

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination)
of Need for an Electrical Power)
Plant in Okeechobee County by)
Okeechobee Generating Company,)
LLC)
_____)

DOCKET NO. 991462-EU

Filed: January 25, 2000

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE
TO OKEECHOBEE GENERATING COMPANY'S
SECOND MOTION FOR PROTECTIVE ORDER**

Florida Power & Light Company (FPL), pursuant to Rule 28-106.206 of the Florida Administrative Code (F.A.C.) and Fla. R. Civ. P. 1.380, responds to Okeechobee Generating Company, LLC's (OGC's) Second Motion for Protective Order and states:

1. On January 18, 2000, OGC filed its Second Motion for Protective Order, which seeks to withhold, on confidentiality grounds, the following two documents from FPL:
 - (A) The "PG&E Pro-Forma," a set of estimates of the OGC Project's revenues, capital costs, gas transportation and procurement costs and other energy production costs.
 - (B) The "August 18, 1999, Memorandum," an internal PG&E memorandum sent to PG&E Generating department heads, which apparently discusses various generating projects.

Both documents are responsive to various discovery requests of FPL. FPL does not contest the assertion that these documents contain confidential business information of OGC and PG&E Generating. However, for the reasons discussed below, the confidential information contained therein is "reasonably necessary" to FPL in this proceeding and must therefore be disclosed,

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subject of course to reasonable protective measures that guard against improper use of the information.

2. Where withholding of discovery responses is based on confidentiality, courts generally apply a two-part approach to deciding whether to grant a protective order. First, the court must determine whether the information is, in fact, confidential business information. *Scientific Games, Inc. v. Dittler Bros., Inc.* 586 So.2d 1128, 1131 (Fla. 1st DCA 1991). If the information is not a confidential trade secret under section 90.056, Florida Statutes and Fla. R. Civ. P. 1.280(c)(7) the inquiry is at an end and the information must be disclosed. Upon a determination that the information is entitled to confidentiality protection, the inquiry turns to whether the information is "reasonably necessary" to the party seeking discovery. *Scientific Games*, 586 So.2d at 1131. If a reasonable necessity for use at trial is found, discovery must be allowed, subject to whatever reasonable protective measures are necessary and proper to limit the adverse consequences of disclosure while still meeting the need for litigation purposes. *Becker Metals Corp. v. West Fla. Scrap Metals*, 407 So. 2d 380, 382 (Fla. 1st DCA 1981). Consistent with this case law the Commission's rules allow for disclosure of confidential business information "subject to a protective order limiting disclosure in the manner provided for in Rule 1.280," which order "shall specify how the confidential information is to be handled." Rule 25-22.006(6)(a), F.A.C.

A. The PG&E Pro-Forma

3. OGC states that the PG&E Pro-Forma contains "forward price curves for energy and capacity, natural gas transportation costs, costs of capital, rates of return [and] net revenue projections" for the OGC project and that this information is used by PG&E Generating for its business decisions regarding the OGC Project, including "risk management and investment

decision making." Such information is clearly relevant to test the veracity of the assertions in OGC's Petition that:

- "The Okeechobee Generating Project represents the lowest cost technology available." (Petition at 17)
- "The direct construction cost and heat rate of the Okeechobee Generating Project compare favorably to those of other proposed similar power plants." (Petition at 18)
- "[T]he OGC Project is the most cost-effective alternative available to Peninsular Florida Based on its highly efficient heat rate and low construction cost the project is demonstrably cost effective . . ." (Petition at 23-24)
- "[T]he [OGC] project will operate economically at annual capacity factors of approximately 93 percent from 2004 through 2013." (Petition at 24)
- "The [OGC] Project is expected to displace approximately 4.3 million MWH per year of power produced by less efficient . . . generation units." (Petition at 32)
- "The [OGC] Project's capacity and energy will be economically and environmentally preferable to other supply-side alternatives. Thus, future cost-effective conservation measures would likely displace other supply-side alternatives, rather than replace the capacity and energy available from the Project." (Petition at 29)

4. The core purpose of section 403.519, Florida Statutes, is to prevent unnecessary generation projects from being built. OGC has premised its assertion that there is a need for its project on the alleged existence of a wholesale market for almost all of the project's generation capacity, due, according to OGC, to the relative economics of the project versus existing sources of electric power. However, the only support provided for these assertions has been the Altos studies, which are based on various generic and hypothetical model inputs, none of which are specific to the proposed OGC project. Now, when FPL asks for the "real" data – i.e., the project-specific information compiled by PG&E Generating for its own business decision making –

OGC hides behind a shield of confidentiality. The Commission's determination of whether the OGC project is needed should be based on all the relevant information, not just that data which OGC and PG&E Generating have selectively chosen to present.

5. Moreover, the PG&E Pro-Forma is the only known document that estimates the profits that PG&E Generating can expect to receive from the project. Several OGC witnesses, including PG&E Generating's Mr. Finnerty, testify that the OGC project is economically viable. OGC has put economic viability at issue in this docket. The PG&E Pro-Forma is necessary: (a) to test Mr. Finnerty's economic viability assertions, and (b) to determine whether the costs of OGC's power to Florida utility customers will result in exorbitant rates of return flowing to PG&E Generating in California. The Commission should know how much consumer surplus OGC and PG&E intend to extract from Florida ratepayers.

6. FPL appreciates the sensitivity of competitive business information such as pro-forma projections. However, due to the high degree of need for the PG&E Pro-Forma in this proceeding, it must be disclosed. Of course, such discovery may be limited by reasonable protective measures, such as limiting disclosure to only that necessary for litigation, requiring all persons given access to the document to execute a reasonable confidentiality agreement, treating any testimony that refers to the pro-forma as confidential proprietary business information under the Commission's confidentiality rules, and requiring return of all copies of the PG&E Pro-Forma to OGC at the close of this proceeding.

7. OGC argues that the controversy over disclosure of the PG&E Pro-Forma is similar to the issues raised in FPL's motion for protective order. However, OGC fails to recognize that the FPL affiliates' documents addressed in that motion had no bearing on this

proceeding because they related solely to FPL projects outside the state of Florida. By contrast, the PG&E Pro-Forma is the only known project-specific evaluation of the OGC generating project and is therefore highly relevant. There is clearly a great disparity in the relevance of the FPL and PG&E documents, which compels disclosure of one but not the other.

8. Similarly, OGC's assertion that it should be provided the pricing information of FPL and its wholesale affiliates is without merit. OGC has put the economics of its generating plant at issue in this proceeding, and the Commission must be able to test the veracity of OGC's assertions. No similar issue exists with regard to any FPL generating project, much less one located outside the state of Florida. OGC, in an attempt to coerce FPL to refrain from fully prosecuting this case, fails to recognize that the principle consideration for determining whether to require disclosure of confidential information is relevance. FPL submits that the PG&E information OGC wishes to withhold is highly relevant to this proceeding, and this relevance far outweighs OGC's confidentiality concerns.

B. The August 18, 1999 Memorandum

9. The other document that OGC seeks to withhold is the August 18, 1999, Memorandum, an internal memorandum of PG&E Generating. From OGC's vague description, it appears that this document discusses various PG&E Generating projects across the country, including the OGC project. OGC seeks to withhold the document specifically because it discusses "PG&E Generating's development plans outside of Florida."

10. FPL does not seek discovery of any information relating to PG&E Generating projects other than the OGC Project at issue in this proceeding. For the reasons discussed in FPL's Motion for Protective Order, information on projects that are not at issue has no bearing

on this case and is therefore not reasonably necessary to any party. Thus, to the extent any information in the August 18, 1999, Memorandum does not relate to the OGC Project, FPL has no objection to it being withheld and/or redacted.

11. However, FPL is entitled to discovery of any information in the document that does relate to the OGC Project. Such information is relevant and "reasonably necessary" for the reasons outlined in the above discussion of the PG&E Pro-Forma. Because OGC has not identified the types of information contained in the memorandum, FPL is not in a position to fully evaluate OGC's claims of confidentiality or determine whether disclosure is necessary in this proceeding. For this reason, FPL requests that the prehearing officer conduct an in-camera inspection of the August 18, 1999, memorandum to determine whether it contains information relevant to this proceeding. *See Appel v. Quilantang*, 629 So.2d 1004 (Fla. 4th DCA1993) (*in camera* review is the preferred method for evaluating the relevance of documents). If relevant information is contained in the document, FPL submits that disclosure is required subject to protective measure similar to those suggested for the PG&E Pro-Forma and with any information relating to PG&E projects other than the OGC project redacted. *See, e.g., Haywood v. Samai*, 624 So.2d 1154 (Fla. 4th DCA 1993) (redaction is a preferred remedy when only part of a document is discoverable).

Conclusion

For the reasons stated herein, OGC's Second Motion for Protective Order should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this FPL's Response to OGC's Second Motion for Protective Order was served by facsimile transmission and U.S. Mail this 25th day of January, 2000, to the following:

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