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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C.) DOCKET NO. 99-1462-EU) FILED: MARCH 11 2000

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OKEECHOBEE GENERATING COMPANY'S RESPONSE TO FLORIDA POWER CORPORATION'S MOTION TO STRIKE PORTIONS OF PREFILED TESTIMONY OF GERARD J. KORDECKI AND SEAN J. FINNERTY

Okeechobee Generating Company, L.L.C. ("OGC"), pursuant to Rules 28-106.204, Florida Administrative Code ("F.A.C.") hereby respectfully submits its response to Florida Power Corporation's ("FPC") Motion to Strike Portions of the Prefiled Testimony of Gerard J. Kordecki and Sean J. Finnerty ("FPC's Motion to Strike"). As explained more fully herein, FPC's Motion to Strike should be denied because the subject portions of Mr. Kordecki's and Mr. Finnerty's testimony do not represent expert testimony on legal issues. In support of its response, OGC says:

The Subject Passages of Gerard R. Kordecki's Prefiled Testimony Do Not Constitute Expert Testimony on Legal Issues

1. On October 25, 1999, OGC filed with the Florida Public Service Commission ("Commission") the testimony of Gerard R. Kordecki. As described in his testimony, Mr. Kordecki has over 35 years of experience in the field of regulation of electrical power plants in Florida. Based on that experience, Mr. Kordecki offers testimony regarding various regulatory and policy issues, including cost recovery for power supplied by utility-owned power plants and

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by merchant plants, cost-effectiveness of merchant power plants within Florida's regulatory framework, the roles of the Commission and the FERC with respect to wholesale power and the reliability benefits of the Okeechobee Generating Project within Florida. It is important to note that Mr. Kordecki is not a lawyer.

2. In its Motion to Strike, FPC argues that five passages of Mr. Kordecki's testimony should be stricken as inappropriate legal opinion. FPC is wrong--the subject portions of Mr. Kordecki's testimony do not represent legal opinion. Rather, Mr. Kordecki, a regulatory policy witness, offers the subject testimony to inform the Commission of his view of the regulatory constructs at issue in this case. Moreover, much of the subject testimony involves pure issues of fact or mixed issues of fact and law, not legal opinion. OGC offers the following specific responses to FPC's Motion to Strike Mr. Kordecki's testimony:

a. FPC moves to strike the following passage of Mr. Kordecki's testimony:

- Q. What agency, if any, regulates these wholesale sales?
- A. The Federal Energy Regulatory Commission (FERC) has jurisdiction over the rates, terms and conditions of the sales made by jurisdictional utilities. In Florida this includes only the investor-owned utilities, marketers, exempt wholesale generators, independent power producers, and some cogeneration sales. The FERC does not have authority over the wholesale sales made by any of the cities or generation and transmission organizations. There are some exceptions, but generally this jurisdictional authority description is accurate.

This passage represents Mr. Kordecki's informed view of how the wholesale market is currently regulated. In essence, Mr. Kordecki states that FERC has "jurisdiction" over "jurisdictional utilities," describes those "jurisdictional utilities," and describes exceptions to the general rule. Mr. Kordecki offers this testimony to inform the Commission about the current regulatory framework under which OGC's Project should be considered. This is not legal opinion, rather it is factual in nature,¹ and thus, should not be stricken.

b. FPC moves to strike the following passage of Mr. Kordecki's testimony:

Q. How will the merchant plants be designated?

A. I believe that, in general, they will have exempt

¹Evidence of the factual nature of this testimony is apparent from the fact that Florida Power & Light's ("FPL") counsel asked the following questions of Mr. Kordecki at his deposition on January 27, 2000:

Q. At page 9, line 13 and 14, you make the observation that there are some exceptions to what you have previously described in the lines above. Can you tell me what some of those exceptions are?

A. FERC has had some jurisdiction over co-ops in some instances. I don't believe any in Florida.

Q. Any other exceptions that you are aware of?

A. And exceptions was generic to the whole thing. Some of the QF stuff I am not sure I completely understand. Though the state blesses them, I think they are still-- FERC jurisdiction, there is still some question on. I am not sure about that level of jurisdiction.

Transcript of Deposition of Gerard Kordecki at 131 (January 27, 2000). FPC attended Mr. Kordecki's deposition. Clearly, FPC's claim that it cannot cross-examine Mr. Kordecki concerning this passage is misplaced.

wholesale generator ("EWG") status and will also be subject to FERC's regulatory authority as "public utilities" under the Federal Power Act.

In this passage of his prefiled testimony, Mr. Kordecki simply makes factual statements concerning how he understands merchant plants will be designated. The issues of whether an entity is an EWG and whether an entity will be subject to FERC's regulatory authority involve mixed questions of fact, law, and policy. Mr. Kordecki's testimony speaks to the factual and policy issues, not the legal issues. Accordingly, this passage of Mr. Kordecki's testimony should not be stricken.

c. FPC moves to strike the following passage of Mr.

Kordecki's testimony:

Q. What roles does the Florida Public Service Commission have in wholesale transactions?

A. For sales made by investor-owned utilities, the Commission will determine the treatment of revenues. In the case of firm sales, the Commission must decide whether to jurisdictionally separate the sales or flow back the proceeds as credits against retail customers' cost responsibility and, if so, how the proceeds will be flowed back (e.g. to a fuel clause). In the case of non-firm sales and short term firm sales, how the proceeds will be handled must be decided.

For purchases made by jurisdictional utilities, these expenditures will be examined in the fuel adjustment hearings for prudence.

In this instance, FPC has mischaracterized this passage of Mr. Kordecki's testimony as legal opinion. Here, Mr. Kordecki describes the regulatory role the Commission currently exercises with regard

to wholesale sales in Florida. This is pure factual testimony.² If FPC disagrees with Mr. Kordecki's statement of what currently occurs in Florida, it can cross-examine him. Accordingly, FPC's attempt to strike this portion of Mr. Kordecki's testimony should be denied.

d. Lastly, FPC moves to strike the following underlined passages of Mr. Kordecki's testimony:

Q. Can the capacity of the Okeechobee Generating Project be included in calculating Peninsular Florida's reserve margins?

A. Yes, since this capacity can be required under a statewide emergency to be sold into the grid...

and

Q. Mr. Kordecki, some opponents of merchant power plants have argued that merchant plants are not required to sell into the grid during power shortages. What is your reaction to these assertions?

A. . . . Also, it is my understanding that under a statewide emergency, the Governor could require any utility with generation to supply into the grid. . .

In these passages, Mr. Kordecki states that it is his understanding that under a statewide energy emergency, any utility could be required by the Governor to sell its power into the Florida grid. Once again, this is a mixed question of fact, law and policy. Mr. Kordecki's testimony addresses the fact and policy issues.³ FPC's

²Once again, FPL questioned Mr. Kordecki concerning this passage during his recent deposition. See Deposition of Gerard J. Kordecki at 131-32 (January 27, 2000).

³During Mr. Kordecki's recent deposition, FPC's counsel, Ms. Jill Bowman, posed a series of questions regarding the factual basis for this passage of Mr. Kordecki's testimony. See

attempt to characterize these passages as "legal opinion" is misplaced and its Motion to Strike should be denied.

3. In summary, the above-referenced portions of Mr. Kordecki's testimony do not constitute legal opinion testimony. Mr. Kordecki is not a lawyer and accordingly, he is not competent to testify as an expert offering "legal opinion." To the contrary, the five subject passages are appropriate fact-based testimony with which FPC apparently disagrees. However, FPC's disagreement is not a valid basis for striking the subject passages of Mr. Kordecki's testimony and FPC's Motion to Strike should be denied.

The Subject Passages of Sean J. Finnerty's
Prefiled Testimony Do Not Constitute
Expert Testimony on Legal Issues

4. On October 25, 1999, OGC filed with the Commission the testimony of Sean J. Finnerty. As described in his testimony, Mr. Finnerty is the Project Manager for the Okeechobee Generating Project (the "Project"). The purpose of Mr. Finnerty's testimony is to provide an overview of the Project. Mr. Finnerty is not a lawyer and is not competent to offer "legal opinion" testimony.

5. In its Motion to Strike, FPC argues that two passages of Mr. Finnerty's testimony should be stricken as inappropriate legal opinion. FPC also argues that certain portions of the Exhibits to

Deposition of Gerard Kordecki at 99-104 (January 27, 2000). Apparently, despite FPC's claim in its Motion to Strike, FPC was able to identify factual questions relating to these passages to ask Mr. Kordecki.

OGC's Petition for Determination of Need (the "Exhibits to the Petition") sponsored by Mr. Finnerty should be stricken. FPC is wrong as to both arguments. First, the two passages identified by FPC do not represent legal opinion testimony. Rather, Mr. Finnerty merely provides the current regulatory status of OGC as he understands it from his perspective as Project Manager. Second, the portions of the Exhibits to the Petition sponsored by Mr. Finnerty are not incorporated in Mr. Finnerty's testimony and thus should not be stricken. OGC offers the following specific responses to FPC's Motion to Strike Mr. Finnerty's prefiled testimony:

a. FPC moves to strike the following two passages of Mr. Finnerty's testimony. (The subject passages are underlined in the following excerpts of Mr. Finnerty's testimony.)

Q. Please describe the regulatory status of Okeechobee Generating Company, L.L.C.

A. The Okeechobee Generating Company, L.L.C. is a "public utility" under the Federal Power Act. OGC has received authorization from the Federal Energy Regulatory Commission ("FERC") to sell wholesale power at negotiated, market-based rates. OGC has also been certified by the FERC as an Exempt Wholesale Generator ("EWG") pursuant to the Public Utility Holding Company Act of 1935 ("PUHCA"). Copies of the orders approving OGC's market-based rate tariff and EWG status are presented in Exhibits _____ (SJF-3) and _____ (SJF-4). Okeechobee Generating Company, L.L.C. will be an "electric utility" under Florida law including the Grid Bill provisions, and will comply with all applicable laws and regulations.

The two identified passages of Mr. Finnerty's testimony represent Mr. Finnerty's understanding of OGC's regulatory status. The passages do not represent a "legal opinion" because Mr. Finnerty is

not and cannot be offered to testify as a legal expert.⁴ Mr. Finnerty is not a lawyer--he is the Project Manager and as the Project Manager, it is appropriate for him to describe his understanding of OGC's regulatory status. Accordingly, the subject passages of Mr. Finnerty's testimony should not be stricken.

b. Lastly, FPC moves to strike several passages of the Exhibits to the Petition sponsored by Mr. Finnerty. FPC states:

At Page 3[sic], Lines 1-6 -- Finnerty sponsors [sic] certain narrative text, figures and tables contained in the Exhibits filed with the Petition for Determination of Need (hereinafter "Pet. Exh"). The following legal opinions incorporated by Finnerty into his testimony should be stricken [sic] as well.

FPC's Motion to Strike at 3. FPC has apparently created from whole cloth the notion that Mr. Finnerty has "incorporated" into his testimony the portions of the Exhibits to the Petition that he sponsors. Nowhere in his prefiled testimony does Mr. Finnerty state that he is "incorporating" into his testimony the portions of the Exhibits to the Petition that he is sponsoring. The relevant part of Mr. Finnerty's testimony provides:

I am also sponsoring Figures 1 and 2, the Status with Federal Agencies section of Table 1, and Section II of Table 11 contained in the Exhibits filed with the Petition for Determination of

⁴Coincidentally, Mr. Finnerty's understanding of OGC's regulatory status dovetails with the Commission's view of OGC's regulatory status. See Order on Procedural Matters and Notice of Proposed Agency Action Order Granting Petition for Rule Waiver at 23 (Order No. PSC-99-2438-PAA-EU) (stating that OGC is a "public utility" regulated by FERC).

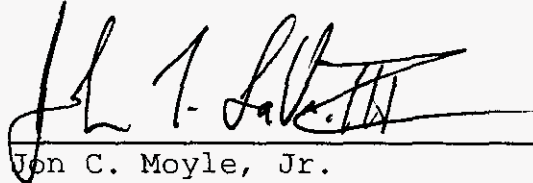
Need for the Okeechobee Generating Project and narrative text at pages 1-3, 5-12, 21, 30, 33-34, 41, 44, 54, 58-59, 63-64 and 69-71 of those Exhibits.

Direct Testimony of Sean J. Finnerty at 6. In essence, FPC has moved to strike from Mr. Finnerty's testimony material that is not part of Mr. Finnerty's testimony.⁵ FPC's motion is nonsensical and should be denied as moot as to the portions of the Exhibits to the Petition sponsored by Mr. Finnerty.

WHEREFORE, OGC respectfully requests that the Commission deny FPC's Motion to Strike in its entirety.

⁵As an evidentiary issue, it is perfectly appropriate for Mr. Finnerty to sponsor the subject portions of the Exhibit to the Petition. If FPC disagrees, the appropriate remedy is for FPC to challenge the admissibility of the subject exhibits.

Respectfully submitted this 1st day of March, 2000.



Jon C. Moyle, Jr.
Florida Bar No. 727016
Moyle Flanigan Katz Kolins
Raymond & Sheehan, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, Florida
Telephone (850) 681-3828
Telecopier (850) 681-8788

and

Robert Scheffel Wright
Florida Bar No. 966721
John T. LaVia, III
Florida Bar No. 853666
LANDERS & PARSONS, P.A.
310 West College Avenue (ZIP 32301)
Post Office Box 271
Tallahassee, Florida 32302
Telephone (850) 683-0311
Telecopier (850) 224-5595

Attorneys for Okeechobee Generating
Company, L.L.C.

CERTIFICATE OF SERVICE
DOCKET NO. 991462-EU

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*), facsimile transmission (**), or by United States Mail, postage prepaid, on the following individuals this 1st day of March, 2000

William Cochran Keating, IV, Esq.*
Florida Public Service Commission
2540 Shumard Oak Boulevard
Gunter Building
Tallahassee, FL 32399

Lee L. Willis, Esq.
James D. Beasley, Esq.
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302

Matthew M. Childs, Esq.
Charles A. Guyton, Esq.
Steel Hector & Davis
215 South Monroe Street
Suite 601
Tallahassee, FL 32301

Mr. Paul Darst
Dept. of Community Affairs
Division of Local
Resource Planning
2740 Centerview Drive
Tallahassee, FL 32399-2100

William G. Walker, III
Vice President, Regulatory Affairs
Florida Power & Light Company
9250 West Flagler Street
Miami, FL 33174

Mr. Scott Goorland
Department of Environmental
Protection
3900 Commonwealth Boulevard
Tallahassee, FL 32399-3900

Gail Kamaras, Esq.
Debra Swim, Esq.
LEAF
1114 Thomasville Road
Suite E
Tallahassee, FL 32303-6290

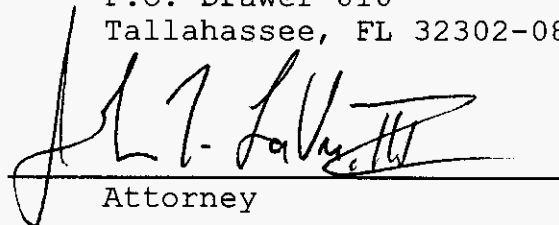
Ms. Angela Llewellyn
Administrator
Regulatory Coordination
Tampa Electric Company
Post Office Box 111
Tampa, FL 33601-2100

Gary L. Sasso, Esquire**
Carlton Fields
P.O. Box 2861
St. Petersburg, FL 33731

James A. McGee, Esq.
Florida Power Corporation
P.O. Box 14042
St. Petersburg, FL 33733

Harry W. Long, Jr.
Tampa Electric Company
P.O. Box 111
Tampa, FL 33601

D. Bruce May, Esquire
Holland & Knight LLP
P.O. Drawer 810
Tallahassee, FL 32302-0810



Attorney