

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.

Docket No. 100437-EI

Filed: June 9, 2011

PEF'S OBJECTIONS TO OPC'S FOURTH SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS (Nos. 36-40)

Pursuant to Fla. Admin. Code R. 28-106.206, and Rule 1.350 of the Florida Rules of Civil Procedure, Progress Energy Florida, Inc. ("PEF" or the "Company") hereby serves its objections to OPC's Fourth Set of Requests for Production of Documents (Nos. 36-40) and states as follows:

GENERAL OBJECTIONS

PEF generally objects to the time and place of production requirement in OPC's Fourth Set of Requests for Production of Documents and will make all responsive documents available for inspection and copying at the offices of Progress Energy Florida, Inc., 106 E. College Ave., Tallahassee, Florida, 32301 at a mutually-convenient time, or will produce the documents in some other manner or at some other place that is mutually convenient to both PEF and OPC for purposes of inspection, copying, or handling of the responsive documents.

With respect to the "Definitions" and "Instructions" in OPC's Fourth Set of Requests for Production of Documents, PEF objects to any definitions or instructions that are inconsistent with PEF's discovery obligations under applicable rules. If some question arises as to PEF's discovery obligations, PEF will comply with applicable rules and not with any of OPC's definitions or instructions that are inconsistent with those rules. PEF objects to any definition or

request that seeks to encompass persons or entities other than PEF who are not parties to this action and that are otherwise not subject to discovery. Furthermore, PEF objects to any request that calls for PEF to create documents that it otherwise does not have because there is no such requirement under the applicable rules and law.

Additionally, PEF generally objects to OPC's requests to the extent that they call for documents protected by the attorney-client privilege, the work product doctrine, the accountant-client privilege, the trade secret privilege, or any other applicable privilege or protection afforded by law. PEF will provide a privilege log in accordance with the applicable law or as may be agreed to by the parties to the extent, if at all, that any document request calls for the production of privileged or protected documents.

Further, in certain circumstances, PEF may determine upon investigation and analysis that documents responsive to certain requests to which objections are not otherwise asserted are confidential and proprietary and should be produced only under an appropriate confidentiality agreement and protective order, if at all. By agreeing to provide such information in response to such a request, PEF is not waiving its right to insist upon appropriate protection of confidentiality by means of a confidentiality agreement, protective order, or the procedures otherwise provided by law. PEF hereby asserts its right to require such protection of any and all information that may qualify for protection under the Florida Rules of Civil Procedure, and all other applicable statutes, rules, and legal principles.

PEF generally objects to OPC's Fourth Set of Requests for Production of Documents to the extent that it calls for the production of "all" documents of any nature, including, every copy of every document responsive to the requests. PEF will make a good faith, reasonably diligent attempt to identify and obtain responsive documents when no objection has been asserted to the

production of such documents, but it is not practicable or even possible to identify, obtain, and produce “all” documents. In addition, PEF reserves the right to supplement any of its responses to OPC’s requests for production if PEF cannot produce documents immediately due to their magnitude and the work required to aggregate them, or if PEF later discovers additional responsive documents in the course of this proceeding.

PEF also objects to any Interrogatory or Request for Production that purports to require PEF or its experts to prepare studies, analyses, or to do work for OPC that has not been done for PEF, presumably at PEF’s cost.

By making these general objections at this time, PEF does not waive or relinquish its right to assert additional general and specific objections to OPC’s discovery at the time PEF’s response is due under the Florida Rules of Civil Procedure

SPECIFIC OBJECTIONS

Request No. 36 – In addition to and without waiving the general objections outlined above, PEF objects to OPC’s Request No. 36 because the request does not comport with the Florida Rules of Civil Procedure. PEF is not required by the Florida Rules of Civil Procedure to create or maintain a “data map” for the retrieved documents. Specifically, Florida Rule of Civil Procedure 1.350, which provides for, among other things, the production of documents, “was derived from Federal Rule of Civil Procedure 34 as amended in 1970.” Fla. R. Civ. P. 1.350, adv. comm. note (1972 adoption). Notably, in 2006 Congress amended Federal Rule of Civil Procedure 34 to address the procedures for requesting and producing electronically stored information (“ESI”). *See, e.g.*, Fed.R.Civ.P. 34(b)(1)(C). However, no such amendments have been adopted to the Florida Rules. Therefore, the Florida Rules do not include a provision that

grants the requesting party the right, privilege or authority to request the production of information in any specific format, including the production of a data map of the information.

Request No. 37 – In addition to and without waiving the general objections outlined above, PEF objects to OPC's Request No. 37 because it requests duplicative information that has already been produced to OPC. By providing documents for OPC's review and copying at PEF's offices, PEF has fully complied with its obligations under the Florida Rules of Civil Procedure.

Additionally, the request is unduly burdensome. The "documents . . . which were made available for review . . . at the PEF Tallahassee Office" were culled from a group of documents that totaled greater than 1.2 million pages. The review was necessary to protect potentially privileged, proprietary and/or confidential documents and to avoid the production of irrelevant documents. Because that review was accomplished by reviewing the documents in hardcopy form, in order to meet OPC's current request, a similar review would have to be completed the same documents again in electronic format. Moreover, OPC has neither attempted to support its perceived need for these documents in their "native format" nor explain why the original production, which fully conformed to the Florida Rules of Civil Procedure, was in any way inadequate.

Furthermore, as OPC candidly admits in its request, PEF is "not required by the Florida Rules of Civil Procedure or the Commission's rules, . . . to provide the responses to these requests for production of documents in a searchable electronic format." Florida Rule of Civil Procedure 1.350, which provides for, among other things, the production of documents, "was derived from Federal Rule of Civil Procedure 34 as amended in 1970." Fla. R. Civ. P. 1.350, adv. comm. note (1972 adoption). Notably, in 2006 Congress amended Federal Rule of Civil

Procedure 34 to address the procedures for requesting and producing electronically stored information (“ESI”). *See, e.g.*, Fed.R.Civ.P. 34(b)(1)(C). However, no such amendments have been adopted to the Florida Rules. Therefore, the Florida Rules do not include a provision that grants the requesting party the right, privilege or authority to request the production of information in any specific format.

Moreover, OPC requests the Company to produce any software necessary to view the files in their “native file format” if the files cannot be viewed with either the Microsoft Office Suite of Programs or Adobe. Discovery is intended to provide other parties with information related to the merits of the pending case. *See Fla. R. Civ. P. 1.280(a)* (“Parties may obtain discovery regarding any matter, not privileged that is relevant to the **subject matter** of the pending action . . .”) (emphasis supplied). Software of the type OPC is requesting is not information related to the subject matter of this docket. However, if OPC does not possess the software necessary to view or use information in its “native file format,” the rules provide that PEF may translate the information into a “reasonably usable form.” *See Fla. R. Civ. P. 1.350(a)*. The Rule could have been drafted in such a way as to require a producing party to provide a means to view the information in its “native format” – instead it provides for “translation” of the information. Therefore, OPC’s request that PEF provide the means necessary to view files in their native format is not within the contemplation of the Rules.

For these reasons, OPC’s request number 37 is improper.

Request No. 38 – In addition to and without waiving the general objections outlined above, PEF objects to OPC’s Request No. 38 because the request does not comport with the Florida Rules of Civil Procedure. PEF is not required by the Florida Rules of Civil Procedure to create or maintain a “load file” for “all the documents made available for review in Docket No.


100437-EI at the PEF Tallahassee Office.” Specifically, Florida Rule of Civil Procedure 1.350, which provides for, among other things, the production of documents, “was derived from Federal Rule of Civil Procedure 34 as amended in 1970.” Fla. R. Civ. P. 1.350, adv. comm. note (1972 adoption). Notably, in 2006 Congress amended Federal Rule of Civil Procedure 34 to address the procedures for requesting and producing electronically stored information (“ESI”). *See, e.g.*, Fed.R.Civ.P. 34(b)(1)(C). However, no such amendments have been adopted to the Florida Rules. Therefore, the Florida Rules do not include a provision that grants the requesting party the right, privilege or authority to request the production of information in any specific format, including the production of a load file of the documents.

Request No. 40 - In addition to and without waiving the general objections outlined above, PEF objects to OPC’s Request No. 40 because the request does not comport with the Florida Rules of Civil Procedure. Assuming that responsive messages exist and that the Commission finds that it would not be an undue burden on the Company to perform the required review prior to production, OPC has requested that PEF “provide a copy of the documents in both in [sic] its ‘native file format’ and optical character recognizable (OCR) searchable, PDF format.” As discussed above in the Company’s objection to OPC’s 37th Request (and fully incorporated herein), the Florida Rules of Civil Procedure do not provide the requesting party with the authority to dictate the production’s format.

Moreover, OPC has compounded the inappropriate nature of its request by requesting that PEF produce any responsive documents in not one but two different electronic formats. Specifically, OPC requests that the information be produced in both native file format and **PDF format**, and that PEF to provide it with a “viewer if the ESI ‘native file format’ is not viewable in the Microsoft Office Suite of Programs or **Adobe**.” If PDF format is acceptable and OPC

has the necessary software to read such files, any files in a "native file format" that OPC may not be able to read without additional software provided by PEF is unnecessary. As discussed above, the Rules governing discovery do not require PEF to provide OPC with software that may be necessary to read ESI. The Rules instead allow PEF to translate any such information into a readily usable format. See Fla. R. Civ. P. 1.350(a). Furthermore, even assuming that OPC could choose the format for PEF's production, which it cannot, the Rules do not require that documents be produced twice – that is, by definition, duplicative discovery.

For these reasons, OPC's request number 40 is improper.



R. ALEXANDER GLENN
General Counsel - Florida
JOHN T. BURNETT
Associate General Counsel – Florida
PROGRESS ENERGY SERVICE COMPANY, LLC
299 First Avenue North
St. Petersburg, FL 33701
Telephone: (727) 820-5184
Facsimile: (727) 820-5519

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic and U.S. Mail this 9th day of June, 2011 to all parties of record as indicated below.



JOHN T. BURNETT

Keino Young/Lisa Bennett Office of General Counsel Florida Public Service Commission 2540 Shumard Oak Blvd.	Florida Industrial Power Users Group Vicki Gordon Kaufman John C. Moyle, Jr. Keefe Anchors Gordon & Moyle, PA
--	--

Tallahassee, FL 32399-0850
kyoung@psc.state.fl.us
lbennett@psc.state.fl.us

Mr. James W. Brew/F. Alvin Taylor
c/o Brickfield Law Firm
1025 Thomas Jefferson St., NW
8th Floor, West Tower
Washington, DC 20007
jbrew@bbrslaw.com
al.taylor@bbrslaw.com

118 North Gadsden Street
Tallahassee, FL 32301
vkaufman@kagmlaw.com
jmoyle@kagmlaw.com

J.R.Kelly/Charles Rehwinkel/Eric Sayler
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, #812
Tallahassee, FL 32399
Kelly.jr@leg.state.fl.us
Rehwinkel.charles@leg.state.fl.us
Sayler.eric@leg.state.fl.us