BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Base Rate Increase and Rate Unification by Florida Power & Light Company.	Docket No. 20210015-EI Filed: July 30, 2021

FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO FLORIDA INTERNET AND TELEVISION INC.'S MOTION TO COMPEL

Florida Power & Light Company ("FPL") submits this Response in Opposition to Florida Internet and Television, Inc.'s ("FIT") July 23, 2021 Motion to Compel ("Motion"). FIT's Motion asks the Florida Public Service Commission ("Commission") to Order FPL to provide discovery responses on or before August 3, 2021. Under the Commission's April 8, 2021 Amendatory Order (Order No. PSC-2021-0120A-PCO-EI), FPL's responses are not due until August 9. If FIT wanted more time to conduct discovery, it should have moved to intervene more than 39 days prior to the close of discovery. FIT's alleged hardship is of its own making. That said, FPL has been working diligently and is willing to produce responsive and relevant documents as soon as it is reasonably able. Indeed, FPL has today responded to 23 of FIT's 50 discovery requests, notwithstanding the fact that those responses are not due until August 9, 2021. But, FPL cannot and should not be expected to compress the response timeline afforded it by Florida law, merely for FIT's convenience. FIT's Motion should be denied.[1]

INTRODUCTION AND SUMMARY

This proceeding has been pending since January. More than five months went by before FIT filed its Petition to Intervene. In fact, FIT waited until just 39 days prior to the discovery deadline to seek intervention. FIT's Motion to Compel should be denied because FIT did not have

[1] FPL believes oral argument on this issue is wholly unnecessary. The parties' briefing provides sufficient information for the Commission to render a decision and oral argument will only occupy more of the Commission and parties' resources in the two weeks prior to trial.

the ability to issue discovery requests until it was granted party status on July 13. Despite FIT's allegation concerning "past Commission practice" (without any citation), any ruling that FPL's deadline to respond to FIT's discovery requests began *before* the Commission granted FIT party status is unsupported by the law and sets a very dangerous precedent going forward that is contrary to the Florida Rules of Civil Procedure. FPL is not to blame for FIT's untimely participation in this case or its tardy discovery requests, and granting FIT's Motion to Compel will prejudice both FPL and the other litigants whose discovery requests FPL must deprioritize if the Commission requires expedited discovery responses from FPL.

ARGUMENT

1. FPL's Responses are due August 9.

Prior to FIT's participation in this docket – which was opened in January 2021, with FPL's direct case having been filed March 11, 2021 - the Commission entered a series of orders establishing discovery deadlines. The Commission's Second Order Revising Order Establishing Procedures issued June 28, 2021 (Order No. PSC-2021-0233-PCO-EI) set August 9 as the discovery cutoff. (The Commission's April 8, 2021 Order had previously set the discovery deadline for August 6.) Under the April 8 Order, parties are afforded 25 days to respond to discovery requests.[2] *See* April 8 Order at 2-3. All discovery is governed by the Florida Rules of Civil Procedure. *Id.* at 2 ("Discovery shall be conducted in accordance with…the Florida Rules of Civil Procedure…").

[2] For discovery related to FPL's rebuttal, FPL has 10 days to respond. The FIT discovery, if related to any issue in this case (which FPL contests, as discussed in its Motion to Quash filed contemporaneously with this Response), does not even remotely related to FPL's rebuttal, nor has FIT argued this.

FIT moved to intervene on June 30. *See* FIT Petition to Intervene ("Petition"). On July 1, and July 8, respectively, FIT emailed discovery requests to FPL. The Commission granted the Petition on July 13 – leaving precisely 27 days before the discovery cutoff (sufficient time for FPL to timely respond within the timelines in the Commission's Orders). FIT takes the position that FPL's 25-day deadline to respond to its discovery requests began to run from the date they were emailed to FPL. *See* FIT Motion to Compel at 1 ("The due dates for FIT's discovery requests should be July 26, 2021 (for the first set) and August 2, 2021 (for the second set)"). The motivation for this expedited production is FIT's hope that it will obtain documents and responses in time to depose FPL before the discovery cutoff. *See* FIT Motion to Compel at 6 ("If FIT has no discovery from FPL before the depositions, the depositions will be less efficient, as counsel for FIT will be forced to spend time asking questions to uncover basic facts that would have been revealed in FPL's written discovery answers and/or documents.") Respectfully, the fabricated motivation is a function of FIT's poor planning.

In order for FIT's argument to be valid, the Commission must first reject a basic tenet of civil procedure, along with the language in its April and August Orders in this proceeding. To adopt FIT's argument, the Commission would grant non-parties the right to issue discovery requests before being granted party status. But, it is self-evident that only <u>parties</u> to a proceeding may issue discovery. And a person or entity is only a <u>party</u> to a proceeding if it is either a petitioner or defendant, or it is granted intervener status. Both the Commission's Order and the Florida Rules of Civil Procedure only contemplate discovery amongst <u>parties</u>. They do not contemplate discovery between parties and non-litigants. *See* April 8 Order at 3 ("<u>Parties</u> shall file in the Commission Clerk's Office a notice of service of any interrogatories or requests for production of documents propounded in this docket, giving the date of service and the name of the party to whom

the discovery was directed.") and Florida Rule of Civil Procedure 1.350 ("Any party may request to any other party (1) to produce and permit the party making the request, or someone acting in the requesting party's behalf, to inspect and copy any designated documents…") (emphasis added). As a matter of fact, this rule is so axiomatic that in order for litigants to request discovery from non-parties, they must request the Court issue a special type of discovery request – a subpoena. Parties do not have unilateral ability to issue discovery requests to non-litigants. Conversely, there is no "reverse-subpoena" for non-litigants. Non-litigants have no ability to issue discovery requests in proceedings without a Court Order. Thus, absent a Court Order, or party status, discovery may not be issued.

FIT's argument that discovery requests should be due earlier than August 9 is premised on the idea that it had the ability to serve discovery requests before the Commission granted its Petition to Intervene. The argument would produce absurd results. Under FIT's theory, non-litigants could issue discovery requests even without an Order granting party status. Consequentially, parties would be forced to spend time and resources to respond to discovery requests from non-parties without knowing whether the requesting party would ever be granted party status – and thus, whether the requesting party ever had a right to request the discovery in the first instance (for example, intervenor status could be granted conditionally or limited by the Commission). This could result in untold discovery requests from the general population and an unreasonable burden on litigants. Individuals or entities with no legitimate claim or desire to actually participate in a proceeding could simply file a petition to intervene, and thereafter send out discovery asking for virtually any information that piqued its interest. There is no support for this argument in the Florida Rules of Civil Procedure or the Commission's Orders in this proceeding. FIT's argument cannot be a precedent the Commission wishes to set.

Separately, the Florida Rules of Civil Procedure prohibit FIT from using the Notice to shorten FPL's response deadline. Rule 1.310, which governs depositions *duces tecum*, states that any documents requested with the deposition must be in accordance with the procedures in Rule 1.350. *See* Florida Rule of Civil Procedure 1.310 ("…notice to a party deponent may be accompanied by a request made in compliance with rule 1.350 for the production of documents and tangible things at the taking of the deposition. The procedure of rule 1.350 applies to the request.") Rule 1.350 of course, affords litigants 30 days to respond to document requests. *See* Florida Rule of Civil Procedure 1.350 ("[t]he party to whom the request is directed shall serve a written response within 30 days after service of the request.") FIT's Notice cites Rule 1.310 as the basis for the deposition and requests documents to be produced in response to its Rule 1.350 document requests. *See generally* Notice and FIT First and Second Requests for Production. While FPL concedes that the Commission has shortened the response deadline from 30 to 25 days in this proceeding, the principle stands – FIT cannot use the Notice as a way to dictate – and arbitrarily shorten - the discovery response deadline.

FIT was not a party to this proceeding until July 13. It did not have the right to issue discovery requests until July 13.[3] Under the Commission's Orders, FPL has 25 days from July 13 to respond to FIT's discovery requests. FPL fully intends to do so, and indeed has produced and will produce as many responses and documents as are reasonably gathered beforehand. But, FPL cannot be asked, expected, or ordered to expedite its responses merely because FIT did not correctly plan its participation in this proceeding.

[3] In fact, FPL could have taken the position that the service of the discovery requests prior to July 13 was a nullity and they needed to be re-served (meaning there are no pending discovery requests). Obviously, FPL did not take that position and is attempting to work with FIT in good faith to accommodate their late entrance into this proceeding.

2. FPL is not to blame for FIT's late intervention in this proceeding.

FIT finds itself in a precarious position because it waited too long to intervene, notwithstanding the fact that FPL made known its plan to initiate this proceeding through its January 11, 2021 public filing – not because FPL seeks to enforce the deadlines afforded it by the Commission and the Florida Rules of Civil Procedure. FIT tries to shift blame for its compressed discovery period by taking significant liberties in describing FPL's Response to its Petition to Intervene and the Commission's July 13 Order. *See* Motion to Compel at 5 ("the Prehearing Officer should conclude that FPL had no good faith basis to withhold its consent to FIT's Petition to Intervene when asked in advance, and FPL should not be permitted to file meritless procedural filings purely to impose delay in discovery."). The argument is flawed because it is based on misrepresentations.

First, FPL *did consent* to FIT's participation in this proceeding as an associational representative of electric ratepayers. *See* FPL Response to FIT Petition ("FPL does not oppose FIT's Petition for the first stated reason – as an association representing the interests of its members as retail electric customers of FPL and Gulf.") How FPL's consent can be construed to cause a delay is confusing at best.[4] Second, FIT grossly overstates the Commission's July 13 Order when arguing that the Commission "rejected FPL's arguments and granted FIT's intervention without condition." FIT Motion to Compel at 3. On the contrary, the Order expressly reserved the right to consider FPL's pole attachment specific objections when filed by appropriate motion – which FPL is raising in its contemporaneously filed motion for protective order. *See* July 13 Order ("FPL's arguments that discovery propounded by FIT may stray beyond the scope of this proceeding will

[4] It appears the real crux of FIT's issue is the fact that the Commission did not enter its Order granting FIT's Petition before July 13 – never mind that the Commission granted FIT's Petition faster than it granted any other Petition in this proceeding.

be entertained when and if they are raised by objections or appropriate motions filed with respect to specific discovery requests.")

Regardless, FIT's displeasure with the fact that FPL filed its Response to the FIT Petition is of no consequence. Its belief that it would "be granted intervention imminently" is unreasonable and subjective – the Commission would have been well within its rights to rule on the Petition at a later date, or deny FIT's Petition altogether. No litigant, FIT included, should ever hedge the timing of discovery responses on its personal belief about the timing of the Commission's actions or the filings of adverse parties.

3. FIT's request seeks favorable treatment without consideration to other litigants or FPL.

The desired effect of FIT's Motion to Compel is, of course, to have FPL prioritize (1) responses to its discovery over responses to requests from other litigants (litigants who timely issued their requests),[5] and (2) the other burdens carried by FPL in this proceeding and as a functioning electric utility. There is no reason FIT's requests should be permitted to leapfrog the requests of other parties. Likewise, FIT is simply incorrect in its assertion that "there is no prejudice or harm to FPL." FIT Motion to Compel at 7. That is false. Requiring FPL to expedite its responses to FIT's discovery requests requires FPL to reallocate existing resources that are being spent preparing for the trial of this case, concluding discovery with other litigants, or assisting in the daily operation of FPL as a functioning electric utility. Alternatively, the request requires FPL to expend new resources because, in reliance on the Commission's April 8 Order, FPL expected to have a full 25 days to respond to FIT's requests and allocated its existing resources

[5] At the time that FIT served its premature discovery, about 135 discovery requests (more than 200, including subparts) from other intervenors were pending in FPL's "queue." FIT would have FPL delay or deprioritize these pending items so that FIT could skip ahead of others who abided by the rules.

accordingly. Notably, FIT offers nothing in the way of consideration to either FPL or the other litigants for the extra exertion it demands.[6] Again, this cannot be a precedent the Commission wishes to set.

CONCLUSION

FPL requests the Court enter an Order denying FIT's Motion to Compel and allow FPL to produce responses to FIT's discovery requests on or before August 9, as prescribed in the Commission's April 8 and June 28 Orders.

Respectfully submitted,

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[6] The contention that expedited responses are not prejudicial to FPL because FIT's discovery requests "seek materials and information that FPL should already have at its easy access" is borderline comical. FIT has no personal knowledge of FPL's record keeping procedures and has absolutely no basis to make that argument.

CERTIFICATE OF SERVICE
20210015-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 30th day of July 2021 to the following parties:

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