

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for Approval of )  
Arrangement to Mitigate Impact of ) DOCKET NO. 150075-EI  
Unfavorable Cedar Bay Power Purchase )  
Obligation, by Florida Power & ) FILED: August 12, 2015  
Light Company. )  
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**CEDAR BAY GENERATING COMPANY’S RESPONSES TO OBJECTIONS OF  
FLORIDA INDUSTRIAL POWER USERS GROUP TO CEDAR BAY’S  
REQUESTS FOR CONFIDENTIAL CLASSIFICATION**

Cedar Bay Generating Company, Limited Partnership ("Cedar Bay"), by and through undersigned counsel, and pursuant to Rule 28-106.204(1), Florida Administrative Code ("F.A.C."), hereby files these responses to the objections submitted by the Florida Industrial Power Users Group ("FIPUG") in opposition to Cedar Bay’s Seventh, Tenth, and Thirteenth Requests for Confidential Classification in this proceeding.

**Background**

1. This case was initiated on March 6, 2015, by Florida Power & Light Company’s ("FPL") filing of its Petition for approval of a transaction (the "Transaction") through which FPL will acquire the equity interests in an entity that owns Cedar Bay, which in turn owns the Cedar Bay Generating Facility (the "Cedar Bay Facility"). FPL desires to acquire these equity interests in order to be able to provide substantial economic and reliability benefits to its customers by terminating the existing Power Purchase Agreement ("PPA") between FPL and Cedar Bay, while preserving additional operational value for the benefit of FPL and its customers by retaining ownership and control of the Cedar Bay Facility.

2. Cedar Bay is a non-party to this docket, but Cedar Bay's counsel was permitted to appear at the PSC hearing held July 28, 2015 (the "Hearing") for the limited purpose of defending the confidentiality of Cedar Bay's and its affiliates' proprietary confidential business information.

3. Even though it is a non-party, Cedar Bay has cooperatively furnished thousands of pages of documents in discovery in this docket, mostly in response to expansive discovery requests from FIPUG. Many of these documents contain Cedar Bay's and its affiliates' and counter-parties' proprietary confidential business information, and a number of these documents have been introduced into evidence in the proceeding. Cedar Bay has filed thirteen numbered Requests for Confidential Classification ("RFCCs") of its documents and of Cedar Bay's proprietary confidential business information that is used or cited in the testimony and exhibits of the parties' witnesses. Those RFCCs are pending.<sup>1</sup> Cedar Bay has also sought protection of certain confidential information of Cedar Bay and its affiliates injected into the transcript and video recording of the Hearing without Cedar Bay's prior approval through oral statements of FIPUG's counsel at the Hearing.

4. Cedar Bay has sought protection of its proprietary confidential business information under Section 366.093, Florida Statutes on behalf of itself and certain of its affiliates, including CBAS Power Holdings, Inc., Cogentrix Energy Power

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<sup>1</sup>Several of the RFCCs are moot, in whole or in part, to the extent that they have been superseded by subsequently filed RFCCs.

Management, LLC, and the funds managed by The Carlyle Group that ultimately own the equity interests that FPL proposes to acquire in the Transaction (collectively with Cedar Bay, the "Cedar Bay Entities").

**Documents For Which Confidential Classification Is Sought**

5. FIPUG has submitted objections to Cedar Bay's Seventh RFCC, Revised Tenth RFCC, and Thirteenth RFCC. Specifically, FIPUG objects to the confidential classification of 4 documents, which are the subject of Cedar Bay's (and in some instances FPL's) RFCCs and which have been identified in this proceeding as follows:

Duff & Phelps 2015 Valuation Report	Herr Depo. Exh. 1 Herr Test. Exh. DH-3
Duff & Phelps 2013 Valuation Report	Rudolph Depo. Exh. 18 Herr Depo. Exh. 2 Hartman Depo. Exh. 4
Internal 8/9/2013 Cogentrix Memo	Rudolph Depo. Exh. 17 Herr Depo. Exh. 7
March 24, 2014 Letter to FPL	Hartman Depo. Exh. 1, 6 Barrett Depo. Exh. 1

The Duff & Phelps 2013 Valuation Report includes valuation estimates of certain facilities and power purchase agreements that were acquired in an earlier transaction, including interests in the Cedar Bay-FPL PPA, plus a large amount of additional economic, financial and contractual information, projections, and assumptions concerning the Cedar Bay Facility and other assets that were acquired along with it and that are not a part of the Transaction. On March 6, 2015, FPL filed an RFCC for the entire Duff & Phelps 2015 Valuation Report, which

was filed on that date as Exhibit DH-3 to the direct testimony of David Herr. No party objected to FPL's original RFCC for the Duff & Phelps 2015 Valuation Report.

**Summary**

6. Cedar Bay has gone to great lengths to accommodate the interests of FIPUG and other parties to this docket in obtaining confidential information pertaining to the Cedar Bay Facility. In fact, Cedar Bay has furnished tens of thousands of pages of documents and expended well in excess of \$100,000 to comply with discovery requests (including retention of an outside document management consulting firm to assist with document production); Cedar Bay also furnished four of Cogentrix's officers for corporate representative depositions to provide such information. Cedar Bay has complied in good faith with the Commission's confidential protection rules, including filing its Revised Tenth RFCC to provide the line-by-line designations of the information for which protection is sought. While it is true that Cedar Bay has sought protection of the Duff & Phelps 2013 Valuation Report in its entirety, this is to protect certain information that is highly sensitive with respect to Cedar Bay's and its affiliates' competitive interests.<sup>2</sup>

7. Ultimately, as explained below, Cedar Bay seeks to protect its and its affiliates' proprietary confidential business

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<sup>2</sup> Cedar Bay also notes that FPL has claimed blanket confidentiality of the Duff & Phelps 2015 Valuation Report in part based on that report containing information which discloses the "proprietary methodology that Duff & Phelps employs in performing valuations." That claim would also apply equally to the Duff & Phelps 2013 Valuation Report.

information in order to protect its and its affiliates' competitive business interests, fully within the scope of the specific exceptions authorized by Section 366.093, Florida Statutes. FIPUG's arguments, which confuse "relevance" and the "probative value" of the information with the standards applicable to the exceptions under Section 366.093, Florida Statutes, are irrelevant to whether the information is subject to protection, and FIPUG's case citations are inapplicable to the issues presented by Cedar Bay's RFCCs. Moreover, FIPUG's efforts to remove confidential classification of the information sought to be protected is of absolutely no consequence to the Commission's decisions in this case, because the Commission and the Commission Staff have, and have had, full access to all of the information for which Cedar Bay seeks protection. Stated another way, the Commission has access to all the information, documents, and testimony in this docket, including all the information it needs to render a fully-informed decision on FPL's petition. No matter what relevance or probative value the information that Cedar Bay seeks to protect in its Seventh, Tenth and Thirteenth RFCCs may have, that relevance or probative value does not support FIPUG's attempt to lift confidential protection of that information. FIPUG's precise purpose in seeking public disclosure of the confidential information is not apparent from its objection, but that purpose certainly bears no connection to the Commission's ability to render an informed and reasoned decision in this docket.

**Cedar Bay's Competitively Sensitive Confidential Information Is Entitled to Protection Under Section 366.093, Florida Statutes**

8. Cedar Bay seeks the Commission's protection of information that is extremely sensitive to the competitive business interests of the Cedar Bay Entities (including information pertaining to Cedar Bay, the Cedar Bay Facility and PPA, and information pertaining to other assets owned by Cedar Bay's affiliates that are not part of this Transaction). Again noting that the Commission and Staff have all of the information at issue here, the information that FIPUG particularly wants to use publicly, for its own purposes that are obviously unrelated and unnecessary to presenting its case to the Commission (because the Commission has access to this information), consists of several numbers, one in the 2013 Duff & Phelps report that is Exhibit 18 to the deposition of Steven Mark Rudolph, one in an August 2013 internal Cogentrix memo (Exhibit 17 to Mr. Rudolph's deposition) regarding certain asset acquisitions, and two in an indicative proposal made by The Carlyle Group to FPL in a March 24, 2014 letter (the "March 24, 2014 Proposal"). The number FIPUG is most concerned with in the 2013 Duff & Phelps report represents an allocated value for the Cedar Bay Facility and PPA as part of the total purchase price paid for a group of generating and related assets that included an interest in the Cedar Bay Facility and PPA. The number in the August 2013 memo is the actual price paid for an indirect partial equity ownership interest in an entity which FPL is not proposing to acquire in this Transaction, which entity owned an indirect interest in Cedar Bay along with other assets, and that also had significant

debt associated with those assets. The numbers in the March 24, 2014 Proposal concern The Carlyle Group's initial non-binding offer to FPL, on behalf of the owner funds, for a potential transaction involving a purchase of the Cedar Bay Facility or buyout of the PPA.

9. The reason that Cedar Bay, Cogentrix, and the funds that own the ownership interests in Cedar Bay and the other assets addressed in the documents keep these documents, and the information contained in them, confidential, is that the disclosure of this information - these numeric values - would seriously impair the competitive interests of Cedar Bay, CBAS, and the Carlyle-managed funds and the other Cedar Bay Entities that ultimately own Cedar Bay and other affiliated assets. More specifically, the disclosure of this information would:

1. Disclose confidential financing details and project ownership structures to competitors and actual and potential contract counter-parties;
2. Disclose details regarding Cedar Bay's contractual arrangements, particularly relating to how generating assets and ownership interests in those assets are or have been acquired and transferred;
3. Significantly alter the bargaining position of the Cedar Bay Entities vis-à-vis potential counter-parties with whom the Cedar Bay Entities might be negotiating for the purchase or sale of generating assets, and in particular the Cedar Bay Facility and PPA. Such counter-parties could include private equity funds, infrastructure funds, IPPs, yieldcos and others with whom the Cedar Bay Entities might be negotiating for the purchase or sale of an asset covered in or by the subject documents and figures, including the Cedar Bay Facility or other affiliated assets; and
4. Potentially violate confidentiality obligations of Cedar Bay or its affiliates to others, including counter-parties in prior acquisitions of interests in the Cedar Bay Facility.

10. In real-world terms, if the Commission were to deny FPL's Petition and reject the Stipulation and Settlement reached by FPL and the Public Counsel, and deny the RFCCs to which FIPUG has objected, the Cedar Bay Entities that own Cedar Bay could well be put in the position of negotiating to sell the Cedar Bay Facility and PPA to another entity, and that entity would then have access to the highly competitively sensitive, confidential information of the Cedar Bay Entities, including past transactional price and valuation data, that such entity could use to its advantage and to the detriment of the Cedar Bay Entities. Similarly, even if the Commission were to approve the Transaction at issue in this proceeding and that Transaction is then closed, public disclosure of the information contained in these documents would still give a competitive business advantage to any party with whom the Cedar Bay Entities are or will be negotiating concerning a potential sale of another asset discussed in such documents or otherwise be transacting business by giving them insight into the Cedar Bay Entities' recent business practices, assumptions, and market outlook.

11. The competitive sensitivity of the subject information, as well as the other criteria applicable to Cedar Bay's RFCCs pursuant to Section 366.093, Florida Statutes, is attested to by the affidavits of Jacob A. Pollack, Vice President and Secretary of Cedar Bay and Senior Vice President and General Counsel for Cogentrix Energy Power Management, LLC. The adverse effect on the Cedar Bay Entities' competitive business interests is clear, and accordingly, Cedar Bay has demonstrated that this information



is entitled to the Commission's protection pursuant to Section 366.093, Florida Statutes, and the Commission's rules.

**The Public Records Act and Section 366.093, Florida Statutes**

12. FIPUG is surely correct to extol the virtues of Florida's "open government" laws, including the Public Records Act. However, the Florida Legislature recognized that such laws should not be limitless and enacted, in Section 366.093, Florida Statutes, explicit, express exceptions to the general principle that documents should be public to protect the proprietary confidential business information of utilities and other persons involved in proceedings before the Commission and thereby encourage open disclosure of information in such proceedings. The relevant inquiry here is only whether the information for which protection is sought satisfies the criteria in the statute. Whether such information is relevant or probative to any issue has no bearing on its protected status under Section 366.093, Florida Statutes.<sup>3</sup> FIPUG's attempts to impose a "relevance" or "probative value" standard (see, e.g., FIPUG's Objections to Cedar Bay's Revised Tenth RFCC at 3) that is nowhere to be found in Section 366.093, Florida Statutes, and has never been held to apply thereunder, is completely without merit and should be rejected.

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<sup>3</sup> To be clear, Cedar Bay is not conceding that the information sought to be protected by its Seventh, Tenth, and Thirteen RFCCs is relevant or probative. However, whether it is or is not relevant or probative is immaterial to this docket (because the Commission has access to this information), and is immaterial to whether it qualifies for confidential classification.

13. Moreover, FIPUG's further attempt to conflate Cedar Bay's and FPL's requests for confidential classification of the 2013 and 2015 Duff & Phelps Valuation Reports into a "[w]holesale claim[] of confidentiality" that would "frustrate the administration of justice" (see FIPUG's Objections to 13<sup>th</sup> RFCC at 5) is completely without foundation. The Commission and the Commission Staff, and all of the parties, have all of the information at issue, and thus the "administration of justice" is not compromised at all. Thus, FIPUG's attempt to rely on Allstate Floridian Insurance Company v. Office of Insurance Regulation, 981 So. 2d 617 (Fla. 1<sup>st</sup> DCA 2008), where all the information at issue was not available to the decision maker or fact finder, is inapposite.

**"Blanket" Requests for Confidential Classification**

14. Cedar Bay has requested blanket protection for the Duff & Phelps 2013 Valuation Report; FPL has requested blanket protection for the Duff & Phelps 2015 Valuation Report. FPL's request for blanket protection of the 2015 Valuation Report was not challenged.

15. Blanket RFCCs are not per se objectionable and have been found to be acceptable and appropriate in some circumstances; see, e.g., In re: Fuel and Purchase Power Cost Recovery Clause, Docket No. 50001-EI, PSC Order No. PSC-15-0132-CFO-EI, Order Granting Florida Power & Light Company's Request for Confidential Classification, by which the Commission granted blanket confidential classification to the entire index of a deposition because it contained confidential information.

16. In this instance, Cedar Bay submits that the protection of the entirety of the Duff & Phelps 2013 Valuation Report is appropriate because of the presence therein of certain specific information that is highly sensitive competitive information (as discussed above), and also of a large amount of financial information and assumptions regarding the Cedar Bay Facility and various other assets that were acquired together with interest in the Cedar Bay Facility by the Cedar Bay Entities in 2012. Although FIPUG appears to be concerned with only a specific figure in that report, that figure and everything else in the report is confidential and should be protected accordingly.

**FIPUG's "Materiality" Argument is both False and Misplaced**

17. FIPUG's materiality argument, based on TSC Industries v. Northway, Inc., 426 U.S. 438 (1976), is irrelevant to the issues presented by Cedar Bay's RFCCs. In that case, the U.S. Supreme Court addressed a ruling on summary judgment regarding whether certain information omitted from proxy statements were in fact required to be disclosed in those statements by regulations of the Securities Exchange Commission. The Court held that the correct test for "materiality" under the applicable SEC proxy statement disclosure rules was that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."

18. It should be obvious from just this brief description of the Court's holdings that TSC Industries is inapplicable to the case at hand, but to be clear as to exactly why TSC

Industries is inapplicable, the Commission should note the following:

- a) As discussed above, whether something is probative or relevant, or even rises to the level of "material", has no bearing on whether it qualifies for protection under Section 366.093, Florida Statutes.
- b) Even if Cedar Bay's confidential information could be deemed to be relevant, probative, or material as to the parties in this docket or the Commission, and even if such relevance, probative value, or materiality did cut in favor of disclosure, it would do so only to the limited extent of disclosure to the parties in this docket and to the Commission. The parties and the Commission already have access to this confidential information. FIPUG does not set forth any plausible argument as to why Cedar Bay's confidential information should be made public as to the rest of the world.
- c) There is no proxy statement at issue here, nor does the question here concern whether or not any particular information must be included in a proxy statement or other public securities filing.
- d) Neither Cedar Bay, nor CBAS Holdings, nor any of the upstream funds that own the ownership interests in the Cedar Bay Facility is subject to the SEC regulations, or must make the reports or filings, at issue in TSC Industries.

19. No matter how tortured FIPUG's reading of TSC Industries is, the simple fact remains that Cedar Bay must show only that it meets the specific standards in Section 366.093, Florida Statutes, including, inter alia, that the information relates to its or its affiliates' confidential business information, the disclosure of which would impair its or its affiliates' competitive business. The materiality of the information to a potential securities holder is not relevant to whether the information is entitled to confidential treatment under Section 366.093, Florida Statutes.

20. FIPUG's theory is plainly without merit and should be rejected. By furnishing the affidavits of Mr. Jacob A. Pollack, Vice President and Secretary of Cedar Bay and Senior Vice President and General Counsel for Cogentrix Energy Power Management, LLC, Cedar Bay has furnished the sworn statement of a responsible corporate officer attesting that the subject information is, in fact, Cedar Bay's confidential information and that its disclosure would harm the competitive business interests of Cedar Bay and its affiliates as contemplated by the statutes, particularly Section 366.093(3)(e), Florida Statutes. This sworn attestation as to competitive harm from disclosure of confidential information satisfies the only requirements applicable to the analysis of whether the information is properly subject to protection under Section 366.093, Florida Statutes.

**WHEREFORE**, for the reasons set forth above, the Commission should reject FIPUG's Objections to the Requests for Confidential Classification filed in this proceeding by Cedar Bay (and FPL) with respect to the documents discussed herein, and should grant the pending Requests for Confidential Classification of the subject documents as prayed by Cedar Bay and FPL therein.

Respectfully submitted this 12th day of August, 2015.



Robert Scheffel Wright  
Florida Bar No. 966721  
schef@gbwlegal.com

John T. LaVia, III  
Florida Bar No. 853666  
jlavia@gbwlegal.com

Gardner, Bist, Bowden, Bush,  
Dee, LaVia & Wright, P.A.  
1300 Thomaswood Drive  
Tallahassee, Florida 32308  
(850) 385-0070 Telephone  
(850) 385-5416 Facsimile

Attorneys for Cedar Bay  
Generating Company, Limited  
Partnership

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic delivery, on this 12th day of August, 2015.

Martha Barrera  
Florida Public Service Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399

Jon C. Moyle, Jr./Karen Putnal  
Moyle Law Firm, P.A.  
118 North Gadsden Street  
Tallahassee, Florida 32301

Mr. Ken Hoffman  
Florida Power & Light Company  
215 South Monroe Street, Suite 810  
Tallahassee, Florida 32301

J.R. Kelly / John J. Truitt  
Office of the Public Counsel  
c/o The Florida Legislature  
111 W. Madison Street  
Room 812  
Tallahassee, FL 32399-1400

John T. Butler / Maria J. Moncada  
Florida Power & Light Company  
700 Universe Boulevard  
Juno Beach, FL 33408

  
\_\_\_\_\_  
Attorney