

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:)	
Review of the Retail Rates of)	Docket No. 080677-EI
Florida Power & Light)	Date Filed: March 20, 2009
<u>Company</u>)	

**MOTION OF SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION
FOR ORDER ESTABLISHING DISCOVERY PROCEDURES**

To: Honorable Commissioner Katrina J. McMurrian
Prehearing Officer

Pursuant to Rule 28-106.303 of the Florida Administrative Code (“FAC”), the South Florida Hospital & Healthcare Association (“SFHHA”) hereby moves for the issuance of an order establishing discovery procedures in this proceeding as set forth below. SFHHA further asks that this motion be considered on an expedited basis and that responses to this motion be required to be filed within five (5) days of the filing of this motion.

I.

On March 18, 2009, Florida Power & Light Company (“FPL”) filed its petition, testimony, and Minimum Filing Requirements (“MFRs”) with the Florida Public Service Commission (“PSC” or “Commission”) seeking Commission approval for a substantial increase in FPL’s rates for jurisdictional service. If approved, the increase sought by FPL will likely raise its average total rates by 8 to 9 percent, and its average base rates by more than 20 percent. Rate increases of this magnitude will have a significant impact on FPL’s customers, including each of the individual hospitals and healthcare-related entities that collectively comprise SFHHA. Given the magnitude of FPL’s requested rate increase and the resulting impact on FPL’s customers, it is imperative that FPL’s customers be afforded an adequate opportunity to perform a careful and thorough review of the materials purportedly supporting FPL’s requested increase and to test the propositions and allegations contained therein.

In order for the Commission to issue an order that will allow new rates to go into effect on FPL's system commencing January 1, 2010, a hearing likely will have to be held in late August or September and intervenor testimony likely will be due some time in July. Under such a schedule, intervenors in this proceeding (*i.e.*, FPL's customers) will have only a few months in which to conduct discovery on FPL's proposed rate increase. Thus, it is essential to have an efficient discovery process.

II.

Rule 28-106.206 of the FAC provides that "parties may obtain discovery through the means and in the manner provided . . . [by the] Florida Rules of Civil Procedure." FAC 28-106.206. Under the Florida Rules of Civil Procedure, "[p]arties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission." Fla.R.Civ.P. 1.280(a). Of these allowed methods, requests for the production of documents is one of the most important. Moreover, based upon the experience in FPL's last rate case in 2005, and in rate cases in general, it is reasonable to assume that requests for production of documents will represent a significant portion of the discovery requests in this proceeding.

Rule 1.350 of the Florida Rules of Civil Procedure sets forth the parameters for requests for the production of documents. Under this rule, *inter alia*, "[a]ny party may request any other party . . . to produce and permit the party making the request . . . to inspect and copy any designated documents . . . that are in the possession, custody, or control of the party to whom the request is directed." Fla.R.Civ.P. 1.350(a). Rule 1.350 further provides that each request for the production of documents "shall specify a reasonable time, place, and manner of making the

inspection or performing the related acts” and that each response, which must be served within 30 days after service of the request,¹ “shall state that inspection and related activities will be permitted as requested unless the request is objected to” Fla.R.Civ.P. 1.350(b). Thus, Rule 1.350 does not explicitly require the responding party to send copies of the responsive documents to the requesting party, but rather allows the responding party to make copies of the requested documents available to the requesting party at a specified location for review in hard copy. Based upon this rule, in its 2005 rate case, FPL did not automatically send copies of responsive documents in response to requests for production. Rather, FPL required intervenors to come to document repositories, either in Miami, Juno Beach or Tallahassee, to review responsive documents. Intervenors then were permitted to review the responsive documents only during regular business hours. Because literally thousands of pages of documents were produced in response to discovery requests, this was an extremely inefficient process.

Given the magnitude of FPL’s proposed rate increase in this case, the complexity of the issues, the volume of documents that likely will be responsive to discovery requests and the short time period for FPL’s customers to conduct discovery on FPL’s proposals, limiting FPL’s customers’ access to documents produced in discovery will greatly hinder FPL’s customers’ ability to obtain a meaningful review of FPL’s case. Given what will be a relatively short procedural schedule, professionals working on this case will not have the luxury of proceeding on a 9 to 5 basis, five days a week. Rather, they will need to work, and will need access to the materials that will allow them to work efficiently, outside of regular business hours. Providing for the requested reasonable access to non-voluminous documents by electronic service or through electronic copies (CDs) at the time that responses to production requests are served will

¹ The Commission may, in its discretion, allow a shorter or longer time for responding to requests for the production of documents. Fla.R.Civ.P. 1.350(b).

facilitate the orderly and efficient processing of this case. Limiting professionals' access to FPL's documents would be inconsistent with achieving these goal. However, the desired efficient processing of this case can be facilitated, and largely achieved, by simply requiring customary discovery procedures.

Therefore, SFHHA respectfully moves for the issuance of an order establishing discovery procedures in this proceeding under which all non-voluminous documents responsive to discovery requests will be provided to the requesting party and other parties (i) via e-mail or other electronic means (*e.g.*, by uploading and posting such documents in an electronic data room or for downloading by the requestor and other parties or by furnishing such documents in electronic format on a CD or DVD) or (ii) by sending hard copies of such documents to the requesting party and other parties via express courier service (*e.g.*, FedEx or UPS). Voluminous documents, which SFHHA proposes be defined as documents in excess of 250 pages, would be excepted from this requirement and may instead be made available in a manner consistent with the provisions of Fla.R.Civ.P. 1.350. Such an approach will enhance FPL's customers' ability to conduct a meaningful review of materials purporting to support FPL's requested rate increase and to test the propositions and allegations contained therein.

The discovery procedures proposed by SFHHA are consistent with Commission practice and precedent. For example, in *In Re Application for Certificate to Provide Wastewater Service In Charlotte County by Island Environmental Utility, Inc.*, 2003 WL 23095744 (Dec. 15, 2003), the Commission noted that “[i]f the documents requested [pursuant to Florida Rule of Civil Procedure 1.350] are not voluminous, *it is customary practice for parties to provide copies of such documents to each other by mail,*” and encouraged the parties to “follow that customary practice to the extent feasible.” Emphasis added. SFHHA merely asks that the Commission

require that the customary practice be used in this case, modified only by a requirement that a party producing documents do so electronically or by express mail delivery, rather than by first-class mail. SFHHA further requests that the Commission require expedited procedures under which discovery responses (e.g., interrogatories document productions,. etc.) must be provided within 20 days of a request, unless the party to whom the request is made serves an objection on the requesting party no later than five days from the date of the request. In the event the parties cannot amicably resolve their differences, the party that requested the discovery must file motion to compel no later than five days following its receipt of the objection.

The discovery procedures proposed by SFHHA will benefit the public interest by reducing the burden, expense and delay that otherwise will be associated with the discovery process. Additionally, to the extent that documents are produced electronically, participants will be able to view and search the documents and make hard copies only of those documents that they deem necessary, making the discovery process more efficient and conserving both natural and economic resources. Such a result, which is always desirable, is particularly important in light of the current economic situation. Adopting the discovery procedures proposed by SFHHA also will allow for expedited transfer of information, will reduce delays and facilitate a more efficient discovery process while enhancing FPL's customers' ability to conduct a meaningful review of FPL's case. Thus, adopting the discovery procedures proposed by SFHHA also will further the public interest.

Rule 28-106.206 of the FAC specifically provides that “[t]he presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay” FAC 28-106.206. Therefore, the relief requested by SFHHA is clearly within the Commission's discretion and should be granted.

III.

WHEREFORE, for the foregoing reasons, SFHHA respectfully requests that the Commission issue an order establishing discovery procedures in this proceeding as set forth herein. SFHHA further asks for expedited treatment as specified above. SFHHA has conferred with all other parties of record. FPL has informed SFHHA that it will object to the motion. Subject to its pending petition to intervene, the Florida Retail Federation supports the motion. I.B.E.W. System Council U-4 has authorized SFHHA to state that the I.B.E.W. does not object to the motion.²

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March 20, 2009

² Counsel for SFHHA left a phone message for Saporito Energy Consultants but the call was not returned prior to the filing of this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically or by U.S. mail to the following parties of record and interested parties, this 20th day of March, 2009.

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