

Matilda Sanders

From: mark.sajer@sep-llc.com
Sent: Wednesday, November 03, 2004 9:06 AM
To: Filings@psc.state.fl.us
Subject: Amended Motion for Protective Order - Docket No. 04001-EL



FLPSCMotion
nfidProtectO

Please see the attached amended motion.

Mark Sajer
Managing Director
Summit Energy Partners, LLC

CMP _____
COM 5
CTR _____
ECR _____
GCL _____
OPC _____
MMS _____
RCA _____

SCR _____
SEC 1

OTH Kump
Lockard

DOCUMENT NUMBER-DATE
11813 NOV-3 04
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Florida Power & Light Company -)
Cost Recovery Clause and Generating)
Performance Incentive Factor)

Docket No. 040001-EL
Dated November 3, 2004
Filed Electronically

MOTION OF NON-PARTY SEP FOR PROTECTIVE ORDER
(as Amended)

1. Non-Party SEP Homestead, LLC ("SEP"), pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, Sections 366.093 and 812.081, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, respectfully requests the Florida Public Service Commission ("Commission") to grant a protective order prohibiting Florida Power & Light Company ("FPL") from disclosing SEP's bid proposal to the intervenor(s) in these docket proceedings (the "Motion").

INTRODUCTION

2. On October 23, 2003, SEP submitted its proposal (together with supplementary information, "SEP's Proposal") to supply 50 MWs in response to FPL's 2003 Request for Proposals ("2003 RFP"). By correspondence dated January 15, 2004, FPL advised SEP that SEP's Proposal was not selected to its short list.

3. Via e-mail, FPL advised SEP that Calpine Energy Services, L.P. ("Calpine") has been has served FPL a discovery request: "Para. 63 Any and all documents regarding proposed solid fuel projects, either self-build or from third parties, that would deliver power to you [FPL] during the 2010 to 2015 time frame." SEP's Proposal contemplated a solid fuel project which involved deliveries during the 2010 to 2015 time frame.

4. Via telephone conversation with FPL and as confirmed by PSC staff attorney, SEP understands that the President of a Calpine subsidiary, Mr. Thomas K. Churbuck (Power Systems Manufacturing, Inc.) is the proper person to refer to instead of Calpine.

5. For the reasons stated below, SEP hereby requests a protective order to prevent disclosure of SEP's Proposal. SEP's parent company, Summit Energy Partners, LLC, requests to SEP's Qualified Representative.

REASONS FOR PROTECTIVE ORDER

6. SEP requests that the Commission grant it a protective order for the following reasons:

- (a) Mr. Churbuck is a "controlled person" as defined under confidentiality agreements, and therefore, his interest in terms of confidentiality is the same as Calpines'. Mr. Churbuck cannot represent himself in an individual capacity in these proceedings due to the conflict of interest with his fiduciary duties as president of a Calpine subsidiary. In other words, the knowledge Mr. Churbuck could gain in respect of SEP's Proposal presents the same issue as if it were Calpine receiving such information. Therefore, the same arguments SEP presents in opposition to disclosure to Calpine (or other intervenors) apply to Mr. Churbuck.

- (b) Calpine is a direct competitor of SEP in the State of Florida. SEP is engaged in ongoing efforts to sell output from its planned power plant. SEP will suffer irreparable harm if its proprietary and confidential information is disclosed to Calpine.
- (c) Disclosure to Calpine (and Mr. Chrubuck or other competitor intervenors) is highly prejudicial, and would give intervenors an unfair competitive advantage in any future RFP. Further, there is precedent that docketed proceedings can lead to supplemental RFPs in the future, and therefore, while this proceeding is ongoing, any disclosure of SEP's Proposal to a competitor would create an unfair situation.
- (d) The scope of Mr. Chrubuck's motion to intervene in these proceedings did not identify any merits as to why he (or his employer Calpine) needs to know the information contained in SEP's Proposal in its cause for intervention. His motion did not identify any purpose as to how SEP's 50 MW Proposal, being less than 5% of the total need identified by FPL in its 2003 RFP, would have any material effect on its intervention or the proceedings. In addition, it would be unfair for an intervenor to obtain confidential bidder information while non-intervenors do not.
- (e) Any confidentiality agreement between FPL and Mr. Chrubuck (and possibly others) does not protect the interests of SEP. As noted in paragraph 4(c) above, the basic tenets of a confidentiality agreement, the need to know and purpose, are not supported in this instance. Further, SEP would be unduly burdened in having to monitor FPL (including verbal disclosure) or to cause FPL to monitor and/or enforce a confidentiality agreement on SEP's behalf.
- (f) The conflict of interest resulting from Mr. Chrubuck's position with a Calpine subsidiary is irreconcilable as he is a "controlled person" in fiduciary terms. Therefore, disclosure to Mr. Chrubuck, Calpine by FPL presents the same issue as disclosure to Calpine (or other such intervenors).

QUALIFIED REPRESENTATIVE

7. **SEPs 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 this Motion and the related efforts to prevent the disclosure of SEP's Proposal to intervenors in this docketed proceeding.**

SUMMARY

8. SEP respectfully requests that the Commission grant its Motion as requested herein, that FPL be prohibited from disclosing SEP's Proposal (or any of its confidential information) to intervenors, and specifically prohibit such disclosure to Calpine and its subsidiary president, Mr. Chrubuck, and to allow Summit Energy Partners, LLC to act as SEP's qualified representative in the matters of this Motion.

Respectfully submitted,

Summit Energy Partners, LLC

c/o SEP Homestead, LLC

99 Summit Avenue, Suite 9C

Summit, NJ 07901

By: s/ Mark S. Sajer

Managing Director
Summit Energy Partners, LLC

By: s/ Mark S. Sajer
Member – President
SEP Homestead, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was served electronically via e-mail to filings@psc.state.fl.us on this 3rd day of November, 2004 to the Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-9850, and by US Mail, to the following persons:

Mr. R. Wade Litchfield, Esq.
Ms. Natalie F. Smith, Esq.
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 22408-0420

Mr. Bill Walker
Florida Power & Light Company
215 South Monroe Street, Suite 810
Tallahassee, FL 32301-1859

Thomas K. Churbuck
911 Tamarind Way
Boca Raton, FL 33486
Phone: 561-394-5225

By: s/ Mark S. Sajer
Managing Director
Summit Energy Partners, LLC