

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-01-2176-PCO-EI  
ISSUED: November 6, 2001

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

I. BACKGROUND

On June 20, 2001, Florida Industrial Power Users Group ("FIPUG") served its Second Set of Interrogatories (Nos. 24-33) to Tampa Electric Company in this docket. On July 20, 2001, Tampa Electric Company ("TECO") filed a Motion for Protective Order relating to Interrogatories Nos. 24(c) and 28 from FIPUG's Second Set of Interrogatories ("Motion for Protective Order"). On July 23, 2001, FIPUG responded to TECO's Motion for Protective Order.

Pursuant to Rule 28-106.206, Florida Administrative Code, this dispute is governed by Rules 1.280 through 1.400, Florida Rules of Civil Procedure.

II. POSITIONS OF THE PARTIES

Interrogatory No. 24(c)

FIPUG's Interrogatory No. 24(c) asks TECO to identify each firm contract to purchase capacity and energy to which TECO or any affiliate is or was a purchasing party for all currently effective contracts or contracts with effective dates on or before December 31, 2002. This interrogatory essentially updates Interrogatory No. 1 of FIPUG's First Set of Interrogatories. For each contract, TECO is asked to identify the selling entity; the amount of capacity and energy TECO or any affiliate purchased or purchases under the contract; the term (duration) of the contract; and a description of the nature of the obligation (take-and-pay vs. take or pay).

In its Motion for Protective Order, TECO states that this information reflects the market in which TECO currently participates and the terms of competitive transactions in which

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TECO has entered into in the current wholesale power market and, thus, is sensitive from a competitive standpoint. In support of its request, TECO states that it does not file information about purchase contracts with the Federal Energy Regulatory Commission or otherwise place this information in the public domain. TECO argues this information is confidential competitive or trade secret information as defined in Section 366.093(d) (information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods and services in favorable terms), and (e), Florida Statutes, (information relating to competitive interests the disclosure of which would impair the competitive business of the provider of the information).

TECO indicates that it is answering this interrogatory with the confidential information redacted and will provide the redacted information to FIPUG subject to FIPUG's execution of a non-disclosure agreement to protect any proprietary confidential business information from disclosure. The non-disclosure agreement would restrict the provision of information to FIPUG's counsel and consultants. TECO would exclude individual FIPUG members from access to the information "inasmuch as they are active participants in the wholesale power market in Florida themselves, and could use this information to the detriment of Tampa Electric and its retail customers."

In its response to TECO's Motion for Protective Order, FIPUG states that the reasons offered by TECO are substantially the same as those set out in a TECO motion for protective order filed July 12, 2001, in this docket. FIPUG indicates that it incorporates and adopts its response to TECO's July 12 motion in its response to this motion. FIPUG's argument in response to TECO's July 12 motion was that certain data sought for the period 1998-1999 was "stale", and, therefore, that disclosure of that information could not harm TECO's competitive interests. Thus, FIPUG argued that such information should not be treated as confidential. FIPUG also argued that the interrogatories in question sought information concerning the prudence of TECO's power purchases and, thus, were relevant to this docket. In addition, FIPUG argued against the requirement of a non-disclosure agreement that would prohibit its members from seeing the information. FIPUG asserted that without

the assistance of members, FIPUG would be severely hampered in its ability to prepare for hearing.

Interrogatory No. 28

Interrogatory No. 28 requests that TECO provide the amount of energy it purchased for interruptible customers in lieu of interruption, the average cost of such purchases, and a list of the entities from whom this power was purchased for interruptions imposed on retail non-firm customers for the years 1998, 1999, 2000, and 2001.

TECO again states that an answer to this request for market information would include more detail than TECO has provided in the public domain and would include pricing information which is highly sensitive trade secret information, public disclosure of which would be harmful to the competitive interests of TECO and to the interests of its retail customers. FIPUG's arguments in response are set forth above, in the discussion concerning Interrogatory No. 24(c).

III. 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; Kavanagh 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.

As stated above, Interrogatory No. 24(c) asks for an update of the information sought in FIPUG's Interrogatory No. 1 to TECO in this docket. The type of information sought is identical. Discovery of the information sought in Interrogatory No. 1 has been addressed in this docket, in Order No. PSC-01-1444-PCO-EI, issued July 5, 2001. That Order provided, in pertinent part:

[I]n an effort to balance FIPUG's interest in obtaining the requested information with TECO's concerns over the sensitive nature of the information, any responsive information concerning transactions between TECO and a TECO affiliate or between a TECO affiliate and a party other than TECO shall be provided pursuant to a non-disclosure agreement, the terms of which shall be determined by the parties to this dispute. The non-disclosure agreement shall be designed to prevent the disclosure of information to entities whose knowledge of this information may harm the competitive interests of TECO or an affiliate of TECO.

In addition, the question of whether a non-disclosure agreement should preclude FIPUG's members from seeing competitively sensitive information from TECO was addressed in this docket in Order No. PSC-01-2122-PCO-EI, issued October 29, 2001. That Order states, in pertinent part:

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. . . . The non-disclosure agreement required for FIPUG's access to the information sought . . . 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.

Consistent with these two Orders, TECO's motion for protective order is granted as it relates to Interrogatory No. 24(c). Prior to having access to the information sought in this interrogatory, FIPUG shall execute an appropriate non-disclosure agreement. The non-disclosure agreement 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.


TECO's Motion for Protective Order is granted in part and denied in part with respect to Interrogatory No. 28. Although TECO asserts that the information sought in this interrogatory is sensitive pricing information "very similar in nature" to the information that was the subject of its July 12, 2001, motion for protective order, only the portion of the interrogatory which seeks average cost data for purchases made during interruptions appears to be similar. TECO offers no explanation of how disclosure of the amounts of energy purchased and the names of the suppliers of that energy - information not concerning pricing or cost to TECO - would harm its competitive interests or qualify as trade secrets. Accordingly, TECO shall provide to FIPUG within five business days the amounts of energy purchased and the names of the suppliers of that energy sought in Interrogatory No. 28. Prior to having access to the average cost information sought in this interrogatory, FIPUG shall execute a non-disclosure agreement on the terms set forth above.

Based on the foregoing, it is

ORDERED 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 6th day of November, 2001 .

  
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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.

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 25-22.038(2), 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 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

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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.