

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in rates by Florida
Power & Light Company.

DOCKET NO. 080677-EI
ORDER NO. PSC-09-0569-PCO-EI
ISSUED: August 20, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER GRANTING STAFF'S MOTION FOR ORDER COMPELLING
RESPONSES TO INTERROGATORIES

BY THE COMMISSION:

Background

Our staff sought discovery concerning executive compensation in this rate case, ultimately seeking compensation information for the executives of Florida Power & Light Company (FPL or company) whose total compensation exceeds \$165,000. On August 6, 2009, staff filed a Motion for Order Compelling Responses to Interrogatories (Motion to Compel), requesting that we compel FPL to fully respond to the discovery requests within two days, and requesting that the company file its response to the Motion to Compel no later than noon on Monday, August 10, 2009. On August 7, 2009, FPL filed its and its employee intervenors' Response and Memorandum in Opposition to Staff's Motion to Compel, and filed its and its employee intervenors' Supplemental Response in Opposition to Staff's Motion to Compel on August 10, 2009.

At issue are Interrogatory Nos. 16-17 from Staff's Third Set of Interrogatories to FPL, Interrogatory No. 32 from Staff's Fourth Set of Interrogatories to FPL, and Interrogatory No. 97 from Staff's Eighth Set of Interrogatories to FPL. We have jurisdiction pursuant to sections 120.569 and 120.57, Florida Statutes (F.S.), and Rule 28-106.211, Florida Administrative Code (F.A.C.).

Interrogatory Nos. 16-17

Staff served its Third Set of Interrogatories (Nos. 9-19) upon FPL on May 22, 2009. FPL served its responses and "General Objections" to those interrogatories on June 11, 2009, and made no specific objections to Interrogatory Nos. 16-17. By Interrogatory Nos. 16-17, staff requested that FPL provide, for each officer of FPL Group (Interrogatory No. 16) and FPL

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(Interrogatory No. 17), the name and title of the officer and the actual or projected compensation amounts for 2008, 2009, and 2010 for the following:

- a) Base Salary
- b) Stock Awards
- c) Option Awards
- d) Non-Equity Incentive Plan Compensation
- e) All Other Compensation
- f) Total Compensation
- g) Amount of Total Compensation Allocation to FPL
- h) Amount of Total Compensation Included in Adjusted Jurisdictional Other O&M Expenses on MFR Schedule C-1, Pages 1, 2, and 3.

Staff argued that FPL's responses to these interrogatories were evasive or incomplete as follows:

1. The responses provided for a) through f) were incomplete because the name and title for each officer were not matched with the dollar amounts provided, except for five officers. Staff requested this information in order to evaluate the appropriateness of the employee compensation to be included in base rates;

2. The responses provided for a) through f) were incomplete because compensation amounts provided for a) through f) above were developed by applying an "affiliation allocation rate" and represent the net "expense to FPL for each individual." The amounts for a) through e) should be gross amounts before any allocations. The total of a) through e) should be provided as the response to f). The responses to g) should then show the amounts allocated to FPL. Staff requested this information in order to evaluate the appropriateness of the employee compensation and its allocation between FPL Group and FPL for purposes of including such amounts in base rates; and

3. FPL did not respond to h). The responses to h) should identify the amount included in "Adjusted Jurisdictional Other O&M Expenses" shown on MFR Schedule C-1, pages 1 – 3. It would be acceptable for FPL to provide a reasonable estimate and an explanation of how the estimate was developed. Staff requested this information in order to evaluate FPL's request for inclusion of portions of employee compensation in base rates.

Interrogatory No. 32

Staff served its Fourth Set of Interrogatories (Nos. 20-35) upon FPL on May 29, 2009. FPL served its responses and "General Objections" to those interrogatories on June 18, 2009, and made no specific objections to Interrogatory No. 32. By Interrogatory No. 32, staff requested that FPL provide the following information for each employee of FPL whose total compensation is \$200,000 or greater:

- a. Name/Title
- b. Base Salary (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- c. Overtime Pay (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- d. Bonuses (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- e. Stock Awards (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- f. Option Awards (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- g. Non-Equity Incentive Plan Compensation (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- h. All Other Compensation (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- i. Total Compensation (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- j. Amount of Total Compensation Allocated to Florida Power & Light Company (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- k. Amount of Total Compensation Included in Adjusted Jurisdictional Other O&M Expenses on MFR Schedule C-1, Pages 1, 2 and 3 (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011).

Staff argued that FPL's responses to Interrogatory No. 32 were evasive or incomplete as follows:

1. The name and title a) for each employee were not matched with the dollar amounts provided for b) and k). Staff requested this information in order to evaluate the appropriateness of the employee compensation to be included in base rates;

2. The responses provided for b) through i) were incomplete because compensation amounts provided for b) through i) were developed by applying an "affiliation allocation rate" and represent the net "expense to FPL for each individual." The amounts for b) through h) should be gross amounts before any allocations. The total of b) through h) should be provided as the response to i). The response to j) should then show the amounts allocated to FPL. Staff requested this information in order to evaluate the appropriateness of the employee compensation and its allocation between FPL Group and FPL for purposes of inclusion in base rates;

3. FPL originally did not respond to k). The response should have identified the amount included in "Adjusted Jurisdictional Other O&M Expenses" shown on MFR Schedule C-1, pages 1 – 3. In discussions with FPL, staff concurred that it would be acceptable for FPL to provide a reasonable estimate and an explanation of how the estimate was developed. FPL provided a supplemental response on August 5, 2009, which gave staff a reasonable estimate. However, staff needed an explanation of how the estimate was developed; and

4. FPL only provided responses to Interrogatory No. 32 for the historical year 2008. In its response to the Interrogatory, FPL stated:

With respect to the requested estimates for 2009 through 2011, FPL does not budget total compensation or its components at the individual employee level. Each FPL business unit budgets for the base salary, overtime, non-equity incentive plan compensation and certain other earnings of its employees, which are aggregated. FPL also maintains a separate corporate budget location where stock awards and option awards are budgeted, also on an aggregate basis. Therefore, forecasting each component of total compensation for each employee listed on attached 2008 schedule for 2009, 2010 and 2011 cannot be done with precision. A fair estimate of 2009, 2010 and 2011 expenses would be to escalate the 2008 numbers in Attachment No. 1 by the MFR C-35 year-over-year increases of gross average payroll per employee for 2009, 2010 and 2011 of 2.64%, 3.41%, and 0.87% respectively.

With respect to the estimates for 2009 through 2011 compensation for officers provided by the Company in FPL's response to Staff's third Set of Interrogatories No. 16, such estimates were possible to perform because all officers are budgeted in one centralized location rather than by each respective business unit. Furthermore, in the centralized budget for officers, "base salary," "non-equity plan compensation," and some "other" compensation expenses are budgeted by individual. As to the "stock awards" and "options," FPL used the estimated grants that would be awarded to each executive each year. This combination of salary, non-equity incentives, equity and other compensation estimates give a fair view of the amount of compensation each executive may receive in 2009, 2010 and 2011. However, the same individual budget data does not exist in the same format for all employees below officer level.

Staff argued that FPL has presented its rate case for a projected year of 2010 and a subsequent projected year of 2011. Included in FPL's base rates is employee compensation. Employee compensation is an issue in the proceeding and intervenors have provided testimony questioning employee compensation. Staff requested this information in order to evaluate FPL's proposed rate increase.

Interrogatory No. 97

Staff served its Eighth Set of Interrogatories (Nos. 96-97) upon FPL on June 25, 2009. FPL served its responses and "General Objections" to them on July 15, 2009, and made no specific objection to Interrogatory No. 97. By Interrogatory No. 97, staff requested that FPL provide the actual or projected compensation amounts for each employee of FPL during 2008, 2009, 2010 and 2011, whose total annual compensation is \$165,000 or greater but less than \$200,000 for the following:

- a. Name/Title
- b. Base Salary
- c. Overtime Pay
- d. Bonuses
- e. Stock Awards
- f. Option Awards
- g. Non-Equity Incentive Plan Compensation
- h. All Other Compensation
- i. Total Compensation
- j. Amount of Total Compensation Allocated to Florida Power & Light Company
- k. Amount of Total Compensation Included in Adjusted Jurisdictional Other O&M Expenses on MFR Schedule C-1, Pages 1, 2 and 3.

Staff argued that FPL's response was evasive or incomplete as follows:

1. The name and title a) for each employee were not matched with the dollar amounts provided for b) and k). Staff requested this information in order to evaluate the appropriateness of the employee compensation to be included in base rates;

2. The responses provided for b) through j) were incomplete because compensation amounts provided for b) through i) were developed by applying an "affiliation allocation rate" and represent the net "expense to FPL for each individual." The amounts for b) through h) should be gross amounts before any allocations. The total of b) through h) should be provided as the response to i). The response to j) should then identify the amounts allocated to FPL. Staff requested this information in order to evaluate the appropriateness of the employee compensation and its allocation between FPL Group and FPL;

3. FPL did not provide a response to k) in its first set of responses. After discussion with staff, FPL provided a supplemental response which adequately addressed staff's question raised by 97 k). It was acceptable for FPL to provide a reasonable estimate. Staff still needs FPL to provide an explanation of how the estimate was developed; and

4. FPL only provided responses to Interrogatory No. 97 for the historical year 2008. In its response to the Interrogatory, FPL stated:

With respect to the requested estimates for 2009 through 2011, FPL does not budget total compensation or its components at the individual employee level. Each FPL business unit budgets for the base salary, overtime, non-equity incentive plan compensation and certain other earnings of its employees, which are aggregated. FPL also maintains a separate corporate budget location where stock awards and option awards are budgeted, also on an aggregate basis. Therefore, forecasting each component of total compensation for each employee listed on Attachment No. 1 cannot be done with precision. A fair estimate of 2009, 2010 and 2011 expenses would be to escalate the 2008 numbers in Attachment No. 1 by the MFR C-35 year-over-year increases of gross average

payroll per employee for 2009, 2010 and 2011 of 2.64%, 3.41%, and 0.87% respectively.

Staff requested the 2009, 2010, and 2011 information in order to evaluate FPL's proposed inclusion of employee compensation in base rates. FPL has presented its rate case for a projected year of 2010 and a subsequent projected year of 2011. Included in FPL's base rates is employee compensation. Employee compensation is an issue in the proceeding and intervenors have provided testimony questioning employee compensation. Staff requested the information in order to evaluate FPL's proposed rate increase. Staff argued that this Commission reviews expenses for reasonableness, and that compensation is a major component of FPL's operating expenses which may be recoverable from ratepayers. Employee compensation is therefore a significant component of base rates. In order to determine if the portion of an employee's compensation allocated to FPL is reasonable, the Commission needs to know if the total compensation for that employee is reasonable. Staff stated that it is currently unable to determine the reasonableness of compensation allocations between FPL and FPL Group. The purpose of obtaining this information is to show the revenue effect on rates. Ultimately, this information impacts the revenue requirement which translates into rates and charges.

Attachment 1

In its responses to Interrogatories Nos. 16-17, 32, and 97, FPL states:

Once all of the expenses for 2008 through 2011 were developed, an affiliate allocation rate was then applied to more accurately reflect the amount of expense to FPL for each individual. Please refer to Attachment No. 1 of FPL's response . . . for more details. Attachment No. 1 is confidential and will be made available by FPL for inspection and review.

Upon staff's request, FPL filed an unredacted version of Attachment No. 1 with a request for confidential classification. Staff states that this document does not provide the information necessary to respond to Interrogatories Nos. 16-17, 32, and 97.

Staff further stated that in addition to Attachment 1, FPL counsel informed staff that a "key" exists which would allow staff to be able to match each employee with his or her compensation amounts. FPL indicated that the "key" would not provide other information responsive to staff's interrogatories, such as unallocated compensation amounts. Thus, staff stated that even if the "key" were provided to staff, FPL's response would still not fully comply with staff's discovery requests. Staff has asked the utility to provide this "key." FPL takes the position that it will not file the "key" with the Commission, but has allowed staff to view it only at FPL's offices. Staff states that FPL has not allowed them to take notes on the key's contents.

Staff argues that FPL is required to provide complete responses to the interrogatories at issue pursuant to Rule 1.280, Florida Rules of Civil Procedure, and Rule 28-106.206, F.A.C. Staff notified FPL of its failure to respond and conferred in good faith with FPL in an effort to secure the requested discovery without Commission action.

Attachment B to Motion to Compel

Staff's August 6, 2009, E-Mail

As Attachment B to the Motion to Compel, staff attached an e-mail dated August 6, 2009, that staff sent to FPL and all parties, and FPL's response thereto, also dated August 6, 2009. By way of that e-mail, staff indicated what information staff still needs to have from FPL to satisfy its interrogatory requests, as follows:

1. For responses to Interrogatory Nos. 16 and 17, staff needs the individual job positions, total compensation levels by job position, including individual job positions and each component that comprises total compensation levels, as well as total compensation levels by each individual job position;

2. For each job position, including officers and directors, staff needs all salary and incentive information including total compensation by each individual job position before the amounts are allocated to FPL. Staff needs the information for each of the job positions, including FPL and FPL Group job positions. Staff does not want the numbers to be aggregated.

Also by way of that e-mail, staff indicated that FPL had already provided the FPL-allocated amounts for each job position, which is responsive to Interrogatory Nos. 16 g), 17 g), 32 j), and 97 j). Staff indicated that it will accept the aggregated information for Adjusted Jurisdictional Other O&M Expenses on MFR Schedule C-1 as long as supporting workpapers and assumptions are provided with those responses, and that this will satisfy staff's requests under Interrogatory Nos. 16 h), 17 h), 32 k), and 97 k).

Moreover, by way of that e-mail, in consideration of FPL's concerns regarding employee privacy, staff revised its request and stated that it would be satisfied with receiving the individual compensation information by each individual job title or position, and not the names of the employees. However, staff does not want an aggregate number by groups of positions.

Finally, staff expressed its concern regarding only receiving 2008 information in response to Interrogatory Nos. 32 and 97. FPL provided staff with "per job description compensation" for 2008. FPL also provided escalation factors as a fair estimate of the increases for 2009, 2010, and 2011. To completely answer staff's interrogatories, staff requested that FPL apply those escalation factors per employee and provide staff with the Excel spreadsheet.

In its response to the e-mail, FPL indicated it would provide certain supplemental responses to the discovery questions at issue, but stated it has the same employee privacy concerns and concerns about driving up compensation costs with providing specific or generic job titles as it does with providing individual names.

Staff requests that we issue an order compelling FPL to respond within two days to each interrogatory and each subpart, as revised by staff's August 6, 2009 e-mail, with answers that are specifically responsive and that are individually and clearly labeled to identify to which interrogatory and specific subpart the answer is responsive.

FPL's Response

On August 7, 2009, FPL filed its and its Employee Intervenors' Response and Memorandum in Opposition to Staff's Motion to Compel (Response). The 15 FPL employees named in the Response state they are acting in their individual capacities. FPL and its employee intervenors (collectively referred to herein as FPL) state that compelled disclosure of employee-identifiable compensation would violate the employee intervenors' fundamental rights of privacy as guaranteed by Article I, Section 23 of the Florida Constitution, is unnecessary to the performance of any authorized Commission function and is therefore irrelevant and outside the jurisdiction and powers of this Commission, and would violate FPL's long-standing policy of maintaining confidentiality of such information. FPL argues that disclosure of this information would have an adverse impact upon employee morale, drive up compensation costs paid to employees, and open the door to competitors in the electric industry to poach FPL's highly skilled employees, thereby increasing recruitment, training and compensation costs and resulting rates for FPL's customers.

FPL cites to Von Eiff v. Azicri¹ and a string of other Florida Supreme Court cases in arguing that the Florida constitution is broader in scope than its federal counterpart with respect to privacy rights. FPL argues that the burden rests with the government to justify an intrusion on privacy by meeting a two-part test. The agency must demonstrate that the challenged regulation or requirement serves a compelling governmental interest and that it is seeking to accomplish such interest through the use of the least intrusive means. An individual's personal financial information is entitled to protection by Article I, Section 23.² Disclosure of such information when not justified can cause irreparable injury.³

FPL states that it has already provided this Commission with detailed information that discloses total compensation paid, and compensation paid to particular employment positions without personal identifying information. FPL also has provided access to line item (name and title) compensation information for the individual employees subject to staff's Motion to Compel on a confidential basis. FPL publicly discloses compensation paid to named top-level corporate officers. The only thing it has not publicly disclosed is information that would enable a person to determine the identity of an employee receiving a particular amount of compensation or to compare specific compensation against the compensation of others, including other employees' as well as competitors' compensation. FPL argues that in order to meet its heavy burden, this Commission would be required to demonstrate that such information is essential to meet a compelling interest of the Commission in the fulfillment of our lawful duties and that such interest cannot be served by a less intrusive means, including the disclosures already made. FPL argues that given the limitation of this Commission's interest to our ratemaking power, such a demonstration cannot be made. According to FPL, staff and this Commission have made no demonstration that compelling FPL to provide employee-specific, identifying information is the least intrusive means of fulfilling our ratemaking duties and that we cannot do so. FPL states it

¹ 720 So. 2d 510, 514 (Fla. 1998).

² Mogul v. Mogul, 730 So. 2d 1287 (Fla. 5th DCA 1999).

³ Spry v. Prof'l Employer Plans, 985 So. 2d 1187 (Fla. 1st DCA 2008).

has provided responses to staff's discovery using the least intrusive means by making the employee-specific information available to staff for review at staff's convenience.

FPL further argues that the amount of compensation received by a particular identifiable employee is irrelevant to the exercise of our ratemaking authority and is beyond the scope of our power to compel production of information. FPL refers us to the orders it cited to in its Request for Confidential Classification filed July 27, 2009, in which we provided confidential treatment for employee-specific compensation information. FPL states that it has never before been compelled to produce employee-specific information in order to enable this Commission to fulfill its ratemaking responsibilities.

FPL recognizes that it is not bound by the Florida constitutional privacy provision, but states that it desires to respect the privacy rights of its employees and to support their assertion of their constitutional guaranty.⁴ FPL argues that the same privacy concerns and concerns about driving up compensation costs exist by filing specific employee-identifiable titles or even generic titles. Many job titles are held by only one or two people, so it is the equivalent of providing specific names from a privacy perspective.

FPL states that it pays its employees competitive market rates, and they, in return, deliver industry-leading performance that benefits its customers. According to testimony submitted by Concentric Energy Advisors, a consulting firm retained by FPL to conduct research comparing the performance of electric utilities, FPL consistently ranks as one of the best utilities in the country for providing reliable electric service while keeping costs under control. FPL argues that granting the Motion to Compel would increase costs and severely compromise FPL's ability to achieve efficiencies in the recruitment, training and retention of skilled employees to the detriment of FPL, its employees whose privacy rights are at stake, and its customers.

Finally, FPL argues that it has agreed to provide information requested by staff in the Motion to Compel. FPL has agreed to provide a supplemental response that supplies a more detailed explanation of how its estimate of the aggregated information for Adjusted Jurisdictional Other O&M Expenses on MFR Schedule C-1 was developed. FPL has also agreed to provide an Excel spreadsheet applying escalation factors to compensation per employee for 2009, 2010 and 2011. Finally, with respect to staff's request for gross amounts before allocations on an individual employee basis for each compensation category, FPL has agreed to supply staff information that it believes will meet staff's needs. FPL believes that with the provision of this information in addition to information previously provided, this Commission will have all the information we need to fulfill our ratemaking responsibilities.

FPL's Supplemental Response

In its Supplemental Response, FPL and its employee intervenors provide a letter from H. Antonio Cuba, Director of Regulatory Accounting, asserting that from a ratemaking perspective,

⁴ FPL attaches as Exhibit 1 to its Response the Affidavit of Mr. James Poppell, Executive Vice President of Human Resources for FPL Group, Inc., attesting that public disclosure of the compensation information at issue would cause harm to FPL's business operations, which would be detrimental to both FPL and to its ratepayers, and that FPL safeguards such information from disclosure to protect the individual privacy interests of its employees.

it is abundantly clear that this Commission has more than enough information to evaluate the appropriateness of FPL's compensation-related costs.

Mr. Cuba provides examples of compensation-related cost information that FPL has provided through the discovery process, including, among other things, its response to Staff Interrogatory No. 97, in which FPL provides, in a publicly available format, average total compensation by role with average adjusted jurisdictional amounts and also includes job descriptions for each role. In addition, FPL has made available to staff, on a confidential basis, line by line compensation information for each individual. Mr. Cuba asserts that these average salary amounts by description can be compared to industry and other market references to determine the reasonableness of these amounts. Mr. Cuba states that in the past, we have used benchmarks and comparisons to market information to evaluate the appropriateness of FPL's projected salary levels.

Mr. Cuba further states that in FPL's response to the Office of Public Counsel's (OPC) Interrogatory No. 32, FPL provides name, title and job description of each shared executive whose costs are directly charged to FPL for the years 2006-2010. FPL also provides aggregate total gross shared executive costs, aggregate amount allocated to affiliates and aggregate amount remaining at the utility. Additionally, FPL's response to OPC's Interrogatory No. 35 provides aggregate total gross amount of 2006-2009 year to date shared executive pay and number of shared executives with high, low and average amounts for each year. Mr. Cuba asserts that from these responses, total executive compensation can be evaluated when coupled with all the other information that the company has provided related to compensation.

Analysis and Ruling

Rule 1.280(b)(1), Florida Rules of Civil Procedure, states:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to a claim or defense of the party seeking discovery or the claim or defense of any other party. . . . 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.

FPL argues that the Article I, Section 23 of the Florida Constitution prevents us from requiring FPL to produce the compensation information at issue, and that the information is unnecessary to the performance of any authorized Commission function and is therefore irrelevant and outside our jurisdiction and powers. We disagree.

With respect to whether Article I, Section 23 of the Florida Constitution prevents us from requiring FPL to produce the compensation information at issue, FPL may decline to provide the information on that basis with the result being that such compensation costs may be excluded from its base rates. We hereby grant our staff's Motion to Compel the responses to the discovery requests as revised by its August 6, 2009, e-mail, so that we may fully evaluate FPL's request for inclusion of these costs in its base rates.

Article I, Section 23 of the Florida Constitution provides, in pertinent part, that “every natural person has the right to be let alone and free from governmental intrusion into his private life.” FPL recognizes that this provision does not apply to FPL. FPL is not a “natural person,” but a business entity. FPL argues that this constitutional right to privacy does apply to its employee-intervenors acting in their individual capacities. FPL’s concern about the disclosure of employee-identifiable compensation would likely disappear if we had the ability to afford such information confidential treatment, thereby protecting it from public disclosure. However, section 366.093(3)(f), F.S., instructs otherwise. Section 366.093(3)(f), F.S., provides that “[e]mployee personnel information unrelated to compensation, duties, qualifications, or responsibilities” falls within the definition of proprietary confidential business information. Conversely, pursuant to that section, employee personnel information that is related to compensation, duties, qualifications, or responsibilities is not proprietary confidential business information.

FPL’s argument that the compelled disclosure of employee-identifiable compensation violates its employee-intervenors’ fundamental rights of privacy under Article I, Section 23 amounts to an argument that section 366.093(3)(f), F.S., is unconstitutional. The Von Eiff case, which FPL cites to in its Response, makes this point all the more clear. At issue in that case was whether a particular statutory provision was facially unconstitutional because it impermissibly infringed on privacy rights protected by Article I, Section 23.⁵ The Court held that when analyzing a statute that infringes on the fundamental right of privacy, the applicable standard of review requires that the statute survive the highest level of scrutiny; i.e., the compelling state interest standard.⁶ As an administrative agency, however, we have only those powers delegated to us by statute.⁷ This Commission is not the proper forum in which to challenge the facial constitutionality of a statute.⁸ Therefore, we decline to address this constitutional question.

FPL’s reliance on Mogul⁹ for the proposition that an individual’s personal financial information is entitled to protection by Article I, Section 23, is misplaced. In that case, the Court quashed the discovery order under review because there was no basis to conclude that the personal financial information sought was relevant.¹⁰ Similarly, in the Spry case, the Court found that “the Florida Supreme Court has recognized that ‘the disclosure of personal financial information [via discovery] may cause irreparable harm to a person forced to disclose it, in a case in which the information is not relevant.’”¹¹ With respect to whether the employee compensation information at issue is relevant in this case, FPL has requested the inclusion of

⁵ Von Eiff, 720 So. 2d at 510.

⁶ Id. at 514.

⁷ DER v. Falls Chase Special Taxing Dist., 424 So. 2d 787, 793 (Fla. 1st DCA), review denied, 436 So. 2d 98 (Fla. 1983).

⁸ Key Haven Associated Enters., Inc. v. Board of Trs. of the Internal Improvement Trust Fund, 427 So. 2d 153, 157 (Fla. 1982) (citation omitted). See also Communications Workers of America, Local 3170 v. City of Gainesville, 697 So. 2d 167, 170 (Fla. 1st DCA 1997) (finding that “[t]he Administrative Procedure Act does not purport to confer authority on administrative law judges or other executive branch officers to invalidate statutes on constitutional or any other grounds.”)

⁹ 730 So. 2d 1287 (Fla. 5th DCA 1999).

¹⁰ Id. at 1290.

¹¹ 985 So. 2d at 1188 (citation omitted).

such compensation information in its base rates, and this is therefore an issue in the rate case. We disagree that FPL has provided more than enough compensation information for us to evaluate the reasonableness of its request. As stated in our staff's Motion to Compel, compensation is a major component of FPL's operating expenses and is therefore a significant component of base rates. In order to determine if the portion of an employee's compensation allocated to FPL is reasonable, we need to know if the total compensation for that employee is reasonable. With the information provided thus far, we are unable to determine the reasonableness of compensation allocations between FPL and FPL Group. Ultimately, this information impacts the revenue requirement, which translates into rates and charges. The information is therefore clearly relevant, and would become irrelevant only if FPL were to withdraw its request for inclusion of these costs in rates.

With respect to whether we have the jurisdiction and power to require FPL to produce the employee compensation information, Section 366.04(1), F.S., confers upon us the authority "to regulate and supervise each public utility with respect to its rates and service." Section 366.041(1), F.S., authorizes us, in fixing just, reasonable, and compensatory rates, to give consideration to, among other things, the cost of providing service. Employee compensation is one such cost of service.

Furthermore, providing information to this Commission through discovery does not automatically open the records to the public. We have statutory¹² and rule¹³ provisions that maintain the confidentiality of documents until we have made a determination on a request for confidential classification of them. Section 366.093(2), F.S., provides in part:

Any records provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the commission and the office of the Public Counsel and any other party subject to the public records law as confidential and shall be exempt from s. 119.07(1), pending a formal ruling on such request by the commission or the return of the records to the person providing the records. Any record which has been determined to be proprietary confidential business information and is not entered into the official record of the proceeding must be returned to the person providing the record within 60 days after the final order, unless the final order is appealed. If the final order is appealed, any such record must be returned within 30 days after the decision on appeal.

Rule 28-106.211, F.A.C., grants us broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case." Based upon this authority, we hereby grant Staff's Motion for Order Compelling Responses to Interrogatories, as revised by staff's August 6, 2009, e-mail. We have consistently recognized that discovery is proper and may be compelled if it is not privileged and is, or likely will lead to, relevant and admissible evidence. FPL is directed to fully and completely respond to the interrogatories at issue, as revised by staff's August 6, 2009,

¹² Section 366.093, F.S.

¹³ Rule 25-22.006, F.A.C.

e-mail (attached to the Motion to Compel as Attachment B) within two days of the issuance date of this Order. Accordingly, FPL is required to provide staff with the individual compensation information by each individual job title or position, but FPL is not required to provide the names of the employees.

It is, therefore,

ORDERED by the Florida Public Service Commission that Staff's Motion for Order Compelling Responses to Interrogatories, as revised by staff's August 6, 2009, e-mail attached thereto as Attachment B is granted. It is further

ORDERED that FPL is directed to fully and completely respond to the interrogatories at issue, as revised by staff's August 6, 2009 e-mail (attached to the Motion to Compel as Attachment B) within two days of the issuance date of this Order. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 20th day of August, 2009.



ANN COLE
Commission Clerk

(SEAL)

RG

CONCURRENCE BY: COMMISSIONER SKOP

COMMISSIONER SKOP, concurring specially with a separate opinion:

The instant case arises from the failure of FPL to comply with legitimate discovery requests which are relevant to the subject matter of the pending rate case and necessary to allow the Commission to perform its regulatory function. FPL advanced several legal arguments in opposition to providing the requested information. First, FPL argued that the compelled production of employee identifiable compensation information would violate the Employee Intervenors' fundamental right of privacy afforded under Article I, Section 23 of the Florida Constitution. Second, FPL further asserted that the amount of compensation received by a specific FPL employee is irrelevant to the Commission's vested ratemaking authority and beyond the scope of the Commission's power to compel discovery. Finally, FPL argued that competitively sensitive data linking particular employees to their compensation is entitled to protection pursuant to subsection 366.093(3)(e), Florida Statutes. Based upon the record evidence before the Commission, I find the FPL arguments to be unpersuasive for the following reasons:

The Requested Discovery Does Not Infringe Upon the Fundamental Right of Privacy

The Constitution of the State of Florida provides for a fundamental right of privacy.¹⁴ The fundamental right of privacy must be asserted by a natural person.¹⁵ Although Florida law recognizes a legitimate expectation of privacy with respect to personal financial information, the right of privacy does not provide absolute immunity from governmental regulation and will yield to a compelling state interest in performing a regulatory function through the least intrusive means.¹⁶ Furthermore, when seeking discovery necessary to perform a regulatory function, it is the purview of the Commission, not FPL, to determine what information is relevant.¹⁷

¹⁴ Art. I, § 23, Fla. Const. ("Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.").

¹⁵ Id.; see also Siemiarecki v. State, 756 So. 2d 68, 76 (Fla. 2000) (a daughter could not assert her mother's right to privacy under Fla. Const. Art. I, § 23).

¹⁶ Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985); see also Woodward v. Berkery, 714 So. 2d 1027, 1035-37 (Fla. Dist. Ct. App. 4th Dist. 1997) (example of overreaching discovery). The instant case is readily distinguished from Woodward to the extent that the compelled discovery sought from FPL was reasonably calculated and narrowly tailored to obtain information relevant to the subject matter of the pending rate case and necessary to allow the Commission to perform its regulatory function.

¹⁷ Id. at 548 ("To ensure that it has all of the information necessary for a complete investigation, the agency rather than the bank or depositor must calculate what is and what is not relevant."; further holding that the subpoena of private bank records without notice did not constitute an impermissible and unbridled exercise of legislative power when seeking relevant discovery necessary to perform a regulatory function.).

In the instant case, the requested discovery, as subsequently modified within the Motion to Compel, was reasonably calculated and narrowly tailored to lead to the discovery of information relevant to the subject matter of the pending rate case and necessary to allow the Commission to perform its regulatory function. Specifically, Attachment B to the Motion to Compel only required FPL to produce the relevant compensation information for each individual job title or position having a total compensation level exceeding \$165,000. FPL was not required to produce the individual employee names in conjunction with their respective compensation. It further stands to reason that FPL employee compensation information ceases to become personal information when the individual is not specifically named in relation to their compensation, and that FPL employees do not have reasonable expectation of privacy with respect to their job title or position.¹⁸ Accordingly, requested discovery does not infringe upon the fundamental right of privacy afforded under Article I, Section 23 of the Florida Constitution because it was crafted in a manner that does not require the disclosure of personal financial information, does not require the disclosure of individual employee names, avoids a direct conflict with the constitutional provision, and fully respects concerns expressed by FPL and its Employee Intervenors thereby rendering the constitutional question moot.¹⁹

The Requested Discovery is Relevant

It suffices to say that employee compensation is a major component of FPL operating expenses and represents a significant component of FPL base rates. In order to determine whether the portion of an employee's compensation allocated to FPL is reasonable, the Commission must assess whether the total compensation for that employee is reasonable. Based upon the failure of FPL to comply with legitimate discovery requests which are relevant to the subject matter of the pending rate case, the Commission is unable to determine the reasonableness of compensation allocations between FPL and FPL Group. Ultimately, this information impacts the revenue requirement, which translates into rates and charges. Accordingly, the discovery sought by the Commission is relevant and necessary to allow the Commission to perform its regulatory function.²⁰

¹⁸ FPL alternatively argued that many job titles are held by only one or two people, so it is the equivalent of providing the specific names from a privacy perspective. This argument is nothing more than an impermissible attempt to expand the scope of existing case law and should be rejected. FPL employees do not have reasonable expectation of privacy with respect to their job title or position even if compensation information could somehow be indirectly related back to an individual employee through the use of additional knowledge or deductive reasoning. While directly matching an employee with their compensation (i.e., name/compensation) may implicate privacy concerns, a one step removed or attenuated nexus (i.e., job title/compensation) is sufficient to protect the privacy interest.

¹⁹ Having fully considered the privacy interest, including lengthy discussion at bench, and narrowly tailoring the discovery request to avoid infringing upon the right of privacy, the Commission can decide the instant case without reaching the constitutional question on the premise that section 366.093, Florida Statutes, is facially constitutional.

²⁰ The requested discovery would become irrelevant only if FPL were to withdraw its rate case or request for inclusion of these costs in rates; see also Fla. R. Civ. P. 1.280(b)(1).

Statutory Analysis

When a statute is clear and unambiguous on its face, courts will not look behind the plain language of the statute for legislative intent or resort to rules of statutory construction to ascertain intent.²¹ Subsection 366.093(3)(f), Florida Statutes, plainly states that proprietary confidential business information includes “employee personnel information unrelated to compensation, duties, qualifications, or responsibilities”. Therefore, pursuant to the clear and unambiguous language of the statute, employee personnel information that is unrelated to compensation, duties, qualifications, or responsibilities meets the definition of proprietary confidential business information as long as it is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that disclosure would cause harm to the ratepayers or to the person or company’s business operations, and it has not been disclosed except under the circumstances as defined therein. Conversely, employee personnel information that is related to compensation, duties, qualifications, or responsibilities is expressly excluded from the definition of proprietary confidential business information.

FPL argued that the Commission should determine that the information linking particular employees to their compensation information is entitled to protection pursuant to subsection 366.093(3)(e), Florida Statutes, or alternatively, that this information should be protected as confidential pursuant to the general authority granted to the Commission by subsection 366.093(3), Florida Statutes. The language of subsection 366.093(3)(f), Florida Statutes, however, clearly and unambiguously excludes the information at issue from the definition of proprietary confidential business information. Even assuming, for the sake of argument, that the statute were ambiguous such that the rules of statutory construction should apply, there is a well-established rule of statutory construction instructing that when two statutory provisions are in conflict, the specific statute controls over the general statute. Under this rule of statutory construction, if the Commission were to determine that the general language of subsection 366.093(3) conflicted with the specific language of subsection 366.093(3)(f) then the specific language of subsection 366.093(3)(f) would control over the general language of subsection 366.093(3). Accordingly, the FPL argument would fail even if the rules of statutory construction were to apply in this instance.

FPL further asserted that subsection 366.093(3)(f), Florida Statutes, entitles automatic protection to personnel information unrelated to compensation and nothing in that subsection precludes a Commission determination that information related to compensation should be afforded confidential treatment if the relevant criteria are met. FPL is incorrect. Subsection 366.093(3)(f), Florida Statutes, clearly and unambiguously excludes such information from the definition of proprietary confidential business information. While the Commission clearly lacks the power to construe an unambiguous statute in a manner that would extend or modify its express terms, or its reasonable and obvious implications, the Commission may exercise its sole discretion as to the scope of relevant discovery in response to legitimate concerns regarding the

²¹ Daniels v. FDOH, 898 So. 2d 61, 64 (Fla. 2005).

need to safeguard competitively sensitive information.²² In the instant case, the Commission properly exercised this discretion to the extent that it only required FPL to produce the relevant compensation information for each individual job title or position having a total compensation level exceeding \$165,000. The use of such discretion forms the basis of the interest balancing analysis which is further discussed below.

Application of an Interest Balancing Test Promotes Sound Public Policy

When struggling to balance various competing interests, courts often resort to adopting an interest balancing test. In the instant case, the application of an interest balancing test promotes sound public policy by considering the public interest served by the disclosure of compensation information when such compensation represents a major component of FPL operating expenses and impacts base rates. In articulating such a test, I would adopt the following guiding principals:

- FPL is a regulated monopoly.
- The compelling and overarching public interest in the transparency and disclosure of compensation information above a specified total compensation threshold level.
- Disclosure of compensation information above a specified total compensation threshold level would not require the disclosure of individual employee names.
- The company interest in maintaining rank and file compensation information confidential for competitive reasons below a specified total compensation threshold level.

In the instant case, the Commission properly exercised its discretion by limiting the scope of discovery to the extent that it only required FPL to produce the relevant compensation information for each individual job title or position having a total compensation level exceeding \$165,000. Accordingly, the Commission's decision serves to achieve the appropriate balance between:

- Limiting the scope of discovery to that which is relevant to the subject matter of the pending rate case and necessary to allow the Commission to perform its regulatory function.
- Narrowly tailoring the discovery request to respect the fundamental right of privacy afforded under Article I, Section 23 of the Florida Constitution.

²² University of Florida, Bd. Of Trustees v. Sanal, 837 So. 2d 512, 516 (Fla. 1st DCA 2003); see also Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985) ("To ensure that it has all of the information necessary for a complete investigation, the agency rather than the bank or depositor must calculate what is and what is not relevant.").

- Recognition of the compelling and overarching public interest in the transparency and disclosure of compensation information above a specified total compensation threshold level.
- Recognition of the company interest in maintaining rank and file compensation information confidential for competitive reasons below a specified total compensation threshold level.

Based upon the aforementioned discussion, I would respectfully hold that the Commission has properly exercised its authority to compel discovery of information relevant to the subject matter of the pending rate case and necessary to allow the Commission to perform its regulatory function through the least intrusive means.

In closing, the failure of FPL to comply with legitimate discovery requests which are relevant to the subject matter of the pending rate case substantially harms the ability of the Commission to perform its regulatory function. Furthermore, as astutely observed by Justice Pariente in Alterra, "...courts also must be alert to the possibility of a litigant raising a claim of the privacy rights of others as a subterfuge to prevent the disclosure of relevant information."²³ Based upon the record evidence before the Commission, the FPL arguments are not persuasive, and I would respectfully hold that the Commission has properly exercised its authority to compel discovery of information relevant to the subject matter of the pending rate case and necessary to allow the Commission to perform its regulatory function through the least intrusive means.

²³ Alterra Healthcare Corp. v. Estate of Shelley, 827 So. 2d 936, 947 (Fla. 2002) (Pariente, J., concurring).

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; or (2) 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 wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, 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.