

Ruth Nettles

080677-EI
090130-EI

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Subject: FPL's Motion to Compel Deposition of Richard Unger / Docket No. 080677-EI
Attachments: FPL M Compel depo of Unger(8.18.09).doc; FPL M Compel depo of Unger(8.18.09).pdf

Electronic Filing

- a. Person responsible for this electronic filing:
 Scott A. Goorland, Esq.
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- b. Docket No. 080677-EI
 In re: Petition for rate increase by
 Florida Power & Light Company
- c. Document is being filed on behalf of Florida Power & Light Company.
- d. There are a total of 8 pages in the attached document.
- e. The document attached for electronic filing is Florida Power & Light Company's Motion to Compel Deposition of Richard Unger

Thank you for your attention and cooperation to this request.

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8/18/2009

Fpsc-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by)
Florida Power & Light Company)

Docket No: 080677-EI

In re: 2009 depreciation and dismantlement)
study by Florida Power & Light Company)

Docket No. 090130-EI

Filed: August 18, 2009

**FLORIDA POWER & LIGHT COMPANY'S
MOTION TO COMPEL DEPOSITION OF RICHARD UNGER**

Florida Power & Light Company (FPL), pursuant to Rules 1.380(a) and 1.310 of the Florida Rules of Civil Procedure and Rule 28-106.206, Florida Administrative Code (F.A.C.), hereby moves to compel the deposition of Richard Unger, and states as follows:

1. On August 13, 2009, Richard Unger filed a Petition for Leave to Intervene ("Petition") in this docket. The Petition was filed by and through Mr. Stephen Stewart, who is seeking classification as a Qualified Representative in this proceeding.

2. On August 14, 2009, FPL contacted Mr. Stewart to request the deposition of Mr. Unger on August 19, 2009. Mr. Stewart indicated he would check with his client, but might not reply prior to 5 p.m.

3. The deadline for discovery is August 21, 2009. Given the short time frames surrounding Mr. Unger's intervention request, and the impending hearing date and deadline for discovery, FPL pursuant to its legal rights issued a Notice of Deposition for a telephonic deposition to take place on August 19, 2009. Provided such short time frames in this proceeding, such notice is reasonable and there is cause for allowing such. Mr. Stewart contacted the undersigned counsel later in the day on August 14, 2009, asking to know why FPL felt it was necessary to depose Mr. Unger, and indicating he

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would “ignore the Notice of Deposition” until and unless he was granted status as a Qualified Representative.

4. On August 17, 2009, FPL issued an email to all parties providing the telephone number for the deposition, as well as requesting that Mr. Stewart ensure that a notary is present at the deposition.

5. On August 18, 2009, Mr. Stewart filed Objections of Richard Unger to Florida Power & Light Company’s Notice of Taking Deposition (“Objections”).

6. Mr. Unger is a potential intervenor party in this action. The Petition to Intervene affirmatively asserts that Mr. Unger’s “interests may be substantially affected by this proceeding” as a customer of FPL. The Petition is vague and does not provide any detail as to what interests may be affected, or Mr. Unger’s position on issues in this proceeding. Further, Mr. Stewart’s Objections continue to suggest that “Mr. Unger’s basic position in this matter is that FPL’s request for a rate increase is not fair and should not be granted.” There is no specific detail as to Mr. Unger’s interests and positions. FPL has the right to inquire and investigate through discovery, prior to hearing, Mr. Unger’s substantially affected interests, and his position on issues in the proceeding.

7. Florida Rule of Civil Procedure 1.310(a) provides, “(a) When Depositions May Be Taken. After commencement of the action any party may take the testimony of any person, including a party, by deposition upon oral examination.” (emphasis added)

8. Many of the procedural deadlines in this case have already passed, which provided parties opportunities to conduct its legally provided right to discover the details of other party claims, positions, and factual assertions. Mr. Unger’s Petition to Intervene was filed on August 13, 2009, after the deadlines for service of Interrogatories, Requests

for Production and Requests for Admissions, after issue identification and pre-hearing statements, and after any other opportunity for FPL to discover the details of Mr. Unger's intervention. This deposition provides the sole opportunity for FPL to discover a host of issues, including any basis for any positions taken by Mr. Unger's and the derivation and source of the grounds for any such positions.

9. The courts have consistently held that discovery is designed to avoid "trial by ambush". Allowing a party to simply walk into the final hearing and participate fully as a party at that proceeding, without FPL having the opportunity to discover relevant issues related to his intervention, amounts to just that, an opportunity for such "trial by ambush." FPL has the right to avoid such impropriety. "Civil trials are not to be ambushes for one side or the other." Department of Health and Rehabilitative Services v. J.B., 625 So.2d 241 (Fla. 4th DCA 1996), discussing the appropriateness of discovery cut-off dates. "All the discovery rules and the extensive efforts of parties to discover the other party's case would be for naught if one side were able to wait until after the trial started to establish key pieces of evidence such as what occurred in this case." Grau v. Branham, 626 So.2d 1059 (Fla. 4th DCA 1993). The goals of procedural rules are to eliminate surprise, encourage settlement, and assist in getting to the truth. Spencer v. Beverly, 307 So.2nd 461, 462. See also Binger v. King Pest Control, 401 So.2d 1310.

10. Contrary to the assertions contained in Mr. Stewart's Objections, the information sought to be obtained through the deposition of Mr. Unger is relevant, admissible, reasonably calculated to lead to admissible evidence in this matter, and intended to assist FPL in the preparation of its case. Mr. Unger is a potential party to this legal proceeding against FPL. FPL has the right to discover all relevant matters related to

his positions in this proceeding.

11. Mr. Stewart objects to the deposition based on the fact that Mr. Unger is a “regular” citizen of the state of Florida and a customer of FPL who wishes his voice to be heard on this matter through a representative. Mr. Stewart also suggests that it would be unfair to citizens to allow this deposition. See par. 6 of Objections. What Mr. Stewart fails to understand is that Mr. Unger is not simply voicing his wishes, he is, pursuant to law, a potential party in a legal proceeding and as a party, Mr. Unger must be subject to all requirements, processes, and rights applicable to all parties.

12. Mr. Stewart claims in his Objections that “Mr. Unger is not an expert on regulatory matters.” This statement is irrelevant. There is no requirement that a party or person be an expert in regulatory matters in order for that party to be subject to discovery in a legal proceeding. The discovery rules are clear.

14. Mr. Stewart claims that Mr. Unger has no intention of filing any testimony in this case. The time for doing so has long since passed. In any case, under the law and Commission precedent, FPL still has the right to seek discovery related to Mr. Unger’s positions in this proceeding to the extent that such has not been provided. In re: Petition to determine need for an electrical power plant in Martin County by Florida Power & Light Company; and In re: Petition to determine need for an electrical power plant in Manatee County by Florida Power & Light Company, Order No. PSC-02-1260-PCO-EI, Dockets Nos. 020262-EI and 020263-EI, Sept. 13, 2002.

WHEREFORE, Florida Power & Light Company respectfully requests that this commission enter its Order compelling Richard Unger to appear for his deposition on August 19, 2009, or as soon thereafter as can be set, no later than August 20, 2009.

Respectfully submitted this 18th day of August, 2009.

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By: /s/ Scott A. Goorland
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically this 18th day of August, 2009, to the following:

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