

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of arrangement
to mitigate impact of unfavorable Cedar
Bay power purchase obligation, by Florida
Power & Light Company

Docket No. 150075-EI

Filed: July 1, 2015

FLORIDA POWER & LIGHT COMPANY'S MOTION TO INCLUDE COUNTER-DESIGNATIONS OF THE DEPOSITION OF WITNESS RUDOLPH AT HEARING

Florida Power & Light Company ("FPL" or the "Company"), pursuant to Rules 28-106.204 and 28-106.211, Florida Administrative Code ("F.A.C.") and Florida Public Service Commission ("FPSC" or the "Commission") Order Nos. PSC-15-0143-PCO-EI and PSC-15-0143A-PCO-EI, hereby files this motion to include counter designations of pages and lines (specified below) to the deposition of Stephen Mark Rudolph, in response to the portions of Mr. Rudolph's deposition designated by the Florida Industrial Power Users Group ("FIPUG"). In support of this Motion, FPL states:

1. On May 15, 2015, Stephen Mark Rudolph, pursuant to appropriate notice, was deposed by the Office of Public Counsel, the FIPUG, FPL and counsel for the Commission Staff. Mr. Rudolph is employed by Cogentrix Energy Power Management, a non-party.
2. On June 5, 2015, by Order No. PSC-15-0143A-PCO-EI, the Commission entered its Second Order Establishing Procedure, which permits parties to designate by no later than June 8, 2015 all or part of a deposition transcript that it wishes to use at hearing.
3. On June 8, 2015, FIPUG filed a Notice of Intent To Use Deposition. Specifically, FIPUG noticed its intent to introduce certain designated pages and lines from the deposition transcripts of Mr. Rudolph, along with certain exhibits marked during the depositions.

4. Pursuant to Florida Rules of Civil Procedure 1.330(a)(4) and Florida Rule of Evidence 90.108, FPL requests the introduction of additional pages and lines of Mr. Rudolph's deposition, along with the corresponding exhibits, so that the Commission may have a more

complete and fair understanding of the context of portions of Mr. Rudolph's deposition testimony.

Applicable Florida Law

5. The Commission's Order Establishing Procedure and Rules 28-106.206,¹ F.A.C. recognize that the Florida Rules of Civil Procedure apply in hearings involving disputed issues of material fact. Moreover, the Commission historically has relied on the Florida Rules of Evidence as guidance in determining the admissibility of testimony or exhibits during such hearings.

6. Florida law recognizes "the rule of completeness," founded on principles of fairness, which recognizes that a misleading impression may be created when matters are presented out of context. *Larzelere v. State*, 676 So. 2d 394, 401-02 (Fla. 1996).² Section 90.108 provides that when a portion of a writing or document is admitted, an adverse party has the right to require the remainder of the writing or document to be introduced if fairness requires that it should be considered contemporaneously.³ See *Robinson v. CSX Transp., Inc.*, 103 So. 3d 1006, 1011 (Fla. 5th DCA 2012) (error to permit impeachment with redacted copy of accident report when redaction distorted reports contents and fairness required the remainder of report be shown witness under section 90.108.). The opposing party is entitled to have a portion of the writing introduced to the extent it tends to explain or shed light upon the part already admitted. *Mason v. State*, 719 So. 2d 304, 305 (Fla. 4th DCA 1998).

¹ Rule 28-106.206, F.A.C. 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."

² In *Larzelere*, the Florida Supreme Court noted that the party proposing counter-designations does not bear the burden of showing that it is prejudiced by the introduction of the partial statement. Rather, "the correct standard is whether, in the interest of fairness, the remaining portions of the statements should have been contemporaneously provided to the jury." 676 So. 2d at 402.

³ Section 90.108(1), F.S. states: "Introduction of related writings or recorded statements. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section."

7. The principles of section 90.108 are separately recognized in Florida as it relates to depositions. Under Florida Rule of Civil Procedure 1.330(a)(4), when only portions of depositions are offered by a party, an adverse party may require the introduction of any other part that in fairness ought to be considered with the part introduced.

8. FIPUG designated portions of Mr. Rudolph's deposition that provide an incomplete picture of the facts and circumstances regarding the figures contained in a 2013 valuation of the power purchase agreement between Cedar Bay and FPL (the "PPA"). Specifically, FIPUG designates passages from Mr. Rudolph's deposition pertaining to details of a report based on 2012 year-end data that assigns a value to the PPA (the "2013 Valuation") that is lower than the value ascribed to the PPA in connection with the instant Cedar Bay Transaction that is the subject of this proceeding (the "2015 Valuation").

9. Absent additional designations enumerated below, the Commission could be left with the misleading impression that nothing changed to warrant a different valuation of the Cedar Bay-FPL PPA based on 2014 year-end data. The Commission would lack the benefit of the cross-examination of Mr. Rudolph in which he describes *actual* 2013 and 2014 financial operational results that differed materially from the projections contained in the 2013 Valuation.

10. In the interest of fairness and to provide the Commission better context in which to consider the 2013 and 2015 Valuations, FPL respectfully requests that the Commission include the counter-designations listed below when FIPUG introduces the deposition of Mr. Rudolph:

- Page 119, Line 23 - Page 126, Line 7
- Deposition Exhibit 3 (referenced initially on Page 119, Line 23)

11. Rule 28-106.211, F.A.C. authorizes the presiding officer to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case."

12. This motion is filed in the interest of justice and not for improper purpose.

13. FPL has conferred with the parties in this docket. The Office of Public Counsel has no objection to the relief requested herein but reserves the right to assert any applicable permitted under rule or Commission practice. The Florida Industrial Power Users Group objects to the relief requested herein.

WHEREFORE, FPL respectfully requests that the Commission introduce page 119, line 23 through Page 126, line 7 of Stephen Mark Rudolph's deposition, along with Deposition Exhibit 3, contemporaneous with the introduction of the portions of Mr. Rudolph's deposition designated by FIPUG.

Respectfully submitted this 1st day of July, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery on the 1st day of July 2015, to the following:

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