

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Determine Need for)
Turkey Point Unit 5 Power Plant)
by Florida Power & Light Company.)

Docket No. 040206-E1

Dated: May 14, 2004

CALPINE ENERGY SERVICES, L.P.'S RESPONSE TO
FLORIDA POWER & LIGHT COMPANY'S MOTION FOR PROTECTIVE
ORDER REGARDING CALPINE ENERGY SERVICES, L.P.'S FIRST REQUEST
FOR PRODUCTION OF DOCUMENTS (NOS. 1 -71)

Calpine Energy Services, L.P. ("Calpine"), pursuant to Rule 28-106.206, Florida Administrative Code ("FAC"), submits the following response to Florida Power & Light's ("FPL") Motion for Protective Order Regarding Calpine's First Request for Production of Documents (Nos. 1-71) (hereinafter, FPL's "Motion") and states:

I. FPL Seeks to Thwart Legitimate Discovery

FPL has issued a Request for Proposals ("RFP") for electrical generating capacity under the Commission's Bid Rule, Rule 25-22.082, Florida Administrative Code. This rule specifically provides that the intent of this rule is "to ensure that a public utility's selection of a proposed generation addition is the most cost-effective alternative available." Rule 25-22.082(1), F.A.C.

Calpine, as an entity submitting a proposal in response to FPL's RFP, seeks to ensure that the requirements of the Bid Rule are complied with and that the "most cost-effective alternative" is selected as a result of this process. Accordingly, Calpine has sought discovery designed to determine if, in fact, FPL's self-build alternative is the most cost-effective alternative available.

FPL, on the other hand, seeks to effectively eliminate any meaningful, independent analysis of FPL's bid process by deeming all information useful to holding FPL accountable

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as “confidential,” “proprietary,” “trade secret,” or otherwise non-disclosable because of some third party obligation of confidentiality.

II. Scope of Discovery

Florida has adopted a set of discovery rules designed to facilitate “broad and liberal” discovery. Allstate Insurance Co. v. Boecher, 773 So. 2d 993, 995 (Fla. 1999). Further, as recognized by Florida’s Supreme Court, “courts must remain vigilant in preserving our discovery rules’ basic framework, which envisions broad discovery in order to advance the state’s important interest in the fair and efficient resolution of disputes.” Alterra Healthcare Corporation, v. Estate of Shelley, 827 So. 2d 936, 948 (Fla. 2002).

III. Vendor Contract Data

FPL seeks to completely deny Calpine access to information FPL has characterized as “Vendor Contract Data.” As defined by FPL, this includes “information related to [FPL’s] contracts and negotiations with third party vendors” that is “proprietary and highly sensitive data both to FPL and to its third-party vendors.” (Motion, ¶ 5). The key question for consideration is: Who is the owner of the proprietary and highly sensitive data that FPL is seeking to protect? Reading FPL’s Motion, it is clear that the information that FPL seeks to protect (suppress) from production is primarily third party information that has been provided to FPL.

First, FPL has no standing to assert the rights of third parties to this proceeding. Therefore, FPL’s purported justification for a protective order based on the rights of “third-party vendors” is without merit and cannot be considered. Alterra, 827 So. 2d at 941 (“in the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.”) (citing, Powers v. Ohio,

499 U.S. 400, 410 (1991)). Further, because these “third-party vendors” are free to intervene in this action and protect their own rights, there is no recognized exception to the rule stated above. Alterra, 827 So. 2d at 944.

Second, FPL seeks to suppress discovery of information that it claims is subject to an obligation of confidentiality it owes to third party vendors. However, it is well settled that contractual agreements between FPL and third parties cannot be used to diminish Calpine’s discovery rights. For example, in Scott v. Nelson, 697 So. 2d 1300 (Fla. 1st DCA 1997), the court denied Scott’s Petition for Writ of Certiorari to review an order denying Scott’s motion for a protective order. Scott sought a protective order to prevent the testimony of a third party to the litigation that had previously entered into a litigation settlement agreement with Scott that contained confidentiality and non-disclosure provisions.

In denying Scott’s Petition, the First DCA stated:

While we recognize and respect the strong public policy favoring settlement of disputed claims and policy which dictates that confidentiality agreements not be regarded lightly, we find that to prevent any discovery based upon a settlement agreement would result in a defendant being able to buy the silence of a witnesses with a settlement agreement when the facts of one controversy are relevant to another. Id. at 1301.

* * * * *

Settlement agreements which suppress evidence violate the greater public policy. Id.

In Nestor v. Posner-Gerstenhaber, 857 So. 2d 953, 955 (Fla. 3d DCA 2003), the Third DCA affirmed this principle, citing Scott and specifically holding that “[c]ontractual confidentiality agreements, however, cannot be used to adversely interfere with the ability of nonparties to pursue discovery in support of their case.” In Smith v. TIB Bank of the Keys,

687 So. 2d 895, 896 (Fla. 3d DCA 1997), the Court held “[w]hile confidentiality agreements are necessary in some instances, to facilitate settlement, they may not be subsequently employed by a litigant to obscure issues or otherwise thwart an opponent’s discovery.”

Therefore, FPL’s primary justifications for suppressing the production of Vendor Contract Data (protection of third party rights and obligations under third party confidentiality agreements) are totally without merit and cannot form the basis for the Commission to suppress this category of information. To the extent that FPL seeks to protect its own (as opposed to third parties’) interests, it appears that the basis for FPL’s requested protected order is that Calpine is a “direct competitor” of FPL.¹ (Motion, ¶ 18, 19, 20, 21). However, during the depositions of FPL witnesses Steven Sim and Rene Silva, these witnesses indicated that entities that submitted proposals in response to FPL’s RFP are not really “competitors,” but rather are “potential partners” or otherwise cooperating entities. The Commission should not allow FPL to manipulate its position to suit FPL’s then-current interest.

Third, even if FPL did have a legitimate basis for its requested protective order, the information requested by Calpine is critical - and absolutely essential - to Calpine’s ability to determine if FPL has complied with the requirements of the Bid Rule and otherwise has fairly and accurately evaluated its own proposal against Calpine’s proposal. FPL’s primary justification for selecting its self build option is FPL’s assertion that this option is the most cost effective. Necessarily underlying this assertion is a financial analysis - an analysis that uses as key inputs the very information that FPL now seeks to withhold from Calpine as

¹ A recurring phrase throughout FPL’s Motion is “Calpine, a direct competitor to FPL, . . .”

“Vendor Contract Data.” FPL seeks to create the very situation that Justice Pariente warned about in Alterra - namely, the situation where one party [FPL] asserts confidentiality rights “as a subterfuge to prevent the disclosure of relevant information.” Id. at 947.

To the extent that any of the information requested by Calpine should be provided confidential treatment, the parties can negotiate an appropriate confidentiality agreement that will protect truly confidential information while still protecting Calpine’s right, as a party to this proceeding, to conduct reasonable discovery. Therefore, Calpine respectfully requests that the Commission deny FPL’s request for a protective order prohibiting discovery of Vendor Contract Data.

IV. FPL Competitive Data

FPL also seeks to completely deny Calpine access to information FPL has characterized as “FPL Competitive Data.” As defined by FPL, this includes “commercially sensitive information that contains or constitutes trade secrets and which is confidential, proprietary business information to FPL irrespective of any obligations to third parties.” (Motion, ¶ 6). Examples provided by FPL include, inter alia, unit performance data related to turbines and boilers proposed by FPL in its self-build alternative.

Again, this information is absolutely critical to Calpine’s ability to determine if FPL has complied with the requirements of the Bid Rule and otherwise has fairly and accurately evaluated its own proposal vis-à-vis the other proposals. For example, FPL’s EGEAS modeling runs necessarily include inputs related to the performance of FPL’s self-build alternative. These inputs include the type of information that FPL seeks to totally exclude from production, including, e.g., heat rate and operating characteristics. The Commission cannot allow FPL to have a monopoly on this critical information.

To the extent that any of the information requested by Calpine should be provided confidential treatment, the parties can negotiate an appropriate confidentiality agreement that will protect truly confidential information while still protecting Calpine's right, as a party to this proceeding, to conduct reasonable discovery. Therefore, Calpine respectfully requests that the Commission deny FPL's request for a protective order prohibiting discovery of FPL Competitive Data.

V. Highly Sensitive Bid Data

FPL also seeks to condition Calpine's access to information FPL has characterized as "Highly Sensitive Bid Data." As defined by FPL, this includes "competitively sensitive, confidential, proprietary business information related to proposals received in response to FPL's 2003 RFP." (Motion, ¶ 7). Examples provided by FPL in its Motion include, inter alia, vendor bids and FPL's evaluations of these bids.

Again, FPL here seeks to assert rights on the behalf of third-parties. As discussed above, there is no basis for FPL to assert such rights, and no basis for the Commission to grant FPL's Motion based on an assertion of such rights. As is already evidenced by the filings in this docket, third parties are fully capable of asserting their rights related to confidential information. To the extent FPL seeks to suppress non third-party information, the information sought is critical to Calpine's ability to determine if FPL has complied with the requirements of the Bid Rule and otherwise has fairly and accurately evaluated its own proposal against Calpine's proposal.

Furthermore, FPL seeks to have the Commission condition FPL's release of the requested information "only to the extent necessary to permit Calpine to replicate FPL's evaluation of bids and only after Calpine demonstrates to FPL an intention and the capability

to use the information solely for the purpose of replicating FPL's bid evaluation." (Motion, ¶ 7). Of course, this proposal is wholly antithetical to Florida's "broad and liberal discovery" as FPL seeks to unilaterally determine both what information is "necessary," and when Calpine has adequately (in FPL's unilateral, subjective opinion) demonstrated its "intention" and "capability," such that FPL's obligation to disclose is triggered. Such additional requirement also interfere with the ability to plan trial strategy in an unrestricted fashion. Clearly, the limitations sought by FPL amount to a denial of any meaningful discovery.

VI. FPL's Proposed Confidentiality Agreement

The Confidentiality Agreement attached to FPL's Motion contains many significant flaws. For example, there is no provision allowing a party to challenge a confidentiality designation made by the other party. There is little, if any, guidance to determine what separates information into the two classes of confidential information FPL proposes. Finally, the agreement allows FPL to assert third-parties' rights - in direct contradiction to established case law.

Calpine believes that a confidentiality agreement can be structured such that legitimate concerns are addressed without unnecessarily obstructing access to discoverable information. However, the Confidentiality Agreement proposed by FPL does not reasonably accomplish these objectives and should not be entered by the Commission. Calpine has attached as Exhibit "A" a proposed Protective Order that it believes better balances the competing interests of the parties.

VII. Legal Standard

The Commission is required to balance two competing interests. One interest is in the protection from unnecessary disclosure of confidential and proprietary information. The

second interest is the right of parties to this proceeding to conduct the “broad and liberal” discovery provided for under the Florida rules that is necessary “to advance the state’s important interest in the fair and efficient resolution of disputes.” Rasmussen v. South Florida Blood Serv., Inc., 500 So. 2d 533, 535 (Fla. 1987).

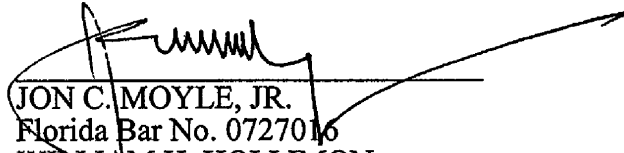
There is no reason for the Commission to resort to the draconian measures that FPL advocates (denying all access to information that FPL has classified as Vendor Contract Data and FPL Commercial Data). Rather, the Commission should fashion a protective order that balances the competing interests described above without depriving Calpine the access to information that is clearly discoverable and relevant in this proceeding.

Calpine has a legitimate interest in evaluating FPL’s methods and processes (necessarily including all inputs and assumptions incorporated therein) to determine if Calpine’s bid was fairly evaluated in accordance with the Bid Rule and to determine if FPL has fairly evaluated its own bid in accordance with the Bid Rule. Denying Calpine’s requested discovery effectively block Calpine’s ability to conduct this evaluation. Thus, Calpine has demonstrated a reasonable necessity for the requested information and the Commission should not foreclose Calpine’s access to this information. See Eastern Cement Corp. v. Department of Environmental Regulation, 512 So. 2d 264, 266 (Fla. 1st DCA 1987). Moreover, it is clear that section 366.093(2), Florida Statutes, one basis stated by FPL for its Motion, contemplates that “proprietary confidential business information” be disclosed subject to an appropriate protective order - not totally suppressed from disclosure.

WHEREFORE, Calpine Energy Services, L.P., respectfully requests that the Commission deny the relief requested in FPL’s Motion for Protective Order and enter an order setting forth reasonable conditions under which discovery be had.

Certificate of Counsel

Counsel for Calpine, Jon C. Moyle, Jr., certifies that he has consulted with Counsel for FPL in an attempt to resolve the issued raised herein, but that counsel were unable to agree.



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CERTIFICATE OF SERVICE

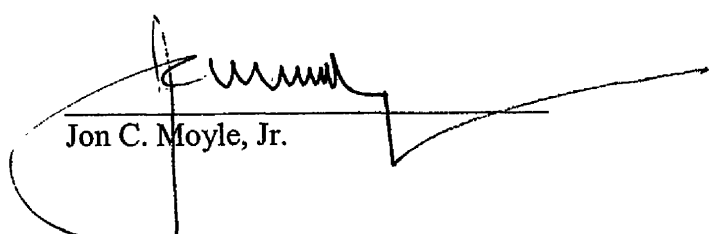
I HEREBY CERTIFY that a true and correct copy was served by hand-delivery this 14th day of May, 2004, on Jennifer Brubaker, Esq., Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-9850; Charles A. Guyton, Esq., Steel Hector & Davis, LLP, 215 South Monroe Street, Suite 601, Tallahassee, FL 32301, and Mr. Bill Walker and Ms. Lynne Adams, Florida Power & Light Company, 215 South Monroe Street, Suite 810, Tallahassee, Florida 32301-1859; and by U.S. Mail to the following persons:

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Turkey Point Unit 5 Power Plant)
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Docket No. 040206-EI

Issued: May ____, 2004

PROTECTIVE ORDER

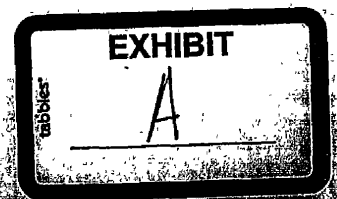
IT IS HEREBY ORDERED: that with respect to any documents or information produced in this docket:

1. **GENERAL.**

A. The parties will produce originals, legible copies of originals, or copies of copies of original documents for inspection pursuant to the Florida Rules of Civil Procedure unless otherwise agreed by the parties, or ordered by the Commission. After examination of documents produced, the requesting party will identify those documents to be copied and furnished to it. Copying of such documents, designations of confidentiality as provided herein, and furnishing of copies shall be done expeditiously and as soon as practical after documents have been so identified.

B. The producing party will retain the original documents until this proceeding is terminated. Copies of produced documents shall be admissible into evidence as true and correct copies of the originals, unless a party reasonably gives notice that he will insist that only the original document be used as evidence (in that event, the party so insisting must produce the document for use at hearing at a reasonable time prior thereto), but objections to admissibility on grounds of relevance or other grounds are not hereby precluded.

C. The fact that information has been designated as CONFIDENTIAL by the producing party pursuant to this Order shall not affect or determine what a trier of fact may find to be confidential or proprietary, nor shall such designation in any way shift, decrease or affect the burdens



of proof and persuasion upon a party seeking to maintain any CONFIDENTIAL designation or upon a party seeking to have the Commission determine that the other party is not entitled to a designation of CONFIDENTIAL. Unless otherwise agreed by all parties, the fact of such designation shall not itself be admissible into evidence and the trier of fact shall not be advised of the fact of such designation. Accordingly, a party who intends to tender into evidence a document or documents marked CONFIDENTIAL must either furnish a copy without the confidential stamp or submit to the party who supplied the document or documents at least ten (10) days prior to the commencement of the hearing a list of all documents stamped CONFIDENTIAL that will be tendered into evidence. When so requested, the party who produced the documents marked CONFIDENTIAL shall have the obligation of providing to the party who intends to tender the documents copies of the documents without the CONFIDENTIAL stamp for introduction into evidence.

2. SCOPE. This Order shall apply to:
 - A. All information designated as CONFIDENTIAL pursuant to this Order;
 - B. Portions of transcripts or videotapes of depositions or other testimony which refer or relate to information designated as CONFIDENTIAL where so requested by the party seeking to maintain a confidential designation; and
 - C. Portions of briefs, memoranda or other writings filed with the Commission (and exhibits to such writings) which refer to or relate to information designated as CONFIDENTIAL.

Information shall be designated as CONFIDENTIAL by conspicuously stamping the word "CONFIDENTIAL" on each page to be designated in a manner which will not obscure the text or affect the legibility. As to transcripts, Commission filings, or similar

documents; the CONFIDENTIAL legend may be stamped on the first page of the document or indicated by letter to the opposing party.

3. CONFIDENTIAL INFORMATION. The producing party may designate as CONFIDENTIAL any document produced by it.

4. TERMS OF PROHIBITION. Information designated as CONFIDENTIAL shall not be disclosed or disseminated to anyone, by any person or entity, except as herein provided.

Disclosure may be made only to:

A. Counsel and associated counsel for the receiving party and their employees;

B. Outside counsel for the producing and receiving party, and their employees involved in the conduct of the proceeding, and representatives of insurance carriers, if any, which provide coverage for the producing or receiving party;

C. Officers, directors, employees and inside counsel of the parties to the extent necessary to assist in preparing for hearing or otherwise assisting in the proceeding;

D. Any fact witnesses to the extent necessary to assist in preparing for hearing or otherwise assisting in the proceeding;

E. Any expert or consultant engaged by a party for the purpose of assisting in the preparation of this proceeding, provided, however, that no CONFIDENTIAL information shall be disseminated to any expert or consultant who is employed by a direct business competitor of the party producing the information;

F. Any person who was involved in the preparation of the document or information or who, prior to the date of the filing of Intervenor's Petition to Intervene, received or reviewed it;

G. The Commission, and Commission personnel, Commission reporters and persons engaged in making copies, provided that all CONFIDENTIAL information filed with the Clerk of the Commission shall be filed under seal and shall be released only upon agreement among all parties, or pursuant to the terms of this Order, or by order of the Commission;

H. Any other person, entity or firm, with the prior written consent of the producing party.

5. Each person to whom CONFIDENTIAL information will be disseminated (other than the parties, attorneys for the parties, and their employees, and officers, directors, employees and inside counsel for any party to this case, the Commission, Commission personnel, and Commission reporters and those persons described in Paragraph 4F) will be required, prior to any such dissemination, to receive and read a copy of this CONSENT PROTECTIVE ORDER and Exhibit "A" hereto, agreeing to be bound by the terms of this Order and to be personally subject to the jurisdiction of this Commission for the purposes of enforcement hereof by the execution of a copy of Exhibit "A" hereto. Counsel for the party receiving CONFIDENTIAL information and disseminating same shall maintain a list of all such persons along with the written agreement of each person. The list and written agreements shall be available for inspection by the Commission upon further order.

6. CONFIDENTIAL INFORMATION FILED UNDER SEAL. All CONFIDENTIAL information, documents, discovery responses, portions of transcripts and any other pleadings or papers disclosing or referring to such CONFIDENTIAL information shall be filed under seal and marked as follows:

CONFIDENTIAL OR CONFIDENTIAL/RESTRICTED: This envelope contains documents that are subject to a protective order of this Commission. The contents are not to be revealed to anyone

except the Commission, or with the prior written consent of the parties herein, or pursuant to an order of this Commission. If the contents are thus revealed, they shall thereafter be resealed.

7. CHALLENGE TO CONFIDENTIALITY DESIGNATION. If any party elects to challenge any designation of confidentiality of any documents or information pursuant to this Order, that party shall provide the designating party seven (7) days advance written notice and afford the designating party an opportunity to voluntarily remove such designation. The party designating shall, within seven (7) days of the receipt of such notice, either voluntarily remove the designation or file a written motion with the Commission for an order preventing or limiting disclosure. Each such motion shall be accompanied by one copy of each document, response or portion of transcript challenged. The motion and accompanying materials shall be filed under seal as provided in paragraph 4 hereof, and the confidentiality of such information shall remain protected until the Commission shall order otherwise.

The parties shall attempt to resolve any such challenge by agreement prior to the time for filing of a motion as herein provided.

If the challenge is not resolved by agreement, or by voluntary removal, and if no motion is filed within twenty (7) days of the receipt of written notice of challenge, then the CONFIDENTIAL designation shall be removed and shall not thereafter apply to such document or information. During the pendency of any motion and before the Commission has ruled, the documents shall continue to be treated as CONFIDENTIAL.

8. PRODUCTION AND RETURN OF DOCUMENTS AND MATERIALS DESIGNATED CONFIDENTIAL. Any documents or other materials designated confidential shall be produced to the requesting party at the expense of the requesting party. At the close of this proceeding each party shall be required to retrieve all copies of confidential materials from experts or

other persons to whom they have been provided consistent with this order and to return to the opposing party any documents or other materials and copies thereof subject to this protective order. In no event shall either party be required to return documents or other materials whose confidentiality has been successfully challenged pursuant to paragraph 7 above.

9. USE OF CONFIDENTIAL INFORMATION BY PRODUCING PARTY. Nothing herein contained shall be construed to limit any party or person in its use of its own documents or information or from disclosing its own documents or information.

10. APPLICATION TO THE COMMISSION. Nothing herein contained shall be construed to preclude or limit any party from opposing any discovery on any grounds which would otherwise be available. Entry of this Order shall not, in and of itself, prejudice any contention of any party upon any motion, nor shall this Order and any consent hereto constitute a waiver of any right to seek relief from the Commission from any and all of the provisions hereof or other modifications of the terms hereof. This Order shall not limit any party's right to seek in camera review or to seek further and additional protection against or limitation upon production or dissemination of information and documents or their contents.

11. CONSTRUCTION. This Order shall, in all instances, be construed according to the Florida Rules of Civil Procedure and the Uniform Rules of Judicial Administration.

DATED this _____ day of _____, 2004.

RUDOLPH "RUDY" BRADLEY
Commissioner and Prehearing Officer

Copies furnished to: All Counsel of Record

EXHIBIT "A"

ACKNOWLEDGMENT OF RECEIPT OF PROTECTIVE ORDER
REGARDING CONFIDENTIAL INFORMATION
AGREEMENT TO BE BOUND THEREBY

I acknowledge receipt of a copy of the PROTECTIVE ORDER dated the ____ day of May, 2004, and I agree that I will be bound by its provisions with respect to any information provided to me pursuant to the terms of this Order. I agree that if I receive any document marked "CONFIDENTIAL", I will not make any copies thereof without the written consent of the party furnishing such document in discovery and I will not discuss the document with anyone other than counsel for a party or others necessary for the purpose of prosecuting or defending the case. I hereby acknowledge that I have read the Order and understand its terms. I further acknowledge that I may be subjected to sanctions if I fail to comply with the Order.

DATED this _____ day of _____, 2004.

Signature