

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition To Determine Need For
an Electrical Power Plant in Martin County
by Florida Power & Light Company.

) Docket No. 020262-EI

In re: Petition To Determine Need For
an Electrical Power Plant in Manatee County
by Florida Power & Light Company.

) Docket No. 020263-EI

) Filed: September 16, 2002

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**FACT'S MOTION FOR PROTECTIVE ORDER TO FULL COMMISSION
PENDING RESOLUTION OF MOTION FOR RECONSIDERATION**

The Florida Action Coalition Team ("FACT"), pursuant to Rules 28-106.204 and 28-106.206, Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, hereby moves the Florida Public Service Commission ("Commission") to enter its order finding that FACT does not have to answer Florida Power & Light Company's ("FPL's") First Set of Interrogatories, First Request for Production of Documents, or provide Ernie Bach for deposition by FPL pending the full commission's resolution of FACT's Motion for Reconsideration of Order No. PSC-02-1260-PCO-EI, which motion will be filed by September 23, 2002, pursuant to Rule 25-22.0376, Florida Administrative Code. Absent such protection, FACT may be forced to disclose privileged information that will irreparably harm it. In support of its motion, FACT states as follows:

1. On July 11, 2002, Prehearing Officer Commissioner Deason entered his Order No. PSC-02-0934-PCO-EI granting FACT's amended petition to intervene stating, in part:

In its amended Petition, FACT states that it is a statewide, non-partisan, grassroots public interest organization, "... representing the interests of its members in taxpayer, consumer, healthcare, environmental and public utility issues, among others." FACT alleges that a number of its members are retail

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residential customers of FPL, whose substantial interests will be affected by the outcome of these need determination dockets. FACT provided the names and addresses of 6 FACT members who are retail electric customers of FPL, but asserted that other FACT members are also retail customers of FPL. FACT asserts that the Commission's decision in these dockets will affect the rates its members' pay to FPL for electricity, and therefore they have an interest in the Commission's determination whether FPL has proposed the most-cost effective means to acquire additional generating capacity. FACT also points out that the Commission must consider whether FPL has taken all reasonably available conservation measures to avoid or defer the need for new generating capacity. FACT states that; "[f]ailure to implement cost-effective conservation measures in lieu of building new power plants will, by definition, increase customer rates more than is otherwise necessary."

In its Amended Petition to Intervene, FACT has adequately alleged that the substantial interests of a substantial number of its members may be affected by the Commission's decision in these dockets, and that those interests are both the type of interest the Commission's need determination proceedings are designed to protect and the type of interest FACT is entitled to represent on behalf of its members. For these reasons, FACT's Amended Petition to Intervene is granted. (Emphasis supplied.)

2. Following the ordering paragraphs of Order No. PSC-02-0934-PCO-EI appeared the standard administrative and appellate review opportunity language required by Florida Law, which read:

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.

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.

3. As stated above, the order granting FACT intervenor status in these dockets was entered on July 11, 2002. The tenth day by which a party adversely affected by this order could have sought reconsideration by the full Commission ran on July 21, 2002 without FPL, or any other party, seeking review of Commissioner Deason's order. Likewise, the 30 day period in which to seek appellate review to the Florida Supreme Court expired without FPL seeking such review. To date, no party, including FPL has sought administrative or appellate review of Order No. PSC-02-0934-PCO-EI and the time for doing both has expired. Consequently, FACT has been a party to these docket since July 11, 2002 and remains so by virtue of an order that could have been reviewed, but which was not.

4. On August 1, 2002, FPL served upon FACT its First Request for Production of Documents to the Florida Action Coalition Team, which included, among others, requests for:

- a. A list of the exact current membership of FACT;
- b. The name and address of each FACT member who is a retail residential customer of FPL;

- c. All documents relating to FACT's engagement of the services of Michael B. Twomey, including the basis for his compensation and the parties responsible for his compensation;
 - d. as well as other requests either not related to the associational representation issue or the need determination issues.
5. Also on August 1, 2002, FPL served upon FACT its First Set of Interrogatories to the Florida Action Coalition Team, which, among others, included the following questions:
- a. Please list the exact current membership of FACT;
 - b. Please list the name and address of each FACT member who is a retail residential customer of FPL;
 - c. Please explain how and when FACT engaged the services of Michael B. Twomey, including the basis for his compensation and the person or persons responsible for compensating him.
 - d. as well as other questions either not related to the associational representation issue or the need determination issues.
6. On August 8, 2002, FPL served upon FACT its Amended Notice of Taking Deposition Duces Tecum, which directed the deponent, Ernie Bach, to bring to the deposition, amongst other things, copies of documents concerning the . . . membership of the Florida Action Coalition Team ("FACT") and copies of documents concerning the decision by FACT members or representatives to intervene in FPL's Determination of Need proceeding.

7. Thereafter, on August 12, 2002, FACT served FPL, by both facsimile and U.S. Mail, with FACT's objections to FPL's First Request for Production of Documents and its First Set of Interrogatories.

8. On August 19, 2002, FACT served upon FPL its Objections to FPL's Amended Notice of Taking Deposition Duces Tecum.

9. On August 21, 2002, FPL served upon FACT its Motions to Compel FACT to Respond to its First Set of Interrogatories and First Request for Production of Documents and Motion to Compel Intervenor's Deposition.

10. On August 26, 2002, FACT filed its Fact's Motion for Protective Order; Motion for Order Limiting Discovery; and Motion for Stay in Relation to Florida Power & Light Company's First Request for Production of Documents and First Set of Interrogatories.

11. Last Friday, on September 13, 2002, Commissioner Deason entered his order completely denying FACT's motions and completely granting FPL's motions to compel by ordering that the "Florida Action Coalition Team shall make its founder, Ernie Bach, available for deposition immediately, and the Florida Action Coalition Team shall respond to FPL's other discovery within five days of the date of this order."

12. Commissioner Deason's September 13, 2002 Order contains precisely the same "notice of further proceedings or judicial review" language FPL failed to avail itself of in Commissioner Deason's order granting FACT party status, namely: "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. . . ." FACT will request that the full commission review

Commissioner Deason's order and, pursuant to the cited rule, FACT has until September 23, 2002 to prepare and file its motion for reconsideration. Pending the filing of its motion for reconsideration and the full commission's decision with respect to it, FACT should not be placed in the position of having to presently provide discovery, which the full commission, or a court, may ultimately find FPL is not entitled to receive. This is particularly important where the information sought is privileged lawyer-client communications or is otherwise protected and where its disclosure would result in irreparable harm to FACT that could not be cured by a reversal of Commissioner Deason's decision, either by the full commission or a court.

13. FACT's primary position on reconsideration will be that Commissioner Deason's granting FACT's amended petition to intervene was unqualified, was not challenged by FPL within the statutory time limits, and is now beyond further interlocutory commission review or interlocutory appellate review. Failing in that argument, FACT will argue that any discovery allowed by FPL must be strictly limited to the relevant issues surrounding "associational standing" and the substantive issues raised by FPL's petitions in these dockets and the intervenors' responses thereto. It is clear that FPL's pending discovery requests exceed those limitations by requesting privileged information, including lawyer-client communications, which, once disclosed, can never be "undiscovered" so as to regain the protections afforded by the privilege.

14. The Commission has the authority, indeed the obligation, pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, to issue protective orders where appropriate.

The rule provides:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

15. Whether FPL should be allowed discovery and, conversely, whether FACT should be protected from having to provide certain information is dependent upon whether the information sought falls within the scope of the permissibly discoverable. All information possessed by a party is not available to opponents in a case and it is Rule 1.280(b), Florida Rules of Civil Procedure that provides the limitations on what can be had. The rule states:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(Emphasis supplied.)

16. In the event the Commission determines that FPL did not waive its ability to question FACT's party status by ignoring the review options afforded by Commissioner Deason's order, then the Commission should still protect FACT from annoyance, oppression and undue burden and expense by strictly limiting any FPL discovery to the issue of "associational standing" and any other issues related to the core purpose of these hearings under Section 403.519, Florida Statutes.

17. If "associational standing" is still viable for FPL's discovery, what are the issues to be considered in determining whether the discovery is permissible? In Florida Home Builders Ass'n v. Dept. Of Labor, 412 So.2d 351 (Fla. 1982), the Florida Supreme Court established the elements of proof for associational standing, saying:

After reviewing the legislative history and purpose of chapter 120, we have concluded that a trade or professional association should be able to institute a rule challenge under section 120.56 even though it is acting solely as the representative of its members. To meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and

the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.

18. If FPL is to be allowed to test FACT's associational standing, then FACT would urge the Commission, pursuant to Rule 1.280(c)(4), Florida Rules of Civil Procedure, to order "(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters." Specifically, and first, FACT would request that the Commission issue its detailed order limiting discovery to these specific subjects:

(a) Whether FACT is an "association" within the meaning of Florida Home Builders and subsequent case law evolved from it;

(b) The total number of coalition team members currently associated or affiliated with FACT;

(c) The number of coalition team members that are FPL customers and, thus, will be "substantially affected" by the Commission's determination on the "need" of the two plants and whether they are the most cost-effective alternative available;

(d) Whether the "subject matter" of these proceedings, namely the determination of the need for these generating units and their cost-effectiveness is within FACT's "general scope of interest and activity;" and

(e) Whether FACT seeking to ensure that the Commission makes the correct decision on the "need" for the generating units and that the units are the most cost-effective is of a type relief (cost-effective and appropriate) for it to receive on behalf of its members.

19. Conversely, FACT would request that the Commission protect it from annoyance, oppression and undue burden and expense by specifically prohibiting FPL from seeking discovery on the following issues, which are irrelevant to the issues in the case, privileged or both:

(a) A listing of the names and addresses of all FACT members, or all FACT members that are customers of FPL;

(b) Any questions as to FACT's financial condition, or sources of funding;

(c) Questions related to the hiring of FACT's attorney of record in these dockets, Michael B. Twomey, the basis for his compensation and the person or persons responsible for compensating him, which questions are privileged as lawyer-client and are not relevant to any of the issues in this case, whether the focus be the need determination or the limited questions involving "associational standing;" and

(d) Questions related to how FACT decided to "intervene in FPL's Determination of Need proceeding."

20. Forcing FACT to disclose membership lists or names of members and their addresses would unreasonably and unconstitutionally infringe upon their rights of free speech and association. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958)

21. Forcing FACT to answer questions at deposition, through interrogatory responses, or through production of documents that address questions of how FACT came to the decision to participate in this case, how it came to retain the undersigned as its counsel, how the undersigned is to be compensated and by whom, as well how FACT is funded are not only completely irrelevant to the issues identified for hearing in this case, they are also protected by the lawyer-

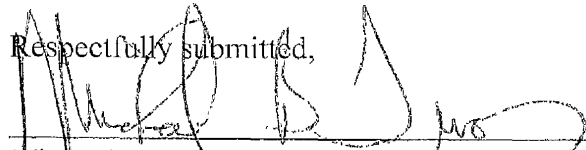
client privilege provided by Section 90.502, Florida Statutes. Corry v. Meggs, 498 So.2d 508 (Fla. 1st DCA 1986)

22. Compelling FACT to answer discovery that is not directly relevant to either the “need determination” issues or the “associational standing issues,” or that are questions that appear reasonably calculated to lead to the discovery of admissible evidence on these issues, will unnecessarily subject FACT to annoyance, oppression, and undue burden or expense. Furthermore, if privileged matters are forced to be disclosed, FACT will be irreparably harmed, because, once violated, the privileged information cannot be taken back.

23. Accordingly, FACT would respectfully request that the full Commission, if it allows discovery on the issue of associational standing, enter its written order specifically delineating what FPL may permissibly ask and not ask pursuant to the requests above.

Deltona Corporation v. Bailey, 336 So.2d 1163 (Fla. 1976); Canella v. Bryant, 235 So.2d 328 (Fla. 4th DCA 1970).

WHEREFORE, the Florida Action Coalition Team respectfully requests that the full Florida Public Service Commission enter its written order granting FACT a Protective Order protecting it from all pending FPL discovery of privileged matters pending the full Commission’s final resolution of FACT’s motion for reconsideration of Order No. PSC-02-1260-PCO-EI.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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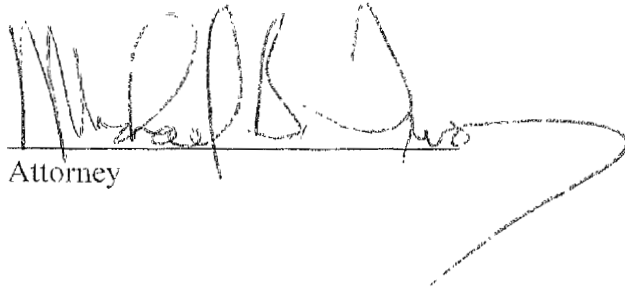
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