ORIGINAL

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January 2, 2007

VIA HAND DELIVERY

Blanca Bayo, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RE: Docket No. 060635-EU
In re: Petition for determination of need for electrical power plant in Taylor County by FMPA, JEA, Reedy Creek Improvement District and the City of Tallahassee

Dear Ms. Bayo:

Attached please find the original and fifteen (15) copies of NRDC's Motion to Compel and Emergency Request for Oral Argument to be filed in the above-styled case. Also enclosed is one copy of each of these documents to be stamped and returned to our office.

Should you have any questions or need any additional information regarding this filing please contact me.

Very truly yours,

Suzanne Brownless
Attorney for NRDC

00017-07 Emergency Request

CMP ____
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Motion

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition for Determination of Need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and the City of Tallahassee.
_____/

DOCKET NO. 060635-EU

NRDC'S MOTION TO COMPEL

The Natural Resources Defense Council (NRDC) files this motion to compel compliance with discovery pursuant to Rule 1.380(a)(2), Rules of Civil Procedure, and in support thereof states as follows:

1. NRDC served its First Set of Interrogatories Nos. 1-26 and Second Set of Interrogatories Nos. 1-8 to the Florida Municipal Power Agency, JEA, Reed Creek Improvement District and City of Tallahassee (Applicants) by electronic mail and U.S. Mail on December 11, 2006 and December 12, 2006, respectively.

2. Pursuant to Order PSC-06-0819-PCO-EU, issued on October 4, 2006, all discovery must be answered within 20 calendar days (inclusive of mailing) of receipt of the discovery request or an objection filed within 14 days of receipt of the discovery request.

3. On December 26, 2006, the Applicants filed timely Objections to the NRDC's First Set of Interrogatories Nos. 1-26 and Second Set of Interrogatories Nos. 1-8 in which it objected to Interrogatories Nos 14, 20, 21, 22, 23, 24, 25, and 26 of NRDC's First Set of Interrogatories and 2, 3, 4, 5, 6, 7, and 8 of NRDC's Second Set of Interrogatories.

4. After discussion between the parties, NRDC has agreed to waive responses to NRDC's First Set of Interrogatories Nos. 14, 20 and 21 and the Applicants have agreed to provide responses to NRDC's First Set of Interrogatories Nos. 22 and 23. Further, NRDC has agreed to waive responses to its Second Set of Interrogatories Nos. 4, 7 and 8. The Applicants have agreed to provide the inputs and outputs of the FIRE model at updated Taylor Energy Center (TEC) costs in response to NRDC's Second

Set of Interrogatories No.1 which should be sufficient to allow NRDC to develop the information requested in its Second Set of Interrogatories No. 2. With regard to its Second Set of Interrogatories No. 3, the Applicants will provide the requested information for the City of Tallahassee for which this type of analysis already exists.

5. The remaining interrogatories on which the parties have been unable to reach agreement are NRDC's First Set of Interrogatories Nos. 24 and 25 and NRDC's Second Set of Interrogatories Nos. 5 and 6.

6. NRDC's First Set of Interrogatories Nos. 24 and 25 state as follows:

> Interrogatory 24: Please provide a CO2 sensitivity analysis similar to Ex. (MP-5) which uses the same parameters for electricity demand growth, same amount of nuclear capacity and same amount of energy produced by renewables or other non-emitting sources as that used in Ex. (MP-2).
>
> Interrogatory 25: Please provide a low fuel sensitivity study similar to Ex. (MP-4) which also includes CO2 emissions allowances as stated on Ex. (MP-5).

7. NRDC's Second Set of Interrogatories Nos. 5 and 6 state as follows:

> Interrogatory 5: Please provide a low fuel price sensitivity study assuming implementation of all DSM measures that pass the Total Resource Test.
>
> Interrogatory 6: Please provide a low load growth sensitivity study assuming implementation of all DSM measures that pass the Total Resource Test.

8. With regard to each of these interrogatories the Applicants raise the same objection: that they would be required to prepare a study which does not currently exist in order to respond to NRDC's discovery request. In support of this proposition the Applicants cite two Commission water and sewer cases and one telephone case as well as *Balzebre v. Anderson,* 294 So.2d 701 (Fla. 3rd DCA 1974). It should be noted that the Applicants did not object on the grounds of relevance. Interrogatories Nos. 24 and 25 are directly relevant to the appropriate evaluation of CO_2 emission allowances in the economic analysis of the TEC unit, Issue 5. Interrogatories Nos. 5 and 6 are directly relevant to whether any

reasonably available conservation measures exist that might mitigate the need for the TEC unit , Issue 4.

9. In order to answer Interrogatory 24 the Applicants are required to run the Hill & Associates' proprietary PRISM model using the same parameters used in the development of Mr. Preston's Exhibit (MP-2), the Applicants' Base Case, to produce CO_2 emission allowances. In order answer Interrogatory 25 the Applicants are required to run the Hill & Associates' proprietary PRISM model to provide a low fuel sensitivity study using the same parameters as that found in Mr. Preston's Exhibit (MP-4) which also includes CO_2 emissions allowances as stated on Mr. Preston's Exhibit (MP-5). Because the PRISM model is proprietary, NRDC has no access to it and no means of preparing these studies itself.

10. In order to answer Interrogatories 5 and 6, it is NRDC's understanding that the Applicants are required to run the Black and Veatch POWROPT model using energy and demand forecasts which take into account the forecasted savings associated with the demand side management programs previously screened by the Applicants which pass the Total Resource Test. As NRDC understands the FIRE model used by the Applicants to screen demand side management programs, the programs which pass the Total Resource Test are an output of the model and are already available to the Applicants.

11. In Staff Interrogatory 74, the Staff requested the following:

> Please provide two cost-effectiveness sensitivities for the Taylor Energy Center (TEC) using an "acid test", in which the differential between coal and gas prices is held constant for the study period. In the first sensitivity, the differential between coal and gas prices should be set equal to the differential at the starting point of the Participants' analysis. In the second sensitivity, the differential between coal and gas prices should be set equal to the differential at the in-service date of TEC.

12. As NRDC understands these sensitivity studies, they require that the POWROPT model be run once for each study with the fuel parameters set as requested by the Staff. Applicants provided

these sensitivity studies on December 7, 2006 without objection.[1]

13. In Interrogatory No. 101, the Staff has requested that the Applicants prepare a cost-effectiveness sensitivity for TEC with the revised capital costs and revised fixed and variable O&M costs for the TEC unit that "models an expansion plan including TEC against an expansion plan which includes joint ownership of a combined cycle unit located at the Taylor Energy site." In Interrogatory No. 102, the Staff requests that a cost-effectiveness sensitivity study be prepared similar to that requested in Interrogatory No. 101 but that capital costs be increased by 20% so that it is "similar to the high capital cost sensitivity performed in the need study." NRDC's understanding is that in order to answer both interrogatories the Applicants will be required to run Black and Veatch's proprietary POWROPT model twice, once for each sensitivity study. As with NRDC, the Staff does not have access to the POWROPT model and therefore has no means of preparing these studies itself.

14. The Staff served Interrogatories Nos. 101 and 102 on the Applicants on December 13, 2006. Pursuant to Order PSC-06-0819-PCO-EU any objections to these interrogatories had to be filed on or before Wednesday, December 27, 2006. No objections have been filed by the Applicants to Staff Interrogatories Nos. 101 and 102. Absent timely objections the Applicants are required to provide the studies requested and NRDC has no reason to believe that they will not do so when due on January 2, 2007.

15. The Staff of the Public Service Commission is not a party to this case but "is authorized to act as a party." *In re: Petition for interim and permanent rate increase in Franklin County by St. George Island Utility Company, Ltd.,*95 FPSC 3:33, 34 (1995); *Citizens of the State of Florida v. Beard,*

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[1] This "acid test"analysis has been requested by the Staff, and provided without objection, in numerous need determinations over the last 14 years. *See*: *In re: Joint Petition to determine need for electric power plant to be located in Okeechobee County by Florida Power & Light Company and Cypress Energy Partners, Limited Partnership,* 92 FPSC 11:363, 372-76 (1992); *In re*: *Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities in Polk County by Tampa Electric Company,* 92 FPSC 3:19,28-9 (1992).

613 So.2d 403, 404 (Fla. 1992)(Holding that the memoranda of Commission Staff who testify at hearing or Staff Attorneys who cross-examine witnesses at hearing are properly included as part of the record on appeal.) Presumably, that means that the Staff conducts discovery pursuant to Rule 28-106.206, Florida Administrative Code, and Rules 1.280 through 1.400, Rules of Civil Procedure, just like every other "party" as defined by §120.52(12), Florida Statutes. NRDC was allowed to intervene in this case and granted the status of "party" because it proved that the substantial interests of its members would be affected as required by §120.52(12)(a), Florida Statutes. *In re: Petition for determination of need for electrical power plant in Taylor County by FMPA, JEA, Reedy Creek Improvement District and the City of Tallahassee*, Order No. PSC-06-0971-PCO-EU, issued November 21, 2006 at 2-3.

16. Neither the Staff nor NRDC have the ability to conduct the sensitivity studies each has requested of the Applicants since the models used are the proprietary property of both Black and Veatch and Hill and Associates. One could argue that if required to produce these studies the Applicants will incur additional expense that they otherwise would not have had to incur thereby creating an "undue burden" on the Applicants.

17. Accepting for purposes of argument that the Applicants will incur additional costs to provide these studies, the additional costs to the Applicants incurred to prepare these four studies when compared to what has already been incurred to prepare the need determination application is so small as to be *de minimus.* Additionally, courts have held that even if there is a cost for the preparation of a document, if the material requested is relevant to the issue to be decided, the document must be produced. *MacArthur v. Moffett*, 340 So.2d 500, 501 (Fla. 4th DCA 1976). Finally, and perhaps most significantly, the Applicants did not raise the cost of preparation as an issue with regard to the preparation of the sensitivity studies either previously provided to the Staff in response to Interrogatory No. 74 or requested by Staff in Interrogatories Nos. 101 and 102.

18. Basic fairness and due process require that all parties be treated alike. At this stage of

the process, the Staff is in the same posture as every other party to the case and is doing what every other party is doing: developing the evidence that it will present at hearing and by so doing "test the validity, credibility and competence of the evidence presented" at hearing by the Applicants. *Legal Environmental Assistance Foundation, Inc. v. Clark,* 668 So.2d 982, 986 (Fla. 1996). The Applicants raised no objections to providing the very same type of information to the Staff now being requested by NRDC. In both instances the Applicants are being requested to generate studies to support another party's "view of the case." In both instances the aim of each party is to present that relevant information to the Commission in support of its "view of the case" with the ultimate goal of supporting factual and incipient policy findings that each believes the Commission should make. The Commission must compel the Applicants to answer these interrogatories in order to satisfy the most basic requirement of due process: equal treatment under the law.

19. Finally, a few minutes should be spent on the cases relied upon by the Applicants in support of their objection. The *Balzebre* case involved a counterclaim for punitive damages where the defendant requested that the plaintiff prepare a statement of net worth reflecting the plaintiff's assets, liabilities and net worth. *Balzebre,* 294 So.2d at 701. While the court did not require the plaintiffs to prepare such a statement, the court did reverse without prejudice to the defendants' proceeding with discovery to establish the identity and existence of relevant documents they wished to have produced. *Id.* There is nothing in the record that indicates the defendant could not obtain documents from the plaintiff through discovery that would allow him to prepare an accurate statement of the plaintiff's net worth. As explained above, NRDC does not have the ability to develop the sensitivity studies requested above independently.

20. *In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc., et al. (Southern States II)*, 99 FPSC 4:366, 368 (1999) the Commission made two related decisions. First, it granted the Office of Public

Council's (OPC) requests in Interrogatories Nos. 2 and 3 that the utility "provide the build-out ERC numbers or capacities for all of the water and wastewater lines included in this docket" and "provide the methodology utilized to produce the estimated build-out ERC numbers requested". 99 FPSC 4: 366, 367. Second, the Commission denied OPC's request that "[i]f the company can not furnish the estimated ERC numbers requested in Question 2, based upon a justifiable and verifiable methodology, then supply the best numbers with the best methodology available, regardless of its flaws." In *In re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia and Washington Counties by Southern States Utilities, Inc., et. al (Southern States I),* 92 FPSC 8:322, 323-24 (1992), the Commission denied a portion of OPC's requests regarding the selection of an interim test year holding that the utility only had to produce estimates and projections which were already in existence. Since the order does not give the actual wording of the interrogatories objected to, or state the specific interrogatories that must be answered, it is difficult to fully analyze the Commission's decision. Absent the details, the general proposition that the utility did not have to produce information not already in existence sheds little light on the instant case since it can't be determined if OPC could have calculated the information requested itself from information which had already been provided to OPC.

21. However, based on the information normally provided in Minimum Filing Requirements (MFRs) for Class A and B water and wastewater utilities pursuant to Chapter 367, Florida Statutes, and Rules 25-30.430 through 25-30.475, Florida Administrative Code, it appears that the information requested by OPC in the *Southern States I* case could have been derived from the information provided in the MFRs, i.e., that OPC could have calculated a "ballpark" number of ERCs based on the as-builts that the utility is required to provide. Rule 25-30.440, Florida Administrative Code. Such is not the case for the sensitivity studies requested by NRDC.

22. In *In re: Dade County Circuit Court referral of certain issues in Case No. 92-11654*

(Transcall America, Inc. d/b/a ATC Long Distance vs. Telecommunications Services, Inc. vs. Transcall America, Inc. d/b/a ATC Long Distance) that are within the Commission's jurisdiction, 98 FPSC 8:97, 98-99 (1998), the Commission did not require Transcall to produce the complete CDR tapes which contained information about TSI and non-TSI customers on the grounds that information about non-TSI's customers was both irrelevant and proprietary. The discussion in the order regarding production of documents which do not exist cited by the Applicants is totally unrelated to the Commission's threshold ruling of relevancy and *dicta* at best.

23. In sum, the information requested by NRDC is relevant to identified issues in the case, necessary to fully develop the record and can not be otherwise produced by NRDC. Thus, it stands in exactly the same posture as the information requested and supplied to the Staff without objection.

WHEREFORE, NRDC requests that this Commission grant its Motion to Compel and require the Applicants to answer its First Set of Interrogatories Nos. 24 and 25 and Second Set of Interrogatories Nos. 5 and 6 as soon as possible but no later than Friday, January 5, 2007.

Respectfully submitted this 1st day of January, 2007 by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by electronic mail as listed and U.S. Mail, this 1st day of January, 2007 to the following:

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