

ORIGINAL

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, L.L.C.)

DOCKET NO. 991462-EU
FILED: DECEMBER 23, 1999

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RECORDS AND REPORTING

**OKEECHOBEE GENERATING COMPANY'S FIRST
MOTION FOR PROTECTIVE ORDER**

Okeechobee Generating Company, L.L.C. ("OGC"), pursuant to Rules 25-22.006(6), 28-106.204, and 28-106.206, Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, hereby moves the Florida Public Service Commission ("Commission") for a protective order limiting the conditions under which Altos Management Partners, Inc. ("Altos") and MarketPoint, Inc. ("MarketPoint") will make available certain computer models used in support of OGC's petition for determination of need, and limiting the use that may be made of those models and of the results of analyses prepared by other parties in this need determination proceeding. OGC is the petitioner in this proceeding; neither Altos nor MarketPoint¹ is a party to this docket.

In summary, Altos and MarketPoint, whose intellectual property the subject models are, will make the models fully available to the Commission Staff and to full-time, bona fide

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¹ MarketPoint, Inc. is a corporation that develops and markets economic modeling software. One of MarketPoint's principal software packages is called MarketPoint™. MarketPoint, Inc. is referred to herein as MarketPoint. The software package is identified as MarketPoint™.

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employees of the intervenors in this case on a computer at the Florida Public Service Commission's offices² without the payment of any license fee or any training fee by any entity, subject to restrictions to protect Altos' and MarketPoint's proprietary interests in their intellectual property. OGC (and Altos and MarketPoint) believe that this proposal is fair and reasonable and indeed provides for far easier and far broader access than required by Commission precedent.

Background

On September 24, 1999, OGC filed its Petition for Determination of Need for the Okeechobee Generating Project and accompanying Exhibits in support of that Petition. (Collectively, these materials are referred to herein as "OGC's Petition.") On October 26, 1999, in compliance with the Order Establishing Procedure for this docket, OGC filed the prefiled direct testimony of nine witnesses, including Dale M. Nesbitt, Ph.D., in support of OGC's Petition. Certain of the information presented in support of OGC's Petition, e.g., the projected operation of the Okeechobee Generating Project ("the Project") at a capacity factor of approximately 93 percent and projected wholesale price suppression effects of the Project's operation in the Peninsular Florida wholesale power market, were based on analyses prepared by Dr. Nesbitt using models and computer software owned by Altos and

² Counsel for OGC has conferred with counsel for the Commission Staff to confirm the logistical acceptability of this part of OGC's proposal.

MarketPoint.

The subject models (hereinafter collectively "the Altos Models" or simply "the Models") include (1) the Altos North American Regional Electric Model ("the NARE Model"), the Altos North American Regional Gas Model ("the NARG Model"), and MarketPoint™, which is the economic modeling software in which the Altos NARE Model and the Altos NARG Model are implemented. It is useful to think of MarketPoint™ as a type of economic modeling and analysis software analogous to EXCEL™ and of the Altos NARE and NARG Models as independent models or submodels that exist and are run within the MarketPoint™ framework analogous to .XLS spreadsheets that run in EXCEL™. MarketPoint™ is the proprietary intellectual and commercial property of MarketPoint, Inc. The NARE Model and the NARG Model are the proprietary intellectual and commercial property of Altos Management Partners, Inc.

The Models represent the confidential, proprietary business information of MarketPoint and Altos, respectively. They represent the product of extensive work by MarketPoint and Altos personnel in developing models that integrate all electric reliability regions in North America, all significant transmission lines in North America, all substations in North America, approximately 13 defined sub-regions within Peninsular Florida, all major natural gas production and gathering areas in North America, and all interstate natural gas pipelines in North America. They also include sophisticated software architecture and detailed processes, algorithms, and procedures developed by

MarketPoint and Altos personnel relating to the interrelationships of demand, supply, and prices of electricity, natural gas, and other fuels used to produce electricity across all regions of North America. Accordingly, this information constitutes the proprietary and valuable trade secrets of MarketPoint and Altos. The Models have never been disclosed without payment of the applicable licensing fees.

Neither OGC nor any affiliate of OGC is in possession, custody, or control of either MarketPoint™, the NARE Model, or the NARG Model. OGC has already produced all input and output data of the Models upon which the information supporting OGC's Petition is based.

On October 19, 1999, Florida Power Corporation ("FPC") propounded its First Request for Production of Documents and other discovery requests. On November 2, 1999, Florida Power & Light Company ("FPL") propounded its First Request for Production of Documents and other discovery requests. Among other things, FPC's and FPL's discovery requests asked OGC to produce the models and related documentation used by Dr. Nesbitt in preparing his testimony and exhibits. In addition, the Models are responsive to several other of FPL's and FPC's discovery requests.

On October 29, 1999, OGC objected to FPC's discovery requests relating to the Altos Models on the grounds that they sought confidential, proprietary business information. On November 12, 1999, OGC objected to FPL's similar discovery requests on similar grounds. On November 8, 1999, OGC responded to FPC's production

requests by furnishing, inter alia, a high-density computer ZIP disk containing approximately 63 megabytes of information, including all of the input and output data sets for all runs used by Dr. Nesbitt in preparing his testimony, but not the Models themselves. In its response, OGC also advised FPC that OGC would furnish certain documents relating to the Altos Models subject to FPC's execution of a confidentiality agreement and further advised FPC that the Altos Models themselves constituted the confidential, proprietary, intellectual property of Altos and that they would be furnished to FPC subject to FPC's executing a licensing agreement and paying the applicable licensing fees for such models. On November 16, 1999, OGC responded to FPL's first set of production requests, furnishing a copy of the documents produced in response to FPC's first production request, including a copy of the same computer ZIP disk previously furnished to FPC. On November 12, 1999, FPC moved to compel the production of the Altos Models. On November 23, 1999, FPL similarly moved to compel production of the Models.

On December 7, 1999, OGC's counsel, with the approval of Altos and MarketPoint, offered an alternate arrangement to FPC and FPL by which both FPC and FPL, as well as the Commission Staff and any other party to this docket, could obtain essentially unlimited access to the Altos Models without paying any license fees or training fees. In summary, this proposal had the following features:

1. Altos and MarketPoint would load the Altos Models onto a computer at the Florida Public Service Commission, where any

party's bona fide, full-time employees could have essentially unlimited access to the Models, including the opportunity to prepare analyses using them. Copying of the Models would be prohibited. Any communication regarding or disclosure of the Models, data, or results thereof outside the record of this proceeding would also be prohibited.

2. OGC would pay for Altos personnel to conduct a two-day training session on the Models and their use.

3. No party would have to pay any licensing or training fees. (The standard licensing fees for all of the subject Models, including the data bases for both the NARE Model and the NARG Model, is \$115,000 per year, which includes a one-and-one-half-day training session.)

4. Any party making runs using the Models would have to disclose the input and output data for all such runs to the Commission Staff and to the other parties to the docket.

5. The intervenors would have to agree not to criticize, disparage, or otherwise "bad-mouth" the Models outside the record of this docket. There would be no restriction on criticism of the Models by witnesses under oath in the docket (where, of course, OGC would have the opportunity to cross-examine such witnesses and to challenge any criticisms that they might offer).

A copy of the term sheet that was hand-delivered to FPL's and FPC's counsel is attached to this Motion as Exhibit A. The undersigned is advised that this basic approach has been used and has worked well in other venues, including California and the Federal Energy Regulatory Commission.

On or about December 9, 1999, FPC's counsel responded verbally that the proposal would not be satisfactory to FPC and instead, in essence, offered to license the Altos Models for \$9,000 for the entire term of this need determination proceeding, while agreeing to use the Models only for the need determination proceeding. On December 14, 1999, FPL's counsel responded by letter with a similar counter-proposal.

Applicable Law

The law of discovery provides generally that discovery may be had on any non-privileged matter relevant to the subject matter of the litigation, so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Fla. R. Civ. Proc. 1.280(b)(1). Discovery of experts is limited to certain specified interrogatories, Fla. R. Civ. Proc. 1.280(b)(4)(A)(i), and depositions. Discovery of documents and things, including the opportunity to inspect and copy designated documents, may be had of such documents and things as are in the "possession, custody, or control of the party to whom the request is directed." Fla. R. Civ. Proc. 1.350(a)(1).

Generally, a party cannot be compelled to produce documents that are not in its possession, custody, or control, 19 Fla. Jur. 2d, **Discovery and Depositions** § 45, and the Commission has followed this principle. See In Re: Determination of the Cost of Basic Local Telecommunications Service Pursuant To Section 364.025, Florida Statutes, 98 FPSC 10:44 ("Cost of Local Service") (recognizing that the Commission could not compel ATT to produce documents not in its possession, custody, or control). The Florida Evidence Code provides that "[u]nless otherwise required by the court, an expert may testify in terms of opinion or inferences and give reasons without prior disclosure of the underlying facts or data. On cross-examination the expert shall be required to specify the facts or data." Fla. Stat. 90.705(1) (1997). Rule 1.280(c)(7) of the Florida Rules of Civil Procedure

provides that courts may issue orders "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Commission Rule 25-22.006(a), F.A.C., provides that in formal proceedings before the Commission, any party may request a protective order, and that the Commission may issue such an order in the manner provided by Rule 1.280(c)(7).

With respect to computer models and software, the general principle is that discovery may be had in accordance with the above principles. See, e.g., Robins, Mark D., Computers and the Discovery of Evidence, XVII Journal of Computer & Information Law 411, 428-32. However, the law allows for protective orders where necessary to protect confidential, proprietary business information, including trade secrets.

In their motions to compel, FPC and FPL have cited to several cases that generally conform to the above, i.e., requiring disclosure of computer models and analyses used in support of a party's positions in litigation.³ However, no case cited by

³ See, e.g., City of Cleveland v. Cleveland Electric Illuminating Co., 538 F.Supp. 1257 (N.D. Ohio 1980) (antitrust case in which court authorized discovery by defendant of data and programs formulated by plaintiff's antitrust experts); Bartley v. Isuzu Motors, 151 F.R.D. 659 (D. Col. 1993) (products liability action in which court granted defendants' motion for a protective order requiring preservation of input and output data from each computer simulation run by plaintiff's expert witness); Williams v. E.I. duPont de Nemours & Co., 119 F.R.D. 648 (W.D. Ky. 1987) (Title VII action in which defendant employer was held entitled to discover, at its own expense, copies of a computerized data base, code books, and user's manuals, with the exception of a commercially available software program known as "Statpac"); United States v. Russo, 480 F.2d 1228 (6th Cir. 1973), cert. denied, 414 U.S. 1157 (1974) (criminal case in which the court

either FPC or FPL stands for the proposition that a party seeking discovery of such information is entitled to such discovery without complying with the commercial terms and conditions upon which such information is available. Moreover, no case stands for the proposition that such discovery of the commercially valuable, confidential, proprietary intellectual property of a non-party may be had without paying applicable licensing fees. In fact, in Williams v. duPont, a case relied upon by both FPC and FPL, the court ruled that the defendant (the party seeking discovery) could not discover a statistical analysis software package known as "Statpac," noting that that software "may be purchased from a vendor." Id. at 651.

Analysis

In this Motion, OGC is seeking protection of Altos' and MarketPoint's trade secrets. OGC does not disagree that the intervenors are entitled to an opportunity to conduct discovery with respect to the Altos Models and to conduct appropriate discovery via deposition of Dr. Nesbitt with respect to the Models. OGC does disagree with FPL and FPC, however, as to whether FPL and FPC are entitled to have unlimited access to the Models without licensing them by executing and abiding by the terms of a standard licensing agreement, including paying the standard commercial licensing fees for the use of the Models.

noted that a defendant doctor had a right, not exercised, to obtain information regarding computerized records and computer processes relating to those records).

The question posed here is identical to that which would be presented to the Commission if, in some future need determination proceeding in which FPC or FPL had based its cost-effectiveness analyses on PROMOD or PROSCREEN analyses, an intervenor sought discovery of PROMOD or PROSCREEN including unlimited access (though not necessarily unlimited use) of those models. This has happened in the past, and at least FPL has refused to make the PROMOD model available to parties to need determination proceedings without such parties obtaining an appropriate license from PROMOD's proprietors. Moreover, this is standard practice: to the best of the undersigned counsel's knowledge, neither PROMOD nor even PROMOD data has ever been released to any party to any litigation without that party procuring a valid license to the PROMOD software. Similarly, in litigation between FPC and a QF, styled Metropolitan Dade County, et al. v. Florida Power Corporation, et al., (United States District Court, Southern District of Florida) (Case No. 96-0495-Civ-Lenard), FPC refused to produce the WESCOUGER model (which was used by FPC to calculate dispatch information at issue in the case) until the plaintiff QF demonstrated that it had a license to the WESCOUGER software.

Essentially, in their motions, FPL and FPC are asking for unlimited access to the Models, including access by hired consultants, for free. Even in their counter-proposals, they are attempting to obtain unlimited access to the Models at a fire-sale price. The law, however, provides for protective orders, including limitations on who may see confidential information.

Given that the Altos Models and MarketPoint™ are the trade secrets of their respective owners, OGC would submit that very tight restrictions on disclosure and use would be appropriate in any protective order applicable to the Altos Models.

As a basic matter, OGC cannot produce, and cannot be compelled to produce, the Models because OGC is not in possession, custody, or control of them. In this aspect, OGC is not like FPL or FPC, who actually have in their possession (resident on their computers) models such as PROMOD (a generation planning and production costing model) and WESCOUGER (a generation dispatch model). On the other hand, the Models at issue here are somewhat similar to PROMOD and WESCOUGER in that they are the intellectual property of non-parties and in that they are commercially available on standard licensing terms and conditions.

As described above, the Models are the valuable trade secrets of MarketPoint and Altos. For any private sector consultant with expertise in energy markets modeling to have access to these models would be tantamount to giving away these valuable trade secrets without compensation. (One cannot "un-learn" or "un-know" what one knows.)

No case cited by either FPC or FPL stands for the proposition that a party is entitled to unlimited access to computer software, data bases, or models without paying the applicable licensing fees. As noted above, in Williams v. duPont, the Court specifically held that the party of whom discovery was sought did not have to produce the computer software in question (a program

identified as "Statpac") because that software was available commercially. 119 F.R.D. at 651.

Moreover, the Commission should be mindful of the "goose and gander" principle as it applies here. In litigation before this Commission and in other venues, both FPL and FPC have routinely insisted that parties seeking discovery of their computer models - - models used to develop production cost information or to dispatch their generation systems and used in support of their positions in litigation -- obtain licenses before such models would be produced. OGC merely suggests that the same treatment would be appropriate here for the intellectual property of MarketPoint and Altos as FPC and FPL have insisted on for the intellectual property of Energy Management Associates (the proprietor of PROMOD, now re-named New Energy Associates) or ABB (the proprietor of WESCOUGER).

Terms of Requested Protective Order

OGC asks the Commission to enter a protective order providing for all parties to this proceeding to have access to the Altos Models on the terms and conditions set forth on the attached term sheet (Exhibit A)⁴. Of course, FPC and FPL have been offered the opportunity, and any other intervenor has the same opportunity, to license the Models pursuant to MarketPoint's and Altos' standard commercial terms.

⁴Pursuant to Rule 22.006(6)(b), F.A.C., OGC also requests that the protective order exempt the Altos Models from Section 119.07(1), F.S.

These proposed terms and conditions are reasonable, consistent with the requirements of law, fair to the intervenors, and adequate to protect Altos's and MarketPoint's interests. The terms are also reasonable, fair, and consistent with the requirements of law because they provide the intervenors with unlimited access to the Models during regular business hours, including the opportunity to make alternate "runs" using the Models, without the payment of any licensing fee or training fees, subject to reasonable restrictions designed to protect Altos' and MarketPoint's proprietary interests in their intellectual property.

In this regard, the terms and conditions of the protective order requested by OGC provide for far easier and far broader access to the subject information than required by the Commission only last year in the Cost of Local Service docket. In that case, Commissioner Jacobs recognized that AT&T, the party from whom discovery was sought, had no control over the requested information, a data base developed by a company known as PNR and Associates ("PNR") that was used to support a model sponsored by AT&T in that proceeding, which data base was available to persons other than AT&T on a commercial basis. Cost of Local Service, 98 FPSC 10:47-48. Like AT&T in that case, neither OGC nor any affiliate of OGC has ever had possession, custody, or control of the Altos Models. Like PNR in that case, Altos and MarketPoint consider the Altos Models to be highly sensitive, proprietary, valuable business information. In that case, AT&T had offered to

arrange for the other parties to the proceeding to have an open visit to PNR's premises to allow the parties to review the requested data. 98 FPSC 10:47. Ultimately, Commissioner Jacobs ordered that AT&T had to arrange for reasonable access to the requested information at the PNR premises and that the parties seeking discovery "shall be allowed to review and analyze the relevant information on the PNR premises" but that they "shall not be permitted to remove the requested information from the PNR premises, but shall be allowed to remove with them any analytical notes, charts, or graphs that they produce during the review of the information, short of the actual requested information itself." 98 FPSC 10:48.

The analog here would be that FPC and FPL could go to Altos' and MarketPoint's offices (near San Jose, California) and review the Models there, taking such notes and making such charts as they might choose, without the opportunity "to remove the requested information from" the Altos and MarketPoint premises. See Cost of Local Service, 98 FPSC 10:48. Clearly, OGC (with the consent of Altos and MarketPoint) has offered far more, far easier, and far broader access to the requested information. The Commission could well ask whether FPC or FPL has ever offered to make PROMOD, PROSCREEN or any other proprietary model used to support its positions in other need determination cases (or other proceedings) available on similar terms. Again, the requested Models are, like the data base in Cost of Local Service, available to FPC, FPL, and others on a commercial basis.

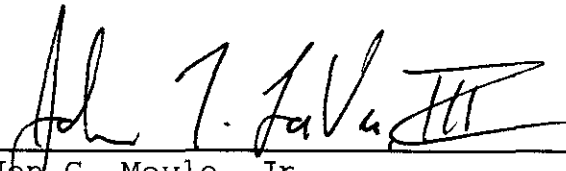
Moreover, FPC and FPL still have the opportunity to fully question Dr. Nesbitt regarding the Models in deposition.

Counsel for OGC have contacted counsel for FPC, FPL and LEAF regarding this motion and are authorized to represent that: FPC and FPL object to this motion; LEAF does not object to this motion. Counsel for OGC was unable to reach counsel for Commission Staff and counsel for TECO regarding this motion.

Conclusion

The terms and conditions of OGC's requested protective order are fair, reasonable, and more than compliant with the Commission's order in Cost of Local Service. Moreover, they provide for far greater access to the requested models than OGC is aware of having ever been provided by either FPC or FPL without a party seeking discovery from those entities paying applicable licensing fees. Recognizing the reasonableness of OGC's proposal, and mindful of the "goose and gander" principle, the Commission should issue the requested protective order allowing FPC and FPL (and other intervenors) either (1) to have access to the Altos Models on the terms and conditions outlined on the attached term sheet or, (2) at FPC's or FPL's option, to have access the Altos Models pursuant to the standard terms and conditions upon which these Models are commercially available.

Respectfully submitted this 23rd day of December, 1999.



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CERTIFICATE OF SERVICE
DOCKET NO. 991462-EU

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 23rd day of December, 1999.

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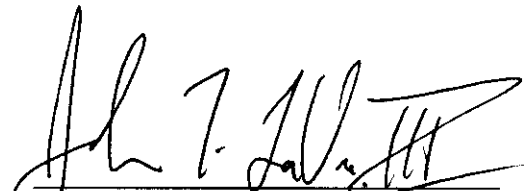
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PROPOSED TERM SHEET FOR ACCESS TO ALTOS MODELS, 12/7/99

Altos and MarketPoint will make available and load the models onto a single computer at the FPSC under a protective agreement to be incorporated into a protective order issued by the FPSC.

No one may copy the models or any supporting materials for use elsewhere. All use of the models must be done on-site at the FPSC on the computer upon which MarketPoint is installed.

Nesbitt and Blaha will conduct a two-day workshop/training session on the models in Tallahassee on dates to be arranged. At this time, dates in the first two weeks of January are possible. OGC will pay for the workshop. All parties to the case will be permitted to attend.

No licensing fees will be required from the parties to the case nor from the FPSC.

The FPSC will maintain a log book that details every person who accesses the model, including the person's name, title, date, time, and employer or affiliation.

Unlimited access will be provided to the models for FPSC personnel and full-time, bona fide FPL, FPC, and TECO company employees during regular business hours at the FPSC.

If FPC, FPL, or TECO wish to hire a consultant, then each and every hour of the consultant's access must be directly supervised by an Altos professional. The organization who has hired the consultant must pay the Altos professional's labor and travel expenses (\$225 per hour plus actual, reasonable out-of-pocket travel costs). Prior to such access, the sponsoring organization must execute a time and materials contract with Altos and must prepay for 40 hours of Altos' professional time. If the sponsoring organization uses less than 40 hours, then the remaining balance will be refunded on a pro rata basis. Payments to Altos for such supervision must be made within 15 working days of receipt of Altos invoices.

All runs made on the FPSC computer, including all inputs and all outputs of such runs, must be furnished to the FPSC Staff and to OGC. It is expressly understood that such information may be introduced as part of the record of this proceeding.

Any additional technical support will be provided by Altos at the requesting utility's expense. (Nesbitt @ \$300 per hour, Blaha @ \$200 per hour)

EXHIBIT A

Use of the MarketPoint software and the Altos NARE and NARG models will be limited to the OGC proceeding. There will be no use of either MarketPoint or the NARE or NARG models for any commercial purpose under this agreement.

The models will be maintained at the FPSC for the duration of the need determination proceeding for the Okeechobee Generating Project before the FPSC. The models may be retrieved by Altos at any time on or after the day following the conclusion of the hearings in this proceeding.

There will be no communication or disclosure whatsoever about the models (including MarketPoint and the NARE and NARG models), data, or results outside the record of this proceeding, including advising others to look at the record of the proceeding and also including furnishing copies of the record to others. No party to this proceeding will disparage, decry, "badmouth," or otherwise criticize the models in any situation, context, or venue whatsoever outside the record of this proceeding.

Each individual who accesses the model will sign a statement that personally guarantees compliance with this agreement. There will be personal as well as corporate guarantees for all persons who access the models.

All parties to this agreement agree to provide reciprocal access, on fundamentally the same terms as set forth herein, to any models used by any of FPL's, FPC's, or TECO's witnesses or experts in this proceeding.

One copy of the user's manual will be provided to the FPSC to be held, subject to a confidential protective order, for use in the course of this proceeding. Neither user's manual nor any portion thereof will be introduced into the written record of this proceeding, except as a confidential document under applicable Florida law and rules, because that user's manual is the confidential, valuable, and competitively sensitive property of Altos.