



Progress Energy Service Company

A Progress Energy Company

ORIGINAL

JAMES A. MCGEE
ASSOCIATE GENERAL COUNSEL

April 29, 2002

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

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Re: Docket Nos. 020262-EI and 020263-EI.

Dear Ms. Bayó:

Enclosed for filing in the subject dockets are an original and fifteen copies each of Progress Ventures, Inc.'s Motion for Protective Order and its Request for Oral Argument.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced documents in WordPerfect format. Thank you for your assistance in this matter.

Very truly yours,

James A. McGee

JAM/scc
Enclosure

cc: Parties of record

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Request for
Protective Order
DOCUMENT NUMBER - DATE
04679 APR 29 2002

Request for
Oral Argument
DOCUMENT NUMBER - DATE
04680 APR 29 2002

FPSC-COMMISSION CLERK

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Determine Need for
an Electrical Power Plant in Martin
County by Florida Power & Light Co.

Docket No. 020262-EI

In re: Petition to Determine Need for
an Electrical Power Plant in Manatee
County by Florida Power & Light Co.

Docket No. 020263-EI

Submitted for filing:
April 29, 2002

**PROGRESS VENTURES, INC.'S
MOTION FOR PROTECTIVE ORDER**

Progress Ventures, Inc. ("PVI"), pursuant to Section 366.093, F.S., and Rule 25-22.006, F.A.C., hereby moves the Florida Public Service Commission ("Commission") for a protective order prohibiting Florida Power & Light Company ("FPL") from disclosing to the Intervenor in these consolidated proceedings the highlighted confidential information contained in the bid proposals submitted by PVI in response to the Request For Proposals ("RFPs") issued by FPL.

Introduction

FPL should be prohibited from producing PVI's bid proposals to Intervenor because: (1) PVI's bid proposals contain highly confidential proprietary business information, disclosure of which will cause irreparable harm to PVI and its competitive business interests; (2) PVI's bid proposals are not relevant in any way to Intervenor's challenge in these proceedings; (3) FPL has already provided any arguably relevant information by its filing of the evaluations of the bid proposals and

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its Need Study Document; (4) production of PVI's Bid Proposals is further unnecessary and potentially even more harmful in light of the Prehearing Officer's recent decision granting FPL's motion to hold the consolidated proceedings in abeyance until FPL completes a supplemental RFP; and (5) the proposed confidentiality agreement submitted for approval by FPL and Intervenors has been agreed to by those parties only, and does not protect the interests of PVI and other non-intervening bidders.

PVI's Standing as a Non-Party

PVI has standing as a non-party to seek a protective order preventing the disclosure of its confidential information to the Intervenors in these proceedings. Commission Rule 25-22.006(6)(a), F.A.C., provides that in a formal proceeding before the Commission ". . . any utility or other person may request a protective order protecting proprietary confidential business information from discovery." (Emphasis supplied.) The same terminology, "a utility or other person", is used in Section 366.093, F.S., under which authority the Commission's confidentiality rule was adopted. Section 366.093 also includes the following within the definition of "proprietary confidential business information":

(e) information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information. (Emphasis supplied.)

Thus, Section 366.093 and the Commission's confidentiality rule adopted under its authority offer protection to the provider of confidential information, irrespective of whether or not that provider is a party. This is confirmed by Rule 1.280, Florida Rule of Civil Procedure, with which protective orders issued by the Commission are

to conform. Rule 1.280 provides that a protective order may be granted “upon motion by a party or by the person from whom discovery is sought,”

It is clear, therefore, that PVI has standing to protect its confidential information to the Intervenors who compete directly with PVI in the wholesale power markets.

PVI's Bid Proposals

PVI submitted detailed bid proposals ("PVI's Bid Proposals") in response to FPL's Request for Proposals issued on August 13, 2001 ("RFP"). FPL's RFP requested capacity proposals for 1,150 MW of capacity to meet FPL's 2005 needs, and an additional 600 MW of capacity for FPL's 2006 needs. PVI's Bid Proposals were deemed responsive to the RFP, and, like all other responsive bids, were evaluated both by FPL and by an independent third-party evaluator, Sedway Consulting, Inc. (the "Evaluations").

As a result of the Evaluations, FPL determined that the FPL self-build portfolio of Manatee Unit 3 and Martin Unit 8 was the most cost-effective alternative to meet FPL's 2005 and 2006 capacity needs. FPL thus rejected all of the bids submitted in response to the RFP, including PVI's Bid Proposals.

Consistent with its determination to self-build, FPL filed petitions for determinations of need for electrical power plants ("Petitions"), which Petitions are the subjects of these pending consolidated proceedings. FPL also filed a detailed Need Study Document with appendices, discussing the Evaluations, final costs comparisons and evaluation of non-price attributes supporting FPL's determination to self-build. Certain bidders such as Reliant Energy Power Generation, Inc.

("Reliant"), Calpine Energy Services, L.P. ("Calpine") and others have been granted permission to intervene in these docket proceedings (collectively, "Intervenors"). PVI, however, has not sought permission to intervene, and is not party to these proceedings.

Intervenors are challenging FPL's Petitions on grounds that FPL violated Rule 25-22.082, F.A.C., (the "Bid Rule"). Intervenors specifically allege that FPL understated the costs of its self-build options in violation of the Bid Rule; placed onerous and commercially infeasible terms in the RFP; and improperly changed its self-build option. Intervenors seek an order from this Commission requiring FPL to issue a new Request for Proposals that complies with the Bid Rule.

Intervenors Calpine and Reliant have also filed a Joint Motion for Summary Final Order in these proceedings, alleging that there are no disputed issues of material fact relative to FPL's failure to comply with the Bid Rule, and that dismissal of FPL's Petitions is required as a matter of law. Intervenors have requested oral argument and expedited consideration of their Joint Motion.

Notwithstanding the pending Joint Motion for Summary Final Order, various Intervenors have served requests for production of documents upon FPL. These requests demand, *inter alia*, all bid proposals submitted in response to the RFP, including PVI's Bid Proposals.

On April 18, 2002, FPL notified all RFP bidders, including PVI, that it intended to produce all bid proposals to the Intervenors. FPL announced that it was working with Intervenors to draft a confidentiality and non-disclosure agreement acceptable to FPL and the Intervenors, and that an agreement would be finalized at a meeting

to be held the following day. Non-intervenor bidders such as PVI were invited to attend the meeting.

FPL and the Intervenor in attendance made minor revisions and signed a marked-up copy of the draft agreement. On April 22, 2002, the Intervenor filed a joint motion with FPL seeking approval of the confidentiality agreement by the Prehearing Officer. FPL has advised PVI and the other non-intervenor bidders that once the confidentiality agreement has been approved by the Prehearing Officer, all bid proposals, including PVI's Bid Proposals, will be produced to the Intervenor.

Reasons for Protecting PVI's Bid Proposals from Disclosure

The highlighted portions of PVI's Bid Proposals contain highly sensitive proprietary confidential business information. These portions of PVI's Bid Proposals contain trade secrets as defined in Section 812.081, F.S., highly proprietary technology descriptions, and technical/patented information owned and used by PVI in its business ventures throughout the world. PVI will suffer irreparable harm if this information is disclosed to the Intervenor, all of whom are competitors of PVI and the other non-intervenor bidders. Disclosure of PVI's Bid Proposals at this time also would be highly prejudicial, and would give Intervenor an unfair competitive advantage in any future request for proposals. The confidentiality agreement proposed by FPL and the Intervenor is completely insufficient, and does not protect the interests of PVI and the other non-intervenor bidders.

In addition, PVI's Bid Proposals should not be produced because they are simply not relevant to these proceedings, and will not lead to any discovery admissible at the hearing on the Petitions. As is evident by their motions seeking

intervention, the Intervenor's are challenging only FPL's compliance with the Bid Rule, not any bidder's compliance with the Rule. PVI's Bid Proposals are simply not at all relevant to any such challenge.

Moreover, the Prehearing Officer's recent April 22, 2002 Interim Order On Procedure, which grants FPL's motion to hold the consolidated proceedings in abeyance until it completes a supplemental RFP, renders the production of PVI's Bid Proposals further unnecessary and potentially even more harmful. Because FPL's selection of the most cost-effective alternatives to meet its 2005 and 2006 capacity needs will be based on the results of its supplemental RFP, the bids received in response to the initial RFP have even less relevance, if any, to the challenge of the Intervenor's. Indeed, this challenge itself may well become moot, depending on the outcome of the supplemental RFP. By the same token, disclosure of PVI's Bid Proposal to the Intervenor's would be potentially even more harmful, since these Intervenor's will almost certainly be among the bidders in FPL's supplemental RFP and therefore would have the benefit of valuable market intelligence in the form of PVI's recent bid information and strategy, with no obligation to reciprocate.

Without some showing by Intervenor's why PVI's Bid Proposals are relevant to these docket proceedings, no access to these documents should be permitted. PVI thus seeks a protective order prohibiting FPL from producing any of the highlighted confidential information contained in PVI's Bid Proposals to any of the Intervenor's. The harm to PVI and its competitive interests that would flow from such disclosure far outweighs any benefit that may be provided to the Intervenor's in their challenge to FPL's need determination Petitions. PVI does not object to FPL providing the

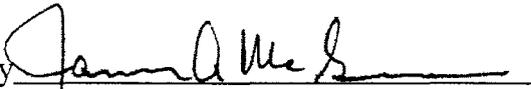
Intervenors those portions of its Bid Proposals not highlighted as confidential information, so long as this information is redacted.

The undersigned counsel believes, and therefore represents, that this motion will be opposed by certain Intervenors. However, the undersigned has been advised by counsel for Intervenor Calpine that Calpine does not object to the relief requested by PVI's motion, with the understanding that this position by Calpine is without prejudice to its position on any discovery issues that may arise in connection with FPL's supplemental RFP.

Conclusion

For the foregoing reasons, PVI requests that its motion for protective order be granted as requested herein, and that FPL be prohibited from producing to the Intervenors the highlighted confidential information contained in PVI's Bid Proposals submitted to FPL.

Respectfully submitted,

By 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished this ____ day of April, 2002, via U.S. Mail to the following:

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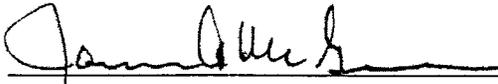
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