

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to determine need for an electrical power plant in Manatee County by Florida Power & Light Company.

Docket No.: 020262-EI

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In re: Petition to determine need for an electrical power plant in Martin County by Florida Power & Light Company.

Docket No.: 020263-EI  
Filed: September 4, 2002

**CPV Gulfcoast Ltd.'s Response to Florida Power and Light Company's Motion to Compel Production of Documents and Answers to Interrogatories to (sic) CPV Gulfcoast, Ltd. and CPV Gulfcoast's Motion for Protective Order**

CPV Gulfcoast, Ltd., (hereafter "CPV Gulfcoast" or "CPV") pursuant to Section 403.519, Florida Statutes (F.S.), Florida Rules of Civil Procedure (Fla. R. Civ. P.) 1.280, 1.340, and 1.350, and Rules 28-106.204 and 28-106.206, Florida Administrative Code (F.A.C.), files this Response to Florida Power and Light Company's Motion to Compel Production of Documents and Answers to Interrogatories to (sic) CPV Gulfcoast, Ltd. Additionally, CPV Gulfcoast, Ltd, pursuant to Fla. R. Civ. P. 1.280(c) and Rule 28-106.206, F.A.C., files this Motion for Protective Order and in support, states the following.

1. Put simply, FPL is seeking discovery from CPV Gulfcoast in this proceeding that is not relevant to the proceeding, nor is it likely to lead to the discovery of admissible evidence. Thus, its requests exceed the scope of Fla. R.

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Civ. P. 1.280, 1.340, and 1.350 and therefore are not permitted as a matter of law. See Elkins v. Syken, 672 So. 2d 517 (Fla. 1996). Additionally, as will be made clear, FPL has served discovery that serves little purpose other than to pry unjustifiably into CPV Gulfcoast's sensitive business matters and cause CPV Gulfcoast to incur unnecessary expense in responding to discovery that seeks information not relevant to the issues in this need determination proceeding. This case is about FPL's establishing that it meets certain statutory and rule criteria for its need determination, and has done so in a fair and impartial manner that resulted in the selection of the most cost-effective alternative. It is not CPV's need case.

2. One need not read much further than the first two pages of FPL's Motion to Compel Production of Documents and Answers to Interrogatories to CPV Gulfcoast, Ltd. ("Motion to Compel") to understand the disconnection between the discovery requests FPL served on CPV Gulfcoast and the issues in this case. Tellingly, FPL states:

The purpose of this discovery was:

- 1) to obtain documents from CPV that support FPL's ultimate determination on CPV's bid proposal;
- 2) to identify CPV's positions regarding the issues in this case;
- 3) to determine which witnesses CPV intends to have testify at the hearing before the PSC; and
- 4) to identify the evidence CPV intends to rely upon in support of its position.

Motion to Compel, pages 1-2.

Addressing each of the "reasons" FPL cites to justify its need for the onerous discovery served on CPV Gulfcoast will point out the reasons why CPV's motion for protective order should be entered and FPL's Motion to Compel denied.

3. First, FPL contends that it needs documents "that support FPL's ultimate determination on CPV's bid proposal." CPV Gulfcoast is not contesting FPL's determination on CPV's bid proposal as it relates to the other proposals received and ranked by FPL. CPV's witness Egan, in prefiled testimony, offers no testimony that suggests CPV should be ranked ahead of the other competing bids or that FPL should have declared CPV the winner of its RFP process. CPV is not putting on a case to show the PSC that it should have come in first place in the RFP. Consequently, all of FPL's discovery designed to explore the financial viability of CPV is neither relevant nor likely to lead to the discovery of admissible evidence in this proceeding. On this ground alone, a protective order should be entered. Fla. R. Civ. P. 1.280; see State Road Department v. Florida East Coast Railway Company, 212 So. 2d 315 (Fla. 3<sup>rd</sup> DCA 1968).

4. Second, FPL contends the discovery will identify CPV's positions regarding the issues in the case. The issues in the case have been debated, though not settled. Nevertheless, pursuant to the case schedule established in this proceeding, next week CPV will be filing a prehearing statement which provides CPV's positions on the issues in the case. This should satisfy FPL as to CPV's positions on the issues and obviates the need to force CPV to respond to burdensome discovery which FPL contends is somehow "needed" to identify

CPV's position on the issues. FPL fails to articulate how the discovery challenged by CPV will allow FPL to "identify CPV's positions regarding the issues in the case." It is FPL's burden to do so in its Motion to Compel, and FPL has failed to meet that burden.

5. Third, FPL contends that it needs the information it seeks to discover "to determine which witnesses CPV intends to have testify at the hearing." CPV has responded to FPL's discovery in which it asks which witnesses CPV plans to call. See CPV Response to FPL interrogatory No. 1, which lists the names of witnesses CPV planned to call at the time the interrogatory was answered. Moreover, counsel for CPV has told FPL's counsel the names of adverse witnesses employed, or formerly employed, by FPL that it may call as witnesses at hearing. While there was no duty to supplement CPV's previous Response to FPL Interrogatory No. 1, CPV has voluntarily done so. Thus, FPL's stated reason that it needs CPV to answer its multitude of questions in order to learn the witnesses CPV intends to call at hearing is baseless.

6. Fourth, FPL contends that it needs to know the evidence that CPV intends to rely upon in support of its position. CPV has already set forth, in Mr. Egan's prefiled testimony, key evidence that it intends to rely upon at hearing. Additionally, the prehearing statement to be filed next week requires the listing of witnesses and documents each party intends to use. That information will satisfy FPL stated needs, so that imposing additional discovery burdens on CPV is not warranted.

7. Therefore, for the reasons set forth above, FPL's motion to compel should be denied and CPV's motion for protective order should be granted. However, as FPL has devoted 15 pages to "explaining" why certain discovery should be produced, CPV must point out certain flaws in FPL's reasoning and arguments:

(a) CPV's Stability and Financial Viability: FPL somehow contends that it should be privy to CPV's most sensitive and secret financial information because CPV has challenged the fairness of FPL's RFP process. At page 12 of its Motion to Compel, FPL states: "By challenging FPL's Supplemental RFP, and the analysis FPL performed, CPV has opened the door to scrutiny." FPL's arguments set forth in its Motion to Compel, that CPV's calling into question the Supplemental RFP makes pertinent the each bidder's financial viability, conveniently ignores the import of deposition testimony given by FPL witnesses last week. That testimony, in sum, was that if a proposal was clearly out of the money during the financial analysis, it obviated the need to apply more qualitative factors, like financial viability criteria. FPL asserts in its Motion to Compel and elsewhere that CPV's bids were out of the money; yet now, despite that FPL never gave serious consideration to CPV's financial viability during the evaluation process, it somehow "needs" CPV's sensitive financial information. This reasoning is flawed and FPL's attempts to gain access to CPV's most sensitive financial information should be rebuked for what it is -- an unwarranted, intrusive discovery foray. Moreover, case law points out that

“ordinarily the financial records of a party are not discoverable unless the documents themselves or the status which they evidence are somehow at issue in the case.” Compton v. West Volusia Hospital Authority, 727 So. 2d 379 (Fla. 5<sup>th</sup> DCA 1999). As demonstrated, CPV’s financial records are not at issue and not relevant in this proceeding, and therefore are not discoverable. CPV’s requested protective order should be entered on this ground alone.

(b) CPV’s Participation in the April 2002 Supplemental RFP: FPL next seeks to compel a group of discovery it characterizes as CPV’s participation in the April 2002 Supplemental RFP. However, when reviewing FPL’s motion, most of what FPL is seeking is, again, sensitive financial information that should be protected for the reasons set forth above. For example, FPL seeks “the projected capital expenditure requirements for the CPV Gulfcoast”, “the forecasted uses and sources for funding of the capital expenditure requirements for the CPV Gulfcoast project” and “the projected return on equity CPV forecasted it would earn on the CPV Gulfcoast project”. This information is relevant for an entity seeking to invest in the CPV Gulfcoast project, but FPL, a competitor of CPV’s, has absolutely no legitimate use for such information.

(c) With respect to FPL’s discovery that is not related to CPV finances and is related to CPV’s participation in the RFP process, FPL’s requests are objectionable. To support its argument that CPV should be compelled to produce certain documents, FPL, at the bottom of page 12 in its Motion to Compel, uses an example to make its case. FPL states “. . . FPL has requested

'all documents regarding CPV's participation in FPL's August 2001 RFP and FPL's April 2002 Supplemental RFP.'" CPV objected to this request on a number of grounds, including relevancy, and that it was overbroad and burdensome. FPL is seeking documents from CPV related to CPV's participation in the initial, August 2001 RFP when, at the same time, it objects to producing documents that CPV has requested as it relates to the initial RFP. (See Exhibit A, attached, which is an excerpt from FPL's Objections to and Request for Clarification of CPV Gulfcoast Ltd.'s Second Request for Production of Documents (Nos. 18-27) and Third Set of Interrogatories (Nos. 78-117)). Moreover, on the same day FPL filed its Motion to Compel, it served a Motion to Remove Intervenor CPV Cana as a Party and to Dismiss as Moot CPV Cana's Allegations. Tellingly, FPL states on page 4 of that Motion that: "It is FPL's Supplemental RFP, not its original RFP, that is at issue in these proceedings." Nonetheless, FPL seeks an order compelling CPV to produce documents regarding CPV's participation in the original August 2001 RFP. Obviously, FPL should not be able to change its position on the relevancy of the initial RFP at its convenience and as it suits FPL's needs. FPL's motion to compel CPV's production of documents as set forth in Interrogatory 26 should be denied.

(d) CPV's Participation in the Present Hearing: FPL also seeks an order to compel certain discovery requests that it classifies as "CPV's Participation in the Present Hearing." For example, FPL seeks "all documents reviewed or utilized by CPV's witnesses in preparation of his or her testimony." This request

is objectionable on a number of grounds. First, most documents “reviewed or utilized” by CPV witnesses are documents already in the possession of FPL or are available online at the PSC website. Second, CPV presently plans to call witnesses who are not under its control. Thus, it is not able to respond to these discovery requests for witnesses other than Mr. Doug Egan, the President of CPV. Finally, this request is compound to the extent it seeks documents “reviewed or utilized”. Obviously, the field of documents “reviewed” is likely to be larger than the field of documents “utilized”. To the extent the request seeks documents reviewed by not utilized, it is overbroad and objectionable.

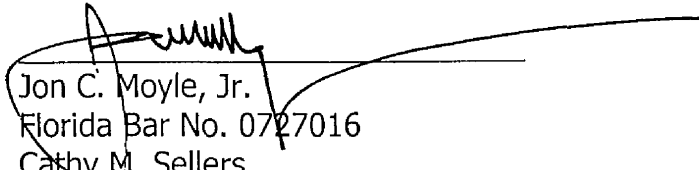
(e) FPL seeks “all documents supporting the testimony of each of CPV’s witnesses in this proceeding.” This request is overbroad and impinges on the attorney work product privilege. Case preparation is under way. FPL has produced literally thousands of pages of documents to CPV and other parties. Now, FPL apparently is asking CPV, barely a month before trial, to identify all documents supporting the testimony of each of CPV’s witnesses, some of whom are not within the control of CPV. If this request were limited to documents generated by CPV Gulfcoast, it might not be overbroad. However, as framed, it is overbroad and CPV should not be compelled to respond. CPV has appended certain documents to the testimony of Mr. Egan that are obviously used to support his testimony. The nature of FPL’s overbroad request would require CPV and its counsel to produce documents to FPL that would signal certain trial strategies and thus impinges on the work product privilege.



8. Finally, pursuant to Fla. R. Civ. P. 1.280(c), CPV affirmatively seeks the entry of an order protecting key financial information of CPV Gulfcoast and related corporate entities.<sup>1</sup> FPL's discovery to CPV seeking sensitive financial information has no bearing on the issues in this case, so that a protective order should be entered shielding CPV Gulfcoast from FPL's overbearing discovery tactics. As FPL scored CPV's bids in a manner that FPL testified made the consideration of CPV's financial condition immaterial, burdensome discovery seeking sensitive financial data from CPV is unwarranted. Thus, CPV should not be required to disclose such information pursuant to FPL's Documents Requests, Interrogatories, or in depositions of CPV witnesses which are scheduled for September 17, 2002.

9. Wherefore, for the reasons discussed herein, CPV Gulfcoast respectfully requests the Commission, to deny FPL's Motion to Compel and to grant CPV Gulfcoast's Motion for Protective Order, shielding CPV Gulfcoast from FPL's unwarranted and unduly burdensome discovery requests related to sensitive financial information in possession of CPV.

Respectfully submitted this 4<sup>th</sup> day of September, 2002.



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<sup>1</sup> Indeed, discovery is only appropriate of CPV Gulfcoast, Ltd. and CPV Cana, Ltd., the parties in these proceedings. Similarly, FPL has objected to discovery served by CPV that seeks information from corporate entities related to FPL.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and U.S. Mail to those listed below without an asterisk, and by e-mail and hand delivery to those marked with an asterisk on this 4<sup>th</sup> day of September, 2002:

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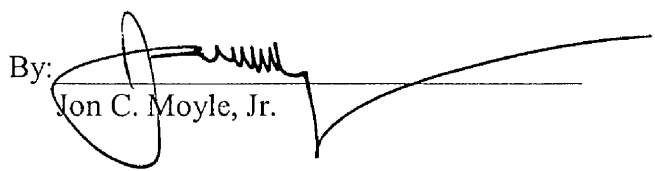
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By:

  
Jon C. Moyle, Jr.

FPL objects to CPV Gulfcoast's definition of "RFP" in its Request for Production to the extent it includes the initial Request for Proposal issued on August 13, 2001, because that Request for Proposal is irrelevant to these proceedings. FPL will respond to CPV Gulfcoast's Requests for Production only insofar as they relate to the Supplemental Request for Proposal issued on April 26, 2002.

