

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Determine Need)
for Turkey Point Unit 5 Electrical)
Power Plant by Florida Power and)
Light Company)
_____)

DOCKET NO. 040206-EI

**TOSHIBA INTERNATIONAL CORPORATION'S
MOTION FOR PROTECTIVE ORDER**

Pursuant to section 366.093, Florida Statutes, and rule 25-22.006(6), Florida Administrative Code, Toshiba International Corporation (“TIC”) files this Motion for Protective Order prohibiting Petitioner Florida Power & Light Company (“FPL”) from producing to Calpine Energy Services, L.P. (“Calpine”) any documents that include TIC’s proprietary confidential business information.

Introduction

1. Calpine has filed a request for production of documents to FPL that seeks certain contractual and other documents involving both FPL and TIC. *See, e.g.*, Calpine’s First Request for Production of Documents (Nos. 1-71) to FPL at ¶ 66, April 16, 2004 (asking for “[a]ny and all documents exchanged between you and any and all third party vendors who will be supplying goods, materials, or services for the Turkey Point Unit 5.”).¹

2. TIC sells large power plant equipment, such as steam turbine generators (“STGs”). *See* Affidavit of Hiroshi Kasagi, Senior Vice President and General Manager of the Power Systems Division of TIC, at ¶ 2. (attached as **Appendix 1**).

¹ Numerous specific requests of Calpine are potentially broad enough to cover contractual relationships involving FPL and TIC. Among those that certainly would cover those relationships are Paragraph 66 and Paragraph 53 (“Please provide all documents, including any contractual arrangements, exchanged between you and any supplier of turbine generators to provide turbine generators for FPL’s Turkey Point Unit 5.”).

3. Pursuant to a Master Purchase Agreement (“Agreement”) for the supply of Steam Turbine Generators, FPL may buy STGs from TIC. **Appendix 1** at ¶ 3.

4. The Agreement includes a provision specifically making confidential the terms under which TIC agreed to supply any ordered STGs. **Appendix 1** at ¶ 4. TIC considers the terms and conditions of the Agreement to be highly sensitive commercial information, the disclosure of which would place TIC in a detrimental position relative to current and future customers, including Calpine and its affiliates. *Id.*

5. The information in the Agreement constitutes proprietary confidential business information as defined in section 366.093(3), Florida Statutes, including trade secrets, as defined in section 812.081(1)(c), Florida Statutes.

Standing

6. TIC has standing as a non-party to seek a protective order preventing the disclosure of its proprietary confidential business information to Calpine. Rule 25-22.006(6)(a) provides in relevant part as follows:

In any formal proceeding before the Commission, any utility or other person may request a protective order protecting proprietary confidential business information from discovery. Upon a showing by a utility or other person and a finding by the Commission that the material is entitled to protection, the Commission shall enter a protective order limiting discovery in the manner provided for in Rule 1.280, Florida Rules of Appellate Procedure.

(Emphasis supplied).

7. Section 366.093, which is one of the statutes implemented by rule 25-22.006, provides that “[u]pon a showing by a utility or other person and a finding by the commission that discovery will require the disclosure of proprietary confidential business information, the commission shall issue appropriate protective orders” (Emphasis supplied). Section 366.093(3)(e), which is included within the definition of “proprietary confidential business

information,” makes clear that the definition applies to “the provider of the information.” (Emphasis supplied).

8. Finally, rule 1.280 of the Florida Rules of Civil Procedure, with which Florida Public Service Commission (“Commission”) protective orders must conform, provides that a protective order may be granted “upon motion by a party or by the person from whom discovery is sought . . .” See R. 1.280(c), Fla. R. Civ. P.

9. Thus, TIC has standing as a non-party to protect its proprietary confidential business information from discovery by filing this Motion for Protective Order.

**The Agreement and Any Related Documents Constitute
Proprietary Confidential Business Information**

10. The definition of “proprietary confidential business information” in section 366.093(3) provides in relevant part:

Proprietary confidential business information means information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person’s or company’s business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public. Proprietary confidential business information includes, but is not limited to:

- (a) Trade secrets.
-
- (e) Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.

11. The definition of “trade secret” in section 812.081(c), Florida Statutes, includes “any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof.” § 812.081(c), Fla.

Stat. Trade secrets are among the information that constitutes “proprietary confidential business information” pursuant to section 366.093(3).

12. Pursuant to section 90.506, Florida Statutes, a person has a privilege to refuse to disclose, and to prevent others from disclosing, a trade secret owned by that person.

13. In evaluating whether to issue a protective order pursuant to rule 25-22.006(6), this Commission first evaluates whether the movant has demonstrated that the information sought to be protected is a trade secret or otherwise meets the definition of section 366.093(3), Florida Statutes. *See In re: Petition to determine need for Hines Unit 3 in Polk County by Florida Power Corporation*, Order No. PSC-02-1673-PCO-EI at 2 in Docket No. 020953-EI, citing *Kavanaugh v. Stump*, 592 So. 2d 1231, 1232-33 (Fla. 5th DCA 1992), *Inrecon v. The Village Homes at Country Walk*, 644 So. 2d 103, 105 (Fla. 3d DCA 1994) and *Rare Coin-it v. I.J.E., Inc.*, 625 So. 2d 1277 (Fla. 3d DCA 1993). If the information is confidential, the burden then shifts to the opposing party to establish that its need for the information outweighs the countervailing interest in withholding production. *Id.*; *see also In re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C.*, Order No. PSC-00-0291-PCO-EU at 7 in Docket No. 991462-EU.

14. The Agreement and any related documents meet the definition of proprietary confidential business information in section 366.093(3), as well as the definition of “trade secret” in section 812.081. As previously noted, the Agreement provides that the terms upon which TIC agreed to provide any ordered STGs are confidential. **Appendix 1** at ¶ 4. Information in the Agreement also constitutes proprietary technical information. *Id.* at ¶ 7. Disclosure of any terms and conditions of the Agreement would place TIC in a detrimental position relative to TIC’s

relationship with TIC's other current and future customers, including Calpine and its affiliates. *Id.*

15. TIC's agreement to the terms in the Agreement were subject to numerous factors, including manufacturing facility capacity, current and projected costs of materials and labor, and economic projections for the industry. **Appendix 1** at ¶ 5. If TIC's other customers were to obtain information about the terms in the Agreement, TIC would be placed in an unfair bargaining position during future negotiations because the factors that existed during the negotiation of the Agreement have changed. *Id.*

16. Moreover, TIC is concerned that disclosure of the terms of the Agreement would allow TIC's immediate competitors to obtain TIC's proprietary confidential business information. **Appendix 1** at 6. If competitors were to obtain this information, TIC would be placed in an unfair bargaining position during future negotiations with TIC's customers. *Id.*

17. Because the Agreement and any related documents constitute TIC's proprietary confidential business information, they should be protected from disclosure entirely. Rule 1.280(c), Florida Rules of Civil Procedure, permits this Commission to enter an order requiring that requested discovery "not be had" and "that a trade secret or other confidential research, development, or commercial information not be disclosed" R. 1.280(c), Fla. R. Civ. P. In the case of discovery seeking proprietary confidential business information, including trade secrets, entry of such an order is the only appropriate remedy.

18. Calpine cannot meet its burden of proving that its need for TIC's proprietary confidential business information outweighs TIC's interest in keeping the information confidential. As FPL noted in its Supplemental Objections to Calpine's First Request for Production of Documents, the request appears to be "nothing more than a thinly veiled attempt by

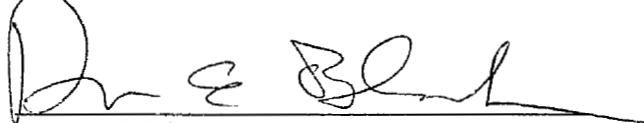
Calpine to obtain competitive intelligence.” FPL’s Supplemental Objections to Calpine’s First Request for Production of Documents (Nos. 1-71) and First Set of Interrogatories (Nos. 1-19) at 19.

19. The undersigned has contacted counsel in this docket and is authorized to represent that FPL supports this motion and that Calpine opposes it.

For the reasons expressed, TIC respectfully requests that the Commission enter a Protective Order prohibiting FPL from disclosing to Calpine any documents that include TIC’s proprietary confidential business information, including the Agreement for supply of STGs and any related documents.

Respectfully submitted this 6th day of May, 2004.

TOSHIBA INTERNATIONAL CORPORATION



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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served by U.S. Mail this 6th day of May

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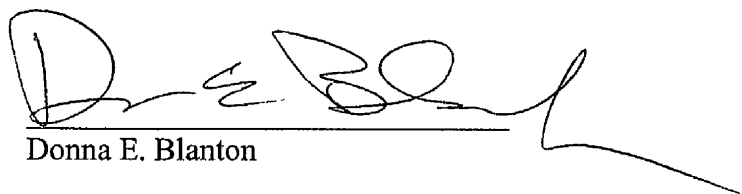
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Donna E. Blanton

APPENDIX 1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Determine Need)
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_____)

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AFFIDAVIT

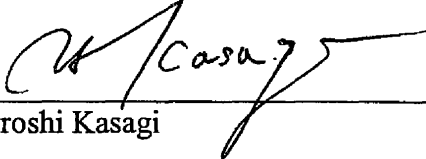
State of California)
)
County of San Francisco)

BEFORE ME, the undersigned authority, this day personally appeared Hiroshi Kasagi, who, being first duly sworn, deposes and states:

1. My name is Hiroshi Kasagi. I am over eighteen (18) years of age and make this affidavit upon my personal knowledge.
2. I am Senior Vice President and General Manager of the Power Systems Division of Toshiba International Corporation ("TIC"), which sells large power plant equipment such as steam turbine generators ("STGs").
3. Pursuant to a Master Purchase Agreement for the supply of Steam Turbine Generators ("Agreement"), Florida Power & Light Company ("FPL") may procure STGs from TIC.
4. The terms upon which TIC agreed to supply these STGs, if ordered, are confidential, according to the Agreement. TIC considers the terms and conditions of the Agreement, including the favorable pricing extended to FPL under the Agreement, to be highly sensitive commercial information, the disclosure of which would place TIC in a detrimental position relative to current and future customers, including Calpine Energy Services, L.P. ("Calpine") and its affiliates. Moreover, such disclosure would affect TIC's willingness to offer FPL favorable pricing and other terms and conditions in future negotiations.
5. Disclosure of the terms of the Agreement would be detrimental to TIC's relationship with FPL and with TIC's other customers. TIC's agreement to the terms in the Agreement were subject to many factors, including but not limited to manufacturing facility capacity, current and projected costs of materials and labor, and economic projections for the industry. To the extent the Agreement contains favorable terms and conditions from the standpoint of FPL and provision of confidentiality, TIC agreed to such terms and conditions based on TIC's assessment of these factors


during negotiations and because FPL is one of TIC's valued customers. If TIC's other customers obtain this information, TIC will be placed in an unfair bargaining position during future negotiations because the factors that existed during negotiations of the Agreement have changed.

6. Additionally, TIC is very concerned that disclosure to third parties would allow TIC's confidential, proprietary information to be disclosed to TIC's immediate competitors. If TIC's competitors obtain this information, TIC will be placed in an unfair bargaining position during future negotiations with TIC's customers.
7. The Agreement also contains proprietary technical information. For the same reasons as previously stated, disclosure of this information to third parties, especially competitors, would cause serious damage to TIC's business.



Hiroshi Kasagi

Before me, the undersigned authority, appeared Hiroshi Kasagi, who is personally known to me, ~~or has produced~~ _____ as identification, on May 4, 2004.



Notary Public
State of California

Printed name and commission number:

ESTER WASIDLOW
COMMISSION # 1329091

My commission expires on NOV. 9, 2005