

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee.

DOCKET NO. 060635-EU

FILED: January 2, 2007

**FLORIDA MUNICIPAL POWER AGENCY, JEA, REEDY CREEK IMPROVEMENT DISTRICT, AND CITY OF TALLAHASSEE (APPLICANTS')
MOTION FOR PROTECTIVE ORDER AND RESPONSE IN OPPOSITION TO
NRDC'S MOTION TO COMPEL RESPONSES TO NRDC'S
1ST SET (NOS. 24 AND 25) AND 2ND SET (NOS. 5 AND 6) OF INTERROGATORIES**

Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee ("Applicants"), by and through their undersigned attorneys, hereby serve this Motion for Protective Order and Response in Opposition to NRDC's Motion to Compel Responses to NRDC's 1st Set (Nos. 24 and 25) and 2nd Set (Nos. 5 and 6) of Interrogatories, in accordance with Rules 1.380(a)(2) and 1.280(c), Florida Rules of Civil Procedure ("F.R.C.P."). Applicants request a Motion for Protective Order that Applicants are not required to respond to NRDC's Interrogatories (Nos. 24, 25, 5, and 6) because such responses would cause Applicants "annoyance, ... oppression, or undue burden or expense." Rule 1.280(c), F.R.C.P.

INTRODUCTION

1. The Applicants filed a Petition to Determine Need for an Electrical Power Plant in Taylor County, establishing this Docket No. 060635-EU, on September 19, 2006, along with Applicants' pre-filed testimony and exhibits.

2. NRDC filed a petition to intervene in this matter on November 2, 2006. NRDC then waited almost six weeks before filing any written discovery requests. NRDC filed two sets on Interrogatories on December 12, 2006, totaling 34 interrogatories, such that the Applicants'

responses are due on the eve of the discovery cut-off deadline set out in the Pre-Hearing Officer's Order Establishing Procedure, Order No. PSC-06-0819-PCO-EU (Oct. 4, 2006).

3. On December 26, 2006, the Applicants filed timely Objections to NRDC's 1st Set and 2nd Set of Interrogatories. After discussions among counsel, NRDC agreed to waive or withdraw, from its 1st Set of Interrogatories, Nos. 14, 20, and 21, and from its 2nd Set of Interrogatories, Nos. 4, 7, and 8.

4. In response to NRDC's remaining interrogatories on this same date, the Applicants are providing more than 50 pages of responsive information, data, tables, and analysis, in accordance with the Order Establishing Procedure. This includes responses to Interrogatories Nos. 22, 23, and 26 (of NRDC's 1st Set) and Nos. 2 and 3 (of NRDC's 2nd Set), provided as a courtesy despite Applicants' objections to these improper interrogatories.

5. Only four interrogatories remain in dispute: Nos. 24 and 25 of NRDC's 1st Set and Nos. 5 and 6 of NRDC's 2nd Set of Interrogatories. The Applicants object to these four interrogatories because to respond to each interrogatory would require Applicants to prepare a study or analysis which does not currently exist. NRDC's interrogatories are inconsistent with Commission precedent and Florida law governing discovery.

**DISCOVERY THAT REQUIRES THE CREATION OF NEW DOCUMENTS OR
INFORMATION IS IMPROPER UNDER FLORIDA LAW**

6. Florida law is clear that "a party may not be required to produce documents which it does not have and which are not shown to exist." Balzebre v. Anderson, 294 So.2d 701, 702 (3d DCA 1974) (court rejected plaintiff's request to produce documents establishing defendant's net worth that did not exist). NRDC attempts to distinguish this case by arguing that in Balzebre, the requesting party could proceed with discovery to establish the existence of the information sought, (see NRDC's Motion to Compel, ¶19), while NRDC cannot proceed because it does not

have the ability to develop the sensitivity studies it is seeking. NRDC's distinction fails on the facts, however, because NRDC is in the same position as the requesting party in Balzebre: NRDC could have requested the information it needed to prepare the analysis sought by NRDC and prepared the analyses it is seeking on its own.

7. Discovery "cannot be used to require preparation of a document. It is limited to production of those already in existence." Trawick, Fla. Prac. and Proc., §16-10 (2006); Kyker v. Lopez, 718 So.2d 957 (Fla. 5th DCA 1998) ("a court does not have the authority to require production of documents not yet in existence"); Bissell Brothers, Inc. v. Fares, 611 So.2d 620 (Fla. 2nd DCA 1993)¹; In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc., et al, Docket No. 950495-WS, Order No. PSC-99-0708-PCO-WS, at 3-4 (Apr. 13, 1999), 99 FPSC 4:366, 367 ("Southern States II Order"). With respect to an interrogatory propounded by Office of Public Counsel ("OPC"), the Pre-Hearing Officer in the Southern States II Order found that:

the utility shall not be required to create new documents, undertake new analysis, or create new studies or reports. ... If the requested information does not already exist, or is not already known to the utility, it shall simply so state in its response.

Id.

8. NRDC improperly attempts to distinguish the Southern States II Order on the grounds that the Pre-Hearing Officer in that case allowed discovery of two of OPC's interrogatories. However, OPC's two interrogatories in Southern States II are not analogous to the NRDC's interrogatories in this case because, there, the utility did not object on the grounds that OPC's interrogatories required the creation of new documents or analysis, but rather,

¹ *Disapproved on other grounds by* Elkins v. Syken, 672 So.2d 517 (Fla. 1996) ("An expert may not be compelled to compile or produce nonexistent documents"; disapproving Bissell Bros. on grounds of whether medical expert's existing tax returns were subject to discovery).

objected on the grounds of relevance in light of the limited scope of the remanded proceeding. See id., at 2-3.

9. The Commission has consistently applied this principle in utility cases. See In re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, et al, by Southern States Utilities, Inc., Docket No. 920199-WS, Order No. PSC-92-0819-PCO-WS, at 2-3 (Aug. 14, 1992), 92 FPSC 8:322, 323-24 (“Southern States I Order”). In the Southern States I case, OPC requested projections and cost information for the next three years, and the utility objected on the grounds that, as the proceeding was limited to an historical one-year period, the requested information was not known or quantifiable.² The Pre-Hearing Officer found that:

... I cannot agree that the utility should be required to produce information or answer questions based on information which is not presently in existence. ... if an interrogatory or document request solicits a projection or estimate and the projection or estimate has already been prepared by the utility for its own purposes, the utility shall answer the discovery. However, if the discovery solicits a projection or estimate and the projection or estimate does not exist, the utility need not answer the discovery.

Southern States I Order, at 2-3. This ruling was made without regard to whether OPC could have calculated the information requested from information already provided by the utility.

10. With respect to the third Commission order cited in Applicant’s objections, NRDC’s attempt to distinguish the Transcall America Order as relating only to relevancy is misguided. (See NRDC’s Motion to Compel, ¶22.) In Transcall America, the Pre-Hearing Officer allowed discovery to the extent the requested information was relevant, consistent with his previous order in that docket, but denied discovery that would require the requested party “to prepare a record or computer file that does not currently exist.” In re: Dade County Circuit Court referral of certain issues in Case No. 92-11654 (Transcall America, Inc. d/b/a ATC Long

² See Amended Motion of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Protective Order, Docket No. 920199-WS (July 9, 1992) (available on PSC website: <http://www.psc.state.fl.us/dockets/>).

Distance vs. Telecommunications Services, Inc. vs. Transcall America, Inc. d/b/a ATC Long Distance) that are within the Commission's jurisdiction, Docket No. 951232-TI, Order No. PSC-98-1058-PCO-TI, at 3 (Aug. 7, 1998), 98 FPSC 8:97, 98-99. The Pre-Hearing Officer outlined the scope of lawful discovery as follows:

Rule 1.350, Florida Rules of Civil Procedure, requires that the party from whom production is sought must have possession, custody or control of the documents. See also Henry P. Trawick, Florida Practice and Procedure, §16-10 (1991). It is not proper to seek production of documents that do not exist and would, therefore, require preparation. See Bissell Bros. v. Fares, 611 So.2d 620 (Fla. 2nd DCA 1993) (discovery of nonexistent records cannot be had); Balzebre v. Anderson, 294 So.2d 701 (Fla. 3rd DCA 1974) ("... a party may not be required to produce documents which it does not have..."); and Henry P. Trawick, Florida Practice and Procedure, §16-10 (1991). (emphasis in original)

11. "[A] litigant may not use interrogatories to compel his adversary to investigate the case for him." Cabrera v. Evans, 322 So.2d 559, 560 (3d DCA 1975); Trawick, Fla. Prac. and Proc., §16-12 (2006). NRDC is improperly seeking to use the time and resources of the Applicants to prepare its own case.

**NRDC'S INTERROGATORIES WOULD REQUIRE THE APPLICANTS TO
CREATE NEW DOCUMENTS AND CONDUCT NEW ANALYSES**

12. With respect to NRDC's 1st Set of Interrogatories (Nos. 24 and 25) (requesting sensitivity studies relating to CO2 regulation and low fuel prices), the Applicants would be required to conduct analysis and modeling using the proprietary PRISM software owned by Hill and Associates. These responses would require a significant commitment of time and resources, including developing new runs of the PRISM model with different inputs. (See Affidavit of Bradley Kushner, ¶¶ 1-2, attached.)

13. With respect to NRDC's 2nd Set of Interrogatories (Nos. 5 and 6) (requesting sensitivity studies relating to implementation of DSM measures that pass the Total Resource Test), the Applicants would be required to conduct analysis and modeling using the proprietary

POWRPRO and POWROPT software owned by Black & Veatch and the FIRE model software. These responses are even more complicated than those discussed above, and would require extensive commitment of time and resources. These interrogatories would require a sensitivity analysis using the POWROPT and POWRPRO software, a new FIRE model analysis using that sensitivity analysis' results, and then the development of penetration and participation projections per DSM measure and aggregation of savings, a re-run of the POWROPT and POWRPRO models, and finally, incorporation of the additional costs of each DSM measure reflected in the new analysis. These complicated analyses would involve developing time-intensive assumptions (such as penetration projections, participation projections, and estimates of the useful life of each DSM measure) and changing inputs into the POWROPT and POWRPRO models. Further, the development of penetration and participation projections, which is similar to the DSM study prepared by Navigant for the City of Tallahassee's Integrated Resource Planning study, is a process that could take weeks. NRDC has made no showing, other than unfounded assertions, of inability to obtain the requested information on its own. (See Affidavit of Bradley Kushner, ¶¶ 4-6, attached.)

14. NRDC's assertions that it has no access to fuel forecast and production cost modeling software and no means of preparing these analyses (see NRDC's Motion to Compel, ¶¶ 9, 13, 16) are unfounded and exaggerated.³ NRDC intervened in this case more than eight weeks ago and has had ample time to obtain access to other commercially-available production cost modeling software and fuel price forecast modeling software and consultants with expertise in these areas. Both types of modeling software are commercially available. There are consultants available with the expertise to conduct the modeling requested by NRDC. (See Affidavit of

³ The Applicants also note that NRDC's assertions are wholly unsupported by evidence, and consist only of bare assertions by NRDC's counsel.

Bradley Kushner, ¶¶ 7-8, attached.) It is unfair and improper for NRDC to impose these eleventh-hour burdens on the Applicants to develop studies and analyses to support NRDC's case. To the extent that NRDC wishes to pursue its case, it must do so at its own expense and effort.

15. NRDC's demands on the Applicants' witnesses are unreasonable, especially in light of the eleventh-hour timing. These additional analyses and studies were not anticipated by the Applicants' witnesses in their scheduling of their work load immediately prior to the hearing scheduled in this docket. (See Affidavit of Bradley Kushner, ¶ 9, attached.)

16. NRDC complains that the Applicants have provided responses to interrogatories from Commission Staff that required additional or new analysis (similar to that required in response to NRDC's interrogatories) and asserts that Staff and NRDC's requests are essentially the same. (See NRDC's Motion to Compel, ¶¶ 11-18.) First, the Applicants' provision of responses to interrogatories from Staff does not waive any objections to interrogatories from other parties. The Applicants provided those analyses to Staff as a courtesy because the time and effort involved could reasonably be accommodated by the Applicants' witnesses, just as Applicants are providing responses to NRDC's Interrogatories Nos. 22, 23, and 26 (of NRDC's 1st Set) and Nos. 2 and 3 (of NRDC's 2nd Set) as a courtesy.

17. Further, NRDC's requests and Staff's requests are not the same. The Staff's written discovery requests have been largely completed; unlike NRDC, Staff did not wait until the eleventh hour to bombard the Applicants with more than two dozen requests for additional analyses and modeling. Most of Staff's discovery requests were sent out early in the case, and Applicants timely responded well over a month ago.

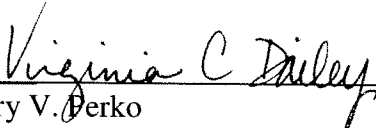
18. In addition, most of Staff's requests did not require extensive time and manpower effort in response by the Applicants, but rather involved simple changes to the analyses already

prepared by the Applicants, unlike NRDC's multiple requests for time-intensive analyses and modeling. For example, Staff's Interrogatory No. 101 did not require a new study because it was prepared as part of developing the supplemental testimony of Bradley Kushner; and Staff's Interrogatory No. 102 involved only a minor change to the Applicants' existing analysis and did not require any development of new assumptions. Staff's Interrogatory No. 74 required no time-intensive iterations or development of new studies related to inputs. In the same vein, Applicants have provided a response to NRDC's Interrogatory No. 26, which was similar to Staff's Interrogatory No. 74. In contrast, NRDC's Interrogatories (Nos. 24, 25, 5 and 6) require time-intensive analysis including the development of new assumptions and the conduct of new iterative studies.

19. NRDC has waited until the eleventh hour to propound discovery requests and is attempting to place an improper and undue burden on the Applicants to conduct analyses and studies to support the NRDC's case. NRDC should be required to develop its own evidence in support of its case, rather than trying to improperly impose that burden on the Applicants.

WHEREFORE, the Applicants request this Commission to grant Applicant's Motion for a Protective Order with respect to responses to NRDC's 1st Set (Nos. 24 and 25) and 2nd Set (Nos. 5 and 6) of Interrogatories and deny NRDC's Motion to Compel the same.

RESPECTFULLY SUBMITTED this 2nd day of January, 2007.



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AFFIDAVIT OF BRADLEY KUSHNER

1. The undersigned is the consultant engaged by the Applicants who would be most appropriate to conduct or oversee the analyses and studies requested in NRDC's Interrogatories (Nos. 24, 25, 5, and 6).

2. In order to respond to NRDC's 1st Set of Interrogatories (Nos. 24 and 25), which request sensitivity studies relating to CO2 regulation and low fuel prices, the Applicants would be required to conduct analyses and modeling using the proprietary PRISM software owned by Hill and Associates.

3. These new analyses and modeling using the PRISM software would require significant commitment of time and resources. This work would include developing new runs of the PRISM model with different inputs.

4. In order to respond to NRDC's 2nd Set of Interrogatories (Nos. 5 and 6), which request sensitivity studies relating to implementation of DSM measures that pass the Total Resource Test, the Applicants would be required to conduct analysis and modeling using the proprietary POWRPRO and POWROPT software owned by Black & Veatch and the FIRE modeling software.

5. Preparation of responses to Interrogatories Nos. 5 and 6 would be even more complicated and time-intensive than responses to Interrogatories Nos. 24 and 25, discussed above. This work would require extensive commitment of time and resources. Preparation of responses to these interrogatories would require a sensitivity analysis using the POWROPT and POWRPRO software, a new FIRE model analysis using that sensitivity analysis' results, and then the development of penetration and participation projections per DSM measure and

aggregation of savings, a re-run of the POWROPT and POWRPRO models, and finally, incorporation of the additional costs of each DSM measure.

6. These complicated analyses would involve time-intensive development of assumptions (such as penetration projections, participation projections, and estimates of the useful life of each DSM measure) to appropriately change inputs into the POWROPT and POWRPRO models.

7. The development of penetration and participation projections, which is similar to the DSM study prepared by Navigant for the City of Tallahassee's Integrated Resource Planning study, is a process that could take weeks of effort.

8. Production cost modeling software that performs the same or similar functions as POWROPT/POWRPRO software is commercially available. There are consultants available in the market who have the expertise to conduct the production cost modeling requested by NRDC.

9. Fuel price forecast modeling software that performs the same or similar functions as the PRISM software is commercially available. There are consultants available in the market who have the expertise to conduct the fuel price forecast modeling requested by NRDC.

10. These additional analyses and studies were not anticipated by the undersigned or other of Applicants' witnesses in the scheduling of our work load immediately prior to the hearing scheduled in this docket.


Signature: Bradley Kushner

STATE OF FLORIDA
COUNTY OF TAYLOR

Sworn to and subscribed before me this 2nd day of January 2007, by Bradley Kushner, who is personally known to me or who has produced _____ as identification.

Notary Signature: Rebecca J. Emerson

Notary Seal or Stamp:



Rebecca J. Emerson
MY COMMISSION # DD177705 EXPIRES
January 15, 2007
BONDED THRU TROY FAIN INSURANCE, INC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Applicants' Motion for Protective Order and Response in Opposition to NRDC's Motion to Compel Responses to NRDC's 1st Set (Nos. 24 and 25) and 2nd Set (Nos. 5 and 6) of Interrogatories in Docket No. 060635-EU were served upon the following by electronic mail(*) or U.S. Mail(**) on this 2nd day of January, 2007:

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