

ORIGINAL

Matilda Sanders

From: James A. McGee [jmcgee@tampabay.rr.com]
Sent: Thursday, May 06, 2004 3:29 PM
To: Filings@psc.state.fl.us
Cc: Jennifer Brubaker; Smith, Natalie; jmoylejr@moylelaw.com
Subject: Docket No. 040206-EI; Motion for Protective Order

This electronic filing is made by

James A. McGee
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Docket No. 040206-EI

In re: Florida Power & Light's Petition to
Determine Need for Turkey Point Unit 5
Electrical Power Plant.

On behalf of Progress Ventures, Inc.

Consisting of 20 pages in two files.

The attached documents for filing are
Progress Ventures, Inc.'s Motion
for Protective Order, including a filing letter
and certificate of service (Word file), and
Exhibit A to PVI's Motion (PDF file).

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JAMES A. MCGEE
ASSOCIATE GENERAL COUNSEL
PROGRESS ENERGY SERVICE COMPANY, LLC

May 6, 2004

VIA ELECTRONIC FILING

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 040206-EI

Dear Ms. Bayó:

Enclosed for filing in the subject docket on behalf of Progress Ventures, Inc., is its Motion for Protective Order.

Please acknowledge your receipt of the above filing as provided in the Commission's electronic filing procedures. Thank you for your assistance in this matter.

Very truly yours,

s/ James A. McGee

JAM/scc
Enclosures

cc: Parties of record

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Florida Power & Light's
Petition to Determine Need for
Turkey Point Unit 5 Electrical
Power Plant.

Docket No. 040206-EI

Submitted for filing:
May 6, 2004

**PROGRESS VENTURES, INC.'S
MOTION FOR PROTECTIVE ORDER**

Progress Ventures, Inc. ("PVI"), pursuant to Section 366.093, F.S., and Rule 25-22.006, F.A.C., hereby moves the Florida Public Service Commission ("Commission") for a protective order limiting disclosure of the bid proposal submitted by PVI in response to the Request For Proposals ("RFP") issued by Florida Power & Light Company ("FPL") in accordance with the provisions of the Confidentiality Agreement proposed by FPL and attached hereto as Exhibit A. The bid proposals of PVI and other respondents to the RFP are currently sought by Calpine Energy Services, L.P. ("Calpine") through its First Request for Production of Document propounded upon FPL in this proceeding.

Need to Protect PVI's Bid Proposal

PVI's bid proposal contains highly sensitive proprietary confidential business information. Specifically, the bid proposal includes trade secrets as defined in Section 812.081, F.S., highly proprietary technology descriptions, and technical/patented information owned and used by PVI in its business ventures throughout the world. PVI will suffer irreparable harm if this information is disclosed without suitable safeguards to Calpine, who is a competitor of PVI.. Disclosure of PVI's bid proposal would be highly prejudicial and would give Calpine an unfair competitive advantage in any future request for proposals.

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As a result, the production of PVI's bid proposal requested by Calpine will cause irreparable harm to PVI and its competitive business interests absent suitable limitations restricting disclosure to and access by Calpine. The Confidentiality Agreement proposed by FPL provides such limitations on disclosure and access in a manner which fairly and reasonably balances the need to protect the highly sensitive information in PVI bid proposal against Calpine's interest in using this and other bid proposals to replicate FPL's evaluation of the proposals through computer simulation models.

In FPL's recent companion need cases for its Martin and Manatee power plants, Docket Nos. 020262-EI and 020263-EI, respectively, PVI filed a non-party motion for protective order in response to a similar production request for the bid responses to FPL's RFPs. As grounds for its requested protective order, that motion alleged the confidentiality agreement FPL proposed to employ in conjunction with producing the bid proposals was wholly inadequate to protect the interests of non-party RFP respondents such as PVI. The Commission granted PVI's motion for protective order in Order No. PSC-02-0611-PCO-EI, issued in each of FPL's two dockets.

Had the Confidentiality Agreement now proposed by FPL been utilized in the prior need cases, PVI would not have needed to file its motion for protective order in those cases. The fact that PVI, through this motion, has not only found it unnecessary to object to the Confidentiality Agreement, but in fact endorses and supports the Agreement as the means to protect the sensitive information in PVI's bid response is a testament to the appropriateness of the proposed Confidentiality Agreement.

PVI therefore seeks a protective order from the Prehearing Officer that requires Calpine to adhere to conditions substantially similar to the provisions contained in FPL's proposed Confidentiality Agreement regarding access to PVI's bid proposal, or that requires Calpine to execute the Agreement as a condition upon its receipt of the bid proposal.

PVI's Standing as a Non-Party

PVI has standing as a non-party to seek a protective order limiting disclosure of its confidential bid information to Calpine in these proceedings. Commission Rule 25-22.006(6)(a), F.A.C., provides that in a formal proceeding before the Commission “. . . any utility or other person may request a protective order protecting proprietary confidential business information from discovery.” (Emphasis supplied.) The same terminology, “a utility or other person”, is used in Section 366.093, F.S., under which authority the Commission's confidentiality rule was adopted. Section 366.093 also includes the following within the definition of “proprietary confidential business information”:

(e) information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information. (Emphasis supplied.)

Thus, Section 366.093 and the Commission's confidentiality rule adopted under its authority offer protection to the provider of confidential information, irrespective of whether or not that provider is a party. It is clear, therefore, that PVI has standing to protect its confidential information that may be provided to intervenors, including Calpine, who competes directly with PVI in the wholesale power markets.

Miscellaneous

The undersigned counsel has been authorized by counsel for FPL to represent that FPL supports the relief request in this motion, and believes that this motion will be opposed by Calpine.

Prayer for Relief

WHEREFORE, PVI requests that its motion for protective order be granted as requested herein, and that the production of PVI's bid proposal be conditioned upon Calpine's execution of the Confidentiality Agreement, or upon provisions established in a protective order issued by the Prehearing Officer that govern disclosure to and access by Calpine which are substantially similar to those set forth in the Confidentiality Agreement.

Respectfully submitted,

s/ James A. McGee

James A. McGee
Associate General Counsel
Progress Energy Service Company, LLC
Post Office Box 14042
St. Petersburg, Florida 33733-4042
Telephone: 727-820-5184
Facsimile: 727-820-5519
Email: james.mcgee@pgnmail.com

Attorney for
PROGRESS VENTURES, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following individuals by electronic mail this 6th day of May, 2004.

Jennifer Brubaker, Esquire
Office of the General Counsel
Economic Regulation Section
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

R. Wade Litchfield, Esquire
Natalie F. Smith, Esquire
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408-0420

Jon C. Moyle, Esquire
Cathy M. Sellers, Esquire
118 North Gadsden Street
Tallahassee, FL 32301

s/ James A. McGee

Attorney

EXHIBIT A

**PVI's Motion for
Protective Order**

FPL'S PROPOSED CONFIDENTIALITY AGREEMENT

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Florida Power & Light Company's) Docket No. 040206-EI
Petition to Determine Need for)
Turkey Point Unit 5 Electrical Power Plant)
) Dated: _____, 2004
_____)

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (the "Agreement") is entered into by and between Florida Power & Light Company ("FPL") and the undersigned parties (the "Parties" or a "Party") by and through their representative counsel. The Agreement shall govern the use of all information that a Party deems confidential and produces in responding to discovery requests.

1. Applicability: The terms of this Agreement shall apply to:
 - (a) all information found to be confidential by the Florida Public Service Commission ("FPSC" or the "Commission") pursuant to Section 25-22.006, Florida Administrative Code (the "Confidentiality Rule"), and Section 366.093(3), Florida Statutes, and all other information, regardless of format, that a Party to this Agreement designates confidential, whether pursuant to this Agreement or the Confidentiality Rule, (collectively "Confidential Information").
 - (b) The term Highly Sensitive Information applies to a subset of Confidential Information and refers to information that a responding Party claims is of such a highly sensitive nature that allowing a Party to make copies of or notes regarding such material or providing access to a Party or its employees would expose the responding Party, or a person or entity to which the responding Party owes a duty to protect the confidentiality of such materials, to an unreasonable risk of harm.

2. Reviewing Party:

A party to FPSC Docket No. 040206-EI is a “Reviewing Party” to the extent that such party receives or is provided access to material pursuant to this Agreement.

3. Obligation to Act in Good Faith:

- (a) By signing this Agreement, no Party accepts the validity of, or waives the right to contest a claim of confidentiality on any grounds.
- (b) In the event that a Reviewing Party wishes to disclose Confidential Information to any person to whom disclosure may not be authorized by this Confidentiality Agreement, or wishes to have changed the designation of certain information or material as protected by alleging, for example, that such information or material has entered the public domain, such Reviewing Party shall first file and serve on the Party asserting confidentiality written notice of such proposed disclosure or request for change in designation, identifying with particularity each of the protected materials with respect to which such a disclosure or change in designation is proposed, the nature of such proposed disclosure or change in designation, and the basis therefor.
- (c) The Parties agree to attempt to resolve any issues on an informal basis before resorting to the provisions and procedures of the Confidentiality Rule. All Parties agree to act reasonably and in good faith in claiming or questioning the claim of confidentiality of information provided pursuant to this Agreement.
- (d) If the Parties are unable to informally resolve the matter, the Party asserting the confidentiality of information or the particular designation of confidentiality shall promptly seek a ruling from the FPSC. The Party asserting the information to be

non-confidential shall preserve the confidentiality of the information as provided in this Agreement pending resolution of the matter by the FPSC or any subsequent reviewing or appellate body or authority.

4. Procedure for Producing Confidential Information:

- (a) Any Party producing materials, including but not limited to documents or records stored or encoded on a computer disk or other similar electronic storage medium, in the above-referenced proceeding may designate that material or any portion of it as Confidential Information pursuant to this Agreement by clearly labeling, typing, or stamping on the face of the material "CONFIDENTIAL INFORMATION PURSUANT TO AGREEMENT IN FPSC DOCKET NO. 040206-EI " or words of similar import.
- (b) Any Party producing materials, including but not limited to documents or records stored or encoded on a computer disk or other similar electronic storage medium, in the above-referenced proceeding may designate that material or any portion of it Highly Sensitive Information pursuant to this Agreement by clearly labeling, typing, or stamping on the face of the material "HIGHLY SENSITIVE INFORMATION PURSUANT TO AGREEMENT IN FPSC DOCKET NO. 040206-EI."
- (c) Confidential Information shall not include any information or document contained in the public files of the FPSC, the Federal Energy Regulatory Commission, or any other federal or state agency unless an exception or exemption exists or is granted. Unless an exception or exemption exists or is granted, Confidential Information also shall not include documents or information which at the time of

or prior to disclosure in these proceedings is or was public knowledge or which becomes public knowledge other than through disclosure in violation of this Agreement.

5. Procedures applicable to Review of Confidential Information:

- (a) Except as otherwise provided in this Agreement, a Reviewing Party shall be permitted access to Confidential Information only through its authorized "Reviewing Representatives." "Reviewing Representatives" of a Reviewing Party may include its counsel of record in Docket No. 040206-EI and associated attorneys, paralegals, economists, statisticians, consultants, expert witnesses, or other persons employed or retained by the Reviewing Party and directly engaged in these proceedings. The total number of Reviewing Representatives who may be designated by a Party to have access to the Confidential Information shall not exceed ten (10) without the express written permission of the Party providing the Confidential Information.
- (b) Each Reviewing Representative who inspects the Confidential Information shall, before such inspection, agree in writing to the following Acknowledgement, and shall provide a copy of a signed Acknowledgement in the form of that attached to this Agreement to counsel for the Party asserting confidentiality:

"I certify my understanding that the Confidential Information is provided to me pursuant to the terms and restrictions of the Confidentiality Agreement in Florida Public Service Commission Docket No. 040206-EI, Florida Power & Light Company's Petition to Determine Need for Turkey Point Unit 5 Electrical Power Plant (the "Agreement"), and that I have been given a copy of the Agreement and have read the Agreement and agree to be bound by it. I understand that the contents of the Confidential Information, and my notes, memoranda, or any other form of information regarding or derived from the Confidential Information, shall not

be disclosed to anyone other than in accordance with the Agreement and shall be used only for the purpose of the proceeding in Florida Public Service Commission Docket No. 040206-EI. Provided, however, if the information contained in the Confidential Information is publicly available or is obtained from the independent sources, the understanding stated herein shall not apply unless an exception or exemption exists or is granted.”

- (c) Except as otherwise provided in this Agreement, any Reviewing Representative may disclose Confidential Information to any other Reviewing Representative, provided that a copy of the Acknowledgement appended to this Agreement as Appendix A signed by the Reviewing Representative is provided to counsel for the Party asserting confidentiality before any such disclosure.
- (d) In the event that any Reviewing Representative to whom such Confidential Information is disclosed ceases to be engaged in this proceeding, access to such materials by such person shall be terminated. Any person who has agreed to the Acknowledgement in Appendix A shall continue to be bound by the provisions of this Agreement, even if no longer so engaged.
- (e) Except as otherwise provided in this Agreement, Confidential Information shall be made available for inspection by Reviewing Representatives at a location specified by the Party declaring such materials to be confidential between the hours of 9:30 a.m. and 5:00 p.m., Monday through Friday (except holidays). The materials may be reviewed only during the "reviewing period," which period shall commence upon signing of this Agreement, and continue until conclusion of these proceedings. As used in this paragraph, "conclusion of these proceedings" refers to the exhaustion of available appeals, or the running of the time for the making of such appeals, as provided by applicable law.

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- (f) Except as otherwise provided in this Agreement, Reviewing Representatives may take handwritten notes regarding the Confidential Information made available for inspection pursuant to paragraph 5(e), and, after such inspection, may designate materials to be copied. Only one copy of the materials designated shall be reproduced by the Party making such materials available for inspection. A Party may reproduce Confidential Information only to the extent necessary to provide a copy to Reviewing Representatives who have executed the Acknowledgement appended to this Agreement as Appendix A. Each Party will maintain a copy control log.

6. Special Procedures Applicable to Review of Highly Sensitive Information:

- (a) No copies shall be made of any Highly Sensitive Information and no notes shall be made regarding Highly Sensitive Information except to the extent that such information is necessary to replicate a Party's analyses of non-Party competing generation supply proposals and the Reviewing Party demonstrates that it has the intention and capability to do so; Highly Sensitive Information shall be made available for inspection only by the Reviewing Representatives of the Reviewing Parties; provided, however, that, for purposes of access to Highly Sensitive Information, "Reviewing Representatives" of a Reviewing Party may include its counsel of record in Docket No. 040206-EI and associated attorneys, paralegals, economists, statisticians, consultants, and expert witnesses retained by the Reviewing Party and directly engaged in these proceedings, except to the extent that the duties, responsibilities, or assignments of such individuals involve them in any aspect of generation-related planning or management, including, but not

limited to, the development, construction, operation or maintenance of electric generation facilities, the purchase, sale, or marketing of equipment, materials or labor associated with the development, construction, or operation of electric generation facilities, the purchase, sale, or marketing of electric energy or capacity, the development, construction, operation, or maintenance of electric transmission facilities that facilitate the flow of electric capacity or energy to or from electric generation facilities, or the development construction, or operation of facilities that interconnect electric generation facilities to gas pipelines. Further, for purposes of access to Highly Sensitive Information, Reviewing Representatives may not include persons employed by the Reviewing Party or its affiliates. The total number of Reviewing Representatives who may be designated by a Party to have access to the Highly Sensitive Information shall not exceed two (2) without the express written permission of the Party providing the Highly Sensitive Information.

- (b) If the Party asserting confidentiality believes that further protections should be afforded with respect to the manner in which, or the Reviewing Representatives to which, such materials are disclosed, such materials may be made available for inspection by counsel for the Reviewing Party only, pending a determination of the manner in which, and the Reviewing Representatives to which, such materials will be disclosed pursuant to this Agreement, which determination shall be made on a case-by-case basis, depending on the level of protection that may be necessary to protect the responding Party, and any other person or entity to which the responding Party owes a duty to protect the confidentiality of such materials,

from any unreasonable risk of harm that may result from disclosure of such information.

- (c) In the event the Parties are unable to agree on the manner in which, and the Reviewing Representatives to which, such materials will be disclosed, the Party asserting confidentiality reserves its right to seek from the Commission a protective order providing the level of protection for the Highly Sensitive Information that the Party asserting confidentiality believes is required.

7. Protection of Confidential Information in General:

- (a) The Confidential Information provided or made available by a Party pursuant to this Agreement shall remain the property of the Party who provided it.
- (b) All Confidential Information shall be made available to the Reviewing Parties and their Reviewing Representatives solely for the purpose of the Party's participation in Docket No. 040206-EI. Confidential Information or access to Confidential Information may not be used in furtherance of any other purpose, including, without limitation, (i) any other pending or potential proceeding involving any claim, complaint, or other grievance of whatever nature, or (ii) any business endeavor or competitive purpose of whatever nature.
- (c) The Confidential Information, as well as the Reviewing Party's notes, memoranda, or any other information regarding, or derived from the Confidential Information, are to be treated as confidential by the Reviewing Party and shall not be disclosed or used by the Reviewing Party except as permitted and provided in this Agreement. Information derived from or describing the Confidential Information shall not be placed in the public or general files of the Reviewing

Party except in accordance with provisions of this Agreement. A Reviewing Party must take all reasonable precautions to ensure that Confidential Information, including handwritten notes and analyses made from protected materials, are not viewed or taken by any person other than a Reviewing Representative of the Party.

8. Terms and Termination:

- (a) This Agreement shall be effective from the date it is executed by the Parties until all Confidential Information has been destroyed by the Party to whom it is provided, or returned to the Party who provided it, or as to any information for which a determination of confidential status has been sought, until the FPSC has made a final adjudication as to the confidential status of the information.
- (b) Except for information for which the FPSC has issued a final order holding that the information is not granted confidential status, each Party's obligation not to disclose Confidential Information continues unless or until the information is otherwise publicly disclosed in a manner not in violation of this Agreement and the information is not otherwise protected. The continuing obligation not to disclose of each Party and each person who has been granted access to Confidential Information under the terms of this Agreement, shall survive the expiration of this Agreement.
- (c) All Confidential Information as well as the Reviewing Party's notes, memoranda, or any other information regarding, or derived from the Confidential Information, shall be returned to the Party who provided or it shall be certified to that Party that it has been destroyed no later than 45 days after the date the FPSC issues its final

decision or order in this proceeding, unless any decision of the FPSC in Docket No. 040602-EI is appealed, in which case the Agreement shall continue until all appellate review is completed. At the end of the term of this Agreement, or before, each Party shall either return all Confidential Information as well as the Reviewing Party's notes, memoranda, or any other information regarding, or derived from the Confidential Information, remaining in its possession to the Party from whom it was obtained or, alternatively, certify in writing to said Party that all Confidential Information has been destroyed.

9. Remedies.

Each Party agrees that: (i) divulgence or unauthorized use of Confidential Information could damage the owner of the information; (ii) the amount of resulting damages could be difficult to ascertain; (iii) the owner of the information may not reasonably or adequately be compensated for the loss of such information in damages alone; and (iv) the owner of the information shall be entitled to injunctive or other equitable relief to prevent or remedy a breach of this Agreement or any part of it. In any action to enforce the provisions of this Agreement, the prevailing Party shall be entitled to any and all costs and attorneys' fees incurred in that action. Furthermore, nothing herein is intended to restrict any remedies available to the owner of Confidential Information for the unauthorized disclosure, dissemination or release of proprietary information by any of the Parties to this Agreement. This Agreement shall be interpreted, governed, and construed under the laws of the State of Florida.

10. Authority.

The undersigned counsel acknowledge and represent that they have actual authority to enter into this Agreement on behalf of their respective clients.

11. Modifications.

This Agreement may be modified only in writing and only upon the mutual consent of the Parties to the modification.

Dated this _____ day of April 2004.

Counsel for [insert company's name]

Counsel for Florida Power & Light Company

APPENDIX A

NON-DISCLOSURE ACKNOWLEDGEMENT

I certify my understanding that the Confidential Information is provided to me pursuant to the terms and restrictions of the Confidentiality Agreement in Florida Public Service Commission Docket No. 040206-EI, Florida Power & Light Company's Petition to Determine Need for Turkey Point Unit 5 Electrical Power Plant, and that I have been given a copy of the Confidentiality Agreement and have read the Agreement and agree to be bound by it. I understand that the contents of the Confidential Information, and my notes, memoranda, or any other form of information regarding or derived from the Confidential Information, shall not be disclosed to anyone other than in accordance with the Agreement and shall be used only for the purpose of the proceeding in Florida Public Service Commission Docket No. 040206-EI. Provided, however, if the information contained in the Confidential Information is publicly available or is obtained from the independent sources, the understanding stated herein shall not apply unless an exception or exemption exists or is granted.

