BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Increase in Rates by Florida Power & Light Company	))	Docket No. 080677-EI
In re: 2009 Depreciation and Dismantlement Study by Florida Power & Light Company	))	Docket No. 090130-EI Filed: July 6, 2009

FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO THE CITY OF SOUTH DAYTONA'S MOTION TO COMPEL

NOW, BEFORE THIS COMMISSION, through undersigned counsel, comes Florida Power & Light Company ("FPL" or the "Company"), and pursuant to Rule 28-106.204(1), Florida Administrative Code, files this Response to the City of South Daytona's ("CSD's") Motion to Compel Responses to its First Set of Interrogatories (Nos. 1-11, 16 and 17) and its First Request for Production of Documents (Nos. 1-6, and 8) From Florida Power & Light Company (the "Motion to Compel"), and in support thereof states:

Response in Opposition to Discovery Motion

1. On May 4, 2009, CSD filed its First Set of Interrogatories (Nos. 1-17) and its First Request for Production of Documents (Nos. 1-9) ("CSD's Discovery Requests"). On May 26, 2009 Florida Power & Light Company ("FPL") filed its Objections to CSD's discovery requests ("FPL's Objections"). FPL's Objections are attached as Exhibit A. FPL's Objections included general objections to CSD's Discovery Requests in their entirety, as well as specific objections to CSD's First Set of Interrogatories, Nos. 1-11 and 16, and CSD's First Request for Production of Documents, Nos. 1-6 and 8.

2. FPL specifically objected to CSD's First Set of Interrogatories, Nos. 1-11 and 16, and CSD's First Request for Production of Documents, Nos. 1-6 and 8, as improper in purpose and irrelevant to FPL's request for increase in rates, as the purpose of CSD's discovery requests is to

obtain information for use in a separate proceeding against FPL. (*City of South Daytona v. Florida Power & Light Co., Case No. 2008-30441-CICI, 7th Circuit, Volusia County, Fla.*) FPL also specifically objected to CSD's First Set of Interrogatories, No. 4, and CSD's First Request for Production, No. 6., as vague, ambiguous, overly broad, imprecise, irrelevant, and overly burdensome. FPL also objected to CSD's First Request for Production, No. 8, as overly broad and unduly burdensome.

3. On June 3, 2009, FPL filed its Responses to CSD's Discovery Requests, providing responses to CSD's First Set of Interrogatories, Nos. 12-15, and 17, and CSD's First Request for Productions, Nos. 7 and 9. On June 26, 2009, CSD filed its Motion to Compel.

4. CSD erroneously argues that FPL has given no reason for not responding to CSD's First Set of Interrogatories, Nos. 2, 3, 5, 6, 7, 11, and 17. FPL did clearly state its reasons for not responding to Interrogatories, Nos. 2, 3, 5, 6, 7, and 11, in FPL's Objections, including, as specifically stated, that CSD's Interrogatories were of improper purpose. Furthermore, FPL did not specifically object to CSD's Interrogatory No. 17, and, in fact, FPL provided a response to this interrogatory in FPL's Responses to CSD's Discovery Requests.

5. In its Motion to Compel, CSD has completely misinterpreted and misstated FPL's objections to CSD's Discovery Requests and the relevant case law. CSD cites caselaw supporting the proposition that suggests that where two related claims are to be litigated separately, discovery relevant to both types of claims is allowed in a trial on the claim that had to be resolved first. However, CSD's caselaw is distinguishable, as CSD's separate claim against FPL is not only completely unrelated to FPL's request for rate increase, FPL maintains that the information is irrelevant to this case, and, significantly, for the purpose of gathering information for use in that separate proceeding. CSD has made its purposes clear time and time again. As discussed in FPL's

Objections, CSD is separately litigating against FPL in Circuit Court in Volusia County in attempt to contest FPL's valuation of FPL's distribution system within the city boundaries of CSD. As that case is currently under a court ordered abeyance, CSD is unable to reinitiate that litigation until October 1, 2009.[1] CSD is therefore unable to conduct any discovery in that forum, and is attempting to use this forum to obtain information on the identification of FPL's distribution assets and the valuation of FPL's system in the CSD city boundaries for use in its Circuit Court case. Even a brief read of CSD's questions make it clear that they are designed solely for the purpose of obtaining distribution identification and valuation information for such purposes. CSD itself admits, on Page 1 of its Motion to Compel, that "Much of the City's discovery relates to work done in the City under FPL's pole inspection, feeder/lateral cable, and storm hardening programs … The City also requests documents relating to the depreciation of plant in the City and costs incurred to replace plant in the City."

6. CSD claims that FPL uses Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) to "support its position that the discovery sought in this case does not have to be produced if it is also relevant to the circuit court case." CSD further states that "Oppenheimer Fund did not involve the question of whether discovery can be sought in one case for use in a different case." The City of South Daytona completely misconstrues and misstates FPL's argument in regards to this issue. Oppenheimer Fund involved a class action and discussed the appropriate mechanism for Plaintiff's to obtain identification of class members. In discussing the appropriate mechanism, the Court first discusses whether such discovery is appropriate under the Federal Rules of Civil Procedure. In its discussion, the Court finds that it would not be, stating that "In deciding whether a request comes within the discovery rules, a court is not required to blind itself to the purpose for which a party seeks information. Thus, when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery is

[1] *City of South Daytona v. Florida Power & Light Co., Order issued June 4, 2009.*

properly denied." Oppenheimer Fund at 352-353. Based on this language, FPL's argument pertaining to this Supreme Court ruling was that when the purpose of a discovery request is to gather information for another matter, it should be denied. As discussed in FPL's Objections, subsequent federal rulings have supported the applicability of this ruling.[2] It is proper to apply these rulings to the Florida Rules of Civil Procedure.[3]

7. Key to Oppenheimer Fund and other supporting cases is the issue of relevance. Oppenheimer notes that the key phrase in Federal Rule of Civil Procedure (26)(b)(1) is that the discovery should be "relevant to the subject matter involved in the pending action." *Oppenheimer Fund, at 351.* Furthermore, Rule 1.280(b)(1) of the Florida Rules of Civil Procedure clearly requires that discovery be relevant to the pending action.

8. Information regarding the identification of FPL's distribution assets and the valuation of FPL's system within the city boundaries of CSD is irrelevant to FPL's request for rate increase. CSD argues that information on cost and depreciation rate of plant in the City is directly related to the value of the rate base in the City, and that determination of rate base is integral to this proceeding. CSD fails to understand how FPL's base rates are set. FPL does not set rates for customers based on the specific assets within their respective cities. FPL charges customers based on system averages of all of its systems. Information regarding the valuation of CSD's system within its city boundaries, as requested by CSD, would not provide information of any value in FPL's request for rate increase. By seeking calculation of rate base within the City, CSD makes clear their improper purpose of their discovery requests, to determine valuation of assets within the City for use in its Circuit Court case against FPL.

---

[2] See also, *Awad v. Cici Enterprises, 2006 US Dist LEXIS 85123 (M.D. Fla. 2006), Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1570 (11th Cir. 1992), Blount International, Ltd. v. Schuykill Energy Resources, Inc., 124 F.R.D. 523 (D. Mass. 1989)], MacKnight v. Leonard Morse Hospital, 828 F.2d 48, 52 (1 Cir., 1987), Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 597 (1 Cir., 1980), Milazzo v. Sentry Insurance, 856 F.2d 321, 322.*

[3] *Suburban Propane v. The Estate of Ralph Pitcher, 564 So.2d 1118, 1123-1124 (Fla. 1st DCA 1990)*

9. CSD further argues that the Commission has denied rate increase when utilities have been unable to prove up the value of their assets. Yet FPL has provided significant details regarding the value of its assets in is Request for Increase in Rates before the Commission. There has been an abundance of discovery regarding the valuation of FPL's system in this case. FPL's system details are based on system average and regional levels. FPL is not required to provide its calculation of rate base within each city boundary in FPL's territory, FPL does not maintain information in such manner, and such information is irrelevant to FPL's request for rate increase.

10. CSD also attempts to assert that a 1995 order of the Commission requires that FPL maintain specific locations of its assets within its Continuing Property Records ("CPRs"). However, whatever detail FPL has within the CPR system, it isn't organized in a way that allows one to sort and identify assets by locations within specified municipal geographic boundaries. Thus FPL's point remains that there is no feasible means of responding to discovery requests about all assets within the CSD boundaries without an extraordinarily burdensome undertaking. This, coupled with the minimal-to-nonexistent relevance of city-specific costs in a general base rate proceeding supports FPL's Objections.

11. CSD further attempts to suggest that accurate record keeping is needed to support territorial disputes and asset transfers. However, CSD's argument is not relevant to the issue at hand, as FPL's Request for Rate Increase involves neither a territorial dispute, nor an asset transfer.

12. CSD confusingly and inappropriately argues that FPL raised its objections in the wrong forum, that FPL claims that the discovery is not allowed because it would violate the stay in the Circuit Court, and that the Commission lacks jurisdiction to determine whether the City's discovery in this rate case violates the stay in the Circuit Court case. In no instance has FPL suggested that the

Commission determine whether CSD's discovery is appropriate for any other forum or any other case. Nor has FPL stated that the discovery in this case would violate any process in any other proceeding. As is made absolutely clear in FPL's Objections, FPL is solely objecting to CSD's discovery in this forum, for the purposes of this request for rate increase as CSD's discovery is, among other things, irrelevant, improper, overbroad, and would be unduly burdensome. FPL has only cited to the separate forum, CSD's Circuit Court case against FPL, as the improper purpose in this proceeding for which CSD seeks the discovery information. FPL only references the stay ordered in the separate Circuit Court case to show that CSD has been limited in that forum, and is attempting to seek another forum to gather information for that separate forum. Interestingly, by suggesting that the Commission should not determine whether CSD's discovery is improper for use in its Circuit Court case, CSD makes it absolutely clear that CSD is seeking this information specifically for the purpose of use in the Circuit Court case.

13. CSD attempts to overcome FPL's burden arguments by suggesting that FPL sworn testimony in its 2005 rate case stated that FPL maintains records by "geographic location", and that information can be displayed in FPL's asset management system in geographical format. What CSD fails to understand is that geographic doesn't necessarily mean city boundary. FPL does maintain records by geographic format. Those records are retained by geographic regions, broken down to county level, and by feeder lines as a whole. FPL does not maintain records by city boundary levels. FPL has attempted time and time again to explain this to CSD in various forums. For FPL to go into each city within its jurisdiction and identify every single asset would be an enormous undertaking, resulting in months of assessments for just one city, at enormous cost to FPL and its customers. Nor would such information be relevant to FPL's request for rate increase currently before this commission.

14. Finally, it is important to note that FPL, in its Objections, also stated that "FPL also objects to each and every discovery request to the extent it calls for FPL to prepare information in a particular format or perform calculations or analyses not previously prepared or performed as purporting to expand FPL's obligations under applicable law." (*FPL's Objections, at 3*) As already stated, FPL does not maintain information in a format as CSD requests regarding City specific data, and is not required to conduct such analysis.

15. FPL further restates its objections to CSD's discovery provided on May 26, 2009, in its entirety as if stated herein, and in particular notes that information on City specific data is irrelevant, improper, overbroad, and would be unduly burdensome. Subject to, and without waiving such objections, FPL will agree to provide responses to certain CSD's Discovery Requests that ask for information on a system level. These include CSD's First Set of Interrogatories, Nos. 2, 3 and 5-7. FPL will also agree provide information at a system level for systems and feeder line level for feeder lines that cross City boundaries in response to CSD's First Set of Interrogatories, Nos. 1, 4 and 8-11, and First Request for Production, Nos. 1, 2, 3, 4, 5, and 8. FPL will also agree to supplement its response to CSD's First Set of Interrogatories, No. 17, with the updated information. FPL requests a reasonable amount of time to gather the information necessary to provide such information. In providing such information, FPL notes that most of CSD's requests are overbroad, seeking "all" information in FPL's possession. FPL is a large company with many thousands of employees. Furthermore, information prior to 2006 is not relevant to this rate case, as FPL's rates were last discussed in its 2005 rate case. FPL will agree to provide relevant information it is able to obtain from 2006 forward.

WHEREFORE, FPL respectfully requests that CSD's Motion to Compel be denied.

Respectfully submitted this 6th day of July, 2009.

R. Wade Litchfield, V.P. of Regulatory
Affairs and Chief Regulatory Counsel
John T. Butler, Managing Attorney
Scott A. Goorland, Attorney
Florida Power Light Company
700 Universe Boulevard
Juno Beach, FL 33408
Telephone: (561) 304-5226
Facsimile: (561) 691-7135

By: */s/ Scott A. Goorland*
Scott A. Goorland
Fla. Bar No. 0066834

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically this 6th day of July, 2009, to the following:

Lisa Bennett, Esquire
Anna Williams, Esquire
Martha Brown, Esquire
Jean Hartman, Esquire
Office of the General Counsel
Florida Public Service Commission
2540 Huard Oak Boulevard
Tallahassee, FL 32399-1400
LBENNETT@PSC.STATE.FL.US
ANWILLIA@PSC.STATE.FL.US
mbrown@psc.state.fl.us
JHARTMAN@PSC.STATE.FL.US

Robert A. Sugarman, Esquire
D. Marcus Braswell, Jr., Esquire
c/o Sugarman & Susskind, P.A.
100 Miracle Mile, Suite 300
Coral Gables, FL 33134
Attorneys for I.B.E.W. System Council U-4
sugarman@sugarmansusskind.com
mbraswell@sugarmansusskind.com

J.R. Kelly, Esquire
Joseph A. McGlothlin, Esquire
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
Attorneys for the Citizens of the State of Florida
Kelly.jr@leg.state.fl.us
mcglothlin.joseph@leg.state.fl.us

Robert Scheffel Wright, Esquire
John T. LaVia, III, Esquire
Young van Assenderp, P.A.
225 South Adams Street, Suite 200
Tallahassee, Florida 32301
Attorneys for the Florida Retail Federation
swright@yvlaw.net
jlavia@yvlaw.net

Kenneth L. Wiseman, Esquire
Mark F. Sundback, Esquire
Jennifer L. Spina, Esquire
Lisa M. Purdy, Esquire
Andrews Kurth LLP
1350 I Street, NW, Suite 1100
Washington, DC 20005
Attorneys for South Florida Hospital and Healthcare Association ("SFHHA")
kwiseman@andrewskurth.com
msundback@andrewskurth.com
jspina@andrewskurth.com
lisapurdy@andrewskurth.com

Jon C. Moyle, Jr., Esquire
Vicki Gordon Kaufman, Esquire
Keefe Anchors Gordon & Moyle, PA
118 North Gadsden Street
Tallahassee, FL 32301
Attorneys for The Florida Industrial Power Users Group (FIPUG)
jmoyle@kagmlaw.com
vkaufman@kagmlaw.com

John W. McWhirter, Jr., Esquire
c/o McWhirter Law Firm
P.O. Box 3350
Tampa, FL 33601
Attorneys for The Florida Industrial Power Users Group (FIPUG)
jmcwhirter@mac-law.com

Brian P. Armstrong, Esquire
Marlene K. Stern, Esquire
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, FL 32308
Attorneys for the City of South Daytona, Florida
barmstrong@ngnlaw.com
mstern@ngnlaw.com

Thomas Saporito
Saporito Energy Consultants, Inc.
Post Office Box 8413
Jupiter, FL 33468-8413
Support@SaporitoEnergyConsultants.com

Cecilia Bradley
Senior Assistant Attorney General
Office of the Attorney General
The Capitol - PL01
Tallahassee, FL 32399-1050
cecilia.bradley@myfloridalegal.com

By: */s/ Scott A. Goorland*
Scott A. Goorland

EXHIBIT A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for increase in rates by Florida Power & Light Company	Docket No. 080677–EI
In Re: 2009 depreciation and dismantlement study by Florida Power & Light Company	Docket No. 090130-EI
	Served: May 26, 2009

FLORIDA POWER & LIGHT COMPANY'S OBJECTIONS TO THE CITY OF SOUTH DAYTONA'S FIRST SET OF INTERROGATORIES (NOS. 1-17) AND FIRST REQUEST FOR PRODUCTION OF DOCUMENTS (NOS. 1-9)

Florida Power & Light Company ("FPL"), pursuant to Rules 1.340 and 1.350, Florida Rules of Civil Procedure, and Rule 28-106.206, Florida Administrative Code, submits the following objections to the City of South Daytona's ("CSD's") First Set of Interrogatories (Nos. 1-17) and First Request for Production of Documents (Nos. 1-9) in Docket No. 080677-EI.

I. Preliminary Nature of These Objections

FPL's objections stated herein are preliminary in nature. FPL is furnishing its objections consistent with the time frame set forth in the Commission's Order Establishing Procedure, Order No. PSC-09-0159-PCO-EI dated March 20, 2009, and Rule 1.190(e), Florida Rules of Civil Procedure. Should additional grounds for objection be discovered as FPL develops its responses, FPL reserves the right to supplement or modify its objections up to the time it serves its responses. Should FPL determine that a protective order is necessary regarding any of the information requested of FPL, FPL reserves the right to file a motion with the Commission seeking such an order at the time its response is due.

II. General Objections

FPL objects to each and every discovery request that calls for information protected by the attorney-client privilege, the work product doctrine, the accountant-client privilege, the trade

secret privilege, or any other applicable privilege or protection afforded by law, whether such privilege or protection appears at the time response is first made or is later determined to be applicable for any reason. FPL in no way intends to waive any such privilege or protection. The nature of the document(s), if any, will be described in a privilege log prepared and provided by FPL.

In certain circumstances, FPL may determine, upon investigation and analysis, that information responsive to certain discovery requests to which objections are not otherwise asserted is confidential and proprietary and should not be produced without provisions in place to protect the confidentiality of the information, if at all. By agreeing to provide such information in response to such request, FPL is not waiving its right to insist upon appropriate protection of confidentiality by means of a protective order or other action to protect the confidential information requested. FPL asserts its right to require such protection of any and all documents that may qualify for protection under the Florida Rules of Civil Procedure and other applicable statutes, rules and legal principles.

FPL is a large corporation with employees located in many different locations. In the course of its business, FPL creates numerous documents that are not subject to Florida Public Service Commission or other governmental record retention requirements. These documents are kept in numerous locations and frequently are moved from site to site as employees change jobs or as business is reorganized. Therefore, it is possible that not every relevant document may have been consulted in developing FPL's responses to the discovery requests. Rather, these responses provide all the information that FPL obtained after a reasonable and diligent search conducted in connection with these discovery requests. To the extent that the discovery requests

propose to require more, FPL objects on the grounds that compliance would impose an undue burden or expense on FPL.

FPL objects to each discovery request to the extent that it seeks information that is not relevant to the subject matter of this docket and is not reasonably calculated to lead to the discovery of admissible evidence.

FPL objects to each and every discovery request to the extent it is vague, ambiguous, overly broad, imprecise, or utilizes terms that are subject to multiple interpretations but are not properly defined or explained for purposes of such discovery requests. Any responses provided by FPL will be provided subject to, and without waiver of, the foregoing objection.

FPL also objects to each and every discovery request to the extent it calls for FPL to prepare information in a particular format or perform calculations or analyses not previously prepared or performed as purporting to expand FPL's obligations under applicable law.

CSD's discovery generally requests information regarding assets located within the municipal boundaries of the City. FPL does not maintain a record of its assets located within municipal boundaries, and as such, it would be incredibly burdensome to require FPL to identify and assess assets located within municipal boundaries. FPL objects to each and every discovery request by CSD to the extent it calls for FPL to prepare such information or perform calculations or analyses not previously prepared or performed as purporting to expand FPL's obligations under applicable law.

FPL objects to providing information to the extent that such information is already in the public record before the Florida Public Service Commission and available to the requesting Party through normal procedures.

FPL objects to each and every discovery request that calls for the production of documents and/or disclosure of information from FPL Group, Inc. and any subsidiaries and/or affiliates of FPL Group, Inc. that do not deal with transactions or cost allocations between FPL and either FPL Group, Inc. or any subsidiaries and/or affiliates. Such documents and/or information do not affect FPL's rates or cost of service to FPL's customers. Therefore, those documents and/or information are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, FPL is the party appearing before the Florida Public Service Commission in this docket. To require any non-regulated entities to participate in irrelevant discovery is by its very nature unduly burdensome and overbroad. Subject to, and without waiving, any other objections, FPL will respond to the extent the request pertains to FPL and FPL's rates or cost of service charged to FPL's customers. To the extent any responsive documents contain irrelevant affiliate information as well as information related to FPL and FPL's rates or cost of service charged to its customers, FPL may redact the irrelevant affiliate information from the responsive document(s).

FPL objects to any production location other than the location established by FPL, at Rutledge, Ecenia & Purnell, P.A., 119 South Monroe Street, Suite 202, Tallahassee, Florida.

FPL objects to each and every discovery request and any instructions that purport to expand FPL's obligations under applicable law.

In addition, FPL reserves its right to count discovery requests and their sub-parts, as permitted under the applicable rules of procedure, in determining whether it is obligated to respond to additional requests served by any party.

FPL expressly reserves and does not waive any and all objections it may have to the admissibility, authenticity or relevancy of the information provided in its responses.

Notwithstanding any of the foregoing general objections and without waiving these objections, FPL intends in good faith to respond to CSD's discovery requests.

III. Specific Objections

FPL incorporates by reference all of the foregoing General Objections into its Specific Objections set forth below as though fully stated herein.

Interrogatories

Interrogatories Nos. 1-11, 16: FPL objects to Interrogatories Nos. 1-11 and 16 on the grounds that they are improper under the law. Interrogatories Nos. 1-11 and 16 are clearly designed and intended to obtain information in this proceeding for use in separate litigation between FPL and CSD in which CSD is attempting to identify and establish a purchase price for FPL's distribution assets within the City of South Daytona in order to purchase those assets and establish a municipal electric company. Additionally, the discovery, clearly designed to obtain information potentially relevant to CSD's municipalization efforts, has been propounded in this case at a time when CSD is prohibited from obtaining the requested discovery in that separate litigation. Pursuant to the Florida Rules of Civil Procedure and relevant caselaw, CSD should not be permitted to gather information in this proceeding for use in another proceeding. This is particularly noteworthy in light of the fact that the Judge presiding over that separate litigation has enforced an agreement between the parties (i.e., FPL and CSD) to hold all aspects of that separate litigation – including discovery - in abeyance until October 1, 2009.

In order to better understand the basis for FPL's objections to the discovery propounded by CSD, a brief explanation of the circumstances giving rise to that separate litigation, together with an identification of the primary issues and the current procedural posture of that case, is appropriate. FPL had a franchise agreement with CSD which ended in June of 2008. In January

of 2008, FPL notified CSD that it would not continue franchise payments after June of 2008 unless and until the franchise was renegotiated. In February of 2008, CSD filed suit against FPL in circuit court in Volusia County seeking to force FPL to continue franchise payments after the franchise expired. *Case No. 2008-30441-CICI, 7th Circuit, Volusia County, Fla.* On June 3, 2008, FPL and CSD entered into a Stipulated Abeyance Agreement (the "Agreement") in that case, in which both parties agreed that: i) the parties would work in good faith to negotiate a new franchise or negotiate CSD's acquisition of FPL's distribution system in its municipality to municipalize the system; ii) the lawsuit would be held in abeyance while the parties negotiated, and any party could reinstate the suit by providing six months' written notice of intent to do so; and iii) FPL would collect and remit franchise fees to CSD during the term of the Agreement and during any reinstated litigation until final ruling.

On April 2, 2009, CSD filed an Amended Petition which added a count specifically contesting the valuation of FPL's distribution system. As a result, under the recently filed Amended Petition, filed by CSD at a time when it knew that it was required to provide six months' notice before proceeding, the primary issues involve an identification of FPL's distribution system assets within the municipal boundaries of the City of South Daytona, together with an evaluation of those assets. On April 15, 2009, FPL filed a Motion to Dismiss CSD's Amended Petition, or in the Alternative, to Stay All Proceedings. FPL argued, *inter alia*, that the Agreement required CSD to provide FPL six months' notice before reinstating the lawsuit. On May 19, the Circuit Court granted FPL's Request for Stay, treated the CSD Amended Petition as notice of CSD's intent to reinstate the case, and held that CSD could not act on such notice and reinstatement until October 1, 2009.

Florida Rule of Civil Procedure 1.280 (b)(1) states that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." The rule is derived from Federal Rule of Civil Procedure 26(b)(1), which contains almost identical language. The rules are so similar that in 1990, Florida's First District Court of Appeal noted "Rule 1.280 (b)(1) is virtually a verbatim adoption of the first paragraph of Federal Rule of Civil Procedure 26(b)(1). Consequently, it must be assumed that in adopting a rule identical to its federal counterpart, the Florida Supreme Court intended to achieve the same results which would transpire under the federal rule." *Suburban Propane v. The Estate of Ralph Pitcher*, 564 So. 2d 1118, 1123-1124 (Fla. 1st DCA 1990).

In 1978, a unanimous United States Supreme Court stated the key phrase in Federal Rule of Civil Procedure 26(b)(1) was "relevant to the subject matter involved in the pending action." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). The Court concluded that, "in deciding whether a request comes within the discovery rules, a court is not required to blind itself to the purpose for which a party seeks information. Thus, when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery is properly denied." *Id.* at 353.

In 2000, Federal Rule of Civil Procedure 26(b)(1) was amended to further restrict the scope of discovery by deleting the "subject matter" language. See *Notes of Advisory Committee on 2000 Amendments to Fed. Rule Civ. Proc. 26.* While Florida has not chosen to remove that language from the state rule, the *Oppenheimer* decision indicates even a broader interpretation does not allow a discovery request's purpose to be for another cause of action.

Federal courts in Florida have upheld the provisions pertaining to relevancy outlined in *Oppenheimer*, as well as the specific language pertaining to the use of discovery solely for use in another matter. In 2006, the United States District Court for the Middle District of Florida referred to the issue of using discovery solely for other cases, noting "discovery should be tailored to the issues involved in the particular case." *Awad v. Cici Enterprises*, 2006 U.S. Dist. LEXIS 85123 (M.D. Fla. 2006) citing *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570 (11th Cir. 1992).

Federal courts in other states have also interpreted Federal Rule of Civil Procedure 26(b)(1) to require the denial of discovery requests if a party propounds discovery for the sole purpose of using the responsive documents or information in another matter. See, for example, *Blount International., Ltd. v. Schuylkill Energy Resources Inc.*, 124 F.R.D. 523 (D. Mass. 1989). There, during a breach of contract suit in Pennsylvania, the defendant served subpoenas in Massachusetts upon the bank that financed its construction project. The court found that the defendant's discovery was directed at gathering information for use in potential proceedings against the bank outside the pending suit, and thus, it was not relevant to the subject matter of the pending action as required by Federal Rule of Civil Procedure 26(b)(1). The court ordered that the discovery be limited to the subject matter of the Pennsylvania action holding, "while [defendant] SER should be permitted to discover material relevant to the subject matter of the Pennsylvania action, it should not be permitted to take discovery in the Pennsylvania action for the purpose of discovering a right of action against the Bank of New England and its officers which could not also be asserted in the Pennsylvania action as a counterclaim against Blount." In the situation in which a lawsuit is filed against a party, a court should be satisfied that the lawsuit is not a vehicle for discovering a right of action. 4 Moore's Federal Practice paras. 26.56

[1] at 26-95 n. 3 cited in *MacKnight v. Leonard Morse Hospital,* 828 F.2d 48, 52 (1 Cir., 1987). "As a threshold matter, the court should be satisfied that a claim is not frivolous, a pretense for using discovery powers in a fishing expedition." *Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F.2d 583, 597 (1 Cir., 1980). *See also Milazzo v. Sentry Insurance,* 856 F.2d 321, 322 (1 Cir., 1988). These opinions, and the opinion in *Suburban Propane*, should be binding or at least present powerful precedent for Florida courts and the Florida Public Service Commission.

Since CSD cannot proceed with its suit in Circuit Court regarding the franchise until October 1, 2009, CSD cannot proceed with discovery in its suit against FPL until then, or seek any information from FPL regarding the identification or value of FPL's assets in the City of South Daytona. It is clear from the nature of CSD's questions that the purpose of the questions is to obtain information regarding the identification of assets and valuation of FPL's system in the City of South Daytona. For example, the interrogatories seek information regarding inspections of poles in the City and costs/benefits, assessments of feeders and laterals in the City and costs/benefits, and costs/benefits of storm hardening of the system in the City. Interrogatory No. 16 makes clear CSD's purpose on its face, asking FPL to explain why it has not identified to CSD all FPL assets within the City. Thus, it is clear that CSD's purpose of these interrogatories is to obtain information for its separate suit against FPL in Circuit Court. CSD's interrogatories are improper under the appropriate interpretations of the Florida Rules of Civil Procedure, and the relevant case law.

Interrogatory No. 4: In addition to the objections stated for Interrogatory No. 4, above, FPL objects to Interrogatory No. 4 on the grounds that it is vague, ambiguous, overly broad, imprecise, irrelevant and would be overly burdensome for FPL to respond. This question asks, "Has FPL inspected, replaced or rehabilitated any direct buried feeder or lateral cable in the City

of South Daytona?" The interrogatory also seeks specific information related to inspection, replacement, or rehabilitation of feeders and laterals. The question is unlimited in time, and therefore is vague, ambiguous, overly broad, imprecise, irrelevant, and is not reasonably calculated to lead to the discovery of admissible evidence.

Requests for Production

Requests for Production Nos. 1-6, 8: FPL objects to Requests for Production Nos. 1-6 and 8 on the grounds that they are improper under the law. Requests for Production Nos. 1-6 and 8 are designed to obtain information in this proceeding for the purpose of use in separate litigation between FPL and CSD. As discussed in the analysis above, pursuant to the Florida Rules of Civil Procedure and relevant caselaw, CSD should not be permitted to gather information in this proceeding for use in another proceeding. Since CSD cannot proceed with its suit in Circuit Court regarding the franchise until October 1, 2009, CSD cannot proceed with discovery in its suit against FPL until then, or seek any information from FPL regarding the identification or value of FPL's distribution assets in the City of South Daytona. It is clear from the nature of CSD's Requests for Production that the purpose of the requests is to obtain information regarding an identification of distribution assets and a valuation of FPL's system in the City of South Daytona. For example, the requests seek information regarding inspections of poles in the City and costs/benefits, assessments of feeders and laterals in the City and costs/benefits, and costs/benefits of storm hardening of the system in the City. Request for Production No. 1 makes clear CSD's purpose on its face, asking FPL to provide documents which identify all FPL assets within the City. Thus, it is clear that CSD's purpose of these Requests for Production is to obtain information for its separate suit against FPL in Circuit

Court. CSD's requests are improper under the appropriate interpretations of the Florida Rules of Civil Procedure, and the relevant case law.

Request for Production No. 6: In addition to the objections stated for Request for Production No. 6 above, FPL objects to Request for Production No. 6 on the grounds that it is vague, ambiguous, overly broad, imprecise, irrelevant and would be overly burdensome for FPL to respond. This question asks FPL to "provide all documents ... relating to ... the depreciation of assets located in the City." The term "all documents" is overly broad. Attempting to identify all items would result in undue burden and expense on FPL, is not reasonably calculated to lead to the discovery of admissible evidence, and it may result in the unnecessary production of documents that are irrelevant. Furthermore, the question is unlimited in time, and therefore is vague, ambiguous, overly broad, imprecise, irrelevant, and is not reasonably calculated to lead to the discovery of admissible evidence.

Request for Production No. 8: In addition to the objections stated for Request for Production No. 8 above, FPL objects to Request for Production No. 8 on the grounds that it is overly broad and it would be unduly burdensome for FPL to respond. This request calls for FPL to "provide all documents ... related to ... any FPL costs incurred to replace any FPL assets in the City in the past ten (10) years." The term "all documents" is overly broad. Attempting to identify all items would result in undue burden and expense on FPL, is not reasonably calculated to lead to the discovery of admissible evidence, and it may result in the unnecessary production of documents that are irrelevant. Furthermore, the question asks for information going back 10 years. Such information going back 10 years is irrelevant to FPL's current request to set rates, and is not reasonably calculated to lead to the discovery of admissible evidence.

Respectfully submitted this 26th day of May, 2009.

R. Wade Litchfield, Vice President of
Regulatory Affairs and Chief Regulatory Counsel
John T. Butler, Managing Attorney
Scott A. Goorland, Principal Attorney
Attorneys for Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: (561) 691-7101
Facsimile: (561) 691-7135

By: _____
Scott A. Goorland
Florida Bar No. 0066834

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically and by United States Mail this 26th day of May, 2009, to the following:

Lisa Bennett, Esquire
Anna Williams, Esquire
Martha Brown, Esquire
Jean Hartman, Esquire
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-1400
LBENNETT@PSC.STATE.FL.US
ANWILLIA@PSC.STATE.FL.US
mbrown@psc.state.fl.us
JHARTMAN@PSC.STATE.FL.US

Robert A. Sugarman, Esquire
D. Marcus Braswell, Jr., Esquire
c/o Sugarman & Susskind, P.A.
100 Miracle Mile, Suite 300
Coral Gables, FL 33134
Attorneys for I.B.E.W. System Council U-4
sugarman@sugarmansusskind.com
mbraswell@sugarmansusskind.com

J.R. Kelly, Esquire
Joseph A. McGlothlin, Esquire
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
Attorneys for the Citizens of the State of Florida
Kelly.jr@leg.state.fl.us
mcglothlin.joseph@leg.state.fl.us

Robert Scheffel Wright, Esquire
John T. LaVia, III, Esquire
Young van Assenderp, P.A.
225 South Adams Street, Suite 200
Tallahassee, Florida 32301
Attorneys for the Florida Retail Federation
swright@yvlaw.net
jlavia@yvlaw.net

Kenneth L. Wiseman, Esquire
Mark F. Sundback, Esquire
Jennifer L. Spina, Esquire
Lisa M. Purdy, Esquire
Andrews Kurth LLP
1350 I Street, NW, Suite 1100
Washington, DC 20005
Attorneys for South Florida Hospital and Healthcare Association ("CSD")
kwiseman@andrewskurth.com
msundback@andrewskurth.com
jspina@andrewskurth.com
lisapurdy@andrewskurth.com

Jon C. Moyle, Jr., Esquire
Vicki Gordon Kaufman, Esquire
Keefe Anchors Gordon & Moyle, PA
118 North Gadsden Street
Tallahassee, FL 32301
Attorneys for The Florida Industrial Power Users Group (FIPUG)
jmoyle@kagmlaw.com
vkaufman@kagmlaw.com

John W. McWhirter, Jr., Esquire
c/o McWhirter Law Firm
P.O. Box 3350
Tampa, FL 33601
Attorneys for The Florida Industrial Power Users Group (FIPUG)
jmcwhirter@mac-law.com

Brian P. Armstrong, Esquire
Marlene K. Stern, Esquire
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, FL 32308
Attorneys for the City of South Daytona, Florida
barmstrong@ngnlaw.com
mstern@ngnlaw.com

Thomas Saporito
Saporito Energy Consultants, Inc.
Post Office Box 8413
Jupiter, FL 33468-8413
support@SaporitoEnergyConsultants.com

Cecilia Bradley
Senior Assistant Attorney General
Office of the Attorney General
The Capitol - PL01
Tallahassee, FL 32399-1050
cecilia.bradley@myfloridalegal.com

By: _____
Scott A. Goorland