

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida Power & Light Company	§ § §	Docket No. 160021-EI
In re: Petition for approval of 2016-2018 storm hardening plan by Florida Power & Light Company	§ § § §	Docket No. 160061-EI
In re: 2016 depreciation and dismantlement study by Florida Power & Light Company	§ § § §	Docket No. 160062-EI
In re: Petition for limited proceeding to modify and continue incentive mechanism by Florida Power & Light Company	§ § § §	Docket No. 160088-EI
	§	Filed: July 7, 2016

**SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION'S
RESPONSE IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S
MOTION TO COMPEL**

Pursuant to Rules 28-106.204 of the Florida Administrative Code and Rule 1.280(c) of the Florida Rules of Civil Procedure, South Florida Hospital and Healthcare Association (“SFHHA”) hereby files this response in opposition to Florida Power & Light Company’s (“FPL”) July 1, 2016 Motion to Compel Discovery of Florida Power & Light Company’s First Set of Interrogatories (Nos. 7 and 8) and First Request for the Production of Documents (No. 3). SFHHA respectfully requests that the Commission deny FPL’s Motion to Compel. In support hereof, SFHHA states as follows:

**I.
INTRODUCTION**

None of the discovery requests that are the subject of FPL’s Motion to Compel will obtain discovery of relevant information or are calculated to lead to the discovery of admissible evidence. Rather, the discovery requests, along with most others that FPL served on SFHHA

prior to the time SFHHA filed its prepared testimony in this case, appear to be part of a continuing effort by FPL to engage in harassment for the purpose of attempting to induce SFHHA to refrain from participating in FPL's rate cases.

FPL's implementation of that strategy commenced in the 2009 rate case. In that case, FPL sought the deposition of SFHHA's then-president, Ms. Linda Quick, notwithstanding that she had not offered prepared testimony in that case; nor had she done so in any other FPL or other utility proceeding. FPL sought the deposition just in advance of the commencement of the evidentiary hearing although it was clear that FPL had no way to move the deposition into evidence or use the deposition to attempt to impeach the positions of SFHHA's expert witnesses. SFHHA objected to the deposition on those grounds, as well as on the ground that the deposition was not sought for the purpose of obtaining discovery of relevant information and that the deposition was not calculated to lead to the discovery of admissible evidence. SFHHA argued that the deposition was sought for the purpose of harassing and embarrassing SFHHA's then-president. Nonetheless the deposition was allowed to go forward.

Consistent with counsel's representation of FPL's purposes in seeking the deposition, FPL's first question to Ms. Quick after she was sworn in was: "Mrs. Quick, I assume you do believe in God?"¹ FPL's counsel went on to ask questions about SFHHA's dues structure in an attempt to learn how SFHHA was receiving funding to participate in the case.² He also wanted to find out how many times Ms. Quick had conferred with SFHHA's attorneys.³ Over the course of the two-and-a-half hour deposition, FPL sought useless information, none of which was about

¹ Transcript of Telephonic Deposition of Linda Quick, *In re: Petition for rate increase by Florida Power & Light Company*, Docket No. 080655-EI (August 20, 2009) ("Tr.") at page 6, lines 18-19.

² *See, e.g.*, Tr. at 23:1:16.

³ *Id.* at 36:14

the substance of SFHHA's positions in the case, and as counsel for SFHHA had noted in opposing FPL's request for the deposition, at no time during the course of the evidentiary hearing did FPL make any attempt to use any of the information provided during the deposition *inter alia* because none of the information was relevant to any issue in the litigation. The only apparent purpose of the deposition was to oppress and harass SFHHA.

FPL later made a more direct effort to discourage SFHHA from participating in FPL 2012 rate case. Shortly in advance of FPL filing its 2012 rate case, Mr. Eric Silagy, FPL's President and Chief Operating Officer, requested to make a presentation to SFHHA's members at SFHHA's annual meeting. At the meeting, Mr. Silagy suggested that it was very important for FPL to obtain a rate increase, and he encouraged SFHHA not to intervene in the rate case.

With respect to the current rate case, FPL again undertook efforts in advance of SFHHA intervening that appear to have been designed to induce SFHHA members not to support SFHHA's intervention. Specifically, it sent out teams of officers and/or employees to meet with executives of a number of SFHHA's largest members to influence them not to support SFHHA's participation in the case.

Efforts by FPL to discourage SFHHA's participation in its rate cases, regardless of the form those efforts take, constitute harassment of SFHHA and its members. The discovery requests that FPL served on SFHHA, including but not limited to those that are the subject of FPL's Motion, represent such harassment. None of FPL's discovery requests that are the subject of its Motion to Compel seek relevant information and they are not calculated to lead to the discovery of admissible evidence. The Commission should prevent FPL from using the Commission's discovery procedures as a weapon to harass SFHHA and its members, who seek only to ensure that the rates they pay FPL for electric service are fair, just and reasonable.

II. BACKGROUND

1. On May 20, 2016, FPL served upon SFHHA, FPL's First Set of Interrogatories (Nos. 1-16) and First Request for the Production of Documents (Nos. 1-3).

2. On June 15, 2016, SFHHA served upon FPL its general and specific objections to all 16 of FPL's interrogatories and all three of its requests for production of documents. In general, SFHHA objected to the discovery requests on the grounds that they were premature, overbroad, failed to seek relevant information and/or were not calculated to lead to the discovery of admissible evidence.

3. Following the service of the objections counsel for FPL and SFHHA conferred on June 17 and 22, 2016, and narrowed the scope of a number of FPL's discovery requests. As a result of those discussions, on June 28, 2016, SFHHA provided responses to 12 of FPL's interrogatories. The parties also reached agreement regarding the production of documents responsive to two of FPL's document requests, both of which concern prior testimonies by and/or publications of SFHHA's expert witnesses.

4. On July 1, 2016, counsel for FPL and SFHHA conferred again, and SFHHA agreed to serve, later in the day on July 1, 2016, a response to an additional interrogatory (FPL Interrogatory No. 9). Based upon the discussion, counsel for SFHHA also indicated that SFHHA would consider supplementing the answers it previously had supplied to FPL Interrogatory Nos. 11 and 12.

5. FPL filed its Motion to Compel on July 1, 2016, initially seeking responses to Interrogatory Nos. 7, 8, 11 and 12. It also sought to compel a response to Request for Production of Documents ("POD") No. 3 as it relates to the foregoing interrogatories.⁴

⁴ Motion to Compel at P 3.

6. On July 5, 2016, SFHHA served supplemental responses to Interrogatory Nos. 11 and 12 clarifying its prior responses to those requests. On July 7, 2016, FPL withdrew its Motion to Compel with respect to Interrogatory Nos. 11 and 12. As a result, the discovery requests that remain at issue are Interrogatory Nos. 7 and 8 and POD No. 3 as it relates to those interrogatories.

7. FPL asserts that “the information sought to be obtained through discovery is relevant, admissible, reasonably calculated to lead to admissible evidence in this matter, and intended to assist FPL in the preparation of its case and *for purposes of cross examination of SFHHA’s outside consultants.*”⁵ FPL alleges that preventing FPL’s access to the information, all of which is information relates to communications between SFHHA and its members, will “limit[], prejudice[], and may even preclude FPL from challenging SFHHA’s positions.”⁶ The only argument FPL raises to attempt to support those broad assertions in the context of the individual discovery requests is to assert in each instance that it seeks the requested information to illustrate “bias, motive, or prior inconsistent statements.”⁷ At no time however does FPL attempt to show how the information is relevant; how it could lead to the discovery of admissible evidence; how it could relate to the testimony of SFHHA’s outside consultants whose prepared testimony was not even filed at the times FPL sought the discovery; how showing alleged bias or motive on SFHHA’s part is relevant to the testimony of its expert witnesses; how the discovery even arguably could show inconsistent statements by any of SFHHA’s witnesses; or how failure to obtain the information would limit or prejudice FPL in challenging SFHHA’s positions in the case, all of which will be advanced through SFHHA’s outside expert witnesses or counsel, as

⁵ Motion to Compel at P 21 (emphasis added).

⁶ FPL Motion to Compel at PP 9 and 12.

⁷ *Id.*

opposed to SFHHA personnel or SFHHA members, none of whom ever have offered testimony in a FPL case (including this one).

III. ARGUMENT

8. The information FPL seeks is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Therefore, the discovery FPL seeks is in contravention of Rule 1.280(b) of the Florida Rules of Civil Procedure. The issue in this case is whether the rates proposed by FPL are fair, just and reasonable. A determination of that issue will be made based upon the testimony and cost support filed by FPL, and the testimony and exhibits of parties opposing FPL's proposed rate increase. Relevant information thus concerns FPL's costs and the methodologies for determining those costs. FPL's discovery requests do not seek any information regarding either of those subjects. Instead, FPL's discovery requests seek information and materials provided to SFHHA's members, such as information and documents: (1) regarding any "rate case or similar proceeding;" or (2) "that mention FPL."

9. Neither of these areas of inquiry is designed to obtain information that even arguably could be relevant to determining what the costs are that underlie FPL's proposed rates or what methodologies should be used in the design of rates. Information regarding the areas of inquiry sought by FPL also would shed no light on the propriety of the cost calculations and methodologies offered in the testimonies of SFHHA's expert witnesses that have now been submitted and which recommend results far different than those requested by FPL.

10. For each of the foregoing reasons that will be discussed on a discovery request specific basis below, the discovery FPL is seeking is entirely inappropriate, and its Motion to Compel should be denied.

11. Interrogatory No. 7 reads as follows:

Interrogatory No. 7

Please identify all materials and documents provided to SFHHA members regarding electric rates as a result of any and all Public Utility Commission dockets or Public Service Commission dockets, Federal Energy Regulatory Commission dockets, or any other state or federal regulatory body dockets in the last seven (7) years in connection with a general base rate case or similar proceeding.

12. As an initial matter, Interrogatory No. 7 is vastly overbroad. As drafted, it does not limit the documents it is seeking to those, if any, that SFHHA provided to SFHHA members. In fact, as drafted, it does not specify or provide any limit as to the universe of entities that might have provided information to SFHHA members “regarding electric rates;” and it does not even limit the universe of documents it is seeking to those regarding FPL’s “electric rates” but rather seeks identification of documents “regarding electric rates” regardless of the electric utility whose electric rates are referred to in a document. As a result, articles published at any time over the last seven years, for example, by newspapers or other periodicals that refer to “electric rates [of any electric utility anywhere in the United States or for that matter the world] as a result of . . . Public Utility Commission dockets or Public Service Commission dockets, Federal Energy Regulatory Commission dockets, or any other state or federal regulatory body dockets” would be responsive to this request as drafted. A response to this request as drafted also would require, for example, that SFHHA produce all bills FPL has sent to each of its members over the last seven (7) years because each bill concerns “electric rates as a result of [a Florida] . . . Public Service Commission docket[.]”

13. It is not SFHHA’s obligation, nor is it the Commission’s job, to re-draft FPL’s discovery requests so that they properly seek relevant information or so that they will be calculated to lead to the discovery of admissible evidence. That is especially so when the breadth of a discovery request indicates an intention to oppress or harass, or a carelessness that suggests FPL is indifferent as to whether it does so.

14. It is readily apparent that discussions about the electric rates of utilities other than FPL will not show whether FPL's projected costs of providing service in 2017 or 2018 support a finding by the Commission that FPL's proposed cost-based rates at issue in this case are fair, just and reasonable. Similarly irrelevant is information about FPL's rates as a result of prior Commission orders. The issues to be addressed in this case concern the underlying cost justifications for the future rates FPL is proposing now. Discussions by unknown commentators about electric rates of other electric utilities approved by other regulatory bodies in orders going back to 2009 will not shed light on whether FPL has cost-justified its proposed rates here. Further, to the extent that FPL contends such information is relevant to its case, FPL already is in possession of information it relies on to compare itself to other utilities and has submitted testimony and exhibits in support of that proposal. It does not need information from SFHHA members regarding the rates of other utilities when FPL itself is far better situated to obtain such information than hospitals that by definition are not in the electric utility business and are not in the business of collecting data about the rates of electric utilities in other jurisdictions.

15. Further, the suggestion that FPL needs to obtain these documents to show "bias, motive, or inconsistent statements" is nothing more than an empty sound-bite. No doubt FPL and its witnesses have a bias and motive to achieve higher rates. And, if opposition to paying rates that are not fair, just and reasonable is evidence of bias, SFHHA will stipulate that it is biased in that manner. But any such "bias" on the part of SFHHA or its members is entirely irrelevant to the question of how much weight the Commission should accord to the testimony of SFHHA's expert witnesses or the credibility of those witnesses. To the extent FPL wants discovery to test the merits of their testimony, including whether they are making inconsistent statements, FPL needs to seek discovery regarding positions taken by SFHHA's expert

witnesses. Amorphous documents, if any, in the possession of an SFHHA member “regarding electric rates” of a utility in New York, Oregon or Timbuktu are irrelevant to an attempt to show bias, motive or inconsistent statements by SFHHA’s expert witnesses.

16. The testimony of each of SFHHA’s witnesses is accompanied by a *curriculum vitae* that identifies every case in which the witness has testified. SFHHA has advised FPL that to the extent any of the testimonies are not available on a public website, SFHHA will provide them to FPL if the documents are in its witnesses’ possession. To the extent FPL wants to show “bias, motive, or prior inconsistent statements” by any of its witnesses, evidence to support such a showing, if it exists, will come from their prior testimonies. It is not credible for FPL to assert that the documents it seeks from SFHHA’s members in response to this interrogatory will illicit such information.

17. Finally, FPL’s arguments overlook the fact that SFHHA intervened in this case. Individual SFHHA members did not. SFHHA is not privy to documents that may be in its members’ possession. A party cannot be compelled to identify or produce documents that are not in its possession.⁸ Accordingly, because SFHHA itself does not have possession or control over the documents FPL is seeking, it cannot produce them even if they exist. And whether they exist is something of which SFHHA has no knowledge. And since SFHHA does not know if responsive documents even exist, it is hard to understand how any such documents could show bias on SFHHA’s part beyond the obvious that SFHHA is opposed to its members paying rates that are not fair, just and reasonable.

⁸ *Buckley Development Co., Ltd., v. Tagrin*, 270 So. 2d 433, 434 (Fla. App. 1972).

18. Interrogatory No. 8 reads as follows:

Interrogatory No. 8

Please describe the efforts or activities undertaken by SFHHA or any member of the SFHHA or their agents and representatives from 2010 to the present to disseminate fliers, handouts, documents, materials, letters, presentation materials, videos, and any and all other written or computer generated documents to members, prospective members, and others that discuss, address, refer to or otherwise mention FPL including but not limited to the positions or issues that are the subject of this pending case.

19. FPL Interrogatory No. 8 seeks information regarding “efforts or activities undertaken by SFHHA or any member of the SFHHA or their agents . . . to disseminate fliers, handouts, documents...that discuss, address, refer to or otherwise mention FPL including but not limited to the positions or issues that are the subject of this pending case.” FPL’s justification for seeking this information again is that “[t]his type of information...can be used in this proceeding to illustrate bias, motive, or prior inconsistent statements,” and that “FPL Parties naturally need to know what information supports or contradicts their adversaries’ position.”⁹

20. This request does not directly seek information about any positions that are the subject of this case but rather about SFHHA’s efforts to inform it members about any topic if FPL happens to be mentioned. As opposed to seeking information about substantive positions, this interrogatory is seeking the same type of irrelevant information FPL sought in the 2009 deposition about SFHHA’s undertakings with its members to obtain support for SFHHA’s participation in FPL’s rate cases.

21. SFHHA’s expert witnesses will be available for cross-examination at the upcoming hearing. It clearly is appropriate for FPL through proper discovery requests in advance of the hearing to test the theories and opinions of SFHHA’s expert witnesses, including

⁹ Motion to Compel at P 12. SFHHA notes that it is not clear who beside itself FPL is referring to by the use of the term “FPL Parties.”

attempts to find out if they have made statements that are inconsistent with their current testimonies. However, it is entirely inappropriate for FPL to use the Commission's discovery procedures for the purpose of attempting to chill communications between SFHHA and its members regarding any topic, but in particular about SFHHA participating in FPL's rate cases in order to protect against its members being charged unfair, unjust and unreasonable rates by FPL. It also is entirely inappropriate for FPL to attempt to dissuade SFHHA from participating in FPL's rate cases which appears to be the real purpose behind this interrogatory and FPL's efforts discussed above.

22. FPL Interrogatory No. 8 also is objectionable for much the same reasons as is Interrogatory No. 7. Even in light of FPL's admission that the scope of Interrogatory No. 8 is overbroad to the extent it requests information relating back to 2010, Interrogatory No. 8 remains overbroad in that it seeks information regarding the dissemination of any information that mentions FPL in any context. The mere fact that FPL is referred to in a document does not make the information inherently relevant to any issue in this case, nor would discovery of SFHHA's dissemination of materials to its members that mention FPL, if any, inherently be calculated to lead to the discovery of admissible evidence.

23. Outside of discovery it receives from FPL in this case and evidence presented by its expert witnesses, SFHHA has no information about the specific costs FPL incurs and claims justify its proposed rate increase. Therefore, even if a document refers to FPL's proposed rates in this case, unless a document were to discuss discovery SFHHA has obtained in this case or the testimony of SFHHA's expert witnesses which was just filed today, the document would have no bearing on whether FPL has provided cost support for its proposed rates. SFHHA will certify that it has not sent to any member any document that discusses discovery it has obtained in this

case, nor has it sent any member either the testimony of its expert witnesses or any document that discussed such testimony. As a result, there can be no documents that are responsive to this request that would constitute relevant evidence or lead to the discovery of admissible evidence. Again, that is the case because information responsive to this request would be wholly irrelevant to a determination of what the appropriate costs are underlying FPL's proposed rates or what methodologies should be used in designing rates. Moreover, even if one were to take FPL's alleged need for this information at face value, no showing of bias by SFHHA or its members in any event will show whether the positions taken by its sponsoring witnesses should be adopted or not by the Commission. *See* discussion of SFHHA's objection to Interrogatory No. 7. Accordingly, FPL Interrogatory No. 8 does not seek relevant information and is not calculated to lead to the discovery of admissible evidence.

24. POD No. 3 reads as follows:

POD No. 3:

Please produce any and all documents identified in your responses to FPL's First Set of Interrogatories Nos. (1-16) to SFHHA.

25. With respect to SFHHA's objections to FPL Request for Production of Documents No. 3, FPL moves to compel the production of documents, if any, identified in response to Interrogatory Nos. 7 and 8. FPL's request to compel documents is objectionable for the same reasons applicable to each of the corresponding interrogatories.

**IV.
CONCLUSION**

26. For the foregoing reasons, SFHHA respectfully requests that the Commission: (1) deny FPL's Motion to Compel; and (2) enter an order directing FPL to cease and desist from harassment of SFHHA and its members whether through misuse of the Commission's discovery procedures or otherwise.

Respectfully submitted,

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July 7, 2016

CERTIFICATE OF SERVICE
DOCKET NO. 160021-EI

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail,
U.S. Mail or Federal Express, this 7th day of July, 2016 to the following:

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