

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Determination)
of Need for an Electrical Power)
Plant in Martin County by Florida)
Power & Light Company)

DOCKET NO. 020262-EI

In Re: Petition for Determination)
of Need for an Electrical Power)
Plant in Manatee County by Florida)
Power & Light Company)

DOCKET NO. 020263-EI

FILED: MAY 16, 2002

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JOINT MOTION FOR ORDER GOVERNING THE HANDLING OF CONFIDENTIAL
BID INFORMATION AND FOR PROCEDURAL SCHEDULE AND
INCORPORATED MEMORANDUM OF LAW

Calpine Energy Services, L.P. ("Calpine"), Reliant Energy Power Generation, Inc. ("Reliant"), and Mirant Corporation ("Mirant"), collectively referred to herein as the "Joint Movants," pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), and Chapter 120, Florida Statutes,¹ hereby file this Joint Motion for Order Governing the Handling of Confidential Bid Information and for Procedural Schedule in the above-styled dockets. In summary, the Joint Movants ask the Commission, through the Prehearing Officer assigned to these dockets, to enter an order: (1) approving the procedures by which confidential bid information produced in these dockets will be handled and (2) establishing an orderly procedure and schedule for addressing these issues. The Joint Movants respectfully ask the Commission to

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¹ All citations herein to the Florida Statutes are to the 2001 edition thereof.

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establish the appropriate procedures for handling confidential bid information on a schedule that will have those procedures fully in place no later than July 16, 2002.

PROCEDURAL BACKGROUND

These dockets were initiated by FPL's filing of two need determination petitions on March 22, 2002. Each of the Joint Movants has been granted intervenor status in both dockets. The intervenors have propounded discovery that would require the disclosure of information contained in bids submitted by the intervenors, and by other non-intervenor bidders, in response to FPL's request for proposals ("RFP") issued in August 2001.

By a joint motion filed on April 23, 2002, FPL and several intervenors sought an order approving procedures for handling information asserted to be confidential; such information includes certain cost and price data of FPL and of the various bidders (including both the intervenors and non-intervenor bidders) who responded to FPL's RFP. That joint motion included an agreement (the "Confidentiality Agreement") to govern the handling of confidential information as between the parties thereto. Between April 22 and April 29, 2002, three non-intervenor bidders, AES Coral ("AES"), Tampa Electric Company ("TECO"), and Progress Ventures, Inc. ("Progress"), sought protective orders prohibiting FPL from disclosing information designated by them as confidential in their responses to FPL's August 2001 RFP.

On April 22, 2002, FPL moved for the subject need

determination cases to be held in abeyance while it conducted a supplemental RFP which, among other things, identified the Martin 8 unit and the Manatee 3 unit as FPL's "next planned generating units" pursuant to the Bid Rule. This motion was granted in part by Commission Order No. PSC-02-0571-PCO-EI, issued on April 26, 2002. On April 26, 2002, FPL issued a second RFP ("FPL's April 26 RFP"). Among other things, the April 26 RFP specifies that bids submitted in response to the August 2001 RFP will not be considered in the new process unless they are formally submitted again. Bidders are also free to submit new bids.

In its motion for abeyance, FPL stated that, if it again selects one or more self-built power plants to meet its customers' needs, it would file the requisite information (e.g., an amended petition and exhibits, and revised testimony) to support its need determination case for its selection on July 16, 2002.

In light of the new RFP process, and the concomitant fact that new bids would be submitted therein followed by a new evaluation by FPL, the intervenors did not oppose the issuance of protective orders as prayed by TECO, AES, and Progress with respect to their information submitted in response to FPL's August 2001 RFP.

By Order No. PSC-02-0611-PCO-EI, the Prehearing Officer granted the Joint Movants' April 23 motion for approval of procedures governing the handling of confidential information; this

Order included approval of the Confidentiality Agreement.² In the same Order, the Prehearing Officer also granted the motions for protective orders sought by AES, TECO, and Progress. Also in that Order, the Prehearing Officer stated that "all entities who respond to FPL's supplemental RFP should do so with the clear understanding that confidential information submitted in response to the RFP may very well be subject to disclosure in discovery to the parties to these dockets." Order No. PSC-02-0611-PCO-EI at 3. FPL's April 26 RFP also notified potential respondents of the reasonable likelihood that their bid information would be subject to disclosure in discovery in any subsequent need determination proceedings.

FACTUAL BACKGROUND

These dockets are need determination proceedings that may determine whether certain proposed power plants should be approved by the Commission as best meeting the power supply needs of FPL's customers in accordance with applicable statutory criteria. One of the most significant factors to be considered in these proceedings is whether a proposed power plant, or a contract to purchase power from a proposed power plant, is the most cost-effective alternative available to meet these needs. Participants in (or respondents to) an investor-owned utility's RFP process submit power sales

²Any party to these dockets may execute the Confidentiality Agreement and obtain access to the confidential information covered thereby in accordance with the provisions of Order No. PSC-02-0611-PCO-EI.

proposals that include pricing, duration, performance specifications, and other information that the utility uses in evaluating whether such proposals are more or less cost-effective than the utility's self-build options. There is no dispute that at least some of the information submitted in the participants' proposals falls within the scope of confidential, proprietary business information as that term is defined in Section 366.093(3), Florida Statutes, and is accordingly subject to protection from public disclosure.

Participants in the utility's RFP process have standing to intervene in ensuing need determination cases and to challenge the utility's selection on various grounds, including whether the selected option is in fact the most cost-effective alternative. The various cost-effectiveness analyses performed by the utility in evaluating the cost-effectiveness of its self-build options and of the participants' proposals are generally within the scope of discoverable information, either as directly admissible evidence or as being reasonably calculated to lead to the discovery of admissible evidence in the need determination proceedings. See Fla. R. Civ. Proc. 1.280(b)(1).

SUMMARY OF PROPOSED CONFIDENTIALITY PROCEDURES

The purpose of this motion is to establish, in a timely way, the procedures for handling confidential bid information in any further proceedings in these dockets. The Joint Movants respectfully request the entry of an order (hereinafter the

"Confidentiality Order") providing that the Confidentiality Agreement approved by Order No. PSC-02-0611-PCO-EI governs the handling of all confidential bid information used in FPL's evaluation of proposals, including, without limitation, information relating to price, duration of a proposed power sale, non-price terms and conditions, and the like, submitted in response to FPL's April 26 RFP.³ Other confidential information may be handled pursuant to Order No. PSC-02-0611-PCO-EI and the Confidentiality Agreement approved thereby, pursuant to other agreements between or among parties, or pursuant to other orders of the Commission; no party would be precluded by the Confidentiality Order requested hereby from seeking a protective order applicable to any information other than the confidential bid information.

**SUGGESTED SCHEDULE FOR ADDRESSING
CONFIDENTIALITY ISSUES**

The Joint Movants also respectfully move the Commission to establish, by order, procedures for the timely and definite resolution of issues relating to the handling of confidential information in these proceedings. Timely resolution is necessary to enable all parties to the case to prepare their cases in an orderly and timely way following the initiation, or re-initiation,

³ Pursuant to the terms of the Confidentiality Agreement the information would be available to up to ten employees, attorneys, or consultants of each party to the proceedings, provided that each such person had responsibility for formulating or presenting the party's litigation position in the proceedings. The information could be used only in connection with this litigation and could not be used for any other purpose.

of need determination proceedings with respect to FPL's identified need for power. At present, this means that all parties must be prepared to proceed with their cases based on a potential filing by FPL on July 16, 2002. If these confidentiality issues are not resolved beforehand, the parties could lose a significant amount of valuable time, potentially three weeks or more, to motion practice relating to such issues, e.g., motions for protective orders followed by motions for reconsideration of the Prehearing Officer's initial decision.

Accordingly, the Joint Movants suggest the following schedule. Naturally, the Joint Movants recognize that events that require the Prehearing Officer's presence will be set at the Prehearing Officer's convenience. The crucial goal is the definite resolution of these issues before the next set of need proceedings commences, which may be as early as July 16.

- May 16 - Motion for Confidentiality Order filed
- May 23 - Procedural Order issued
- May 24 - Notice published in Florida Administrative Weekly; actual notice sent by FPL to all entities that obtain FPL's supplemental RFP
- May 31 - Responses to Motion for Confidentiality Order filed
- June 7 - Oral Argument and Bench Decision by Prehearing Officer
- June 10 - Order
- June 17 - Motions for Reconsideration filed, if any
- June 27 - Staff Recommendation on Motions for Reconsideration

July 9 - Commission Agenda Conference decision on Motions for Reconsideration

July 15 - Order on Motions for Reconsideration

MEMORANDUM OF LAW

The bid information that will be submitted by participants in FPL's April 26 RFP process and used by FPL in its evaluation of those proposals is within the scope of discovery allowed under the Florida Rules of Civil Procedure. The Commission has the authority to require discovery of this information, and should do so because the intervenors will need all of the bid information in order to adequately replicate, test, and evaluate FPL's cost-effectiveness analyses. Practically speaking, the issue is whether the parties' legitimate interests in having the information to prepare their cases outweighs the interests of the participants to whom the information belongs and pertains in maintaining its proprietary and confidential character. This issue effectively poses two questions: (1) whether the information should be discoverable at all, and (2) if so, under what protective terms and conditions it should be provided to the parties. The Joint Movants submit that the subject information will be discoverable because it will be integral to FPL's cost-effectiveness analyses, and that the protections afforded by the proposed Confidentiality Agreement are fully appropriate and satisfactory to protect the legitimate interests of the RFP participants in their proprietary confidential business information.

As to the procedural matters addressed herein, the Commission

has the authority to issue orders as prayed by the Joint Movants and should issue the orders requested by this Joint Motion in order to promote the expeditious, timely, and orderly resolution of these proceedings.

I. THE BID INFORMATION IS DISCOVERABLE.

The Confidentiality Order requested by this joint motion would govern the handling of the bid information submitted by respondents to FPL's April 26 RFP that is used by FPL in conducting and preparing its cost-effectiveness analyses of power supply options (both self-build options and power sales proposals) that are the subject of new, or re-initiated, need determination proceedings. A key issue in any need determination proceeding is whether the proposed power plant is "the most cost-effective alternative available" to meet the needs of a retail-serving utility's customers. Clearly, the information used in evaluating cost-effectiveness is either directly admissible, or reasonably calculated to lead to the discovery of admissible evidence, and is accordingly discoverable under Florida law. Rule 1.280(b)(1), Florida Rules of Civil Procedure. Since FPL will presumably use all of the bid information to evaluate all of the bids and other power supply options, the intervenors will need access to all of the bid information in order to adequately replicate, evaluate, and test FPL's cost-effectiveness analyses.

II. THE CONFIDENTIALITY AGREEMENT AND CONFIDENTIALITY ORDER WILL PROVIDE APPROPRIATE PROTECTION OF RFP PARTICIPANTS' CONFIDENTIAL INFORMATION, AND FAIRLY AND APPROPRIATELY BALANCE THE INTERESTS OF THE PARTIES TO THE NEED DETERMINATION PROCEEDINGS AND OF THE PARTICIPANTS WHO SUBMITTED BIDS IN THE RFP PROCESS.

The Confidentiality Agreement and the Confidentiality Order will protect the subject confidential bid information "from disclosure outside the proceeding," consistent with Section 366.093(2), Florida Statutes. The Confidentiality Agreement and Order will specifically prohibit anyone from using the information for any purpose other than formulating and presenting a party's position in the litigation. The proposed Confidentiality Agreement and Order fairly balance the RFP respondents' (including the Joint Movants who are also RFP respondents) interests in protection of their confidential, proprietary business information against the intervenors' needs to be able to evaluate FPL's cost-effectiveness analyses and to conduct their own cost-effectiveness analyses in preparing their cases. The Confidentiality Agreement and the Confidentiality Order achieve this balance (1) by limiting access to such information to only those employees, attorneys, and consultants who have responsibility for formulating or presenting a party's litigation position in these proceedings, and (2) by limiting the use that such persons may make of the subject information to only these proceedings.

Particular information may be excluded from the scope of discovery altogether if either (1) it is a "trade secret," in which

case a privilege not to disclose would apply pursuant to Section 90.506, Florida Statutes, or (2) it is demonstrated that the harm of disclosure outweighs the need of the party seeking discovery for the subject information. As the following analysis shows, the bid information is not in the category of "trade secrets." Moreover, because the information is unique and is in fact the very information that FPL will use to evaluate the cost-effectiveness of various power supply options, the parties' need for the information is indispensable to preparing their cases and accordingly outweighs the interests of bid respondents in avoiding disclosure of the information.

Section 812.081(1)(c), Florida Statutes, provides a workable and commonly used definition of "trade secret." (That statute is in fact a criminal law relating to theft or embezzlement of trade secrets.) Subsection (1)(b) of that statute defines "trade secret" as follows:

(b) "Trade secret" means the whole or any portion or phrase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list or suppliers, list of customers, business code, or improvement thereof. . . .

Pricing and other terms of a specific bid are not "trade secrets." Section 366.093(3), Florida Statutes, defines proprietary confidential business information as including several different categories of such information, including "trade

secrets," Section 366.093(3)(a), and "information concerning bids or other contractual data" and "information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information," Sections 366.093(3)(d) and (e), respectively. It is key that the Legislature recognizes that there is a difference between trade secrets, on the one hand, and "information concerning bids or other contractual data" and "information relating to competitive interests," on the other. In this case, the information at issue is specifically "information concerning bids or other contractual data," and thus does not constitute trade secrets.

Although there are different analyses relating to the production and protection of "proprietary confidential business information" and "trade secrets," the Commission has applied the same basic principles in deciding issues relating to the protection of such information.⁴ For example, in In Re: Fuel and Purchased Power Cost Recovery Clause, Docket No. 010001-EI, Order No. PSC-01-2265-PCO-EI, the Commission applied the following analysis in deciding a discovery dispute between TECO and the Florida

⁴ Section 366.093(3), Florida Statutes, clearly indicates that trade secrets are simply a species of proprietary confidential business information. Section 366.093(2), Florida Statutes, indicates that the applicable analysis would be (1) whether the information was confidential and (2) whether appropriate discovery would require disclosure thereof, and, if the answers to those questions were affirmative, (3) what would be the appropriate "manner for handling such information during the course of the proceeding and for protecting such information from disclosure outside the proceeding."

Industrial Power Users Group ("FIPUG"):

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, 655 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.

In that instance, the Commission granted TECO's request for a protective order with respect to detailed cost information by requiring FIPUG to "execute an appropriate non-disclosure agreement," which is at least conceptually analogous to the Confidentiality Agreement proposed here.

Similarly, in In Re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, Docket No. 991462-EU, Order No. PSC-00-0291-PCO-EU, the Commission applied the following analysis of

information asserted by the petitioner to be confidential:

In determining whether the documents and data at issue in this proceeding should be protected from disclosure, one must first determine whether the moving party, OGC, has demonstrated that the material at issue is entitled to confidential treatment. See, e.g., Eastern Cement Co. v. Dep't of Env'l Reg., 512 So. 2d 264 (Fla. 1st DCA 1987). If the moving party meets this burden, the burden shifts to the opposing party to show that it has a reasonable necessity for use of the information at trial. Id.; see also, Becker Metals Corp. v. West Fla. Scrap Metals, 407 So. 2d 380 (Fla. 1st DCA 1981).

Order No. PSC-00-0291-PCO-EU at 7-8.

Based on the distinctions set forth in Section 366.093(3), Florida Statutes, it is clear that bid and other contractual information do not constitute trade secrets and therefore no privilege applies. Following the analysis applied by the Commission in the 2001 Fuel Cost Recovery Clause proceeding and in Okeechobee Generating, the bid information at issue here should be disclosed because any party to these need determination proceedings will have a "reasonable necessity" for the information. The subject information is case-specific and bid-specific, and is in fact the information (that will be) used by FPL in evaluating the cost-effectiveness of all available power supply proposals: thus, there is no other information that would enable the parties to evaluate and test those critical cost-effectiveness evaluations.⁵

⁵Of course, FPL, obviously a key and indispensable party to any need determination proceedings addressing how the needs of FPL's customers will be served, already has the information. Other parties to the need determination proceedings need the information for exactly the same purpose that FPL has, and uses, the information, i.e., to evaluate the cost-effectiveness of the various power supply proposals.

There is no other way to obtain the information, because it is specific to this case and also specific to the cost-effectiveness analyses that will likely be at issue in these proceedings.

Moreover, the Commission should note that all participants in FPL's RFP process are voluntary. It would be inequitable for such voluntary participants to take advantage of FPL's RFP process, with full knowledge that their bid information might be subject to discovery, and then to attempt to frustrate the efforts of the parties to the need determination proceedings to fully prepare and prosecute their cases.

This leaves the Commission to determine the "manner for handling such information during the course of the proceeding and for protecting such information from disclosure outside the proceeding." The Joint Movants submit that the procedures set forth in the Confidentiality Agreement are entirely appropriate and consistent with the requirements of applicable law. The procedures will protect the information from public disclosure and will limit its use to only the subject need determination proceedings and to a specifically limited number of persons who are responsible for formulating or presenting a party's litigation positions in these proceedings.

III. THE COMMISSION HAS THE AUTHORITY TO GRANT THE PROCEDURAL RELIEF REQUESTED AND SHOULD EXERCISE IT HERE TO ENSURE THE ORDERLY, TIMELY, AND PROCEDURALLY SUFFICIENT DISPOSITION OF ANY NEED DETERMINATION PROCEEDINGS ARISING FROM FPL'S APRIL 26 RFP.

The Commission has the authority to issue procedural orders

such as those sought herein to "effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case." Rule 28-106.211, F.A.C. The procedural relief sought here is for the express purposes of preventing delay, effectuating discovery, and promoting the speedy determination of the case, and accordingly, the Commission should issue the procedural order as prayed herein.

As noted above, timely resolution of these discovery issues is needed -- now -- to facilitate the orderly preparation of the parties' cases if and when new need determination proceedings are commenced for power plants identified via FPL's April 26 RFP. Given that this may occur as early as July 16, 2002, with intervenors' testimony due as early as August 20, 2002, these issues must be resolved soon. The parties cannot lose three weeks or more of needed discovery time to motion practice over the disclosure of confidential information and still have a reasonable opportunity to prepare their testimony for filing on August 20.

The notice provisions suggested by the Joint Movants herein will ensure that any reasonably interested entity will receive actual and timely notice of the proceedings on confidentiality matters, and that they will thus have adequate opportunity to present their concerns and issues to the Commission. These notice provisions include publication in the Florida Administrative Weekly as well as actual notice from FPL to each entity that obtains FPL's April 26 RFP package.

POSITIONS OF THE PARTIES

FPL and South Pond Energy Park LLC take no position on this motion at this time and may file a response. CPV Cana, Ltd. supports the relief requested by the motion. The Commission Staff take no position on the motion.

RELIEF REQUESTED

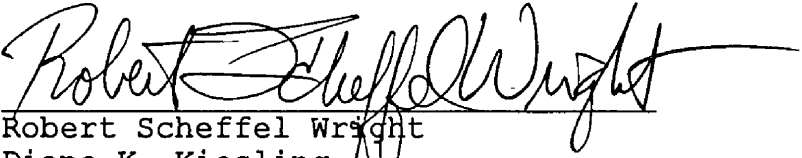
The Joint Movants respectfully ask the Commission to issue two orders:

1. a procedural order establishing a schedule and procedures for addressing and deciding all entities' issues relating to the protection of confidential bid information submitted in response to FPL's April 26 RFP, such that those issues will be decided and appropriate procedures in place by July 16, 2002; and
2. an Order providing that the Confidentiality Agreement is the means for handling bid information asserted to be confidential in any further proceedings in these dockets.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Calpine Energy Services, L.P., Reliant Energy Power Generation, Inc., and Mirant Corporation, pursuant to Rule 28-106.204, Florida Administrative Code, and Chapter 120, Florida Statutes, respectfully move the Commission (1) to enter its order approving the procedures outlined above and set forth in the attached Confidentiality Agreement for handling information designated as confidential if and when these proceedings are resumed, and (2) to enter a procedural order allowing for appropriate notice of proceedings on this motion and for a final decision by the Commission, if necessitated by a motion for reconsideration, to be effective no later than July 16, 2002.

Respectfully submitted this 16th day of May, 2002.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery (*), or U.S. Priority Mail, on this 16th day of May 2002, to the following:

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A handwritten signature in black ink, appearing to read "Robert Stephen Wolfinger". The signature is written in a cursive style with a long horizontal line extending to the right. Below the signature, the word "Attorney" is printed in a simple, sans-serif font.

Attorney