

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to determine  
need for Hines Unit 3 in Polk  
County by Florida Power  
Corporation.

DOCKET NO. 020953-EI  
ORDER NO. PSC-02-1673-PCO-EI  
ISSUED: November 27, 2002

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

On November 22, 2002, Tampa Electric Company (TECO) filed a Motion for Protective Order, and a Request for Oral Argument. The Motion was prompted by discovery requests from Florida Partnership for Affordable Competitive Energy (PACE) to Florida Power Corporation (FPC) for copies of the bid proposals submitted for Hines 3. TECO submitted a bid proposal. TECO contends that FPC should be prohibited from producing the information in its bid proposal to PACE.

TECO's arguments fall into two categories: 1) the information in TECO's bid proposal is proprietary confidential business information pursuant to Section 366.093, Florida Statutes, and trade secret information, pursuant to Section 812.081, Florida Statutes; and, 2) the requested information is not relevant to this proceeding.

TECO explains that if the information is produced, its business interests would suffer irreparable harm, and the information would give TECO's competitors an unfair advantage in any future bid proposals. TECO filed an affidavit of Mr. Benjamin Smith, the Manager of Wholesale Marketing and Fuels, which attests to the sensitive nature of the documents and the type of harm TECO would suffer if the information is disclosed.

Given that the hearing in this docket is one week away, staff contacted PACE to see if it intended to respond, and PACE gave an oral response. PACE's position is that the Commission put TECO on notice, in consolidated Docket Nos. 020262-EI and 020263-EI, that "confidential information submitted in response to [the supplemental Request for Proposals for capacity needs] may very well be subject to disclosure in discovery to the parties to these dockets." See Order No. PSC-02-0611-PCO-EI, issued on May 3, 2002, in Docket Nos. 020262-EI and 020263-EI.

DOCUMENT NUMBER DATE

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FPSC-COMMISSION CLERK

Legal Standard

Rules 25-22.006(6)(a) and (b), Florida Administrative Code, allow the Commission to grant protective orders in accordance with Rule 1.280, Florida Rules of Civil Procedure. Rule 1.280(c), Florida Rules of Civil Procedure, allows for protective orders to be granted to the person from whom discovery is sought for good cause shown. Rule 1.280(c)(7) allows issuance of protective orders to protect trade secrets or other confidential commercial information.

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 information sought is not confidential, then it can not be withheld from discovery on grounds that it is confidential commercial information. If the information is confidential, the burden shifts to the opposing party (PACE) 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.

Analysis

The information which TECO seeks to protect was granted confidential classification in Order No. PSC-02-1276-CFO-EI, issued on September 18, 2002, in this docket. The information therefore constitutes confidential commercial information pursuant to Rule 1.280(c)(7), Florida Rules of Civil Procedure. See Order No. PSC-00-1171-CFO-EI, issued on June 27, 2000, in Docket No. 000061-EI. The facts attested to in Mr. Smith's affidavit demonstrate that TECO would suffer substantial harm if the information were disclosed to TECO's competitors, such as those who are members of PACE.

PACE has not explained why its need for the information outweighs TECO's need to protect the information. The Order on which PACE relies, Order No. PSC-02-0611-PCO-EI, addresses a different situation than the present one. In Docket Nos. 020262-EI and 020263-EI, a need determination for Florida Power & Light (FPL), FPL issued its first RFP, but during the course of the proceeding issued a second RFP. Intervenors requested the bid proposals of companies who responded to the first RFP; the bidders moved for protective orders; the intervenors conceded that they no longer needed the information given that a second RFP would be issued, and the protective orders were granted.

The Order granting the protective orders put any bidders to the second RFP on notice that should intervenors request confidential bid information relating to the second RFP, it may be subject to disclosure. The notice was an appropriate cautionary measure given the intervenor's request to discover responses to the first RFP. The Order took no position on whether the second round of bid proposals would in fact be discoverable, and the question was not before the Prehearing Officer.

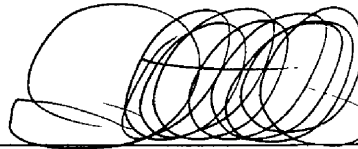
In summary, I find that the information for which TECO seeks a protective order is confidential, and TECO's interest in protecting the information outweighs PACE's interest in obtaining the information. Because TECO's Motion is granted, there is no need to address TECO's Request for Oral Argument.

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Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that the Motion for Protective Order filed by Tampa Electric Company is granted.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 27th Day of November, 2002.



FO BAEZ  
BRAULIO L. BAEZ  
Commissioner and Prehearing Officer

( S E A L )

MKS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1)

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reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.