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December 6, 1999

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By Hand Delivery

ORIGINAL

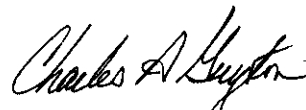
Re: Docket No. 991462-EU

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") in Docket No. 991462-EU are the original and fifteen (15) copies of Florida Power & Light Company's Motion for Protective Order.

If you or your staff have any questions regarding this filing, please contact me.

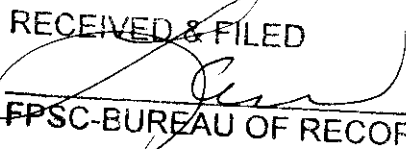
Very truly yours,



Charles A. Guyton

Enclosure  
cc: Parties of Record

- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_
- EAG \_\_\_\_\_
- LEG \_\_\_\_\_
- MAS 3
- OPC \_\_\_\_\_
- RRR \_\_\_\_\_
- SEC I
- WAW \_\_\_\_\_
- OTH \_\_\_\_\_

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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

14846 DEC-6 99

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In re: Petition for Determination )  
of Need for an Electrical Power )  
Plant in Okeechobee County by )  
Okeechobee Generating Company, )  
LLC )  
\_\_\_\_\_ )

DOCKET NO. 991462-EU

Filed: December 6, 1999

**FLORIDA POWER & LIGHT COMPANY'S  
MOTION FOR PROTECTIVE ORDER**

Florida Power & Light Company (FPL), pursuant to Rules 25-22.006(6) and 28-106.206 of the Florida Administrative Code (F.A.C.) and Fla. R. Civ. P. 1.380, moves for a Protective Order regarding Interrogatory No. 54 of Okeechobee Generating Company, LLC's (OGC's) First Set of Interrogatories (Nos. 1-85), and in support thereof states:

1. On November 5, 1999, OGC served its First Set of Interrogatories (Nos. 1-85) on FPL. On November 15, 1999, FPL filed its Objections to OGC's First Request for Production of Documents, First Set of Interrogatories and First Request for Admissions. In that response, FPL objected that Interrogatory No. 54 seeks confidential business information. In compliance with Fla. R. Civ. P. 1.280(c)(7), FPL further indicated that it would move for a protective order, if FPL withheld documents or information on that basis.
2. On December 6, 1999, FPL served its Responses to OGC's First Set of Interrogatories. FPL answered each of OGC's interrogatories fully, with the sole exception of Interrogatory No. 54. In that interrogatory, OGC asks:

Do any of FPL's affiliate or parent corporations, including but not limited to FPL Energy, Inc., have plans to develop, own or operate merchant power plants outside the state of Florida? If the answer is yes, please list the name of the merchant power plants, the size and configuration of the Merchant Power Plants, the location of the Merchant Power Plants and the owners of the Merchant Power Plants.

DOCUMENT NUMBER-DATE

14846 DEC-6 99

FPSC-RECORDS/REPORTING

FPL's response to Interrogatory No. 54 confirmed that an affiliate has plans to develop, own and/or operate merchant power plants outside of the state of Florida. However, consistent with its earlier-filed objections, FPL now moves for a Protective Order regarding the remainder of Interrogatory No. 54 (*i.e.*, the portion of the interrogatory requesting details about the name, size, configuration, location and owners of merchant power plants that an affiliate has plans to develop, own and/or operate outside of the state of Florida) on the basis that: (i) any response will require FPL to reveal confidential information regarding its parent's or affiliates' future business plans to a competitor, thereby causing significant harm to the economic interests of FPL's parent or affiliates, and (ii) the information sought has no bearing on this proceeding and is therefore not reasonably necessary to OGC.

3. Confidential business information is privileged under section 90.506, Florida Statutes, which provides:

A person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice. When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require. The privilege may be claimed by the person or the person's agent or employee.

Fla. Stat. § 90.506; *see also* Fla. Stat. §366.093.<sup>1</sup> This statute is implemented by Florida Rule of Civil Procedure 1.280(c)(7), which allows a tribunal to order “that a trade secret or

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<sup>1</sup> State law rules of privilege apply in administrative proceedings to the same extent as in civil actions under Florida law. Rule 28-106.213(4), F.A.C.

other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.”<sup>2</sup>

4. Under Fla. R. Civ. P. 1.280(c)(7), a party seeking to prevent disclosure of confidential trade secret information is directed to move for a protective order. *Eastern Cement Co. v. Dep’t of Env’tl. Reg.*, 512 So.2d 264 (Fla. 1st DCA 1987). Upon filing of such a motion and showing that the material at issue is in fact a confidential trade secret, the burden shifts to the opposing party to show a “reasonable necessity for the information.” *Eastern Cement*, 512 So.2d at 266; *Scientific Games, Inc. v. Dittler Bros., Inc.*, 586 So.2d 1128 (Fla. 1st DCA 1991). If there is no such “reasonable necessity” the confidential information will not be subject to discovery. *Id.*
5. The information requested by OGC falls squarely within the protections afforded by sections 90.506 and 366.093, Florida Statutes, and Rule of Civil Procedure 1.280(c)(7). *See, Inrecon v. Village Homes at Countrywalk*, 644 So.2d 103 (Fla. 3d DCA 1994) (confidential information about business operations is a protected trade secret). Disclosure of such information to OGC would cause significant economic injury to FPL’s parent or affiliates. In essence, the portion of Interrogatory No. 54 to which FPL has withheld response asks FPL to reveal the details of its affiliates’ nationwide business plans in the merchant power plant arena to the affiliate of a national competitor in the same line of business. *See, Everco Indus. v. OEM Products Co.*, 362 So.2d 204, 206 (N.D. Ill. 1973) (recognizing the importance of preventing disclosure to business competitors of confidential

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<sup>2</sup> Fla. R. Civ. P. 1.280 controls discovery issues in this proceeding under the Commission’s rules and the Uniform Rules of Administrative Procedure. Rules 25-22.006(6), 28-106.206 and 28-106.213(4), F.A.C.

information that is not material to the present litigation). Such disclosure would allow OGC and its affiliates to gain a significant competitive advantage over FPL affiliates by being privy to FPL's affiliates' prospective business plans. An answer to that portion of Interrogatory No. 54 would, in essence, also cause FPL to reveal the results of confidential research conducted to identify potentially profitable opportunities in the merchant power market and determine the best location, size and configuration of merchant power facilities, to a company that is obviously in a position to capitalize on such knowledge.

6. Moreover, by its terms, the information sought by OGC in Interrogatory No. 54 relates solely to power projects "outside the state of Florida," and therefore has no bearing on this proceeding. Such information cannot be considered reasonably necessary to OGC for this litigation. The determination of whether a party has a "reasonable necessity" to learn confidential trade secret information is to be made in light of the specific issues before the Commission in this proceeding. *Scientific Games*, 586 So.2d at 1131. The issue before the Commission is whether there is a need for OGC's Project in Florida. And, in deciding that issue, the Commission is expressly limited to considering "the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available." Fla. Stat. § 403.519. Each of these factors relates solely to the potential impact of the proposed facility on a specific utility in Florida. Thus, information regarding the details of FPL's affiliates' merchant power projects outside the state is immaterial to the issues in this docket and therefore not discoverable. *See, e.g., Inrecon*, 644 So.2d at 105 (confidential information not material to the litigation is not discoverable); *see also, In re Independent Serv. Orgs.*

*Antitrust Litig.*, 162 F.R.D. 355, 356 (D. Kan. 1995) (party seeking discovery of trade secrets must establish that relevance of and necessity for the information)

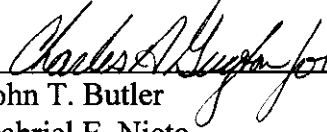
7. FPL recognizes that the typical convention for dealing with confidential information is to put in place limitations restricting its use to the present litigation. However, that approach is only proper where a showing of reasonable necessity for the information for the purposes of litigation has been shown. Based on the sheer lack of relevancy to the issues presented in this docket, FPL submits that OGC cannot meet this burden. *See, e.g., Inrecon*, 644 So. 2d at 105. Moreover, no protective measures that nonetheless permitted OGC to see the confidential information in question would be sufficient to protect the interests of FPL's affiliates. Revealing to OGC the details of any of FPL's affiliates' plans to build or operate merchant plants would necessarily cause FPL's affiliates significant economic injury. The fact that FPL's affiliates are considering entering the merchant power market in a particular state or geographic area would enlighten OGC and its affiliates to market opportunities of which they may not be aware, and allow them to take advantage of such opportunities to the detriment of FPL's affiliates.
8. FPL has conferred with counsel for the various parties regarding this Motion. Counsel for OGC has indicated that it objects to FPL's Motion. Counsel for Florida Power Corporation, LEAF and Tampa Electric Company have stated that they have no objection to the Motion. Counsel for Staff states that Staff has no position on the motion.

WHEREFORE, FPL requests that the Commission enter a Protective Order directing FPL not to answer that portion of OGC Interrogatory No. 54 that asks FPL to identify the name, size,

configuration, location and owners of merchant power plants that its affiliates may contemplate developing, owning and/or operating outside the state of Florida.

Respectfully submitted,

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By:   
John T. Butler  
Gabriel E. Nieto

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Motion was served by U.S. Mail or Hand Delivery (\*) this 6th day of December, 1999 to the following:

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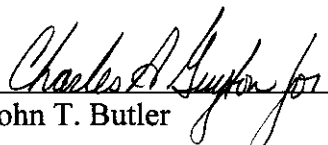
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