BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaints by Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc., and Dillard's Department Stores, Inc. against Florida Power & Light Company concerning thermal demand meter error.	DOCKET NO. 030623-EI ORDER NO. PSC-04-1069-PCO-EI ISSUED: November 1, 2004

ORDER DENYING MOTION FOR PROTECTIVE ORDER, GRANTING MOTION TO COMPEL, DENYING MOTION FOR SANCTIONS, AND DENYING REQUEST FOR CONFIDENTIALITY RULING

On September 13, 2004, Florida Power & Light Company ("FPL") filed a Motion to Compel George Brown to respond to questions posed at his August 27, 2004, deposition and questions that could arise concerning these subjects during the continuation of his deposition, a Motion for Sanctions, and a Request for Ruling on the portions of the deposition transcript that were claimed confidential. Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc., and Dillard's Department Stores, Inc. ("Customers") responded to FPL's requests and filed a Motion for Protective Order on September 20, 2004.

FPL's Motion to Compel, Motion for Sanctions, and Request for Confidentiality Ruling

FPL states that prior to the commencement of Mr. Brown's deposition, counsel for Customers and FPL agreed to reserve areas of inquiry that Mr. Brown considered to be "confidential" for the end of the deposition. FPL asserts that at the latter stage of the deposition, counsel for FPL advised counsel for Customers that he was prepared to address the areas that already had been claimed or would likely be claimed as confidential by Mr. Brown. FPL states that Mr. Brown's counsel instructed him not to answer several questions on the basis that the information was confidential or not relevant.

FPL notes that Rule 1.310(c), Florida Rules of Civil Procedure, states that "[a] party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [to terminate or limit the examination]." FPL argues that Rule 1.310(c) required Mr. Brown to answer the questions posed by FPL's counsel, as none of the rule's exceptions applied in this case. Further, FPL maintains that the questions are relevant and reasonably calculated to lead to the discovery of admissible evidence, pursuant to Rule 1.280(b)(1), Florida Rules of Civil Procedure. FPL argues that that all the questions asked, but not answered, during Mr. Brown's deposition are relevant to this proceeding.

First, FPL states that when its counsel asked what different methods Mr. Brown used to assist customers in "spiking" meters, Mr. Brown was instructed by his counsel not to answer on

the grounds that the information concerns proprietary processes. FPL disagrees that the information is confidential but states that to the extent this information is claimed to be confidential, then the confidentiality can be protected through the methods already established for this proceeding outlined in the Order Establishing Procedure. FPL contends that Mr. Brown's practice of assisting customers in "spiking" meters to enable customers to qualify for different rates for which they may not otherwise be eligible is relevant to Mr. Brown's credibility as a witness in this proceeding and the credibility of the billing information he submitted to the Commission in prefiled testimony on behalf of the Customers.

Next, FPL states that Mr. Brown was asked how much money his company spends on marketing its services. FPL states that Mr. Brown's counsel instructed him not to answer on relevancy grounds. FPL asserts that Mr. Brown's consulting company, Southeastern Utility Services, Inc. ("SUSI"), has spent much of the last two years initiating contacts with FPL customers for the purpose of pursuing refund claims before the Commission. FPL asserts that Mr. Brown, in his deposition, admitted that he travels looking for commercial customers of FPL with thermal demand meters and conducts stop watch tests on these meters for the purpose of initiating contacts with customers and potential representation. FPL contends that information concerning SUSI's marketing expenses is relevant and reasonably calculated to lead to admissible evidence in this proceeding because it goes directly to Mr. Brown's credibility as a witness.

Finally, FPL states that when its counsel asked Mr. Brown if conducting stop watch tests on meters was a way in which his company generates business, Mr. Brown's counsel again instructed him not to answer on relevancy grounds. FPL maintains that this information is also relevant to Mr. Brown's credibility as a witness.

FPL asserts that there was no legal basis for instructing Mr. Brown not to answer the questions posed by FPL's counsel. Thus, FPL requests that an order be issued compelling Mr. Brown to answer the questions posed at his August 27 deposition, ordering Mr. Brown to answer any additional questions that arise in the continued deposition, and awarding FPL its reasonable expenses in obtaining an order to compel. FPL also seeks a ruling on the portions of the deposition transcript that Mr. Brown claims to be confidential, although Customers have not filed a request for confidential treatment of that information.

Customer's Response and Motion for Protective Order

In its response to FPL's Motion to Compel, Customers agree that FPL and SUSI agreed to a procedure under which questions that potentially involved SUSI's confidential information would be consolidated at the end of the deposition. Customers assert, however, that FPL sought to improperly use the deposition to harass, annoy, and seek economic retaliation against SUSI and Mr. Brown and to improperly use the deposition to conduct discovery relevant to other cases pending in the circuit courts of Dade and Leon Counties.

Customers state that discovery "must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence"[1] and that "information sought in discovery must relate to the issues involved in the litigation, as framed in the pleadings."[2] Customers further state that the purpose of discovery "is in no sense designed to afford a litigant an avenue to pry into his adversary's business or go on a fishing expedition to uncover business methods, confidential relations, or other facts pertaining to the business"[3] and that this limitation "applies with greater force where . . . the discovery sought is from a witness, not a party."[4]

Customers assert that the information sought by FPL is not relevant to any issue in this docket. Customers contend that FPL's questions concerning SUSI's marketing budget and techniques are not relevant but designed to arm FPL with information it can use to "economically retaliate" against SUSI and to gain discovery for proceedings other than the case pending before the Commission. Customers further contend that FPL's questions concerning SUSI's business practices and methods are not relevant. Customers state that while Mr. Brown was instructed not to answer FPL's question concerning the methods used by Mr. Brown to assist customers in qualifying for a lower rate via meter "spiking," Mr. Brown had previously testified that SUSI had not assisted any of the customers in this docket in qualifying for a different rate. Thus, Customers assert, there is no uncertainty over Mr. Brown's credibility in this regard because he has answered the question with respect to the customers in this docket.

Customers assert that FPL's Motion for Sanctions should be denied because the Customers' opposition to the Motion to Compel is justified and supported by case law. Customers also assert that FPL's Request for Ruling on the claimed confidential portions of the transcript is premature because FPL has not followed the procedures outlined in a protective agreement between FPL and Customers. In particular, Customers contend that FPL did not comply with paragraph 2.(b) of the protective agreement because it has not notified either SUSI or Mr. Brown that it challenges the confidential designation made.

In support of its Motion for Protective Order, Customers cite Scientific Games, Inc. v. Dittler Brothers, Inc.[5] for the following standard:

> When confronted with a claim of trade secrets or proprietary information in opposition to a discovery request, a trial court must first determine if the materials sought to be provided are, in fact, trade secrets and proprietary information. Upon

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[1] Allstate Insurance Co. v. Langston, 655 So. 2d 91, 94 (Fla. 1995).
[2] Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathe Communications Co., 629 So. 2d 852, 854 (Fla. 1st DCA 1993).
[3] Hollywood Beach Hotel & Golf Club, Inc. v. Gilliland, 191 So. 30, 32 (Fla. 1939).
[4] Inrecon v. Village Homes at Country Walk, 644 So. 2d 103, 105 (Fla. 3rd DCA 1994).
[5] 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991).

such a showing, the party seeking discovery must demonstrate a reasonable necessity to obtain the information.

Customers assert that the testimony FPL seeks to compel is related to SUSI's proprietary business methods and processes and to sensitive and proprietary commercial information related to its marketing budget and marketing techniques. Customers assert that SUSI operates in a competitive business environment and derives a competitive advantage through use of this proprietary and confidential business processes and methods. Customers also assert that SUSI's marketing techniques are proprietary, commercially sensitive information that is critical to SUSI's effective competition in its industry. Customers contend that FPL has not demonstrated any reasonable necessity for this information.

FPL's Response to Motion for Protective Order

FPL contends that Customers' arguments do not support granting a protective order. First, FPL asserts that there is no legal basis for Customers' assertion that FPL should not be able to compel testimony from Mr. Brown because he is not a party to this proceeding. FPL states that, by his own admission, Mr. Brown speaks for the customers who are parties in this proceeding and is testifying on their behalf. Next, FPL asserts that Customers offer no legal support for the conclusion that its business methods and processes and marketing techniques are proprietary, commercially sensitive information and, nonetheless, such information would remain subject to discovery by FPL. Further, FPL asserts that Customers' belief that a matter is not relevant provides no justification for instructing the witness not to answer a question.

Analysis and Findings

Rule 1.280(b)(l), Florida Rules of Civil Procedure, provides that the scope of discovery extends to "any matter, not privileged, that is relevant to the subject matter of the pending action." The rule goes on to state that "it is not ground for objection that the information sought will be inadmissible at the trial if the information is reasonably calculated to lead to the discovery of admissible evidence."

Rule 1.280(c), Florida Rules of Civil Procedure, provides that "upon motion by a party or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including . . . that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way . . .." In determining whether the information at issue in this proceeding should be protected from disclosure, one must first determine whether Customers, as the party seeking a protective order, have demonstrated that the material at issue is

entitled to confidential treatment.[6] If Customers meet this burden, the burden shifts to the opposing party to show that it has a reasonable necessity for use of the information at trial.[7]

Rule 28-106.211, Florida Administrative Code, grants broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case . . .." Based upon this authority, and having considered the pleadings in light of the rules and standards set forth above, my findings are set forth below.

Customers' Motion for Protective Order is denied, and FPL's Motion to Compel is granted. Customers have not demonstrated that the information at issue is confidential commercial information. Customers have made only conclusory statements that SUSI's business processes and methods and marketing techniques are proprietary, commercially sensitive information that is critical to SUSI's effective competition in its industry. Customers do not explain how disclosure of this information to the public or to FPL in particular would impact SUSI's competitive interests. Because Customers have not met their burden of demonstrating that this information is entitled to confidential treatment, I do not reach the question of whether FPL has shown it has a reasonable necessity for use of the information at trial.

I note that paragraph 3.(b) of the Protective Agreement between the parties, which was attached to FPL's pleadings and referenced by both parties, states that "all Confidential Information or Designated Confidential Information shall be furnished to each Party to this Agreement on the same time schedule and in the same manner as any non-confidential information." The Agreement contains provisions to ensure non-disclosure of such information by the party who is furnished the information. Customers' withholding of the information at issue on the grounds that it is proprietary, commercially sensitive information appears to be inconsistent with the parties' Protective Agreement.

The three questions posed by FPL that are the subject of its Motion to Compel appear to be within the permissible scope of discovery, i.e., relevant and reasonably calculated to lead to the discovery of admissible evidence. The questions appear to be directed at discovering information related to Mr. Brown and SUSI's pursuit of clients for the purpose of potentially making claims to FPL for refunds associated with thermal demand meter error. The issues in this case involve refund claims made by SUSI on behalf of FPL customers concerning thermal demand meter error. Thus, I do not believe that these questions exceed the broad scope of permissible discovery. FPL shall be permitted to reconvene Mr. Brown's deposition for the limited purpose of addressing these questions and any reasonably related follow-up questions. Given the limited time remaining before the hearing in this docket, the continued deposition shall not exceed one hour. Whether the information ultimately gleaned through this discovery is

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[6] See, e.g., Eastern Cement Co. V. Dep't of Envtl. Reg., 512 So. 2d 264 (Fla. 1st DCA 1987).
[7] Id.

deemed admissible at hearing is a matter to be decided when and if FPL attempts to use the information at hearing and an appropriate objection is made.

I find no support for Customers' contention that FPL's line of inquiry is intended to harass, annoy, or seek "economic retaliation" against the deponent, particularly in light of my finding, above, that the three questions posed by FPL that are at issue appear to be within the permissible scope of discovery. Further, while the information sought via FPL's Motion to Compel may be relevant to circuit court proceedings involving these same parties and similar issues, it is still relevant to the proceeding pending before the Commission.

FPL's Motion for Sanctions is denied. While I believe that it is better practice to preserve an objection on the record of the deposition or, under appropriate circumstances, move to limit the deposition pursuant to Rule 1.310(d), rather than instruct a witness not to answer on relevance grounds[8], I believe Customers pursued their objections to FPL's questions in good faith and do not believe sanctions are appropriate in this instance.

FPL's request to determine whether the claimed confidential portions of the deposition transcript are proprietary confidential business information pursuant to Section 366.093(3), Florida Statutes, is denied. My finding, above, that Customers have not demonstrated that the information at issue is confidential commercial information is made only for purposes of determining whether a protective order should be granted. Customers have not filed a request for confidential treatment of this information pursuant to Section 366.093, Florida Statutes. If the confidential deposition transcript is to be filed with the Commission or made part of the record of this proceeding, Customers should request confidential classification and provide the necessary justifications pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006, Florida Administrative Code. Until such time, it is premature for the Commission to determine whether the document should be treated as confidential and exempt from public disclosure.

It is therefore

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that Customers' Motion for Protective Order is denied. It is further

ORDERED that FPL's Motion to Compel is granted under the terms set forth in the body of this Order. It is further

ORDERED that FPL's Motion for Sanctions is denied. It is further

ORDERED that FPL's Request for Confidentiality Ruling is denied.

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[8] See Quantachrome Corporation v. Micromeritics Instrument Corporation, 189 F.R.D. 697 (S.D. Fla. 1999); Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977).

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 1st day of November, 2004

CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(SEAL)

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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.