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In re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C.	DOCKET NO. 991462-EU Filed: February 14, 2000

FLORIDA POWER CORPORATION'S RESPONSE TO OKEECHOBEE GENERATING COMPANY'S MOTION TO COMPEL

Florida Power Corporation ("FPC"), pursuant to Rule 28-106.204 of the Florida Administrative Code, hereby files its response to Okeechobee Generation Company's ("OGC") Motion to Compel and requests that this Commission deny OGC's motion.

OGC does not need discovery from Florida Power Corporation for its need determination proceeding. If it did, OGC would have joined FPC as a essential party to the proceeding in the first instance. By failing to do so, OGC has admitted that no information or documents FPC has are needed for its case. Nonetheless, OGC served 44 Requests for Admission, 37 Interrogatories, and 29 Production requests on FPC. FPC responded to all 44 Requests for Admission, and those interrogatories and production requests that appeared remotely relevant and were not burdensome. As part of its response, FPC also advised OGC that it did not plan to offer the testimony of any employee witness in opposition to OGC's need case.

OGC has now moved to compel discovery from FPC. Since OGC, admittedly, does not need discovery from FPC either to put on its own need case or to cross-examine any FPC employee witness, OGC's motion to compel can only be viewed as an unnecessary fishing expedition or as an attempt to divert FPC's resources away from its challenge to OGC's petition; the consequence, as OGC puts it, of being a party to its proceeding. OGC bases its asserted

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entitlement to discovery on its mistaken legal conclusion that FPC – whose Petition to Intervene has already been granted without opposition or reservation – must "prove up" its allegations of standing (i.e., that its substantial interests are affected by this proceeding) during the formal hearing on OGC's need petition. OGC then claims that each of its outstanding discovery requests specifically relate to allegations in FPC's Petition to Intervene. OGC is wrong on both counts.

FPC'S STANDING IS NO LONGER AT ISSUE IN THIS PROCEEDING

FPC's Petition to Intervene, *unlike OGC's Petition for a Determination of Need*, has already been granted and is no longer at issue. Indeed, on November 4, 1999, Commissioner and Prehearing Officer Jacobs issued an Order **granting** FPC's Petition to Intervene. (Order No. PSC-99-2153-PCO-EU attached hereto as Ex. A). The Order is clear and precise. It does not contain any reservations, nor does it make FPC's party status subject to subsequent evidentiary proof. OGC did not oppose FPC's intervention and did not seek to challenge the Prehearing Officer's Order.

Nonetheless, OGC's now claims that the Commission's November 4th Order granting FPC intervention is only *preliminary,* and that FPC must still "prove-up" its standing at the formal hearing on OGC's need petition. OGC's claim in this regard is legally baseless and, if accepted, would lead to an illogical and impractical application of the Commission's rules, would constitute a significant departure from longstanding Commission practice regarding intervention, and would threaten to overwhelm final hearngs before the Commission with collateral testimony and exhibits relating solely to the standing of numerous intervenors.

First, the three decisions by the Department of Environmental Protection ("DEP") cited by OGC do not support OGC's legal contention that, in an administrative proceeding, FPC must

"prove-up" its unchallenged allegations of standing and a right to intervene at the final hearing. Thus, OGC's reliance on these decisions is misplaced, and worse, its representations to this Commission concerning the holdings in each of the three cases are misleading.

As primary support for its contention that FPC is legally obligated to "prove-up" the allegations of its intervention petition, OGC relies on language quoted from Florida Audubon Society v. Department of Environmental Regulation, 1986 WL 32870, at *22. However, the quoted language does not even appear in the Secretary's Final Order in that proceeding. Rather the quoted language, which appears only in the hearing officer's discussion of standing in the "recommended order," is specifically rejected by the Secretary in the Final Order. See Florida Audubon at *2, ("The hearing officer erred in his addition of requirements for the establishment of standing . . . ."). Thus, not only is the quoted language **not the law**, it is not even salvageable dicta.

Similarly, the language OGC relies on in Jacksonville Shipyards, Inc. v. Florida Dep't of Envtl. Reg., is found only in "*Respondent George H. Hodges Jr.'s Exception to Recommended Order.*" And, even though the Secretary's Final Order does discuss standing, the Final Order ultimately rejects each of Hodges' exceptions to the challenged party's standing and even notes that Hodges likely waived any right to challenge that party's standing in earlier pleadings.

Finally, the most recent DEP decision relied on by OGC, reasonably read, actually proves that FPC is correct here; that the Commission's Order granting FPC intervention without reservation ends the inquiry as to FPC's party status and/or standing. In Florida Power Corp. v. Dep't of Envtl. Protection, 1999 WL 166086 at *1, FPC initiated a proceeding at DEP to obtain an air construction permit. LEAF and Sierra Club petitioned to intervene, and FPC challenged their right to do so based on standing. As the Final Order notes, instead of making a

determination on the standing issue at that time, the ALJ granted LEAF's and the Sierra Club's petitions, but specifically made the grant "*subject to*" LEAF and Sierra Club providing proof of their standing at the final hearing.

Here, OGC did not challenge FPC's standing by filing pleadings responsive to FPC's Petition to Intervene. The Commission's Order granting FPC intervention says nothing about requiring FPC to "prove-up" its standing at the final hearing. And, notably the Commission's Order setting the hearing on OGC's need petition states, "[o]nly issues relating to the need for the power plant and its associated facilities will be heard at the March 20-22, 2000 hearing." Thus, the Commission obviously considers the matter closed, and a reasonable reading of the Florida Power case leads to the conclusion – not that every intervenor must "prove-up" its standing at the final hearing as OGC suggests – but, that in the absence of a specific reservation in the Order on intervention, an intervenor's standing and party status is conclusively determined at the time the Order on intervention becomes final.

This conclusion, rather than OGC's, is also consistent with the Commission's Rule and long-standing Commission practice regarding intervention. For example, Rule 25-22.039, the Commission's Rule on intervention, permits Petitions to Intervene to be filed up to five (5) days before the final hearing in a proceeding. At that point in time, all other parties to a proceeding have filed testimony, discovery has been conducted and closed, and the pre-hearing conference is complete. If at this point, as OGC now claims, an unchallenged intervenor still had to "prove-up" its petition to intervene at the final hearing, it would be impossible for the intervenor to do so (unless it could accomplish this through cross-examination of its adversary). This is an absurd result that would essentially abrogate the five (5) day portion of the Commission's intervention rule.

There may be instances where appropriate challenges are made to such a petition to intervene, in which case the proposed intervenor's standing will have to be resolved via legal argument or a mini-evidentiary hearing prior to the final hearing. But, that is something the Commission can handle on a case-by-case basis in light of the facts and circumstances. This conforms to the Commission's usual practice of ruling on matters of intervention prior to hearing.

On the other hand, if, as OGC's claims, *every intervenor* in *every proceeding* before the Commission has to "prove-up" the allegations of its Petition to Intervene, the Commission's valuable hearing time would quickly be swallowed up, precluding the Commission from getting to the real, substantive, issues in any case. Indeed, a hearing on a case with numerous intervenors could effectively bring this Commission's work to a near standstill. For this reason, the Commission's practice has been to decide issues of intervention prior to the final hearing in a particular docket. The Duke proceeding provides a perfect example. In that case, FPC filed a Petition to Intervene, Duke responded with a *Response in Opposition and Motion to Deny FPC's Petition to Intervene,* the pre-hearing officer heard oral arguments, and then entered an Order granting FPC's Petition to Intervene.

Accordingly, the only reasonable conclusion is that the Order granting FPC's Petition for Intervention, which was unopposed and unchallenged, is conclusive as to FPC's status and standing in this proceeding.

In addition, OGC cannot claim that it was not on notice that the Commission's Order granting FPC's Petition to Intervene constituted a final determination on the issue of FPC's standing. To the contrary, the November 4th Order specifically notes that OGC's Motion to Strike another investor owned utility's Petition to Intervene did "not contest that utility's

"**standing** to intervene." (Order p.1.). OGC did not even move for reconsideration of the November 4th Order. Thus, OGC failed to take the appropriate steps to challenge FPC's standing to intervene in this proceeding and now, left without a legal basis to conduct its fishing expedition into FPC's records, OGC is attempting to re-open that which has already been determined. OGC's Motion to Compel should be denied.

In any event, FPC's standing in this case was foreshadowed, and is furher necessitated by the Commission's rulings in the Duke case, now pending before the Florida Supreme Court. As FPC explained in its Petition to Intervene, FPC must be afforded standing in this case to raise and preserve the critical issues litigated in the Duke case; otherwise the Commission might render ruling that proves to be contrary to law, and no stakeholder in the current regulatory framework would have standing to challenge the illegal decision. This alone establishes with certainty FPC's standing to intervene. Hence OGC's Motion to Compel should be denied for this reason as well.

OGC'S OUTSTANDING DISCOVERY REQUESTS DO NOT RELATE TO FPC'S PETITION TO INTERVENE

Even if OGC were correct that it can challenge FPC's standing at the hearing on its need petition, OGC's Motion to Compel must still be denied because FPC responded to each and every one of OGC's discovery requests that arguably relates to FPC's standing. For example, FPC responded to each of the following Interrogatories and Production requests:

Interrogatories:

1. *Please describe in detail the detrimental impacts that FPC believes the Project will have on FPC's shareholders.*

2. *Please describe the detrimental impacts that FPC believes the Project will have on its ratepayers.*

3. *Please describe the detrimental impacts that FPC believes the Project will have on FPC's short-term and long-term planning.*

4. *Please describe in detail the detrimental impacts that FPC believes the Project will have on FPC's transmission system.*

Production Requests:

1. *All documents which relate to, mention or otherwise reflect on FPC's long-term planning being adversely affected by the existence of capacity and energy from Merchant Plants in the Florida grid.*

2. *All documents which relate to, mention or otherwise reflect on FPC's long-term planning being adversely affected by the Project.*

3. *All documents which relate to, mention or otherwise reflect on FPC's ability to serve its retail customers being impaired by capacity from Merchant Plants being available for purchase by FPC or by other retail-serving utilities in Peninsular Florida.*

OGC's remaining requests (including some of the requests to which FPC responded) have absolutely no relationship to FPC's Petition to Intervene. To the contrary, OGC, having now asserted by its Motion to Compel that the reason it needs discovery from FPC is to challenge FPC's standing, finds itself in the awkward position of trying to relate its argumentative, irrelevant, immaterial, and overreaching interrogatories and production requests back to FPC's Petition to Intervene. However, FPC's Petition to Intervene does not contain broad allegations that might open the door to extensive, burdensome discovery, such as that propounded by OGC. Rather, FPC's petition sets-forth three narrow and very specific reasons why FPC is entitled to participate in OGC's need proceeding as follows:

> First, FPC is entitled to participate in OGC's need proceeding to preserve, in this case, the question concerning the Commission's authority under existing law to approve OGC's merchant plant, presently on appeal to the Florida Supreme Court in the Duke merchant plant case. Otherwise, as FPC explained, the Commission might render a ruling that proves to be contrary to law, and no stakeholder in the current regulatory framework would have standing to challenge the illegal decision;

> Second, FPC is entitled to participate in OGC's need proceeding because OGC claimed that its merchant plant would meet the needs of Peninsular Florida utilities, including FPC. Indeed, OGC's own petition exhibits show that its merchant plant will displace FPC's power plants. Thus, unless OGC intends to disprove its own allegations, this alone makes FPC an indispensable party; and
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> Third, FPC is entitled to participate in OGC's need proceeding because a finding that OGC's uncommitted "merchant" plant capacity, as OGC claimed, can and should be counted toward the reserves available to Peninsular Florida utilities, including FPC, will constitute a derogation of long-standing Commission policy that only committed capacity can be counted towards reserves.[1]

OGC's hindsight attempt to fit its outstanding, objectionable discovery requests into FPC's narrow and very specific Petition, is the equivalent of trying to force a camel through the eye of a needle.

Indeed, OGC makes no real attempt to relate its outstanding discovery requests to the three reasons FPC indicates it has standing to participate in OGC's need proceeding. Instead, OGC extracts words and phrases from FPC's Petition, takes them totally out-of-context, attaches groups of outstanding discovery requests to them, and then claims that FPC's mere use of these words and phrases gives OGC carte-blanche discovery rights.

For example, OGC claims that since FPC's Petition states at paragraph 10 that, *"[i]f the Commission were to accept OGC's position, therefore, FPC's obligations under long-standing Commission policy would change, and FPC's long-term planning will be detrimentally affected,"* OGC is somehow entitled to extensive discovery relating to FPC's long-term "generation and transmission planning." (OGC's Motion p. 8-9, referencing interrogatories 10-13). This is absurd. Paragraph 10 of FPC's Petition concerns the Commission's long-standing

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[1] FPC's Petition to Intervene also noted that a derogation of the long-standing Commission policy that only committed (not merchant) capacity could be counted towards reserves would pre-determine issues then pending before the Commission in the Reserve Margin docket to which FPC had been made a mandatory party. Since that

policy that retail utilities and the FRCC may count only firm power resources towards reserve margins. FPC does not, by using the term long-term planning, open the floodgates to any discovery OGC wants concerning FPC's generation and transmission planning. (In any event, FPC responded to OGC's interrogatories and production requests relating to how merchant plant capacity adversely affects its long-term planning.)

Similarly, OGC asserts that FPC's statement that *"[i]n this climate, FPC is uncertain both how and if regulated retail load-serving utilities are supposed to co-exist with merchant plants in the existing regulatory environment," (paragraph 17)* – which is a comment on the Commission's longstanding policy on reserves and the uncertainty remaining as a result of the pending Duke appeal – opens to the door for OGC to request broadly *all documents relating to FPC's wholesale power sales* (request 5), *all documents relating to FPC's recovery of generation costs when FPC purchases power* (request 21), *all documents relating to FPC's power marketing arrangements . . .* , (request 23), *all documents relating to wholesale power sales by FPC's affiliates . . .etc.* (request 25).

These requests clearly have no relationship to FPC's identified reasons for intervening in OGC's need case, and OGC cannot justify them by claiming that FPC used the terms *regulatory environment* and *merchant plants*.

Certainly, OGC would object to such a broad, out-of-context, reading of its need petition and refuse to comply with extensive discovery requests concerning PG&E Corporation's development of merchant plants around the Country – although its petition does state that OGC "*is an indirect, wholly-owned subsidiary of PG&E Generating*," which "*is an indirect wholly owned subsidiary of PG&E Corporation, an energy-based holding company that markets energy*

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time, the Reserve Margin docket has been settled and closed. Nonetheless, FPC's interest in the Commission long-

services throughout North America." (OGC's Petition p.16). PG&E's development of merchant plants outside the state is simply irrelevant to whether OGC's plant is "needed" in Florida. Likewise, OGC's outstanding discovery requests to FPC are not relevant to FPC's standing in this proceeding.

In sum, OGC's outstanding discovery requests (Interrogatories 10-25 and 29-37 and Production Requests 4-9, 14, 21-23, and 25-26) have no relationship to FPC's Petition to Intervene. Therefore, even if OGC were correct that it can challenge FPC's standing to intervene at the need hearing (which it cannot), its motion to compel should be denied.

SPECIFIC DISCOVERY REQUESTS AS UNDULY BURDENSOME

In its Motion to Compel, OGC complains that FPC does not sufficiently articulate why some of OGC's requests are burdensome. The burdnsome nature of these requests may be easily seen.

Document Requests 4-7

OGC's production requests 4-7 collectively seek 10 years of hour-by-hour documentation of every wholesale capacity or energy contract entered into by FPC that was for less than a year. In its motion to compel, OGC now, only seeks 5 years of data, but in either case, such requests in OGC's need proceeding is unduly burdensome. In order to comply with these requests, FPC would have to expend an extraordinary number of hours collecting and reviewing forty-three thousand, three hundred and fifty hours of data to determine which, if any, of its wholesale sales reflected in the hourly data were for less than a year, and then produce that hourly material. FPC's wholesale sales are irrelevant to both its standing claims and OGC's need petition. There is simply no need for OGC to have FPC's hourly wholesale sales data and,

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standing policy concerning how Peninsular Florida utilities must calculate reserves is not diminished.

given the extraordinary burden of providing it, the burdensomeness of this discovery far outweighs any claim by OGC that it is entitled to these documents.

FPC'S SUBSTANTIVE RESPONSES TO OGC'S PRODUCTION REQUESTS

OGC concludes its Motion to Compel by complaining that FPC provided or designated too many documents as responsive to OGC's production requests 1-3, 10-12, 17-20, 24, 27 and 28. To the contrary, in view of OGC's broad requests, FPC designated quite specifically the documents FPC considers responsive to OGC's requests. These documents are FPC's hearing testimony, deposition testimony, and exhibits in the Duke need case, the entire record of the Reserve Margin docket, the transcript (if available) of the Merchant Plant workshop, and the entire record on appeal in the Duke case, all of which OGC's counsel is intimately familiar with having participated in each of those proceedings. Additionally, FPC also indicated that it will be filing pre-filed testimony in this proceeding that will be responsive to these requests.

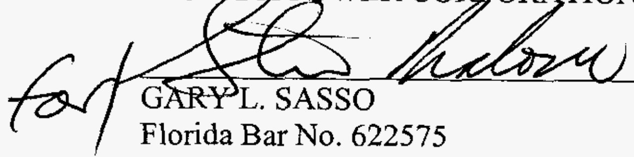
If OGC is unhappy with these accurate responses, it could have made an effort to narrow its requests, but absent that, FPC is not obligated to narrow its designations/production. Indeed, FPC would put itself at risk if it did narrow its responses, since OGC may later object to FPC's use of such documents in this proceeding if they were not designated or produced in response to these requests.

Thus, FPC's responses to the aforementioned production requests are accurate and as specific as the requests themselves permit. As such, OGC's Motion to Compel more specific responses should be denied.

Wherefore, FPC respectfully requests that the Commission deny OGC's Motion to Compel.

Respectfully submitted,

FLORIDA POWER CORPORATION



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FLORIDA POWER CORPORATION'S RESPONSE TO OKEECHOBEE GENERATING COMPANY'S MOTION TO COMPEL has been furnished by facsimile and U.S. Mail to Robert Scheffel Wright and John Moyle as counsel for Okeechobee Generating Company, LLC and to all other following counsel of record via U.S. Mail this 14th day of February, 2000.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C	DOCKET NO. 991462-EU ORDER NO. PSC-99-2153-PCO-EU ISSUED: November 4, 1999

ORDER GRANTING PETITIONS TO INTERVENE AND DENYING MOTION TO STRIKE

By separate petitions, the Legal Environmental Assistance Foundation, Inc. (LEAF), Tampa Electric Company (TECO), Florida Power Corporation (FPC), and Florida Power & Light Company (FPL) have requested permission to intervene in this proceeding, each alleging that its substantial interests will be determined or affected by the outcome of this proceeding. In support of its petition, LEAF states that it is a public interest organization whose corporate purposes include protection of public health and the environment. LEAF asserts that the Commission's action in this proceeding will affect its substantial interests because it will influence the environmental and health impacts of meeting Florida's energy service needs. In support of their petitions, TECO, FPC, and FPL essentially assert that the Commission's action in this proceeding will affect their substantial interests because granting the petition for need will affect their ability as individual utilities to plan, certify, build, and operate transmission and generation facilities necessary to meet their service obligations and the needs of their customers.

Petitioner, Okeechobee Generating Company, L.L.C. (Okeechobee), filed a motion to strike certain portions of FPL's petition to intervene. Okeechobee asserts that certain portions of FPL's petition to intervene contain allegations and legal arguments concerning the merits of Okeechobee's petition and therefore should be stricken as irrelevant to FPL's petition to intervene. In its motion, Okeechobee does not contest FPL's standing to intervene. FPL filed a memorandum in opposition to Okeechobee's motion to strike, asserting, in part, that the contested portions of its petition to intervene are required by rule and help establish FPL's substantial interests in this proceeding. Okeechobee did not file responsive pleadings to the intervention petitions of LEAF, TECO, or FPC.

Upon review of the above-mentioned pleadings, I find that the petitions of LEAF, TECO, FPC, and FPL to intervene in this proceeding should be granted. Further, I find that Okeechobee's motion to strike should be denied. This ruling on the motion to strike is not intended to prejudge any factual allegations or legal arguments raised in the above petitions to intervene as they relate to the merits of Okeechobee's petition. Factual and legal

EXHIBIT A

arguments concerning the merits of Okeechobee's petition shall be heard and ruled upon at the appropriate time in this proceeding.

Having considered all of the above-mentioned pleadings, it is hereby

ORDERED by Commissioner E. Leon Jacobs, Jr., as Prehearing Officer, that the petitions to intervene filed by the Legal Environmental Assistance Foundation, Inc., Tampa Electric Company, Florida Power Corporation, and Florida Power & Light Company are hereby granted. It is further

ORDERED that Okeechobee Generating Company, L.L.C.'s motion to strike portions of Florida Power & Light Company's petition for leave to intervene is denied. It is further

ORDERED that all parties to this proceeding shall furnish copies of all testimony, exhibits, pleadings and other documents which may hereinafter be filed in this proceeding, to:

Gail Kamaras, Esquire, and Debra Swim, Esquire, Legal Environmental Assistance Foundation, 1114 Thomasville Road, Suite E, Tallahassee, Florida 32303, on behalf of Legal Environmental Assistance Foundation;

Lee L. Willis, Esquire, and James D. Beasley, Esquire, Ausley & McMullen, Post Office Box 391, Tallahassee, Florida 32302, on behalf of Tampa Electric Company;

James A. McGee, Esquire, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042, and Gary L. Sasso, Esquire, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Post Office Box 2861, St. Petersburg, Florida 33731, on behalf of Florida Power Corporation; and

Matthew M. Childs, Esquire, P.A., and Charles Guyton, Esquire, Steel Hector & Davis LLP, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301, on behalf of Florida Power & Light Company.

By ORDER of Commissioner E. Leon Jacobs, Jr., as Prehearing Officer, this 4th day of November, 1999.

/s/ E. Leon Jacobs, Jr.
E. LEON JACOBS, JR.
Commissioner and Prehearing Officer

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

WCK/TRC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary,

procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.