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February 12, 1996

ORIGINAL
FILE COPY

Ms. Blanca S. Bayó, Director
Division of Public Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399

Re: Docket No. 960001-EI

Dear Ms: Bayó:

Please find enclosed the original and fifteen copies of the Comments of Destec Energy, Inc. to be filed by Destec in the above cited docket.

Also enclosed is a 3.5 inch double sided high density disk containing the Comments formatted in Wordperfect 5.1.

Thank you for your attention in this matter.

Sincerely,

Suzanne Brownless
Suzanne Brownless
Attorney for Destec Energy, Inc.

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EPSC-BUREAU OF RECORDS

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Fuel and Purchased Power) Docket No. 960001-EI
Cost Recovery Clause and Generating))
Performance Incentive Factor.) Filed: February 7, 1996
)

COMMENTS OF DESTEC ENERGY, INC.

Destec Energy, Inc. (Destec), a party to this docket and a participant in the Staff's January 31, 1996 A-Schedule Confidentiality Workshop, hereby files its comments on the issues related to the request by Florida Power and Light (FPL) to keep portions of its Florida Public Service Commission (FPSC) Schedule A filings confidential and states as follows:

1. FPL is seeking to keep portions of Schedules A4, A6, A6a, and A9 confidential pursuant to Rule 25-22.006, F.A.C., and §366.093, F.S. Material found by the FPSC to be "proprietary confidential business information" is exempt from disclosure under the Public Records Act, Chapter 119, Florida Statutes, and may be kept confidential by the FPSC.

2. "Proprietary confidential business information" must meet several criteria: 1) it must be owned or controlled by the utility; 2) it must be intended to be, and consistently kept, confidential by the utility; and 3) the disclosure of this information must be harmful to the ratepayers or the business operations of the utility. §366.093(3), F.S.

3. FPL has stated that the disclosure of the information it is seeking to keep confidential impairs its ability to be competitive, i.e., to buy and sell electric power on the wholesale market at the lowest and highest possible prices, respectively.

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FPSC-RECORDS/REPORTING

FPL goes on to argue that the profit associated with the wholesale transactions disclosed in the A Schedules are shared either completely or 80% with its jurisdictional customers and therefore its ratepayers are adversely affected when FPL loses a wholesale customer.

4. In analyzing FPL's request two broad areas must be addressed: the policy implications of granting the request and the statutory criteria found in §366.093, F.S. The policy implications are: 1) the strong presumption expressed in the Public Records Act, Chapter 119, F.S., that the information used by state agencies to regulate businesses be available to the general public and 2) the federal policy as enumerated in the Energy Policy Act of 1992 (EPACT), Public Law 102-486, 106 Stat. 2776 (1992), that competition at the wholesale level will produce lower costs for ratepayers and should be encouraged.

Statutory criteria

5. With regard to the first criteria found in §366.093(3), F.S., all of the information which FPL seeks to keep confidential has been developed by the utility from assets controlled by it with the possible exception of the Scherer Unit 4 data found on the A4 Schedule which is controlled equally by Georgia Power Company.

6. With regard to the second criteria, there is no reason to doubt FPL's statement that it treats this information confidentially in the routine course of business and does not disclose this information to third parties who call requesting it. However, in analyzing this criteria two additional questions must

be asked: 1) is the information which FPL seeks to keep confidential available from other public sources in the same detail or substantially the same detail and 2) can the information which FPL seeks to keep confidential be calculated from information available from other public sources. If either one of these answers is yes, the statutory criteria can not be met.¹

7. Schedule A4 (1), As Burned Fuel Cost (\$) - The unit specific amounts can be calculated using the fuel inventory information found on FPSC Schedule A-5 coupled with information available from FPSC Form 423, neither one of which FPL has sought to keep confidential. Plant specific data on fuel costs are also reported on FERC's Form 1 annually. Given the fact that heat rates for natural gas and coal units remain relatively constant absent some change in plant design, and are available from FERC Form 1, the per unit as burned fuel costs for each month can be accurately calculated from data available from many other sources. And, if the as burned fuel cost can be calculated, fuel cost per kwh (cents/kWH) (Column M) and cost of fuel (\$/unit) (Column N) can

¹ Destec understands that FPL does not agree with this statement of the law. FPL stated at the workshop that it "had to start somewhere" and that the availability of this information in FERC Form 1s, in FERC and FPSC Form 423s, on the Florida Broker and simply by asking the potential buyer should not influence the FPSC's decision on confidentiality. Indeed, FPL stated that the Florida Broker had already restricted the type of information it made public and that FPL would soon petition the FERC to do the same. Unfortunately, case law is very specific in this area and statutory exemptions from disclosure under the Public Records Act do not apply if information has already been made public. Staton v. McMillan, 597 So.2d 940 (Fla. 1st DCA 1992); review dismissed, 605 So.2d 1266 (Fla. 1992).

also be easily calculated using the information found on Schedule A4. This information is readily available and should not be classified as confidential.

8. It should also be noted here that the information on the St. Lucie and Turkey Point nuclear units should not be kept confidential. These units, when operational, produce the cheapest power on FPL's system and thus should consistently be the first base load units dispatched. As such, the capacity associated with these units should always be totally unavailable for wholesale transactions, and therefore, not subject to the pressures of the marketplace which lead FPL to file its request in this proceeding.

9. Power Sold - Schedule A6 and 6a

A quick review of the entities to whom power is sold reveal that of entities listed, all but 3 are municipals or electric cooperatives. All Florida municipal electric utilities are subject to the provisions of the Public Records Act , Chapter 119, F.S., which requires that this type of information in the detail reported on the schedule be revealed to the general public upon request.

10. Mr. Dick Basford, a former manager at the Jacksonville Electric Authority, verified that this information was available on a daily basis simply by FAXing a request for it. Oglethorpe Power Corporation and the Seminole Electric Cooperative (SEC) are also required by federal law to reveal this type of information to the extent that they accept funding from the Rural Electric Cooperation. Further, Oglethorpe Power's and the Southern Company's wholesale sale and purchase information is reported to

and available from the Georgia Public Utilities Commission.

11. Enron Power, a power marketer, did not indicate at the workshop whether it revealed its pricing in the same detail as that found on the A schedules which are the subject of FPL's confidentiality request. However, FERC requires all power marketers to file the following information on a quarterly basis: 1) a list of new interchange agreements entered into during the reporting period; 2) sales and purchases to or from any affiliated companies of the power marketer; 3) volume of sales; type of sale (firm, non-firm); location (interface); name of purchaser/seller and range of prices (high and low). For a single transaction, the price filed would be the exact transaction price. This information is not only filed with FERC but routinely reported by the trade press, e.g., the McGraw Hill publication Power Marketer's Week.

12. And, it would be almost impossible to imagine that if one called a power marketer, they would not reveal this information in order to effectuate additional sales. This information is also currently available from the Florida Broker at least to the buyer and seller with regard to any one transaction.

13. Power Purchased - A9

Again, with regard to the municipalities and the cooperatives, this information is available under the Public Records Act and federal mandates. The information concerning the Southern Companies, Oglethorpe Power and Municipal Electric Authority of Georgia is available from the Georgia Public Utilities Commission. Column 6(a) and (b) information can be calculated using the A4

schedule information plus estimated dispatch data. That being the case, most of the information in Column 7 can also be derived.

14. In sum, virtually all of the information that FPL is requesting be kept confidential is either available upon request from the buying or selling party or can be accurately calculated from readily available data already in the public domain. When reduced to its essence, FPL is simply complaining about the fact that it is required to compile this data in an easy to use format, i.e., that it has to hand over this data to other power wholesalers on "a silver platter." While one can understand FPL's chagrin, however, this fact does not change the §366.093 statutory criteria for confidential proprietary business information.

Public Policy Issues - Public Records Act

15. The intent of the Public Records Act is clearly stated in §119.01(1), F.S., "It is the policy of this state that all state, county, and municipal records shall be open for personal inspection by any person." The Florida Public Service Commission is listed specifically as an "agency" subject to the Public Records Act . §119.011(2), F.S. Exemptions from the Public Records Act are found in §119.07, F.S., and do not include the type of information which FPL is seeking to keep confidential in this proceeding. Case law indicates that exemptions from disclosure should be construed narrowly and limited to their designated purpose. Barfield v. City of Ft. Lauderdale Police Department, 639 So.2d 1012 (Fla. 4th DCA 1994). And that statutory exemptions from disclosure under the Public Records Act do not apply if information has already been

made public. Staton v. McMillan, 597 So.2d 940 (Fla. 1 DCA 1992); review dismissed, 605 So.2d 1266 (Fla. 1 DCA 1993). Thus, the only basis upon which FPL can request and be granted confidentiality for this material is pursuant to §366.093, F.S., which as an exemption to the requirements of the Public Records Act should be construed narrowly.

16. John McWhirter on behalf of the Florida Industrial Power Users Group (FIPUG) stated that his clients, large industrial customers, wanted to continue to have access to the information found in the A4, A6 and A Schedules so that they could evaluate FPL's marketing efforts, i.e., make some comparisons. One such comparison would be to compare the wholesale price at which FPL sold its power with the retail price FPL charged for power during the same month. Stated simply in this analysis, FIPUG wants to assure itself that FPL is using its cheapest generation on its own system and not selling it to the wholesale market leaving large customers to pay for the more expensive generation which remains. Another calculation is to compare the price of FPL's own generation with the wholesale purchase prices since FPL should be buying power when cheaper wholesale power is available. Every customer should also be interested in the "spread" between what FPL's cost of production is and what concurrent wholesale prices are. If there is a significant difference, what are the factors which contribute to that difference?

17. FPL's response to this legitimate concern on the part of FIPUG is that this information will continue to be available to the

FPSC Staff. However, the Public Records Act does not condone the substitution of the evaluation of agency staffers for that of private citizens. In every instance some agency has the information available for its review or it would not be subject to the Public Records Act in the first place.

18. FPL also conceded in the workshop that "some industrial clients" really needed this information and FPL had provided it to those clients on a limited basis subject to the execution of nondisclosure agreements. Neither the Public Records Act or §366.093 make FPL or any other private corporation the judge over what and to whom information used in the regulation of its business is revealed. Destec would suggest that any FPL customer, not just selected large industrial customers, has the right to be assured that FPL is providing service at the most economic price.

19. Given the statutory law cited above and the clearly expressed legislative intent in this area, FPL's arguments for confidentiality should be rejected as contrary to the public policy underlying the Public Records Act.

EPACT

20. Destec Energy, Inc. is an independent, non-utility developer of cogeneration and independent power projects. Destec currently has 19 projects in operation totaling 2900 MW, including the Tiger Bay Cogeneration (Tiger Bay) a facility in Polk County, Florida. As an independent power producer and power marketer, Destec is a competitor of FPL, as well as a potential supplier of electrical energy and capacity to FPL. Additionally, Tiger Bay is

a supplier of electrical energy and capacity to Florida Power Corporation (FPC) pursuant to a long-term contract which utilizes Tampa Electric Company's (TECO) Big Bend Unit 4 fuel prices in the calculation of energy payments due to Tiger Bay. Therefore, Destec and Tiger Bay closely monitor the prices that FPL, FPC and TECO pay for both wholesale power and for fuel to ensure that Tiger Bay is appropriately compensated under the terms of its power sales agreement and to monitor its relationship to the current wholesale market.

21. One of the basic policy thrusts of EPACT is to stimulate competition at the wholesale level by the creation of Exempt Wholesale Generators (EWGs), Power Marketers and other independent wholesalers and giving those wholesalers access to transmission facilities. In order to implement this competitive market, FERC has determined that information about transmission prices and availability must be widely disseminated.²

22. Reduced to the basics, Congress has made two national policy decisions: that a competitive wholesale market is good for ratepayers and that a wholesale market can't develop or thrive unless pricing information is available to everyone who wishes to participate in that market.

23. In applying this national energy policy to Florida a bit

²This is exemplified by the concept of Real Time Pricing and prohibitions against a utility giving its affiliated power marketer information on the availability of transmission which is not also available simultaneously to every other power marketer or EWG.

of history is necessary. FPL states that it wishes to keep this information secret in order to get the "best deal" for its ratepayers with whom it shares the profit realized from wholesale transactions. But why is this sharing arrangement in place since the FPSC doesn't regulate wholesale sales? It is in place because the facilities, both generation and transmission, which are used to produce this wholesale power are totally in rate base. There is no "used and useful" percentage applied to FPL's plants many of which were admittedly "oversized" at the time constructed but put completely into rate base to take advantage of "economies of scale" and to meet Florida's anticipated increasing demand for electricity.

24. FPL's demand for confidentiality is really a request to allow a regulated utility to utilize assets constructed to serve, and paid for by, captive, core customers to "compete" against non-utility entities who are not provided the same rate of return and rate base protections. It might be true that in the short run such core customers benefit from fuel savings engendered by this type of "subsidized competition", but in the long run competition is harmed to the ultimate detriment of all electric customers. To then compound the harm of continuing to provide regulatory protections to the utility by not even allowing the customers which supposedly benefit to verify that benefit for themselves, is even more inappropriate.

25. Destec does not desire to remove or keep competitors from the wholesale marketplace. However, Destec does believe that

competition should take place on a "level playing field". Non-utility competitors do not have the luxury of sticking core customers with fixed costs, and pricing/competing only to recover variable operating expenses. Neither should traditional utilities. If traditional utilities desire to compete in the new marketplace, they should be allowed to do so - as exempt wholesale generators or power marketers themselves. And as exempt wholesale generators or power marketers, they would be required by FERC to reveal the very information they now seek to keep confidential. Of course, to secure approval of such activity, FPL would have to show lack of market power and ensure open, comparable access to their common-carrier transmission system. This might explain why FPL desires to continue to "compete" under the umbrella of regulation.

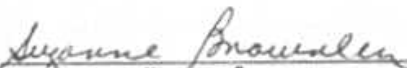
26. A viable wholesale market will develop nationally as electricity becomes traded on the exchanges as a commodity and commodity indices are established. Many industry analysts believe that these indices will be established this year.³ The FPSC should not be a party to depriving the State of Florida of the benefits of the developing wholesale market for electricity. That is bad public policy; both for electric power customers and the continued economic health of the state.

WHEREFORE, Destec Energy, Inc. would request that the Commission deny the request of Florida Power and Light Company that selected information contained in Schedules A4, A6, A6a and A9 be

³ The New York Mercantile Exchange recently received approval to offer electricity commodity futures contracts.

found to be "confidential proprietary business information" under §366.093, F.S. Further, Destec requests that the Commission provide clear guidance to electric industry participants that competition is the watchword of the day in the electric industry. And, that Florida's electric customers will receive the benefits of competition through the continued efforts of the Commission.

Respectfully submitted this 12 day of February, 1996 by:


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Attorney for Destec Energy, Inc.

c:1458

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Comments of Destec Energy, Inc. filed in Dcokst No. 960001-EI on behalf of Destec Energy has been furnished by U.S. Mail or Hand Delivery (*) this 12th day of February, 1996 to the following individuals:

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