

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Florida Power & Light Company's
Petition for Approval of Arrangement to
Mitigate Impact of Unfavorable Cedar Bay
Power Purchase Obligation

DOCKET NO.: 150075-EI

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**FLORIDA INDUSTRIAL POWER USERS GROUP'S RESPONSE AND
OBJECTIONS TO CEDAR BAY GENERATING COMPANY'S
THIRTEENTH REQUEST FOR CONFIDENTIAL CLASSIFICATION**

The Florida Industrial Power Users Group (FIPUG), by and through its undersigned counsel, hereby responds and objects to the Thirteenth Request for Confidential Classification filed by Cedar Bay Generating Company, Limited Partnership ("Cedar Bay"), specifically with respect to the documents comprising Herr Deposition Exhibits 2, 7; Barrett Deposition Exhibit 1; and Hartman Deposition Exhibits 1, 4, and 6. FIPUG timely provided notice of FIPUG's intent to use these exhibits in this proceeding. (See PSC Document #03480-15). FIPUG's objections to Cedar Bay's Thirteenth Request for Confidential Classification are timely filed pursuant to Rule 25-22.006, Florida Administrative Code.

Overview

Cedar Bay's Thirteenth Request for Confidential Classification is primarily an improper blanket request for confidential classification. Cedar Bay's request captures virtually every line on almost every page of the exhibits at issue and thus is an improper blanket request.

In addition, Cedar Bay has failed to demonstrate, as required by section 366.093, Florida Statutes, that any of the information contained in the exhibits is "bona fide proprietary confidential business information." Moreover, as explained below, the information contained in the exhibits is directly probative of a primary issue in this proceeding, i.e., the reasonableness of

Florida Power & Light's proposed purchase price of \$520.5 million for the Cedar Bay facility and its related Power Purchase Agreement ("PPA").

Background

The Cedar Bay facility is a coal-fired power plant that has been selling its capacity and energy to Florida Power & Light Company since 1994. Pursuant to the PPA, Florida Power & Light is required to continue making above-market capacity payments to Cedar Bay through 2024. In its petition in this matter, Florida Power & Light proposes to purchase the Cedar Bay facility (through a stock acquisition), and seeks approval of the proposed purchase price that was previously agreed to between Florida Power & Light and Cedar Bay's current owner.

Cedar Bay is currently and ultimately owned by The Carlyle Group through Carlyle Infrastructure Partners, L.P. ("Carlyle"). In 2013 Carlyle's subsidiary, Cogentrix, engaged Mr. David Herr of Duff & Phelps, LLC, to prepare an explicit valuation of the Cedar Bay facility, including all intangible assets and liabilities. As requested, Mr. Herr produced a valuation report for Cedar Bay dated April 5, 2013 which included a detailed valuation of the PPA that is at issue in this case. Mr. Herr's April 5, 2013 valuation report was later marked in this proceeding as Herr Deposition Exhibit 2 and Hartman Deposition Exhibit 4.

In 2014, Carlyle's subsidiary Cogentrix and Florida Power & Light agreed on a proposed purchase price for the sale of Cedar Bay, including the PPA, from Carlyle to Florida Power & Light. After reaching agreement, Florida Power & Light engaged Mr. David Herr of Duff and Phelps, LLC, to prepare another valuation of the Cedar Bay facility, including the same PPA that he previously valued. Mr. Herr provided this second valuation report on March 4, 2015. Florida Power & Light attached Mr. Herr's March 4, 2015 report to its petition in this matter as support for the proposed purchase price of \$520.5 million for the Cedar Bay facility and PPA.

Cedar Bay requests confidential classification for virtually all of Herr Deposition Exhibits 2, 7; Barrett Deposition Exhibit 1; and Hartman Deposition Exhibits 1, 4, and 6. FIPUG contends that the exhibits are directly relevant to the issue before the Commission and that Cedar Bay has failed to show that the documents contain “bona fide proprietary confidential business information” and accordingly, the documents should be openly evaluated by the Commission in its determination of Florida Power & Light’s petition. In particular, because witnesses for both the Office of Public Counsel and FIPUG state that the value of a revenue payment stream like that found in the PPA declines in value as time passes (because there is less money to be paid pursuant to a 10-year PPA compared to a 5-year PPA, all things being equal) these prior valuations are relevant and should be publicly available.

Florida’s Public Records and Sunshine Laws

Florida has a rich history of conducting government business “in the sunshine” so that those who may be substantially affected by government action can watch government proceedings and review records used in those proceedings. Indeed, the Florida citizens voted for a constitutional amendment entitled “Access to Public Records and Meetings” that is embodied in Article I, Section 24 of the Florida Constitution. Recent comments of the state’s chief legal officer, Attorney General Pam Bondi, are instructive:

The benefits of open government are frequently acknowledged – transparency promotes accountability, aids the search for truth, and fosters consistency and fairness in government decision making. Fortunately, though, Florida’s laws do not require that open government be justified by reference to these desirable consequences. We live in a state that values open government for its own sake, and for that we should be thankful.

(Introduction to 2015 Government-in-the-Sunshine-Manual, p. xv.). This policy should be kept front and center when reviewing requests for exemption of information from the Florida public records law.

Burden of Proof

As the party seeking exemption, Cedar Bay has the burden of proof. Pursuant to Rule 25-22.006(4)(e), Florida Administrative Code, “[t]he burden of proof shall be on the utility or other person to show that the material in question contains bona fide proprietary confidential business information. A request for confidential classification that fails to identify the material for which confidential classification is sought in sufficient detail to permit a reasoned analysis or which fails to provide the required justification for classification may be denied as insufficient on its face.” Cedar Bay thus has the burden of proof to demonstrate, in detail, that Herr Deposition Exhibits 2, 7; Barrett Deposition Exhibit 1; and Hartman Deposition Exhibits 1, 4, and 6, and in particular, the 2013 valuation of Cedar Bay, consist of “bona fide proprietary confidential business information” pursuant to section 366.093, Florida Statutes. *See, Florida Soc. of Newspaper Editors, Inc. v. Florida Public Service Commission*, 543 So.2d 1262, 1267, fn. 13 (Fla. 1st DCA 1989) (“The burden of proof is on the utility to show which portions of the document ‘do in fact constitute bona fide proprietary confidential business information which must be edited from the material.’”).

Procedural Deficiencies

Cedar Bay’s request fails to comply with the procedural provisions of the Commission’s Rule 25-22.006. In particular, Cedar Bay’s Thirteenth Request for Confidential Classification does not identify any specific information or data within Herr Deposition Exhibits 2, 7; Barrett Deposition Exhibit 1; and Hartman Deposition Exhibits 1, 4, and 6 that constitutes bona fide

proprietary confidential business information. Instead, Cedar Bay continues to make a blanket request for exemption of virtually the entirety of the exhibits. With respect to Herr Deposition Exhibit 2 (Hartman Deposition Exhibit 4), Cedar Bay's request encompasses a substantial volume of information that is in the public domain, such as descriptions of standard corporate valuation methods and procedures, factual descriptions of the Cedar Bay facility, and material drawn from government and industry publications.

The Commission does not have authority to grant Cedar Bay's blanket request for exemption of wholesale portions of the record of this proceeding. The Commission is authorized to determine whether specific data or information falls within a narrow statutory exemption. Wholesale claims of confidentiality that frustrate the administration of justice are and should be viewed with disfavor. See, generally, *Allstate Floridian Insurance Company v. Office of Insurance Regulation*, 981 So. 2d 617 (Fla. 1st DCA 2008) (claiming wholesale trade secret protection over documents, including public records, effectively obstructed regulatory investigation). The requirement for specificity is consistent with the purpose of Florida's public records law, which constitutionally and legislatively recognizes that all state, county, and municipal records shall - except those that are narrowly excepted from disclosure - at all times be open for personal inspection by the public. *Downs v. Austin*, 559 So.2d 246, 247 (Fla. 1st DCA), review denied, 574 So.2d 140 (Fla.1990); *S. Bell Tel. & Tel. Co. v. Beard*, 597 So. 2d 873, 876 (Fla. 1st DCA 1992).

No Reasoned Analysis or Factual Basis for Request

Cedar Bay fails to provide any reasoned analysis or factual basis to support its request for confidential classification. Instead, Cedar Bay's request contains the general statement that Herr Deposition Exhibits 2, 7; Barrett Deposition Exhibit 1; and Hartman Deposition Exhibits 1, 4,

and 6 have been kept “confidential,” followed by a list of adjectives that purport to characterize the exhibits as “proprietary business information” but that are unexplained and untethered to either fact or reason.

Under section 366.093(3), Florida Statutes, it is not enough to merely assert that information has been kept “confidential.” A party seeking exemption also must “show” that the information, if disclosed, would result in harm to ratepayers or to the person’s or company’s business operations. Section 366.093(3) describes the level of proof required to demonstrate that certain information comprises bona fide proprietary confidential business information:

(3) Proprietary confidential business information means information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private *in that the disclosure of the information would cause harm to the ratepayers or the person’s or company’s business operations*, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public. Proprietary confidential business information includes, but is not limited to:

- (a) Trade secrets.
- (b) Internal auditing controls and reports of internal auditors.
- (c) Security measures, systems, or procedures.
- (d) Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms.
- (e) *Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.*
- (f) Employee personnel information unrelated to compensation, duties, qualifications, or responsibilities.

(emphasis added).

Cedar Bay’s request makes the global assertion that virtually every line of Herr Deposition Exhibits 2, 7; Barrett Deposition Exhibit 1; and Hartman Deposition Exhibits 1, 4, and 6 consists of information “relating to competitive interests, the disclosure of which would impair the competitive business” of Cedar Bay or its affiliates. Cedar Bay fails to demonstrate or

explain how disclosure of any of the information contained in Herr Deposition Exhibits 2, 7; Barrett Deposition Exhibit 1; and Hartman Deposition Exhibits 1, 4, and 6 would have any harmful effect on any competitive interest of Cedar Bay or any affiliated entity.

Specifically, Cedar Bay globally alleges that Herr Deposition Exhibits 2, 7; Barrett Deposition Exhibit 1; and Hartman Deposition Exhibits 1, 4, and 6 “contain information concerning internal business plans, projected capital expenditures, confidential contractual negotiations, contractual arrangements, internal budget projections, financial forecasts, plant operations, and other competitively sensitive commercial information.” The exhibits, however, do not contain information about pending or future transactions or negotiations. Similarly, the exhibits do not contain or consist of business plans, projected capital expenditures, confidential contractual negotiations, confidential contractual arrangements, internal budget projections, financial forecasts, or confidential information regarding plant operations. Cedar Bay has not specifically identified any of these items within the exhibits. Cedar Bay also does not specifically identify any competitive interest. Pursuant to the PPA, Cedar Bay does not compete in the energy market. In addition, the information contained in Herr Deposition Exhibits 2, 7; Barrett Deposition Exhibit 1; and Hartman Deposition Exhibits 1, 4, and 6.

Cedar Bay has not demonstrated that the exhibits at issue have any present or future competitive economic value to Cedar Bay. *Cf., Florida Power & Light Company v. Florida Public Service Commission*, 31 So.3d 860, 866 (Fla. 1st DCA 2010) (compensation information for individual employees has current and future economic value to utility, and confidentiality is appropriate to “prevent other utility companies from stealing their employees” and avoid employees’ potential demands for higher wages).

Finally, Cedar Bay's general assertion that the 2013 valuation of the Cedar Bay facility is material and "important" to the financial position of the company or its affiliates is belied by Carlyle's internal conclusion that the valuation of Cedar Bay and its acquisition by Carlyle was not sufficiently material to the operations or financial position of either Carlyle or Cogentrix so as to require disclosure of the valuation to investors or the Securities and Exchange Commission. *See, TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) (SEC requires disclosure of information that may be important to an accurate understanding of the company's current and prospective financial position and operating results.).

Conclusion

Cedar Bay's request fails to demonstrate that Herr Deposition Exhibits 2, 7; Barrett Deposition Exhibit 1; and Hartman Deposition Exhibits 1, 4, and 6, particularly information related to the prior market value of the PPA in question, contain any bona fide proprietary confidential business information that is exempt from Florida's public record laws. The assertions made by Cedar Bay are conclusory and offer no insight or explanation as to how or why the requested documents affect any competitive interest of Cedar Bay or its affiliates.

Herr Deposition Exhibits 2, 7; Barrett Deposition Exhibit 1; and Hartman Deposition Exhibits 1, 4, and 6 reflect the recent valuation of the Cedar Bay facility, including the Power Purchase Agreement, by the same firm that prepared the valuation attached to Florida Power & Light's petition. The prior valuation is potentially relevant to the evaluation of the reasonableness of Carlyle's and Florida Power & Light's proposed purchase price for Cedar Bay. Cedar Bay has not shown that the information is bona fide proprietary confidential business information that is exempt from the public record law and accordingly, the prior valuation should

be included in the information that is openly considered by the Commission in its evaluation of Florida Power & Light's petition.

Wherefore, for the above and foregoing reasons, Cedar Bay Generating Company's Thirteenth Request for Confidential Classification should be denied.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Florida Industrial Power Users Group's Objections to Cedar Bay Generating Company's Thirteenth Request for Confidential Classification was served by electronic mail this 31st day of July 2015, to the following:

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