

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

|                                  |   |                      |
|----------------------------------|---|----------------------|
| In re: Fuel and Purchased        | ) | DOCKET NO. 910001-EI |
| Power Cost Recovery Clause and   | ) | ORDER NO. 24953      |
| Generating Performance Incentive | ) | ISSUED: 8/21/91      |
| Factor.                          | ) |                      |

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ORDER ON CONFIDENTIALITY

BY THE COMMISSION:

During our 1991 fuel audit of Florida Power & Light Company (FPL), Commission Staff requested access to various FPL records. During Staff's audit of FPL's fuel related records, FPL asserts that certain confidential material was obtained by Staff through note taking and the copying of portions of FPL's fuel, transportation, terminaling, and inspection service contracts. FPL argues that portions of this information should be classified as proprietary confidential business information pursuant to Rule 25-22.006, Florida Administrative Code, and Section 366.093, Florida Statutes. Accordingly, on July 10, 1991, FPL filed a Request for Confidential Classification of Certain Material Obtained During the Commission's June 1991 Fuel Audit (Document No. 6957-91).

Florida law provides, in Section 119.01, Florida Statutes, that documents submitted to governmental agencies shall be public records. The only exceptions to this law are specific statutory exemptions, and exemptions granted by governmental agencies pursuant to the specific terms of a statutory provision. This law derives from the concept that government should operate in the "sunshine." In the instant matter, the value that all parties would receive by examining and utilizing the information contained in this document must be weighed against the legitimate concerns of FPL regarding disclosure of business information which it considers proprietary. It is our view that parties must meet a very high burden when requesting confidential classification of documents.

Pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, FPL has the burden to show that the material submitted is qualified for confidential classification. Rule 25-22.006, Florida Statutes, provides that the Company may fulfill its burden by demonstrating that the information falls under one of the statutory examples set out in Section 366.093, Florida Statutes, or by demonstrating that the information is proprietary confidential business information, the disclosure of which will cause the Company or its ratepayers harm.

Section 366.093(3)(d), Florida Statutes, provides several examples of proprietary confidential business information. Included in this list is "[i]nformation concerning bids or other

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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." To establish that material is proprietary confidential business information under Section 366.093(d), Florida Statutes, a utility must demonstrate (1) that the information is contractual data, and (2) that the disclosure of the data would impair the efforts of the utility to contract for goods or services on favorable terms. We have previously recognized that this latter requirement does not necessitate the showing of actual impairment, or the more demanding standard of actual adverse results; instead, it must simply be shown that disclosure is "reasonably likely" to impair the company's contracting for goods or services on favorable terms.

On work paper number 8-1/1, FPL argues that lines 23-25 is contractual information, which if publicly disclosed would impair FPL's efforts to contract for goods and services on favorable terms. We agree. The information delineates the price that FPL paid for Orimulsion. Disclosure of the invoice price for Orimulsion paid by FPL to its supplier is reasonably likely to impair FPL's ability to negotiate price concessions in future Orimulsion contracts. In addition, FPL is in the process of renegotiating provisions of the Orimulsion supply contract. Public disclosure of price concessions could result in the supplier withdrawing price concessions in the future. Moreover, the Orimulsion contract contains provisions which require that the terms of the contract not be publicly disclosed. Also, the Orimulsion contract contains quality adjustments, volume and delivery terms, payment arrangements, and other contractual provisions which are, in effect, pricing terms which are as important as the price itself. We find these other terms to be confidential for the reasons stated above relative to price concessions. These provisions were specifically negotiated between the parties. Public disclosure of these terms, or even the existence of these terms, could result in these favorable terms being withdrawn in future contracts. We find this information to be proprietary confidential business information.

On work paper number 8-1/1, lines 27-28 and on work paper number 8-1/2, lines 9-18, FPL argues that it also shows important provisions negotiated in the Orimulsion contract. As stated above, the Orimulsion contract contains quality adjustments, volume and delivery terms, payment arrangements, and other contractual provisions which are, in effect, pricing terms which are as important as the price itself. For the reasons stated in the above paragraph, we find this contractual data to be confidential proprietary business information, the disclosure of which could harm the ability of FPL to negotiate on favorable terms in the

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future.

FPL argues that portions of lines 20-26, and line 27 on work paper number 8-2/2 are confidential for the reasons expressed for work paper number 8-1/1, lines 27-28, and for work paper number 8-1/2, lines 9-18. We disagree. We find that the information uses the term price and references a letter of agreement, but that it contains no contractual information. Accordingly, we deny FPL's request for confidentiality as it relates to lines 20-26, and line 27 on work paper number 8-2/2.

For work paper number 8-2/2, Attachment V, Para. #4, page 2, lines 4-6, FPL argues that this data is also contractual information, which if publicly disclosed, would impair FPL's efforts to contract for goods and services on favorable terms. We agree. This information delineates the price that FPL paid for Orimulsion. As discussed above, the disclosure of the invoice price for Orimulsion paid by FPL to its supplier is reasonably likely to impair FPL's ability to negotiate favorable terms in future Orimulsion contracts.

FPL contends that the data on work paper number 8-2/2, Attachment V, Para. #5, page 2, lines 10-13 is contractual information, which if made public, would impair FPL's efforts to contract for goods and services on favorable terms. We agree. This information also delineates the price that FPL paid for Orimulsion. As discussed above, we find this information to be proprietary confidential business information. In addition, as noted above, the Orimulsion contract contains quality adjustments, volume and delivery terms, payment arrangements, and other contractual provisions which are, in effect, pricing terms which are as important as the price itself. As previously stated, we find these terms of the Orimulsion contract to be proprietary confidential business information.

Concerning work paper number 8-2/2, Attachment V, Para. #6, page 2, lines 18-20 and Note (1), page 2, line 24, FPL asserts that this data is contractual information, which if publicly disclosed would impair FPL's efforts to contract for goods and services on favorable terms. We agree. The information delineates the price that FPL paid for Orimulsion. As noted above, we find that this invoice price is proprietary confidential business information.

FPL states that the information on work paper number 8-2/2, Attachment V, Note (3), page 2, line 35 concerns important terms of the Orimulsion contract. Specifically, the quality adjustments, volume and delivery terms, payment arrangements, and other contractual provisions which are, in effect, pricing terms which

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are as important as the price itself. As noted above, we find these terms to be proprietary confidential business information.

FPL argues that lines 30-31 are confidential for the same reasons as line 35 on work paper number 8-2/2, Attachment V, Note (3), page 2. We disagree. We find that although this information uses the term price, it contains no contractual information. Accordingly, we deny the request for confidential classification for these lines 30-31.

According to FPL, the data on work paper number 8-3/1, item #4(C), lines 24-26; on work paper number 8-4/1, items #4(A) and 4(C), page 2, lines 23 and 41; and on work paper number 8-4/1, item #4(D), page 3, lines 2 and 4 is contractual information, the disclosure of which harm FPL's ability to contract for goods and services on favorable terms. We agree. We note that terminaling and transportation services in Florida tend to have the same, if not more severe, oligopolistic attributes of fuel oil suppliers. For instance, in 1987, FPL was only able to find eight qualified parties with an interest in bidding either or both of these services. Of these, four responded with transportation proposals and six with terminaling proposals. Due to this small demand in Florida, market entry is difficult. Consequently, disclosure of this contractual data is reasonably likely to result in increased prices for terminaling and transportation services. Thus, we find this information to be proprietary confidential business information.

On work paper number 43-1/3, page 1 and 3, items circled 1-4; page 2 of 3, items circled 1-3, and 7-9; and page 3 of 3, item circled 1 is No. 6 fuel information. FPL claims that this is contractual information which, if made public, would impair FPL's efforts to contract for goods and services on favorable terms. We agree. This information delineates the price FPL has paid for No. 6 fuel oil per barrel for specific shipments from specific suppliers. This information would allow suppliers to compare an individual supplier's price with the market quote for that date of delivery, and thereby determine the contract pricing formula between FPL and that supplier. Contract pricing formulas generally contain two components. These components are: (1) a markup in the market quoted price for that day, and (2) a transportation charge for delivery at an FPL chosen port of delivery. Disclosure of the invoice price would allow suppliers to determine the contract price formula of their competitors. This contract formula knowledge among No. 6 fuel oil suppliers is reasonably likely to cause the suppliers to converge on a target price, or to follow a price leader, which could effectively eliminate any opportunity for a major buyer, like FPL, to use its market presence to gain price

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concessions from any one supplier. The end result is reasonably likely to be increased No. 6 fuel oil prices and therefore increased electric rates. Price concessions in an oligopolistic market will only be available when such concessions are kept confidential. Once the other suppliers learn of the price concessions, the conceding supplier will be forced, due to the oligopolistic nature of the market, to withdraw from future concessions. Consequently, disclosure of the invoice price of No. 6 fuel oil paid by FPL to specific fuel suppliers is reasonably likely to impair FPL's ability to negotiate price concessions in future No. 6 fuel oil contracts. Accordingly, we find this information to be proprietary confidential business information.

FPL asserts that the data on work paper number 43-1/3, page 2 of 3, items circled 4-6, and page 3 of 3, item circled 2 is contractual information which, if made public, would impair FPL's efforts to contract for goods and services on favorable terms. The information delineates the price FPL has paid for No. 2 fuel oil per barrel for specific shipments from specific suppliers. No. 2 fuel oil is purchased through a bidding process. At the request of the No. 2 fuel oil suppliers, FPL has agreed to not publicly disclose any supplier's bid. This non-disclosure agreement protects both FPL's ratepayers, and the bidding suppliers. As to FPL's ratepayers, the non-public bidding procedure provides FPL with a greater variation in the range of bids that would otherwise be available if the bids were publicly disclosed. If the No. 2 fuel oil prices found on Staff's work papers were publicly disclosed, the bids would narrow to a close range around the last winning bid. This could eliminate the possibility that one supplier might, based on his economic situation, come in substantially lower than the other suppliers. Non-disclosure likewise protects the suppliers from divulging any economic advantage that a particular supplier may have that the others have not discovered. We find this data to be proprietary confidential business information.

Concerning work paper number 43-1/5, page 2 of 12, item circled 1; page 3 of 12, item circled 1; page 6 of 12, item circled 1; page 7 of 12, item circled 1; page 9 of 12, item circled 1; and, page 10 of 12, items circled 2-3, FPL argues that this data is contractual information, the disclosure of which could impair FPL's efforts to contract for goods and services on favorable terms. We agree. As noted above, this information delineates the price FPL has paid for No. 6 fuel oil per barrel for specific shipments from specific suppliers. As previously stated, disclosure of the invoice price of No. 6 fuel oil paid by FPL to specific fuel suppliers is reasonably likely to impair FPL's ability to negotiate price concessions in future No. 6 fuel oil contracts, and we find

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it to be proprietary confidential business information.

FPL states that the information on work paper number 43-1/5, page 3 of 12, item circled 2 is contractual information, which if made public, would impair FPL's efforts to contract for goods and services on favorable terms. We agree. The information delineates the price that FPL paid for Orimulsion. As stated above, we find the Orimulsion price to be proprietary confidential business information.

On work paper number 43-1/5, FPL states that page 4 of 12, items circled 1-2, and on page 5 of 12, items circled 1-2 the information is contractual information, which, if publicly disclosed could impair FPL's efforts to contract for goods and services on favorable terms. We agree. This information delineates the price FPL has paid for No. 6 fuel oil per barrel for specific shipments from specific suppliers. As noted above, this information would allow suppliers to compare an individual supplier's price with the market quote for that date of delivery and thereby determine the contract pricing formula between FPL and that supplier. Disclosure of the invoice price of No. 6 fuel oil paid by FPL to specific fuel suppliers is reasonably likely to impair FPL's ability to negotiate price concessions in future No. 6 fuel oil contracts. In addition, the end result is reasonably likely to be increased No. 6 fuel oil prices, and, therefore, increased electric rates. Also, as noted above the non-disclosure agreement between FPL and its suppliers protects both FPL's ratepayers, and the bidding suppliers. Accordingly, we find this data to be proprietary confidential business information.

The data on work paper number 43-1/5, page 8 of 12, item circled 1; page 9 of 12, items circled 2-3; page 10 of 12, items circled 1; and page 11 of 12, item circled 1, FPL argues is contractual information which, if made public, would impair FPL's efforts to contract for goods and services on favorable terms. The information delineates the price FPL has paid for No. 2 fuel oil per barrel for specific shipments from specific suppliers. No. 2 fuel oil is purchased through a bidding process. At the request of the No. 2 fuel oil suppliers, FPL has agreed to not publicly disclose any supplier's bid. As we have found above, this non-disclosure agreement protects both FPL's ratepayers, and the bidding suppliers. Therefore, we find this data to be proprietary confidential business information.

On work paper number 43-2/1, items circles 1-7, FPL states that the information is contractual information, which if made public, would impair FPL's efforts to contract for goods and services on favorable terms. We agree. The information delineates

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the price that FPL paid for Orimulsion. As noted above, disclosure of the invoice price for Orimulsion paid by FPL to its supplier is reasonably likely to impair FPL's ability to negotiate price concessions in future Orimulsion contracts. Accordingly, we find this to be proprietary confidential business information.

On work paper number 43-2/1-1, Notes (B) and (C), page 2 of 3, items circled 1-4, FPL states that this is contractual information, the disclosure of which could harm the ability of FPL to contract for goods and services on favorable terms. We agree. The data concerns the Orimulsion contract, and it contains quality adjustments, volume and delivery terms, payment arrangements, and other contractual provisions. As noted above, public disclosure of these terms, or even the existence of these terms, could result in these favorable terms being withdrawn in future contracts. Therefore, we find this information to be proprietary confidential business information.

FPL asserts that the data on work paper number 43-2/1-1, page 3 of 3, items circled 1-2 is contractual information, which if made public, would impair FPL's efforts to contract for goods and services on favorable terms. We agree. The information delineates the price that FPL paid for Orimulsion. As noted above, disclosure of the invoice price for Orimulsion paid by FPL to its supplier is reasonably likely to impair FPL's ability to negotiate price concessions in future Orimulsion contracts. Moreover, the Orimulsion contract contains terms other than price which were specifically negotiated between the parties. Public disclosure of these terms, or even the existence of these terms, could result in the favorable terms being withdrawn in future contracts. We find this information to be proprietary confidential business information.

FPL argues that the highlighted information on work paper number 43-2/1-1, page 1-3, items circled 1-7, should be classified confidential for the same reason as the information on work paper number 43-2/1-1, page 3 of 3, items circled 1-2. We disagree. While we find that items 1-5 is contractual data, the disclosure of which could impair FPL's ability to contract for goods and services on favorable terms, we find that disclosure of the payment due date listed on items 6 and 7 would not impair FPL's contracting ability. We find that items 1-5 is confidential for the same reason as the information on work paper number 43-2/1-1, page 3 of 3, items circled 1-2. However, we deny FPL's request as it relates to items 6-7 because we find the payment due date is not confidential.

Finally, on work paper number 43-2/1-2, lines 7, 8, 24-32; on work paper number 43-2/1-3, items circled 1-10; and on work paper

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number 43-2/1-4, items circled 1-2, FPL argues that this is contractual information, the disclosure of which would impair FPL's ability to contract for goods and services on favorable terms. We note that petroleum inspection services also have the market characteristics of an oligopoly. Due to the limited number of fuel terminal operations, there are correspondingly few requirements for fuel inspection services. In FPL's last bidding process for petroleum inspection services, only six qualified bidders were found for FPL's bid solicitations. Consequently, disclosure of this contractual data is reasonably likely to result in increased prices for petroleum inspection services. Accordingly, we find this information to be proprietary confidential business information.

#### DECLASSIFICATION

FPL requests that the confidential information identified above not be disclosed until the identified date of declassification. FPL calculated the date of declassification by adding six (6) months to the last day of the contract period under which the goods or services identified on Staff's work papers were purchased.

We find that the contractual information concerning Orimulsion which appears on Staff's work papers, and for which confidential classification is sought, should remain confidential for approximately two years. We note that disclosure of this contractual information for two years is reasonably likely to impair FPL's ability to negotiate future contracts as described above. As noted below, at the end of this two year declassification period, FPL can repetition us for an extension to this declassification period.

FPL typically renegotiates its No. 6 fuel oil contracts and fuel related services contracts prior to the end of such contracts. However, on occasion some contracts are not renegotiated, until after the end of the current contract period. In those instances, the contracts are typically renegotiated within six months. Consequently, we find that it is necessary to maintain the confidentiality of the information identified as confidential on Staff's work papers for six months after the end of the individual contract period the information relates to.

The No. 2 fuel oil pricing information appearing on Staff's work papers, for which confidential classification is sought, should remain confidential for the time period the contract is in effect, plus six months. We find that disclosure of pricing

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information during the contract period or prior to the negotiation of a new contract is reasonably likely to impair FPL's ability to negotiate future contracts as described above.

FPL typically negotiates its No. 2 fuel oil contracts prior to the end of such contracts. However, on occasion some contracts are not negotiated, until after the end of the current contract period. In those instances the contracts are typically renegotiated within six months. Consequently, we find that it is necessary to maintain the confidentiality of the information identified as confidential on Staff's work papers for six months after the end of the individual contract period the information relates to.

The pricing information for terminating, transportation and inspection services appearing on Staff's work papers, for which confidential classification is sought, should remain confidential for the time period the contract is in effect, plus six months. We find that disclosure of pricing information during the contract period or prior to the negotiation of a new contract is reasonably likely to impair FPL's ability to negotiate true contracts as described above.

We note that we have approved similar declassification dates in regard to FPL's monthly filing of its fuel reports, Form 423-1(A).

We approve the following declassification dates for the confidential information as it relates to the appropriate contract subject matter on the Commission Staff's work papers:

- A. Orimulsion supply - July 31, 1993
- B. No. 6 fuel oil supply - March 31, 1993
- C. No. 2 fuel oil supply - March 1, 1992
- D. Terminating and transportation services - July 13, 1993
- E. Inspection services - February 29, 1992

We note that FPL requested that the confidential information relating to the Orimulsion supply contract not be declassified until December 31, 2015. However, we find that Section 366.093, Florida Statutes, does not give us such broad authority to give contractual data confidential status for a period of 24 years. Instead, Section 366.093(4), Florida Statutes, states that "[a]ny finding by the commission that records contain proprietary confidential business information is effective for a period set by the commission not to exceed 18 months, unless the commission finds, for good cause, that the protection from disclosure shall be for a specified longer period." We do not find good cause to hold this Orimulsion contractual information confidential for a period of 24

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years. Instead, we find this contractual data relating to the Orimulsion supply to be confidential until July 31, 1993. At the end of this time period, FPL may resubmit a petition to extend this period of confidentiality. Thus, before the period's expiration, we will consider extending the period upon FPL's request.

It is, therefore,

ORDERED by the Florida Public Service Commission that the specified information in Attachment A (Document No. 6959-91) to Florida Power & Light Company's Request for Confidential Classification, as discussed in the body of this Order, is proprietary confidential business information, and that it shall be afforded confidential status pursuant to Section 366.003, Florida Statutes, and Rule 25-22.006, Florida Administrative Code. It is further

ORDERED that the specified information for which we denied confidential classification in the body of this Order is hereby denied. It is further

ORDERED that this information shall be classified as proprietary confidential business information for the periods discussed in the body of this Order.

By ORDER of Commissioner Betty Easley, as Prehearing Officer, this 21st day of AUGUST, 1991.

  
BETTY EASLEY, Commissioner  
and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that

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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.

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 25-22.038(2), 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 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 sewer utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, 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.