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October 13, 2005

**BY HAND DELIVERY**

Ms. Blanca Bayo, Director  
Commission Clerk and Administrative Services  
Room 110, Easley Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Docket No. 050001-EI

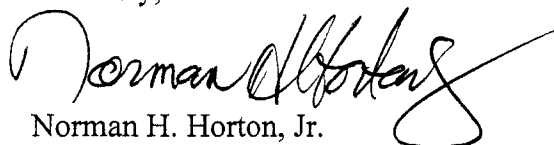
Dear Ms. Bayo:

Enclosed for filing on behalf of Florida Public Utilities Company are an original and 15 copies of Florida Public Utilities Company's Motion for Protective Order in the above referenced docket.

Please indicate receipt of this document by stamping the enclosed extra copy of this letter.

Thank you for your assistance in this matter.

Sincerely,



Norman H. Horton, Jr.

NHH:amb

Enclosures

cc: Ms. Cheryl Martin  
Parties of Record

DOCUMENT NUMBER-DATE

09873 OCT 13 05

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Fuel and Purchased Power Cost            )  
Recovery Clause                                    )  
\_\_\_\_\_  )

Docket No. 050001-EI  
Filed: October 13, 2005

**MOTION FOR PROTECTIVE ORDER**

COMES NOW, Florida Public Utilities Company (“FPUC” or “the Company”) by and through undersigned counsel and pursuant to section 366.093, Fla. Stat., and Rule 25-22.006(6), F.A.C., and requests the entry of a Protective Order that certain discovery not be had and as basis would state:

1. FPUC currently purchases power under contracts that expire December 31, 2007. FPUC is currently engaged in the process for the procurement of wholesale electricity services beginning January 2008. To initiate the procurement process, FPUC issued a Request or Proposals (“RFP”) in April 2005. The RFP was distributed to interested parties and was publicly advertised and available to anyone requesting a copy. FPUC received responses to the RFP and is in the process of evaluating those responses.

2. On September 23, 2005, Staff served its Fourth Set of Interrogatories and Second Request for Production of Documents on Florida Public Utilities Company seeking responses and documents relating to ongoing contractual negotiations and pending RFPs. The Office of Public Counsel (“OPC”) has requested the production of any and all documents produced to Staff. The Protective Order requested herein extends to the discovery requests of both the Staff and the OPC. Additionally, Staff has issued a Notice of Deposition of FPUC witnesses for October 19, 2005. FPUC believes that inquiry at the depositions will include questions about the RFP process.

3. Although there has been no selection of a provider, the PSC Staff, as well as the OPC, have requested that FPUC respond to questions about the RFPs and provide documents relative to the RFP responses submitted by all responders. The information sought by Staff and OPC is highly confidential, commercial information which is considered to be trade secrets by the respondents to the RFP. Disclosure of that information would provide valuable information to competitors and would seriously damage the competitive market. As important, disclosure of any of the information, plans, programs, proposals or any information related to the RFPs would impair the ability of FPUC to negotiate the best contract it can for its customers. FPUC thus requests that the Commission grant a protective order directing that discovery not be had on any matter relating to plans, concepts, responses, proposals negotiations, numbers or any information as to the RFP process which the owner of the information deems confidential. Specifically, as to the discovery, this includes Interrogatories 12, 13, 14, and 15 and as to the production of documents would include all or part of Requests 3, 4, 5, 6, 8, 9, 10, and 11. The protective order would also include depositions.

4. In recognition of the important to maintain confidentiality, the RFP contains language addressing the issue. Paragraph 6.3 of the RFP states:

In accordance with the Confidentiality Agreement contained in Exhibit D but subject to the exceptions defined below, FPUC pledges to hold in strict confidence all documents and information that constitutes and is related to Offers, as provided by Bidders, in response to this RFP.

There are two exceptions to this pledge, but as discussed below, neither is applicable at this time.

Exhibit D (Attachment A hereto) to the RFP is the Confidentiality Agreement which each respondent and FPUC signed. In that agreement FPUC and the responding party each agreed to

protect the confidentiality of information belonging to the other. There is provision for disclosure to regulatory authorities under certain circumstances but those do not exist at this time.

5. Discovery in this forum proceeds pursuant to Rule 28-106.206, F.A.C., which incorporates Rules 1.280 through 1.400, Fla. R. Civ. P. Additionally, what constitutes confidential business information is contained in Section 366.093, Fla. Stat. Rule 1.280(b)(1) permits parties to obtain discovery on any matter that is relevant to the subject matter of the pending matter and subsection (c) thereof permits the issuance of protective orders in certain cases.

6. This discovery was filed in Docket 050001-EI which is the fuel cost recovery adjustment factor proceeding. Staff chose to file its discovery request in that docket because FPUC has requested that the Commission approve an additive to the approved fuel cost recovery adjustment factor. Inquiries about the wholesale electricity procurement RFP are simply not relevant to any issue in that docket, including the issue as to whether the additive should be approved. Staff has requested all documents discussing extension of the existing wholesale electricity contracts, analyzing options, responses to the RFP by providers of electricity and other issues relating to FPUC's procurement of wholesale electricity, none of which has any relevance to the issue of the additive — or any other issue in Docket 050001-EI. Moreover, the requests would have FPUC produce its thoughts and criteria for fuel procurement arrangements. The value of such information to a bidder is obvious. If a potential provider knows what FPUC is willing to pay for electricity, the response will, in all likelihood, be tailored to that information, and the opportunity for any meaningful negotiation is gone. Knowledge of the expectations of the purchaser can provide a tremendous advantage to the seller — especially if the prospective seller planned to provide services at a cost less than that set as a ceiling by the buyer. Disclosure or discussion of the expectations of

FPUC in the RFP process in any manner can only provide unfavorable results and harm both FPUC and its customers.

7. The standard for discovery is that the discovery seek evidence that is either admissible at trial, or is reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 1.280(a), Fla. R. Civ. P. There is no issue in this docket to which the discovery requested by Staff and OPC bears any relevance, or would lead to the discovery of any evidence relevant or admissible in this docket. What FPUC plans to do; what options FPUC may have or may not have; and what wholesale providers of electricity are offering, have absolutely nothing to do with the calculation of the fuel adjustment factor or with the additive. The fuel adjustment factor proposed by FPUC will be evaluated based on the schedules prepared by FPUC and analyzed by the Staff. That process is not one “which affects a utility rates or costs of service” within the meaning of Section 366.093(2), Fla. Stat. The discovery simply is not relevant to the issues in this docket, will not lead to the discovery of evidence admissible in this docket, and is not an appropriate subject of discovery in this docket under Chapter 366.

8. As important is the fact that the information sought constitutes proprietary confidential business information concerning bids and other contractual data. Such information is exempt from public disclosure pursuant to Section 366.093, Fla. Stat. The nature of the business information and the strategy and planning of FPUC are so confidential that any public discussion or disclosure could permanently damage the competitive position of both FPUC and the prospective providers and hamper the ability of FPUC to enter the most favorable contract possible. Given that the information sought is not relevant to any issue in the docket is not calculated to lead to the discovery of admissible evidence and is not necessary for a decision, the Commission should

consider the damage that will be done by any public disclosure of this information and grant the requested Protective Order.

9. The information being sought is nothing more than a “fishing expedition” on the part of the Staff and the OPC. The PSC has the authority to prohibit such abuses of the discovery process upon a balancing of the competing interests served by granting or denying a request for protective order. *Sugarmill Woods Civic Association, Inc. v. Southern States Utilities*, 687 So. 2d 1346, 1351 (Fla. 1<sup>st</sup> DCA 1997). In addition, the information requested is proprietary, confidential business information as described in Section 366.093, Fla. Stat. As such, it is the duty of the Staff and the OPC to “make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information,” *Berkeley v. Eisen*, 699 So. 2d 789, 791 (Fla. 4<sup>th</sup> DCA 1997). Neither the Staff nor the OPC have made such a showing.

WHEREFORE, for the reasons set forth herein, FPUC requests that the PSC enter a protective order against the discovery as to the wholesale electricity RFP and proposals.

Respectfully submitted this 13<sup>th</sup> day of October, 2005.



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served by U. S. Mail this 13<sup>th</sup> day of October, 2005 upon the following:

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