

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Adoption of Numeric ) DOCKET NO. 930548-EG  
Conservation Goals and ) ORDER NO. PSC-94-0667-CFO-EG  
Consideration of National Energy ) ISSUED: June 1, 1994  
Policy Act Standards (Section )  
111) by Florida Power and Light )  
Company. )  
\_\_\_\_\_)

ORDER GRANTING IN PART AND DENYING IN PART REQUEST  
FOR SPECIFIED CONFIDENTIAL CLASSIFICATION

BY THE COMMISSION:

On April 22, 1994, Florida Power & Light Company (FPL or company) filed a Request for Specified Confidential Classification for documents included in Document No. 3829-94. The request for confidential classification is for certain portions of documents which, according to FPL, Commission staff requested from FPL in late March 1994. In accordance with Rule 25-22.006(3), Florida Administrative Code, these documents were produced to Commission Staff subject to FPL's Notice of Intent to Request Specified Confidential Classification, filed on April 1, 1994. FPL, however, does not seek confidential classification for all the documents that were listed in the Notice of Intent. Those documents for which confidential classification is requested are identified as Exhibits, by title and by bates numbers, and are listed below.

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." It is this Commission's view that the burden to be met by one requesting specified confidential classification of documents submitted during a proceeding before us is very high.

Rule 25-22.006, Florida Administrative Code, provides that the Company may fulfill its burden by demonstrating how that information qualifies as 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.

The Company raised Sections 366.093(3) (a) (d) and (e), Florida Statutes, in support of the confidentiality of the material at issue. These sections exempt "[t]rade secrets", [i]nformation concerning bids or other contractual data, the disclosure of which

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would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable term," and "[i]nformation relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information," respectively. Further, the Company asserts that this information is intended to be and is treated by FPL as confidential, that it has not been publicly disclosed, and that it has been circulated to a select few FPL employees on a need to know basis only.

DOCUMENT ANALYSIS

Exhibit B:           **FPL's SO2 Allowance Auction Bid Price Strategy  
Bates No. 601324-601328**

These items consist of the last two lines on page 601324, bullet points 2 and 3 under subtitle "SO2 Allowance Strategy" on page 601325, bullet points 1 and 2 under subtitle "Suggested Bid Price" on page 601327, and the paragraph under bullet point titled "Upside" on page 601328.

FPL argues that this is proprietary confidential business information as defined by Section 366.093 (3) (d) and (e), Florida Statutes. The information details FPL's need for SO2 allowances, identifies a particular bidding strategy, including a proposed price bid, and elaborates on the potential upside risk. The disclosure of the strategy and potential bid price for allowances by FPL prior to a federal SO2 allowance auction could interfere with the competitive nature of the bidding process. If other participants in the bidding process determine the value and quantity of credits, they could alter their bids accordingly. Thus, the bidding process could be undermined and ultimately increase the cost of obtaining these credits to FPL and its ratepayers. I agree with the company. I find this information to be proprietary confidential information the disclosure of which will harm FPL's ability to contract and could enable FPL's competitors to derive economic advantage.

Exhibit C:           **Graphs, Which Analyze the Cost of FPL's SO2 Reduction  
Measures. Bates Nos. 611456, 611458, 611462, 611466**

FPL similarly argues that these graphs are proprietary confidential business information pursuant to Section 366.093(3) (d) and (e), Florida Statutes. The graphs plot the correlation or trade-off between SO2 emissions and the cost of electricity under two different FPL planning scenarios. Disclosure of this information could allow others to calculate FPL's specific SO2 allowance needs, which for the reasons previously set forth in the

discussion of Exhibit B, would impair FPL's ability to participate in the SO2 emission allowance market on a competitive basis with other utilities. I agree with this argument to the extent that the numeric values associated with the X and Y axis of the graphs are proprietary. Disclosure of these numbers could allow competitors to calculate the quantities and rate of SO2 allowances to FPL. FPL's ability to participate in the SO2 emission allowance market could be compromised if competitors have the ability to calculate the quantity and rate of allowances required by the company. However, disclosure of the titles of each axis and the data points, depicting various supply and demand side expansion plans within the body of the graphs, is meaningless without the values associated with the axis. Therefore, while I find that the numeric values enumerated in the X and Y axis of the graphs are proprietary confidential information, the titles and data points within the body of the graphs are not.

Exhibit D            **Residential and Commercial Options Data Summary for FPL. Bates Numbers 305737-305738**

Exhibit E            **1992 Residential DSM Program Evaluation Baseline Results. Conservation Water Heating Program Appendices, July 1993. Bates Numbers 307646-307649**

Both of these exhibits are similar in that they relate to water heating studies contracted for by FPL from Quantum Consulting, Inc. or performed by FPL. FPL states that the information it deems confidential actually is compiled from three other reports: 1992 Residential DSM Program Evaluation Baseline Results - Conservation Water Heating Program Appendices; Appliance Specific Electricity Consumptions; and 1987 - 88 Residential Water Heating Study Load Shapes. FPL asserts that these reports were obtained by FPL at significant expense in the course of an on-going effort by FPL to evaluate its DSM programs, in order to enable FPL to propose DSM goals. The entire budget from the inception of this DSM evaluation effort in 1991 through 1994 is approximately \$13,000,000. FPL has not indicated how much of this overall budget was expended on these particular reports.

Specifically, FPL is requesting confidentiality for the following information:

- 1) The numeric values associated with the two columns "Energy Savings" and "% of Baseline" in the table titled "Annual Energy Reductions" on bates page 305737 and the same information on bates page 307649. The information consists of the average energy savings results for residential customers

using the various water heating energy conservation measures examined.

- 2) The numeric values for the Summer kW and Winter kW associated with water heating technologies in the table titled "Demand per System - Peak Day" on bates page 305738. This information shows the average demand reduction figures in summer and winter for various water heating DSM measures, including solar water heating, the use of heat recovery water heaters, and heat pump water heaters. This information is based on the Appliance Specific Report and the 1987 Water Heating Report.
- 3) The numeric values associated with the energy savings, summer and winter demand savings for each of the three water heating technologies solar heater, heat recovery unit, heat pump water heater on bates page 307648. The numeric values associated with the "Energy Savings" and "% of Baseline" in the table titled "Annual Energy Reductions" on bates page 307648, which is same information on bates page 305737. This information is based on the 1992 Evaluation Report.
- 4) The numeric values associated with the Summer and Winter Energy and Demand Savings, and the numeric values associated with "Per Tank Insulated Results" on bates page 307647. This information and the top portion of bates page 307648 is a disaggregation or break-down of the information common to these exhibits.

FPL requests confidential classification of this material on the basis that it is a trade secret as defined in the Uniform Trade Secrets Act, Section 688.02 (4), Florida Statutes and therefore, pursuant to Section 366.093 (3) (a), Florida Statutes, is subject to confidentiality as proprietary business information.

FPL argues that although the information may not be in and of itself confidential, it was gathered or obtained by FPL at great expense. Therefore, FPL should have the opportunity to realize the commercial value of the information through its sale to others. FPL asserts that "[i]t is simply not fair for one utility to obtain information at its own expense and then be expected to share the information gratis with other utilities or intervenors who may find it is useful."

The Commission has characterized the enumerated items listed at Section 366.903 (3) (a) - (f), Florida Statutes as per se proprietary business information which are entitled to confidential treatment under the Statute. However, merely asserting that the material is an enumerated per se item because the company has

expended funds to obtain the information does not relieve FPL of the obligation to demonstrate that the material is indeed as purported. An adequately reasoned pleading asserting that an item is a trade secret and entitled to confidential treatment under the Statute should begin by defining the elements of a trade secret and then demonstrating that the material meets each requirement.

In the instant case, I find that the company's pleadings are more conclusive than demonstrative regarding the concepts of value and advantage under the statutory tests for a trade secret. Upon examination of the materials and the applicable law, I have concluded that the confidentiality justification for the submitted information at issue does not meet the burdens set forth in the statutes.

"Trade Secret" as defined by Section 688.02 (4), Florida Statutes, means:

... [i]nformation, including a formula, pattern, compilation, program, device, method, technique, or process 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."

FPL cites several cases to support its proposition that Florida has long recognized that information that is not itself confidential such as a customer list or product formula, may be a



trade secret if it is compiled through the industry of its owner and held confidential by him. The operative phrase in this analysis is "may be a trade secret."

The Florida Energy Efficiency and Conservation Act (FEECA), Sections 366.80-366.85 and 403.519, Florida Statutes, mandates the Florida Public Service Commission to "adopt goals and approve plans related to the conservation of electric energy and natural gas usage." The Legislature directed this Commission to require each utility to develop plans and implement programs for increasing energy efficiency and conservation. In so doing, the Legislature intended that the use of new technology and highly efficient energy systems be encouraged. Further, to meet these important goals, the Legislature declared that FEECA was to be "liberally construed" to meet the "complex problems of reducing and controlling the growth rates of electric consumption and reducing the growth rates of weather-sensitive peak demand...." This was necessary to protect the health, prosperity, and general welfare of the state and its citizens.

In the instant conservation goals docket, FPL has previously provided the same category of work product relating to demand and energy savings for various water heating options. FPL filed cost-effectiveness runs in Appendix K of the Cost Effectiveness Goals Results Report and later, pursuant to the settlement conference held March 24, 1994, FPL filed a matrix identifying all nine water heating measures. Finally, FPL's witness, Mr. Hughes, pre-filed testimony includes an exhibit which identifies the same study as the source of its information as the study from which this confidentiality request emanates. Besides, there appears to be some significant numerical differences between some of the information which has been filed previously and what FPL wishes now to keep confidential. While there may be valid reasons for the differences, this raises the question of whether FPL has made public its most current information on energy and demand savings for competing water heating technologies. This information is the fundamental input data necessary for the cost-effectiveness analysis required by FEECA.

Actually, FPL has proposed a goal of zero, meaning the company does not forecast any new megawatts, for the water heating market segment for the period 1995-2003. In the company's pleading, however, FPL asserts that the purpose of the various studies was to assess the impact of FPL's DSM programs on energy and demand and to learn more about these programs to better market them. With a goal of zero, it would appear, however, that FPL does not plan on marketing water heating programs. Second, the overall commercial value of the information is questionable at best. The

resale market for the information may be limited because the data is extremely specific to FPL's service territory and may be valid for Florida utilities only. Other Florida utilities have been gathering similar information in their efforts to meet the aims outlined in FEECA.

Because FPL spent money to get these reports is not sufficient justification for keeping the results confidential. The major reason that the utilities are required to pursue conservation is that they are uniquely positioned to remove or lessen market barriers and create a competitive energy efficiency market. Therefore, as to Exhibits D and E, I have concluded that the information at issue does not meet the burdens set forth in the Section 366.093. I find that this information is not proprietary business information and its disclosure will not cause harm to the ratepayers or the company's business operations. FPL's competitors will derive no perceptible economic advantage from such disclosure.

It is, therefore,

ORDERED by the Chairman J. Terry Deason, as prehearing officer that the specified information in Exhibits B and C to Florida Power and Light Company's Specified Request for Confidential Classification, as discussed in the body of this Order, is proprietary confidential business information, and that it shall be afforded confidential status pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006, Florida Administrative Code. It is further


ORDERED that this information shall be classified as proprietary confidential business information for a period not longer than 18 months. It is further

ORDERED that this Order will be the only notification by the Commission to the parties concerning the expiration of the confidentiality time period. It is further

ORDERED that the portion of Exhibit C, as discussed in the body of this order, and Exhibits D and E for which Florida Power and Light Company has requested confidential treatment are held to be not entitled to confidential treatment.

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By ORDER of Chairman J. Terry Deason, as Prehearing Officer,  
this 1st day of June, 1994.

  
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J. TERRY DEASON, Chairman 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(40), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Section 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) 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.