

Case No. VES-0071

May 23, 2000

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Application for Stay

Petitioner: Mississippi Power Company

Date of Filing: May 1, 2000

Case Number: VES-0071

On May 1, 2000, the Mississippi Power Company, of Gulfport, Mississippi (Mississippi Power), filed with the Office of Hearings and Appeals (OHA) of the Department of Energy an Application for Exception and an Application for Stay pursuant to 10 C.F.R. Part 1003. The first request seeks "an exception to the EIA (Energy Information Administration) policy of public disclosure of certain EIA Form 861 (Annual Electric Utility Report for the Reporting Period 1999) material which the Company deems confidential and proprietary commercial and financial information.(1) Application for Stay at 1. The material at issue is "commercial and financial information, including without limitation, information concerning the Company's sales for resale and monthly peaks and output." Id. The Application for Stay requests the suspension of any requirement that Mississippi Power file Form 861 for its 1999 operations pending a decision on the merits of the Application for Exception. In the alternative, during the pendency of the Exception proceeding the firm requests that the Department of Energy withhold from release any of the material Mississippi Power states is confidential.

As a public utility, Mississippi Power is required by regulation to file Form 861(2) with the EIA. The data from these filings, along with similarly collected data concerning motor gasoline, heating oil, propane and other fuel supplies, is used by EIA to fulfill its Congressional mandate to monitor and disseminate information concerning the nation's energy supplies. EIA publishes or otherwise releases much of this material in aggregate and/or company-specific form.

Of the material included in Mississippi Power's 8 page proposed submission of EIA Form 861 for its 1999 operations, the firm requests confidential treatment only for the material set forth in Schedules II and III on page 3 of the Form. This material depicts Mississippi Power's "Sources" and "Disposition of Energy," and its "Electric Operating Revenues."

In support of its Stay request, Mississippi Power argues that to "allow competitors access to this type of confidential information . . . will (cause the Company) to suffer irreparable harm." Id. Referencing its enclosed Request for Confidential Treatment of Certain Commercial and Financial Information, Mississippi Power argues that information relating to its sales, purchase and transmission of electricity would provide Mississippi Power's competitors with commercially sensitive information relating to potential competitors. See April 28, 2000 Request for Confidential Treatment of Certain Commercial and Financial Information at 3. Mississippi Power also argues that competitors and suppliers would be able to gain advantage by knowledge of its transactions, costs and operations. Id. Additionally, Mississippi Power points out that the competitive environment has changed in that non-traditional utilities, which are not subject to utility reporting requirements, are now able to compete with traditional utilities such as Mississippi Power. Id. at 4.

While we express no opinion as to the ultimate merit of Mississippi Power's underlying Request for Exemption, we find that its explanation as to the likelihood of commercial harm is not such that we can now conclude that it has made a sufficient showing that it will succeed on the merits of its Exception Request. See 10 C.F.R. § 1003.45(b)(5). For example, it is not entirely clear how this material might lead a competitor to derive Mississippi Power's pricing strategies, such as, its cost of generating a kilowatt hour of electricity, or otherwise gain a competitive advantage. (3) In addition, EIA has no current plans to release this data. In the normal course of operations, it would not be disseminated until October 2000.(4) Consequently, we also do not find that Mississippi Power has made a sufficient showing that irreparable injury would result if its stay request is denied. See 10 C.F.R. § 1003.45(b)(1).

Of importance in considering this Application for Stay is the fact that in 1997, EIA began a very extensive rulemaking proceeding specifically concerning the confidentiality of the material which EIA collects and disseminates -- including material derived through Form 861.(5) The proceeding was announced and comments solicited on a four separate occasions, and all of the firms from which the relevant data is collected -- including Mississippi Power itself -- received direct mail notice from EIA of the proceeding and of the opportunity to comment. Furthermore, because EIA is very sensitive to the dynamic state of the power industry and its divergent views on confidentiality, EIA also held public hearings to allow interested persons a full opportunity to make their views known.

In response to the EIA rulemaking and comment, Mississippi Power's parent, The Southern Company, made a brief submission to EIA in which it simply indicated that it supported the comments of the Edison Electric Institute, a Washington, D.C., association representing the interests of various electric utility members. Thus Mississippi Power has already had a very ample and recent opportunity to present its views as to the confidentiality of all of the Form 861 data. It did so to only a very limited extent. The Mississippi Power submission is silent as to whether the Edison Electric Institute -- or any other submitter in the EIA rulemaking proceeding -- opposed the release of the data in Schedules II and III of Form 861. If such comments were made, it is clear from the outcome of the proceeding that they were weighed and rejected by EIA. In any event, Mississippi Power itself received direct mail notice of the EIA rulemaking proceeding, had an ample opportunity to make its views known directly to EIA on a number of occasions, but apparently elected not to do so. This weighs against the firm's request for stay.

In the course of this very extensive rulemaking proceeding, EIA carefully reviewed and considered the comments of all parties, both for and against any limitations on the dissemination of the data EIA collects, and also weighed these comments against EIA's Congressional mandate to collect and disseminate information concerning the country's energy supply. Finally, in late 1998, EIA final procedures concerning the submission and release of company-specific data were submitted to the Office of Management and Budget (OMB) on November 28, 1998, and were authorized by OMB for a three-year period on December 29, 1998. Little more than one year has passed since that approval and implementation of these final procedures (OMB ACTION/APPROVAL No. 1905-0129, December 29, 1998). Neither in the Mississippi Power Stay submission nor in the firm's exception request is there any explanation of what changes might have occurred in the marketplace or in Mississippi Power's own business operations in this brief period that would warrant the extraordinary relief of a stay.

Reviewing the facts surrounding the foregoing EIA decisions regarding the confidentiality of information and Mississippi Power's other arguments, we can not find that sufficient public policy reasons have been demonstrated to favor the granting of a stay. See 10 C.F.R. § 1003.45(b)(3). Further, there is no factual material or persuasive argument indicating that a denial of the stay would result in Mississippi Power experiencing a more immediate hardship or inequity than a grant of the stay would cause to other affected parties. See 10 C.F.R. § 1003.45(b)(2). Nor is there any information indicating that the applicant cannot meet the filing requirement(6). See 10 C.F.R. §1003.45(b)(4). In sum, application of the criteria listed in 10 C.F.R. § 1003.45(b) to the facts as we know them now leads us to the conclusion that a stay is not warranted.

As discussed earlier, any claim of injury to Mississippi Power through the release of the data during the pendency of its Application for Exception is speculative because, as stated above, no release of the 1999 Form 861 data in any form is planned by EIA until October 2000. That is the earliest date when EIA expects to (a) finish receiving and digesting the data provided by submitters such as Mississippi Power and (b) release the material to the public. Even then, company-specific material would not be released under normal EIA procedures. With no release of the Mississippi Power data proposed, no immediate threat of harm is presented. See 10 C.F.R. §1003.45(b)(1).

It Is Therefore Ordered That:

The Mississippi Power Company Application for Stay submitted on May 1, 2000 is hereby denied.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 23, 2000

(1)" A similar but considerably more expansive request has been filed by Mississippi Power with the Federal Energy Regulatory Commission. Copies of that submission accompanied the firm's Applications for Stay and Exception.

(2)The Form states that: "This report is mandatory under Public Law 93-275, the Federal Energy Administration Act of 1974, Public Law 95-91, Department of Energy Organization Act, and Public Law 102-486, the Energy Policy Act of 1992."

(3)The Mississippi Power Application for Exception is similarly deficient in this respect.

(4)A possibility exists that the Mississippi Power data could be requested under the Freedom of Information Act (FOIA). EIA generally grants such requests for this type of material because: "Information reported on the form EIA-861 is not considered confidential." See form EIA-861, "Annual Electric Utility Report for the Reporting Period 1999." However, should EIA decide that Mississippi Power's Form 861 commercial information would be released pursuant to a FOIA request, Mississippi Power would be given at least 7 days advance notice in which time it may file in a federal court to seek to prevent release of the allegedly confidential information. See 10 C.F.R. § 1004.11(g).

(5)EIA has published the following relevant notices: Comment Request on Provisions for Confidentiality, 63 Fed. Reg. 1,960 (1998); Comment Request on Modification & Extension of Electric Power Survey Forms, 63 Fed. Reg. 35582 (1998); Comment Request on Procedure of Confidential Treatment of Electric Power Survey Data, 63 Fed. Reg. 38620 (1998); EIA Submission to OMB Final Procedure of Confidential Treatment of Electric Power Survey Data & Survey Forms Modifications and Extensions, 63 Fed. Reg. 64682 (1998).

(6)To the contrary, Mississippi Power submitted a completed Form 861 for the year 1999 with its Application for Exception and

Application for Stay.