

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for limited proceeding to recover costs of water system improvements in Marion County by Sunshine Utilities of Central Florida, Inc.

DOCKET NO. 992015-WU
ORDER NO. PSC-02-1249-PCO-WU
ISSUED: September 10, 2002

TEMPORARY PROTECTIVE ORDER

On August 2, 2002, the Office of Public Counsel (OPC) served its First Request for Production of Documents on Sunshine Utilities of Central Florida, Inc. (Sunshine or utility). On August 9, 2002, Sunshine served Sunshine's Objections To, and Requests For Clarification Of, Citizens' First Request for Production of Documents ("Objections") on OPC. These Objections purported to reserve to Sunshine the right to seek a protective order with respect to any documents requested by OPC.

On August 19, 2002, the day the discovery requests were due, Sunshine served its responses to OPC's discovery requests. Contemporaneously, Sunshine filed its Motion for Temporary Protective Order Seeking Confidential Treatment of Tax Returns (Motion). In that Motion, Sunshine notes Request for Production No. 1 seeks federal income tax returns of Sunshine's president and vice-president, who are also the owners of the utility, and that Request for Production No. 12 seeks Sunshine's corporate tax returns for the years 1999-2001. These returns were provided to OPC with the understanding that they would be afforded confidential treatment, and were also filed with the Commission and assigned Commission Document No. 08736-02.

Section 367.156(2), Florida Statutes, provides that proprietary confidential business information shall be exempt from disclosure under Section 119.07(1), Florida Statutes. Section 367.156(3), Florida Statutes, provides that proprietary confidential business information is:

[I]nformation. . . which is owned or controlled by the . . . company, is intended to be and is treated by . . . the company as

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private in that the disclosure of the information would cause harm to the ratepayers or the . . . company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or a private agreement that provides that the information will not be released to the public.

Sunshine states that the information at issue is intended to be and is treated by Sunshine as proprietary and confidential and that this information has been disclosed only to the Commission and OPC pursuant to Sunshine's objection and motion requesting confidential treatment. The information contained in Document 08736-02 consists of tax information. Sunshine contends that the Commission has specifically determined in the past that these types of documents are confidential.

Sunshine requests that the materials and information described above and provided in response to OPC's requests for production be granted the protection of a Temporary Protective Order, which will protect the materials and information from disclosure until OPC completes its review. Sunshine requests that OPC be required "to notify the Prehearing Officer and all parties to this proceeding of its plans to use any of the confidential information at hearing no later than seven days prior to the hearing." Moreover, Sunshine states that it will "file a Request for Confidential Classification with the Commission within 21 days of the conclusion of the hearing in order to maintain continued confidentiality of the information," pursuant to Rule 25-22.006(8)(b), Florida Administrative Code.

Sunshine notes that prior to filing this Motion, it presented OPC with a draft protective agreement. However, OPC indicated that it was not willing to sign such an agreement, and would "only maintain the confidentiality of the tax returns upon issuance of a protective order by the Commission." Therefore, Sunshine filed its Motion. OPC advises Commission staff that it does not intend to respond to Sunshine's Motion.

The Commission's rule on confidentiality draws a distinction between confidential information which is provided to the parties during the discovery phase of a proceeding, and confidential

information which is actually filed at the Commission to be included in the record of a docketed proceeding. Rule 25-22.006(6), Florida Administrative Code, codifies our policy to protect confidential information from public disclosure during the discovery process in a manner that is not overly burdensome to the parties, and provides in pertinent part:

(6) Discovery.

(a) In any formal proceeding before the Commission, any utility or other person may request a protective order protecting proprietary confidential business information from discovery. Upon a showing by a utility or other person and a finding by the Commission that the material is entitled to protection, the Commission shall enter a protective order limiting discovery in the manner provided for in Rule 1.280, Florida Rules of Civil Procedure. The protective order shall specify how the confidential information is to be handled during the course of the proceeding and prescribe measures for protecting the information from disclosure outside the proceeding.

* * *

(c) When a utility or other person agrees to allow Public Counsel to inspect or take possession of utility information for the purpose of determining what information is to be used in a proceeding before the Commission, the utility may request a temporary protective order exempting the information from section 119.07(1), F.S. If the information is to be used in a proceeding before the Commission, then the utility must file a specific request for a protective order under paragraph (a) above. If the information is not to be used in a proceeding before the Commission, then Public Counsel shall return the information to the utility in accordance with the record retention requirements of the Department of State.

The request for confidential treatment filed under subsection (6) does not require specificity. On the other hand, when a confidential document is filed at the Commission, subsection (4) of

Rule 25-22.006 requires a line-by-line justification to be included in the request for confidential treatment. As the Commission has recognized:

The purpose of a temporary protective order . . . is to facilitate the examination of potentially confidential information by temporarily exempting the information from the disclosure provision of Florida's Public Records Act, Section 119.07(1), Florida Statutes. Under the rule, if information subject to a temporary protective order is to be used in a proceeding, then the utility must file a specific request for confidential treatment. Alternatively, if the material is not to be used in a proceeding, then the material shall be returned to the utility.

In re: Comprehensive review of the requirements and rate stabilization plan of Southern Bell Telephone and Telegraph Company, Order No. PSC-96-0975-PCO-TL, 96 F.P.S.C. 7:639 (1996).

For the information at issue here, we are now past the discovery phase of the case. In this case, OPC has now used at least part of the information in the prefiled testimony of Kimberly H. Dismukes and it appears that it will become part of the record of the case. Sunshine shall file specific requests for confidential treatment of this prefiled testimony pursuant to Rule 25-22.006(4), Florida Administrative Code, within 21 days of the date of this order.

Because the Commission has recognized that federal income tax returns and corporate tax returns are confidential under federal law, specifically, 26 U.S.C. Section 6103(a), and Florida law, specifically Section 213.053(2), Florida Statutes, and, therefore, exempt from Section 119.07(1), Florida Statutes, the information discussed above shall remain protected from public disclosure by this order until the time expires for Sunshine to file a specific request for confidential treatment pursuant to Rule 25-22.006(4), F.A.C. The redacted information in the specific request would then remain confidential until ruled upon by the Commission.

The parties are reminded that the Order Establishing Procedure in this case, Order No. PSC-02-0852-PCO-WU, filed June 20, 2002, requires the parties to notify the prehearing officer and the other parties to the case at least seven days prior to the hearing that confidential information will be used during the course of the proceeding. The notice must include a recommended procedure for maintaining the confidentiality of the confidential information during the hearing. Sunshine shall file specific requests for confidential treatment for this information identified by OPC prior to the hearing.

The remaining materials that the Office of Public Counsel does not plan to use in this proceeding shall be returned to Sunshine according to the procedures found in Section 367.156, Florida Statutes, and Rule 25-22.006, Florida Administrative Code. The expiration date of this Order shall be void upon the issuance of an order finding that the information and materials herein are not proprietary and confidential business information. This Order shall have no effect on the subsequent determination of any request for specified confidential classification of any of these materials and information.

Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that Sunshine Utilities of Central Florida, Inc.'s Motion for Temporary Protective Order Seeking Confidential Treatment of Tax Returns is granted in part as set forth in the body of this Order. It is further

ORDERED that, in order to maintain confidential treatment, Sunshine Utilities of Central Florida, Inc., shall file a specific request for confidential treatment of the information used by the Office of Public Counsel in the prefiled testimony of Kimberly H. Dismukes within 21 days of the date of this Order. It is further

ORDERED that the above-noted documents and testimony shall be treated temporarily as proprietary confidential business information within the meaning of Section 367.156, Florida Statutes, and protected from public disclosure for 21 days from the date of this Order, and, upon a timely filing of a specific request for confidential treatment, shall continue to receive confidential

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treatment pending a Commission ruling on the specific request for confidential treatment. It is further

ORDERED that the Office of Public Counsel and Sunshine Utilities of Central Florida, Inc., shall notify this Commission and all parties to this proceeding of any plans to use additional confidential information at hearing no later than seven days prior to the hearing. It is further


ORDERED that once the Office of Public Counsel has notified Sunshine Utilities of Central Florida, Inc., which additional materials, if any, the Office of Public Counsel intends to use in this proceeding, then Sunshine Utilities of Central Florida, Inc., in accordance with Rule 25-22.006(4), Florida Administrative Code, shall file a specific request for confidential classification. This request shall be filed prior to the hearing. The remaining materials that the Office of Public Counsel does not plan to use in this proceeding shall be returned to Sunshine Utilities of Central Florida, Inc., according to the procedures found in Section 367.156, Florida Statutes, and Rule 25-22.006, Florida Administrative Code. It is further

ORDERED that the Office of Public Counsel shall take measures to preserve the confidentiality of the documents and information protected by this Order. No disclosure of the documents or information protected by this Order shall be made or permitted. It is further

ORDERED that this Order will be the only notification by the Florida Public Service Commission to the parties concerning the expiration of this Temporary Protective Order.

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By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 10th day of September, 2002.


BRAULIO L. BAEZ
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 25-22.0376, 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

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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.