

ORIGINAL



**Florida
Power**
CORPORATION

JEFFERY A. FROESCHLE
CORPORATE COUNSEL

September 26, 1997

**Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0830**

Re: Docket No. 961894-EQ

Dear Ms. Bayó:

9/26/97

Enclosed for filing in the subject docket is an original and 15 copies of Response of Florida Power Corporation to Staff's Objections to Interrogatories and Request for Protective Order.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

- ACK
- AFA 4
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG JAF/kp
- LEG 1 cc: Parties of Record
- LIN 2
- OPC _____
- ROH _____
- SEL 1
- WFS _____
- OT 4 _____

Very truly yours,

Jeffery A. Froeschle

RECEIVED & FILED

[Signature]
DIVISION OF RECORDS

DOCUMENT NUMBER - DATE

09001 SEP 29 1997

Docket No. 961184-EQ
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the enclosed Response of Florida Power Corporation to Staff's Objections to Interrogatories and Request for Protective Order has been furnished to the following individuals by U.S. Mail this 26th day of September 1997.

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Orlando Cogen Limited
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Orlando, FL 32809



Attorney

COPY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of an early termination amendment to a negotiated qualifying facility contract with Orlando Cogon Limited, Ltd. by Florida Power Corporation.

Docket No. 961184-EQ

**Submitted for filing:
September 29, 1997**

**RESPONSE OF FLORIDA POWER CORPORATION
TO STAFF'S OBJECTIONS TO INTERROGATORIES
AND REQUEST FOR PROTECTIVE ORDER**

Florida Power Corporation (Florida Power), hereby responds to Staff's Objection to Florida Power Corporation's First Set of Interrogatories Propounded to Staff and Request for Protective Order and states as follows:

1. On August 20, 1997, pursuant to Rule 1.340, Florida Rules of Civil Procedure, Florida Power filed its First Set of Interrogatories Propounded to Staff, seeking information related to the issues in this matter.

2. On September 2, 1997, Staff of the Florida Public Service Commission (Staff) filed an objection (Objection) to those interrogatories and requested that the Prehearing Officer issue a protective order relieving Staff from the burden of responding to them.

3. Staff states that it is not a real party in interest in any proceeding before the Florida Public Service Commission ("FPSC" or "Commission"). Objection, ¶6, p. 3. Staff appears to be suggesting, without explicitly so stating, that because of this status, it should not be required to respond to Florida Power's interrogatories. Florida Power disagrees.

4. Section 120.52(12), Florida Statutes (1996 Supp.), provides that "Party" includes specifically named persons whose substantial interests are being determined in the proceeding and any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding.

5. Rule 1.340, Florida Rules of Civil Procedure, provides that "any party may serve upon any other party written interrogatories to be answered ... (2) if that party is a ... governmental agency, by any officer or agent, who shall furnish the information available to that party."

6. There is no provision in either the rule or the statute that explicitly or implicitly exempts Staff from responding to discovery in a proceeding in which Staff is a party.

7. Rule 1.280, Florida Rules of Civil Procedure, allows for discovery of any matter, not privileged, that is relevant to the subject matter of the action. However, the discovery of relevant, non-privileged information may be limited or prohibited in order to prevent annoyance, embarrassment, oppression or undue burden or expense. Fla.R.Civ.P. 1.280(c). Most discovery questions may be decided by a proper balancing of a litigant's right to pursue full discovery with the deponent's right to protection against oppressive disclosure. See In Re: Investigation into Florida Public Service Commission Jurisdiction over Southern States Utilities, Inc. in Florida, Docket No. 930945-WS, Order No. PSC-94-1562-PCO-WS, issued December 14, 1994.

8. Florida Power first submits that the interrogatories seek only relevant information. The interrogatories inquire into three principal areas: (1) the

regulatory goal of inter-generational fairness; (2) Staff's view of the "primary objectives" of Florida Power's reverse auction bid solicitation; and (3) the sensitivity cases performed by Staff in its review of the contract buyout. Each of these areas was specifically discussed in Staff's December 26, 1996 alternative recommendation adopted by the Commission at its January 7, 1997 Agenda Conference and is relevant to the instant hearing on Florida Power's Petition for Approval of the Early Termination Amendment to the Florida Power/OCL Contract (Petition).

9. Staff, however, argues that the information sought in Interrogatories 1-9 is irrelevant to this proceeding because the impressions and analysis that led to Staff's recommendation in another docket, or in the Proposed Agency Action (PAA) portion of this proceeding are not relevant to the formal *de novo* portion.

10. Florida Power disagrees. With respect to the regulatory goal of inter-generational fairness, Florida Power is unaware of any such goal being specifically enunciated by the Commission or its Staff. By seeking information regarding the application of this goal in other previous dockets and in the prior PAA proceeding, Florida Power hopes to determine what the goal is and how to apply the goal in the instant docket. While the Staff analysis in those other and prior dockets may not be precedential, it may provide Florida Power with relevant information to be applied in the instant docket. With respect to the alleged "primary objectives" of FPC's reverse auction bid solicitation, this was the first lead issue identified by Staff in its alternative recommendation to deny Florida Power's petition. Florida Power is attempting to determine why Staff considers this to be a relevant issue and how its analysis of this issue rationally supports a

denial of Florida Power's petition. Finally, the remaining interrogatories seek information regarding Staff's sensitivity analyses. Those analyses are at the heart of any determination of whether the Petition is desirable from the standpoint of Florida Power's ratepayers. That they were performed for Staff's analysis of the prior PAA does not make them irrelevant. Rather, they are extremely relevant to determining how Staff has viewed Florida Power's sensitivity analysis of the Amendments to the Florida Power/OCL Contract, and to determining whether there are some aspects of Staff's analysis with which Florida Power disagrees.

11. The lack of merit in Staff's contention that the information sought by Florida Power is irrelevant can be seen in the inconsistency of its own objections. As discussed below, Staff also objects to the same interrogatories on the grounds that they seek analysis and conclusions from Staff on a pending matter. If the information sought relates to the pending matter, it clearly is relevant to the pending matter. Staff cannot have it both ways.

12. Staff states that if it determines that the profiled testimony does not provide an adequate record it will file appropriate testimony to assure an adequate record. Florida Power submits that it should not be constrained in its discovery by Staff's assurances that it will complete the record as Staff sees necessary. The issues raised by Florida Power in its discovery requests are relevant to the issues in the instant docket, and Florida Power should be allowed to conduct this discovery.

13. Florida Power next submits that matters inquired into in the interrogatories are not privileged. Staff makes no assertion that the matters are privileged. Therefore, privilege does not appear to be an issue herein.

14. Finally, Florida Power submits that Florida Power's right to full discovery in the case outweighs any annoyances, embarrassment, oppression or undue burden or expense to Staff as a result of responding to the interrogatories.

15. Staff argues that responding to Florida Power's interrogatories would cause an undue burden on Staff by impinging upon Staff's role as an advisor to the Commission. In support, Staff cites Rule 25-22.033(5), Florida Administrative Code, stating that a staff member who testifies in a case cannot discuss the merits of that case with any Commissioner during the pendency of the case, including participating in preparation of recommendations and at the agenda conference.

16. Florida Power responds that simply answering interrogatories does not prevent that member of Staff from participating in the docket. In fact, Rule 25-22.033(5), F.A.C., only applies to a staff member who testifies in a case. The rule further states that "[n]othing in this subsection shall preclude non-testifying advisory staff members from discussing the merits of a pending case with a Commissioner, provided the communication is not otherwise prohibited by law." Florida Power is not attempting to compel the testimony of a member of Staff. It is simply attempting to learn the basis for certain statements made by Staff with respect to the subject matter of this docket. The Staff member who responds to these interrogatories will not be disqualified from discussing the merits of the case with a Commissioner, or from participating in the preparation of recommendations or appearing at the agenda conference.

17. Staff also argues that the interrogatories are objectionable because they improperly seek analysis and conclusions from Staff on a pending matter. In

support, Staff cites previous Commission decisions where the Commission allegedly recognized the concerns raised in Staff's objection with respect to other forms of discovery. Florida Power responds that those decisions are not dispositive of the issues in the instant proceeding.

18. In In Re: Investigation into Florida Public Service Commission Jurisdiction over Southern States Utilities, Inc. in Florida, Docket No. 930945-WS, Order No. PSC-94-1562-PCO-WS, issued on December 14, 1994 (SSU 1), the Prehearing Officer quashed a notice of deposition of a member of Staff. In deciding to grant a protective order to Staff, the Prehearing Officer balanced the right of the County to full discovery in the interest of adequately preparing its case against the Staff's interest in the integrity of its deliberative process and found that the public policy behind the Staff's concern with the integrity of the deliberative process was more compelling. In In Re: Investigation into the appropriate rate structure for Southern States Utilities, Inc., Docket No. 930880-WS, Order No. PSC-94-0425-PCO-WS, issued April 11, 1994 (SSU 2), one of the parties issued subpoenas for depositions of seven Staff members in addition to the Staff members who Staff was sponsoring. The Prehearing Officer noted that virtually the entire supervisory structure of the Division of the Commission had been noticed for deposition, and then commented that "the subpoenas of Staff appear to be nothing more than an attempt to annoy, harass, or somehow discredit Staff..." The Prehearing Officer balanced the interests in full discovery against "the lack of relevance of any information that might be elicited thereby, the lack of necessity for such information to the Counties' case, and the Counties' ability to obtain the information through less burdensome means," and held in favor of

granting Staff's protective order. These cases, however are distinguishable from the instant case. *SSU 1* concerned a deposition of the Director of the Division of Water and Wastewater to seek discovery of the subject, reason, necessity, and effect of a statute. Such discovery is clearly outside the scope of permissible discovery. In the instant case, however, Florida Power's interrogatories concern information available to Staff that is relevant to Florida Power's case. *SSU 2* was decided in favor of Staff because the depositions of numerous Staff persons concerned information that was irrelevant to the proceeding, was unnecessary to the Counties' case, and could be obtained through less burdensome means. In the instant case, the information, as discussed above, is relevant to Florida Power's case and can not be obtained from any other source. Therefore, the reasoning which applied to *SSU 1 & 2* cases does not apply in this docket.

19. On the other hand, in In Re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Deval, Highlands, Lake, Lee Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties (SSU 3), Docket No. 950495-WS, Order No. PSC-96-0411-FOF-WS, issued on March 22, 1996, the Staff moved to quash a subpoena and for a protective order on the grounds of relevance, the potential chilling effect upon Staff, and the deliberative process privilege. The Commission again balanced the competing interests but denied Staff's motion on the grounds that objections to relevancy, undue burden, or invasion of the deliberative process could be raised at the deposition.

20. Florida Power submits that the approach taken by the Commission in the SSU 3 decision is the better approach for the Commission to take in the instant proceeding. If Staff were to identify a specific person who would be unable to participate further in the proceeding as a result of responding to the interrogatories, or were to find some particular aspect of the deliberative process that would be impinged upon, then it could raise that specific objection. Such an approach would be less burdensome on Florida Power's ability to conduct discovery in the docket, but would still protect Staff's interests in the deliberative process.

WHEREFORE, for the foregoing reasons, Florida Power requests that the Prehearing Officer deny Staff's request for a protective order.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION



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