



Public Service Commission
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COMMISSION CLERK
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DATE: MARCH 7, 2002
TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)
FROM: OFFICE OF THE GENERAL COUNSEL (C. KEATING)
DIVISION OF ECONOMIC REGULATION (BOHRMANN) *next to WBM/13 JDJ*
RE: DOCKET NO. 020001-EI - FUEL AND PURCHASED POWER COST RECOVERY CLAUSE WITH GENERATING PERFORMANCE INCENTIVE FACTOR.
AGENDA: 03/19/02 - REGULAR AGENDA - MOTION FOR RECONSIDERATION OF NON-FINAL ORDER - ORAL ARGUMENT NOT REQUESTED
CRITICAL DATES: NONE
SPECIAL INSTRUCTIONS: NONE
FILE NAME AND LOCATION: S:\PSC\GCL\GCO\WP\020001.RCM

CASE BACKGROUND

On June 20, 2001, Florida Industrial Power Users Group ("FIPUG") served its Second Set of Interrogatories (Nos. 24-33) to Tampa Electric Company ("TECO") in this docket. FIPUG's Interrogatory No. 28 asked TECO to provide the amount of energy it purchased for interruptible customers in lieu of interruption, the average cost of such purchases, and a list of the entities from whom this power was purchased, for interruptions imposed on retail non-firm customers for the years 1998, 1999, 2000, and 2001.

On July 20, 2001, TECO filed a motion for protective prder relating to FIPUG's Interrogatory No. 28, among others. By Order No. PSC-01-2176-PCO-EI, issued November 6, 2001, TECO's motion for protective order, as it related to Interrogatory No. 28, was granted in part and denied in part, and TECO was required to provide FIPUG with the amounts of energy purchased and the names of the suppliers of that energy.

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On November 8, 2001, TECO filed a motion for reconsideration of Order No. PSC-01-2176-PCO-EI to the extent that Order required TECO to provide FIPUG with the names of suppliers of energy purchased by TECO in the wholesale market. On November 13, 2001, FIPUG filed a response in opposition to TECO's motion for reconsideration.

This recommendation addresses TECO's motion for reconsideration. The Commission has jurisdiction over this matter pursuant to the provision of Chapters 120 and 366, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Tampa Electric Company's motion for reconsideration of Order No. PSC-01-2176-PCO-EI?

RECOMMENDATION: No. Tampa Electric Company's motion for reconsideration should be denied. The Commission did not overlook or fail to consider any point of fact or law when rendering Order No. PSC-01-2176-PCO-EI.

STAFF ANALYSIS:

Standard of Review

The applicable standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law that was overlooked or not considered by the decision-maker in rendering its order. Diamond Cab Co. V. King, 146 So.2d 889 (Fla. 1962). The mere fact that a party disagrees with the order is not a valid basis for reconsideration. Id. Further, reweighing of the evidence is not a sufficient basis for reconsideration. State v. Green, 104 So.2d 817 (Fla. 1st DCA 1958).

Arguments of the Parties

As stated above, TECO seeks reconsideration of Order No. PSC-01-2176-PCO-EI to the extent that Order required TECO to provide

FIPUG with the names of suppliers of wholesale energy purchased by TECO for interruptible customers in lieu of interruption. In its motion for reconsideration, TECO notes that in its motion for protective order it stated that the information requested in FIPUG's Interrogatory No. 28 is similar in nature to information addressed in TECO's July 12, 2001, motion for protective order in the same docket. TECO also notes that its July 12, 2001, motion for protective order included an affidavit stating that a supplier's costs and availability are valuable information to other market participants. TECO asserts that disclosing a supplier's name would enable other participants in the Florida wholesale market to determine the supplier's availability.

In its motion for reconsideration, TECO cites Order No. PSC-01-2061-CFO-EI, issued October 18, 2001, in which the Commission determined that the identity of TECO's wholesale power suppliers is entitled to confidential treatment under Section 366.093(3), Florida Statutes. TECO asserts that the supplier information referred to in Order No. PSC-01-2176-PCO-EI is exactly the same type of information that was found confidential in Order No. PSC-01-2061-CFO-EI.

In its response, FIPUG asserts that TECO is improperly attempting to reargue matters already considered and rejected by the Commission in rendering Order No. PSC-01-2176-PCO-EI. Specifically, FIPUG points out that TECO previously argued, in its motion for protective order, that the names of TECO's wholesale suppliers of energy are similar to the information addressed in TECO's July 12, 2001, motion for protective order. FIPUG notes that the Commission rejected this assertion, stating at page 5 of Order No. PSC-01-2176-PCO-EI that "only the portion of [Interrogatory No. 28] which seeks average cost data for purchases made during interruption appears to be similar."

As to TECO's contention that the supplier names sought in Interrogatory No. 28 are the same type of information previously held confidential in Order No. PSC-01-2061-CFO-EI, FIPUG asserts that this claim of confidentiality is belied by the fact that TECO has previously provided information detailing power purchases by supplier and MWH - without a claim of confidentiality - in response to other FIPUG interrogatories in the docket.

Analysis

TECO makes two arguments in its motion for reconsideration. Each is addressed separately below.

First, TECO argues that the affidavit included with its July 12, 2001, motion for protective order provided support for its claim that the names of its wholesale power suppliers constitute sensitive trade secret information. This argument was raised in TECO's motion for protective order and was addressed at page 5 of Order No. PSC-01-2176-PCO-EI:

Although TECO asserts that the information sought in [Interrogatory No. 28] is sensitive pricing information "very similar in nature" to the information that was the subject of its July 12, 2001, motion for protective order, only the portion of the interrogatory which seeks average cost data for purchases made during interruptions appears to be similar. TECO offers no explanation of how disclosure of the amounts of energy purchased and the names of the suppliers of that energy - information not concerning pricing or cost to TECO - would harm its competitive interests or qualify as trade secrets.

Because TECO's argument is essentially reargument of points already considered and rejected by the Commission, it does not satisfy the standard of review, set forth above, for reconsideration.

Second, TECO suggests that Order No. PSC-01-2176-PCO-EI, as it relates to Interrogatory No. 28, is inconsistent with another Commission order finding that the identity of TECO's wholesale power suppliers is entitled to confidential treatment under Section 366.093(3), Florida Statutes. This suggestion, however, does not account for the fact that the established standards for determining whether information should be granted confidential classification and thus exempted from disclosure under Florida's public records law are different than the established standards for determining whether a protective order is necessary to govern discovery between parties to a case.

Section 366.093(3), Florida Statutes, sets forth the standards used by the Commission to determine whether information should be classified as "proprietary confidential business information" and thus exempted from disclosure as public records under Section

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119.07(1), Florida Statutes. Section 366.093(3), Florida Statutes, states:

Proprietary confidential business information means information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that the information will not be released to the public.

This section goes on to provide a non-exclusive list of specific types of information that constitute proprietary confidential business information. In Order No. PSC-01-2061-CFO-EI, the Commission determined that the information at issue appeared to fit one of the types listed in the statute:

This information also appears to be "information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information" [as provided for in] Section 366.093(3)(e), Florida Statutes. Accordingly, it is granted confidential classification.

This finding protected the information from disclosure to the public under Florida's public records law.

In addressing a motion for protective order, a two part test is applied, as identified in Order No. PSC-01-2176-PCO-EI:

When ruling on a motion for protective order involving commercial information, a two part test is used to decide if the information is discoverable. First, the movant, TECO, must demonstrate that the information sought is confidential by virtue of being a trade secret or some other type of confidential commercial information. See Order No. PSC-00-0291-PCO-EU, issued February 11, 2000, in Docket No. 991462-EU; Kavanaugh v. Stump, 592 So.2d 1231, 1232-3 (Fla. 5th DCA 1992); Inrecon v. The Village Homes at Country Walk, 644 So.2d 103, 105 (Fla. 3rd DCA 1994); Rare Coin-it v. I.J.E., Inc., 625 So.2d 1277 (Fla.

3rd DCA 1993). If the movant makes a showing that the information is confidential, the burden shifts to the opposing party, FIPUG, to establish that its need for the information outweighs the countervailing interest in withholding production. See Order No. PSC-00-0291-PCO-EU, issued February 11, 2000, in Docket No. 991462-EU; Inrecon at 105; Rare Coin-it at 1277; Higgs v. Kampgrounds of America, 526 So.2d 980, 981 (Fla. 3rd DCA 1988); Eastern Cement Corp. V. Dep't of Environmental Protection, 512 So.2d 264, 265-6 (Fla. 1st DCA 1987). Broad discretion is granted in balancing the competing interests of the parties and a wide variety of factors can be considered. See Fortune Personnel Agency of Ft. Lauderdale, Inc. v. Sun Tech Inc. of South Florida, 423 So.2d 545, 547 (Fla. 4th DCA 1982); Inrecon at 105.

Under the first part of this test, a finding that commercial information is or is not confidential can be made without reference to the standards in Section 366.093(3), Florida Statutes. Even if such a finding is made by reference to the standards in Section 366.093(3), Florida Statutes,

Although the type of information requested in Interrogatory No. 28, i.e., the names of wholesale suppliers, was the same type of information for which confidential classification was granted in a prior Commission order, TECO, in its motion for protective order, did not meet its burden of showing that the information requested was confidential. Order No. PSC-01-2176-PCO-EI, at 5. Even if TECO had made such a showing, the Commission had broad discretion to require disclosure of the information to FIPUG given its competing interest in needing the information to prepare for hearing. Further, by requiring disclosure of the information to FIPUG, the Commission did not render the information a public record. Accordingly, no mistake of law or fact was made in rendering Order No. PSC-01-2176-PCO-EI.

In sum, TECO has not identified any point of fact or law that was overlooked or not considered in the rendition of Order No. PSC-01-2176-PCO-EI, and, thus, its motion for reconsideration of that Order should be denied.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket is an ongoing docket and should remain open.

STAFF ANALYSIS: This docket is an ongoing docket and should remain open.