

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition to determine need for Turkey Point Unit 5 electrical power plant, by Florida Power & Light Company. | DOCKET NO. 040206-EI  
ORDER NO. PSC-04-0518-PCO-EI  
ISSUED: May 21, 2004

ORDER ON MOTIONS FOR PROTECTIVE ORDER

BY THE COMMISSION:

On April 16, 2004, Calpine Energy Services, L.P. (Calpine), propounded on Florida Power & Light Company (FPL) its First Request for Production of Documents. A number of motions were filed in response to Calpine's discovery:

- (1) Motion for Protective Order, with Request for Parent Company, Summit Energy Partners, LLC, to be Qualified Representative in Proceeding, filed May 5, 2004, by SEP Homestead, LLC (SEP);
- (2) Motion for Protective Order, and Motion for Oral Argument, filed May 6, 2004, by Toshiba International Corporation (TIC);
- (3) Motion for Protective Order, filed May 6, 2004, by Progress Ventures, Inc. (PVI);
- (4) Motion for Protective Order Based on Confidentiality, and a Request for Oral Argument, filed May 6, 2004, by Southern Power Company (SPC);
- (5) Motion for Protective Order Regarding Calpine's First Request for Production of Documents, and Request for Oral Argument, filed May 7, 2004, by FPL; and,
- (6) Motion for Protective Order based upon Confidentiality, and Motion for Oral Argument, filed May 13, 2004, by General Electric Company (GE).

On May 13, 2004, Calpine filed a Response in opposition to TIC, SPC, and PVI's respective motions for protective order. On May 14, 2004, Calpine filed a Response in opposition to FPL's Motion for Protective Order. Calpine then filed a Response in opposition to GE's Motion for Protective Order Based on Confidentiality on May 19, 2004.

SUMMARY OF THE MOTIONS FOR PROTECTIVE ORDER AND RESPONSES

SEP submitted a bid proposal to supply 50 MW in response to FPL's 2003 Request for Proposals, which is at issue in this proceeding. By its motion, SEP requests a protective order to prohibit FPL from disclosing SEP's bid proposal to Calpine, as part of Calpine's discovery

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request. SEP contends that Calpine is a direct competitor of SEP, that the bid proposal contains proprietary and confidential information, and that SEP will suffer irreparable harm if the information is disclosed to Calpine. SEP contends that a confidentiality agreement between FPL and Calpine would not sufficiently protect SEP's interests, and that SEP would be unduly burdened in having to monitor FPL. Finally, SEP requests that the Commission allow its parent company, Summit Energy Partners, LLC, to be its qualified representative in these proceedings for the limited purpose of its motion for protective order.

In its motion for protective order, TIC states that Calpine seeks disclosure of certain contractual and other documents involving both FPL and TIC, who is a seller of large power plant equipment such as steam turbine generators. Pursuant to a master purchase agreement, FPL may buy steam turbine generators from TIC. The agreement contains a provision making confidential the terms under which TIC agreed to supply equipment to FPL. TIC states that 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. TIC contends that disclosure of the information would place TIC in a detrimental position relative to current and future customers, including Calpine and its affiliates.

PVI's motion requests a protective order limiting disclosure of the bid proposal submitted by PVI to the Request for Proposals issued by FPL in 2003. PVI alleges that the bid proposal contains trade secrets, as defined by Section 812.081, Florida Statutes, highly proprietary technology descriptions, and technical/patented information owned and used by PVI in its business ventures worldwide. Disclosure of this information to Calpine without suitable safeguards would cause irreparable harm to PVI and would give Calpine an unfair competitive advantage in any future request for proposals, as Calpine is a competitor of PVI.

SPC is requesting a protective order prohibiting FPL from disclosing the bid proposals and related documents submitted by SPC in response to the 2003 Request for Proposals issued by FPL. The bid proposal contains capacity costs, energy prices, fixed and variable O&M, heat rates, unit availability, and other confidential information, as well as different proposal options, from which competitors could derive key relationships between various types of data, according to SPC. SPC maintains that this is highly sensitive confidential and proprietary business information, from which competitors could gain an unfair competitive advantage and use to irreparably harm SPC's ability to compete in the wholesale power market. SPC also alleges that all the information is proprietary confidential business information within the meaning of Section 366.093(3), Florida Statutes, and a trade secret as defined in Section 812.081(1)(c), Florida Statutes.

GE requests a protective order prohibiting FPL from disclosing the Master Purchase Agreement for the Supply of Combustion Turbines and documents related to that agreement that are in FPL's possession. GE alleges that the information in the agreement is 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. The terms of the agreement, including but not limited to pricing, delivery, performance, and technical specifications, under which GE agreed to provide combustion turbines to FPL, contain highly sensitive commercial and technical information of GE. GE maintains that disclosure of the agreement would have a serious detrimental effect on its position in negotiations with current and future customers for the purchase and sale of combustion turbines.

In its response to TIC, SPC, and PVI's motions for protective order, Calpine states that the information sought is relevant to the proceeding and within the scope of discovery. Further, Calpine argues that TIC, SPC and PVI do not have standing to seek the relief requested as they are not parties to this proceeding. Calpine requests that the Commission deny the motions for protective order and direct the parties to this proceeding to enter into an appropriate confidentiality agreement that will ensure both access to relevant information and protection of confidential information.

Calpine responds to GE's motion for protective order and states that by GE's motion it is attempting to prevent Calpine's access to highly relevant information. Calpine maintains that GE does not have standing to seek a protective order because GE is not a party to this proceeding nor is it the entity from which discovery is sought. Calpine requests that the Commission deny the motion for protective order and direct the parties to this proceeding to enter into an appropriate confidentiality agreement that will ensure both access to relevant information and protection of confidential information.

In its motion for protective order, FPL requests protection for three types of information. The first type of information FPL seeks to protect is vendor contract data, the competitively sensitive, confidential, proprietary business information related to its contracts and negotiations with third-party vendors. FPL states that this type of information is requested in Calpine's First Request for Production of Documents, Request Nos. 10-14, 30, 33, 36-38, 45, 47, 49-60, 62-63, and 66. FPL asserts that the vendor contract data is confidential proprietary business information both to FPL and its third-party vendors within the meaning of Section 366.093(3)(d) and (e), Florida Statutes. In addition, certain of the vendor data consists of or contains trade secret information, as defined in Section 812.081(c), Florida Statutes. FPL argues that this information should be protected from disclosure entirely as the harm to FPL's present and future ability to obtain similar contracts or favorable terms far outweighs Calpine's need to this information in this proceeding.

The second type of information FPL is requesting a protective order for is FPL competitive data, the commercially sensitive information that contains or constitutes trade secrets and which is confidential, proprietary business information to FPL irrespective of any obligation to third parties. FPL states that this type of information is requested in Calpine's First Request for Production of Documents, Request Nos. 3, 8-14, 18-20, 30, 33, 35-38, 41, 42, 45, 46, 49-60,

62-64, and 66. The FPL competitive data includes information reflecting cost or operational parameters, as well as information that would indicate FPL's contracting methods, business strategies, security, and practices to optimize plant performance. In addition, information on the tools and techniques used to develop power plant design and cost estimates by FPL is included in the request by Calpine, which constitutes FPL competitive data. Much of the performance data requested by Calpine are trade secrets, according to FPL, the disclosure of which would cause significant and irreparable harm to the economic interests of FPL. As a result, FPL asserts that no access to these documents should be allowed.

The third type of information FPL seeks to protect is highly sensitive bid data which was received in response to FPL's 2003 Request for Proposals. FPL states that this type of information is requested in Calpine's First Request for Production of Documents, Request Nos. 3, 6-8, 18-24, 26, 28, 29, and 39. The bid data contains sensitive proprietary business information about the bidding companies' operations and costs. FPL argues that public disclosure of this information would cause irreparable harm to the competitive interests of FPL, as well as to the companies who submitted sensitive competitive information to FPL as part of the Request for Proposals process, as the revelation of specific competitive data would impair FPL's and the companies' ability to enter into contracts on favorable terms in the future. Nevertheless, FPL believes that Calpine should be granted access to the data to the extent necessary to replicate FPL's analyses, subject to the confidentiality agreement which FPL attached to its motion.

In its response to FPL's motion for protective order, Calpine states that FPL seeks to eliminate any independent analysis of FPL's bid process by deeming all information as confidential, proprietary, trade secret, or otherwise non-disclosable because of a third-party obligation of confidentiality. As to the vendor contract data, Calpine states that FPL has no standing to assert the rights of third parties to this proceeding. According to Calpine, FPL's justification for a protective order based on the rights of third-party vendors is without merit and cannot be considered. Calpine asserts that a representative of FPL stated that Calpine is a potential partner, not really a competitor, and that Calpine being a direct competitor is not a valid ground for FPL to request a protective order for the vendor data. As to FPL's competitive data, Calpine states that this information is critical to its ability to determine if FPL has complied with the requirements of the Bid Rule and evaluated Calpine's proposal by comparison to the other proposals. For both vendor contract data and FPL competitive data, Calpine states that if any of the information requested should be provided confidential treatment, the parties can negotiate an appropriate confidentiality agreement that would still allow Calpine to conduct reasonable discovery. As to the highly sensitive bid data, Calpine argues that FPL seeks to assert rights on behalf of third-parties, and there is no basis for FPL to assert such rights. Furthermore, this information is critical to Calpine's assessment of FPL's compliance with the Bid Rule. Calpine objects to the confidentiality agreement proposed by FPL, and attached a proposed protective order to its motion.

### ANALYSIS AND FINDINGS

Section 366.093, Florida Statutes, provides that upon 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 designating the manner for handling such information during the course of the proceeding and for protecting such information from disclosure outside the proceeding. Similarly, Rule 25-22.006(6)(a), Florida Administrative Code, provides that 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 Civil Procedure. Further, the protective order shall specify how the confidential information is to be handled during the course of the proceeding and prescribe measures for protecting the information from disclosure outside the proceeding. Rule 1.280, Florida Rules of Civil Procedure, provides that, for good cause shown, a protective order may be entered which either prevents disclosure of trade secret or confidential commercial information or requires such information be disclosed only in a designated way.

When addressing a motion for protective order involving confidential commercial information which is filed pursuant to Rule 1.280, Florida Rules of Civil Procedure, a two part test is utilized to determine if the information is discoverable. First, the movant must show that the information requested in discovery is confidential because it is a trade secret or some other type of confidential commercial information. See Order No. PSC-04-0157-PCO-EI, at page 2, issued February 16, 2004, in Docket No. 031033-EI, In Re: Review of Tampa Electric Company's 2004-2008 Waterborne Transportation Contract with TECO Transport and Associated Benchmark; Kavanaugh v. Stump, 592 So. 2d 1231, 1232-3 (Fla. 5<sup>th</sup> DCA 1992); Inrecon v. The Village Homes at Country Walk, 625 So. 2d 103, 105 (Fla. 3d DCA 1994); Rare Coin-It v. I.J.E., Inc., 625 So. 2d 1277 (Fla. 3d DCA 1993). Once the movant has shown that the information is confidential, the burden then shifts to the opposing party, in this case Calpine, to demonstrate that its need for the information outweighs the movant's interest in withholding production of confidential information. Inrecon at 105; Rare Coin-It at 1277; Higgs v. Kampgrounds of America, 526 So. 2d 980, 981 (Fla. 3d DCA 1988); Eastern Cement Corp. v. Dept. of Environmental Protection, 512 So. 2d 264, 265-6 (Fla. 1<sup>st</sup> DCA 1987). Broad discretion is granted in balancing the competing interests of the parties. Fortune Personnel Agency of Ft. Lauderdale, Inc. v. Sun Tech Inc. of South Florida, 423 So. 2d 545, 547 (Fla. 4<sup>th</sup> DCA 1982); Inrecon.

After consideration of the motions for protective order filed by SEP, TIC, PVI, SPC, GE, and FPL,<sup>1</sup> it appears that each has demonstrated that the information for which discovery is sought is confidential commercial information the disclosure of which could harm the competitive interests of the movants. In its responses to the motions, Calpine did not contest that the information it sought was confidential commercial information. As such, I find that the information covered by each of the motions is proprietary confidential business information, within the meaning of Section 366.093(3), Florida Statutes. As a result, the movants have all satisfied the first prong of the test, by demonstrating that the information requested is confidential commercial information.

Since the movants have demonstrated that the information is confidential, the burden shifts to Calpine to demonstrate that its need for the information outweighs the movants' interest in withholding production. With regard to FPL's motion for protective order, Calpine has not demonstrated that its need for FPL's vendor contract data and FPL's competitive data outweighs FPL's interest in maintaining the confidentiality of that information. Calpine has not sufficiently alleged that the information sought appears to be reasonably related to the subject matter of the proceeding. Accordingly, FPL's motion for protective order as to vendor contract data and FPL competitive data is granted. As to the bid data received in response to FPL's 2003 Request for Proposals, Calpine has demonstrated a need for the information that does outweigh FPL's interest in withholding production. FPL acknowledged that Calpine should have access to the bid data to the extent necessary to replicate FPL's analyses, subject to the confidentiality agreement proposed by FPL. Without this information, Calpine would be unable to duplicate the analyses done by FPL, which is at issue in this proceeding. Accordingly, FPL's motion for protective order as to the bid data is granted in part, as Calpine has demonstrated a countervailing need to review the confidential bid data. Therefore, Calpine shall have access to the bid data information sought in discovery once Calpine executes the confidentiality agreement that FPL attached to its motion for protective order. Because all the remaining motions for protective order address the same bid data and vendor contract data which was the subject of FPL's motion for protective order, my decision on FPL's motion for protective order shall stand for all the remaining motions for protective order. Accordingly, the motions for protective order filed by SEP, TIC, PVI, SPC, and GE, are granted in part, subject to the disclosure requirement for bid data information described above.

As to the motions for oral argument filed by TIC, SPC, FPL, and GE, I find that oral argument is not necessary in this instance to comprehend and evaluate the issues at hand. Therefore, the requests for oral argument filed by TIC, SPC, FPL, and GE, respectively, are denied.

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<sup>1</sup> The movants, other than FPL, are not parties to this proceeding. Pursuant to Section 366.093, Florida Statutes, Rule 25-22.006(6)(a), Florida Administrative Code, and Rule 1.280, Florida Rules of Civil Procedure, the owner or provider of confidential information that is sought in discovery may seek a protective order governing disclosure of the information even if it is not a party to the proceeding.

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SEP's request for qualified representative does not comport with Rule 28-106.106, Florida Administrative Code, because at a minimum the request should identify the name, address, and telephone number of the representative. SEP asked that its parent company, rather than an individual person, be its qualified representative. Accordingly, SEP's request for qualified representative is denied.

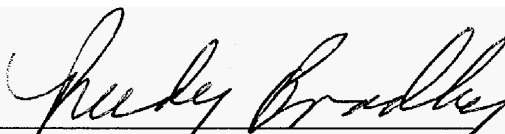
Based on the foregoing, it is

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that the motions for protective order are granted as set forth in the body of this Order. It is further

ORDERED that the requests for oral argument filed by TIC, SPC, FPL, and GE, respectively, are denied. It is further

ORDERED that the request by SEP Homestead LLC for qualified representative is denied.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 21st day of May, 2004.



RUDOLPH "RUDY" BRADLEY  
Commissioner and Prehearing Officer

(SEAL)

JSB/AEV

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and

time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.