

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO. 010001-EI
ORDER NO. PSC-01-2122-PCO-EI
ISSUED: October 29, 2001

ORDER GRANTING IN PART AND DENYING IN PART
MOTION FOR PROTECTIVE ORDER

Pursuant to Order No. 01-1444-PCO-EI, issued July 5, 2001, Tampa Electric Company ("TECO") was ordered to respond to Interrogatory No. 11(e) from the Florida Industrial Power Users Group's ("FIPUG") First Set of Interrogatories to TECO (Nos. 1-23) and to provide daily reports from TECO's Historical Allocation Pricing ("HAP") program in response to Document Request No. 3 from FIPUG's First Set of Requests for Production of Documents to TECO (Nos. 1-6). The Order also afforded TECO the opportunity to file within seven days a motion for protective order describing with specificity the confidential nature of the information sought in these discovery requests, if TECO believed this information was confidential and if TECO wished to protect the information through a non-disclosure agreement.

On July 12, 2001, TECO filed a motion for protective order concerning the information sought in Interrogatory No. 11(e) and the HAP reports in response to Document Request No. 3. With respect to both discovery requests, TECO asserts that the information sought is sensitive, proprietary business information and asks the Commission to require a non-disclosure agreement assuring that this information will be treated confidentially. TECO requests that the non-disclosure agreement allow FIPUG's counsel and expert witness consultants to have access to this information but preclude FIPUG's members from having such access. In support of its motion, TECO filed the affidavit of Mr. William L. Brown III, the Director Wholesale Marketing and Sales of TECO.

On July 19, 2001, FIPUG filed its response to TECO's motion. FIPUG argues that the motion should be denied and that TECO should be required to immediately supply the information and documents requested without limitation.

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FPCO-DIVISION CLERK

A. POSITIONS OF THE PARTIES

Interrogatory No. 11(e)

FIPUG's Interrogatory No. 11(e) asks TECO to provide the incremental costs of each power purchase made on the day of, the day before, and the day after each interruption imposed on its retail interruptible customers during the years 1998-2001.

In its motion, TECO states that its incremental cost of power purchases is the actual price it pays for such purchases. TECO asserts that "[t]his pricing information is sensitive, proprietary business information relating to Tampa Electric's participation in the highly competitive wholesale electric power market in this state, the disclosure of which would impair the competitive business interests of Tampa Electric." TECO asserts that unlike other regions of the country where prices are indexed and published, the Florida market is completely private and non-published. Accordingly, TECO contends, any information concerning the "costs, operating characteristics, negotiated or offered prices, or other similar information" of a market participant is valuable to competitors.

TECO asserts that disclosure of the price it pays for purchased power for any given hour discloses the fact that TECO could not produce the needed power during that time frame at a lower cost. TECO claims that this can be used by its competitors and potential wholesale customers "to model Tampa Electric's system and to define the threshold of Tampa Electric's incremental cost of power production on an hour-by-hour basis." TECO further asserts that public disclosure of this information would allow "potential sellers of electricity to predict what TECO would be willing to pay for power under any given set of circumstances", thus allowing those sellers to target a higher price to TECO than they might otherwise offer.

In its motion, TECO notes that FIPUG offered to sign a confidentiality agreement for this information from the past 18 months but objected to protecting information from 1998 and 1999 on the basis that such information was stale. TECO asserts that the information from 1998 and 1999 is still sensitive because "the physical makeup of Tampa Electric's system, system operations and

incremental production costs have not changed significantly since the beginning of 1998."

TECO contends that it is "very likely" that FIPUG seeks this information to be deemed nonconfidential so that FIPUG members who compete with TECO in the wholesale market may use it to their advantage in that market. TECO alleges that many of FIPUG's members are active participants in the wholesale power market in Florida. Thus, TECO requests that the Commission require a non-disclosure agreement that allows FIPUG's counsel and expert witness consultants to access this information but precludes FIPUG's members from seeing this information.

In its response, FIPUG asserts that the information it seeks in Interrogatory No. 11(e) is critical to assess whether TECO is selling lower price power in the wholesale market then purchasing higher priced power to serve its retail customers. FIPUG states that it offered, "in a spirit of compromise," to sign a protective agreement for the information from 2000 and 2001, although not one that would preclude its members from reviewing that information. FIPUG contends that the information from 1998 and 1999 is outdated, could not be useful to competitors, and should not be protected from public disclosure.

FIPUG states that TECO, in its motion, never explains how the incremental cost information for 1998 and 1999 could be used by others to model TECO's system. FIPUG further states that "[g]iven changes in weather, fuel prices, operating conditions ... it is difficult to understand how information that is years old could be relevant to today's market or of any help to those who participate in that market." Finally, FIPUG asserts that precluding its members from reviewing this information would hamper its ability to prepare for hearing because counsel for FIPUG must have the assistance of its members in preparing for hearing.

Document Request No. 3

FIPUG's Document Request No. 3 states:

Order No. PSC-97-1273-FOF-EI, ordered that "TECO shall credit its Fuel Clause with the system incremental fuel costs associated with the FMFA and Lakeland sales. In

addition TECO shall document how the incremental fuel costs are calculated in its fuel adjustment filings." Provide the documentation used during the period that TECO sold power from generation in the TECO rate base.

In response to this request, TECO offered to allow FIPUG to review TECO's HAP reports for the period, subject to a non-disclosure agreement, although TECO did not believe those documents were directly responsive to the request.

In its motion, TECO asserts that the HAP reports contain "detailed hourly incremental cost information" and are thus subject to the same confidentiality justification set forth with respect to Interrogatory No. 11(e). TECO further asserts that "the HAP reports contain actual hour-by-hour pricing quotes and all of the detailed system operations information used to develop [these] quotes." According to TECO, this includes the incremental costs requested in Interrogatory 11(e) and "unit-by-unit generating characteristics and recent operational history" TECO asserts that disclosure of its hourly incremental cost of making wholesale power sales would enable its competitors making such sales to model TECO's system operations and the cost of these operations "within a very minor margin of error" to determine how to underbid TECO on a potential new sale. Further, TECO asserts that disclosure of this information would similarly enable potential wholesale customers, thus putting downward pressure on prices TECO is able to negotiate.

TECO asserts that public disclosure of the information contained in its HAP reports would harm its competitive interests and, in turn, reduce the benefits that flow to TECO's retail customers as a result of its participation in the wholesale power market in this state. TECO further asserts that the Commission has on many occasions recognized the sensitive nature of cost information relating to utilities, and their affiliates, who participate in competitive markets. Consistent with its request under Interrogatory 11(e), TECO asks the Commission to require a non-disclosure agreement that allows FIPUG's counsel and expert witness consultants to access the HAP reports information but precludes FIPUG's members from seeing these documents.

In its response, FIPUG challenges TECO's assertion that the Commission has recognized the sensitive nature of this type of information on several occasions, noting that TECO has provided no citation to prior Commission orders. FIPUG states that the only example provided by TECO was a ruling by former Commissioner Garcia that was not reduced to writing. Citing Order No. PSC-01-1444-PCO-EI, FIPUG points out that the Prehearing Officer found that because "that ruling, and the basis for it, were not reduced to writing, [it] provided little guidance for a determination of confidentiality in this proceeding."

B. ANALYSIS AND FINDINGS

Rule 1.280(c)(7), Florida Rules of Civil Procedure, allows issuance of protective orders to protect trade secrets or other confidential commercial information. When ruling on a motion for protective order involving commercial information, a two part test is used to decide if the information is discoverable. First, the movant, TECO, must demonstrate that the information sought is confidential by virtue of being a trade secret or some other type of confidential commercial information. See Order No. PSC-00-0291-PCO-EU, issued February 11, 2000, in Docket No. 991462-EU; Kavanaugh v. Stump, 592 So.2d 1231, 1232-3 (Fla. 5th DCA 1992); Inrecon v. The Village Homes at Country Walk, 644 So.2d 103, 105 (Fla. 3rd DCA 1994); Rare Coin-it v. I.J.E., Inc., 625 So.2d 1277 (Fla. 3rd DCA 1993). If the movant makes a showing that the information is confidential, the burden shifts to the opposing party, FIPUG, to establish that its need for the information outweighs the countervailing interest in withholding production. See Order No. PSC-00-0291-PCO-EU, issued February 11, 2000, in Docket No. 991462-EU; Inrecon at 105; Rare Coin-it at 1277; Higgs v. Kampgrounds of America, 526 So.2d 980, 981 (Fla. 3rd DCA 1988); Eastern Cement Corp. V. Dep't of Environmental Protection, 512 So.2d 264, 265-6 (Fla. 1st DCA 1987). Broad discretion is granted in balancing the competing interests of the parties and a wide variety of factors can be considered. See Fortune Personnel Agency of Ft. Lauderdale, Inc. v. Sun Tech Inc. of South Florida, 423 So.2d 545, 547 (Fla. 4th DCA 1982); Inrecon at 105.

Based upon the motion and supporting affidavit filed by TECO, the incremental cost information sought in Interrogatory No. 11(e) and the HAP reports that have been offered in response to Document

Request No. 3 are hereby found to be proprietary confidential business information as defined in Section 366.093(3), Florida Statutes. It appears that public disclosure of this information would impair TECO's competitive business in the wholesale power market and impair its efforts to contract for wholesale power on favorable terms.

FIPUG does not challenge the notion that this information is competitively sensitive. However, FIPUG does challenge TECO's assertions as to the length of time that this incremental cost information remains sensitive. As FIPUG argues, that information must become stale at some point. The only evidence put forward to suggest whether that point has been reached or not is found in the affidavit of Mr. William L. Brown in support of TECO's motion. In his affidavit, Mr. Brown asserts that incremental cost data from 1998 and 1999 is still competitively sensitive because there have been no significant changes to TECO's system configuration and operation since the beginning of 1998. Because there have been no significant changes, Mr. Brown asserts that this information could be used by competitors to take "an inside look" at TECO's operations, ultimately harming TECO's competitive interests. FIPUG suggests that changes in weather, fuel prices, and operating conditions should make the data from 1998 and 1999 outdated and no longer competitively sensitive.

Mr. Brown's statement is persuasive. If TECO's system configuration and operation has not changed significantly since the beginning of 1998, release of the incremental cost information sought in Interrogatory No. 11(e) and the HAP reports offered in response to Document Request No. 3 may still provide competitors and potential wholesale customers a competitive advantage. Accordingly, TECO's motion for protective order is granted to require FIPUG to enter into a non-disclosure agreement with TECO prior to gaining access to all of the incremental cost information sought in Interrogatory No. 11(e) and all of the HAP reports offered in response to Document Request No. 3.

One issue remains to be addressed: should the non-disclosure agreement preclude FIPUG's members from seeing TECO's response to Interrogatory No. 11(e) and the HAP reports provided in response to Document Request No. 3? As stated above, TECO asserts that many of FIPUG's members are active participants in the wholesale power

market in Florida and could thus use this information to gain a competitive advantage over TECO. Accordingly, TECO requests that the Commission require a non-disclosure agreement that allows FIPUG's counsel and expert witness consultants to access this information but precludes FIPUG's members from seeing this information. FIPUG asserts that its counsel must have the assistance of its members to adequately prepare for hearing. Thus, FIPUG contends, precluding its members from seeing this information would severely impair its ability to prepare for hearing.

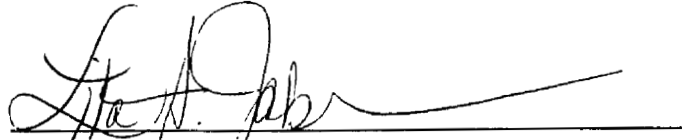
If any of FIPUG's members or their affiliates compete with TECO in the wholesale power market and if those FIPUG members are not precluded from seeing this information, some of the protection gained through the requirement of a non-disclosure agreement would be lost. However, allowing other members of FIPUG to see this information would not compromise the protection provided by a non-disclosure agreement. Accordingly, in this regard, TECO's motion for protective order is granted in part and denied in part as follows. The non-disclosure agreement required for FIPUG's access to the information sought in Interrogatory No. 11(e) and the HAP reports offered in response to Document Request No. 3 shall provide access for FIPUG's counsel, expert witness consultants, and all FIPUG members except (1) those FIPUG members who generate and sell electricity in the wholesale market in Florida and (2) those FIPUG members with affiliates who generate and sell electricity in the wholesale market in Florida.

Based on the foregoing, it is

ORDERED by Commissioner Lila A. Jaber, as Prehearing Officer, that Tampa Electric Company's motion for protective order is granted in part and denied in part, as set forth in the body of this Order.

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By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer,
this 29th day of October, 2001.



LILA A. JABER
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, 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

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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.