Dorothy Menasco

From: ROBERTS.BRENDA [ROBERTS.BRENDA@leg.state.fl.us]

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Cc: Allan Jungels; Anna Williams; Blaise N. Ruhta; Bryan Anderson; James M. Walls; James W. Brew; Jessica Cano (Jessica.Cano@fpl.com); John Burnett; John Moyle; Keino Young; Ken Hoffman; Matthew Feil (mfeil@gunster.com); Paul Lewis; Randy B. Miller; Vickie Gordon Kaufman (vkaufman@kagmlaw.com)

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Electronic Filing

a. Person responsible for this electronic filing:

Joseph A. McGlothlin, Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
mcglothlin.joseph@leg.state.fl.us

b. Docket No. 110009-EI

In re: Nuclear Cost Recovery Clause.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 23 pages.

e. The document attached for electronic filing is OPC's Response to Mr. Rajiv Kundalkar's Motion to Quash Deposition Subopena.
(See attached file: 110009.response to mot quash.sversion.doc)

Thank you for your attention and cooperation to this request.

Brenda S. Roberts
Office of Public Counsel
Telephone: (850) 488-9330
Fax: (850) 488-4491

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause.	DOCKET NOS: 110009-EI FILED: April 15, 2011

OPC'S RESPONSE TO MR. RAJIV KUNDALKAR'S MOTION TO QUASH DEPOSITION SUBPOENA

The Citizens of the State of Florida, through the Office of Public Counsel ("OPC"), hereby respond to the Motion to Quash the deposition subpoena that OPC served on Mr. Rajiv Kundalkar on March 29, 2011.

BACKGROUND

In May 2009, FPL submitted the prefiled testimony of Mr. Rajiv Kundalkar in Docket No. 090009-EI, which was the docket opened to administer the proceeding on the 2009 hearing cycle of the Nuclear Cost Recovery Clause ("NCRC"). At the time, Mr. Kundalkar held the position with FPL of Vice President, Nuclear Power Uprates. Among other things, in his prefiled May testimony, Mr. Kundalkar provided FPL's estimate of the cost of completing FPL's uprate projects. Rule 25-6.0423, Florida Administrative Code, requires FPL to prepare and submit a feasibility analysis of a nuclear project to the Commission for its review each year. The estimate of the cost of completing the uprate project is a principal input to the feasibility analysis of the uprate project.

On September 8, 2009, Mr. Kundalkar appeared at the hearing. On the witness stand, he adopted his prefiled testimony, which included the estimate of the cost of completing the uprate project, without making any amendments or changes to the May 2009 estimate. Docket No. 090009, TR-208. The witness who sponsored FPL's feasibility analysis continued to incorporate in that analysis the estimate of the cost of completing FPL's uprate project that was contained in Mr. Kundalkar's May 2009 prefiled testimony.

As is customary, in the docket opened for the 2010 NCRC hearing cycle, the Commission scheduled for consideration the prudence of 2009 activities and expenditures. In May 2010, FPL witness John Reed, President of Concentric Energy Advisors, stated in his prefiled testimony that, as a result of an investigation of an employee complaint letter that his firm conducted at FPL's request, he had identified an instance in which FPL had not adhered to its policies with respect to communicating estimates of the costs of completing the uprate. He testified that he would detail his findings in a separate report. He also stated that the report should be considered a supplement to the testimony on the subject of FPL's management controls that he prefiled in April 2010. (Prefiled testimony of John Reed, May 3, 2010, at pp. 19-21).

In June 2010, Mr. Reed submitted his report to FPL ("the Concentric Report"). In the report, he concluded that (1) FPL's estimate of the cost to complete FPL's uprate project had increased by approximately $300 million following the filing of prefiled testimony in May; (2) as of July 2009 FPL managers were treating the higher value as the then current estimate; and (3) therefore, the May 2009 estimate was no longer the best, most accurate information on the subject at the time of the September 2009 hearing. Concentric Report, at pages 15-16. FPL did not identify the report as a supplement to Mr. Reed's testimony. FPL provided it during the discovery process.

In July 2010, the Commission Staff filed an audit report entitled, "Florida Power & Light Company's Project Management Internal Controls for Nuclear Plant Uprate and Construction Projects." In the audit report, the Staff cited and summarized the portion of the Concentric Report in which Mr. Reed concluded that FPL had not provided the most current estimate of the cost to complete its uprate project to the Commission during the September 2009 hearing. Staff

witnesses attached the audit report to their prefiled testimony of July 27, 2010. In their prefiled testimony, Staff witnesses also expressed their concern that performance issues on the part of FPL's uprate management team may have led FPL to incur imprudent costs in 2009, and recommended that the Commission defer its prudence review of FPL's 2009 activities to a separate docket or to the next hearing cycle so that Staff would have adequate time to scrutinize those costs.

In response to the increasing focus on the difference between the estimate contained in the May 2009 prefiled testimony and the revised figures that were the subject of the Concentric report and the Staff audit report, FPL sought and received permission to submit additional prefiled testimony of Art Stall. In his prefiled testimony, Mr. Stall disagreed with the conclusion of Mr. Reed, asserting that the revised estimates cited by Mr. Reed were still being evaluated at the time of the September 2009 hearing.

At the time of the scheduled hearing in Docket No. 100009-EI, the Commission Staff issued subpoenas to Mr. Kundalkar, FPL attorney Bryan Anderson, and FPL President Armando Olivera. Mr. Kundalkar's counsel filed a motion to quash the subpoena that Staff served on him.

On September 7, 2010, the Commission voted to approve a stipulation of FPL, OPC, and the Florida Industrial Power Users Group and deferred all of FPL's issues to the 2011 NCRC hearing cycle.

Following the deferral, through interrogatories and requests to produce documents, OPC has pursued discovery on the question of whether FPL failed to provide its most current estimate of completing the uprate projects during the September 2009 hearing.

On February 28, 2011, in response to FPL's motion to bifurcate the hearing in Docket No. 110009-EI, OPC apprised FPL, Staff, and other parties of OPC's intent to identify the following issue for the hearing on deferred 2009 subjects in its Prehearing Statement:

Issue __

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?[1, 2]

On March 29, 2011, OPC served on Mr. Kundalkar's attorney, who had agreed to accept service, a subpoena for a deposition to be conducted on April 20, 2011, in West Palm Beach, Florida. West Palm Beach is located in the county in which Mr. Kundalkar resides. OPC delivered with the subpoena the payment for the witness' appearance and mileage as prescribed by Sections 120.59(2)(k)(1) and Section 92.142(1), Florida Statutes.

On April 12, 2011, counsel for Mr. Kundalkar filed a Motion to Quash the subpoena. For the following reasons, OPC submits the Prehearing Officer should deny the motion.

ARGUMENT

That a nonparty person may object to appearing at a deposition is no basis upon which to exclude that person from the scope of legitimate discovery. The Commission's discovery practice is governed by rules that provide a broad scope of discovery. Those rules specifically contemplate subpoenas to nonparty witnesses.

Characterizing his motion as a "case of first impression," Counsel for Mr. Kundalkar makes much of his belief that the Commission rarely, if ever, has issued a subpoena requiring an *objecting* nonparty witness to appear. Putting aside for a moment the fact, acknowledged by Counsel for Mr. Kundalkar, that Mr. Kundalkar was an officer of FPL who in 2009 was involved

[1] OPC distributed this draft issue language to parties and Staff a second time during a status conference convened by the Commission Staff on April 7, 2011.

[2] At page 6 of the motion to quash, Counsel for the deponent referred to this language as follows: "In the way of a crude summary, that question is what did FP&L know in Docket No. 090009 and when did it know it?" OPC believes that upon reviewing the actual language, the reader will conclude that counsel's summary does not fairly characterize OPC's tentative issue. More important, however, is the fact that counsel and his client were aware of the issue at the time counsel filed the motion to quash.

in matters that are the subjects of a current Commission proceeding, Mr. Kundalkar's assertion, even if factually accurate, is wholly irrelevant. Counsel for Mr. Kundalkar seeks protection from not one, but *two* distinctions that do not exist in the law. The rules establishing depositions as a tool that is available to a party conducting discovery do not distinguish between persons who are parties and those who are non-parties; it follows that they certainly do not distinguish between non-party persons who object to a subpoena and those who do not object. The Commission could not establish a "policy" of categorizing the applicability of discovery rules to non-parties on the basis of their willingness or unwillingness to appear, even if it wished to do so.

The Commission does not have a separate set of rules that define a Commission-specific discovery practice. Rather, the Commission is governed by the Administrative Procedure Act, the Model Rules of Procedure applicable to agencies, including the Commission (with exceptions not applicable here), and the Florida Rules of Civil Procedure.

Section 120.569(2)(f), Florida Statutes, provides:

> The presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure.

(Counsel for Mr. Kundalkar did not mention this provision of the Administrative Procedure Act in the pending motion to quash).

Rule 28-106.206 of the Model Rules, which applies to Commission proceedings, states:

> After commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanctions in accordance with the Florida Rules of Civil Procedure, except contempt.

(This provision of the Model Rules is not mentioned in the pending motion to quash.)

Rule 1.280 of the Florida Rules of Civil Procedure provides in pertinent part:

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise and under subdivision (c) of this rule, the frequency of use of these methods is not limited, except as provided in rule 1.200, 1.340, and 1.370.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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.

. . . .

(c) Protective Orders. Upon motion by a party or by the person from whom 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, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

(The pending Motion to Quash mentions neither the scope of discovery nor the avenue of seeking a protective order established in these subsections of Rule 1.280, Florida Rules of Civil Procedure.)

Rule 1.310, of the Florida Rules of Civil Procedure entitled "Depositions Upon Oral Examination," provides, in pertinent part:

> (a) When Depositions May Be Taken. After commencement of the action any party may take the testimony ***of any person, including a party***, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition within 30 days after service of the process and initial pleading upon any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in rule 1.410. The deposition of a person confined in prison may be taken only be leave of court on such terms as the court prescribes.
>
> (b) Notice; Method of Taking; Production at Deposition.
>
> (1) A party desiring to take the deposition ***of any person*** upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced under the subpoena shall be attached to or included in the notice.
>
> (Emphasis provided)

To summarize the import of these provisions to the deponent's argument, the Commission's practice is governed, statutorily, by provisions that establish broad discovery rights, and in that context provide the deposition of "any person" as one tool with which to pursue the broad scope of discovery. In fact, the phrase "of any person, including a party," demonstrates the scope of the rule includes nonparty witnesses. Clearly, a person who is not a party does not bring himself or herself within the scope of discovery established by the Florida Rules of Civil Procedure by "volunteering" to do so, and a nonparty who objects to a deposition does not escape the scope of the rule by virtue of an objection.

Mr. Kundalkar is not a "bystander."

At various points in the motion to quash, counsel for Mr. Kundalkar characterizes his client as a "private citizen and retired resident" (page 3), a "non-party citizen" (pages 7 and 8), a "retiree" (page 14), and an "innocent bystander" (page 11). These descriptions obviously are an attempt to portray Mr. Kundalkar as being remote and removed from the subjects of the pending proceeding. He is not a bystander, for the simple but compelling reason that the matters for which he had responsibility and/or to which he testified are currently pending before the Commission in an active docket.

A quick review will demonstrate that the effort to depict Mr. Kundalkar as an uninvolved private citizen is disingenuous. During the greater portion of 2009, Mr. Kundalkar held the position of Vice President, Nuclear Power Uprates at FPL. Upon information and belief, in that capacity Mr. Kundalkar was actively involved in developing, or overseeing the development of, the estimates of the cost of completing the uprate project. Upon information and belief, Mr. Kundalkar held responsibility for preparing or overseeing the preparation of revisions to the estimates that occurred between the time he submitted prefiled testimony in May 2009 and the time he sponsored that prefiled testimony without change in September 2009. Far from being distant or removed from the matters pending before the Commission, in both his managerial and regulatory roles, Mr. Kundalkar was at the center of the circumstances and events that are pending before the Commission as a result of the deferral of the 2009 FPL issues.

Contrary to his counsel's arguments, as the individual who sponsored testimony on the subject of the cost of completing the uprate projects, Mr. Kundalkar's role is singular and unique. The fact that Mr. Kundalkar retired following his testimony renders his knowledge no less discoverable than does the fact that his job description changed after he submitted his May 2009 prefiled testimony.

Counsel for Mr. Kundalkar asks the Commission to misconstrue the term "necessary" in Section 350.123, Florida Statutes. The interpretation he advances is severely flawed. It would turn the existing, well established discovery scheme in Florida on its head.

At page 5 of the motion to quash, counsel for Mr. Kundalkar quotes Section 350.123, Florida Statutes, which provides:

> The commission may administer oaths, take depositions, issue protective orders, issue subpoenas and compel the attendance of witnesses and the production of books, papers, documents and other evidence necessary for the purpose of any investigation or proceeding. Challenges to, and enforcement of, such subpoenas and orders shall be handled as provided in s. 120.569.

Counsel for Mr. Kundalkar argues that the term "may" indicates the issuance of a subpoena by the Commission is permissive, and is a function the Commission should exercise restrictively and with caution. Further, he contends the term "necessary" means that the burden is on a party seeking to depose an individual to demonstrate that the proposed deponent is the party's only possible source of information. Counsel reaches these conclusions by citing case law holding that each term of a statute must be given effect. However, counsel's argument is incomplete, and his omissions skew his results.

In his argument, counsel attempts to read out of the equation the provisions of the Administrative Procedure Act that establish a party's right to engage in discovery. Section 120.569(a)(f), Florida Statutes, provides that the ". . .presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure. . ."

Counsel for Mr. Kundalkar did not cite this language from the Administrative Procedure Act when advancing his limiting interpretation of the discovery rights of a party to a Commission proceeding[3].

Significantly, the Administration Commission cited Section 120.569(a)(f), quoted above, as the statute it implemented when it adopted Rule 28-106.206 of the Model Rules. That rule states:

> After commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanctions in accordance with the Florida Rules of Civil Procedure, except contempt.

(Rule 28-106.206 is not mentioned in the motion to quash.)

It cannot be argued seriously that provisions of the Administrative Procedure Act and the Model Rules governing discovery are inapplicable to the Commission or irrelevant to a legal debate over the efficacy of a deposition subpoena. In fact, Counsel for Mr. Kundalkar cited Section 120.569 of the Administrative Procedures Act and Rule 28-106.204 of the Model Rules as the authority for his procedural ability to file the motion to quash![4] Yet, Counsel for Mr. Kundalkar omitted any reference to these provisions of law when advancing his argument concerning the meaning of the terms "may" and "necessary."

To provide full context to the construction of Section 350.123, Florida Statutes, one must begin by reading Section 120.569(2)(f) *in pari materia* with Section 350.123, Florida Statutes. Moreover, when doing so, it is necessary to interpret the language in a manner that will

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[3]The Motion to Quash ignores the Administrative Procedure Act's provisions governing discovery when urging a restrictive interpretation of Section 350.123. F.S., but cites Section 120.569(2)(k)(1) of the Act in another section of the pleading, in the mistaken belief that it supports a different argument.

[4] The first sentence of the pending motion to quash begins, "Pursuant to Sections 350.123 and 120.569, Florida Statutes, and Rule 28-106.204, Florida Administrative Code, comes now the undersigned. . ."

harmonize and give effect to both statutes. *Heart of Adoptions, Inc. v. J. A.*, 963 So.2d 189 (Fla. 2007).

Section 120.569(2)(f) makes available to a party to a proceeding of an agency governed by the Administrative Procedure Act the means of discovery "available to the courts and in the manner provided in the Florida Rules of Civil Procedure." In these rules of court, the Supreme Court of Florida has prescribed broad, liberal discovery rights. See Rule 1.280(b), quoted above.

When the breadth of the scope of permissible discovery prescribed by the Florida Supreme Court, and adopted by reference by the Legislature, is properly taken into account, it becomes evident that the Florida Legislature intended neither Section 350.123 nor Section 120.569(2)(f) to establish the Commission as a limiting, restrictive gatekeeper to the discovery process. Rather, the role of the "Presiding Officer" in Section 120.569(2)(f) and of the "Commission" in Section 350.123 is to *effectuate* the prescribed liberal scope of discovery. Seen in this light, the term "may" in Section 350.123 is used in the sense of a conferring of power on the Commission — the power to ensure and enforce the prescribed scope of discovery, both in investigations initiated by the Commission and in adjudicatory proceedings. This construction of Section 350.123 is directly analogous to the phrases "presiding officer has the power" and "to effect discovery" – which accomplish the same end in Section 120.569(2)(f), Florida Statutes. Under this logical and harmonious construct, a subpoena is "necessary" within the meaning of Section 350.123, Florida Statutes, if it is required to enable the Commission to obtain the full breadth of information it needs to conduct an investigation, or for a party conducting discovery in a different type of proceeding to realize the full scope of discovery afforded by the Florida Rules of Civil Procedure. This result is necessary to harmonize Section 350.123, Florida Statutes, with the portion of the Administrative Procedure Act that clearly imports the liberal

rules of discovery promulgated by Florida's judiciary into agency proceedings, including those of the Commission.

The subpoena is legally valid.

When considering Counsel's contention that the subpoena that OPC served on Mr. Kundalkar is deficient, it is reasonable to begin with the Commission's rule on subpoenas — another legal provision bearing on the issue that the Motion to Quash ignores.

Rule 25-22.045, Florida Administrative Code, states:

> When the proceeding is before the Commission or member thereof, subpoenas may be issued by the presiding officer or the Office of Commission Clerk *on subpoena forms supplied by the Commission.* When the proceeding is before an administrative law judge of the Division of Administrative Hearings, subpoenas may be issued by the Administrative Law Judge.
>
> (Emphasis supplied)

Consistent with this rule, OPC obtained a subpoena form supplied by the Office of Commission Clerk, and completed the form by providing the information required by the form. The form of subpoena supplied by the Commission does not require or contemplate a description of the anticipated lines of questions.[5] Counsel's argument necessarily is based on the contention that the subpoena violates a standard of Section 120.569(2)(k)(1), Florida Statutes, which provides,

> Any person subject to a subpoena may, before compliance and on a timely petition, request the presiding officer having jurisdiction of the dispute to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope or requires the production of irrelevant material.

With respect to the "not lawfully issued" criterion, OPC used the form for subpoena that the Commission Clerk provided pursuant to the Commission's rule on the subject. OPC engaged the services of a process server, who served Counsel for Mr. Kundalkar after he agreed to accept

[5] Similarly, Rule 1.310, Florida Rules of Civil Procedure, does not require the party conducting discovery to include a description of anticipated subjects in the notice of deposition.

service on behalf of his client. The March 29, 2011, subpoena scheduled the deposition for April 20, which provided ample notice of 22 days. OPC secured a location in West Palm Beach, where the deponent resides. OPC delivered with the subpoena the payment for the witness' appearance and the applicable statutory reimbursement for mileage, as required by Section 120.569(2)(k)(1), Florida Statutes. Counsel for Mr. Kundalkar has not taken issue with any of these aspects of the "lawfully issued" criterion of Section 120.569(2)(k)(1), Florida Statutes.

This leaves the question of whether the subpoena should be invalidated because it is "unreasonably broad in scope or requires the production of irrelevant material." Counsel for Mr. Kundalkar apparently contends that the subpoena fails both standards. He is wrong.

At page 12, Counsel claims that "Any open-ended subpoena like the one here is a blank check for irrelevant material and is therefore improper." In support of his assertion, Counsel cites Order No. PSC-95-1134-PCO-WS, which he attached to the motion as Exhibit C. A review of Exhibit C reveals that the order cited by Counsel says nothing about "production of irrelevant material." Further, in the motion Counsel does not explain how the subpoena served on Mr. Kundalkar, which did not require the deponent to produce any documents, could possibly constitute "a blank check for irrelevant material."

OPC deduces that Counsel is attempting to invoke this criterion by conflating two separate subjects: Counsel's contention that a subpoena must identify intended lines of inquiry, on the one hand, and the potential for overreaching in the list of documents designated in a subpoena duces tecum, on the other. The Commission should reject the effort out of hand. Clearly and obviously, the reference to "production of material" refers to a subpoena that commands the deponent to provide specified documents at the deposition. As the subpoena that OPC served did not require Mr. Kundalkar to produce *any* documents, by definition it cannot ". . . require the production of irrelevant material."

Nevertheless, Counsel for Mr. Kundalkar ignores the distinction and proceeds to argue that ". . . the Commission has not yet ruled on the propriety or dimensions of the tentative issue OPC identified; therefore, the relevance of anything sought through the Subpoena for that issue cannot be properly determined at this time." Consider the implications of this argument. As the Commission knows well, parties may identify issues up to and until the date of the Prehearing Conference in a docket. If contested, the issues will not be "approved" until the Prehearing Officer rules on disputes at the time of, or following, the Prehearing Conference. Followed to its logical conclusion, Counsel's argument would mean that a party could not conduct discovery until after the Prehearing Conference — a preposterous scenario. To avoid appearing at deposition in compliance with OPC's subpoena, Counsel for Mr. Kundakar would upend the manner and structure through which the Commission, acting to implement a broad discovery standard, provides due process to parties. The argument runs afoul of another maxim of statutory construction, which is that a statute will not be construed to yield an absurd result. *City of St. Petersburg v. Scetoll*, 48 So.2d 291 (Fla. 1950); *Whitehead v. Tyndall Federal Credit Union*, 46 So.2d 1033 (Fla. App. 1st DCA, 2010).

Next, in conjunction with the misplaced reliance on the "production of irrelevant material" standard, Counsel for Mr. Kundalkar urges the Commission to quash the subpoena to avoid the "unprecedented nature of the intrusion on a non-party private citizen." Again, Rule 1.310, Florida Rules of Civil Procedure, explicitly provides that a party may depose any person, whether that person is a party or a nonparty.

Clearly, Counsel for Mr. Kundalkar's assertion that the subpoena is defective because it does not inform the deponent of planned lines of inquiry must be evaluated within the context of whether it is "unreasonably broad in scope" within the meaning of Section 12.569(2)(k)(1), Florida Statutes. However, Counsel for Mr. Kundalkar cited only one ruling to support his

contention, and that is because most rulings on the subject involve subpoenas duces tecum. A subpoena duces tecum does require the serving party to designate the documents the deponent must provide, and the designation can be found to be unreasonably broad. An example is Order No. PSC-10-0491-PCO-TP, issued in Docket No. 100340 on August 6, 2010. That docket involved the Commission's investigation of several companies' compliance with Lifeline, eligible telecommunication carrier, and Universal Service requirements. The Staff served subpoenas duces tecum on Verizon and BellSouth, who were not parties in the proceeding. The companies that were the subject of the Commission's investigation objected to the subpoenas (which sought information about those companies), and the Prehearing Officer considered whether the subpoenas served by the Staff were "not lawfully issued, . . . unreasonably broad in scope, or requires the production of irrelevant material" within the meaning of Section 120.569(2)(k)1., Florida Statutes. Based on Staff's offer to delete non-Florida materials from the scope of the documents sought, the Prehearing Officer concluded that the subpoenas were ". . . lawfully issued pursuant to Section 350.123, Florida Statutes and with the withdrawal for the demand for non-Florida information, they are not unreasonably broad in scope, nor do they require the production of irrelevant material."

Accordingly, a subpoena duces tecum may possibly require the production of irrelevant material, or may be unreasonably broad in scope – as was the case in *R.W. v. Board of Professional Regulation*, 566 So.2d 26 (Fla. App. 3rd DCA 1990). This implies no duplication or overlapping of standards. OPC submits there are differences in these statutory criteria as they relate to a subpoena duces tecum. One relates to the degree to which a subpoena commanding the production of documents may be burdensome; the other relates to the possibility that the production of materials, while not necessarily burdensome, may nonetheless be unproductive because unrelated to the subject matter of the proceeding.

Efforts to expand the "unreasonably broad" criterion to subpoenas that do not require the deponent to produce documents have been unavailing. As OPC demonstrates below, the single ruling on which Counsel for Mr. Kundalkar relies is against the weight of authority — including a subsequent Commission order.

In the case of *Hames v. City of Miami Firefighters' and Police Officers' Trust*, 980 So.2d 1112 (Fla. App., 3d DCA, 2008), the appellant sought to require the testimony at trial of two FBI agents. The court concluded that the subpoenas served on the FBI agents were "legally valid and sufficient," even though the subpoenas did not contain a "summary of the testimony sought and its relevance to the proceeding." *Hames*, *supra*, at 1117. The issue of the summary arose because the United States Department of Justice refused to allow the agents to appear without the summary required by 28 C.F.R. section 22. On appeal, Hames argued that, in light of the federal regulation, the agency had failed to execute "effective" subpoenas. The court rejected Hames' contention, finding instead that the subpoenas were sufficient and the burden was on Hames to comply with the federal regulation and/or seek enforcement of the valid subpoenas.

With respect to the Commission's own precedents, OPC submits that the ruling in Order No. PSC-03-1065-PCO-EQ, issued in Docket No. 020898-EQ on September 24, 2003, is especially instructive, because there are significant parallels between the facts of that case and the situation that the pending motion to quash presents. Docket No. 020898-EQ involved the application of Cargill for self-service wheeling, which Tampa Electric Company ("TECO") opposed. Cargill served subpoenas duces tecum for deposition on several TECO employees. With respect to certain of those subpoenas, TECO objected on the grounds that Cargill had not disclosed the subject areas that Cargill wanted to address — as Counsel for Mr. Kundalkar argues here. TECO also objected on the basis that none of the individuals were being offered as

TECO witnesses and that the subpoenas were ". . . unreasonable, oppressive, and calculated to harass the individuals in question . . ." Similarly, in the motion to quash in this matter, Counsel for Mr. Kundalkar argues that OPC should be directed to confine OPC's discovery to the individuals whom FPL intends to call as witnesses, and that OPC's subpoena constitutes harassment. In Docket No. 020898-EQ, finding that the subpoenas fell within the broad standards of discovery prescribed by Rule 1.280(b), the Prehearing Officer denied TECO's motion to quash the subpoenas.

One important difference in the fact patterns from the TECO case and this docket is that certain of the individuals whom Cargill subpoenaed had not worked on Cargill's application for self-service wheeling: "Cargill further argues that the fact that a witness has had no involvement with the provision of self-service wheeling to Cargill does not mean discovery may not be conducted to obtain relevant information." Order No. PSC-03-0165-PCO-EQ, at page 2. In sharp contrast, Mr. Kundalkar was intimately involved in the development of estimates of uprate project costs and the circumstances attending the decision to proceed at hearing on the basis of testimony that he prefiled in May 2009.

In the motion to quash, Counsel for Mr. Kundalkar cites the case of *Sugarmill Woods Civic Association, Inc., v. Southern States Utilities*, 687 So.2d 1346 (Fla. App., 1st DCA 1997). It does not support his position. In that case, intervenor counties served subpoenas duces tecum on the attorney for the petitioning utility and on numerous members of the Commission's staff. In the Commission order being reviewed in that case, the Prehearing Officer determined that the counties wished to pursue documents and testimony relating—not to the issue of rate structure that was before the Commission in the case—but to earlier dockets in which the utility's attorney was involved at the time he was employed by the Commission as a staff attorney. Noting that the scope of discovery is "very broad," and that in a discovery dispute the Prehearing Officer ". .

. must take the broadest view as to the potential for eliciting information that will lead to the discovery of admissible evidence," the Prehearing Officer applied this "broadest view" to the possibility that a deposition of the attorney "presumably, based on the documents requested, because he was once an attorney at the Commission, for information apparently related to a prior proceeding" would not be likely to lead to the discovery of admissible evidence in the proceeding then before the Commission. However, applying the same "broadest view as to the potential for eliciting information that will lead to the discovery of admissible evidence" to this case leads to a different result. OPC seeks to depose Mr. Kundalkar on his involvement in, and knowledge of, matters that are before the Commission in the current proceeding.

In the same case cited by Counsel for Mr. Kundalkar, the counties also served subpoenas duces tecum on "virtually the entire supervisory structure of the Division of Water and Wastewater. . . ." In addition to the fact that the counties sought to require the staff members to produce documents related to prior dockets, the Prehearing Officer found persuasive the staff's concern about disrupting the deliberative governmental process: "If parties are allowed to subpoena non-testifying Staff members, any party could eviscerate Staff's ability to execute its advisory function by excluding those Staff members from further participation in the analysis and preparation of the Staff recommendation. Such a result is contrary to all common sense and reason." Order No. PSC-94-0425-PCO-WS, issued in Docket No. 93880-WS on April 11, 1994. On appeal, the court noted that appellees objected to the subpoenas on the grounds that the discovery was "designed largely to disrupt the efficient working relationship between the PSC and its own staff." The court observed that the Prehearing Officer "analyzed the public policy foundations for the claim that SSU's attorney and the subpoenaed PSC staff members should not be required to participate in the depositions." With respect to that analysis, on appeal the court found no abuse of discretion, and so affirmed the order quashing subpoenas. The public policy

ramifications of deposing Staff members are not present here; however, the "broadest view" standard that the Prehearing Officer employed applies with equal force to this case.

Order No. PSC-94-0425-PCO-WS, with its emphasis on a concern for the ability of Commission staff to perform their functions during the deliberative process without disruptions, is typical of the manner in which the Commission has responded to attempts to depose staff members. *See also* Order No. PSC-05-0231-CFO-WU, issued in Docket No. 010503-WU on March 1, 2005. Order No. PSC-95-1134-PCO-WS, issued by the Prehearing Officer in Docket No. 950495-WS (attached to the motion to quash as Exhibit C), does base the Prehearing Officer's decision to quash subpoenas served on staff members on the absence of a description of intended inquiries; however, the order is an exception and an outlier. In fact, the Commission implicitly moved beyond the rationale in a subsequent order entered in the same docket. Later in the proceeding, a different party served a subpoena for deposition on the Director of the Commission's Division of Water and Wastewater. (Significantly, the order does not refer to any documents being requested.) The staff moved to quash on the grounds of "relevance, the potential chilling effect upon Staff, and the deliberative process privilege." This time, the Prehearing Officer referred the staff's motion to quash to the full Commission. After considering the arguments, the majority (including the Prehearing Officer) denied staff's motion to quash, despite one dissenting Commissioner's contention that the rationale of Order No. PSC-95-1134-PCO-WS should have again been applied. Instead, the Commission observed, "Any objections to relevancy, undue burden, or invasion of the deliberative process which have been raised by Staff in its motion may be raised during the course of the deposition itself, and ruled upon pursuant to Rules 1.310(c) and (d), Florida Rules of Civil Procedure." See Order No. PSC-96-0411-FOF-WS, issued in Docket No. 950495-WS on March 22, 1996.

The Commission should reject the unfounded "parade of horribles" predicted by Counsel for Mr. Kundalkar

In the motion to quash, Counsel for Mr. Kundalkar describes a specter that he claims would be associated with a denial of his motion. First, Counsel warns that ". . .once the door is open to subpoena private citizens, the Commission may not be able to close it." (Motion to quash, at page 9). As Rule 1.310 of the Florida Rules of Civil Procedure makes clear, a party may depose "any person," including nonparty witnesses. In fact, at pages 13-14, the Motion states, "Under Rule 1.410 of the Rules of Civil Procedure, anyone wishing to depose a non-party witness must issue a subpoena." Therefore, as the motion here acknowledges, *the door was never closed.* Counsel for Mr. Kundalkar does not identify any problems that have developed under this standard. Yet, Counsel sees in the deposition of Mr. Kundalkar, whose activities and testimony while employed by FPL are the subject of the current proceeding, as a potential for the ballooning of abuses that jump first to friends, family members, and associates of former employees and end somehow (cause and effect are not explained) in "re-litigating once settled matters" and the inability of the Commission to attract qualified personnel. The images of floodgates opening, dominoes falling, and consequences going viral conjured here are fantastical, but they are also groundless — and therefore unpersuasive.

CONCLUSION

The subpoena that is the subject of the Motion to Quash was lawfully issued. The deposition of Mr. Kundalkar is reasonably calculated to lead to the discovery of admissible evidence in an active docket. There is no basis for invalidating the subpoena. The Commission should deny the motion.

J. R. Kelly
Public Counsel

s/ Joseph A. McGlothlin
Joseph A. McGlothlin
Associate Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330

Attorney for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **OPC'S RESPONSE TO MR. RAJIV KUNDALKAR'S MOTION TO QUASH DEPOSITION SUBPOENA** has been furnished by electronic mail and/or U.S. Mail on this 15th day of March, 2011, to the following:

Keino Young, Esquire
Anna Williams, Esquire
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

James W. Brew
Alvin Taylor
Brickfield Law Firm
Eighth Floor, West Tower
1025 Thomas Jefferson Street, NW
Washington, DC 20007

Matthew Bernier
Carlton Fields Law Firm
215 S. Monroe Street, Ste. 500
Tallahassee, FL 32301

J. Michael Walls
Blaise N. Huhta
Carlton Fields Law Firm
P.O. Box 3239
Tampa, FL 33601-3239

Vicki G. Kaufman
Jon C. Moyle, Jr.
Florida Industrial Power Users Group
c/o Keefe Law Firm, The Perkins House
118 North Gadsden Street
Tallahassee, Fl 32301

Bryan S. Anderson
Jessica Cano
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420

Paul Lewis, Jr.
Progress Energy Florida, Inc.
106 East College Avenue, Suite 800
Tallahassee, FL 32301

John T. Burnett
R. Alexander Glenn
Progress Energy Service Company
P.O. Box 14042
St. Petersburg, FL 33733-4042

Randy B. Miller
White Springs Agricultural Chemicals, Inc.
15843 Southeast 78th Street
Post Office Box 300
White Springs, FL 32096

Ken Hoffman
Florida Power & Light Company
215 S. Monroe St., Suite 810
Tallahassee, FL 32301

Allan Jungels, Capt. ULFSC
Federal Executive Agencies
c/o AFLSA/JACL-ULFSC
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319

Rajiv S. Kundalkar
11591 Buckhaven Ln.
West Palm Beach, FL 33412-1607

Matthew Feil
Gunster Law Firm
215 South Monroe Street, Suite 601
Tallahassee, FL 32301

s/ Joseph A. McGlothlin
Joseph A. McGlothlin