

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to determine
need for an electrical power
plant in Martin County by
Florida Power & Light Company.

DOCKET NO. 020262-EI

In re: Petition to determine
need for an electrical power
plant in Manatee County by
Florida Power & Light Company.

DOCKET NO. 020263-EI
ORDER NO. PSC-02-1314-CFO-EI
ISSUED: September 27, 2002

ORDER GRANTING IN PART AND DENYING IN PART
FLORIDA POWER & LIGHT COMPANY'S MOTION TO COMPEL
AND CPV GULF COAST'S MOTION FOR PROTECTIVE ORDER

On July 26, 2002, Florida Power & Light (FPL), served its First Request for Production of Documents (Nos. 1-26) and First Set of Interrogatories (Nos. 1-34) on CPV Gulfcoast, Ltd. (CPV-Gulfcoast), an intervenor in this need determination proceeding. CPV filed Objections to FPL's discovery on August 5, 2002, and filed partial responses to the discovery on August 15, 2002. CPV did not respond to several of the requests for production and interrogatories. FPL's served its Second Request for Production of Documents (Nos. 27-43) and Second Set of Interrogatories (Nos. 35-45) on CPV on July 31, 2002. CPV filed objections to this discovery on August 9, 2002, and on August 20, 2002, CPV filed responses in which it renewed its objections and did not respond to the discovery.

On August 27, 2002, FPL filed a Motion to Compel Production of Documents and Answers to Interrogatories to CPV (Motion to Compel). In its motion FPL sought to compel the production of documents pursuant to Request Nos. 2, 4-6, 9-11, 14-15, 21-24, and 26-43. FPL's motion also sought to compel answers to Interrogatory Nos. 11-14, 16-17, 19, 22-24, 26-28, and 35-45. On September 4, 2002, CPV filed its Motion for Protective Order and Response to FPL's Motion to Compel.

Since the parties to this discovery dispute filed these pleadings they have resolved some of their differences. The following FPL interrogatories and requests for production of documents remain in dispute: Interrogatories Nos. 13, 16, 17, 23, 26, 27, 28, 37, 38, 41, 42, 44, 45, and; Requests for Production of

DOCUMENT NUMBER-DATE

10384 SEP 27 003689

FPSC-COMMISSION CLERK

Documents Nos. 2, 4, 9, 10, 11, 14, 15, 21, 24, 27 31, 35, 36, 37, 38, 39, 40.

In its Motion to Compel, FPL explains that the discovery it has requested from CPV is intended to gather information in three areas: 1) the evidence upon which CPV intends to rely at the hearing; 2) CPV's financial stability and financial health; and 3) CPV's participation in the Supplemental Request for Proposals (RFP). FPL asserts that these subjects are within the scope of reasonable discovery for this case; and whether or not the questions and requests would produce evidence ultimately admissible at the hearing, they are reasonably likely to lead to admissible evidence. In its response to the motion to compel and in its request for a protective order, CPV contends that FPL's requests exceed the scope of permissible discovery, are not relevant and are not likely to lead to the discovery of admissible evidence. CPV states that the discovery in question serves little purpose other than to pry into CPV's sensitive business matters and cause unnecessary expense to CPV.

Pursuant to Rule 28-106.206, Florida Administrative Code, this discovery dispute is governed by Rules 1.280 through 1.400, Florida Rules of Civil Procedure. Rule 1.280(b)(1), "Scope of Discovery", provides, in pertinent part:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . .

(3) Trial Preparation: Materials. . . [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for

trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering the discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

These rules will guide the rulings on the specific discovery matters addressed below.

I. Evidence upon which CPV intends to rely at the hearing (Request for Production No. 14)

FPL's **POD Request No. 14** states: Please provide all documents reviewed or utilized by each of CPV's witnesses in preparation of his or her testimony.

CPV's Response states: Over broad, not limited in scope, burdensome; some witnesses CPV may call are adverse, thus making it impractical to answer this discovery request.

Argument

In its Motion to Compel, FPL states that this request pertains to the subject matter of this need determination, and as such is limited in scope and not over-broad. CPV responds that most documents reviewed or utilized by CPV witnesses are documents that are in possession of FPL or are readily available online at the PSC website. CPV also states that because it plans to call witnesses who are not under its control, it is not able to respond to this request for any witnesses other than its President. CPV argues that the request is compound in nature, because it seeks documents both reviewed and utilized; and it contends that the request impinges on the attorney work product privilege. In response to this objection, FPL states that the documents supporting CPV's witnesses are relevant and material. Further, FPL states that

documents which support a witness's testimony are not likely to be attorney work product, but if documents were protected work product, they should be identified in a privilege log. According to FPL, this is not grounds to ignore a request completely.

Ruling

In consideration of the above arguments and Rule 1.280, Rules of Civil Procedure, FPL's Motion to Compel is granted, and CPV's Motion for Protective Order is denied, with the following conditions. CPV shall identify for FPL the documents reviewed or used by CPV's direct witness in preparation for this case. CPV shall indicate whether the document is an FPL document or otherwise publicly available to FPL. CPV shall provide to FPL those documents that are not FPL documents or otherwise available to FPL. If CPV withholds a particular document on grounds of privilege, CPV shall generally describe the document and indicate specifically the privilege asserted.

Accordingly, subject to the conditions described above, CPV shall produce the documents requested in FPL's Request for Production No. 14 to FPL by the close of business on October 1, 2002.

II. CPV's stability and financial health. (Interrogatories Nos. 13, 16, 17, 23, and 37, 38, 41, 42, 44, 45; Requests for Production Nos. 9-11, 21, 24, 27, 31, 35-40)

Argument

All of the discovery requests listed above seek detailed financial information from CPV. FPL argues that this discovery is proper, because CPV has raised, in its pleadings and testimony, the validity of FPL's determinations evaluating its April, 2002, Supplemental Request for Proposals (RFP). According to FPL, CPV has opened the door to scrutiny by challenging FPL's Supplemental RFP and the analysis that FPL performed. FPL argues that to the extent any information is reasonably related to or underlies information sought in the Supplemental RFP, that information is now at issue in the present case and is discoverable by FPL, including information related to CPV's stability and financial viability. Further, FPL cites to the direct testimony of the President of CPV,

which, according to FPL, raises the possibility that CPV's bid proposal to the April 2002 Supplemental RFP was not made in good faith because CPV knew it could not obtain financing. Thus, FPL states, it must be entitled to obtain discovery regarding CPV's financial information in order to determine if the bid was made in good faith. As to CPV's objection that the information requested is highly confidential business information, FPL states that CPV's blanket confidentiality objection is not specific enough to be sustained. FPL also states that it cannot address any ambiguity in the discovery, because CPV has failed to state what in particular is ambiguous or not understandable.

In response to FPL's argument that CPV has opened the door to scrutiny of its financial records, CPV states that this argument ignores deposition testimony provided by an FPL witness in the case, which asserted that; "if a proposal was clearly out of the money during the financial analysis, it obviated the need to apply more qualitative factors, like financial viability criteria." According to CPV FPL has asserted in its Motion to Compel and elsewhere that CPV's bids were "out of the money;" that is, not competitive with other bids received in response to the supplemental RFP. CPV questions FPL's need for CPV's sensitive financial information, considering that FPL never gave serious consideration to CPV's financial viability during the evaluation. CPV states that it is not contesting FPL's need determination on the basis that it should have been ranked ahead of other bids, or that FPL should have declared CPV the winner of the process. In further support of its objection, CPV cites Compton v. West Volusia Hospital Authority, 727 So. 2d 379 (Fla. 5th DCA 1999), where the Court stated, "ordinarily the financial records of a party are not discoverable unless the documents themselves or the status which they evidence are somehow at issue in the case." CPV states that its financial records or the status which they evidence are not at issue in this case.

Ruling

In consideration of the above, FPL's Motion to Compel is denied with respect to Interrogatories Nos. 13, 16, 17, 23, 37, 38, 41, 42, 44, 45; and Requests for Production Nos. 9-11, 21, 24, 27, 31, 35-40. The information FPL seeks does not appear likely to lead to admissible evidence, because CPV's financial status is not

relevant to the issues identified for resolution in the case. CPV's Motion for Protective Order is granted.

III. CPV's participation in the April 2002 Supplemental RFP. (Interrogatories Nos. 26-28; Request for Production of Documents Nos. 2 and 4)

FPL's **Interrogatory No. 26** states: Please set forth by year the projected capital expenditure requirements for the CPV Gulfcoast project assuming the in service dates included in CPV's proposals submitted in response to FPL's Supplemental RFP.

CPV's Response states: Compound, irrelevant, immaterial, overly broad, burdensome, and not likely to lead to the discovery of admissible evidence. This information is highly confidential business information, similar to information FPL has refused to provide on similar grounds. Moreover, as FPL and FPL Energy are competitors of CPV Gulfcoast's, this information should not be subject to disclosure, particularly to the extent that such extent information involves trade secrets or other proprietary information.

FPL's **Interrogatory No. 27** states: For each year 2002-2005, please set forth the forecasted uses and sources of funding for the capital expenditure requirements for the CPV Gulfcoast project assuming the in service dates included in CPV's proposals submitted in response to FPL's Supplemental RFP.

CPV's Response states: *See response to Interrogatory No. 26*

FPL's **Interrogatory No. 28** states: Please state the projected return on equity CPV forecasted it would earn on the CPV Gulfcoast project under CPV's proposals submitted in response to FPL's Supplemental RFP.

CPV's Response states: *See response to Interrogatory No. 26*

FPL's **POD Request No. 2** states: Please provide copies of all documents regarding CPV's participation in FPL's August 2001 RFP and FPL's April 2002 Supplemental RFP.

CPV's Response states: Overly broad, burdensome, privileged, and ambiguous.

FPL's **POD Request No. 4** states: Please provide copies of all documents, analyses and reports supporting or otherwise addressing the firmness of CPV's proposal submitted to FPL's Supplemental RFP.

CPV's Response states: Ambiguous and unclear regarding "firmness."

Argument

In its Motion to Compel, FPL states that all of the above interrogatories and production of document requests relate to CPV's participation in the April, 2002, Supplemental RFP. Specifically, FPL states that its Interrogatory No. 26 relates to the calculations underlying CPV's bid proposal, and had CPV been chosen in the April, 2002, Supplemental RFP, these would have been the projected capital expenditures. Thus, the documents are relevant and material, and the interrogatory is limited in scope in that it relates only to CPV's bid. With respect to CPV's objection to POD Request No. 2, FPL contends that the request for documents regarding CPV's participation in FPL's RFP is tailored to the issues in this proceeding and therefore is not overly broad or ambiguous.

CPV responds that the interrogatories identified above are actually designed to elicit additional sensitive financial information from CPV, even though FPL characterizes them as relating to CPV's participation in FPL's RFP. CPV argues that the information FPL seeks is not relevant to FPL's determination of need, because CPV's bid was not competitive, and CPV has not placed FPL's failure to choose it in issue in the case. CPV also states that the discovery not related to CPV's finances should also be protected, because it is overboard and burdensome, part of it relates to FPL's initial RFP, which is no longer at issue in the case, and FPL is seeking documents from CPV similar to those it has refused to produce itself.

Ruling

In consideration of the above, FPL's Motion to Compel is denied and CPV's Motion for Protective Order is granted with respect to Interrogatories Nos. 26-28. The information FPL seeks does not appear likely to lead to admissible evidence, because CPV's financial status is not relevant to the issues identified for resolution in the case. FPL's Motion to Compel is denied, and CPV's Motion for Protective Order is granted with respect to POD Request No. 2. The request is overboard and not reasonably likely to lead to admissible evidence in this case. FPL's Motion to Compel is granted, however, and CPV's Motion for Protective Order is denied, with respect to POD Request No. 4. This information is reasonably likely to lead to evidence relevant to the issues in this proceeding. CPV has raised the issue of the fairness of FPL's RFP process and FPL's evaluation of the bids it received. CPV contends that the RFP proposals to provide capacity at a particular price were firm proposals, while FPL's proposals to build its own generating units are not firm. It is reasonable and relevant for FPL to investigate CPV's assertion that its response to FPL's RFP was a firm bid.

Accordingly, CPV shall produce the documents requested in FPL's Request for Production of Documents No. 4 to FPL by the close of business on October 1, 2002.

Based on the foregoing, it is

ORDERED by Commissioner J. Terry Deason as Prehearing Officer, that Florida Power & Light Company's Motion to Compel is granted in part and denied in part, and CPV's Motion for Protective Order is likewise granted in part and denied in part, as set forth in the body of this Order.

ORDER NO. PSC-02-1314-CFO-EI
DOCKETS NOS. 020262-EI, 020263-EI
PAGE 9

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 27th day of September, 2002.



J. TERRY DEASON, Commissioner
and Prehearing Officer

(S E A L)

LAH

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial

ORDER NO. PSC-02-1314-CFO-EI
DOCKETS NOS. 020262-EI, 020263-EI
PAGE 10

review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.