

Dorothy Menasco

From: paulastahmer@aol.com
Sent: Tuesday, April 27, 2010 12:33 AM
To: Filings@psc.state.fl.us
Cc: swright@yvlaw.net; Erik Saylor; Martha Brown; Theresa Walsh; diandv@bellsouth.net
Subject: Intervener's Reply to Petitioners Response to Interveners Motion to Compel
Attachments: INT_Reply2_Pet_Resp_2_INT_Mot_Compel_final_4-27-10[1].pdf

a. Person responsible for this electronic filing:

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b. 090451-EM
In Re: Joint Petition to Determine Need for Gainesville Renewable Energy Center in Alachua County, by
Gainesville Regional Utilities and Gainesville Renewable Energy Center, LLC.

c. Document being filed on behalf of Paula H. Stahmer, Intervener

d. There are a total of 7 pages.

e. The document attached for electronic filing is Intervener's Reply to Petitioner's Response to Interveners Motion to Compel Production of Documents, in pdf format.

Thank you for your attention and assistance in this matter.

Paula H. Stahmer
Phone: 352-373-3958/ 352-222-1063(c)

Paula H. Stahmer

DOCUMENT NUMBER - DATE

03399 APR 27 0

FPSC-COMMISSION CLERK

4/27/2010

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In the Matter of:

DOCKET NO. 090451-EM

JOINT PETITION TO DETERMINE NEED
FOR GAINESVILLE RENEWABLE ENERGY
CENTER IN ALACHUA COUNTY, BY
GAINESVILLE REGIONAL UTILITIES
AND GAINESVILLE RENEWABLE ENERGY
CENTER, LLC.

DATE: April 27, 2010

**INTERVENER STAHMER'S REPLY TO PETITIONERS' RESPONSE TO
INTERVENER STAHMER'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS**

Intervener Stahmer (Intervener) hereby replies to Petitioners' Response in Opposition to Intervener's Amended Motion to Compel Production of Documents, dated April 26, 2010, and state as follows:

1. Intervener filed a Motion to Compel on April 22, 2010, and then an Amended Motion to Compel, in order to seek assistance from the PSC in achieving agreement about the terms of a Non-disclosure Agreement (NDA) between the Parties. The Amended Motion was filed in order to correct the attachment of exhibits appended to the original Motion. The body of the Motion itself, errors and all, remained the same.

2. Intervener filed a Motion to Compel because Interveners believe that some of the terms for an NDA required by Petitioners place Interveners at an extreme disadvantage and essentially encumber Interveners' ability to make reasonable use of confidential information in these proceedings. Although Interveners readily acknowledge that Petitioners have made several revisions to proposed NDA's in response to concerns expressed by Petitioners, Petitioners remain adamant about including language that creates a legal presumption of harm to Petitioners

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should Interveners disclose any information now designated as confidential, and Petitioners refuse to provide assurances that Interveners may communicate about confidential information to Gainesville City Commissioners.

3. Petitioners "do not agree" with some of the factual assertions contained in Intervener's Motion. Petitioners did not enumerate the disputed facts, seemingly for the sake of economy and in order to focus on Petitioners' main concern about ensuring the confidentiality of Petitioners' proprietary information. For the record, Intervener states that Intervener made every effort to provide an accurate if truncated chronology and Intervener cited in the Motion Petitioners' own correspondence addressing the chronology of negotiations in order to avoid presenting a biased account of the negotiations. Intervener has and does again acknowledge that Petitioners have made numerous revisions to a proposed NDA in response to some of Interveners' expressed concerns.

4. Interveners acknowledge that, at one time, they did state to Petitioners that they believed it would be possible to proceed with a proposed NDA. However, upon consultation with Interveners' own attorneys, Interveners saw that some of their original concerns had not been resolved and that Interveners remained in jeopardy were they to sign the then proffered NDA. Interveners own counsel have advised that no person should ever agree to the provisions about the presumption of harm. Interveners recognize that Petitioners may have found Interveners hesitancy frustrating, but remind Petitioners that, given the disparity in resources between the Parties, Interveners are far more vulnerable than Petitioners in the event of any litigation. Indeed, the attachment included with Petitioner's Response includes an NDA as a typical example of NDA's in the business. The language in that NDA (on Page 7, paragraph 6, "Remedies") states that disclosure "could" damage the owner of the information, and the resulting damages "could be difficult to ascertain". However, there is no language about a presumption of harm that prevents the accused party from defending every element of an action alleging a breach of the agreement. (See "Confidentiality Agreement" between Florida Power and Light and the Florida Retail Federation, submitted before the PSC in Docket No. 080677-EI and Docket No. 090130-EI).

5. Interveners state that while Petitioners have revised several NDA's, Petitioners have not revised the provisions/language containing a presumption of harm from any disclosure. This issue has been a constant throughout the negotiations and is not newly raised in response to Petitioners' last proffered NDA. As stated in Intervener's Amended Motion, Petitioners' resources greatly overwhelm those of Interveners and place Petitioners, whether or not they seek the advantage, in a position to intimidate Interveners into silence, not merely on confidential information, but also on information that is in the public realm. Therefore, Interveners seek terms that at least allow Interveners to defend themselves on any and all material facts that might be at issue should Petitioners take legal action against Interveners for a breach of an NDA between the Parties. Petitioners have the resources to prosecute any case of merit. To insist that Interveners waive in advance the right to defend themselves is arbitrary and unreasonable, and can only be intended to discourage Interveners from fully participating in these proceedings.

6. Interveners *do not* object to complying with any rulings by the PSC that granted to Petitioners' documents, testimony, or other material submitted to the PSC by Petitioners, whether or not admitted into the record as evidence, the designation of confidential information. Interveners' do not thereby waive any rights to contest such designation, but fully accept the legal and moral obligation to comply with rulings of the PSC in this proceeding.

7. Interveners disagree with Petitioners as to Petitioners' assertions that Interveners' requested terms have nothing to do with access to or with the use of confidential information in this proceeding before the PSC. As stated above, Petitioners could attempt to restrict public discourse and dissemination of information that is in the public realm. Petitioners' insistence that Interveners agree to a legal presumption of harm as to any breach subjects Interveners to judgments that bypass any examination of the significance of the disclosure or of the harm. For example, prior to the version of the GREC contract that the PSC has posted on its website as of September 2009, the only version available to the public from Petitioners had redacted even boilerplate language. Interveners have good reason to fear that the confidential information to which they seek access also includes similar examples of excessive redaction and Interveners should not be held liable for inadvertently disclosing "information" of no consequence. But if any and all disclosures of "confidential information" carry the legal presumption of harm,

Intervenors can be subject to penalties totally disproportionate to what may be a technical breach but not a substantive breach.

8. Interveners disagree with Petitioners that Interveners request to share confidential information with the City Commissioners of Gainesville, Florida, is outside the scope of these proceedings. Quite the opposite is true. The City Commissioners, as fiduciaries for the city of Gainesville and for GRU, Gainesville's municipal utility, are the true parties in interest in this proceeding and have a right and obligation to be familiar with all materials relevant to this proceeding.

9. Interveners have no intention to and would not disclose confidential information in a public forum, so Petitioners' concern that Interveners would seek to communicate with City Commissioners at a public meeting is misplaced. Interveners have already stated in writing to Petitioners that Interveners would submit written communications with City Commissioners through Petitioners' counsel Monasco. In fact, it is Interveners who have raised the issue that such a procedure be honored by Petitioners and Interveners have requested that Petitioners provide assurances that Petitioners will deliver such written communications without interference. Interveners would, of course, provide copies of such communications to Petitioners. Thus far, Petitioners have refused to provide such assurances.

10. Petitioners concerns about Interveners communicating confidential information to the City Commissioners is rather telling. One of Interveners' primary concerns about every aspect of the pending proceeding has been the almost total lack of transparency about the facts, studies, data, and process by which GREC came into being. Despite Petitioners' claims to the contrary, the public record shows minimal information being provided to the public or to the City Commissioners, and no opportunity for the public to critically examine any assumptions and claims made by Petitioners. At least since the City Commission meeting of April 28, 2008, the Commissioners have been under the directive of the City Attorney, delivered publicly, that the Commissioners could not discuss any aspects of the agreement with Nacogdoches either among themselves or with their constituents. Commissioner Donovan had asked if it would be possible to have an *in camera* Commission meeting to allow Commissioners to discuss the various

aspects of the contract and ask questions about confidential information. The City Attorney advised that such a meeting would be a violation of the Sunshine laws and that Commissioners could only seek advice from GRU staff. That directive is documented by the video of the Commission meeting at the city's website.

11. Interveners believe that they have the right and even an affirmative duty to bring to the attention of Commissioners any information, including confidential information, which has bearing on the Petitioners' application. It is difficult to understand the basis for Petitioners' objection to the possibility that Petitioners might "share" confidential information which the Petitioners had a duty to share with Commissioners in any event.

12. Petitioners harbor exaggerated fears about Interveners intentions and suspected plans to disclose confidential information to the public. Interveners received several documents from Petitioners about two weeks ago that were heavily redacted. However, the redactions were not complete and the entire text could readily be read. Interveners have not shared the substance of the redacted material with anyone. But more to the point, the redacted material contains nothing that could be claimed as proprietary secrets. This fact only underscores Interveners' concerns that Petitioners have used a heavy hand in removing from public scrutiny documents that contain little or no authentic proprietary information or anything that could harm Petitioners' legitimate interests.

WHEREFORE, for all the foregoing reasons, Intervener requests that the PSC grant to Interveners the relief requested in Intervener's Amended Motion to Compel that Petitioners provide access to Interveners to the confidential information according to the most recently provided proposed NDA with the following amendments requested by Interveners:

- a. in any action brought by Petitioners against either or both Interveners alleging a breach of the NDA, Petitioners shall have the burden to prove a breach occurred;
- b. in any action brought by Petitioners against either or both Interveners alleging a breach of the NDA, Petitioners shall have the burden to prove any alleged disclosure contained bona fide confidential information;

- c. in any action brought by Petitioners against either or both Interveners alleging a breach of the NDA, Petitioners shall have the burden to prove any disclosure of confidential information caused harm to Petitioners;
- d. Petitioners shall revise the proposed NDA with Interveners to change the term of their continuing obligation not to disclose to a term of three years;
- e. Petitioners shall revise the proposed NDA with Interveners to include the same insulation from suit for consequential or indirect damages as was provided to the Utilities;
- f. Petitioners shall revise the NDA to include a sharing clause allowing written communication between Interveners and the City Commissioners of Gainesville, Florida, pertaining to confidential information; and
- g. any and all other remedies deemed just by the FPSC.

Respectfully submitted this 28th Day of April, 2010,

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CERTIFICATE OF SERVICE

I, Paula H. Stahmer, hereby certify that a true and complete copy of the foregoing has been served on the following via hand delivery* or electronic and United States Mail on April 5th, 2010:

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