

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Determine Need for Turkey  
Point Unit 5 Electrical Power Plant, by Florida  
Power & Light Company.

DOCKET NO. 040206-EI

Submitted for Filing: May 6, 2004

**SOUTHERN POWER COMPANY'S  
MOTION FOR PROTECTIVE ORDER BASED ON CONFIDENTIALITY**

Southern Power Company ("SPC"), 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 any Intervenor in this proceeding, or any member of the public, SPC's bid proposals and related documents submitted by SPC on October 23, 2003 ("Bid Proposals") in response to the Request for Proposals ("2003 RFP") issued by FPL on August 25, 2003 seeking capacity and energy resources beginning in 2007. In the alternative, if the Commission orders production of such Bid Proposals, then SPC requests confidential treatment of such Bid Proposals as described below.<sup>1</sup>

**Introduction**

On April 16, 2004, Calpine Energy Services, L.P. ("Calpine") filed its First Request for Production of Documents (Nos. 1 - 71) to Florida Power & Light Company ("Calpine's Request"), in which Calpine essentially sought all bids and information pertaining to bidders who participated in FPL's 2003 RFP. SPC now moves that FPL should be prohibited from

<sup>1</sup> The Bid Proposals contains highly sensitive confidential and proprietary business information, and this information as aggregated constitutes a trade secret, and is appropriate for protection from disclosure pursuant to Commission Rule 25-22.006(6)(a). SPC has provided confidential versions of the Bid Proposals, in Sealed Confidential Exhibit 2 to this Motion, only for the purposes of explaining the confidential nature of the information contained within, as described in Exhibit 1. SPC's provision of such Bid Proposals does not constitute a waiver of confidential treatment of such Bid Proposals.

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FPSC-COMMISSION CLERK

disclosing SPC's Bid Proposals, and any correspondence or documentation related thereto, to any third party, for the following reasons: (1) SPC's individual Bid Proposals and correspondence or documentation related thereto are not relevant or necessary in any way to this proceeding (FPL has already provided relevant and necessary information for this proceeding by its filing of the evaluation of the Bid Proposals and its Need Study document); and (2) SPC's Bid Proposals contain highly sensitive confidential and proprietary business information, disclosure of which will cause irreparable harm to SPC and its competitive business interests.<sup>2</sup> To the extent that the Commission orders the disclosure of any of the Confidential Information, then such disclosure should be subject to certain essential minimum protections, as described below.

#### **The Bid Proposals Are Unnecessary and Irrelevant to this Proceeding**

Calpine's access to the Bid Proposals is irrelevant to, and unnecessary for, the Commission's determination of need for FPL's Turkey Point Unit 5 electrical power plant. The Commission recognized Calpine's allegations that "FPL rejected all proposals submitted in response to its RFP, and ultimately filed a petition to determine the need for its own proposal to build an additional power plant itself in Dade County." See Order No. PSC-04-0432-PCO-EI, Docket No. 040206-EI, issued April 28, 2004. The Commission also stated that "Calpine challenges the validity of FPL's RFP process and alleges that FPL failed to comply with the requirements of Rule 25-22.082." Id. The Bid Proposals are unnecessary to determine whether FPL followed the RFP process, or whether FPL complied with applicable rules.

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<sup>2</sup> SPC has not agreed to any confidentiality agreement with any Intervenor in this proceeding, and as such, objects to FPL providing the Confidential Information under any confidentiality agreement to which SPC is not a signatory.

The Commission and the State of Florida have a long-standing policy of economic, competitive procurement of new generating resources. If bidders' information is regularly disclosed to their competitors (even if subject to a confidentiality agreement) in proceedings for the determination of need for new generating facilities, such disclosure will discourage generators from submitting bids, which will chill the competitive marketplace for new generation in the State of Florida. Such disclosure of confidential bidders' information will also clearly provide Calpine an unfair advantage in the next RFP that FPL issues. Such disclosure will encourage unsuccessful bidders to intervene in need determination proceedings to access competitors' bid information so that they will not be at a disadvantage to other bidders in the Florida market.

SPC respectfully submits that the Commission has the power to avoid the potential harmful effects that such disclosure of SPC's Bid Proposals (and other bidders' confidential information) will have on competition in the Florida wholesale power market.<sup>3</sup> Specifically, the Commission could require Calpine to first demonstrate that its bid is superior to FPL's self-build proposal that was selected. This demonstration should not require the disclosure to Calpine of any bidders' bid proposals, and should only require the modeling of information from Calpine's bid and FPL's own self-build proposal. Only after Calpine successfully demonstrates that it should have won the bid should the Commission consider whether any disclosure of SPC's Bid Proposals and other bidders' bid information is necessary to determine an appropriate remedy in this proceeding.

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<sup>3</sup> The negative impact of such disclosure of bid information on FPL's ability to attract bidders was clearly contemplated by the Florida legislature in the drafting of Section 366.093(3)(d), F. S., which includes the following as confidential information worthy of protection, "Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms." (emphasis added).

## **SPC's Bid Proposals**

SPC's Bid Proposals, submitted to FPL on October 23, 2003, complied with the submittal requirements of FPL's 2003 RFP. Specifically, in its 2003 RFP, FPL committed to protecting bidders' confidential information "provided that such information is clearly identified by the FPL's 2003 RFP Proposer as Proprietary and Confidential on the page(s) on which the information appears. To clearly identify confidential information, the Proposer must (1) stamp each such page with 'Confidential Information' and (2) highlight/shade the confidential information on the pages stamped 'Confidential Information.'" See Sealed Confidential Exhibit 2.

SPC fully complied with FPL's requirements for confidential treatment. The confidential information described in Exhibit 1 ("Confidential Information") contains, or is repeated from, SPC's Bid Proposals, and is comprised of capacity costs, energy prices, fixed and variable O&M, heat rates, unit availability, and other confidential information, as well as different proposal options, from which competitors could derive certain key relationships between various types of data. This is highly sensitive confidential and proprietary business information. Competitors could use this Confidential Information as an unfair competitive advantage in a manner that will irreparably harm SPC's ability to compete in the wholesale power market. SPC took the appropriate measures as defined within FPL's 2003 RFP to protect SPC's Confidential Information; thus, SPC objects to FPL's disclosure of the Confidential Information in response to Calpine's Request. See Sealed Confidential Exhibit 2. An affidavit in support of this Motion is attached hereto as Exhibit 3.

## **SPC's Bid Proposals Contain Confidential Information that Warrants Protection**

SPC objects to disclosure of the Confidential Information contained within its Bid Proposals, as well as any correspondence or documentation related thereto. First, SPC seeks to protect the disclosure of the Confidential Information to members of the public, which would include direct competitors of SPC. Second, SPC seeks to protect the disclosure of the Confidential Information to any Intervenor, especially when such Intervenor is a direct competitor of SPC. The Confidential Information is comprised of highly sensitive trade secrets, including technical/patented information owned and used by SPC in its business ventures (including data derived from proprietary models).

SPC will suffer irreparable harm if the Confidential Information is disclosed to either the public or to any Intervenor as it will give Calpine an unfair competitive advantage in any future RFP issued by FPL or other similar requesting utilities in the markets in which both Calpine and SPC participate. Specifically, all the Confidential Information is proprietary confidential business information within the definition of Section 366.093(3), F. S., which provides:

Proprietary confidential business information means information . . . [that] 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 . . . company's business operations . . . . Proprietary confidential business information includes, but is not limited to:

- (a) Trade secrets.
- (b) Internal auditing controls and reports of internal auditors.
- (c) Security measures, systems, or procedures.
- (d) Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms.
- (e) Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.
- (f) Employee personnel information unrelated to compensation, duties, qualifications, or responsibilities.

(emphasis added).

As explained in Exhibit 1, the Confidential Information consists of competitive data and details which go to the heart of SPC's ability to compete in the wholesale power market. Therefore, the Confidential Information contained within the Bid Proposals comports with the statutory definition of "confidential proprietary business information" and should be protected from disclosure pursuant to Commission Rule 25-22.006(6)(a).

Furthermore, all of the elements contained within the Confidential Information, as aggregated in the Bid Proposals, are trade secrets within the definition of Section 812.081(1)(c) F.S., which provides that:

"Trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

Therefore, the Confidential Information contains, and constitutes, "trade secret" information, as defined by statute, and is appropriate for protection from disclosure pursuant to Commission Rule 25-22.006(6)(a).

Calpine's Request seeks all proposals submitted to FPL's 2003 RFP, including SPC's Bid Proposals. However, the harm to SPC and its competitive interests that would flow from such disclosure far outweighs any benefit that may be provided to any Intervenor during this proceeding.

**Any Disclosure of the Confidential Information  
Should Be Subject to Certain Minimum Protections**

SPC maintains that disclosure of the Confidential Information is not relevant or necessary for the Commission's determination of need for FPL's Turkey Point Unit 5 electrical power plant. In the alternative, if the Commission orders disclosure of the Confidential Information, such disclosure should be protected as highly sensitive confidential and proprietary business information as follows:

(1) the Commission should permit disclosure of Confidential Information only to the extent that Calpine has demonstrated that it has the intention and capability to replicate the FPL bid evaluation process;

(2) the Commission should permit disclosure of only that Confidential Information which is necessary for replication of FPL's bid evaluation process, such as certain input data taken from the Confidential Information ("Input Data"). Designation of Input Data should be agreed upon by SPC and the Reviewing Representatives. If agreement as to the designation of Confidential Information as Input Data is not reached, the Commission should rule upon such designation;

(3) the identity of SPC or other bidders should not be revealed since it is not necessary for the replication of FPL's bid evaluation process. Any of the Confidential

Information which might be linked to SPC should be redacted if such redaction would not frustrate the replication of the bid evaluation process;

(4) Calpine should be restricted from using any Confidential Information or Input Data in any other proceeding or for any other purpose other than to replicate the bid evaluation process;

(5) Confidential Information or Input Data should only be made available to two representatives of any Intervenor -- one outside attorney who has entered an appearance in this proceeding and one outside expert consultant (“Reviewing Representatives”);

(6) Reviewing Representatives should not be allowed to make copies or take notes regarding the Confidential Information or Input Data, except to the extent necessary to replicate the bid evaluation process;

(7) any output information concerning the respective ranking of the bidders resulting from the replicated bid evaluation process should not be disclosed by the Reviewing Representatives to any other Calpine representative or employee -- only the output data that shows how Calpine’s bid compares to the FPL self-build proposal should be made available to Calpine;

(8) any allowed access by any Intervenor to the Confidential Information or Input Data should not be construed as SPC’s, or any bidders’, waiver of confidentiality of the Input Data or the Confidential Information;

(9) each Reviewing Representative that inspects the Confidential Information or Input Data should, before such inspection, agree in writing to an acknowledgment of the confidential, proprietary nature of the Confidential Information or Input Data, and the Reviewing



Representative should agree to be bound by a confidentiality agreement consistent with the foregoing that survives the conclusion of this proceeding; and

(10) the Confidential Information or Input Data should be made available to Reviewing Representatives at a location specified by SPC, including a neutral location that will protect all bidders' identities, during the hours of 9:30 a.m. and 5:00 p.m., Monday through Friday (except holidays).

Should the Commission order disclosure of the Confidential Information or Input Data, the above described requirements are essential to ensure a minimum level of protection for the confidentiality of the Confidential Information and Input Data, as well as the identity of the bidders, including SPC.

#### **SPC is a Non-Party with Standing to Seek a Protective Order**

Pursuant to Commission Rule 25-22.006(6)(a), SPC, as a non-party to this proceeding, has standing to "request a protective order protecting proprietary confidential business information from discovery." As demonstrated above, SPC's individual Bid Proposals and certain correspondence or documentation related thereto, as identified in Exhibit 1, contain highly sensitive confidential and proprietary business information. FPL's disclosure of this Confidential Information, especially to SPC's direct competitors such as Calpine that also participated in the 2003 RFP, will impair the competitive interests of SPC in the Florida market as well as other markets. The Confidential Information is protected by Section 366.093, F.S., which directs the Commission to protect such proprietary confidential business information from disclosure during discovery.

Upon a showing by a utility or other person and a finding by the commission that discovery will require the disclosure of proprietary confidential business

information, the commission shall issue appropriate protective orders designating the manner for handling such information during the course of the proceeding and for protecting such information from disclosure outside the proceeding.

Section 366.093(2), F.S (emphasis added).

Accordingly, SPC has standing to move for protection of the Confidential Information. The Commission is authorized to grant this motion under Rule 1.280, Florida Rules of Civil Procedure, which provides that a protective order may be granted “upon motion by a party or by the person from whom discovery is sought.”<sup>4</sup> Therefore, under the statutes and rules described above, SPC has standing to seek a protective order from the Commission to ensure that the Confidential Information will not be shared with persons that compete directly with SPC in the wholesale power market. SPC’s request is consistent with the Commission’s precedent. See Commission Order No. PSC-02-0611-PCO-EI in Docket Nos. 020262-EI and 020263-EI (granting non-party bidders’ motions for protective orders for confidential business information).

Undersigned counsel has attempted to reach Calpine’s counsel to determine whether Calpine has any objection to this motion, but to date has not been able to speak directly with Calpine’s counsel on this issue.

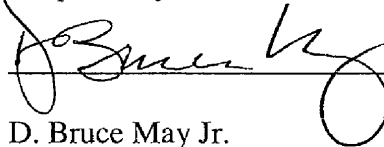
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<sup>4</sup> Rule 28-106.206 of Florida’s Uniform Rules of Administrative Procedure provide that discovery in this proceeding “may be obtained in the manner provided for in Rules 1.280 - 1.400, Florida Rules of Civil Procedure.”

## Conclusion

For the foregoing reasons, SPC respectfully requests that its motion for protective order be granted as requested herein, and that the Commission issue a protective order prohibiting FPL from producing to any Intervenor, or any member of the public, SPC's Bid Proposals, which, as described in Exhibit 1, is highly sensitive confidential and proprietary business information. Also, SPC respectfully requests that FPL be prohibited from producing to any Intervenor any other documents or related correspondence that may otherwise disclose the Confidential Information contained in SPC's Bid Proposals. If the Commission determines the Confidential Information, or parts therein as Input Data, should be disclosed to any Intervenor, SPC requests that such disclosure be subject to the essential protections described above and as may otherwise be ordered by this Commission to protect the competitive interests of SPC and other bidders in the wholesale power market of Florida.

Respectfully submitted,



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Counsel for Southern Power Company

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of Southern Power Company's Motion for a Protective Order Based on Confidentiality with the exception of Sealed Confidential Exhibit 2 in Florida Public Service Commission Docket No. 040206-EI has been furnished by Hand-Delivery to Jennifer Brubaker, Esq., Senior Attorney, Florida Public Service Commission, Gerald L. Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 and Harold McLean, Office of Public Counsel, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400; and by Hand-Delivery (\*) or by United States Mail this 6th day of May, 2004, to the following official parties of record:

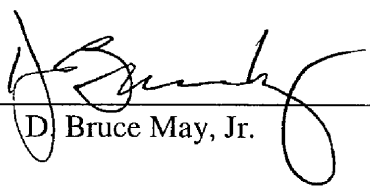
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By: \_\_\_\_\_

  
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# EXHIBIT 1

## EXHIBIT 1

LOCATION	BATES NUMBER	DOCUMENT	INFORMATION
Second Paragraph	SPC-FPSC-00008	Cover Letter	Confidential pricing information from the proposal, identified as highly sensitive confidential and proprietary business information throughout the Bid Proposals
2 <sup>nd</sup> paragraph	SPC-FPSC-00012	Option 1, Form 2	Proposed Site Information
4 <sup>th</sup> paragraph	SPC-FPSC-00012	Option 1, Form 2	Proposed Pricing Structure
3a	SPC-FPSC-00016	Option 1, Form 4	Projected Planned Outage and Forced Outage Data
3b	SPC-FPSC-00017	Option 1, Form 4	Runtime Limitations and Explanations
4b	SPC-FPSC-00017	Option 1, Form 4	Operating Time Using Backup Fuel
5a	SPC-FPSC-00020	Option 1, Form 4	Primary Fuel Data (for guaranteed firm capacity)
5b	SPC-FPSC-00020	Option 1, Form 4	Secondary Fuel Data (for guaranteed firm capacity)
6a	SPC-FPSC-00021	Option 1, Form 4	Primary Fuel Data (for expected heat rates)
6b	SPC-FPSC-00021	Option 1, Form 4	Secondary Fuel Data (for expected heat rate)
Graph	SPC-FPSC-00021	Option 1, Form 4	Part Load Characteristic Graph
7a	SPC-FPSC-00022	Option 1, Form 4	Primary Fuel Data (for emission rates)
7b	SPC-FPSC-00022	Option 1, Form 4	Secondary Fuel Data (for emission rates)

**Exhibit 1 (continued)**

<b>LOCATION</b>	<b>BATES NUMBER</b>	<b>DOCUMENT</b>	<b>INFORMATION</b>
8a	SPC-FPSC-00023	Option 1, Form 4	Source of Natural Gas Supply
8d	SPC-FPSC-00023	Option 1, Form 4	Gas Delivery Pressure
8e	SPC-FPSC-00023	Option 1, Form 4	Maximum Daily Gas Consumption Requirement
8g	SPC-FPSC-00023	Option 1, Form 4	Maximum Hourly Natural Gas Consumption Requirement
1	SPC-FPSC-00025	Option 1, Form 5	Guaranteed Capacity Payments
2	SPC-FPSC-00026	Option 1, Form 5	Guaranteed Energy Payments
3	SPC-FPSC-00027	Option 1, Form 5	Guaranteed Startup Payments (Gas) and Guaranteed Startup Payments (Oil)
4	SPC-FPSC-00027	Option 1, Form 5	Transmission Interconnection Costs
Graph	SPC-FPSC-00028	Option 1, Form 5	Diagram of Proposed Interconnection Facilities and Estimated Costs
4	SPC-FPSC-00031 - 32	Option 1, Form 7	Emission Rates for Regulated Pollutants
6	SPC-FPSC-00033 - 34	Option 1, Form 7	Strategy for Zoning Issues
8	SPC-FPSC-00034	Option 1, Form 7	Water Supply Strategy
9	SPC-FPSC-00035	Option 1, Form 7	Water Discharge Strategy
10	SPC-FPSC-00036	Option 1, Form 7	Infrastructure Needs or Requirements
a through l	SPC-FPSC-00037	Option 1, Form 8	Key Milestones

**Exhibit 1 (continued)**

<b>LOCATION</b>	<b>BATES NUMBER</b>	<b>DOCUMENT</b>	<b>INFORMATION</b>
1	SPC-FPSC-00038	Option 1, Form 9	Receipt Points to the FPL System
Map	SPC-FPSC-00039	Option 1, Form 9	Map of Receipt Points
2 <sup>nd</sup> paragraph	SPC-FPSC-00043	Option 2, Form 2	Proposed Site Information
4 <sup>th</sup> paragraph	SPC-FPSC-00043	Option 2, Form 2	Proposed Pricing Structure
3a	SPC-FPSC-00047	Option 2, Form 4	Projected Planned Outage and Forced Outage Data
3b	SPC-FPSC-00048	Option 2, Form 4	Runtime Limitations and Explanations
4b	SPC-FPSC-00048	Option 2, Form 4	Operating Time Using Backup Fuel
5a	SPC-FPSC-00051	Option 2, Form 4	Primary Fuel Data (for guaranteed firm capacity)
5b	SPC-FPSC-00051	Option 2, Form 4	Secondary Fuel Data (for guaranteed firm capacity)
6a	SPC-FPSC-00052	Option 2, Form 4	Primary Fuel Data (for expected heat rates)
6b	SPC-FPSC-00052	Option 2, Form 4	Secondary Fuel Data (for expected heat rate)
Graph	SPC-FPSC-00052	Option 2, Form 4	Part Load Characteristic Graph
7a	SPC-FPSC-00053	Option 2, Form 4	Primary Fuel Data (for emission rates)
7b	SPC-FPSC-00053	Option 2, Form 4	Secondary Fuel Data (for emission rates)
8a	SPC-FPSC-00054	Option 2, Form 4	Source of Natural Gas Supply



**Exhibit 1 (continued)**

<b>LOCATION</b>	<b>BATES NUMBER</b>	<b>DOCUMENT</b>	<b>INFORMATION</b>
8d	SPC-FPSC-00054	Option 2, Form 4	Gas Delivery Pressure
8e	SPC-FPSC-00054	Option 2, Form 4	Maximum Daily Gas Consumption Requirement
8g	SPC-FPSC-00054	Option 2 Form 4	Maximum Hourly Natural Gas Consumption Requirement
1	SPC-FPSC-00056	Option 2, Form 5	Guaranteed Capacity Payments
2	SPC-FPSC-00057	Option 2, Form 5	Guaranteed Energy Payments
3	SPC-FPSC-00058	Option 2, Form 5	Guaranteed Startup Payments (Gas) and Guaranteed Startup Payments (Oil)
4	SPC-FPSC-00058	Option 2, Form 5	Transmission Interconnection Costs
Graph	SPC-FPSC-00059	Option 2, Form 5	Diagram of Proposed Interconnection Facilities and Estimated Costs
4	SPC-FPSC-00062 - 63	Option 2, Form 7	Emission Rates for Regulated Pollutants
6	SPC-FPSC-00064 - 65	Option 2 , Form 7	Strategy for Zoning Issues
8	SPC-FPSC-00065	Option 2, Form 7	Water Supply Strategy
9	SPC-FPSC-00066	Option 2, Form 7	Water Discharge Strategy
10	SPC-FPSC-00067	Option 2, Form 7	Infrastructure Needs or Requirements
a through l	SPC-FPSC-00068	Option 2, Form 8	Key Milestones
1	SPC-FPSC-00069	Option 2, Form 9	Receipt Points to the FPL System

Exhibit 1 (continued)

LOCATION	BATES NUMBER	DOCUMENT	INFORMATION
Map	SPC-FPSC-00070	Option 2, Form 9	Map of Receipt Points
Appendix E discussion	SPC-FPSC-00096	Southern Power Company Exceptions to RFP and Draft PPA Provisions	Guaranteed Startup Payments
Appendix G Discussion	SPC-FPSC-00098	Southern Power Company Exceptions to RFP and Draft PPA Provisions	Outage Hours and Operating Time Limitations

**SEALED CONFIDENTIAL EXHIBIT 2**

**FILED UNDER SEAL**

## EXHIBIT 3



of eighteen months. Southern Power will continue to treat all this confidential business information as protected for the foreseeable future. Southern Power's competitive interests which would be damaged by the release of this information will still exist after eighteen months. Most of the Information will continue to be relevant for years to come, and its disclosure would injure Southern Power Company's competitive interests. The return of this information to Southern Power Company after the close of the hearing, if not admitted into evidence, would protect its competitive interests. If the confidential information is admitted into the record, then the potential injury from disclosure of competitive interests will last longer than eighteen months and warrants the Commission finding that its confidential classification should not be limited to eighteen months.

  
William N. McKenzie

Before me the undersigned authority personally appeared, on this the 5th day of May, 2004, who is personally known to me.

  
Notary Public, State of Georgia

Carol H. James  
Printed Name of Notary

13575 : N02-NY-0069  
Commission Number

My Commission expires:

