BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power & Light Company for approval of cogeneration agreement with AES Cedar Bay, Inc.	)	DOCKET NO. 881570-EQ
	)	ORDER NO. 20994
	)	ISSUED: 4-7-89

ORDER ON CONFIDENTIALITY

On December 13, 1988, Florida Power & Light Company (FPL) filed a petition requesting that its negotiated contract of November 9, 1988, for the purchase of electricity from AES Cedar Bay, Inc.'s (AES) proposed qualifying facility be approved. Simultaneous with its petition requesting contract approval, FPL also filed a petition requesting that portions of its negotiated contract with AES be found to be "specified confidential information" pursuant to Rule 25-22.006, Florida Administrative Code and Section 366.093, Florida Statutes.

FPL sought to keep confidential specific contract terms in the following areas: the capacity factors on which FPL will make capacity payments; avoided energy payments; actual delivered capacity to FPL over the term of the contract; scheduled maintenance times; the dollar amounts of workers' compensation and employers' liability insurance and commercial general liability insurance; the impact on capacity payments of force majeure; default and termination terms and the payments associated with the same; the extent of FPL's access to the facility and control over the planning and operation of the facility; the specifics of certain FPL-mandated project financing requirements; and certain FPL-mandated guarantees on the part of AES Cedar Bay's parent.

As the grounds for its request, FPL alleged that the above information for which it has requested specified confidential information falls under Section 366.093(3)(d), Florida Statutes. Section 366.093(3)(d), covers "[i]nformation concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility to contract for services on favorable terms." [Emphasis added.] The gist of FPL's argument was that if these contract terms were revealed, they would necessarily form the starting point from which FPL would have to negotiate with other cogenerators in the future. Thus, FPL's ability to negotiate similar "good" deals for the purchase of cogenerated power would be compromised. FPL also asserted that it was requesting confidentiality for these terms because this information could harm the ability of AES to negotiate a subsequent contract for the sale of cogenerated power with another Florida utility on more favorable terms to AES. Finally, FPL argued that the revelation of the financing and default/termination terms of the contract could reveal AES' financial status to its cogeneration competitors to its disadvantage.

On January 30, 1989, Chairman Wilson, as Prehearing Officer, issued Order No. 20672 denying the request for specified confidential treatment "without prejudice to refile." The Chairman found that the existence of the standard offer contract limited any alleged impairment that the disclosure of the disputed terms might have on a utility's negotiating efforts with a QF. Furthermore, he reasoned that the terms found in this contract were so tailored to the type

and timing of the proposed cogeneration facility to be built by AES that it would be unrealistic for any other cogenerator to expect FPL to repeat them verbatim. To the extent that a cogenerator did request exactly the same treatment, FPL could always refuse. This would force the QF to either take the standard offer or come back to the bargaining table with more realistic requests. He also ruled that the contention that disclosure of AES' financial status would cause harm was, without more, unfounded.

On February 13, 1989, FPL refiled its Request for Specified Confidential Classification of the disputed terms with supplemental information and supporting affidavits. On February 16, 1989, FPL amended its Refiled Request to include reference to Order No. 15413, issued on December 4, 1985, in which the Commission granted a Motion for Protective Order regarding a similar negotiated cogeneration contract between FPL and the Royster Company.

As grounds for its refiled request, FPL has essentially made the same arguments which it made initially. In addition, FPL argues that once disputed terms are found to fall within the provisions of Section 366.093(3), Florida Statutes, countervailing public policies are irrelevant. The included affidavits of J. C. Collier, Senior Vice President, FPL, and Ronald R. Wood, a partner with Black & Veatch, a consulting engineering firm, support FPL's contention that disclosure of the disputed terms would impair the efforts of FPL to contract with cogenerators in the future on favorable terms, and would enhance the bargaining position of other independent power producers in competition with AES, to the detriment of Florida ratepayers.

FPL relies heavily on Order No. 15413, issued by Chairman Wilson, as Prehearing Officer, on December 4, 1985. The rationale of the order is clearly that "[d]isclosure of the Agreement would impair FPL's ability to negotiate for similar contracts on favorable terms." The order also states that "[s]uch a result would be counter to the interests of FPL's customers and would also frustrate the Commission's policy to encourage these types of contracts." That was error.

First, we note that each cogeneration contract which has come before this Commission to date is extremely unique. That being the case, we question that disclosure of negotiated contract terms valuable to one cogenerator would be at all desirable to another such that they would form the "floor" for negotiations. Second, we are still not persuaded that AES is in any way adversely affected by the disclosure of this contract either in subsequent negotiations with other utilities or vis-a-vis its competitors. Third, we reject FPL's assertion that if material falls under Section 366.093(3)(d), competing policy interests are no longer relevant.

This Commission supports FPL's efforts to obtain terms and conditions which are best suited to its utility's needs through the use of negotiated contracts. However, both this Commission in Rules 25-17.080-.091, Florida Administrative Code, and the Federal Energy Regulatory Commission (FERC) in its rules implementing the Public Utility Regulatory Policies Act of

1978, 16 U.S.C. §824a-3 (PURPA), recognize the need to encourage and develop cogeneration as a valuable means of meeting the nation's energy demands. Part of the implementation scheme set out by FERC for developing cogeneration is to pay cogenerators "avoided cost" for their power. Those costs are defined as the costs which would be incurred had the facilities been constructed and operated by utilities. The concept is designed to keep the ratepayers "neutral" since they would pay cogenerators what they would otherwise have paid the utilities.

We have implemented the "avoided cost" concept through the use of a standard offer based on a statewide avoided unit. Thus we have already determined what a "fair" price is for cogenerated power. The standard offer contract is filed as part of every investor-owned utility's tariffs. Our rules do not allow the approval of negotiated contracts for the sale of cogenerated power in which the revenue stream over the life to the contract exceeds that of the standard offer. So that, in a sense,the standard offer can be looked at as both the ceiling and the floor for cogenerated power pricing. Additionally, many of the other terms of the standard offer as well as any negotiated contract have been set by either FERC's rules implementing PURPA or by PURPA itself. So that, unlike the fuel procurement contracts, for which § 366.093(3)(d) protection is granted routinely, both the maximum price and many of the relevant terms are already public knowledge.

Clearly, the disclosure of the terms of this, or any other negotiated cogeneration contract, may impair the ability of FPL to negotiate the lowest possible price for a cogenerator's power in the future. However, when all of the above factors are weighed, the disclosure of the negotiated terms, though not in the ratepayers short-term interest, may give cogenerators negotiating with utilities in the future an opportunity to obtain more favorable terms than those of the standard offer contract to the long-term benefit of the public. In short, it may allow the development of viable and stable cogeneration projects which otherwise would not have taken place.

Based on the above, it is,

ORDERED by Chairman Michael McK. Wilson, Prehearing Officer, that the amended request of Florida Power and Light Company that certain portions of its November 9, 1988 contract with AES Cedar Bay be classified "specified confidential information" pursuant to Rule 25-22.006, Florida Administrative Code, and Section 366.093(3)(d), Florida Statutes, is hereby denied as discussed in the body of this Order. It is further

ORDERED that if a protest is filed within 14 days of the date of this Order, it will be resolved by the appropriate Commission panel pursuant to Rule 25-22.006(3)(d), Florida Administrative Code.

By ORDER of Chairman Michael McK. Wilson, as Prehearing Officer, this 7th day of APRIL, 1989.

MICHAEL McK. WILSON, Chairman
and Prehearing Officer

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