

BEFORE THE PUBLIC SERVICE COMMISSION

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

DOCKET NO. 050001-EI  
ORDER NO. PSC-05-1108-PCO-EI  
ISSUED: November 3, 2005

ORDER DENYING MOTION FOR PROTECTIVE ORDER

On October 13, 2005, Florida Public Utilities Company (FPUC) filed a Motion for Protective Order asking that it not be required to provide certain discovery requested by the Staff of the Commission and the Office of Public Counsel (OPC) relating to its wholesale electricity Request for Proposals (RFP) issued in April 2005 and the proposals received in response to this RFP. OPC responded in opposition on October 20, 2005.

FPUC states that on September 23, 2005, the Staff served its Fourth Set of Interrogatories and Second Request for Production of Documents on FPUC seeking responses and documents relating to ongoing contractual negotiations and pending RFPs. OPC requested the production of all documents produced to Staff. Staff also noticed a deposition of FPUC witnesses for October 19, 2005, wherein FPUC believes that Staff will ask questions about the RFP process. FPUC states that although there has been no selection of a wholesale electricity provider, the Staff and OPC have requested that FPUC respond to questions about the RFPs and provide documents relative to RFP responses submitted by all responders. FPUC argues that this information is confidential commercial information which is considered to be trade secrets by the respondents to the RFP as disclosure of that information would be valuable to competitors and would damage the competitive market. In addition, FPUC maintains that disclosure of any of that information would impair the ability of FPUC to negotiate the best contract. As a result, FPUC requests that the Commission grant a protective order directing that discovery not be had on any matter relating to the RFP process which the owner of the information deems confidential. This request directly relates to Interrogatory Nos. 12, 13, 14, and 15, Request for Production of Documents Nos. 3, 4, 5, 6, 8, 9, 10, and 11, and any depositions.

FPUC argues that inquiries about the wholesale electricity procurement RFP are not relevant to any issue in this docket, including the issue concerning the additive to the fuel cost recovery adjustment factor that FPUC has requested.<sup>1</sup> According to FPUC, Staff's requests would have FPUC produce its thoughts and criteria for fuel procurement arrangements, and if a potential provider knows what FPUC is willing to pay for electricity then the opportunity for any meaningful negotiation is gone. FPUC asserts that this discovery does not bear any relevance to any issues in this proceeding, nor would it lead to the discovery of any evidence relevant or admissible in this docket. FPUC argues that what FPUC plans to do, what options it may or may

<sup>1</sup> FPUC has proposed that the following issue, identified as Issue 15C in the Prehearing Order, be resolved by the Commission at this year's fuel hearing:

Should the Commission grant Florida Public Utilities Company's request to adopt a surcharge to its fuel factor(s) to phase in future higher wholesale capacity and energy costs, expected to begin in January 2008?

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not have, and what wholesale electricity providers of electricity are offering have nothing to do with the calculation of the additive to the fuel adjustment factor proposed by FPUC. FPUC maintains that any public discussion or disclosure of this information could damage the competitive position of both FPUC and the prospective bidders and hamper FPUC's ability to enter the most favorable contract possible.

In response, OPC asserts that, contrary to FPUC's argument, the responses to the RFP are the best information available to evaluate whether or not the FPUC's proposed fuel surcharge additive should be approved by the Commission since the contracts are not yet finalized. The proposed surcharge is being requested to offset the increase in electric rates that FPUC is anticipating at the beginning of 2008 when its new purchased power contracts are in effect. However, since FPUC has not yet finalized these new purchased power contracts, the information necessary to evaluate the appropriateness of the fuel surcharge is available in the RFP and the bids received, which is the subject of the contested discovery. OPC also argues that as long as FPUC's request for a surcharge is an issue in this docket, then OPC and Staff are entitled to the information. OPC states that it has no objection to reasonable guidelines to ensure the confidential nature of this information.

After reviewing the pleadings and considering the arguments, FPUC's Motion for Protective Order is denied. In this proceeding, FPUC has requested the implementation of a surcharge to its fuel factor to phase in the future higher cost of purchasing wholesale power. In order to evaluate the reasonableness of the amount of the surcharge requested by FPUC, there must be an opportunity to look at the underlying information supporting FPUC's petition. The best source for that information would be the purchased power contracts executed by FPUC; however, at this point in time, FPUC has not finalized those contracts. As a result, the best source for the information needed to evaluate FPUC's proposed surcharge are the bids themselves. The bids contain the pricing information necessary to evaluate the appropriateness of the amount of the proposed surcharge. These bids provide the basis for the information sought in the disputed discovery requests. Therefore, contrary to FPUC's assertions, the information sought by Staff's discovery requests is directly relevant to a contested issue in this proceeding.

I agree with FPUC that the discovery sought by Staff is considered to be confidential business information by the respondents to the RFP, and that disclosure of that information would be valuable to competitors. However, I do not believe that disclosure of that information to the Staff and OPC would damage the competitive market as alleged by FPUC, nor do I believe that it would impair the ability of FPUC to negotiate the best contract. Any information produced in discovery to Staff and OPC would be provided on a confidential basis subject to the procedures outlined in Section 366.093, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, ensuring that any confidential business information provided cannot be publicly disclosed. Also, Exhibit D to FPUC's Motion contains the Confidentiality Agreement executed by the utility and all bidders to its RFP, which states in Section 3 that "Notwithstanding the foregoing or any other provisions of this Agreement, the Utility may share any Confidential Information with the Florida Public Service Commission or its Staff on an as needed basis." As a result, all bidders are on notice that FPUC may have to provide bidder information to the

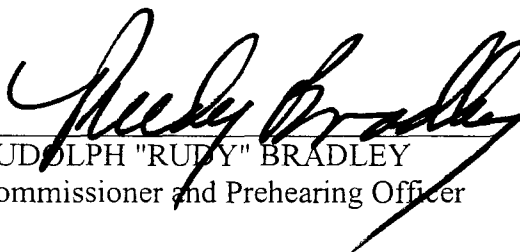
Commission Staff. Accordingly, FPUC's Motion for Protective Order is hereby denied, and FPUC is directed to provide responses to Staff Interrogatory Nos. 12, 13, 14, and 15, and Staff Request for Production of Documents Nos. 3, 4, 5, 6, 8, 9, 10, and 11 to the Commission Staff and OPC by 12:00 p.m. on Friday, November 4, 2005, at their respective offices in Tallahassee. FPUC's Motion is also denied with respect to any depositions that may be held.

Based on the foregoing, it is

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that Florida Public Utilities Company's Motion for Protective Order is hereby denied as set forth in the body of the Order. It is further

ORDERED that Florida Public Utilities Company shall produce the discovery responses discussed herein by 12:00 p.m. on Friday, November 4, 2005, to the Commission Staff and the Office of Public Counsel, at their respective offices in Tallahassee.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 3rd day of November, 2005.

  
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RUDOLPH "RUDY" BRADLEY  
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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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; or (2) 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 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.