Realizing, however, that certain issues arising out of the merger make the documents of Progress Energy, Florida Progress and Progress Energy Service Company, relevant, Florida Power has offered to and indeed has provided such documents gratuitously. If OPC later determines that a particular request calls for documents from these other entities, and FPC does not produce them, then OPC can move to compel them. However, the Commission should not pre-judge this issue.

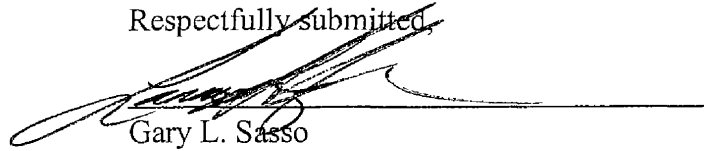
Certainly even OPC would have to admit that not every request calls for documents from these other entities even though they have repeated this broad definition in connection with each and every request. As such, striking the objection is neither a permissible or appropriate solution. Moreover, OPC suggestion that Florida Power has not identified documents to be withheld on this basis misses the mark. Florida Power is not obligated to identify or produce documents in the hands of other companies. To the extent the Commission determines otherwise, this determination should be made on a request by request basis after Florida Power's production is actually made.

Similarly, Florida Power has objected to and is not producing any third party's documents (such as the work papers of outside auditors or accountants), nor is it obligated to do so. Indeed, Florida Power has no ability to obtain these documents of third parties except through legal process. It is just as easy for OPC to subpoena them as

it is for Florida Power to do so. Clearly, Florida Power's general objection in this regard is appropriate and any suggestion that Florida Power has to identify documents not in its custody, possession, or control is baseless.

For all these reasons, Florida Power's general objections are both necessary and appropriate and should not be struck as requested by OPC.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of foregoing has been furnished via hand delivery (where indicated by \*) and via U.S. Mail to the following this <sup>27<sup>th</sup></sup>~~19<sup>th</sup>~~ day of November, 2001.

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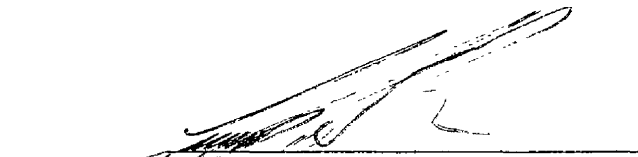
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