

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 January 9, 2002

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FLORIDA POWER CORPORATION'S EXPEDITED MOTION TO COMPEL CITIZENS TO PRODUCE DOCUMENTS IN TALLAHASSEE ON DUE DATE OR ALTERNATIVELY FLORIDA POWER'S MOTION FOR EXTENTION OF TIME FOR FLORIDA POWER TO FILE REBUTTAL TESTIMONY

Florida Power Corporation ("Florida Power" or the "Company"), pursuant to Rule 28-106.206 of the Florida Administrative Code (F.A.C.) and Florida Rule of Civil Procedure 1.380, moves to compel Florida's Citizens ("Citizens") to respond to Florida Power's First Set of Interrogatories and First Request for Production of Documents, or alternatively moves for an extension of time to file rebuttal testimony up to and through February 11, 2002. In addition, Florida Power is requesting expedited treatment of this motion to the extent possible such that the requested due date can be met with as much notice as possible to the parties. In support of its motion, Florida Power states:

- 1. On December 18, 2001, Florida Power served Citizens with its First Set of Interrogatories (Nos. 1-2) and First Request for Production of Documents (Nos. 1-9), indicating as a part of the discovery itself, that the requests are "aimed at discovering information about those proposed experts, consultants and/or witnesses who intend to offer testimony on behalf of Citizens on the date Citizens are required to serve intervenor testimony as established by the Commission in this case on or about January 18, 2002."

APP CAF CMP CTR ECR LEG OPC PAI RGO SEC SER OTH

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DOCUMENT NUMBER-DATE 00310 JAN-98

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Florida Power further requested that if the date for filing intervenor testimony should be altered for any reason, then Citizens still respond to Florida Power's discovery requests on the date the intervenor's testimony was due. For Citizens, that date is January 22, 2002 pursuant to the Commission's January 7, 2002 Order.

2. On December 28, 2001, Citizens filed written objections to portions of these two discovery requests. In particular, Citizens made two objections to Florida Power's discovery requests that give Florida Power great cause for concern and necessitate this motion. First, Citizens objected to Florida Power's discovery requests to the extent they requested documents or information that did not exist on the date the discovery requests were served.¹ Second, Citizens objected to interrogatory 2(h) and request for production number 9 to the extent they request documents or information about documents not relied upon or not referred to by a witness. Florida Power addresses each of these objections in turn and requests that they be overruled and that Citizens be compelled to provide complete responses to discovery simultaneously with the filing of Citizens' testimony on January 22, 2002.

Citizens should be Required to Produce the Requested Discovery on the Due Date

3. Citizens should be compelled to provide complete responses to FPC's discovery requests in Tallahassee on January 22, 2002. The discovery served by Florida Power is essentially expert or witness discovery. In connection with these requests, Florida Power is simply trying to obtain certain background information, prior testimony,

¹ Florida Power notes that Staff's objections to Florida Power's nearly identical requests to Staff contain this same objection. However, following conversations between Staff counsel and FPC's counsel, Staff has agreed to recede from this position and agrees that it is appropriate (subject to the remainder of its objections) for Staff to provide responses to Florida Power's discovery simultaneously with the filing of its testimony.

exhibit back-up materials, work papers and other items relating to Citizen's witnesses testimony simultaneously with the filing of the testimony. Although, Florida Power would certainly have preferred to review Citizens' testimony and then serve more direct interrogatories and production requests, the Commission's schedule for this proceeding does not afford Florida Power this luxury.

4. Recognizing this fact, Florida Power served its discovery requests far enough in advance of the intervenor testimony filing deadline so that it would have some opportunity to discover the underlying basis for that testimony prior to having to file its own rebuttal testimony. If Citizens is permitted any additional time to serve a complete response to Florida Power's discovery requests, then Florida Power's 13 days (from January 23, 2002 to February 4, 2002) will be reduced even further, seriously compromising its ability to adequately prepare its own rebuttal testimony. The amount of time under the original schedule already imposed a hardship on Florida Power to file rebuttal testimony; reducing the time available even further will amount to nothing less than a deprivation of Florida Power's due process right to a meaningful opportunity to be heard by having adequate time to prepare for the hearing in this matter. See Duval County School Board v. Armstrong, 336 So. 2d 1219, 1220 (Fla. 1st DCA 1976) (stating that teacher in disciplinary proceeding would "[u]nquestionably would be deprived of due process of law if he should be forced abruptly into a hearing without adequate opportunity to inspect the documentary evidence, interview witnesses or otherwise adequately prepare."). Due process requires that either Citizens be required to respond to Florida Power's discovery requests at the same time Citizens' file testimony on the January 22, 2002; or, alternatively, if Citizens is permitted to respond later, then

fundamental fairness dictates that Florida Power be given a similar extension of time within which to file its rebuttal testimony. See Department of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla. 1991) (stating due process clause “contemplates that the defendant shall be given fair notice [] and afforded a real opportunity to be heard and defend [] in an orderly procedure. . . .”) (quoting State ex. rel. Gore v. Chillingworth, 171 So. 653, 654 (Fla. 1936)).

Citizens’ Objection to Producing Documents created by its Witnesses and Experts

5. Citizens' objection to producing documents to Florida Power not existing on the date the discovery requests were served is completely without merit and is based upon an unsupportable reading of the rules of Civil Procedure. To begin with, Florida Power served its discovery requests seeking documents and information concerning Citizens’ intervenor testimony prior to the intervenor testimony being filed because Florida Power was left with no choice but to do so given the expedited schedule in this case. Obviously, some documents and information concerning intervenor testimony would not be in existence prior to the intervenor testimony being created, but Florida Power’s request put Citizens on notice that it would need to be compiling those documents and information relevant to Florida Power’s requests as it was preparing its intervenor testimony. As explained above, Florida Power had no other choice but to follow the procedure that it did, given the short period of time between the due dates for intervenor testimony and rebuttal testimony.

6. Moreover, the rules governing discovery in this proceeding inherently support Florida Power’s position that Citizens’ are required to produce all information and documents in existence on the due date as reflected in its rule concerning

supplementing discovery responses. Specifically, rule 1.280 of the Florida Rules of Civil Procedure requires Citizens to produce all documents and information responsive to Florida Power's request in existence **at the time the response is made (i.e. due)**. That is, under Rule 1.280(e), Citizens would have the obligation to supplement its responses if its responses were not complete when made. See Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981). This rule would not read as it does if Citizens interpretation of the rule were true. Furthermore, Citizen's reading of the rule is illogical because it would create a perpetual window of time within which a party could hide otherwise discoverable documents and information. Those documents created in the period between when a request was served and the response was due would always be out of reach of the requesting party. A follow-up request could capture those documents, but then could not capture any documents created in the interim between that follow-up request and the response. This could continue ad infinitum, something clearly not intended by the civil rules of procedure. Accordingly, Citizens should be compelled to produce all documents or information responsive to Florida Power's requests that are in existence as of the time Citizens serves its responses -- responses that should be filed simultaneously with the filing of its testimony.

6. After Florida Power pointed out to Citizens the difficult time constraints Florida Power faced in this case, Citizens' counsel offered to provide the responsive documents and information no later than exactly one week following Citizens' filing of its testimony. However, this concession offered by Citizens is simply inadequate given that under the current schedule Florida Power has only 13 days (including intervening weekends) to:

- a. Review the testimony and exhibits filed by Citizen's witnesses (and any other intervenor);
- b. Review the documents and interrogatory responses that are the subject of this motion relating to that testimony;
- c. Take any necessary depositions; and,
- d. Prepare and file any rebuttal testimony.

In short, Citizens would propose that Florida Power complete all of the above in six (6) days (again, including the intervening weekend), something that is unreasonable to expect Florida Power to do, if even possible.

7. As such, Citizens' objection should be overruled and Citizens should be compelled to serve complete responses to Florida Power's discovery simultaneously with the filing of its testimony on the due date. The only alternative is to grant Florida Power an extension of time to serve rebuttal testimony, which Florida Power seeks here only as an alternative solution.

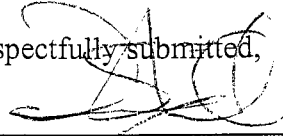
8. In addition, Florida Power has some concern about Citizens objection to providing documents responsive to Florida Power's interrogatory 2(h) and request number 9 seeking the identification and production of documents or other information reviewed by Citizens' witnesses in the preparation of their testimony, whether or not they refer to it or rely on it specifically. Florida Power is entitled to know what Citizens' witnesses reviewed, including but not limited to Florida Power's documents provided to the witness by Citizens' counsel, or any other data, information or documents specifically reviewed by the witnesses in preparing his/her testimony whether or not it was ultimately used or relied upon. Of course, it is not necessary for Citizens to provide copyrighted texts – Florida Power only asks that these items be simply identified.

9. Finally, to the extent possible Florida Power seeks expedited treatment of this motion and requests that the pre-hearing officer consider this motion in time to require Citizens (if at all) to meet the requested deadline of January 22, 2002. In making this request, Florida Power notes that Citizens own request for expedited discovery in this proceeding was considered and granted by the Commission without waiting for Florida Power's response or the running of the response period.

WHEREFORE, Florida Power requests that the Commission enter an order as follows:

- a. compelling Citizens to serve simultaneously with its testimony complete responses to Florida Power's discovery through the date for the filing of Citizens' testimony, January 22, 2002;
- b. (or, alternatively granting Florida Power and extension of time to file its rebuttal testimony coextensive with the time period Citizens have to provide the requested discovery);
- c. compelling Citizens to fully respond to Florida Power's Interrogatory 2(h) and corresponding document request 9 as described in this motion; and,
- d. affording Florida Power such additional relief as it deems just under the circumstances.

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 9th day of January, 2002.

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
Fax: (850) 488-4491
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
Fax: (202) 637-3593
Counsel for Walt Disney World Co.

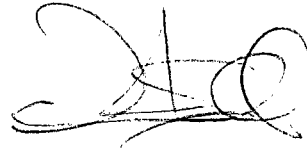
Russell S. Kent, Esq.
Sutherland Asbill & Brennan LLP
2282 Killearn Center Blvd.
Tallahassee, FL 32308-3561
Telephone: (850) 894-0015
Fax: (850) 894-0030
Counsel for Walt Disney World Co.

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.

John W. McWhirter, Jr., Esquire
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, P.A.
400 North Tampa Street, Suite 2450
Tampa, FL 33601-3350
Telephone: (813) 224-0866
Fax: (813) 221-1854
Counsel for Florida Industrial Power Users Group

Joseph A. McGlothlin, Esquire
Vicki Gordon Kaufman, Esquire
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, P.A.
117 South Gadsden
Tallahassee, FL 32301
Telephone: (850) 222-2525
Fax: (85) 222-5606
Counsel for Florida Industrial Power Users Group
and Reliant Energy Power Generation, Inc.

Michael B. Twomey, Esq.
8903 Crawfordville Road (32305)
P.O. Box 5256
Tallahassee, FL 32314-5256
Phone: (850) 421-9530
Fax: (850) 421-8543
Counsel for Sugarmill Woods Civic
Association, Inc. and Buddy L. Hansen



Attorney