Before The
FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Docket No. 100009-EI

Nuclear Cost Recovery Clause. Filed: September 2, 2010

_____/

BRYAN ANDERSON'S MOTION TO QUASH SUBPOENA AND REQUEST FOR DETERMINATION BY THE FULL COMMISSION

Mr. Bryan S. Anderson, pursuant to sections 350.123 and 120.569, Florida Statutes, moves to quash the Subpoena issued by the Commission Clerk and Keino Young on behalf of the Public Service Commission ("Commission") and served on Mr. Anderson that commands Mr. Anderson to appear before the Commission on September 7, 2010, and testify in this proceeding. Mr. Anderson requests that this motion be heard and determined by the full Commission and by separate motion, filed simultaneously with this motion, Mr. Anderson requests oral argument on this motion. The facts and the legal authority supporting this motion and the relief requested herein are as follows:

I. Background

Mr. Anderson is corporate counsel employed by Florida Power & Light Company ("FP&L"), the regulated company that is a party to this proceeding before the Commission. Mr. Anderson is lead trial counsel representing FP&L in this Nuclear Cost Recovery Clause ("NCRC") hearing, which commenced on August 24, 2010, has been in recess and is scheduled to continue on September 7, 2010.

When the NCRC hearing opened on August 24, prior to the taking of evidence and testimony on cost recovery on the NCRC petition of another utility, Progress Energy of Florida ("PEF"), Commissioner Nathan Skop requested that FP&L make the Chief Executive Officer of

FP&L, Mr. Armando Olivera, available at the hearing to respond to questions from Commissioner Skop. On August 25, Mr. Anderson informed the Commission that, if the full Commission desired Mr. Olivera to appear as a witness, FP&L would make him available during the hearing. Mr. Anderson requested that should the full Commission desire Mr. Olivera's appearance that the subject matter of the questions for Mr. Olivera be provided so that he could be ready to provide responsive answers. At the conclusion of the part of the hearing relating to PEF's petition, Commissioner Skop reiterated his request for Mr. Olivera to appear and stated that his appearance could be accomplished either by: (i) FP&L voluntarily complying with his request and producing Mr. Olivera, (ii) a majority of the Commission voting to require Mr. Olivera to appear as had been proposed by Mr. Anderson, or (iii) by subpoena issued to Mr. Olivera by the presiding officer, in this case Chairman Argenziano.

On August 26 and 27 the Commission proceeded to take the testimony of two FP&L witnesses: Mr. Terry Jones, FP&L Vice President of Nuclear Power Uprate and Mr. John Reed, Chief Executive Officer of Concentric Energy Advisors, a consultant for FP&L. At the conclusion of the testimony of Messrs. Jones and Reed, Commissioner Skop moved for the Commission to require Mr. Olivera to appear as a witness. Mr. Skop's motion failed on a 3 to 2 vote. Following the vote and during discussion on whether to move forward with further evidentiary hearings, Chairman Argenziano unilaterally directed the Commission's General Counsel to issue subpoenas to Mr. Olivera, Mr. Rajiv Kundalkar and Mr. Anderson stating there were issues brought out in the docket, most notably the report by Concentric Energy Advisors, that needed to be addressed.

On August 30, 2010, the Commission Clerk, at the direction of the Commission Chairman issued a subpoena directed to Mr. Anderson which compels him to appear before the

Commission on September 7, 2010 at 9:30 A.M. and testify in the trial of this proceeding in which he is FP&L's lead trial counsel. The subpoena, a copy of which is attached as Exhibit A, requires Mr. Anderson to appear and testify but it does not specify the subject matters about which Mr. Anderson will be asked to testify.

In addition to the subpoena issued to Mr. Anderson, on the same date, the Commission issued subpoenas directed to Mr. Armando J. Olivera, FP&L's Chief Executive Officer, and Mr. Rajiv S. Kundalkar, a now-retired FP&L employee who testified for FP&L in a prior Nuclear Cost Recovery proceeding before the Commission. The subpoenas issued to Mr. Olivera and Mr. Kundalkar, like the subpoena issued to Mr. Anderson, require those persons to appear on September 7, 2010, and testify in this proceeding, but do not specify the subjects about which they will be asked to testify.

Based on a review of the Commission proceeding in which the issuance of the subpoenas to Mr. Anderson, Mr. Olivera and Mr. Kundalkar were directed by Chairman Argenziano it is clear that the areas of inquiry the Commission seeks to pursue with these three witnesses are: (i) FP&L's License Amendment Request, (ii) the Concentric Report, prepared under the direction of Mr. John Reed, which was produced to the Commission and Public Counsel by FP&L, and (iii) 2009 cost projection information submitted through prior testimony of Mr. Kundalkar.

Mr. Anderson, as lead trial counsel for FP&L in NCRC hearings, has knowledge concerning each of the three subjects. However, his affidavit, attached as Exhibit B, clearly demonstrates that his knowledge regarding these subjects, as well as any other subject matter relevant to FP&L's NCRC hearings, was acquired only in his capacity as lead trial counsel for FP&L charged with the responsibility of identifying and presenting evidence to be submitted at hearing through pre-filed witness testimony and exhibits, as well as through witnesses' live

testimony before the Commission. Mr. Anderson's knowledge regarding subjects relevant to FP&L's NCRC hearings was derived through communications with FP&L employees and consultants that are protected from disclosure by the attorney-client privilege. In addition, Mr. Anderson's evaluation of documentary evidence and selection of documents as trial exhibits, witness interviews, consultation in preparation for testimony and trial strategy, such as the basis for his client recommendations and decisions of what witnesses and evidence to offer in the course of an NCRC hearing, are fully protected from disclosure by the attorney work product doctrine. Accordingly, should Mr. Anderson be compelled to appear as a witness and asked questions about the three subjects it would be his obligation to assert the attorney-client privilege and attorney work product doctrine to preserve the confidentiality of communications with his client and his work product undertaken on behalf of his client.

As will be shown below, the Commission ignored and departed from well established Commission precedent and applicable Florida case law when it issued the subpoena to Mr. Anderson in a proceeding in which he is appearing as lead trial counsel for FP&L. In these circumstances this motion to quash the subpoena to Mr. Anderson should be granted.

II. Argument

Although the Commission is authorized to issue subpoenas to compel the attendance of witnesses, challenges to and enforcement of Commission subpoenas are governed by section 120.569, Fla. Stat. Section 120.569(2)(k)1. provides that "Any person subject to a subpoena may, before compliance and on timely petition, request the presiding officer having jurisdiction of the dispute to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material." The subpoena issued to Mr. Anderson was not lawfully issued and is unreasonably broad in scope because in

issuing the subpoena the Commission failed to adhere to Commission precedent and Florida law before issuing a subpoena to lead trial counsel representing a party in a hearing before the Commission.

In *Shelton v. American Motors Corp.,* 895 F. 2d 1323, 1327 (8th Cir. 1986) the court reviewed an order of a trial court imposing sanctions for trial counsel's refusal to answer questions at a deposition based on an assertion of attorney-client privilege and attorney work product. Citing to *Hickman v. Taylor,* 329 U.S. 495 (1947), the court noted that the practice of forcing trial counsel for a party to testify as a witness has long been discouraged because it disrupts the adversarial nature of the judicial system, adds to the burdensome time and costs of litigation and "detracts from the quality of client representation because trial counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent." While not absolutely prohibiting a trial counsel from being called as a witness, the *Shelton* court held that trial counsel should only be called as a witness when the party seeking the testimony has shown that (1) no other means exist to obtain the information; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. *Shelton* has been cited with approval by a Florida District Court of Appeal and followed by state and other federal courts, including federal district courts in Florida which apply the *Shelton* analysis and criteria in deciding when to permit trial counsel to be deposed or called as a witness. *State v. Donaldson,* 763 So.2d 1252, 1254 (Fla. 3d DCA 2000); *West Peninsular Title Co. v. Palm Beach County,* 132 F.R.D. 301 (S. D Fla. 1990).

In determining whether to quash subpoenas issued for deposition or witness testimony of trial counsel, this Commission in prior proceedings, has cited approvingly to the *Shelton* analysis, applied the *Shelton* criteria and recognized that compelling the testimony of counsel is

"disruptive, results in increased costs and delays, and interferes with the attorney-client relationship." *In Re: Dade County Circuit Court Referral of Certain Issues in Case No. 92-11654 (Transcall America, Inc. d/b/a ATC Long Distance vs. Telecommunications Services, Inc., and 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-98-1013-PCO-TI (Fla. PSC July 27, 1998) ("*Transcall*").

In *Transcall*, Telecommunications Services, Inc. ("TSI") sought to depose Mr. Floyd Self, an attorney for Transcall America, Inc., TSI's opponent in the case, regarding a Transcall internal investigation conducted by Mr. Self. *Id.* at *1. TSI argued that the information sought from Transcall's counsel Mr. Self was "essential . . . , unobtainable from other sources, and . . . not covered by any privilege." *Id.* at *2. Moreover, TSI argued that the Commission should not prevent the attorney from testifying entirely as any claims of privilege could be raised by the attorney "in response to specific questions" asked. Commissioner Joe Garcia as Prehearing Officer for the Commission disagreed and concluded that TSI had not met its heightened burden for compelling the testimony of opposing counsel:

> Upon consideration, I find that TSI has failed to demonstrate the necessity of deposing Mr. Self. . . . As emphasized by the *Shelton* court, deposing opposing counsel is disruptive, results in increased costs and delays, and interferes with the attorney-client relationship. [*citing Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986).]. It should, therefore, only be employed in limited circumstances where it is shown that (1) no other means exist to obtain the information than to depose opposing counsel ... (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. . . . TSI has failed to sufficiently demonstrate that these circumstances exist in this case.

Id. at * 4-5.

Although in the *Transcall* case, the testimony of opposing counsel was sought by deposition and the subpoena at issue in this motion is for witness testimony, Commission Staff

has taken the position in moving to quash a subpoena for live testimony at a hearing that the *Shelton* analysis also applies to a subpoena issued for live testimony at a hearing. *In Re: Application for Increase in Water Rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.*, Docket No. 010503-WU, 2005 WL 6332325 at ¶ 25 (Motion to Quash) (P.S.C. March 3, 2005) (*"Aloha Utilities"*). In *Aloha Utilities* at ¶ 75, the Commission Staff recognized that the intrusions into the attorney-client relationship and other concerns expressed by the Commission in *Transcall* and the Eighth Circuit in *Shelton* are equally applicable in the context of a subpoena for live testimony at a hearing, if not more so. The motion to quash filed by the Commission Staff was granted by the Commission at the hearing in the *Aloha Utilities* proceeding on March 8, 2005. See Transcript of Hearing at p. 105. See *also Sugarmill Woods Civic Ass'n, Inc. v. Southern States Utilities*, 687 So. 2d 1346 (Fla. 1st DCA 1997) (approving the Commission Prehearing Officer's decision to quash subpoenas issued to Commission staff and counsel for Southern States Utilities after she "analyzed the public policy foundations for the claim that SSU's attorney and the subpoenaed PSC staff members should not be required to participate in the depositions").

As the Commission recognized in granting motions to quash subpoenas in *Transcall* and *Aloha Utilities*, compelling the testimony of counsel is "disruptive, results in increased costs and delays, and interferes with the attorney-client relationship." Compelling the testimony of Mr. Anderson presents the same concerns. It disrupts Mr. Anderson's role as corporate counsel to FP&L and interferes with their attorney-client relationship. See, Anderson Affidavit, ¶ 12. As explained by the Eighth Circuit in *Shelton,* "Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent." Furthermore, there is no countervailing benefit to the Commission because any nonprivileged

matters to which Mr. Anderson could testify can be addressed by Mr. Olivera and other FP&L witnesses. See, Anderson Affidavit, ¶ ¶ 8, 9.

As the Commission in *Transcall* and the Eighth Circuit in *Shelton* both recognized, disrupting the attorney-client relationship and requiring counsel to testify is only to be done when three elements are present: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. Here, the subpoenas were issued by the Commission without consideration of these three required elements. Had the Commission analyzed these three elements before issuing the subpoena to Mr. Anderson, the Commission would have found that none of the required elements are present here. The information of which Mr. Anderson has personal knowledge in this proceeding falls into only two categories: information that can be obtained through the testimony of other corporate representatives of FP&L, and information that is protected by the attorney-client or work product privileges.

A. Other Means Exist To Obtain The Relevant and Non-Privileged Information Sought From Mr. Anderson

As to the first *Transcall/Shelton* element, other means exist to obtain any non-privileged information sought from Mr. Anderson. As stated in Mr. Anderson's affidavit, there are several other witnesses for FP&L who will be testifying as to matters at issue in this proceeding. Those witnesses include management officials and expert witnesses. In addition, FP&L intends to produce for examination its Chief Executive Officer, Mr. Armando Olivera, who has also been subpoenaed to appear. Accordingly, the Commission and all parties have access to witnesses capable of responding to any questions asked regarding matters at issue in this proceeding. Anderson Affidavit ¶¶ 7, 8, 9. Further, since Mr. Anderson's knowledge of any matter at issue in this proceeding was acquired from the witnesses who have and will be testifying in this

proceeding, Mr. Anderson's testimony, even if it were not privileged and protected from disclosure, would be duplicative of testimony provided by other FP&L witnesses. Anderson Affidavit ¶ 9.

Based on the foregoing, it is clear that Mr. Anderson is not the sole source of the information the Commission is seeking because any non-privileged information can be provided by other witnesses available to the Commission. Accordingly, the first *Transcall/Shelton* element has not been satisfied; means other than the testimony of Mr. Anderson exist by which the Commission can obtain the relevant and non-privileged information it seeks.

B. The Information Sought From Mr. Anderson Is Protected By The Attorney-Client Or Work Product Privileges

The second *Transcall/Shelton* element requires a finding that the information sought from trial counsel is relevant and nonprivileged. Mr. Anderson's affidavit establishes that his knowledge regarding matters at issue in this proceeding were obtained in the course of his preparation for this hearing through attorney-client communications and through his work product in preparing to represent FP&L in this hearing. As Mr. Anderson's affidavit establishes, his information was derived from communications with FP&L witnesses and employees and his review of thousands of pages of documents in preparing for this hearing. Anderson Affidavit ¶¶ 5, 11.

Within the Florida Evidence Code, section 90.502(2), Florida Statutes, provides the general rule regarding the attorney-client privilege:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

See also Southern Bell Telephone and Telegraph Company v. Deason, 632 So. 2d 1377 (Fla. 1994) (discussing the privilege in the corporate context). Similarly, the work product privilege protects certain documents and papers of an attorney or a party prepared in anticipation of litigation regardless of whether they pertain to confidential conversations with a client. *See, e.g., Allstate Indem. Co. v. Ruiz*, 780 So. 2d 239 (Fla. 4th DCA 2001). The Eighth Circuit in *Shelton* cited the U.S. Supreme Court in discussing the role of the attorney that must be appreciated when the decision is made whether to compel the attorney's testimony in the proceeding:

> The Supreme Court . . . recognized that a lawyer in preparing the client's case, assembles information, sifts through what the lawyer considers to be relevant facts, prepares "legal theories and plan[s] strategy, without undue and needless interference." This work, which has become known as counsel's "work product," is reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and [in] countless other tangible and intangible ways." . . . The Supreme Court acknowledged the well-recognized policy against invading the privacy of an attorney's course of preparation.

Shelton, 805 F.2d at 1328 (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)).

As Mr. Anderson's affidavit establishes, he has been informed by his client, FP&L, that it intends to maintain its right to the confidentiality of facts and information known to Mr. Anderson that are subject to the attorney-client privilege and the attorney work product doctrine. Anderson Affidavit ¶ 6. Since the relevant information known to Mr. Anderson is privileged and protected from disclosure, Mr. Anderson should not be called as a witness. However, should Mr. Anderson be called as a witness he will have no choice but to honor his obligations under the attorney-client privilege and attorney work product doctrine and refuse to answer questions asked by the Commission or by any other party to the proceeding. In these circumstances, as the Commission recognized in *Transcall* and as Commission Staff argued in *Aloha Utilities,* the subpoena should be quashed and Mr. Anderson should not be called as a witness.

C. The Information Sought Through The Subpoena Is Not Crucial To The Preparation Of The Case

Finally, as to the third *Transcall/Shelton* element, the information sought by the Commission through the subpoena of Mr. Anderson is not crucial to any parties' preparation of its case. The subpoena to Mr. Anderson was issued by the Commission, at the direction of the Commission Chairman without any request by another Commissioner or by any party to the proceeding and without any notice of the subject matter on which Mr. Anderson was being summoned to give testimony. Since no party requested the subpoena no party views Mr. Anderson's testimony as crucial to the preparation of its case. Accordingly, no party will suffer any undue hardship or be handicapped in the preparation of its case if the subpoena is quashed. Anderson Affidavit ¶ 10.

III. Conclusion

As the Commission has previously recognized, compelling the testimony of corporate counsel to a party in a proceeding before the Commission is contrary to law absent a showing that the information sought cannot be obtained from other sources, is relevant and nonprivileged, and is crucial to preparation of the case. The information of which Mr. Anderson has personal knowledge arises solely from his role as corporate counsel to FP&L and is it protected from disclosure pursuant to the attorney-client privilege and attorney work product doctrine. In addition, there are other witnesses from whom the relevant and nonprivileged information can be obtained and the information is not crucial for the preparation of any other party's case. Accordingly, the standard established by this Commission for compelling the testimony of counsel has not been satisfied and the Subpoena issued to Mr. Anderson should be quashed.

Respectfully submitted this 2nd day of September, 2010.

s/ Harry O. Thomas
HARRY O. THOMAS (195097)
Radey Thomas Yon & Clark, P.A.
301 S. Bronough Street, Suite 200 (32301-1722)
Post Office Box 10967
Tallahassee, Florida 32302-2967
Telephone: (850) 425-6654
Facsimile: (850) 425-6694
E-Mail: hthomas@radeylaw.com

Attorneys for Bryan S. Anderson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by U.S. Mail or electronically, on this 2nd day of September, 2010, to the parties listed below:

Brickfield Law Firm
James W. Brew/F. Alvin Taylor
Eighth Floor, West Tower
1025 Thomas Jefferson Street, NW
Washington, DC 20007
Phone: 202-342-0800
Email: jbrew@bbrslaw.com

Carlton Fields Law Firm
J. Michael Walls
P.O. Box 3239
Tampa, FL 33601-3239
Phone: 813-223-7000
FAX: 813-229-4133
Email: mwalls@carltonfields.com

Federal Executive Agencies
Shayla L. McNeill, Capt, USAF
c/o AFLSA/JACL-ULT
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319
Phone: 850-283-6663
FAX: 850-283-6219
Email: shayla.mcneill@tyndall.af.mil

Florida Industrial Power Users Group
John W. McWhirter, Jr.
c/o McWhirter Law Firm
PO Box 3350
Tampa, FL 33601
Phone: 813-505-8055
FAX: 813-221-1854
Email: jmcwhirter@mac-law.com

Florida Power & Light Company
Bryan S. Anderson/Jessica Cano
700 Universe Boulevard
Juno Beach, FL 33408-0420
Phone: 561-691-5253
FAX: 561-691-7135
Email: Anderson@fpl.com

Gary A. Davis & Associates
Gary A. Davis/James S. Whitlock
P.O. Box 649
Hot Springs, NC 28743
Email: gadavis@enviroattorney.com

Keefe Law Firm
Vicki Gordon Kaufman/Jon C. Moyle, Jr.
118 North Gadsden Street
Tallahassee, FL 32301
Phone: 850-681-3828
FAX: 681-8788
Email: vkaufman@kagmlaw.com

Office of Public Counsel
J.R. Kelly/Charles Rehwinkel/Charlie Beck
Joseph McGlothlin c/o The Florida Legislature
111 W. Madison Street, Room 812
Tallahassee, FL 32399-1400
Phone: 850-488-9330
FAX: 487-6419
Email: rehwinkel.charles@leg.state.fl.us

Progress Energy Florida, Inc.
Mr. Paul Lewis, Jr.
106 East College Avenue, Suite 800
Tallahassee, FL 32301-7740
Phone: (850) 222-8738
FAX: 222-9768
Email: paul.lewisjr@pgnmail.com

Progress Energy Florida, Inc.
Dianne M. Triplett
229 1st Avenue N PEF-152
St. Petersburg, FL 33701
Phone: 727-820-4692
Email: dianne.triplett@pgnmail.com

Progress Energy Service Company, LLC
John T. Burnett/R. Alexander Glenn
P.O. Box 14042
St. Petersburg, FL 33733-4042
Phone: 727-820-5184
FAX: 727-820-5519
Email: john.burnett@pgnmail.com

Southern Alliance for Clean Energy
P.O. Box 1842
Knoxville, TN 37901
Phone: 865-637-6055

White Springs Agricultural Chemicals, Inc.
Randy B. Miller
Post Office Box 300
White Springs, FL 32096
Email: RMiller@pcsphosphate.com

Williams Law Firm
E. Leon Jacobs, Jr.
1720 S. Gadsden Street MS 14, Suite 20
Tallahassee, FL 32301
Phone: 850-222-1246
FAX: 599-9079
Email: ljacobs50@comcast.net

Florida Public Service Commission
Anna Williams
Keino Young
Lisa Bennett
2540 Shumard Oak Blvd.
Tallahassee, FL 32399
Phone: (850) 413-6218
FAX: (850) 413-6184
Email: anwillia@psc.state.fl.us
Email: lbennett@psc.state.fl.us
Email: kyoung@psc.state.fl.us

s/ Harry O. Thomas
HARRY O. THOMAS

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Docket No. 100009-EI Nuclear cost recovery clause.

SUBPOENA

THE STATE OF FLORIDA

TO: Bryan S. Anderson, 700 Universe Boulevard, Juno Beach, FL 33408-0420

YOU ARE COMMANDED to appear before the Florida Public Service Commission at The Betty Easley Conference Center, 4075 Esplanade Way, Room 148, Tallahassee, Florida 32399, on September 7, 2010, at 9:30 a.m., to testify in this action.

YOU ARE SUBPOENAED to appear by the following attorney(s) and, unless excused from this subpoena by these attorneys or the Commission, you shall respond to this subpoena as directed. Failure to comply with this Order may result in the Florida Public Service Commission seeking enforcement actions in the appropriate court.

DATED August 30, 2010

Ann Cole, Commission Clerk
Office of Commission Clerk
Florida Public Service Commission

(SEAL)

Keino Young
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Attorney for the Florida Public Service Commission

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Nuclear Power Plant Cost Recovery Clause	))	Docket No. 100009-EI Filed: September 1, 2010

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

AFFIDAVIT OF BRYAN S. ANDERSON

BEFORE ME, the undersigned authority, personally appeared Bryan S. Anderson who, being first duly sworn, deposes and and states as follows:

1. My name is Bryan S. Anderson. My business address is 700 Universe Boulevard, Juno Beach, FL 33408. I am an attorney in good standing licensed to practice law since 1986 in the State of Illinois, Registration No. 6192951, and am also an Authorized House Counsel for Florida Power & Light Company ("FPL") under applicable Florida rules, Registration No. 219511. I am also an authorized representative of FPL pursuant to the rules of the Florida Public Service Commission (the "Commission").

2. I am subject to the attorney rules of conduct and discipline in Illinois and Florida. I have never been subject to complaint or discipline with any attorney regulatory agency or bar in any jurisdiction. I received an A.B. Degree in Economics and in History, Phi Beta Kappa, *summa cum laude*, from Duke University in 1983 and received my law degree from the University of Chicago in 1986.

3. I have practiced electric utility regulatory law since 1989. I represented Commonwealth Edison Company in Illinois until 2005 and have represented Florida Power & Light Company ("FPL") in Florida since 2005 when I was hired by the Company as an in-house attorney in its Juno Beach office. Prior to employment with

FPL I was a partner in a national law firm, Foley & Lardner, headquartered in its Chicago office. In private practice I enjoyed an "AV" rating from Martindale Hubbell, which is the highest individual rating for ethics and competence.

4. I serve as lead trial counsel for FPL in Docket 100009-EI, an electric utility regulatory proceeding before the Commission in which FPL seeks approval of FPL's nuclear cost recovery amounts for the year 2011 as provided for pursuant to Section 366.93, Florida Statutes and Rule 25-6.0423, F.A.C. The proceeding is complex and requires substantial legal and regulatory subject matter expertise, and involves numerous issues with respect to two multi-billion dollar nuclear utility projects – one being the proposed construction of FPL's new nuclear units, Turkey Point 6 & 7, and the other being FPL's Extended Power Uprates of FPL's existing four nuclear generating units at two different plants to produce additional nuclear energy from those existing plants.

5. Hearings in Docket 100009-EI with respect to FPL's request are scheduled to resume on September 7, 2010 at 9:30 a.m. Although not requested by any party to the proceeding, on August 30, 2010, the Florida Public Service Commission (the "Commission") issued a subpoena requiring me to appear before the Commission on September 7, 2010 at 9:30 a.m. to testify as a witness in Docket No. 100009-EI, Nuclear Cost Recovery Clause, the proceeding in which I am lead trial counsel for FPL.

6. The knowledge I have regarding matters at issue in Docket 100009-EI has been obtained in the course of my representation of FPL as an attorney. Thus, if called to testify in this matter, questions posed to me seeking facts as to the issues raised in Docket

100009-EI logically would call for disclosure of information protected by the attorney-client privilege and the attorney work-product doctrine.

7. FPL informs me that the Company, as is its legal right, intends to maintain its right to confidentiality and nondisclosure of all facts and information known to me that are subject to and protected by the attorney-client privilege and the attorney work-product doctrine.

8. In the hearings beginning on September 7, 2010, FPL is scheduled to present the testimony of several witnesses with respect to the matters that are at issue in this proceeding. FPL's witnesses include management officials who are responsible for FPL's Turkey Point 6 & 7 and Extended Power Uprate projects, as well as subject matter experts in the areas of nuclear licensing, economic analysis and accounting, among others. Their pre-filed testimony, prepared and served on the parties consistent with Commission rules and practice, has been available to the Commission and parties for review for the most part for months, and has been the subject of large amounts of written discovery including production of many thousands of pages of documents as well as the deposition of the Company's accounting witness.

9. In addition, I understand that FPL intends to produce for examination at the beginning of the hearings on September 7, 2010 its Chief Executive Officer, Armando Olivera. Thus, the Commission and all parties will have an opportunity to question both the Company's most senior management as well as the subject matter witnesses concerning the matters at issue in this proceeding.

10. Because of the thoroughgoing nature of the pre-filed testimony and discovery, as well as the availability of all of the foregoing witnesses for live examination

at hearing, it is clear that the relevant non-privileged information needed for the hearing and for determination of the issues is obtainable from sources other than FPL's lead trial counsel. Given the availability of ample non-privileged information, there is no necessity to require my testimony. Even assuming the information, communications, legal conclusions and mental impressions that I have were not protected from disclosure due to FPL's entitlement to the benefits of the attorney-client privilege and the attorney work-product doctrine, most if not all of the information I have about the issues in this case is duplicative of that of FPL's witnesses, who are the proper sources of testimony and evidence. For example, the Commission has inquired with respect to the Concentric Energy Advisors investigation report into an employee concern. The author of the report, John Reed, who conducted the investigation and prepared the report has testified and will be able to testify concerning that subject. As another example, the Commission has inquired concerning the recent withdrawal by FPL of a License Amendment Request filed with the Nuclear Regulatory Commission. FPL's Extended Power Uprate vice president Terry Jones has testified and will be available to testify concerning that subject.

11. The subpoena for my testimony was not issued on behalf of or at the request of any party to this proceeding and no party has asserted that my testimony is crucial to the preparation of its case or that it will suffer any undue hardship if I am not required to testify.

12. Further, even if any party were to assert that my testimony is crucial to the preparation of its case, much if not all of the information that may be sought through questioning me is the product of my work as an attorney for FPL, is privileged and protected from disclosure. Such information includes but is not limited to my

conclusions and mental impressions regarding the case, along with the countless communications that I have had working with company witnesses and other employees, as well as the mental products of reviewing many thousands of pages of documents in order to provide legal advice and representation of the Company in this highly complex contested legal matter.

13. The subpoena issued by the Commission has seriously disrupted preparations for presentation of FPL's case. This subpoena was issued just a week before the trial is scheduled to resume in a case that has been scheduled for trial for months. The subpoena has required me to divert substantial time and energy at a critical stage of hearing preparations to retain counsel and move to quash the subpoena, which diversion of my efforts and attention prejudices FPL's rights to the services of its attorney in preparing its case. The subpoena is disruptive of FPL's business in the context of its trial preparations, and issuance of a subpoena to me as FPL's lead trial counsel seriously and detrimentally affects and chills FPL's right to legal counsel to which it is entitled.

FURTHER AFFIANT SAYETH NOT

Bryan S. Anderson

SWORN TO AND SUBSCRIBED before me this 1st day of September, 2010, by Bryan S. Anderson, who is personally known to me and who did take an oath.

Notary Public, State of Florida

My Commission Expires:

AMY LOWE
Commission DD 782917
Expires May 11, 2012
Bonded Thru Troy Fain Insurance 800-385-7019