

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of

PETITION TO DETERMINE NEED FOR
AN ELECTRICAL POWER PLANT IN
MARTIN COUNTY BY FLORIDA
POWER & LIGHT COMPANY.

DOCKET NO. 020262-EI

PETITION TO DETERMINE NEED FOR
AN ELECTRICAL POWER PLANT IN
MANATEE COUNTY BY FLORIDA
POWER & LIGHT COMPANY.

DOCKET NO. 020263-EI

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PROCEEDINGS: ORAL ARGUMENT

BEFORE: COMMISSIONER J. TERRY DEASON
Prehearing Officer

DATE: Friday, May 3, 2002

TIME: Commenced at 9:35 a.m.
Concluded at 10:13 a.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: TRICIA DeMARTE
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4 BONNIE DAVIS, 215 South Monroe Street, Suite 810, Tallahassee,
5 Florida 32301, appearing on behalf of Florida Power & Light
6 Company.

7 JOSEPH A. McGLOTHLIN, McWhirter, Reeves, McGlothlin,
8 Davidson, Dekker, Kaufman, Arnold & Steen, 117 South Gadsden
9 Street, Tallahassee, Florida 32301, appearing on behalf of
10 Reliant Energy Power Generation, Inc.

11 ROBERT SCHEFFEL WRIGHT and DIANE K. KIESLING, Landers
12 & Parsons, P.A., 310 West College Avenue, Tallahassee, Florida
13 32301, appearing on behalf of Calpine Energy Services, L.P.

14 SUZANNE BROWNLESS, 1311-B Paul Russell Road, Suite
15 201, Tallahassee, Florida 32301, appearing on behalf of Mirant
16 Corporation.

17 JON C. MOYLE, JR., Moyle, Flanigan, Katz, Raymond &
18 Sheehan, P.A., 118 North Gadsden Street, Tallahassee, Florida
19 32301, appearing on behalf of CPV Cana, Ltd., and CPV
20 Gulfcoast, Ltd.

21 CAROL A. LICKO, Hogan & Hartson, L.L.P., 1111
22 Brickell Avenue, Suite 1900, Miami, Florida 33131, appearing on
23 behalf of AES Coral.

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1 APPEARANCES CONTINUED:

2 JAMES D. BEASLEY, Ausley & McMullen, 227 South
3 Calhoun Street, Tallahassee, Florida 32301, appearing on behalf
4 of Tampa Electric Company.

5 KAREN D. WALKER, Holland & Knight, L.L.P., 315 South
6 Calhoun Street, Suite 600, Tallahassee, Florida 32301,
7 appearing on behalf of South Pond Energy Park, L.L.C.

8 JAMES A. MCGEE, Associate General Counsel, Progress
9 Energy Service Company, L.L.C., Post Office Box 14042,
10 St. Petersburg, Florida 33733-4042, appearing on behalf of
11 Progress Ventures, Inc.

12 MARTHA CARTER BROWN and LAWRENCE HARRIS, FPSC General
13 Counsel's Office, 2540 Shumard Oak Boulevard, Tallahassee,
14 Florida 32399-0850, appearing on behalf of the Commission
15 Staff.

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P R O C E E D I N G S

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2 COMMISSIONER DEASON: Call this oral argument to
3 order. Could I have a -- do we have a notice to read?

4 MS. BROWN: Yes, Commissioner, we do. By notice
5 issued April 26, 2002, this time and place was set for an oral
6 argument on various procedural motions, more specifically, the
7 motions for protective order and the joint motion for entry of
8 order governing handling and disclosure of information asserted
9 to be confidential.

10 COMMISSIONER DEASON: Okay. Take appearances.

11 MS. LICKO: My name is Carol Licko, attorney with
12 Hogan & Hartson in Miami, Florida. I'm here today on behalf of
13 AES Coral. We are not an intervenor in this case and therefore
14 are a nonparty, but we have filed a motion for protective
15 order.

16 COMMISSIONER DEASON: Okay. And could I have your
17 last name, please, and spell that.

18 MS. LICKO: Yes, sir. It's Licko, L-I-C-K-O.

19 COMMISSIONER DEASON: Okay. Thank you.

20 MR. McGEE: Jim McGee, Post Office Box 14042,
21 St. Petersburg. I'm appearing today on behalf of Progress
22 Ventures, a wholly-owned subsidiary of Progress Energy, also a
23 nonparty to the proceeding who has submitted a motion for a
24 protective order.

25 MR. BEASLEY: I'm James D. Beasley with the law firm

1 of Ausley & McMullen in Tallahassee. I represent Tampa
2 Electric Company, a nonparty who has filed a motion for
3 protective order.

4 MS. DAVIS: Bonnie Davis on behalf of Florida Power &
5 Light Company, and also here today is Charlie Guyton, Steel,
6 Hector & Davis, on behalf of Florida Power & Light Company.

7 COMMISSIONER DEASON: Okay. And you're a
8 nonintervenor; is that correct?

9 (Laughter.)

10 MS. WALKER: Karen Walker with Holland & Knight
11 representing South Pond Energy Park, which is an intervenor in
12 this case.

13 MR. McGLOTHLIN: Joe McGlothlin of the McWhirter,
14 Reeves law firm. I appear for intervenor Reliant Energy Power
15 Generation, Inc.

16 MS. BROWNLESS: Suzanne Brownless, 1311-B Paul Russel
17 Road, Tallahassee, Florida. I'm here today representing
18 Mirant, who is an intervenor in this docket.

19 MR. WRIGHT: Robert Scheffel Wright and Diane K.
20 Kiesling of the Landers & Parsons law firm, 310 West College
21 Avenue, Tallahassee, appearing on behalf of Calpine Energy
22 Services, L.P., an intervenor in the need determination cases.

23 MR. MOYLE: Jon Moyle, Jr., from the Moyle, Flanigan
24 law firm here in Tallahassee appearing on behalf of CPV Cana,
25 which has been granted intervenor status in the case, and also

1 appearing on behalf of CPV Gulfcoast, which has a pending
2 petition to intervene.

3 COMMISSIONER DEASON: I'm sorry, your second client?

4 MR. MOYLE: CPV Gulfcoast.

5 COMMISSIONER DEASON: Oh, Gulfcoast. Okay. And you
6 have filed an intervention request for Gulfcoast; is that
7 correct?

8 MR. MOYLE: That's right, that's pending, but the one
9 for CPV Cana has been ruled on, and we are a party as Cana.

10 COMMISSIONER DEASON: Okay.

11 MS. BROWN: Martha Carter Brown and Larry Harris on
12 behalf of the Florida Public Service Commission.

13 COMMISSIONER DEASON: Well, I'm impressed that on a
14 Friday morning that we can have an oral argument, and we have
15 all of the who's who to come out and be with us today. This is
16 quite impressive.

17 Ms. Brown, do you have a suggested order of procedure
18 that we follow this morning?

19 MS. BROWN: Well, the motions are interrelated,
20 Commissioner, but it seems to me that one way to start would be
21 to deal with the motions for protective order, if you would
22 like. It's really up to you.

23 COMMISSIONER DEASON: Well, that suits me fine unless
24 there's someone who can suggest a better alternative. Hearing
25 nothing, we'll proceed in that manner.

1 Ms. Brown, who should we hear from first?

2 MS. BROWN: AES Coral filed theirs first and then
3 TECO and then Florida Progress. I suppose they could decide
4 who they would like to go first.

5 COMMISSIONER DEASON: Ms. Licko.

6 MS. LICKO: Yes, sir, I'm happy to lead off. On
7 behalf of AES Coral, sir, we have filed a motion for protective
8 order. Our motion was predicated on the fact that we knew this
9 docket was proceeding and that the intervenors were interested
10 in obtaining the bids from the August 31st RFP.

11 An intervening event has occurred here in that FP&L
12 has now issued a supplemental RFP which, in our view, makes our
13 motion for protective order even far more compelling because at
14 this point it looks like parties will have access to the bids
15 while the nonintervening bidders are still trying to submit new
16 bids, would -- certainly would put AES Coral at an extreme
17 competitive disadvantage in this proceeding at this point in
18 time. To everybody's credit, I think many of the intervenors
19 recognize that, and why I think our motion when we filed it was
20 extremely controversial and certainly would have been opposed.

21 I'm not so sure from the responses that I've read and
22 in my conversations with other counsel this morning that there
23 is really a large objection to some sort of motion for
24 protective order being entered at this point in time as to
25 those parties who have chosen not to intervene at this point in

1 time but who don't want their bids disclosed at this point in
2 time given the fact that there is a new RFP out there.

3 COMMISSIONER DEASON: Let me interrupt you just a
4 second. Now, I've read the responses from South Pond, Reliant,
5 and Mirant, and I take it that there is no objection to the
6 Commission entering a protective order as it relates to the
7 nonintervening bidders' bid information that was filed with the
8 first RFP; correct?

9 MS. LICKO: I think you're correct, sir. I think the
10 one point, if I could add there, there seems to be some
11 confusion, and maybe it's my misunderstanding. My
12 understanding in this process all along has been that the only
13 parties who would ever have access to the confidential
14 information would be those who did two things: Number one,
15 agreed to sign the confidentiality agreement, and number two,
16 became intervenors in the proceedings.

17 Some of the intervenors seem to think that all we had
18 to do was to sign the confidentiality agreement. My
19 understanding of these proceedings would be, unless AES decided
20 to formally intervene, which at this point they're not
21 interested in doing, that we could never get access to that
22 other information. So that's the only issue I sort of see, and
23 that may simply be a misunderstanding of these proceedings.
24 But, no, as far as the motion for protective order, I don't
25 sense any strong opposition to it.

1 COMMISSIONER DEASON: Okay. You may proceed. I
2 didn't mean to interrupt, or have you concluded?

3 MS. LICKO: I think with that, yes, that's all I
4 would have to say.

5 MR. BEASLEY: Tampa Electric Company is in the same
6 posture. We filed our motion; it's supported by an affidavit.
7 I don't think there's any opposition to our request for
8 protective order unless someone can correct me in that regard.

9 MR. MCGEE: And, Commissioner Deason, I think
10 Progress Ventures is in exactly that same posture. I have been
11 advised by Mr. Wright on behalf of Calpine that his client
12 imposes no objection on granting the relief requested by our
13 motion.

14 COMMISSIONER DEASON: Okay. Perhaps I should just
15 open it up to anyone that has opposition to the requested
16 protective orders -- protective order to tell me your point of
17 view.

18 MR. MCGLOTHLIN: It isn't so much opposition but some
19 caveats, I think, would -- that might be appropriate. Several
20 of us drew straws earlier and Schef lost, so he's going to go
21 first.

22 COMMISSIONER DEASON: Okay. Very well. Mr. Wright.

23 MR. WRIGHT: Thank you, Commissioner Deason.
24 Commissioner, as you articulated it, we have no objection to
25 the entry of protective orders protecting from disclosure the

1 confidential -- the designated confidential information
2 submitted by the movants here. It's to FPL's August 13th, 2001
3 RFP. The primary caveat is that we just want to call to your
4 attention at this time, and it probably is going to be more
5 appropriate to bring it to your attention via a formal motion
6 in the near future, the fact that this scenario is capable of
7 being repeated in the near future, we cannot stand -- we
8 intervenors cannot stand a three or three and a half week delay
9 for motion practice on confidentiality issues when the new --
10 when whatever new proceedings come out of FPL's new RFP are
11 begun. And accordingly, we would suggest to you that it would
12 be appropriate in a timely way, you don't have to do it this
13 week or next week, but in a timely way resolve how confidential
14 information, the bid information specifically, is going to be
15 treated in whatever proceedings come out of FPL's new RFP.

16 And by "in a timely way," I mean have whatever oral
17 argument you're going to have, make your decision, allow time
18 for motions for reconsideration, and have whatever process it's
19 going to be decided before July the 16th. And that's the day
20 that FPL, if it selects self-build options in its new RFP
21 process, has committed to refile it's new -- any new need
22 determinations. So that's kind of the date I think we have to
23 work with if they wind up selecting some of us for contracts,
24 and we're filing in September, so you'll have the
25 confidentiality procedures in place. Thanks.

1 COMMISSIONER DEASON: Let me ask a question, and,
2 Mr. Wright, you may answer, or Ms. Brownless, you may because
3 I'm going to refer to your response. There's language in
4 Paragraph 6 which requests that the Commission require that
5 FP&L disclose the high probability of the disclosure of all bid
6 data to its second RFP.

7 I guess my question is, should -- is that something
8 that the Commission should require FP&L to do, or is that
9 something FPL is amenable to doing on their own? I'm looking
10 for guidance.

11 MS. BROWNLESS: If I can respond to that. FP&L has
12 included a section in their second bid regarding
13 confidentiality which basically discusses the fact that there
14 are pending motions for protective orders, and that -- and in
15 their original RFP, they indicated that there was -- that there
16 would be need determinations in which this information would be
17 provided certainly to the Commission and could be provided to
18 other parties to the docket.

19 The reason I put this in here, Commissioner, is a
20 very practical reason, which is, I think at least from my
21 client's point of view, one of the things we're going to want
22 to do with the second bid data, because the practicalities of
23 the situation are that the second bid data is the data upon
24 which FPL will rely in this case, because as I understand it,
25 either -- if you filed an original bid, you must refile that

1 bid or indicate to FP&L that you're going to reinstate that
2 bid, or you get an opportunity to modify your bid and file
3 another bid, and also people who did not participate in the
4 first RFP, brand new entrants into the process can come in. So
5 it appears to me that in order to cure some of the procedural
6 problems that were raised by the intervenors vis-a-vis
7 compliance with the Bid Rule, FP&L will have to in fact start
8 again.

9 And if they start again, then that is going to become
10 extremely relevant because my client wants to replicate the
11 computer runs and computer programs, and you simply can't
12 replicate the programs without all the data. So my thought
13 process is, since I know that that's where we're going to be,
14 to tell -- require FPL to tell the bidders now before they
15 submit their bid, it is extremely probable that your bid
16 information will be revealed pursuant to this confidentiality
17 agreement to other intervenors in the docket, and that way
18 bidders can decide with the knowledge that that's what's going
19 to happen. And if they feel that that much transparency in the
20 market is too much for them, they will take that into account.
21 I think that could solve a lot of problems.

22 COMMISSIONER DEASON: Very well. Perhaps it would be
23 helpful to hear from Ms. Davis.

24 MS. DAVIS: Commissioner Deason, in the supplemental
25 RFP document that was issued recently, FPL indicated to all

1 potential bidders that there was a currently pending motion
2 seeking to compel the disclosure of all bid information, and
3 that we thought there was a high probability that the
4 information submitted in response to the supplemental bid may
5 be disclosed pursuant to a nondisclosure agreement, and that we
6 would provide a copy of the nondisclosure agreement to anybody
7 who wanted to look at it.

8 I think we're talking about a relatively fine
9 distinction between telling bidders that it may be disclosed,
10 and if it is, it will be disclosed on these terms and
11 conditions, and telling bidders that it will be disclosed. I
12 think if you tell bidders that it will be disclosed, there is a
13 competing policy consideration of whether that would have a
14 chilling effect on people submitting bids. But having said
15 that, I think that everybody here is interested in a prompt and
16 timely resolution of the matter so that it is not in and of
17 itself a source of delay once we get to July.

18 COMMISSIONER DEASON: Well, I guess my question is,
19 does the Commission need to take any action at this point to
20 lay out the procedure that it would be anticipated to be
21 followed assuming that there is a second bid protest and that
22 there is discovery filed and that bidder information would be
23 solicited?

24 MS. DAVIS: If you wanted to anticipate and have a
25 schedule for deciding that issue so that it's accomplished by

1 July 16th, we would have no objection to that --

2 COMMISSIONER DEASON: Okay. So --

3 MS. DAVIS: -- if that answers your question.

4 COMMISSIONER DEASON: -- I detect a distinction.

5 You're saying, lay out a schedule for deciding that by July the
6 16th. I hear Ms. Brownless saying, decide it now and basically
7 tell folks up front. I'm trying to just clarify.

8 MS. BROWNLESS: Yeah, I just want to have Florida
9 Power & Light because I have talked to some -- a substantial
10 number of the nonintervenor bidders who are not participating
11 here today, and their idea -- the impression that they got,
12 correctly or incorrectly, was that their information would be
13 kept confidential, period. That was the impression they had,
14 and therefore, they were very upset when they realized or it
15 came to their attention that it might not be kept confidential.
16 They believed it was going to be shared with the Public Service
17 Commission but not with other party intervenors.

18 So all I'm saying is, it strikes me that there can be
19 no harm done to tell people, your data will be shared with
20 intervenors pursuant to this confidentiality agreement, or that
21 there's a very highly likelihood of that, so that bidders can
22 bid with that knowledge.

23 COMMISSIONER DEASON: Well, let me ask you this. You
24 heard Ms. Davis just speak, and she described the language that
25 they are including or have included in the second RFP. Do you

1 find -- is there anything lacking in what she suggests be the
2 procedure we follow?

3 MS. BROWNLESS: Well, the language that they have
4 included still does not give a bidder the type of certainty, I
5 think. I think, Commissioner Deason, that not everybody
6 sitting at this table who is going to submit a bid will win,
7 and I think if that's the case, someone will want the
8 information. The information is relevant. The information is
9 needed and necessary in order to effectively evaluate the bid
10 data no matter who wins, FP&L and some combination of whomever.
11 And I think it's fair to say that it will in fact be disclosed.
12 And I just believe it is reasonable and prudent to let people
13 know that from the get-go. And I do not think that a statement
14 to that effect will dissuade people from bidding, but I do
15 think that it will give them the clear parameters for doing so.

16 COMMISSIONER DEASON: So you think that it will not
17 have a chilling effect on people contemplating submitting a
18 bid.

19 MS. BROWNLESS: No, sir, I don't think it will.

20 COMMISSIONER DEASON: Ms. Davis, do you care to
21 respond?

22 MS. DAVIS: We're into fields of judgment calls here,
23 and we don't have any evidence that we can submit one way or
24 the other. And I would suggest that no one really knows what
25 impact it will have, and it would be a difficult matter to ever

1 ascertain since you would be trying to prove the absence of a
2 negative. Having said that, if you are prepared to rule today
3 that in the future all bidder information will be disclosed, we
4 don't have an objection to that, but we do feel compelled to
5 point out that the universe of people who may have a point of
6 view on that may or may not be represented by the people in
7 front of you today.

8 COMMISSIONER DEASON: Okay. Mr. Beasley.

9 MR. BEASLEY: Commissioner, I think it might be a
10 little premature and anticipatory to try to address that
11 question at this point because we don't know what the bid
12 process is going to entail. If there is a protest, surely
13 there will be intervenors. Intervenors represented today have
14 indicated that they can get by with their own information
15 without nonparty bidder information.

16 I don't know whether my client personally is going to
17 rebid on the Florida Power & Light proposal, but if they do and
18 if they don't win and if they're not a party and they don't
19 want to intervene, they still have an interest to be protected
20 as explained in the affidavit that's attached to our motion.
21 So I would suggest to you that you might be getting the cart
22 before the horse to try to address that situation now as
23 opposed to doing it when we see what the second bid process
24 does.

25 MR. McGLOTHLIN: Commissioner, I'd like to respond to

1 that, if I may.

2 COMMISSIONER DEASON: Yes.

3 MR. McGLOTHLIN: Joe McGlothlin for Reliant Energy.
4 First, I'd like to adopt Schef's comments with respect to the
5 need for some expeditious resolution of the confidentiality
6 matters.

7 Secondly, I'd like to emphasize that when Reliant
8 responded to motions for protective order by saying it has no
9 objection, it has no objection to the protective order covering
10 the August 2001 data for the simple reason that in our
11 judgment, we don't require that information for case
12 preparation in light of the second RFP in the second round of
13 bids.

14 And perhaps in terms of communicating to the universe
15 of interested persons the status of things, it might be helpful
16 if your order on the motions for protective order could recite
17 the grounds for the willingness of other parties to do such a
18 protective order. And the grounds simply are that in light of
19 the second RFP, intervenors state that they do not require the
20 information that is the subject of the motion for protective
21 order, but Reliant reserves its right to seek through discovery
22 prompt access to any information that it requires to
23 effectively prepare its case regardless of whether that's in
24 response to an announcement by FPL that it's going forward with
25 its self-build options, as is one possible scenario, or in

1 response to an announcement that some different capacity
2 addition has been chosen. So we see this as an interim
3 resolution, and perhaps the message to the rule at large could
4 be in several forms.

5 First would be, in your order, ruling on the motion
6 for protective order. Another might be in response to a motion
7 by one or more intervenors asking for an order on procedure
8 that sets out both time frames and scope of discovery. That in
9 conjunction with the language that has already been included in
10 the second RFP, it seems to me does much to apprise all
11 interested persons of the scope of discovery in this case.

12 COMMISSIONER DEASON: So are you saying, then, that I
13 could anticipate Reliant and perhaps other parties filing a
14 motion for order on procedure which would lay out the procedure
15 and schedule for dealing with discovery in the second RFP?

16 MR. MCGLOTHLIN: That in conjunction with today's
17 proceedings, which will include the ruling on the joint motion
18 for approval of the confidentiality agreement, it appears to me
19 would be the appropriate vehicles to use for that purpose.

20 COMMISSIONER DEASON: I've kind of skipped around a
21 little bit. It's been helpful to me, but maybe it's been a
22 little disorganized for the participants. If there's anyone
23 who wishes to add anything at this point --

24 MR. MCGLOTHLIN: I would like to add something --

25 COMMISSIONER DEASON: Yes.

1 MR. MCGLOTHLIN: -- in response to Mr. Beasley. He
2 referred to the willingness of intervenors to exchange only
3 their own data; that is for a very expressed purpose of
4 obtaining enough information to use in conjunction with the
5 EGEAS model to understand how the model works. And is -- that
6 says nothing about the need for additional information after
7 the second evaluation has been completed.

8 COMMISSIONER DEASON: Mr. Beasley, do you care to
9 respond?

10 MR. BEASLEY: I don't know the -- for purposes of
11 determining how the EGEAS model operates, I don't know why
12 hypothetical bids could not be used, made-up bids, high,
13 medium, and low, at the user's option, why that information
14 could not show how the EGEAS model operates rather than using
15 actual information submitted by bidders who have interests to
16 protect.

17 COMMISSIONER DEASON: Let me -- just help me here,
18 and I'm just going to lay this out. It appears to me that
19 there's going to be enough information provided from the
20 first bid by intervening bidders that you can detect how the
21 model runs.

22 MS. BROWNLESS: Yes.

23 COMMISSIONER DEASON: So that's not the issue
24 anymore. You're going to have information, and those folks who
25 have not intervened in the -- and are maybe not even

1 participating in the second RFP, you don't need their
2 information from the first RFP to determine how the EGEAS model
3 is run -- runs.

4 MS. BROWNLESS: No. The data we have from each other
5 will allow us to figure out how the model works. What we are
6 anticipating is the necessity of being able to exactly
7 replicate the runs that are involved with the second bid, and
8 for that, you have to have exactly the bid data that was input
9 by FP&L into their system.

10 COMMISSIONER DEASON: You want to be able to run the
11 model yourself with the current second bid information and see
12 how everything falls out and either find comfort that it was
13 done correctly or find areas where you disagree.

14 MS. BROWNLESS: Exactly.

15 MR. MCGLOTHLIN: So that when Mr. Beasley says of the
16 intervenors they have agreed to live with only their own
17 information -- and I wanted to be clear -- that is the interim
18 resolution that we have discussed here and does not say
19 anything about what we may assert as required information later
20 on after the second evaluation.

21 COMMISSIONER DEASON: Okay. I understand.
22 Mr. Moyle.

23 MR. MOYLE: Just a comment, if I could. It seems to
24 me that we're really talking a lot about a notice issue with
25 respect to subsequent bidders that may be participating in a

1 supplemental RFP, and I think that there's possibly a danger
2 out there of sending a mixed message if protective orders are
3 granted because of the changed circumstances. Yet, you hear
4 Mr. Wright and Mr. McGlothlin talking about the need for access
5 to all the information in anticipation of a second FPL
6 self-selection and this controversy coming back before you.
7 And I think what sort of is being urged is that there be a
8 clear message sent that this information may be subject to
9 revelation to the parties. And FP&L has done that in their RFP
10 and I think put people on notice obviously to the extent that
11 there's an order entered by the Commission. And I think that
12 serves as an additional manner in which notice can be provided.

13 And I would just note that out of all of the bidders,
14 I believe FPL has established a Web site where they are posting
15 questions and answers. So if a bidder has a question, they
16 submit it to FP&L, FP&L posts it on the Web site that everybody
17 has access to. So to the extent that there was an order that
18 addressed this issue, I think that could also be effectively
19 communicated through that manner.

20 MS. BROWNLESS: And, Commissioner, if I could just
21 have one other small comment, and it has to do with the
22 statutory authority under which this protective order would be
23 entered. I am very desirous and my client is very desirous to
24 have that specifically limited to 366.093, which is the
25 Commission's confidentiality statute vis-a-vis electric and gas

1 companies, and Florida Administrative Code Rule 25-22.006 and
2 Chapter 120.569(2)(f) which applies the Rules of Civil
3 Procedure on discovery to Chapter 120 proceedings. And the
4 reason for that is quite simple. I just want to make sure that
5 everyone understands that nonintervening parties are limited in
6 whatever appellate rights they might have to an appeal of the
7 protective order issued because there is some -- just to make
8 that perfectly clear so everybody understands that
9 participation in the docket for purposes of entering a
10 protective order does not give them subsequent standing with
11 regard to all other issues in the case.

12 COMMISSIONER DEASON: Yes, I had a question about
13 this. This is in Paragraph 7 of your response, and you
14 indicate that the reason for this has something to do with the
15 appellate rights of nonintervening --

16 MS. BROWNLESS: Parties.

17 COMMISSIONER DEASON: -- participants.

18 MS. BROWNLESS: Participants.

19 COMMISSIONER DEASON: I guess my question is, there
20 doesn't really seem to be that much controversy about the
21 protective order itself. Do we anticipate an appeal of the
22 protective order?

23 MS. BROWNLESS: I don't know whether it will be
24 appealed and whether it will not be appealed. This is one of
25 those technical points that I feel obliged to bring up, and I

1 hope it doesn't become an issue.

2 COMMISSIONER DEASON: Okay. Does anyone care to
3 respond to Ms. Brownless's comment concerning the recitation of
4 authority within the order? You can live with it or not;
5 correct?

6 Does Staff have any -- do you need to evaluate that,
7 or do you have any thoughts at this point?

8 MS. BROWN: I'd like to evaluate it. My initial
9 thoughts are that we will recite the authority necessary to
10 deal with what's before you.

11 COMMISSIONER DEASON: That is standard procedure to
12 do that.

13 MS. BROWN: Yes.

14 COMMISSIONER DEASON: All right. Well,
15 Ms. Brownless, we will certainly take your suggestion --

16 MS. BROWNLESS: Thank you.

17 COMMISSIONER DEASON: -- to heart and review that.

18 Ms. Brown, where are we at this point?

19 MS. BROWN: Well, I think we're pretty well along
20 through the discussion on the motions for protective order. We
21 now have before you the joint motion on confidential processes,
22 the manner in which the confidential information of the
23 existing intervening parties' signatories to the
24 confidential -- joint confidential nondisclosure agreement will
25 be used. That's in that joint motion that was filed, and

1 perhaps you would like to hear discussion on that.

2 COMMISSIONER DEASON: Yes. Who would like to go
3 first?

4 MS. BROWNLESS: Well --

5 COMMISSIONER DEASON: Ms. Brownless.

6 MS. BROWNLESS: -- I'll be happy to go first.

7 COMMISSIONER DEASON: Okay.

8 MS. BROWNLESS: Basically the joint motion is simply
9 tendering the confidentiality agreement that the intervenors
10 with input from some of the nonintervenor participants
11 developed. We've worked very hard, all the parties and Florida
12 Power & Light, to come up with an agreement that we believe
13 fairly protects everybody's interest. It has a mechanism for
14 protecting the information. It has a mechanism for resolving
15 disputes about the information. It utilizes your existing --
16 the mechanisms available in your existing confidentiality rule.
17 And the best I can tell, everyone is pleased with it.

18 COMMISSIONER DEASON: Anyone care to add anything to
19 Ms. Brownless's comments?

20 Mr. McGlothlin.

21 MR. MCGLOTHLIN: I would note that under more usual
22 circumstances parties enter these confidentiality agreements
23 without bringing them to the Prehearing Officer for approval.
24 The fact that there is a joint motion I think is some
25 recognition of perhaps the desirability of more notice and more

1 opportunity for participation by the nonintervenor bidders, and
2 so that in and of itself is one form of which the circumstances
3 of this case have been more fully communicated than is the
4 usual case.

5 COMMISSIONER DEASON: Okay. Yes.

6 MS. LICKO: In conjunction with that, I think it
7 would be good to clarify. My understanding is that although
8 the parties to this proceeding have now agreed with this
9 confidentiality agreement, that the nonintervening bidders such
10 as EAS Coral will not be permitted to sign it and will not have
11 access to any of the confidential information. And in terms of
12 notice, if that is everybody's understanding and if that's the
13 procedure, I just want that to be very clear on the record.

14 MS. DAVIS: Commissioner Deason, if I could address
15 that sort of obliquely for a minute. It's our belief that
16 these agreements are for the sole purpose of allowing parties
17 to formulate their litigation position in this docket. And the
18 agreement is not effective if it is used -- if the information
19 that's provided pursuant to it is used for any other purpose.
20 And we were going to ask you to emphasize in your order that
21 the linchpin of these agreements is the very limited purpose
22 that's to be made of the information that's provided pursuant
23 to those terms and conditions, and it is a particularly acute
24 point in these cases where you're looking at people who are
25 regular competitors in many venues.

1 And to that end, it gives us some pause that the
2 agreement would be viewed by anyone as an avenue to -- access
3 to information unless you were going to formulate and present a
4 position in this litigation, and to the extent that that is not
5 clear in the agreement, it does give us pause. And we're
6 hoping that your order will address that point very clearly.

7 COMMISSIONER DEASON: Okay. Any further comments?

8 Ms. Brown.

9 MS. BROWN: I would just like to support what
10 Ms. Davis just said. I think that's fairly clear under the law
11 of confidentiality and our rules and statutes and -- that this
12 information is to be disclosed to signatories to the agreement
13 for the very limited purpose of pursuing litigation strategy in
14 this need determination case, for nothing else.

15 COMMISSIONER DEASON: Very well. Is there anything
16 else that we need to discuss at this point? This has gone more
17 quickly than I anticipated.

18 MS. BROWN: I'm not aware of anything else,
19 Commissioner Deason, unless the parties want to raise something
20 while they've got you here.

21 COMMISSIONER DEASON: Well, let me just take this
22 opportunity to express appreciation from the Prehearing Officer
23 for the amount of effort and cooperation which has taken place
24 to address a very thorny issue concerning confidential
25 information.

1 I think the parties have gone about this in a very
2 thoughtful way such that necessary protections will be in place
3 but that information that can be obtained for the rightful
4 purpose of pursuing positions within this docket.

5 So having said that, and if there's nothing else to
6 come before the Prehearing Officer, this oral argument is --
7 before I adjourn, let me ask: Ms. Brown, what is the schedule
8 we anticipate for issuing the orders that we've discussed
9 today?

10 MS. BROWN: Monday, Friday afternoon, today, this
11 afternoon?

12 COMMISSIONER DEASON: Okay. Expeditiously.

13 MS. BROWN: Expeditiously, yes. I would think no
14 later than Monday; that this -- they'll be short and sweet.

15 COMMISSIONER DEASON: Let me suggest this. I will be
16 discussing this with Ms. Brown and other Staff members, and I
17 think I can formulate the essence of the orders. She can
18 communicate that. We will be putting that in writing. If we
19 possibly can do that this afternoon, we will. It may be early
20 part of next week, but rest assured, it will be handled
21 expeditiously.

22 MS. BROWN: Thank you.

23 COMMISSIONER DEASON: Very well. This oral argument
24 is adjourned.

25 (Oral Argument concluded at 10:13 a.m.)

1 STATE OF FLORIDA)
2 :
3 COUNTY OF LEON)

CERTIFICATE OF REPORTER

4
5 I, TRICIA DeMARTE, Official Commission Reporter, do hereby
6 certify that the foregoing proceeding was heard at the time and
7 place herein stated.

8 IT IS FURTHER CERTIFIED that I stenographically
9 reported the said proceedings; that the same has been
10 transcribed under my direct supervision; and that this
11 transcript constitutes a true transcription of my notes of said
12 proceedings.

13 I FURTHER CERTIFY that I am not a relative, employee,
14 attorney or counsel of any of the parties, nor am I a relative
15 or employee of any of the parties' attorneys or counsel
16 connected with the action, nor am I financially interested in
17 the action.

18 DATED THIS 6th DAY OF MAY, 2002.

19
20 *Tricia DeMarte*
21 _____
22 TRICIA DeMARTE
23 FPSC Official Commission Reporter
24 (850) 413-6736
25