

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Nassau Power Corporation to Determine Need for Electrical Power Plant (Amelia Island Cogeneration Facility))	Docket No. 910816-EQ
)	Order No. 25303
)	Issued: 11/6/91
)	

SECOND ORDER ON CONFIDENTIALITY

BY THE COMMISSION:

On November 1, 1991, Nassau Power Corporation ("Nassau"), filed a request for confidential classification and motion for permanent protective order regarding the limited material which Nassau provided to Florida Power and Light Company ("FPL") pursuant to a Settlement executed between Nassau and FPL on October 31, 1991, and filed with this Commission on the same date.

Florida law provides, in Section 119.01, Florida Statutes, that documents submitted to governmental agencies shall be public records. The only exceptions to this law are specific statutory exemptions, and exemptions granted by governmental agencies pursuant to the specific terms of a statutory provision. This law derives from the concept that government should operate in the "sunshine." In the instant matter, the value that all parties would receive by examining and utilizing the information contained in this document must be weighed against the legitimate concerns of Nassau regarding disclosure of business information which it considers proprietary. It is our view that parties must meet a very high burden when requesting confidential classification of documents.

Pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, Nassau has the burden to show that the material submitted is qualified for confidential classification. Rule 25-22.006, Florida Administrative Code, provides that the Company may fulfill its burden by demonstrating that the information falls under one of the statutory examples set out in Section 366.093, Florida Statutes, or by demonstrating that the information is proprietary confidential information, the disclosure of which will cause the Company or its ratepayers harm.

Section 366.093(3), Florida Statutes, provides several examples of proprietary confidential business information. Included in this list are "trade secrets" and "information concerning bids or other contractual data." Nassau argues that both of these provisions are applicable here.

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FPC-RECORDS/REPORTING

To establish that material is proprietary confidential business information under Section 366.093(d), Florida Statutes, a utility must demonstrate (1) that the information is contractual data, and (2) that the disclosure of the data would impair the efforts of the utility to contract for goods or services on favorable terms. We have previously recognized that this latter requirement does not necessitate the showing of actual impairment, or the more demanding standard of actual adverse results; instead, it must simply be shown that disclosure is "reasonably likely" to impair the company's contracting for goods or services on favorable terms.

Chapter 688, Florida Statutes, is the Uniform Trade Secret Act. Section 688.002(4) states that:

"Trade secret" means information . . . that

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Chapter 812, Florida Statutes addresses Theft, Robbery, and Related Crimes. Section 812.081(1)(c) states that ". . . 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."

In order to resolve a discovery dispute between FPL and Nassau, the parties entered into a settlement agreement ("Settlement"). Pursuant to the Settlement, Nassau provided FPL with certain information which Nassau asserted was proprietary confidential business information. Upon receiving this information, FPL executed a Nondisclosure Agreement with Nassau. Pursuant to the terms of the Nondisclosure Agreement, on October 31, 1991, FPL notified Nassau that FPL intends to use this information during cross-examination at the hearing scheduled for November 6 and 7, 1991. In order to protect this information from

public disclosure, Nassau filed a request for confidential classification.

Nassau seeks confidential classification for the following information:

- A. Proposed pricing provisions contained in two SONAT offer documents dated February 11, 1991, and October 25, 1991, which are the subject of sensitive on-going negotiations;
- B. An identification of all O&M categories and the annual total O&M expense for Nassau's project through 2015 by year, as well as the escalation rate;
- C. The heat rate assumption consistent with the proposed operating level of the facility including kw, kwh output, and steam sales to ITT;
- D. Steam usage assumption and associated steam revenue by year; and
- E. Assumption as to the annual consumption of gas for each year through 2015.

Specifically, this information can be found in Attachment C to Nassau's motion at C(1), page 2, lines 16-17 and 20; at C(1), page 3, lines 5, 8, and 9; at C(1), page 4, lines 2-5; at C(1), page 5, line 5; at C(2), page 1, lines 8-13; at C(3), page 1, lines 2-10 and 12-19; at C(4), page 1, lines 1-2; at C(5), page 1, lines 1-2; and at C(6), page 1, line 1. Nassau asserts that all of the above information comprises proprietary confidential business information which should be protected from public disclosure pursuant to Section 366.093, Florida Statutes.

The SONAT offer documents contain specific firm pricing offers from SONAT to Nassau, as well as the terms and conditions offered. This information is within Nassau and SONAT's exclusive control, and it is treated by Nassau as extremely private and confidential. As noted in Phillip N. Cantner's affidavit, Nassau believes that information subject to ongoing negotiations with potential fuel suppliers is extremely sensitive, commercially valuable, proprietary business information. Cantner further states that

Nassau's employees have access to such information on a need-to-know basis only, and that such information may not be divulged outside the corporation without the approval of the President. Finally, Nassau argues that public disclosure of the information could cause harm to Nassau and Nassau's business operations.

Nassau submits that this information is in the nature of a trade secret because the information is secret, it is of value, it is used in Nassau's business, and it is of advantage to Nassau over those who do not possess it. Further, Nassau takes strict measures to prevent its disclosure. In addition, Nassau submits that this information is in the nature of bids or other contractual data, the disclosure of which could impair Nassau and Falcon Seaboard's ability to negotiate and enter into contracts on favorable terms. If information concerning SONAT's fuel offer is disclosed, Nassau and Falcon Seaboard's competitors could become privy to the negotiating strategy and postures of the companies, which could hinder the companies in subsequent negotiations.

We note that because of an agreement with SONAT, Nassau is prohibited from putting this information into the public domain. On October 30, 1991, SONAT agreed to provide this information to FPL and to Commission Staff under terms of strict confidentiality. SONAT has not authorized Nassau to release the contents of the SONAT fuel offers to anyone else. This is because public disclosure of this information could harm SONAT by enabling competitors to learn the natural gas price SONAT offered Nassau. Public disclosure may also impede Nassau's on-going negotiations with SONAT.

We find the highlighted information on Attachment C(1) and C(2) to Nassau's request to be proprietary confidential business information.

Nassau argues that the highlighted information pertaining to estimated O&M, heat rate, steam usage and revenue assumptions, and calculated annual gas consumption are also proprietary confidential business information, and that this information should be classified as confidential for the reasons discussed above. Nassau further states that competitors could use this information, not only to gain insight into the technical capabilities of Nassau's proposed unit, but also to back into the fuel costs contemplated by Nassau.

Nassau argues that this information relates to Nassau's internal economic evaluations of the proposed project, and that public disclosure of this information could provide competitors with access and insight into Nassau and Falcon Seaboard's internal business strategies and evaluations in bringing a project on line. In Cantner's affidavit, he states that the non-utility power generation industry is extremely competitive, and that one reason Falcon Seaboard is a privately held corporation is to enhance its ability to compete in the marketplace. Nassau carefully and stringently guards its business information. Nassau argues that public disclosure of this information could be extremely valuable to Nassau and Falcon Seaboard's competitors, and that it could injure the competitive posture of Nassau and Falcon Seaboard. Nassau states that public disclosure of this information could reveal much about Nassau's sophistication and business strategy in the marketplace, that it could be extremely useful to Nassau's competitors, and that Nassau and Falcon's interests could be severely impaired by release of this information.

We find that the information found in Attachment C(3), page 1, lines 10, 16, and 17-19; in Attachment C(4), page 1, line 1; and in Attachment C(5), page 1, line 2, to be proprietary confidential business information for the reasons discussed above.

However, we deny the request for confidential classification as to Attachment C(3), page 1, lines 2-9 and 12-15; as to Attachment C(4), page 1, line 2; as to Attachment C(5), page 1, line 1; and as to Attachment C(6), page 1, line 1. We find that Nassau has failed to provide sufficient justification as to why this information should be exempt from Chapter 119, Florida Statutes.

Finally, we note that the information which is the subject of this request and for which we have classified as confidential was provided to FPL only because FPL agreed to keep this information confidential. We find that this information shall be protected from public disclosure during the course of the hearing by using the procedures the parties are to develop for this purpose.

It is, therefore,

ORDERED by Commissioner Susan F. Clark, as Prehearing Officer, that the information in Document Number 10941-91 discussed above is proprietary confidential business information, and that it will be treated as such by the Florida Public Service Commission. It is further

ORDERED that the information as to Attachment C(3), page 1, lines 2-9 and 12-15; as to Attachment C(4), page 1, lines 1-2; as to Attachment C(5), page 1, line 1; and as to Attachment C(6), page 1, line 1 of Document Number 10941-91 is not found to be proprietary confidential business information.

By ORDER of Commissioner Susan F. Clark, as Prehearing Officer, this 6th day of November, 1991.



SUSAN F. CLARK, Commissioner and
Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2)

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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 Records and Reporting, 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.

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