

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power
cost recovery clause and
generating performance incentive
factor.

DOCKET NO. 010001-EI
ORDER NO. PSC-01-2265-PCO-EI
ISSUED: November 19, 2001

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR
PROTECTIVE ORDER AND GRANTING IN PART AND DENYING IN PART
MOTION TO COMPEL

I. BACKGROUND

On August 21, 2001, Florida Industrial Power Users Group ("FIPUG") served its Third Set of Interrogatories to Tampa Electric Company (Nos. 34 - 74) in this docket. On August 31, 2001, Tampa Electric Company ("TECO") filed its Objection and Motion for a Protective Order relating to Interrogatories Nos. 58(d), 58(f), and 59. On September 27, 2001, TECO filed a Motion for Protective Order Relating to FIPUG's Interrogatories Nos. 43, 44, and 45 ("Motion for Protective Order"). On October 3, 2001, TECO filed a supplement to its Motion for Protective Order, addressing Interrogatory No. 51 ("Supplement").

On October 1, 2001, FIPUG filed a Motion to Compel TECO to Respond to Discovery ("Motion to Compel"). On October 5, 2001, TECO filed its response FIPUG's Motion to Compel.

In its combined pleadings, TECO requests that FIPUG enter into a non-disclosure agreement before TECO responds to Interrogatories Nos. 43, 44, 45, and 51 because confidential information is required to respond. TECO asks that the non-disclosure agreement limit the provision of information only to FIPUG's counsel and consultants, excluding FIPUG members, because some FIPUG members produce electricity with waste heat and sell incidental power, therefore making them potential competitors with TECO. TECO suggests that providing FIPUG the information sought in Interrogatories Nos. 58(d), 58(f), and 59 would give highly sensitive information to parties who could find it useful in competing with TECO's affiliates for the provision of goods and services. Thus, TECO seeks protection from disclosing this information in any manner.

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In its Motion to Compel, FIPUG asks this Commission to compel TECO to respond, or respond further, to Interrogatories Nos. 43, 44, 45, 58(d), 58(f), and 59. The Motion to Compel was filed before FIPUG received notice of TECO's Supplement, hence Interrogatory 51 was not addressed in the Motion to Compel. With regard to Interrogatories 43, 44, 45, 58(d), 58(f), and 59, FIPUG contends that a further non-disclosure agreement is unnecessary because answers to these interrogatories are covered by a non-disclosure agreement previously executed by FIPUG and TECO on August 20, 2001.

II. POSITIONS OF THE PARTIES

Interrogatories Nos. 43, 44, 45, and 51

FIPUG's Interrogatory No. 43 requests TECO to provide the amount in MWH and cost in dollars of purchased power that was allocated to wholesale sales during each interruption of interruptible customers that occurred in 1998-2001. If TECO does not allocate purchased power to any wholesale sale during interruption of interruptible customers, TECO is asked to explain that policy. Interrogatory No. 44 asks TECO to identify the date, amount in MWH, and cost in dollars of the purchased power allocated to wholesale sales when forced outages occurred on any of its generating units for the period 1998-2001. If no purchased power was allocated during these forced outages, TECO is asked to explain its policy. Interrogatory No. 45 asks TECO to provide the date and amount of the purchased power allocated to any wholesale sales during 1998-2001. Interrogatory No. 51 requests TECO to include the appropriate hour-ending ("HE") value for its entire response to FIPUG Interrogatories Nos. 11(d) and (e), which sought information concerning power purchases made the day before, the day of, and the day after interruptions.

In its Motion for Protective Order and Supplement, TECO contends that the information requested in Interrogatories Nos. 43, 44, 45, and 51 constitutes highly sensitive trade secret information, the disclosure of which would be harmful to the competitive interests of TECO and the interests of its retail customers. As support, TECO adopts the arguments set forth in its July 12, 2001, motion for protective order in this docket. TECO states that all of the information required in Interrogatories 43,

44, 45, and 51 qualifies for confidential treatment under Section 366.093(3)(d), Florida Statutes, (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 and services in favorable terms) and Section 366.093(3)(e), Florida Statutes, (information relating to competitive interests the disclosure of which would impair the competitive business of the provider of the information). Therefore, TECO asks that FIPUG be required to execute a non-disclosure agreement restricting the provision of information to FIPUG's counsel and consultants. TECO would exclude all FIPUG members from access to the information because some FIPUG members produce electricity and sell incidental power, therefore making them potential competitors with TECO.

In its Motion to Compel, FIPUG asserts that TECO has failed to show good cause as to how the information could be used by FIPUG to its economic advantage. Further, FIPUG contends that if the information is not disclosed, transactions against the interest of ratepayers and others will be concealed. FIPUG adds that Section 366.093, Florida Statutes, should be construed narrowly and in favor of disclosure under the Public Records Act.

Interrogatories Nos. 58(d), 58(f), and 59

In Interrogatory 58, FIPUG asks TECO to provide a summary of all coal contracts in place or entered into between 1998-2001. Specifically, subpart (d) of Interrogatory 58 requests that TECO provide "[a]ny price indices to which the contract is tied." Subpart (f) of Interrogatory 58 requests the monthly cost in \$/ton for coal delivered to TECO under the contracts in place or entered into between 1998-2001. In Interrogatory 59, FIPUG requests TECO to provide the date of purchase, amount purchased in tons, the cost of the coal, and the unit for which TECO purchased coal for any coal purchases made by TECO on the spot market for 1998-2000.

In its Objections and Motion for Protective Order, TECO asserts that public disclosure of its coal contract pricing information would be detrimental to the interests of TECO and its ratepayers. TECO argues that the standards in 366.093(d) and (e), Florida Statutes, as set forth above, apply to the information sought in these interrogatories. TECO further asserts that disclosure of this information to FIPUG would give highly

competitive information "to the very parties who might find it useful in competing with Tampa Electric's affiliates for the provision of goods and services." Thus, TECO seeks protection from disclosing this information in any manner. Finally, TECO asserts that with respect to Interrogatory No. 58(f), the Commission has consistently found that public disclosure of the delivered price of coal can be used in conjunction with certain publicly disclosed information to derive the segmented transportation costs of TECO's coal transportation affiliates, and the Commission has thus determined that such disclosure would be harmful to TECO's competitive interests.

FIPUG, however, contends that the prices that TECO pays for coal should be available to ratepayers. FIPUG also believes that the information is years old and cannot be of any possible competitive value.

III. ANALYSIS AND FINDINGS

Rule 1.280(c)(7), Florida Rules of Civil Procedure, 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, 655 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 movant makes a showing that the information is confidential, the burden shifts to the opposing party, FIPUG, 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.

Interrogatories Nos. 43, 44, and 45 request information concerning any purchased power that TECO allocated to wholesale sales in certain circumstances. The information sought includes the amount of such purchased power in MWH, the cost of such purchased power in dollars, and the date such purchased power was allocated to wholesale sales. Interrogatory No. 51 requests the "HE" value for purchased power transactions listed in TECO's response to FIPUG's Interrogatory No. 11(d) and (e). In response to Interrogatory No. 11(d) and (e), TECO provided the "HE" values for all such transactions through April 13, 1999, but not thereafter. FIPUG seeks "HE" values for the transactions after that date.

In support of its assertion that this information is confidential, proprietary business information, TECO adopts the arguments set forth in its July 12, 2001, motion for protective order in this docket. In that motion, TECO sought a protective order that would require FIPUG to execute a non-disclosure agreement before TECO would provide incremental cost data that TECO asserted would disclose the price it pays for purchased power. TECO argued that its competitors in the wholesale power market could gain a competitive advantage from the disclosure of such information because it would allow those competitors to model the operation of TECO's system. TECO argues that the information sought in Interrogatories Nos. 43, 44, 45, and 51 is confidential pricing information very similar in nature to the information that was the subject of its July 12 motion for protective order, as well as its July 20, 2001, motion for protective order in this docket.

By Order No. PSC-01-2122-PCO-EI, issued October 29, 2001, which addressed TECO's July 12 motion for protective order, information concerning the pricing of TECO's wholesale power purchases was found to constitute proprietary confidential business information as defined in Section 366.093(3), Florida Statutes. Order No. PSC-01-2176-PCO-EI, issued November 6, 2001, which addressed TECO's July 20, 2001, motion for protective order, states in pertinent part:

Although TECO asserts that the information sought ... is sensitive pricing information "very similar in nature" to the information that was the subject of its July 12, 2001, motion for protective order, only the portion of the interrogatory which seeks average cost data for purchases made during interruptions appears to be similar. TECO offers no explanation of how disclosure of the amounts of energy purchased and the names of the suppliers of that energy - information not concerning pricing or cost to TECO - would harm its competitive interests or qualify as trade secrets.

As was the case with TECO's July 20 motion for protective order, this Motion for Protective Order does not explain how disclosure of the amounts of energy purchased and the dates such purchases were allocated to wholesale sales - information not concerning pricing or cost to TECO - would harm its competitive interests or qualify as trade secrets. Thus, consistent with Order No. PSC-01-2176-PCO-EI, TECO's Motion for Protective Order is granted with respect to the cost in dollars of any purchased power allocated to wholesale sales, as sought in Interrogatories Nos. 43, 44, and 45, but denied with respect to the amounts in MWH of such purchased power and the dates any such purchased power was allocated to wholesale sales. The latter type of information was not granted confidential treatment in the orders addressing TECO's July 12 and July 20 motions for protective order in this docket, and TECO has provided no independent basis in this Motion for Protective Order to make a finding that such information constitutes confidential commercial information. Accordingly, FIPUG's Motion to Compel production of information responsive to these interrogatories is granted as to the amounts and dates. Prior to accessing the cost data sought in these interrogatories, FIPUG shall execute an appropriate non-disclosure agreement consistent with that required in Order No. PSC-01-2176-PCO-EI.

With respect to the information sought in Interrogatory No. 51, TECO's Motion for Protective Order is denied, and FIPUG's Motion to Compel is granted. "HE" values for purchased power transactions were not addressed in the orders addressing TECO's July 12 and July 20 motions for protective order in this docket, and TECO has provided no independent basis in this Motion for

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Protective Order or in the Supplement to make a finding that such information constitutes confidential commercial information.

With respect to Interrogatories Nos. 58(d), 58(f), and 59, TECO's Motion for Protective Order is granted in part and denied in part and FIPUG's Motion to Compel is granted in part and denied in part. This Commission has consistently found that TECO's coal pricing information is proprietary confidential business information, the disclosure of which could harm the interests of TECO and its ratepayers. TECO seeks an order protecting such information from disclosure to FIPUG in any manner. However, TECO has not offered any support for its statement that disclosure of such information "to FIPUG would give highly competitive information to the very parties who might find it useful in competing with TECO's affiliates for the provision of goods and services." FIPUG asserts that it needs this information to analyze the prudence of TECO's coal transactions, a matter relevant to this docket, and that the information should be made available to the public for review. In an effort to balance FIPUG's interest in obtaining the requested information with TECO's concerns over the sensitive nature of the information, TECO shall provide FIPUG with the information requested in these interrogatories pursuant to a non-disclosure agreement, the terms of which shall be determined by the parties to this dispute. The non-disclosure agreement shall be designed to prevent the disclosure of information to entities whose knowledge of this information may harm the competitive interests of TECO or an affiliate of TECO.

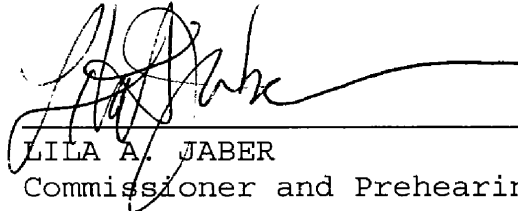
Based on the foregoing, it is

ORDERED that Tampa Electric Company's Motion for Protective Order is granted in part and denied in part, as set forth in the body of this order. It is further

ORDERED that the Florida Industrial Power Users Group's Motion to Compel is granted in part and denied in part, as set forth in the body of this order.

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By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer,
this 19th day of November, 2001.



LILA A. JABER
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(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.

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 the

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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.