

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
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In re: Petition To Determine Need For an Electrical Power Plant in Manatee County by Florida Power & Light Company.)	Docket No. 020263-EI
<hr/>)	Filed: September 20, 2002

FACT'S MOTION TO QUASH SUBPOENA DUCES TECUM

The Florida Action Coalition Team ("FACT"), pursuant to Rules 28-106.204 and 28-106.206, Florida Administrative Code, and Rules 1.280(c) and 1.410, Florida Rules of Civil Procedure, hereby moves the Florida Public Service Commission ("Commission") to enter its order Quashing the Subpoena Duces Tecum served upon Michael B. Twomey, counsel for FACT and Ernie Bach, at 5:30 p.m., Thursday, September 19, 2002, commanding Ernie Bach to appear for a telephonic deposition in Clearwater, Florida at 1:30 p.m. on Friday, September 20, 2002 and to bring with him at that time "copies of documents concerning the organization, officers, and 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 proceedings." (Copy of Subpoena Duces Tecum attached.) The grounds for this motion are as follows:

1. On August 26, 2002, FACT filed its 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.

DOCUMENT NUMBER-DATE
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FPSC-COMMISSION CLERK

2. Last Friday, on September 13, 2002, Commissioner Deason entered his order, Order No. PSC-02-1260-PCO-EI, denying FACT's motions and 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."

3. On September 16, 2002, FACT filed its "Fact's Motion for Protective Order to Full Commission Pending Resolution of Motion for Reconsideration" requesting that the full commission enter a protective 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." FACT alleged in that motion that "[a]bsent such protection, FACT may be forced to disclose privileged information that will irreparably harm it." This motion has not yet been ruled upon by the full commission.

4. 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 Monday,

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 by a court.

5. While Commissioner Deason's September 13, 2002 order stated that FACT "shall make its founder, Ernie Bach, available for deposition immediately," that requirement is both legally and logically inconsistent with the statutory right of FACT to timely seek review of the order requiring it to provide such discovery, including participation at the deposition. Stated differently, FACT cannot avail itself of its legal right to seek review of the requirement to sit for the protested deposition, and other discovery, if it is compelled to provide the disputed discovery before it has an opportunity to seek the review it is entitled to. The discovery bell cannot later be unrung if it is coerced prior to both the opportunity to seek review of the order requiring it and an opportunity for the review to be ruled upon.

6. FPL's discovery should 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, including the deposition and the requested documents sought by the subpoena duces tecum 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. FACT will suffer “irreparable harm” if it is forced to give the deposition before it has an opportunity to see the review it is entitled to. Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987).

7. Courts and the Commission have the authority and the duty to quash a subpoena duces tecum if the production is “unreasonable and oppressive.” Rule 1.410(c), Florida Rules of Civil Procedure. Compelling FACT to provide the discovery required by Commissioner Deason’s order prior to an opportunity for that order to be reviewed is both legally and factually unreasonable and oppressive to FACT, especially where time still remains for FACT’s coming motion for reconsideration of the order in question to be reviewed by the full commission on October 1, 2002.

WHEREFORE, the Florida Action Coalition Team respectfully requests that the Florida Public Service Commission enter its order quashing the subpoena duces tecum compelling Ernie Bach to appear for a telephonic deposition at 1:30 p.m. today, Friday, September 20, 2002

Respectfully submitted,

/s/ Michael B. Twomey
Michael B. Twomey
Attorney for Florida Action Coalition Team
Post Office Box 5256
Tallahassee, Florida 32314-5256
Phone: 850-421-9530
FAX: 850-421-8543
miketwomey@talstar.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been transmitted electronically, by hand delivery* and/or by U.S. Mail this 20th day of September, 2002:

Martha Carter Brown, Esq.
Lawrence Harris, Esq.
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Mbrown@psc.state.fl.us

R. Wade Litchfield, Esq.
Jay Molyneaux, Esq
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
Timothy J. Perry, Esq.
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Jmcglothlin@mac-law.com

Charles A. Guyton, Esq. *
Steel, Hector & Davis, LLP
215 South Monroe Street
Suite 601
Tallahassee, FL 32301

Jon C. Moyle, Jr., Esq.
Cathy M. Sellers, Esq.
Moyle Flanigan Katz Raymond &
Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
Jmoylejr@moylelaw.com

R.L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, Maryland 21202-7110

D. Bruce May, Jr., Esq.
Karen D. Walker, Esq.
Holland & Knight LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Dbmay@hkllaw.com

Mr. William G. Walker, III
Vice President
Florida Power & Light Company
215 S. Monroe Street, Suite 810
Tallahassee, FL 32301-1859

John W. McWhirter
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602

John T. Butler, Esq.
Steel Hector & Davis, LLP
200 S. Biscayne Blvd., Suite 4000
Miami, FL 33131-2398

/s/ Michael B. Twomey
Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Docket No. 020262-EI)
Petition to determine need for an electrical)
power plant in Martin County by Florida)
Power & Light Company.)
and)
Docket No. 020263-EI)
Petition to determine need for an electrical)
power plant in Manatee County by Florida)
Power & Light Company.)
_____)

Subpoena Duces Tecum

RECEIVED 9.19.02 AT 1:55 P.M. &
SERVED 9.19.02 AT 5:10 P.M. BY
Michael R. Compton
CERTIFIED PROCESS SERVICE #099
SIXTH JUDICIAL CIRCUIT OF FLORIDA

THE STATE OF FLORIDA

TO: Mr. Ernest Bach, 700 Starkey Road, Largo, FL 33771
c/o Mr. Michael Twomey, 8903 Crawfordville Rd., Tallahassee, FL 32305-9160

YOU ARE COMMANDED to appear before the Florida Public Service Commission at Airport Business Center, 4500 140th Avenue North, Suite 101, Clearwater, FL 33762, via telephone at 1-800-857-2747, pass code 30859, on September 20, 2002, at 1:30 p.m., to testify in this action, and to have with you at that time the following: copies of documents concerning the organization, officers, and 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 proceedings. If you fail to appear, you may be held in contempt.

YOU ARE SUBPOENAED to appear by the following attorney(s) and, unless excused from this subpoena by these attorneys or the Commission, you shall respond to this subpoena as directed.

DATED on September 19, 2002.

Blanca S. Bayó, Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing Services

(SEAL)

Elizabeth C. Daley, Esq.
Steel Hector & Davis LLP
215 South Monroe Street, Suite 601
Tallahassee, FL 32301-1804
Attorney for Florida Power & Light Company