

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery
clause with generating performance incentive
factor.

DOCKET NO. 140001-EI

DATED: SEPTEMBER 25, 2014

**STAFF'S OBJECTIONS TO CITIZENS' FIRST AND
SECOND SET OF INTERROGATORIES TO STAFF NOS. 1-10
AND MOTION FOR PROTECTIVE ORDER**

The staff of the Florida Public Service Commission, by and through its undersigned counsel, and pursuant to Rules 1.340 and 1.280, Florida Rules of Civil Procedure Fla. R. Civ. P.), Rule 28-106.206, Florida Administrative Code (F.A.C.), and Order No. PSC-14-0439-PCO-EI, files its objections to the Office of Public Counsel's (OPC) First and Second Set of Interrogatories to Staff, (Nos. 1-10) served on September 16 and 17, 2014, respectively.

Specific Objections:

Attached herein and incorporated into this motion as Exhibits A and B are OPC's First and Second Set of Interrogatories to Staff (Nos. 1-10). Staff objects to each and every interrogatory propounded therein on the following grounds:

1. Neither OPC nor any other party in proceedings before the Commission is entitled to discovery regarding the opinions or qualifications of staff serving in a purely advisory role.
2. Tellingly, the interrogatories (No. 1-10) seek information on the identity and qualifications of staff who will be "advising the Commission" regarding issues raised by the gas reserve petition filed by Florida Power & Light Company (FPL). (Emphasis supplied.)
3. It has long been established that Commission staff plays a neutral role and is not a party to proceedings before the Commission. OPC is correct in its assessment that staff will serve in the role of advisors and information gatherers for the Commission. The role of Commission staff is akin to that of judicial staff. Advisory staff qualifications and experience are irrelevant and immaterial to the issues raised in the gas reserve petition.
4. To require staff to participate in irrelevant discovery is unduly burdensome.
5. Any response to the interrogatories will have a chilling effect on staff as they would be subject to being subpoenaed by OPC to testify before Commission proceedings, presumably to elicit and/or impeach staff as to their qualifications and ultimate recommendations to the Commission. Pursuant to Rule 25-22.033(5), F.A.C., staff members who testify in a proceeding are subsequently prohibited from discussing the merits of the case with any Commissioner; participating in the analysis of the record,

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making recommendations to the Commission, and addressing the Commission at the Agenda Conference. The interrogatories specifically ask for information on staff who will be involved in its advisory function.

6. By forcing staff to submit qualifications and to take a position at this time, OPC seeks to force identified staff to move from advisor to advocate for a particular position on any identified issue. The discovery sought may effectively deprive the Commission of staff necessary to assist in its deliberations and ultimately its ruling. OPC is aware that the role of staff is as advisor and comes into play only *after* the hearing and *after* staff has had an opportunity to review the evidence and *after* the record is fully developed.
7. To the extent OPC does not intend to subpoena Commission staff identified in any response to the interrogatories to testify at the hearing, the discovery may be construed as an attempt to harass, embarrass, annoy, and unduly burden Commission staff for performing the duties of their job.
8. The only information Commission staff serving in an advisory role would be able to testify to would be their thoughts and opinions on the evidence produced by the parties at the hearing and the substance and nature of their recommendation to the Commission. Staff's opinions are not developed until after the record is fully developed. Thus any discovery seeking staff opinion, if not prohibited, could only occur *after* staff's recommendation is filed and *after* the deadline for discovery set by Order No. PSC-14-0439-PCO-EI.
9. To the extent that the interrogatories seek information that OPC believes will assist in support of its case, or serve as evidence OPC intends to introduce in this matter, OPC misapprehends the burden of proof required by these proceedings. It has long been established, particularly in rate case proceedings before the Commission, that the burden of proof lies with the utilities and intervenors to support their respective positions in this docket, not with advisory staff.
10. To the extent that OPC believes or asserts that it is entitled to the discovery sought by virtue of any special statutory authority, OPC misapprehends its role in these proceedings which is like that of any other intervenor.
11. Staff is not filing testimony in this docket regarding the gas reserve issues. To the extent OPC believes that the subject interrogatories apply to staff testimony, since none will be filed, the interrogatories are irrelevant.
12. OPC's interrogatories seek information that is not reasonably calculated to lead to the discovery of admissible evidence.

**STAFF'S MOTION FOR PROTECTIVE ORDER AND
MEMORANDUM OF LAW IN SUPPORT**

Pursuant to Rule 1.280, Fla. R. Civ. P., staff moves for the entry of a protective order quashing OPC's first and second sets of interrogatories (Nos. 1-10) and in support thereof states:

1. OPC's interrogatories place an undue burden on Commission staff as the interrogatories seek information on the Commission's advisory staff.
2. A response to OPC's interrogatories would disqualify staff identified therein from performing their function of advisor to the Commission.
3. OPC's interrogatories would irreparably harm the Commission and advisory staff as any responses to the interrogatories would disqualify staff from serving in their advisory role.
4. OPC's interrogatories seek information that is not reasonably calculated to lead to the discovery of admissible evidence.
5. A Motion for Protective Order is proper in this matter as time is of the essence. Staff has objected to the discovery and has 20 days to submit its responses.

**MEMORANDUM OF LAW IN SUPPORT OF
STAFF'S MOTION FOR PROTECTIVE ORDER.**

A motion for protective order must be made in accordance with the Florida Rules of Civil Procedure. The scope of discovery under the Rules is broad. Rule 1.280(b)(1), Fla. R. Civ. P., provides:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

However, discovery without limitation may not be obtained. Rule 1.280(c), Fla. R. Civ. P., States:

Upon motion by a party or by the person from whom the discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires. . . .

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OPC's interrogatories seek the identity of Commission staff serving in their advisory role to the Commission, and the qualifications and experience of the identified staff as to issues that may or may not be relevant to the gas reserve petition which have not, as of yet, been agreed upon by the parties.¹ Staff serves in the role of advisors and information gatherers for the Commission. The unauthorized discovery sought will place a burden on the Commission by inhibiting the Commission's critical post-hearing deliberative process. Responses to the interrogatories would irreparably harm staff in its advisory role. A comprehensive and anticipatory protective order is thus appropriate under these circumstances.

It has long been established that Commission staff is not a party in rate proceedings. Section 360.06 (3), F.S., states that Commissioners may employ clerical, technical, and professional staff "reasonably necessary for the performance of their duties." Staff's role is to investigate, obtain facts, and file its recommendation to the Commission for the purpose of assisting the Commission in its deliberative process. Rule 25-22.033(5), F.A.C., prohibits staff members who testify in a proceeding from discussing the merits of the case with a Commissioner during the pendency of the proceeding, participating in the analysis of the record, making recommendations to the Commission, and addressing the Commission at the Agenda Conference. The Florida Supreme Court, in South Florida Natural Gas v. Public Service Commission, 534 So. 2d 695, 698 (Fla. 1988), held that the Commission was clearly authorized to utilize its staff to test the validity, credibility, and competence of the evidence presented in support of a rate case proceeding before it. The Court recognized the impossibility of the Commission to investigate and make determinations without staff's participation. See also: Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So. 2d 982 (Fla. 1996). The Commission recognized the harm that discovery on Commission staff in their advisory capacity has upon that role in Order No. PSC-94-1562-PCO-WS², where the Prehearing Officer granted staff's motion to quash the subpoena of a staff member finding that staff's ability to assist the Commission in developing evidence and ensuring a complete record would be significantly compromised. Responses to the interrogatories would effectively deprive the Commission of its ability to obtain the assistance of staff to perform the Commission's statutory role. As a result, the Commission and its staff will be irreparably harmed should responses to OPC's interrogatories be compelled.

OPC's discovery will interfere with the deliberative governmental process of the Commission. The discovery in this instance is not unlike discovery directed toward a judge's staff. It has been held that a judge cannot be compelled to testify about their thought processes in making a decision in a case. See: State v. Lewis, 656 So. 2d 1248 (Fla. 1994) (stating that judges may not be examined as to their thought processes in making a decision); Department of

¹ OPC and FPL have each submitted separate lists of issues upon which they do not agree. OPC has stated that it may submit additional issues. The issues not agreed upon will go to the Hearing Officer for resolution at the November 6, 2014 Prehearing Conference.

² In re: Investigation into Florida Public Service Commission Jurisdiction over Southern States Utilities, Inc. in Florida, Docket No. 930945-WS, issued December 14, 1994.

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Highway Safety and Motor Vehicles v. Marks, 898 So. 2d 1063 (Fla. 5th DCA 2005) (holding that a hearing officer acting in a judicial capacity was entitled to claim judicial immunity and could not be compelled to give testimony about his mental process in deciding a case). The First DCA found that a legislative privilege applied to a legislator also applied to legislative staff. "The reason for affording a legislative privilege could be subverted entirely if an aide could be forced to disclose that which the senator or representative would be entitled to keep private." Fla. House of Representatives v. Expedia, Inc., 85 So. 3d 517, 525 (Fla. 1st DCA 2012). While there is no case law or statute granting Commission staff privileged status, nevertheless, following the same reasoning, Commission staff acting in their advisory role to the Commission in its deliberations should be protected from discovery.

RESPECTFULLY SUBMITTED, this 26th day of September, 2014:

/s/ Martha F. Barrera

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery
clause with generating performance incentive
factor.

DOCKET NO. 140001-EI

DATED: SEPTEMBER 25, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that STAFF'S OBJECTIONS TO CITIZENS' FIRST AND SECOND SET OF INTERROGATORIES TO STAFF NOS. 1-10 AND MOTION FOR PROTECTIVE ORDER has been filed with Office of Commission Clerk and a copy has been furnished to the following by electronic mail, this 25th day of September, 2014:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power)	DOCKET NO. 140001-EI
Cost Recovery Clause with)	FILED: September 16, 2014
Generating Performance Incentive)	
Factor)	
_____)	

**CITIZENS' FIRST SET OF INTERROGATORIES TO THE
STAFF OF THE FLORIDA PUBLIC SERVICE COMMISSION (NOS. 1-8)**

The Citizens of the State of Florida, through the Office of Public Counsel (Citizens or OPC), propound the following interrogatories, pursuant to Rule 1.340, Florida Rules of Civil Procedure, to the Staff of the Florida Public Service Commission ("Staff"). These interrogatories shall be answered under oath by you or your agent, who is qualified and who will be identified, with the answers being served as provided by the Rules of Civil Procedure, and within 20 days, or such other date agreed to by parties or established by the Prehearing Officer. As provided by Rule 1.340(a), Florida Rules of Civil Procedure, each interrogatory shall be answered separately and fully in writing under oath unless it is objected to. Each answer shall be signed by the person making it.

Give the name, address, and job title of those persons providing the answers to each of the following interrogatories.

DEFINITIONS

"You", "your", "Company" or "Staff" refers to Florida Public Service Commission and its employees.

“Document” refers to written matter of any kind, regardless of its form, and to information recorded on any storage medium, whether in electrical, optical or electromagnetic form, and capable of reduction to writing by the use of computer hardware and software.

“Identify” means:

- (a) With respect to a person, to state the person’s name, address and job title (e.g., “employee”) on the Staff;
- (b) With respect to a document, to state the nature of the document in sufficient detail for identification in a request for production, its date, its author, and to identify its custodian. If the information or document identified is recorded in electrical, optical or electromagnetic form, identification includes a description of the computer hardware or software required to reduce it to readable form.

c. name of the entity audited; and

d. nature of work performed.

3. Please identify each of the members of the Commission's staff who have experience in preparing financial statements or other business records prepared and maintained in accordance with Accounting Standard Codification ("ASC") 932 – Accounting for Oil and Gas Exploration.

4. For each individual identified in Interrogatory 3, please identify the name of the entity(ies) for which financial statements or other business records were prepared and maintained for, the period and duration of such experience and the specific types of financial statements or other business records that were prepared and maintained by the individual.

STAFF'S OBJECTIONS TO CITIZENS' FIRST AND SECOND SET OF
INTERROGATORIES TO STAFF NOS. 1-10
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DOCKET NO. 140001-EI

Exhibit A
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(850) 488-9330

Attorney for the Citizens
of the State of Florida

AFFIDAVIT

STATE OF FLORIDA)

COUNTY OF _____)

I hereby certify that on this _____ day of _____, 2014, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared _____, who is personally known to me, and he/she acknowledged before me that he/she provided the answers to interrogatory number(s) _____ from in CITIZENS FIRST SET OF INTERROGATORIES TO THE STAFF OF THE FLORIDA PUBLIC SERVICE COMMISSION (NOS. 1-8) in Docket No. 140001-EI, and that the responses are true and correct based on his/her personal knowledge.

In Witness Whereof, I have hereunto set my hand and seal in the State and County aforesaid as of this _____ day of _____, 2014.

Notary Public
State of Florida, at Large

My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Citizens' First Set of Interrogatories to the Staff of the Florida Public Service Commission (Nos. 1-8) has been furnished by electronic mail and/or U.S. Mail on this 16th day of September, 2014, to the following:

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Charles J. Rehwinkel

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power)	DOCKET NO. 140001-EI
Cost Recovery Clause with)	FILED: September 17, 2014
Generating Performance Incentive)	
Factor)	
_____)	

**CITIZENS' SECOND SET OF INTERROGATORIES TO THE
STAFF OF THE FLORIDA PUBLIC SERVICE COMMISSION (NOS. 9-10)**

The Citizens of the State of Florida, through the Office of Public Counsel (Citizens or OPC), propound the following interrogatories, pursuant to Rule 1.340, Florida Rules of Civil Procedure, to the Staff of the Florida Public Service Commission ("Staff"). These interrogatories shall be answered under oath by you or your agent, who is qualified and who will be identified, with the answers being served as provided by the Rules of Civil Procedure, and within 20 days, or such other date agreed to by parties or established by the Prehearing Officer. As provided by Rule 1.340(a), Florida Rules of Civil Procedure, each interrogatory shall be answered separately and fully in writing under oath unless it is objected to. Each answer shall be signed by the person making it.

Give the name, address, and job title of those persons providing the answers to each of the following interrogatories.

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"You", "your", "Company" or "Staff" refers to Florida Public Service Commission and its employees.

"Document" refers to written matter of any kind, regardless of its form, and to information recorded on any storage medium, whether in electrical, optical or electromagnetic form, and capable of reduction to writing by the use of computer hardware and software.

"Identify" means:

- (a) With respect to a person, to state the person's name, address and job title (e.g., "employee") on the Staff;
- (b) With respect to a document, to state the nature of the document in sufficient detail for identification in a request for production, its date, its author, and to identify its custodian. If the information or document identified is recorded in electrical, optical or electromagnetic form, identification includes a description of the computer hardware or software required to reduce it to readable form.

c. The employer during the relevant timeframe;

d. The dates of such work relevant work experience; and

e. Professional coursework, training and certification related to depletion.



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Attorney for the Citizens
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AFFIDAVIT

STATE OF FLORIDA)

COUNTY OF _____)

I hereby certify that on this _____ day of _____, 2014, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared _____, who is personally known to me, and he/she acknowledged before me that he/she provided the answers to interrogatory number(s) _____ from in CITIZENS SECOND SET OF INTERROGATORIES TO THE STAFF OF THE FLORIDA PUBLIC SERVICE COMMISSION (NOS. 9-10) in Docket No. 140001-EI, and that the responses are true and correct based on his/her personal knowledge.

In Witness Whereof, I have hereunto set my hand and seal in the State and County aforesaid as of this _____ day of _____, 2014.

Notary Public
State of Florida, at Large

My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Citizens' Second Set of Interrogatories to the Staff of the Florida Public Service Commission (Nos. 9-10) has been furnished by electronic mail and/or U.S. Mail on this 17th day of September, 2014, to the following:

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