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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need of Hines Unit 2 Power Plant

Docket No.: 001064-EI

Submitted for Filing: October 20, 2000

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FLORIDA POWER CORPORATION'S MOTION FOR PROTECTIVE ORDER

Florida Power Corporation ("FPC" or the "Company"), pursuant to Section 366.093, Fla. Stats., Rule 25-22.006, F.A.C., and Florida Rule of Civil Procedure 1.280(c)(7), moves the Florida Public Service Commission ("PSC" or the "Commission") for a protective order providing that certain, limited confidential documents provided under seal to the Staff in response to Staff's Request for Documents to FPC and subject to FPC's Third Request for Confidential Classification need not be disclosed to an outside party, Panda Energy International, Inc. ("Panda"). Those documents, identified by bates numbers FPC179-210, contain proprietary, confidential contract information with another entity that is not a party to this proceeding and they have not been made public.

Introduction

The Commission Staff served on FPC certain discovery requests, including a request for the production of documents. In response to that request, FPC produced a number of documents only a portion of which was deemed confidential by the Company. The documents bearing bates numbers FPC179-210 are among the limited number of documents that FPC deems confidential.

FPC has sought, and there is presently pending before the Commission, a Third Request for Confidential Classification which includes a request for confidential classification of the documents bearing bates numbers FPC179-210.

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FPSC-RECORDS/REPORTING

At the time of the request and FPC's response to it, there was no other party to this proceeding besides FPC and the Commission Staff and Staff was obligated under the Order of Procedure in this proceeding to maintain the confidentiality of the documents that FPC classified as confidential. Further, the Commission Staff was obligated to return the confidential documents to FPC, whether or not FPC's Request for Confidential Classification with respect to them was granted, if Staff decided not to use them in the proceeding. Under the circumstances, and subject to such protections, FPC was willing to provide Staff with its confidential documents, including its confidential and proprietary contract information with others contained in the documents bearing bates numbers FPC179-210, subject to its Request for Confidential Classification and procedures protecting such information under that request, the Commission's rules, and the Order of Procedure in this proceeding.

Providing such information to an entity other than Staff, such as Panda, who is involved or is intent on involvement in the generation of power in the State of Florida and elsewhere is quite another matter. Certainly, such a party does not stand in the same position as the Commission and its Staff which, by definition, is impartial, neutral, and not an actual participant in the generation of power. Rather, there is a very real risk that such information, once disclosed, will provide an entity like Panda with contract and technical knowledge it otherwise would not have had and can use or build upon in the future, even if there is a confidentiality agreement in place with Panda. To be more blunt, Panda cannot "put the cat back in the bag" once such proprietary, contract information is made known to them; they will know it and that is reason enough to protect it from disclosure.

¹ By filing this motion, FPC in no way concedes that Panda is an appropriate party in this proceeding. Indeed, Panda has no right to intervene in this proceeding and FPC accordingly has moved for reconsideration of the Prehearing Officer's Order granting Panda's petition to intervene over FPC's objection.

For these reasons, as a practical matter FPC must protect its proprietary contract information with other entities who are not parties in this proceeding from disclosure to Panda. Accordingly, FPC moves for a protective order protecting from disclosure to Panda the confidential contract documents located at bates numbers FPC179-210.

Argument

Florida Rule of Civil Procedure 1.280(c)(7) provides that a protective order preventing the disclosure of trade secret or other confidential research, development, or commercial information is appropriate. Rule 1.280(c)(7), Fla. R. Civ. Pro. In this instance, the documents bearing bates numbers FPC179-210 should be protected from disclosure to Panda under that Rule.

There can be no dispute that the documents with bates numbers FPC179-210 contain proprietary, confidential commercial information. Those documents contain the confidential, proprietary contract data between FPC and its equipment supplier for the Hines 2 power plant. The contract and technical terms between FPC and its equipment suppliers certainly fit the statutory definition of proprietary confidential business information.

Subsection 366.093(1) provides that “any records received by the Commission which are shown and found by the Commission to be proprietary confidential business information shall be kept confidential” Proprietary confidential business information means information that is (i) intended to be and is treated as private, confidential information by the Company, (ii) because disclosure of the information would cause harm, (iii) either to the Company’s ratepayers or the Company’s business operations, and (iv) the information has not been voluntarily disclosed to the public. § 366.093(3), Fla. Stats. More to the point, contract information the “disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or

services on favorable terms” is specifically defined as proprietary confidential business information. § 366.093(3)(d), Fla. Stats. Accordingly, FPC’s documents bearing bates numbers FPC179-210 are entitled to protection under Section 366.093 and Rule 25-22.006, F.A.C.

Of course, the very purpose of FPC’s negotiations with its equipment suppliers is to obtain potentially favorable contract terms for FPC and its ratepayers. In order to negotiate and obtain such favorable terms, however, FPC must be able to assure potential suppliers that the terms of their negotiations and contracts will be kept confidential. Without the assurance of confidentiality for the negotiations and the terms of contracts with suppliers, the utility’s “efforts ... to contract for goods or services on favorable terms” will be impaired. §366.093, Fla. Stats.

Indeed, if such proprietary contract information is not kept confidential, and potential suppliers know that the negotiations and terms of their contracts or bids are subject to public disclosure, they will be less willing to make concessions on price, delivery, and other contract terms. (See Affidavit of Michael D. Rib in support of FPC’s Third Request for Confidential Classification, ¶ 13). Rather than make such concessions known to their competitors or other potential customers, thus impairing their ability to compete or negotiate more favorable terms in the future with other customers, they will refuse to negotiate with the Company on such terms at all. (Id.). Or, suppliers who otherwise would have submitted bids to, or entered into negotiations with, the Company might decide not to do so, if there is no assurance that their proposals would be protected from disclosure. (Id.). In either event, the Company will be able to obtain equipment or services only upon less favorable terms than it otherwise would have if the parties were assured that the terms of their negotiations or contract proposals would remain confidential.

For all these reasons, FPC has treated and continues to treat this information as confidential, especially its proprietary contract information. (Id. ¶ 12). Access to the information is restricted within FPC to those employees who need the information to perform their duties and responsibilities with the Company. At no time has such proprietary contract information ever been made public. (Id.).

Accordingly, for each of the foregoing reasons, FPC has requested confidential classification for the documents bearing bates numbers FPC179-210 produced, among others, by FPC in response to Staff's Request for Documents to FPC. FPC further requests, for the same reasons, that the Commission enter an order granting its Motion for Protective Order and preventing the disclosure of these documents to Panda.

No confidentiality agreement can prevent Panda from knowing the information contained in these documents if FPC is forced to disclose them to Panda. Such disclosure will invariably harm FPC and its ratepayers, for all the reasons provided above. Further, Panda should not be allowed the benefit of the knowledge of FPC's contract negotiations and terms when Panda has invested nothing in that knowledge and done nothing to earn it. The Commission has an obligation to protect such proprietary, confidential contract information from disclosure to Panda in order to preserve FPC's ability to obtain favorable contract terms for FPC and its ratepayers.

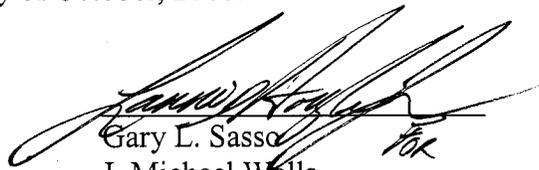
Moreover, Panda has not and cannot justify obtaining these specific documents in this proceeding. There is no issue with respect to the contract documents between FPC and its equipment supplier that must be resolved in this proceeding; the contract price is what it is and that much has been said by FPC and can be confirmed by Staff, without the need to use these documents in the proceeding. Accordingly, because of their proprietary and sensitive nature, and the fact that they are not determinative of any issue in this proceeding, FPC is entitled to a

protective order preventing the disclosure of the documents bearing bates numbers FPC179-210 to Panda in this proceeding.

Conclusion

FPC respectfully requests that the Commission grant its Motion for Protective with respect to the limited proprietary, contract documents located at bates numbers FPC179-210 and enter an order protecting those documents from disclosure to Panda.

Respectfully submitted this 24th day of October, 2000.



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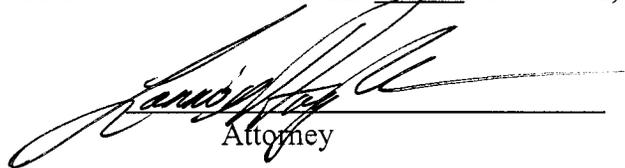
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been furnished by Facsimile and U.S. Mail to Deborah Hart, Esq., as counsel for the Public Service Commission, and Suzanne Brownless, Esq., as counsel for Panda Energy International, Inc., by U.S. Mail to all other interested parties of record as listed below on this 24th of October, 2000.


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