

REQUEST FOR CHANGE TO AGENDA CONFERENCE
HAND DELIVER

ORIGINAL

Date of Request: 9-27-02 Date of Agenda Conference: 10-01-02 Item No. _____

Docket No.: 020262-EI, 020263-EI Brief Title: Florida Power & Light Co. Petitions for Determinations of Need

Requested by: Staff Other _____

Please attach a copy of the written documentation filed (if other) _____ (Name)

STAFF's Recommendation to Executive Suite (IF OTHER) Approve Request Deny Request

ACTION REQUESTED [see APM 2.11 and SOP 1607]

- Defer Item to Agenda Scheduled Date: _____
- Change Order of Item or Take Up at Time Certain
- Withdraw Item
- Late Filed Recommendation (must be filed no later than 3:00 p.m. on the date approved for late filing) **A copy of the front page of the recommendation must be provided to CCA by 12 noon on the regular filing date for use as a place-holder during agenda preparation.**
- Add Item to Published Agenda [see Section 120.525(2), F.S.] - Issue an ADDENDUM and give Legal NOTICE
- Add Emergency Item to Published Agenda [see Section 120.525 (3), F.S.] - Issue an ADDENDUM and Give Fair NOTICE

Concise explanation, justification or comments (attach additional sheet if necessary):

To address two motions filed by the Florida Action Coalition Team (FACT) for review by the full Commission of the Prehearing Officer's Order No. PSC-02-1260-PCO-EI, granting FPL's motion to compel discovery regarding FACT's standing to participate in this need determination, including the deposition of FACT's founder, Ernie Bach. The motions need to be addressed at this Agenda Conference, because the hearing is set to begin Wednesday, October 2, and FACT will not submit to discovery until the full Commission reviews the Prehearing Officer's decision.

Will be filed by 10:00 AM Monday, Sept 30.

Signature (OPR Staff): Michael S. Hays Initials (OPR Division Director or Designee): MSH

Signature (Legal Staff): Debra C. Brown Initials (Legal Division Director or Designee): DES

EXECUTIVE DIRECTOR:

Recommendation to the Chairman's Office Approve Request Deny Request

Initials: MAB Date: 9/27/02

Comments: *Per recommendation of the General Counsel*

CHAIRMAN'S OFFICE: Approve Request Deny Request

Initials: _____ Date: _____

Executive Suite will send the original to the Division of Commission Clerk and Administrative Services and return a copy to the requesting staff after the Chairman's Office takes action on this request. Requesting staff should distribute copies to the Division Directors (OPR & OCR) and Attorney assigned to the docket.

PSC/EXD-1 (03/02)

- AUS
- CAF
- CMP
- COM
- CITR
- OCR
- GCL
- OPC
- MMS
- SEC
- OTH

DOCUMENT NUMBER DATE

10368 SEP 27 02

FPSC-COMMISSION CLERK

BIANCA SANDY ROSE

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
ORDER NO. PSC-02-1260-PCO-EI
ISSUED: September 13, 2002

ORDER GRANTING MOTIONS TO COMPEL DISCOVERY AND DENYING MOTION FOR PROTECTIVE ORDER, MOTION FOR ORDER LIMITING DISCOVERY, AND MOTION FOR STAY

This Order addresses several discovery motions relating to the intervention of the Florida Action Coalition Team (FACT) in this need determination proceeding: Florida Power & Light Company's (FPL) August 21, 2002, Motion to Compel Intervenor's Deposition; FPL's August 21, 2002, Motion To Compel the Florida Action Coalition Team to Respond to FPL's First Set of Interrogatories (Nos. 1-13) and First Request for Production of Documents (Nos. 1-15); and FACT's August 26, 2002, 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. For the reasons explained below, FPL's Motions to Compel are granted, and FACT's Motion for Protective Order and related motions are denied.

Order No. PSC-02-0934-PCO-EI, issued July 11, 2002, granted FACT's amended petition to intervene over FPL's objection that FACT did not have standing to intervene. FPL contended that FACT's bare assertions that it was a grassroots organization representing the interests of its members in utility and other matters was insufficient to prove associational standing under Florida law, as was FACT's proffered list of a few members FACT alleged are retail customers of FPL. FPL stated:

[T]here is nothing in the petition to indicate whether (i) FACT has other members or nonmember backers, (ii) who FACT's other members are, (iii) who funds FACT, or (iv) which of its members' and backers' interests FACT is

truly here to further. To demonstrate standing FACT must do more than merely allege that a few FPL customers are among its members. Such a theory of standing would let almost any organization even partially based in Florida intervene, regardless of whether the true interests being furthered are within the zone of interests of the Commission's governing statutes. . . . [T]he law is clear that FACT has the burden of proving, not merely alleging standing. . . . This factual controversy may necessitate a preliminary evidentiary hearing before the Commission or prehearing officer on the issues surrounding FACT's standing, after FPL has had an opportunity to conduct appropriate discovery on the matter. See, FPL's Response to FACT's Request for Leave to Amend Petition to Intervene and Amended Petition to Intervene, p.4.

FPL has now requested discovery from FACT related to these questions. FPL has also requested discovery from FACT regarding the positions it intends to take in the need determination proceedings. FACT has refused to answer FPL's interrogatories and request for production of documents, or to make its founder, Ernie Bach, available for deposition. FACT asserts that the order granting its intervention in the proceeding was not conditioned on any further proof of standing. According to FACT, since FPL did not seek reconsideration of the intervention order within the time and in the manner prescribed by Commission rules, FPL waived its right to further contest FACT's standing, and any discovery on that subject now would not lead to any admissible evidence.

As to FPL's requests for information on FACT's positions in the case, FACT contends that it is not sponsoring any witnesses or evidence in the case and therefore has not taken any affirmative positions beyond that required in prehearing statements and the prehearing order.

Continuing to challenge the veracity of the assertions FACT has made in its filings, FPL contends; that FACT is actually sponsored by, and represents the interests of, the independent power producers who have intervened in this case; that FACT still has the obligation to prove associational standing to intervene; and that FPL should be able to conduct discovery on that subject in order to contest FACT's standing at the administrative hearing

scheduled for October 2-4, 2002. FPL asserts that Order No. PSC-02-0934-PCO-EI, issued July 11, 2002, only granted intervention to FACT preliminarily, subject to further investigation and proof at hearing. FPL also contends that discovery intended to reveal the evidence and positions a party intends to take in a case is a basic purpose for discovery and therefore FPL should be permitted to discover that information as well.

Order No. PSC-02-0934-PCO-EI, issued July 11, 2002, granted FACT's amended petition to intervene on the basis of the following allegations: FACT alleged it was a statewide, grassroots organization representing the interests of its members in a variety of consumer and public interest issues; FACT provided a list of some names and addresses that it alleged are members of FACT and also retail customers of FPL; and FACT's members' interests in FPL's cost-effective acquisition of additional generating capacity and cost-effective conservation measures to avoid the need for new capacity, were substantial and the type of interests the Commission's proceeding was designed to protect. Order No. PSC-02-0934 stated, at p.3:

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.

This is the test for associational standing established in Florida Home Builders v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), and Farmworker's Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services, 417 So. 2d 753 (Fla. 1st DCA 1982), which is based on the basic standing principles established in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), *rev.denied* 415 So.2d 1359 (Fla. 1982). In initially granting FACT's intervention, Order No. PSC-02-0934 applied those principles to the allegations FACT asserted in its pleading. It is true that the Order granted

intervention without expressly reserving the issue of standing for proof at hearing. All orders issued by this Commission, however, are subject to, and incorporate, the requirements of organic law; and parties to administrative proceedings in Florida have an affirmative duty to prove standing - not just allege standing - when another party contests that standing. See, Agrico, 406 So. 2d at 482; and NAACP, Inc. ex rel. NAACP v. Florida Bd. Of Regents, 2002 Fla. App. Lexis 2012 (Fla. 1st DCA 2002). Contrary to FACT's assertion, under Commission rules, FPL would not have been required to ask for reconsideration of an order that it believed complied with Florida law. For these reasons, Florida Power & Light's Motion to compel discovery from FACT regarding FACT's standing to intervene in this proceeding is granted. FACT shall make its founder, Ernie Bach, available for deposition on this subject, and shall respond to FPL's interrogatories and requests for production of documents.

FACT also generally objected to FPL's discovery on a variety of grounds, including". . . the attorney-client privilege, the work product doctrine, the accountant-client privilege, the trade secret privilege, or any other applicable privilege or protection afforded by law. . ." FACT did not explain how those objections specifically applied to any of FPL's requests for information. Nevertheless, this Order grants FPL's request for discovery from FACT as to all information, not privileged, that is reasonably likely to lead to admissible evidence. FACT may assert applicable privilege objections to discovery as they arise, but must specifically explain how the information sought is privileged, and should be aware that assertion of privilege regarding members of FACT may affect FACT's ability to prove standing. See, National Rifle Association of America, Inc. v. City of South Miami, 774 So.2d 815 (Fla. 3d DCA 2000)

With regard to FPL's request for discovery of FACT's positions on the issues in the case and the materials FACT intends to rely upon in the case; FACT has indicated that it will not submit any testimony or direct exhibits in the case, and FACT indicated its preliminary positions on some of the issues in the case in its prehearing statement filed September 11, 2002. FPL may seek

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discovery related to FACT's positions in the case to the extent that information has not already been provided in FACT's pleadings.

It is therefore,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that FPL's Motion to Compel Intervenor's Deposition, and FPL's Motion To Compel the Florida Action Coalition Team to Respond to FPL's First Set of Interrogatories (Nos. 1-13) and First Request for Production of Documents (Nos. 1-15) are granted. 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. The Florida Action Coalition Team'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 are denied.

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By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 13th day of September, 2002.

/s/ J. Terry Deason
J. TERRY DEASON
Commissioner and Prehearing Officer

This is a facsimile copy. Go to the Commission's Web site, <http://www.floridapsc.com> or fax a request to 1-850-413-7118, for a copy of the order with signature.

(S E A L)

MCB

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

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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.