

Eric Fryson

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Subject: e-filing (Dkt. No. 120015-EI)
Attachments: 120015.motion to compel.FINAL.pdf

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 120015-EI

In re: Petition for rate increase by Florida Power & Light Company.

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

d. There are a total of 13 pages.

e. The document attached for electronic filing is OPC's Motion to Compel FPL to Respond to Certain Interrogatories and Request to Produce Documents.
(See attached file: 120015.motion to compel.FINAL.pdf)

Thank you for your attention and cooperation to this request.

Brenda S. Roberts
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03572 JUN-1 2012
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida
Power & Light Company

Docket No: 120015-EI

Filed: June 1, 2012

**OPC'S MOTION TO COMPEL FPL TO RESPOND
TO CERTAIN INTERROGATORIES AND REQUEST TO PRODUCE DOCUMENTS**

The Office of Public Counsel, on behalf of the Citizens of the State of Florida, moves to compel Florida Power & Light Company (FPL) to provide documents responsive to OPC Request to Produce Item no 32 and answer fully OPC Interrogatory nos. 136, 137, 138, 140, and 141, and in support states:

1. On March 29, 2012, OPC served its Third Request to Produce on FPL. Item no 32 and FPL's response to the item are quoted below:

Request No. 32

Q.
Debt Agreements. This request refers to Note 12 of NextEra Energy Inc.'s 2010 Form 10-K. Please provide the debt agreements of \$2,652 million, \$2,521 million, and \$82 million.

A.
Consistent with FPL's general objection to requests for affiliate information that does not affect FPL's rates or cost of service, FPL has no responsive documents.

2. On May 3, 2012, OPC served its Seventh Set of Interrogatories on FPL. FPL refused to answer any aspects of Interrogatory nos. 136, 137, 138, 140, and 141 that relate to FPL's affiliates. The interrogatories and FPL's objections are copied below:

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Interrogatory No. 136

Q.

See MFR No. C-31 Update, Attachment No. 1 of 1, p. 21 of 83. Please provide the December 31, 2010 and Dec. 31, 2011 dollar amounts of common equity, long-term debt, and short-term debt of each subsidiary of NextEra Energy Capital Holdings, Inc.

A.

Please see FPL's objections to OPC's Seventh set of Interrogatories filed May 18, 2012, which objects to requests for affiliate information that does not affect FPL's rates or cost of service on the ground that such information is not relevant.¹

Interrogatory No. 137

Q.

See MFR No. C-31 Update, Attachment No. 1 of 1, p. 22 of 83. Please provide the Dec. 31, 2010 and Dec. 31, 2011 dollar amounts of common equity, long-term debt, and short-term debt of each subsidiary of NextEra Energy Resources, LLC.

A.

Please see FPL's objections to OPC's Seventh Set of Interrogatories filed May 18, 2012, which objects to requests for affiliate information that does not affect FPL's rates or cost of service on the ground that such information is not relevant.

Interrogatory No. 138

Q.

Please provide the annual dividend payments of NextEra Energy Capital Holdings and Florida Power & Light Company to NextEra Energy, Inc. from January 1, 1995 through April 30, 2012.

A.

Please see the Attachment No. 1, which provides annual dividend payments of Florida Power & Light Company to NextEra Energy, Inc. from January 1, 1990 through April 30,

¹ FPL refers in its answer to the general objections that it filed in response to the entire set of interrogatories. FPL made no specific objection to any of the interrogatories that are the subject of this motion until it served its answers to the interrogatories. Further, the assertion that the discovery requests are "not relevant" is the only objection that FPL raised to the specific requests.

2012. With regard to the portion of this Interrogatory that relates to NextEra Energy Capital Holdings, please see FPL's objections to OPC's Seventh Set of Interrogatories filed May 18, 2012, which objects to requests for affiliate information that does not affect FPL's rates or cost of service on the ground that such information is not relevant.

Interrogatory No. 140

Q.

Please provide the exact dates of issuance of the \$13,206,028,000 of long-term debt outstanding for NextEra Energy Resources.

A.

Please see FPL's objections to OPC's Seventh Set of Interrogatories filed May 18, 2012, which objects to requests for affiliate information that does not affect FPL's rates or cost of service on the ground that such information is not relevant.

Interrogatory No. 141

Q.

Please provide the exact dates and corresponding amounts of common equity infusion into Florida Power & Light Company and Subsidiaries from January 1, 1990 through April 30, 2012.

A.

Please see FPL's response to OPC's Seventh Set of Interrogatories No. 138. In that response, data was supplied from 1990 to April 2012. Regarding other subsidiaries of NextEra Energy, Inc., please see FPL's objections to OPC's Seventh Set of Interrogatories filed May 18, 2012, which objects to requests for affiliate information that does not affect FPL's rates or cost of service on the ground that such information is not relevant.

3. FPL's objections are not well founded. FPL's refusal to respond to Request to Produce Item no. 32 and to answer fully Interrogatory Nos. 136, 137, 138, 140 and 141 constitute a failure to comply with FPL's discovery obligations. Unless the Commission compels FPL to comply with those obligations, OPC's ability to prepare its case on behalf of

FPL's customers will be impaired. For the following reasons, the Commission should require FPL to respond fully to the discovery requests listed above.

4. **Scope of discovery.** The Commission's discovery practice is governed by the Florida Rules of Civil Procedure. Those rules provide liberal discovery rights to parties. Rule 1.280(b)(1) provides:

(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.

A matter is discoverable, therefore, if it is "reasonably calculated to lead to the discovery of admissible evidence." See *Allstate Insurance Company v. Langston*, 655 So.2d 91 (Fla. 1995); *Amente v. Newman*, 653 So.2d 1030 (Fla. 1995).

5. In its objection, FPL implicitly acknowledges that a matter will be relevant if it affects FPL's rates or cost of service. The documents and answers sought by OPC in the items listed above are relevant to the issue of whether FPL's proposed capital structure, which includes an equity ratio of nearly 60%, should be utilized for ratemaking purposes, or whether instead the Commission should deem the 60% ratio to be unreasonable and employ a different equity ratio.

6. FPL appears to assert that the only matters stemming from its relationships with its parent and affiliates that affect rates or cost of service must necessarily be transactional in nature. FPL is wrong. The choice of capital structures—specifically, the decision as to the proportions of equity capital and debt to include in the capital structure—bears directly on the quantification of the total cost of service which customers will support through the rates they pay. Because debt is a contractual obligation of the utility, the utility must pay bondholders before paying a return to shareholders. As the shareholders' return prospects are subordinate to the contractual rights of bondholders, equity capital is riskier than debt, and requires a higher rate of return. In short, equity capital is more expensive than debt. It follows that the higher the proportion of equity capital relative to debt that a capital structure contains, the greater the revenue requirement that will be associated with supporting the capital structure. The relationship between equity ratio and rates/cost of service could not be more direct or more fundamental.

7. FPL is a subsidiary of NextEra Energy, Inc. NextEra Energy, Inc. has other subsidiaries. The manner in which each subsidiary of NextEra Energy is capitalized represents a choice made by the parent entity. The relationship between and among FPL's parent company, NextEra Energy, Inc., FPL, and FPL's affiliates is relevant to, and bears on, the determination of whether the 60% equity ratio proposed by FPL is appropriate for ratemaking purposes. Based upon publicly available information, the consolidated capital structure of NextEra Energy, Inc. and all of its subsidiaries, including FPL, contains only 40% equity (see MFR, Schedule D-2). This means that FPL's proposed equity ratio is significantly higher than the corresponding equity ratios of its affiliates,

even though the operations of the unregulated affiliates are relatively more risky than the operations of FPL, the regulated utility. See affidavit of OPC consultant Kevin O'Donnell, attached. One would expect a riskier, unregulated entity to offset its greater business risk with a more conservative equity ratio having relatively lower financial risk; however, the consolidated capital structure contains lower equity (and therefore higher debt leverage, with its attendant financial risk) than the capital structure of FPL.

8. This observation carries more than mere academic interest. As the credit agencies' reports make clear, an investor in the common stock of FPL's parent, NextEra Energy, Inc. assesses the risk of the overall entity, but is aware that a very high proportion of the overall equity investment is placed in the relatively less risky regulated utility. OPC intends to evaluate whether FPL's ratepayers are subsidizing the relatively riskier unregulated operations by paying the high cost of FPL's extreme 60% equity ratio. The request to produce and the interrogatories to which FPL objected are reasonably calculated to lead to the discovery of information that will shed light on the strategy underlying NextEra Energy's decision to maintain an exceptionally high level of equity capital in FPL, the dividends from which can be used by NextEra Energy, Inc. to fund the unregulated activities of FPL's affiliates. More specifically, OPC needs the debt agreements sought in Request to Produce Item no. 32 to gauge whether dividends from FPL to its parent are effectively acting as a guaranty for its affiliates' debt issuances. Interrogatory no. 136 relates to the capital structure of NextEra Energy Capital Holdings, Inc., the subsidiary which serves as the source of capital for other affiliates, and its subsidiaries. Interrogatory no. 137 relates to the capital structure of NextEra Energy

Resources LLP and its subsidiaries. Interrogatory no. 138 seeks the history of dividend payments from NextEra Capital Holdings to NextEra Energy. Interrogatory no. 140 seeks details regarding the issuance dates of debt issued by NextEra Energy Resources. Interrogatory no. 141 seeks to trace the history of equity infusions from NextEra Energy, Inc. into all of its subsidiaries over time. The information sought by each of these discovery requests is reasonably calculated to lead to the discovery of admissible information, as the information sought will shed light on whether the parent is capitalizing each such entity appropriately for its purpose, or whether instead FPL's customers are subsidizing its unregulated affiliates.

9. The choice of capital structures is a recurring issue in rate cases conducted by the Commission. The relationship between the choice of capital structure and the utility's total cost of service is direct and clear. It is also significant. To illustrate: If the Commission were to apply to FPL the same 40% equity ratio that FPL's parent achieves with all of its subsidiaries on a consolidated basis, the effect would be to lower FPL's revenue requirements by several hundreds of millions of dollars annually. See Affidavit of Kevin O'Donnell, attached. To be clear, OPC has not formulated a position on the precise equity ratio that should be used for ratemaking purposes in this proceeding; however, the illustration provided by Mr. O'Donnell demonstrates the need to scrutinize all pertinent facts carefully. To protect the interests of the customers it represents, OPC is entitled to evaluate whether the 60% equity ratio proposed by FPL would effectively require FPL's customers to subsidize the unregulated operations of FPL's affiliates. The discovery requests that FPL refuses to answer are reasonably calculated to lead to the

discovery of information that will be admissible for the purpose of proving or disproving this concern.

10. A similar issue arose in a telephone company's ratemaking proceeding before the District of Columbia Public Service Commission. Chesapeake and Potomac Telephone Company was a subsidiary of Bell Atlantic, which also had numerous other subsidiaries. The D.C. Office of People's Counsel sought information regarding the regulated telephone company's affiliates on the grounds the information was pertinent to the issue of whether the regulated company's actual capital structure or a hypothetical structure should be used for ratemaking purposes. The telephone company resisted in part on the basis that it had few dealings with some of its affiliates. The D.C. agency granted the D.C. OPC's motion to compel. That agency's disposition of the issue before it is persuasive. It stated:

The Commission cannot ignore the salient facts that 100% of C&P's equity is owned by Bell Atlantic, that there is therefore no market for C&P's stock, and that Bell Atlantic may have significant control over the capital structure of C&P. With these facts, the Commission cannot rule out the possibility that the actual capital structure of C&P may not be the appropriate structure for ratemaking purposes. . . .

It is true that Questions 2-31 and 2-32 encompass many affiliates which have little or no business relationship with C&P. Mr. Rothschild's explanation of the need for this information, however, demonstrates that it is not the business relationship, but the effect upon capitalization which drives the need for this information. . . .

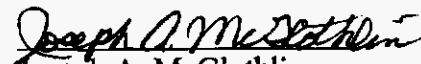
The capitalization of C&P may be influenced by Bell Atlantic, and may be a product of capitalization decisions made for the other affiliates.

Chesapeake and Potomac Telephone Company, Formal Case No. 850, Order No. 9774, issued on August 2, 1991; 12 D.C. P .S.C. 407

As was the case in the above case, the information sought by OPC in this docket falls within the proper scope of discovery.

11. OPC has conferred with Counsel for FPL regarding this Motion. OPC and FPL were unable to resolve the matters raised herein prior to the filing of the Motion. If additional discussions and negotiations have the effect of narrowing the issues raised herein, OPC will so inform the Commission.

WHEREFORE, OPC moves for an order compelling FPL to answer and respond to the above pending discovery requests fully and expeditiously.



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Associate Public Counsel

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c/o The Florida Legislature
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(850) 488-9330

Attorney for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing OPC's Motion to Compel FPL to Respond to Certain Interrogatories and Request to Produce Documents has been furnished by electronic mail and/or U.S. Mail on this 1st day of June, 2012, to the following:

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Sarasota, FL 34234


Joseph A. McGlothlin
Associate Public Counsel

AFFIDAVIT

Kevin O'Donnell, after first being duly sworn, deposes and states as follows:

My name is Kevin O'Donnell. I am President of Nova Energy Consultants, Inc. I hold a B.S. degree in Civil Engineering from NC State University and a M.B.A. degree in Finance from Florida State University. For the past 27 years, I have served as a consultant and expert witness in ratemaking proceedings involving regulated utilities, focusing primarily on the areas of cost of capital and the choice of the appropriate capital structure. I have been engaged by the Florida Office of Public Counsel to assist it in evaluating the reasonableness of the 60% equity ratio proposed by Florida Power & Light Company (FPL) in Docket No. 120015-EI.

The decision as to the proportions of equity capital and debt that FPL should have in its capital structure bears directly on FPL's total cost of providing service. When FPL issues debt, it enters an enforceable contractual obligation to repay the amount borrowed with interest. On the other hand, shareholders who purchase stock in FPL's parent company have no such contractual relationship; they are aware that bondholders will be paid before shareholders receive any return on their investment. For this reason, equity capital is riskier than debt and costs more than debt. In addition, interest expense associated with debt is paid before taxes are paid whereas dividend payments are paid with after-tax funds. Hence, from a risk/return standpoint as well as a tax standpoint, equity capital is significantly more expensive than is debt capital. It follows that, as the portion of total capital comprised of more expensive equity capital increases, the total amount of money necessary to repay debt and provide a return to shareholders also increases. If the equity ratio is inappropriately high, then the utility's total cost of service is also inappropriately high. If the Florida Public Service Commission determines that FPL's proposed 60% equity ratio is unreasonably high, for ratemaking purposes it should employ a lower, more reasonable equity ratio, so that the resulting total cost of service is no higher than ratepayers should bear through the rates they pay.

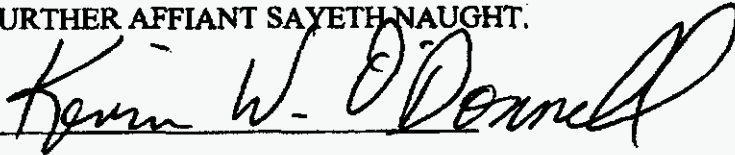
The materiality of the issue of the appropriate equity ratio can be illustrated as follows. FPL currently has an equity ratio of 60%. FPL is a subsidiary of NextEra Energy, Inc. NextEra Energy, Inc. is the parent of several other subsidiaries that are active in unregulated businesses. Each subsidiary has its own capital structure. When viewed on a composite or consolidated basis, the overall operations of NextEra Energy, Inc. and all of its subsidiaries (including FPL) reflects an equity ratio of slightly less than 40%. If the Commission were to impute to FPL the 40% equity ratio of the consolidated operation into the adjusted capital structure of FPL, the impact of substituting this different mix of equity capital and debt for ratemaking purposes

COUNTY OF WAKE
STATE OF NORTH CAROLINA

would be to reduce FPL's revenue requirements by approximately \$400 million annually. While neither I nor OPC has concluded at this stage that the Commission should make this specific adjustment, the differential in revenue requirements associated with the range between FPL's requested equity ratio and the adjusted consolidated equity ratio of FPL and all of its affiliates demonstrates the significance of the subject and the need to scrutinize FPL's proposal closely.

Such a scrutiny necessarily involves information pertaining to FPL's affiliates. The decision as to the mix of equity and debt capital to place into each of its subsidiaries is made by the parent, NextEra Energy, Inc. Because (relative to FPL) they have fewer mechanisms designed to assure cost recovery (e.g. they have neither monopoly markets nor regulatory cost recovery mechanisms), the businesses of FPL's unregulated affiliates are riskier than that of FPL. In view of their greater risk, one would expect that NextEra Energy, Inc. would counterbalance the greater business risk of the unregulated entities with capital structures containing lower debt leverage (financial risk). Instead, based on the publicly available information regarding the consolidated operation, the unregulated affiliates appear to carry far less equity in their capital structures than does FPL. This observation gives rise to the issue of whether NextEra Energy, Inc. is placing the extremely high proportions of equity in FPL—not because it is the level that is appropriate for FPL's operations—but because NextEra wishes to place its equity investment in the subsidiary that has the highest likelihood of earning a high return, and use dividends from that entity to subsidize the unregulated operations. The discovery requests to which FPL objected seek information regarding the capital structures of certain of FPL's affiliates, the flow of dividends between NextEra Energy, Inc. and certain of its subsidiaries, and the terms of debt agreements issued by FPL's affiliates. All of these discovery requests are related to the evaluation of FPL's capital structure in the context of NextEra Energy, Inc.'s overall structure and capitalization, and all are related to the issue of whether FPL's 60% equity ratio is reasonable for ratemaking purposes in this proceeding.

FURTHER AFFIANT SAYETH NAUGHT.



DATED at 531 Walnut St., Cary, NC 27511, this day of June 1, 2012

Sworn to and subscribed before me this _____ day of June, 2012

COUNTY OF WAKE
STATE OF NORTH CAROLINA

Karen Overton
NOTARY PUBLIC



State of NC at Large

My Commission Expires: My Commission Expires 11-08-2015.