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Jonathan E. Sjoström

September 26, 1997

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, FL 32399

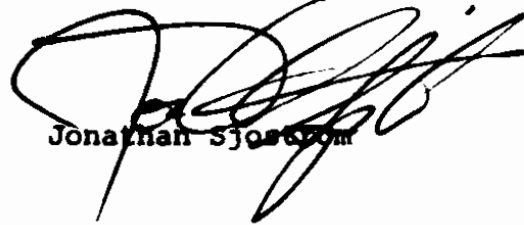
RE: DOCKET NO. 900000-20

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen (15) copies of Orando CoGen Limited, L.P.'s Response in Opposition to Staff's Objection and Motion for Protective Order Regarding Stallcup and Dudley Depositions and Request for Oral Argument in the above referenced docket.

If you or your Staff have any questions regarding this filing, please contact me.

Very truly yours,



Jonathan Sjoström

Enclosure

cc: All Parties of Record
TAL/22152-1

RECEIVED & FILED

FLORIDA PUBLIC SERVICE COMMISSION

Miami
305 577 7000
305 577 7001 Fax

West Palm Beach
561 650 7200
561 655 1509 Fax

Key West
305 292 7272
305 292 7271 Fax

DOCUMENT NUMBER-DATE

09026 SEP 26 5
582 951 4106 Fax
FPSC-RECORDS/REPORTING

- ACK
- AFA
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- CAF
- CMR
- CTF
- ELI
- EV
- FL
- GEN
- SEC
- WAB
- OTH

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition for approval of)
early termination amendment to)
negotiated qualifying facility)
contract with Orlando CoGen)
Limited, Ltd. by Florida Power)
Corporation)

DOCKET NO. 961184-EQ
FILED: September 26, 1997

**ORLANDO COGEN LIMITED, L.P.'S RESPONSE IN OPPOSITION
TO STAFF'S OBJECTION AND MOTION FOR PROTECTIVE ORDER
REGARDING STALLCUP AND DUDLEY DEPOSITIONS AND
REQUEST FOR ORAL ARGUMENT**

Orlando CoGen Limited, L.P. ("OCL") hereby responds in opposition to Staff's Objection to Orlando CoGen Limited, LTD.'s Notice of Taking Deposition Duces Tecum of Paul Stallcup and Kenneth Dudley and Motion for Protective Order ("Staff's Motion for Protective Order").

OCL noticed the depositions of Mr. Dudley and Mr. Stallcup, among other reasons, to try to determine the factual basis for alternate staff's conclusion that the "buyout's cost-effectiveness appears to be too sensitive." Staff filed its Motion for Protective Order on September 19, 1997 asserting that the depositions are irrelevant, burdensome and abusive. Then, on September 24, 1997, Staff filed the testimony of Mr. Paul Stallcup addressing essentially the same subject matter as was addressed in the alternate staff recommendation.

The scope of permissible discovery is broad. "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action. . . ." Fla.

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FPSC-RECORDS/REPORTING

Rule Civ. Proc. 1.280(b)(1). Even information inadmissible at trial is discoverable. "It is not grounds 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." *Id.* "Florida favors complete disclosure in discovery matters, limited only by certain considerations such as privilege, work product, and relevancy. . . ." *ACandS, Inc. v. Askew*, 597 So.2d 895 (Fla. 1st DCA 1992).

Parties are entitled to explore all relevant issues in discovery and a party resisting discovery of relevant information bears the burden of showing good cause. Fla. Rule of Civ. Proc. 1.280(b)(4). Staff seeks the most extreme remedy of a complete prohibition on discovery. Staff offers no method of discovery other than that selected by OCL. *Id.*

Staff's objections are premature. The precise nature of the questions cannot be anticipated in advance nor what objections might be interposed. As the Commission ruled in Order No. 96-0411-FOF, specific objections to particular questions are properly raised during the deposition and hypothetical objections do not properly form the basis for forbidding a deposition altogether.¹

Staff's relevance argument relies upon a formalistic view of the effect of the Commission's proceedings related to issuance of

¹*In Re: Application for Rate Increase by Souther States Utilities, Inc.*, 96 FPSC 3:337 (March 23, 1996).

the PAA. Staff asserts that only the PAA order, and not Staff's recommendation, is "the object for assault by appeal or petition for review"² and that the protest "rendered the Commission's PAA Order a nullity and established a *de novo* proceeding." Staff thus concludes, without authority, that "[t]he underlying advice and analysis of the agency's staff are irrelevant to subsequent proceedings." This is a straw man argument.

The Deponents prepared a factual analysis of the cost effectiveness of the proposed buy out. The assumptions used were not self-evident and it does not appear that the method, assumptions, or other bases for conclusions were known anyone other than the Deponents. This analysis was presented to and accepted by the Commission as an appropriate factual basis for decision. OCL is entitled to inquire as to the analysis to determine the facts and, if appropriate take further steps based upon the evidence developed in discovery to present its case. In addition, it is entirely permissible for OCL to use these depositions to prepare for cross examination of the witness Staff sponsored, Mr. Stallcup or offer rebuttal.

Staff's assertion that these depositions constitute a "burden" on staff ignores that it is Staff itself that made these

²It is instructive to note that the trial court order cited for this proposition did not address discovery directed to Commission staff, but discovery directed to the Commissioners themselves. See Home Shopping Network v. GTE Corp., Case No. 87-01499-7 (Pinellas County Circuit Court June 29, 1989) (Order quashing subpoenas).

depositions necessary. In February of 1997, Florida Power Corp. and OCL began their efforts to understand the data and analysis forming the basis for the alternate staff recommendation sponsored by Mr. Stallcup and Mr. Dudley (the "Deponents"). On that date, FPC filed its Motion for Informal Hearing Schedule to "facilitate the hearing process," "attempt to narrow the issues in dispute and consider an alternative method of addressing and resolving factual and potential policy and legal issues." FPC's Motion for Informal Prehearing Schedule at 1. FPC's motion specifically addressed the Deponents' conclusion "that the proposed 'buyout's cost-effectiveness appears to be too sensitive to fluctuation in fuel price projections and inflationary assumptions." Id. at 2. FPC stated:

Florida Power is not yet fully appraised of the factual basis for the conclusion that the 'cost-effectiveness appears to be too sensitive' to various assumptions. However, Florida Power believes that an informal procedure whereby discussions may be conducted would greatly facilitate which disputed issues are presented to the Commission for resolution and how that presentation, in the judgment of both the Commission Staff and Florida Power, might be made.

FPC further stated that the proceeding might be handled as a 120.57(2) proceeding thus eliminating any factual disputes.

Staff never responded to FPC's Motion and apparently never referred the Motion to the Commission.

Instead, Staff unilaterally set an issue identification meeting for August 11 and there declared that the case should be set for an adversarial evidentiary hearing. Despite efforts to

obtain the factual and methodological basis for the alternate staff recommendation informally and without the necessity for Commissioner intervention, OCL and FPC have essentially been stymied by Staff. The only information provided by Staff was a computer disk containing incomplete, unexplained, and largely indecipherable spreadsheets.

In asserting that the depositions noticed would constitute an "undue burden on staff," the staff quotes a portion of Rule 25-22.026(3), which describes Staff's duties. However, Staff omitted the last sentence of that Rule which provides "The Commission staff may participate as a party in a proceeding." And here, the Commission Staff is participating as a party by propounding substantial discovery requests. The Staff took the following actions as a party, each of which requires that the Staff submit to the obligations of a party, including the obligation to respond to appropriate discovery:

The Staff propounded substantial discovery, including deposing FPC's witness, Mr. Schuster, and demanding that Mr. Schuster produce more than a dozen late-filed deposition exhibits.

Staff propounded interrogatories and requests for production.

Staff declared that this matter would be heard as an adversarial evidentiary hearing and refused to entertain discussions of resolving the matter other than through an adversarial 120.57(1) evidentiary hearing.

³"Parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure." Rule 25-22.034 F.A.C.

The Deponents created factual conclusions, presented by no other party, to advocate against the transaction at issue here.

It is no burden on Staff to respond to discovery and Staff is entitled to no special status, given the role it chose for itself in these proceedings.

Mr. Stallcup is indisputably subject to deposition and cross-examination at trial because he filed testimony in this proceeding. Commission Rule 25-22.026(4)(b) provides: "When advocating a position, Commission staff may testify and offer exhibits and such evidence shall be subject to cross-examination to the same extent as evidence offered by any other party." None of Staff's arguments apply to a staff member who testifies in the proceeding. Staff has no basis to object to Mr. Stallcup's deposition as it must have known at the time it was preparing the Motion for Protective Order. "It is entirely appropriate for a Staff member who will be testifying in a case to be deposed in connection with that case."⁴

Consistent with Staff's unqualified refusal to provide information concerning the alternate staff recommendation, Staff has not modified its position with respect to Mr. Stallcup's deposition **even though his testimony has been filed**. Moreover, Staff clearly must have known at the time its Motion for Protective

⁴In Re: Application for Rate Increase by Southern States Utilities, Inc., 96 FPSC 3:337, 341 (March 23, 1996) (Clark, dissenting from Order refusing to quash subpoena for deposition of staff).

Order was being prepared that Mr. Stallcup's testimony would be filed.

There is simply no basis to resist this discovery once Staff determined to file Mr. Stallcup's testimony.

Finally, the Staff cites a number of Commission Orders, without discussion of their facts, in support of blanket immunity from discovery. The orders cited by Staff each indicate that the discovery under consideration was for the improper purpose of preventing supervisory Commission personnel from participating in Commission proceedings⁵ or for other improper purposes.⁶ None of the Commission Orders cited by Staff discuss a narrowly focused discovery effort designed solely to obtain information relevant to the central issues in the proceeding. None of the orders cited reflect the strenuous efforts undertaken here to avoid having to take discovery from Staff. Additionally, none of the Orders cited by Staff involved staff members exercising the degree of advocacy

⁵See, e.g., In re Investigation into the appropriate rate structure for Southern States Utilities, Order No. 940425, 94 FPSC 4:150, 157 (April 11, 1994) ("The Counties noticed virtually the entire supervisory structure of the Division of Water and Wastewater, without regard to their specific expertise, knowledge, or involvement in this proceeding.").

⁶See, e.g., In re: Application for Transfer of Territory, Order No. 950137 95 FPSC 1:526 (January 27, 1995) ("OPC may not litigate in this docket the competency of the evidence in previous, pending Commission decisions."); In re: Investigation of FPSC Jurisdiction over Southern States Utilities, Inc., Order No. 941562 94 FPSC 12:374 (December 14, 1994) ("the County has stated an intention to discover from Mr. Hill only information that it may not be permitted to discover.").

exhibited by Stallcup and Dudley here. After all, Mr. Stallcup submitted testimony and Stallcup and Dudley together created undisclosed data and analysis and sponsored it before the Commission as a basis to reject the buy out.

CONCLUSION

The Staff failed to show good cause to justify a complete refusal to permit these depositions to go forward. Therefore, OCL respectfully requests that Staff's Motion for Protective Order be denied. OCL requests oral argument on this motion and believes that oral argument would assist in understanding the necessity for these depositions and the nature of the blanket discovery exemption sought by staff.

DATED this 26 day of September, 1997.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP
Suite 601
215 South Monroe Street
Tallahassee, Florida 32301
Attorneys for Orlando
CoGen Limited, Ltd.,

By: 

Matthew M. Childs, P.A.
Jonathan Sjostrom

**CERTIFICATE OF SERVICE
DOCKET NO. 961184-EQ**

I HEREBY CERTIFY that a true and correct copy of ORLANDO COGEN LIMITED, L.P.'S RESPONSE IN OPPOSITION TO STAFF'S OBJECTION AND MOTION FOR PROTECTIVE ORDER REGARDING STALLCUP AND DUDLEY DEPOSITIONS AND REQUEST FOR ORAL ARGUMENT has been furnished by Hand Delivery (*), or U.S. Mail this 26 day of September, 1997, to the following:

William Cochran Keating IV, Esq.*
Division of Legal Services
FPSC
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Jonathan E. Sycamore