

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of the retail  
rates of Florida Power & Light  
Company.

DOCKET NO. 001148-EI  
ORDER NO. PSC-02-0254-PCO-EI  
ISSUED: February 27, 2002

ORDER GRANTING MOTION TO COMPEL

On December 21, 2001, the South Florida Hospital & Healthcare Association ("SFHHA") propounded its third round of discovery requests to Florida Power & Light Company ("FPL") in this docket, including Interrogatories Nos. 32 and 33, which read as follows:

Interrogatory No. 32

Please identify the entities receiving gains on the sales of interests in FiberNet, Adelphia Communications Corp. and the one-third ownership interest in the cable limited partnership (referenced in Document Production Request No. 24) all as described in the FPL Group 2000 Annual Report, and the amount of such gain for each entity.

Interrogatory No. 33

Who were the other partners in the cable limited partnership (referenced in Document Production Request No. 24), and why was an FPL affiliate a partner in the enterprise? Identify the assets contributed, or any other consideration furnished, by FPL or an FPL affiliate as part of the participation in or formation of the partnership or the acquisition of any ownership share in the partnership.

On January 3, 2002, FPL objected to providing the information sought in these interrogatories, stating:

These interrogatories relate at least in part to transactions between FPL's unregulated affiliates, or between an unregulated FPL affiliate and an unaffiliated entity. To the extent that they relate to such transactions, FPL objects to these interrogatories as beyond the proper scope of discovery (see objection to definition of "FPL" above). FPL will respond to these

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interrogatories with respect to transactions involving FPL.

FPL objected to SFHHA's definition of "FPL" because it "purports to include FPL's parent and its affiliates." In its objections, FPL asserted that this Commission's jurisdiction, and hence the permissible scope of discovery in this proceeding, is limited with respect to the parent and affiliates of a utility, and that the scope of discovery is limited to documents within the possession, control, or custody of a party.

On January 30, 2002, SFHHA filed a motion to compel responses to these interrogatories. FPL filed a response in opposition to SFHHA's motion on February 6, 2002.

This Order addresses SFHHA's motion to compel and is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case. Pursuant to Rule 28-106.206, Florida Administrative Code, this dispute is governed by Rules 1.280 through 1.400, Florida Rules of Civil Procedure.

#### Arguments of the Parties

In its motion to compel, SFHHA states that FPL has limited its responses strictly to FPL, without reference to any FPL affiliates. Noting FPL's objections, SFHHA argues that they are without merit. In its motion, SFHHA asserts that rate-regulated utilities have the opportunity to shift value away from ratepayers to unregulated entities where the value may be realized exclusively for the benefit of investors. SFHHA states that its Interrogatories Nos. 32 and 33 are directed at that issue. SFHHA notes that FPL Group's Annual Report for 2000 shows that FPL Group owned interests in an entity called Adelphia Communications Corp. and an unnamed cable limited partnership and achieved gains of \$150 million and \$108 million, respectively, on the sale of those interests. SFHHA asserts that there is no assurance that Adelphia or the cable limited partnership did not receive value by a transfer of assets owned by, or rights of access to property of, FPL in a manner which

transferred value from ratepayers to holders of equity interests in those entities.

SFHHA asserts that FPL, as the owner of an existing network consisting of large distances of rights-of-way in densely populated portions of Florida, has characteristics of high value to cable TV and telecommunications enterprises. SFHHA further asserts that if valuable rights or assets at one time held by FPL were conveyed to Adelphia or the cable limited partnership at below market value, that would tend to increase the value of owning an interest in those entities. SFHHA states that its Interrogatories Nos. 32 and 33 are directed at determining whether FPL Group achieved the gains on sale of its interests in those entities at the expense of ratepayers.

In its response in opposition, FPL asserts that it does not object to addressing "legitimate" questions directed to whether value has been improperly shifted from FPL to an affiliate or other third party, but that Interrogatories Nos. 32 and 33 go beyond that legitimate inquiry. Citing Section 366.093(2), Florida Statutes, FPL asserts that discovery in Commission rate proceedings must relate to "information which affects a utility's rates or cost of service." FPL contends that, in this context, this means that discovery seeking to determine whether a utility has improperly transferred valuable assets to an unregulated affiliate may be appropriate. FPL asserts that Interrogatories No. 32 and 33 go past this threshold issue by seeking information about unregulated activities and dispositions of unregulated interests based on an unsupported assumption that there have been improper transfers from the utility to its affiliates.

FPL asserts that it has made available to SFHHA, in response to other SFHHA discovery requests, documents related to FPL's disposition of property to affiliates or other entities in which an affiliate has a financial interest. FPL states that SFHHA has neither inspected nor requested copies of these documents. FPL also states that nothing in its responses to Interrogatories Nos. 32 and 33 suggests that FPL made any improper transfers to any of the unregulated entities referenced in the interrogatories. FPL therefore argues that SFHHA has not established a proper predicate to explore further into the business dealings of those entities

and, thus, that SFHHA's Interrogatories Nos. 32 and 33 are beyond the scope of permissible discovery.

Decision

Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that the scope of discovery extends to "any matter, not privileged, that is relevant to the subject matter of the pending action." The rule goes on to state that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information is reasonably calculated to lead to the discovery of admissible evidence." Having reviewed the pleadings and considered the arguments raised therein, I find that SFHHA's Interrogatories Nos. 32 and 33 seek information reasonably calculated to lead to the discovery of admissible evidence and relevant to this docket. The information sought in these interrogatories relates to the question of whether FPL shifted value away from ratepayers to investors in unregulated affiliates and, thus, may lead to the discovery of admissible evidence in this rate proceeding.

Further, the fact that these interrogatories request information concerning transactions that, in some cases, are one step removed from FPL does not make them improper. A subsidiary may be compelled to obtain documents or information from a parent company or affiliate for discovery based upon three factors previously identified by this Commission: (1) the corporate structure; (2) the non-party's connection to the transaction at issue; and, (3) the degree to which the non-party will benefit from an outcome favorable to the corporate party to the litigation. Order No. PSC-01-1725-PCO-EI, Docket No. 010827-EI, issued August 23, 2001. See Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127, 130 (D. Del. 1986). Upon consideration of the pleadings and the subject discovery requests in light of these factors, I find that FPL shall respond fully to SFHHA's Interrogatories Nos. 32 and 33, including information sought concerning transactions between FPL's unregulated affiliates and between an unregulated FPL affiliate and an unaffiliated entity. FPL shall respond to these interrogatories by the close of business on Friday, March 1, 2002.

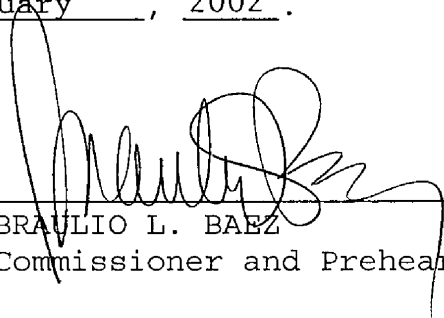
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Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that the South Florida Hospital & Healthcare Association's motion to compel is granted as set forth in the body of this Order. It is further

ORDERED that Florida Power & Light Company shall fully respond to the interrogatories discussed in this Order by the close of business on Friday, March 1, 2002.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 27th day of February, 2002.



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BRAULIO L. BAEZ  
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.