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Sent: Friday, September 03, 2010 4:49 PM
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Subject: Electronic Filing - Docket No. 100009-EI
Attachments: 20100903164048309.pdf

Attached is an electronic filing for the docket referenced below. If you have any questions, please contact either Matt Feil or Nicki Garcia at the numbers below. Thank you.

Person Responsible for Filing:

Matthew Feil
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Docket No. and Name: Docket No. 100009-EI - Nuclear Cost Recovery Clause

Filed on behalf of: Rajiv S. Kundalkar

Total Number of Pages: 14

Description of Documents: Motion to Quash Non-Party Subpoena & Request for Determination by the Full Commission

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- Tam
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9/3/2010



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September 3, 2010

VIA ELECTRONIC FILING

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 100009-EI – Nuclear Cost Recovery Clause

Dear Ms. Cole:

On behalf of Mr. Rajiv S. Kundalkar, please find attached a Motion to Quash Non-Party Subpoena and Request for Determination by the Full Commission, for the above-referenced docket.

Your assistance in this matter is greatly appreciated. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Matthew Feil

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF FLORIDA**

In re:

Nuclear Cost Recovery Clause

Docket No. 100009-EI

Filed: September 3, 2010

**RAJIV KUNDALKAR'S MOTION TO QUASH NON-PARTY SUBPOENA AND
REQUEST FOR DETERMINATION BY THE FULL COMMISSION**

Pursuant to sections 350.123 and 120.569, Florida Statutes, and Rule 28-106.204, Florida Administrative Code, Mr. Rajiv Kundalkar, a non-party to this docket, moves to quash the Subpoena issued by the Commission Clerk and Staff Attorney Keino Young on behalf of the Public Service Commission ("Commission") and served on Mr. Kundalkar that commands Mr. Kundalkar to appear before the Commission on September 7, 2010, and testify in this proceeding. Mr. Kundalkar requests that this motion be heard and determined by the full Commission and by separate motion, filed simultaneously with this motion, Mr. Kundalkar requests oral argument on this motion. The facts and the legal authority supporting this motion and the relief requested herein are as follows:¹

Background

1. Mr. Kundalkar is a private citizen and retired resident of Palm Beach County, Florida, with no current affiliation to Florida Power & Light Company ("FP&L"), the regulated company that is a party to this proceeding before the Commission. Mr. Kundalkar has not been in the employ of FP&L since February 2010, when he retired.

2. On August 30, 2010, the Commission Clerk, at the direction of the Commission Chairman issued a subpoena directed to Mr. Kundalkar which purports to compel him to appear before the Commission on September 7, 2010 at 9:30 a.m. and testify in the trial of this

¹ The filing of this motion should not be construed as an appearance by Mr. Kundalkar or as his agreement or consent to the Commission's subpoena power over his person or to an obligation to further respond in this matter.

(TL256404:2)

proceeding.² The subpoena, a copy of which is attached as "Motion Exhibit A" and was served late in the day September 1, requires Mr. Kundalkar to appear and testify but it does not specify the subject matters about which Mr. Kundalkar will be asked to testify, nor was the subpoena accompanied by payment for fees and travel, as required by law.

3. Mr. Kundalkar has no current work affiliation with FP&L, as a paid consultant or otherwise. As of February, 2010, he is a retiree of the company with no regular, continuing role in its operation. Mr. Kundalkar did, while in the employ of FP&L in September 2009, testify before the Commission in Docket No. 090009, the Nuclear Cost Recovery Clause ("NCRC") proceeding for that year. Mr. Kundalkar was transferred to another area of responsibility for FP&L just before retirement, and, significantly, he did not while still employed at FP&L or at anytime since participate in Docket No. 100009 or in the preparation, support or filing of FP&L's case in this docket in any capacity whatsoever. Mr. Kundalkar does not have any unique knowledge of any issues, times, dates and places of which the commission may enquire, he does not possess the voluminous proprietary business records filed this docket nor is he given regular access to FP&L operational information.

4. Based on a preliminary review of the proceeding in which Chairman Argenziano directed the issuance of the subpoenas to Mr. Anderson, Mr. Olivera and Mr. Kundalkar, it appears that the areas of inquiry the Commission seeks to pursue with these witnesses may include 2009 cost projection information submitted through prior testimony of Mr. Kundalkar.

² In addition to the subpoena issued to Mr. Kundalkar, on the same date, the Commission issued subpoenas to Mr. Armando J. Olivera, FP&L's Chief Executive Officer and Mr. Bryan S. Anderson, FP&L's Counsel of Record in this docket. The subpoenas issued to Mr. Olivera and Mr. Anderson, like the subpoena issued to Mr. Kundalkar, require those persons to appear on September 7, 2010, and testify in the proceeding, but do not specify the subjects about which they will be asked to testify.

Specifically, it appears that one Commissioner may accuse Mr. Kundalkar of inappropriate conduct.

5. In this matter, FP&L has produced multiple witnesses to address the issues which the Commission may seek to further vet, including Mr. Jones, an FP&L Vice President, Mr. Reed, CEO of Concentric, and, through motion filed September 2, Mr. Art Stall, a consultant to NextEra Energy, Inc. -- all of whom have direct knowledge of areas of possible Commission inquiry. Mr. Stall's proposed testimony directly addresses what and when FP&L knew about the Extended Power Uprate ("EPU") costs.

6. As shown below, the Commission's issuance of the subpoena to Mr. Kundalkar was unlawful, unreasonable, a misapplication of authority, and appears to seek testimony that is irrelevant to the Commission's statutory duties. The subpoena serves no real purpose other than to harass Mr. Kundalkar over matters for which he has no responsibility and, judging by the statements of one Commissioner, to unfairly accuse him of inappropriate conduct. This Commission has a surfeit of able witnesses before it to test the validity and veracity of FP&L's cost information, to assess the reasonableness and prudence of those costs, and to make any adjustments the Commission deems warranted, as is the Commission's duty. Indeed, the Commission performs this duty routinely, trueing-up costs annually in clause cases, without requiring appearance from retired personnel with no current knowledge. There is no lawful purpose -- and it is a dubious policy choice -- for the Commission to take the unprecedented step of subpoenaing a private citizen with the apparent design of a pillory for public spectacle.

Argument

7. The Commission's authority to issue subpoenas is governed by Sections 120.569 and 350.123, Florida Statutes. Section 120.569(2)(k)1 provides that "any person subject to a subpoena

may, before compliance and on a 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." Section 350.123 provides that "the commission may administer oaths, take depositions, issue protective orders, issue subpoenas and compel the attendance of witnesses and the production of books, papers, documents and other evidence necessary for the purpose of any investigation or proceeding." The subpoena to Mr. Kundalkar fails to meet these standards in several respects, and the Commission's authority to issue a subpoena to a private citizen under these circumstances is dubious at best.

8. The subpoena served on Mr. Kundalkar did not meet basic legal requirements for a subpoena, including the lack of accompanying payment. Section 120.569(2)(k)3 provides as follows:

Any public employee subpoenaed to appear at an agency proceeding shall be entitled to per diem and travel expenses at the same rate as that provided for state employees under s. 112.061 if travel away from such public employee's headquarters is required. All other witnesses appearing pursuant to a subpoena shall be paid such fees and mileage for their attendance as is provided in civil actions in circuit courts of this state. In the case of a public employee, such expenses shall be processed and paid in the manner provided for agency employee travel expense reimbursement, and in the case of a witness who is not a public employee, payment of such fees and expenses shall accompany the subpoena.

(Emphasis added.) As stated in the attached affidavit of Mr. Kundalkar, the subpoena he was served was not accompanied by payment. See attached "Motion Exhibit B." Mr. Kundalkar is a retired, private citizen and not a public employee. Therefore, pursuant to 120.569(2)(k)3 and Sections 92.142 and 92.151, Florida Statutes, which governs witness fees and mileage costs for civil actions in Florida, the subpoena was required to be accompanied by a payment of specified

mileage and per diem. The subpoena was not accompanied by any payment. Therefore, the subpoena is invalid and must be quashed.³

9. Even if the subpoena were accompanied by payment, the subpoena should be quashed on numerous other grounds, including that it is unreasonably broad in scope. The subpoena says absolutely nothing regarding possible fields of inquiry, which leaves Mr. Kundalkar, who is a year removed from any responsibility in NCRC matters, who possesses no pertinent company documents or unique knowledge of relevant matters, and who is retired from FP&L, to guess what he may be asked. Mr. Kundalkar has not prefiled testimony in the case, he has not been deposed and he has no authority regarding this matter or in the affairs of FP&L since he retired. In short, the subpoena is an unwelcome surprise and is so vague, and hence unreasonably broad in scope, that it makes it impossible for him to prepare for what may come next.⁴ That is inconsistent with Mr. Kundalkar's due process rights as well as principles of fairness.

10. The subpoena of Mr. Kundalkar serves no necessary or lawful purpose under Chapters 350 and 366, Florida Statutes. In this case, FP&L has, consistent with the Commission's Order Establishing Procedure, prefiled testimony from multiple witnesses to address the issues which the Commission may be interested in vetting further and which are within the Commission's specific statutory powers. Mr. Jones, an FP&L Vice President and Mr. Reed, CEO of Concentric, both prefiled direct and rebuttal testimony and were/are subject to cross-examination in this matter. Further, by motion filed September 2, FP&L sought leave to file additional testimony from Mr. Art Stall, a consultant to NextEra Energy, Inc., who addresses

³ From the docket file, it appears the Commission may have reissued the subpoena on the same date of this Motion. Mr. Kundalkar reserves his right to object to this reissued subpoena at the appropriate time.

⁴ These concerns are compounded by questionable notice. Mr. Kundalkar maintains that is unreasonable to serve a subpoena on a disinterested, private citizen living over 400 miles away, who has had no involvement in a case and no prior notice, to be served at 6:45 p.m. on the Wednesday before a holiday weekend and expect that person to appear the day after the holiday.

what and when FP&L knew about the EPU costs. These witnesses all have direct knowledge on matters of potential Commission questions. Thus, witnesses have already been produced to address pertinent matters in the case. FP&L has even taken the extraordinary measure of agreeing to produce its CEO, Mr. Olivera, for the hearings. And based on the Commission's evaluation of the testimony and veracity of these and other witness and the record evidence as a whole, the Commission is charged by statute with making whatever adjustments to the NRCC the Commission deems warranted.

11. The purpose of this docket is to address reasonable and prudent costs. The Commission has **no** contempt or prosecutorial power. It has only those powers expressly granted by the Legislature. *E.g., S. States Utils. v. Pub. Serv. Comm'n*, 714 So. 2d 1046, 1051 (Fla. 1st DCA 1998) (en banc) (“Commission’s powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State.”) (citations and internal quotations omitted); *Ocampo v. Dep’t of Health*, 806 So. 2d 633, 634 (Fla. 1st DCA 2002) (“An agency can only do what it is authorized to do by the Legislature.”). *Accord Globe Sec. v. Pringle*, 559 So. 2d 720, 722 (Fla. 1st DCA 1990) (noting that workers’ compensation is a creature of statute and must be governed by what the statute provides, “not by what we may feel the law should be.”). Yet, as indicated by one Commissioner, the purpose of subpoenaing Mr. Kundalkar appears to be to accuse him of personal wrongdoing. Such a course is not within the necessary and lawful purview of this Commission. If the Commission does not accept any pertinent part of FP&L's testimony or evidence in this docket, the Commission's appropriate recourse is to adjust the NRCC. See Section 366.93, Florida Statutes; Fla. Const., Article I, Sec 18.

12. For the foregoing reasons, Mr. Kundalkar maintains that the subpoena served on him does not comport with the Commission's authority in Sections 350.123 and 120.569, Florida

Statutes, in that it was not lawfully issued, is unreasonably broad in scope, and is not necessary to the proceeding or the Commission's carrying out its Legislatively delegated duties.

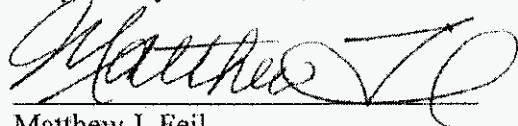
13. Additionally, the Commission should consider the policy implications of compelling appearances by non-party citizens. A decision not to quash the subpoena here opens the door for subpoenaing former commissioners, former commission staff, former company officials, or complaining ratepayers, to harass and inconvenience them, for the purpose of inquiring what they may have known and when they knew it from years before even where there is already adequate means in a docket for the Commission to execute its duties. Experience teaches that Commission proceedings often build off prior decisions involving the same company and that the doctrine of finality has exceptions. That makes it particularly troublesome for the Commission to open the door for non-party citizens with no unique or special knowledge to be needlessly subpoenaed, as the Commission may not be able to ever close the door. Instead, the Commission should apply a more restrictive and thoughtful approach, consistent with its jurisdictional authority, as well as apply a measure of common decency.

Conclusion

14. Mr. Kundalkar is not an FP&L employee, and he is not a paid consultant. He is a retiree with no regular, continuing role in FP&L's operation. He has not participated in this docket or in the preparation, support or filing of FP&L's case in this docket in any capacity. Mr. Kundalkar does not have any unique knowledge of any issues, times, dates and places of which the commission may enquire, nor does he possess the voluminous proprietary documents filed in this docket. He is a private citizen, served with a subpoena which failed to comport with Section 120.569, Florida Statutes, and which does not serve any purpose consistent with the Commission's authority in this matter. That subpoena should be quashed.

WHEREFORE, Mr. Rajiv S. Kundalkar moves that the Commission quash the subpoena issued to him in this docket.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew J. Feil", written in a cursive style.

Matthew J. Feil
Thomas A. Range
Akerman Senterfitt
106 East College Avenue
Suite 1200
Tallahassee, FL 32301

Attorneys for Rajiv S. Kundalkar

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

SUBPOENA

ajc #843
9-1-10
6:45 PM

THE STATE OF FLORIDA

TO: Rajiv S. Kundalkar, 11591 Buckhaven Ln, West Palm Beach, FL 33412-1607

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, until excused by the presiding officer.

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 31, 2010



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



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-EJ
Filed: September 3, 2010

AFFIDAVIT OF RAJIV S. KUNDALKAR

STATE OF FLORIDA)
COUNTY OF PALM BEACH)
_____)

BEFORE ME, the undersigned authority, this day personally appeared Rajiv S. Kundalkar, who, after being duly sworn says:

1. I am a retired resident of the Palm Beach County, Florida. My address is 11591 Buckhaven Lane, West Palm Beach, FL.
2. On September 1, 2010, I was served at my home with a subpoena issued by the Office of the Commission Clerk for the Florida Public Service Commission. The subpoena is attached hereto and marked "Affidavit Exhibit A," consisting of one page.
3. The subpoena had no check or other payment accompanying it to pay my fees and expenses for travel, nor did the process server provide me with a check or any other payment.

FURTHER AFFIANT SAYETH NOT.

Rajiv S. Kundalkar

RAJIV S. KUNDALKAR

STATE OF FLORIDA
COUNTY OF PALM BEACH

Sworn and subscribed before me this 3 day of September, 2010, by RAJIV S. KUNDALKAR, who is personally known to me or who has produced DL KES 3/107-8 me as identification and who did take an oath.

Gail Davis Kemly

Notary Public

My Commission Expires:



BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

SUBPOENA

QJC #843
9-1-10
6:45 PM

THE STATE OF FLORIDA

TO: Rajiv S. Kundalkar, 11591 Buckhaven Ln, West Palm Beach, FL 33412-1607

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DATED August 31, 2010

Ann Cole

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email, and/or U.S. Mail this 3rd day of September, 2010.

| | |
|---|---|
| Brickfield Law Firm James W. Brew/F.Alvin Taylor Eighth Floor, West Tower 1025 Thomas Jefferson Street, NW Washington, DC 20007 202-342-0800 jbrew@bbrslaw.com | Carlton Fields Law Firm J. Michael Walls Post Office Box 3239 Tampa, FL 33601-3239 813-223-7000 mwalls@carltonfields.com |
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By: 
 Matthew Feil