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**Subject:** PSC Filing - Docket No. 110009-EI  
**Attachments:** Kundalkar Motion for Stay - 6.14.11.pdf

The attached document is being filed with the PSC today on behalf of Rajiv S. Kundalkar.

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**Docket Name and Number:** Docket No. 110009-EI – Nuclear Cost Recovery Clause

**Total Number of Pages:** 12

**Filed on Behalf of:** Rajiv S. Kundalkar

**Description of Documents:** Motion for Stay of Order No. PSC-11-0246-PCO-EI

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June 14, 2011

**VIA HAND DELIVERY**

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

**Re: Docket No. 110009-EI - Nuclear Cost Recovery Clause**

Dear Ms. Cole:

On behalf of Mr. Rajiv S. Kundalkar, please find attached a Motion for Stay of Order No. PSC-11-0246-PCO-EI 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 J. Feil

cc: Certificate of Service

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

In re: )  
Nuclear Cost Recovery Clause )  
\_\_\_\_\_ )

Docket No. 100009-EI  
Filed: June 14, 2011

**RAJIV KUNDALKAR'S MOTION TO STAY ORDER NO. PSC-11-0246-PCO-EI  
(ORDER DENYING MOTION TO QUASH SUBPOENA AND GRANTING MOTION  
TO QUASH CROSS NOTICES OF DEPOSITION)**

Pursuant to Rules 25-22.061(2)<sup>1</sup> and Rule 28-106.204, Florida Administrative Code, comes now the undersigned attorneys who hereby move for a stay pending judicial review of Order No. PSC-11-0246-PCO-EI, issued June 3, 2011, by Commissioner Brise, as Prehearing Officer. Order No. PSC-11-0246-PCO-EI (the "Order") denied the April 12, 2011, Motion to Quash filed by Mr. Rajiv Kundalkar.<sup>2</sup>

Without a stay, Mr. Kundalkar ("Movant") will be irreparably harmed and his right to seek judicial review will be effectively taken away by the Commission before the court even has a chance to address the matter on review. In support of this Motion for Stay,<sup>3</sup> Movant states as follows<sup>4</sup>:

**Background**

1. Movant is a private citizen and retired resident of Palm Beach County, Florida, and a non-party to this proceeding. He is not a current employee of Florida Power & Light

<sup>1</sup> Rule 25-22.061(1) governs stays where the order subject to judicial review involves a refund or decrease in rates. Rule 24-22.061(2) governs stays of all other orders.

<sup>2</sup>This stay motion applies to that portion of the Order denying the Motion to Quash.

<sup>3</sup>Rule 25-22.061(4) provides, "Motions filed pursuant to this rule shall be heard by those Commissioners who were on the deciding panel for the order being appealed." In this instance, the Order was decided by the Prehearing Officer, so the application of subsection (4) of the rule is not entirely clear. As a procedural matter, Movant will not object to either the Prehearing Officer or the panel making the initial decision on this Motion for Stay.

<sup>4</sup> A separate Request for Oral Argument is being filed contemporaneously with this Motion.

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Company ("FP&L"), the regulated company that is a party to this proceeding before the Commission, nor any FP&L affiliate. Mr. Kundalkar has not been in the employ of FP&L since February 2010, when he retired.

2. A March 29, 2011, subpoena served by OPC on Movant required Movant to appear for deposition on April 20, 2011, in West Palm Beach. Neither the subpoena nor the notice of deposition attached ("Subpoena") identified any topic or subject matter or issue about which Movant would be asked to testify at deposition. Thereafter, cross-notices of deposition were served by the staff and the Florida Industrial Power Users Group ("FIPUG"). On April 12, 2011, Movant filed a Motion to Quash the Subpoena and related cross-notices.

3. The April 12 Motion to Quash was based on several arguments, including that the Subpoena did not and could not meet the "necessary" requirement of Section 350.123, Florida Statutes; did not meet the lawful issuance, reasonable scope and relevance criteria of Section 120.569(2)(k)1., Florida Statutes; did not pass scrutiny of a public policy balancing test; and was posed for the purpose of annoyance and harassment.

4. Included in the Motion to Quash was Movant's affidavit, wherein he averred: (a) He retired from FP&L in February 2010. (b) He is not employed by or a paid contractor or consultant to FP&L or any affiliate of FP&L. (c) He has no role in the business or operations of FP&L or any affiliate of FP&L. (d) He has no access to the non-public operational or business information of FP&L. (e) He has not participated in any way in the current year's or prior year's nuclear cost recovery ("NCR") dockets. (f) He did, while in the employ of FP&L in September 2009, testify before the Commission in Docket No. 090009, the NCR proceeding for

that year; however, his testimony was consistent with FP&L's position and was based on supporting information from FP&L and input of its employees, management and consultants. (g) He possesses substantially the same or identical personal knowledge of information regarding Docket No. 090009 as other individuals still employed by or working for FP&L.

5. In this matter, FP&L prefiled the testimony of multiple witnesses to address any issues within the Commission's jurisdiction regarding the proceedings in Docket No. 090009 (the 2009 NCR case), including witnesses who had decision-making authority for the conduct of that case. Despite the surfeit of able FP&L witnesses to depose, a considerable record from the prior year's proceeding and the ability to seek discovery from and depose any employees and consultants of FP&L, OPC issued a blank subpoena for the deposition of Movant, a non-party private citizen. This intrusion on a private citizen is without precedent in the annals of the Commission.

6. Though an issue list for this proceeding has yet to be agreed on by the parties or adopted by the Commission, OPC, in its response to the Motion to Quash, insisted that the tentative issue it formulated for which it sought Movant's deposition testimony was as follows:

- (a) Did FPL willfully withhold information that the Commission needed to make an informed decision during the September 2009 hearing in Docket No. 090009-EI?
- (b) If the answer is yes, does the Commission possess statutory and regulatory authority with which to address FPL's withholding of information?
- (c) In light of the determinations on (a) and (b), what action, if any, should the Commission take?

(“OPC’s Information Issue”).<sup>5</sup> OPC did not refute with record evidence any of the allegations of Movant’s affidavit, nor did OPC refute that there were multiple company witnesses available to address any issues raised in the case. Instead, OPC asserted that under Chapter 120, Florida Statutes, Rule 1.280 of the Florida Rules of Civil Procedure and the Uniform Rules on Procedure, OPC had the right (through the Commission) to subpoena and depose any person who may have any information relevant to a Commission proceeding, whether the person is a party or not, and that the term “necessary” in Section 350.123 had no independent meaning; instead, “necessary” meant only “if requested by a party through legitimate discovery.” OPC also asserted, in essence, that only subpoenas for documents need to be reasonable in scope.

7. In the Order, the Prehearing Officer denied the April 12 Motion to Quash as to OPC’s Subpoena, finding that OPC had “broad discovery rights in accordance with the Florida Rules of Civil Procedure.”<sup>6</sup> The only limit on OPC’s discovery rights, per the Order, was discovery imposed for annoyance, embarrassment, oppression, or which posed an undue burden or expense. The Order also found that a subpoena for deposition without any subject description satisfies Section 120.569(2)(k)1’s requirement for reasonable scope.

8. The undersigned counsel warrants that Movant will file a petition for review (as a petition for certiorari and/or prohibition) with the First District Court of Appeal on or before July

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<sup>5</sup> At oral argument on Movant’s Motion to Quash, OPC shifted its approach from the written pleadings, emphasizing there were issues other than OPC’s Information Issue which were targets for inquiry in a deposition of Movant. In the Order, this argument appears to have been accepted in the respect that the Order refers to an Issue No. 17 (Order at p. 9, footnote 8) upon which Movant may be asked to testify, though there is no approved issue list in the docket.

<sup>6</sup> The Order did quash the staff and FIPUG cross-notice of deposition.

5, 2011, thirty (30) days from the date of the Order's rendition date, in accordance with the Florida Rules of Appellate Procedure.

**Summary**

9. Movant cannot somehow undo having his deposition taken once that deposition takes place.<sup>7</sup> The harm posed to Movant by the Order will be incurable after judicial review if the deposition goes forward prior to judicial review. Movant's right to seek judicial review will be effectively denied if the Commission does not stay the Order. Further, since the Order has the effect of rendering Section 350.123, Florida Statutes, a nullity and the Order declares only subpoenas for documents need comply with Section 120.569(2)(k)1, Florida Statutes, Movant has a likelihood of success on appeal. Further, no parties to this case will be prejudiced while Movant seeks judicial review of the Order, as even the issues subject to a statutory clock can move forward without Movant's deposition. The reasonableness of FP&L's costs can be determined without any ruling on the Information Issue, even that issue is ultimately accepted by the Commission as an issue in the case. Movant's right to appeal should not be sacrificed for the sake of a schedule that does not require his involvement, in a case where he has no control over the timing of events and where Movant has no stake.

**Argument**

10. In pertinent part, the Commission's rule governing stays, Rule 25-22.061, Florida Administrative Code, ("the Stay Rule") provides as follows:

(2) . . . [A] party seeking to stay a final or nonfinal order of the Commission pending

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<sup>7</sup> By a phone conversation with the undersigned on June 7, OPC proposed taking Movant's deposition on June 28 or June 29. As of the date of this Motion for Stay, OPC's Subpoena has not been amended and/or reissued, nor has any other party issued a subpoena for Movant.



judicial review may file a motion with the Commission, which has authority to grant, modify, or deny such relief. A stay pending review granted pursuant to this subsection may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions relevant to the order being stayed, or both. In determining whether to grant a stay, the Commission may, among other things, consider:

- (a) Whether the petitioner has demonstrated a likelihood of success on the merits on appeal;
- (b) Whether the petitioner has demonstrated a likelihood of sustaining irreparable harm if the stay is not granted; and
- (c) Whether the delay in implementing the order will likely cause substantial harm or be contrary to the public interest if the stay is granted.

The Stay Rule does not specify the weight to be given to the enumerated factors in paragraphs (a) through (c), and therefore sound discretion must be applied considering the circumstances of each individual case. Movant maintains that in this case, the irreparable harm posed by the Order must be the prime consideration in deciding this Motion for Stay. For if irreparable harm is not the prime consideration, and the Commission denies the stay, the Commission effectively eliminates Movant's rights under the law to seek judicial review.

11. If Movant is forced to be deposed before judicial review is concluded, he will be irreparably harmed. Once Movant is questioned against his will pursuant to the Order, the deposition cannot somehow be erased, reversed or cured. Movant's request for relief from the First District Court of Appeal may be granted; however, if the Commission does not stay the Order, the Court's order would be moot. Movant has the unequivocal right to seek judicial review of the Order, but without a stay, Movant's right to review is effectively denied by the Commission before the First District Court of Appeal even has a chance to consider the matter.

12. Movant has a reasonable likelihood of success on the merits of judicial review. Among its errors, the Order has the effect of rendering Section 350.123, Florida Statutes, a

nullity. Indeed, the Order results in the deletion of Section 350.123 -- with no difference whatsoever to the Commission's authority -- since the Order supplants Section 350.123 with Section 120.569(2)(f). This voiding of a statutory section departs from the essential requirements of the law. Further, the Order concludes that only subpoenas for documents need comply with Section 120.569(2)(k)1's requirement for reasonable scope, although that section contains no such limitation. This conclusion also departs from the essential requirements of the law.

13. The parties and the public interest would not be harmed by staying the Order. Movant has no control over the amount of time that the First District Court of Appeal will take to decide this matter any more so than Movant had control over the amount of time the Commission took to decide the Motion to Quash. Judicial review may or may not be complete before the August 1 discovery cut-off or the mid-August hearings in this matter. However, even if review is not complete until after the hearings, FP&L has several able witnesses available to address any issues which the Commission eventually accepts for consideration in this proceeding. This case, like all other clause cases, is subject to an annual, rolling review; therefore, even if judicial review is not complete by the August hearings, the Commission may move forward with this year's hearings as scheduled. Moreover, the Commission may make a determination of the reasonableness of FP&L's costs without ruling on OPC's Information Issue. That issue, even if it is ultimately accepted as an issue in the case, is not subject to a statutory deadline for Commission determination, nor is it inseverable from other issues in the docket. So, again, if judicial review is not complete by August, the Commission may move

forward with the hearings as scheduled.<sup>8</sup>

14. Movant asserts that the public interest is served by granting a stay because doing so preserves the rights of all non-party individuals to seek judicial review of a Commission discovery order. Indeed, those who sought enforcement of the Subpoena must bear some of the consequences of their pursuit, rather than have Movant bear the consequences (through denial of the stay) simply because Movant wishes to exercise his right to appeal. Any time pressures felt by the parties or the Commission in this case are not Movant's doing.<sup>9</sup> Movant is not a party and made no request of the Commission other than to be left alone. The case can move forward without Movant, consistent with the public interest and in accordance with Commission requirements, and Movant's right to seek judicial review should not be denied by considerations outside Movant's control and regarding which Movant has no interest at stake.

15. There are no conditions appropriate for a stay which should be imposed on Movant.

16. Movant has contacted OPC regarding this motion and reports that OPC opposes the relief sought herein and intend to file responses to that effect.

**WHEREFORE**, Mr. Rajiv S. Kundalkar moves that the Commission stay, as set forth in this motion, Order No. PSC-11-0246-PCO-EI, issued June 3, 2011, pending, and for the duration of, the judicial review he will request and that such stay be granted without condition.

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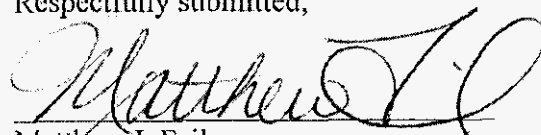
<sup>8</sup> The Order encouraged OPC to depose FP&L's proffered witnesses before deposing Movant. (Order at p. 6.) As of the date of this Motion, not all of FP&L's witnesses have been deposed. The discovery process is on-going.

<sup>9</sup> Movant has occasioned no delays in protecting his rights in this proceeding. Further, Movant has chosen not to seek reconsideration of the Order, which may have consumed additional Commission time and resources.

Docket No. 110009-EI  
Motion for Stay  
June 14, 2011

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Respectfully submitted,



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Attorneys for Rajiv S. Kundalkar

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and/or U.S. Mail on this 14th day of June, 2011, to the following:

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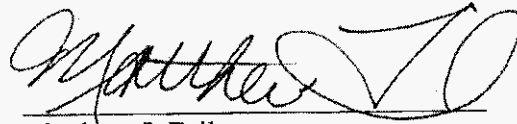
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A handwritten signature in black ink, appearing to read "Matthew J. Feil". The signature is written in a cursive style with a large, stylized "M" and "F".

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