

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination
of Cost Effective Generation Alternative
to Meet Need Prior to 2018, by Duke
Energy Florida, Inc.

Docket No. 140111-EI

Served: August 25, 2014

**NRG'S OBJECTION TO CONFIDENTIAL CLASSIFICATION
OF DUKE ENERGY'S RESPONSE TO
NRG'S FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS (NO. 36).**

Pursuant to Rules 25-22.006 and 28-106.204, Florida Administrative Code, and Section 366.093, Florida Statutes, NRG Florida LP ("NRG") objects to certain claims of confidential classification by Duke Energy Florida, Inc. ("DEF") and states:

Introduction

1. On July 1, 2014, NRG served DEF with its Fourth Request for Production of Documents No. 36, which states:

36. Please provide all documents relevant to any non-refundable costs agreed to or incurred by DEF in connection with the Suwannee Simple Cycle Project, including but not limited to turbine supply agreements.

2. DEF served its initial response on July 16, 2014, followed by supplemental responses on August 8, 2014, and August 14, 2014. A copy of each response is attached as Exhibit A. In each response, DEF claimed that the documents provided were entirely confidential. *See*, DEF's Twelfth, Seventeenth, and Nineteenth Notices of Intent to Seek Confidential Classification and DEF's Twelfth Request for Confidential Classification filed in this docket. The Commission has not ruled on DEF's Request.

3. DEF highlighted and identified as confidential every word on each of the 79 pages provided in its original and supplemental responses to NRG's document request No. 36, and every word on the additional 683 pages provided in its first and second supplemental

responses. It is impossible to determine from DEF's narrative responses to NRG's document request what type of document DEF has provided, and DEF's Twelfth Request for Confidential Classification is similarly mysterious. Exhibit B to the request does not provide a redacted version of the document with "the specific information asserted to be confidential" blocked out as required by Rule 25-22.006(4)(a), but instead merely asserts that "Documents bearing Bates Numbers 14-LGBRA-NRGPOD4-36-000001 through 14 LGBRA-NRGPOD4-36-000079 [sic] in their entirety." Accordingly, the identity and even the existence of each document is hidden from public view.

4. While *some* of the information included in the documents provided by DEF may qualify as confidential and proprietary business information as defined in Section 366.093(3), Florida Statutes, DEF has failed to identify any basis, authority or need for blanket confidentiality of every word of the entire 79-page document provided in its initial response to NRG's document request. DEF's Twelfth Request for Confidential Classification should be denied as overbroad, and for failure to comply with the requirements of Rule 25-24.006, Florida Administrative Code.

Exemptions to the Public Records Act Must Be Narrowly Construed

5. Citizen access to public records is a "fundamental constitutional right" under Florida law. *Rhea v. Board of Trustees of Santa Fe College*, 109 So.3d 851 (Fla. 1st DCA, 2013); Florida Constitution, Art. 1, Sec. 24. Further, Section 119.01, Florida Statutes declares the state's policy that "all state, county, and municipal records are open for personal inspection and copying by any person" and mandates that "[p]roviding access to public records is a duty of each agency." (Emphasis added). The provisions of Chapter 119, Florida Statutes, must be "construed liberally in favor of openness, and all exemptions from disclosure are to be construed

narrowly and limited in their designated purpose.” *Lightborne v. McCollum*, 969 So.2d 326, 332 (Fla. 2007), quoting *City of Riviera Beach v. Barfield*, 642 So.2d 1134, 1136 (Fla. 4th DCA 1994). Liberal construction of the open record requirement, coupled with narrow construction of exemptions, requires that only the particular information that is truly confidential under a specific exemption may be classified as confidential and exempt from Florida’s stringent public records requirements.

6. The Commission has long recognized that the exemptions supplied in Section 366.093, Florida Statutes, must be narrowly construed in favor of disclosure. *See, e.g.*, Order No. 21157, in which the Commission denied Gulf Power’s request for confidential classification where Gulf “failed to identify the specific information which justifies classification as specified confidential and to demonstrate how the requested information falls within [the] statutory exemption. . . .” (emphasis in original). Just as DEF has done here, the Commission found that Gulf sought “to benefit from an overbroad and unintended construction of the narrowly carved exemptions by merely invoking them.” *See, also*, Order No. PSC-05-1026-CFO-TP, citing *Seminole County v. Wood*, 512 So.2d 1000 (Fla 5th DCA 1987), rev. denied 520 So. 2d 586 (Fla. 1986); *City of St. Petersburg v. Romine ex rel. Dillinger*, 719 So. 2d 19 (Fla. 2nd DCA 1998).

DEF’s Request is Overbroad and Facially Insufficient

7. Rule 25-22.006(4)(c), F.A.C., requires a request for confidential classification to “demonstrate how the information asserted to be confidential qualifies as one of the statutory examples listed in Section 364.183(3) ... Florida Statutes” or explain how the ratepayers or the utility’s business operations will be harmed by disclosure if no statutory example is applicable. Pursuant to Rule 25-22.006(4)(e), F.A.C., the requesting party bears the burden of proof “to show that the material in question contains bona fide proprietary confidential business

information,” and requires denial of a request for confidential classification as facially insufficient if it fails to provide the required justification.

8. DEF’s Twelfth Request for Confidential Classification fails on its face to comply with Rule 25-22.006(4) because it fails to identify any particular information that it deems confidential in sufficient detail to permit a reasoned analysis and fails to provide any demonstration of how each page of the documents qualify for exemption under 366.093, Florida Statutes. None of the assertions in DEF’s Request demonstrate how each page of the document relates to DEF’s competitive interests or how the information on each page would impair the competitive business of DEF if disclosed. Instead, DEF merely declares the information confidential.

9. DEF’s Request not only fails to explain how the document qualifies for the exemption, but fails to even identify what the document is. DEF has cited no basis, authority or need for blanket confidentiality of the entire 79-page sequence of documents, and has provided no explanation of why it believes revealing even a single word of the documents or allowing the public to learn of the documents’ existence would impair its business operations, its efforts to contract for goods or services on favorable terms, or impair the competitive business of the owner or provider of the information. By way of example only, NRG can detect nothing in the document that begins with Bates Number 14LGBRA-NRGPOD4-36-000068 that could possibly qualify for exemption from public disclosure.

10. DEF’s overbroad Request is further objectionable because it effectively prevents NRG or any other party from using the documents at hearing. It is difficult to envision how the documents could be used for cross-examination, when neither the witness nor counsel may verbalize anything about the document.

**DEF's Request Will Interfere With The Commission's
Ability to Conduct a Full and Fair Hearing**

11. This proceeding necessarily will focus on the costs and economics of DEF's self-build projects compared to other options. While NRG recognizes the need to protect certain limited confidential information that is truly proprietary, excessive claims of confidentiality are burdensome to the Commission and negatively affect parties' ability to effectively present evidence at hearing.

12. In this proceeding DEF consistently has broadly identified as confidential portions of its testimony and discovery responses that deal with its costs, which are the fundamental factors it asks the Commission to consider in this case, and which it will seek to recover from its ratepayers. DEF's excessive claims of confidentiality will unnecessarily impede the normal flow of give and take in testimony and cross-examination and directly impacts the Commission's ability to fully consider DEF's request for determination of cost-effectiveness, particularly when DEF has voluntarily "fast-tracked" this proceeding. DEF's desire for expediency does not outweigh the Commission's statutory duty to provide access to its records, and to ensure that the public is denied access only to the specific, limited information that qualifies for exemption.

13. NRG acknowledges that this objection is not filed within 14 days of DEF's service of its Twelfth Request for Confidential Classification but respectfully requests the Commission to consider it in connection with its review of DEF's Request. The Commission's duty to comply with Florida's open records laws is independent of any party's objection, and DEF's Twelfth Request should be denied regardless of whether any party has objected.

WHEREFORE, for the reasons stated above, Petitioners object to DEF's Request for Confidential Classification as overbroad and facially and substantively insufficient.

Respectfully submitted this 25th day of August, 2014.

/s/ Marsha E. Rule

Marsha E. Rule, Esq.
Fla. Bar No. 0302066
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301
Email: marsha@rutledge-ecenia.com
Phone: 850.681.6788
Fax: 850.681-6515

Richard A. Zambo, Esq.
Fla. Bar No. 312525
Richard A. Zambo, P.A.
2336 S.E. Ocean Boulevard, #309
Stuart, Florida 34966
Email: richzambo@aol.com
Phone: 772.225.5400

Gordon D. Polozola, Esq.
General Counsel – South Central Region
NRG Energy, Inc.
112 Telly Street
New Roads, LA 70760
Email: Gordon.Polozola@nrgenergy.com
Phone: 225-618-4084

ATTORNEYS FOR NRG FLORIDA LP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following by electronic mail this 25th day of August, 2014:

J. Michael Walls
Blaise N. Gamba
Carlton Law Firm

John T. Burnett
Dianne M. Triplett
Duke Energy

4221 W. Boy Scout Blvd.
Suite 1000
Tampa, FL 33607-5780
mwalls@CFJBLaw.com
bgamba@CFJBLaw.com

Matthew R. Bernier
Paul Lewis, Jr.
106 East College Avenue, Suite 800
Tallahassee, FL 32301
Matthew.bernier@duke-energy.com
Paul.Lewisjr@duke-energy.com

Robert Scheffel Wright
John T. LaVia, III
Gardner, Bist, Wiener, Wadsworth, Bowden,
Bush, Dee, LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308
schef@gbwlegal.com
jlavia@gbwlegal.com

Jon C. Moyle, Jr.
Karen A. Putnal
Moyle Law Firm, P.A.
1 18 North Gadsden Street
Tallahassee, Florida 32301
jmoyle@moylelaw.com
kputnal@moylelaw.com

Linda Loomis Shelley, Esq.
Buchanan Ingersoll & Rooney / Fowler White
Boggs P A
101 North Monroe Street, Suite 1090
Tallahassee, FL 32301
linda.shelley@bipc.com

John Povilaitis
Buchanan Ingersoll & Rooney / Fowler White
Boggs P A
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357
john.povilaitis@bipc.com

P. O. Box 14042
St. Petersburg, FL 33733
John.burnett@duke-energy.com
Dianne.triplett@duke-energy.com

J.R. Kelly
Charles J. Rehwinkel
Office of Public Counsel
C/o The Florida Legislature
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400
Kelly.jr@leg.state.fl.us

Michael Lawson
Florida Public Service Commission
Office of the General Counsel
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399
mlawson@psc.state.fl.us

James W. Brew
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, NW
Eighth Floor, West Tower
Washington, DC 20007-5201
jbrew@bbrslaw.com

Alan Seltzer
Buchanan Ingersoll & Rooney / Fowler White
Boggs PA
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357
alanseltzer@bipc.com

George Cavros
Southern Alliance for Clean Energy
120 E. Oakland Park Blvd. Suite 105
Ft. Lauderdale, FL 33334
george@cavros-law.com

/s/ Marsha E. Rule

Attorney