

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in rates by Progress  
Energy Florida, Inc.

DOCKET NO. 090079-EI  
ORDER NO. PSC-09-0612-CFO-EI  
ISSUED: September 8, 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 DENYING REQUESTS FOR CONFIDENTIAL CLASSIFICATION  
(DOCUMENT NOS. 07388-09, 07595-09, AND PORTIONS OF DN 04092-09)

BY THE COMMISSION:

Background

Our staff sought discovery concerning executive compensation in this rate case, ultimately seeking certain compensation information for the executives of Progress Energy Florida, Inc. (PEF or company) whose total compensation exceeds \$165,000. On May 1, 2009, PEF timely filed its Second Request for Confidential Classification of certain information produced in response to Staff's Second Request for Production of Documents (PODs) and of certain dollar amounts provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2). On July 21, 2009, PEF filed its Fifth Request for Confidential Classification for Portions of PEF's Response to Staff's Tenth Set of Interrogatories (Nos. 123-126) and PEF's Request for Consideration by Full Commission. And on July 24, 2009, PEF filed its Sixth Request for Confidential Classification for Portions of its Response to Staff's Eighteenth Set of Interrogatories (Nos. 197-198) and Request for Consideration by Full Commission.

By these filings, PEF requests that certain employee salary information be afforded confidential classification pursuant to section 366.093, Florida Statutes (F.S.), and Rule 25-22.006, Florida Administrative Code (F.A.C.). Section 366.093, F.S., sets out exceptions from Chapter 119, F.S. (the Public Records Act), for certain proprietary confidential business information filed with the Commission, and states, in relevant part, that

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[p]roprietary confidential business information includes, but is not limited to:

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(e) Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.

(f) Employee personnel information unrelated to compensation, duties, qualifications, or responsibilities.

Pursuant to Rule 25-22.006(10), F.A.C., if this Commission denies a request for confidential classification, the material at issue is kept confidential until the time for filing an appeal has expired, and the utility or other person may request continued confidential treatment until juridical review is complete.

Florida Power & Light Company (FPL) also sought confidential treatment for similar employee compensation information sought by our staff in Docket No. 080677-EI.<sup>1</sup> Because of the similarity of the issues between PEF and FPL and to promote administrative efficiency and consistency of results, we granted PEF and FPL's Requests for Determination by Full Commission and ruled upon PEF's Requests for Confidential Classification at our August 18, 2009, agenda conference.

We have jurisdiction pursuant to section 366.093, F.S.

#### Second Request for Confidential Classification

By its Second Request for Confidential Classification, PEF requests confidential classification of certain information produced in response to Staff's Second Request for Production of Documents (PODs) and of the dollar amounts provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2). Because the information produced by PEF in response to Staff's Second Request for PODs does not contain employee salary information, that portion of PEF's Second Request for Confidential Classification (contained within, but not comprising all of DN 04092-09) is not addressed herein. The information provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2) (also contained within, but not comprising all of DN 04092-09) includes executive compensation data, which PEF states contains confidential information, the disclosure of which could seriously impair its competitive business interests.

According to PEF, the disclosure of the amount of salary, bonuses, and overall compensation that it is willing to pay its executives would have an adverse impact on its ability to contract with and retain qualified individuals, by allowing other companies an advantage in negotiating with such employees. PEF states that at no time has it publicly disclosed the confidential information or documents at issue, and that it has treated and continues to treat this information as confidential. PEF argues that this information fits the statutory definition of

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<sup>1</sup> In Re: Petition for increase in rates by Florida Power & Light Company.

proprietary confidential business information under subsection 366.093(3)(e), F.S.,<sup>2</sup> and Rule 25-22.006, F.A.C., and requests that the redacted portions of Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2) be classified as confidential. Subsection 366.093(3)(e), F.S., provides that proprietary confidential business information includes "[i]nformation relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information." Rule 25-22.006, F.A.C., sets forth this Commission's procedures for the filing and handling of confidential information.

In an Affidavit attached to its Request, Mr. Masceo DesChamps, Director of Compensation and Benefits, Progress Energy Service Company, states that if disclosed to the public or to other utilities, this information could provide firms with which PEF competes for qualified employees with a competitive advantage in acquiring and retaining such employees, and could also give prospective employees an advantage in negotiating compensation packages, leading to increases in the overall amount of compensation paid to employees. He further states that this overall increase in the amount paid in compensation could adversely impact rates paid by PEF's ratepayers, or make the company a less attractive investment to potential investors.

#### Fifth Request for Confidential Classification

By its Fifth Request for Confidential Classification, PEF requests confidential classification of certain numerical information contained within its Response to Staff Interrogatory Nos. 123 and 124 from Staff's Tenth Set of Interrogatories (Nos. 123-126) (DN 07388-09). PEF's Response to Interrogatory Nos. 123 and 124 contains names, job titles, and compensation information, including base salaries, bonuses, and other compensation for all employees of Progress Energy, Inc. and PEF whose total compensation exceeds \$200,000. PEF does not claim confidentiality for the names and job titles of these employees or for the total compensation paid to them as a group. PEF does claim confidentiality to the extent the information discloses the specific compensation paid to specific employees.

PEF points out that subsection 366.093(3), F.S., provides, in pertinent part, that:

[p]roprietary confidential business information means information . . . which 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 the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public.

PEF further points out that under subsection 366.093(3), F.S., proprietary confidential business information includes, but is not limited to, six specific categories of information. PEF states that the two specific categories pertinent to the analysis of its claim of confidentiality are subsections 366.093(3)(e) and (f), F.S. Subsection 366.093(3)(e), quoted above, addresses information

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<sup>2</sup> See pages 33-34 of Attachment C to PEF's Second Request for Confidential Classification, Confidentiality Justification Matrix.

related to competitive interests. Subsection 366.093(3)(f), F.S., provides that proprietary confidential business information also includes “[e]mployee personnel information unrelated to compensation, duties, qualifications or responsibilities.” PEF argues that because protection under subsection 366.093(3), F.S., is not limited to information that falls into one of the six categories enumerated in subsections (3)(a) to (f), protection is available to any information that meets the general definition in that subsection.

PEF argues that the fact that information disclosing the compensation of specific employees does not qualify for protection under subsection 366.093(3)(f), F.S., does not make it ineligible for protection under the general language of subsection 366.093(3), F.S., and particularly under subsection 366.093(3)(e), F.S. PEF states that the Affidavit of Mr. DesChamps attached to its Request shows that the information for which PEF claims confidentiality meets each of the requirements of subsection 366.093(3), F.S., in that the information is controlled by PEF, is treated by PEF as private, the disclosure of the information would cause harm to both PEF and ultimately its ratepayers, and the information has not been publicly disclosed. PEF further states that the Affidavit also shows that the information meets the requirements of subsection 366.093(3)(e), F.S., in that it relates to PEF’s competitive interests and disclosure of the information would impair PEF’s competitive business interests.

PEF argues that the public disclosure of the detailed information on salary and other compensation on an employee-specific basis harms the company and its ratepayers in at least three ways. First, PEF competes for employees with other utilities and businesses both inside and outside Florida. These competitors could use the compensation information to improve their recruitment from PEF of experienced employees. The public disclosure of such information would lead to increased employee hiring and training costs resulting from increased employee turnover, or to a need to increase compensation to prevent such turnover. The end result would be an increase in the company’s costs that could adversely impact its business operations and increase rates. Second, public disclosure of the information would make it available to prospective employees, giving them an advantage in negotiating compensation packages, leading to increases in the overall amount of compensation paid to employees. This would adversely impact the company’s business operations and increase rates. Third, public disclosure of such information would make it available to current employees. If PEF’s employees were to learn the compensation of their colleagues, there would be a detrimental effect on its current employees that could lead to increased employee turnover, increased recruitment and training costs, increased labor costs, and lower employee morale and productivity.

PEF argues that Commission precedent on the protection of detailed compensation information is mixed and that such information has been protected in several Commission orders. PEF argues that in granting such protection, this Commission has stated that disclosure “would hamper the Company’s ability to negotiate compensation with new executives and other management personnel” and “would also enable competing employees to meet or beat the compensation paid and offered to be paid by the Company to its executives and other managers, or [result in] the payment of increased compensation for the purpose of retaining their services,

either of which would cause harm to the Company and its ratepayers.”<sup>3</sup> PEF argues that in the annual fuel docket, this Commission similarly granted confidential classification to the names and positions of Florida Power Company’s power marketing personnel and factors considered in their compensation, pursuant to subsection 366.093(3)(e), F.S.<sup>4</sup> PEF argues that the information at issue in its current Request is even more sensitive, since it contains detailed information on the compensation of specific employees, not merely the factors considered in their compensation.

PEF further argues that even when denying confidential classification to portions of a witness’s testimony related to “compensation levels and compensation plans” that Gulf Power Company considered to be confidential, this Commission was cognizant of the sensitive nature of the type of information at issue, and only denied the request because the information did not “reveal any specifics of compensation plans or compensation levels that would cause irreparable harm to Gulf’s competitive plans. Further, the information [was] given in total dollar amounts and percentages and [did] not reveal individual employees’ names, levels, incentive compensation, or bonuses which would be competitively sensitive or confidential in nature.”<sup>5</sup>

PEF recognizes that there are also Commission orders denying confidential classification to compensation information, but argues that those orders should be rejected. PEF points to Order No. PSC-07-0579-CFO-WS at 3,<sup>6</sup> in which this Commission ruled that subsection 367.156(3)(f), F.S., specifically excludes employee personnel information related to compensation from the statutory definition of proprietary business information, and that the information therefore must be treated as a public record pursuant to section 119.01, F.S.<sup>7</sup> PEF argues that the conclusion in that order, and in the orders denying confidentiality cited therein, is incorrect. PEF argues that subsection (3)(f) of the applicable statutes enables a utility to affirmatively protect employee personnel information unrelated to compensation, duties, qualifications, or responsibilities without the necessity for demonstrating that the information relates to competitive interests under subsection (3)(e). According to PEF, because of the exclusion in subsection (3)(f), the company bears the burden to make a higher showing of competitive impact in order to obtain protection for personnel information related to compensation, but nothing in the language or structure of the statute precludes such a showing. PEF argues that the general language of subsection (3) notes that proprietary confidential business information “is not limited to” the types of information enumerated in the following paragraphs. PEF argues that if the Legislature had wanted to explicitly provide that such compensation information would always be a matter of public record, it could have worded the

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<sup>3</sup> Order No. PSC-02-1755-CFO-GU at 5, issued December 12, 2002, in Docket No. 020384-GU, In Re: Petition for rate increase by Peoples Gas System.

<sup>4</sup> Order No. PSC-01-2528-CFO-EI at 2, 5, issued December 28, 2001, in Docket No. 010001-EI, In Re: Fuel and purchased power cost recovery clause.

<sup>5</sup> Order No. PSC-02-0235-CFO-EI at 2, issued February 25, 2002, in Docket No. 010949-EI, In Re: Request for rate increase by Gulf Power Company.

<sup>6</sup> Issued July 13, 2007, in Docket No. 060368-WS, In Re: Application for increase in water and wastewater rates in Alachua, Brevard, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities, Florida, Inc.

<sup>7</sup> PEF notes that this order involved a water and wastewater company, and hence the confidentiality provisions of Chapter 367, rather than Chapter 366. PEF further notes that except for their applicability to different types of utilities, the sections are identical in all material respects.

statute in such a way to make that clear. According to PEF, as the statute is worded, the requesting utility can still prove that the compensation information harms its competitive business interests under subsection 366.093(3)(e) or otherwise harms its ratepayers or business operations under the general language of subsection 366.093(3).

#### Sixth Request for Confidential Classification

By its Sixth Request for Confidential Classification, PEF requests confidential classification of certain numerical information contained within its Response to Staff's Eighteenth Set of Interrogatories (Nos. 197-198) (DN 07595-09). PEF's Response to Interrogatory Nos. 197 and 198 contains names, job titles, and compensation information, including base salaries, bonus, and other compensation for all employees of Progress Energy, Inc. and PEF whose total compensation exceeds \$165,000. PEF does not claim confidentiality for the names and job titles of these employees or for the total compensation paid to them as a group. PEF does claim confidentiality to the extent the information discloses the specific compensation paid to specific employees.

PEF's arguments for the confidential classification of this information are the same arguments that it raised in its Fifth Request for Confidential Classification, which are summarized above.

#### Analysis and Ruling

When a statute is clear and unambiguous, the courts will not look behind its plain language for legislative intent or resort to rules of statutory construction to ascertain intent.<sup>8</sup> Subsection 366.093(3), F.S., clearly and unambiguously defines what constitutes proprietary confidential business information. Pursuant to this subsection, proprietary confidential business information is information that 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 must not have been disclosed except under certain circumstances as defined therein. The statute further provides, in subsection 366.093(3)(a)-(f), that proprietary confidential business information includes, but is not limited to, six specific types of information. Subsection 366.093(3)(f) plainly states that proprietary confidential business information includes "[e]mployee 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 so 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

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<sup>8</sup> Daniels v. FDOH, 898 So. 2d 61, 64 (Fla. 2005).

confidential business information. The information at issue pertains to employee compensation. Therefore, we find it unnecessary to determine whether disclosure of the information would cause harm to PEF's ratepayers or to its business operations, regardless of the fact that PEF argues that it would cause such harm.

By Order No. PSC-07-0579-CFO-WS at 3, this Commission found that it "has repeatedly, with very few exceptions [including those cases cited by PEF], denied confidential classification for information relating to salaries, compensation, duties, qualifications, or responsibilities."<sup>9</sup> Also by Order No. PSC-07-0579-CFO-WS at 3, this Commission ruled that "[b]ecause the salary information at issue is employee personnel information related to compensation, and the legislature in section 367.156(3)(f) specifically excluded that category of information from the statutory definition of proprietary business information, the information must be treated as public record pursuant to section 119.01, Florida Statutes."

PEF argues that, because the general language of subsection 366.093(3) states that proprietary confidential business information "is not limited to" the types of information enumerated in the following paragraphs, the utility may prove that the compensation information harms its competitive business interests under subsection 366.093(3)(e) or otherwise harms its ratepayers or business operations under the general language of subsection 366.093(3), F.S. However, the language of 366.093(3)(f) 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.<sup>10</sup> Under this rule of statutory construction, if we were to determine that the general language of subsection 366.093(3) conflicted with the specific language of subsection 366.093(3)(f), the specific language of subsection 366.093(3)(f) would control over the general language of subsection 366.093(3). Therefore, PEF's argument would fail even if the rules of statutory construction were to apply in this instance.

PEF is also incorrect that, because of the exclusion in subsection (3)(f), the company bears the burden to make a higher showing of competitive impact in order to obtain protection for personnel information related to compensation, and that nothing in the language or structure of the statute precludes such a showing. Nothing in the language or structure of the statute permits such a showing. PEF is reading language into the statute that does not exist. We lack the power to construe an unambiguous statute in a way that would extend or modify its express terms or its reasonable and obvious implications, as to do so would be an abrogation of legislative power.<sup>11</sup> PEF further argues that if the Legislature had wanted to explicitly provide that such compensation information would always be a matter of public record, it could have worded the statute in such a way to make that clear. That is precisely what the Legislature did by enacting subsection 366.093(3)(f).

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<sup>9</sup> See Order No. PSC-07-0579-CFO-WS at 3, fn 2, for a string of citations to Commission orders denying confidential classification for such information.

<sup>10</sup> State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1073 (Fla. 2006).

<sup>11</sup> University of Florida, Bd. Of Trustees v. Sanal, 837 So. 2d 512, 516 (Fla. 1st DCA 2003).

For the foregoing reasons, we hereby deny the portion of PEF's Second Request for Confidential Classification pertaining to certain information provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2) (contained within, but not comprising all of DN 04092-09), PEF's Fifth Request for Confidential Classification for Portions of its Response to Interrogatory Nos. 123-124 from Staff's Tenth Set of Interrogatories (Nos. 123-126) (DN 07388-09), and PEF's Sixth Request for Confidential Classification for Portions of its Response to Staff's Eighteenth Set of Interrogatories (Nos. 197-198) (DN 07595-09). PEF shall provide in a publicly available manner, spreadsheets which, at a minimum, match the compensation information at issue to the specific job titles previously provided.

It is, therefore,

ORDERED by the Florida Public Service Commission that PEF's Second Request for Confidential Classification pertaining to certain information provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2) (contained within, but not comprising all of DN 04092-09), PEF's Fifth Request for Confidential Classification for Portions of its Response to Interrogatory Nos. 123-124 from Staff's Tenth Set of Interrogatories (Nos. 123-126) (DN 07388-09), and PEF's Sixth Request for Confidential Classification for Portions of its Response to Staff's Eighteenth Set of Interrogatories (Nos. 197-198) (DN 07595-09) are denied. PEF shall provide in a publicly available manner, spreadsheets which, at a minimum, match the compensation information at issue to the specific job titles previously provided. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 8th day of September, 2009.



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ANN COLE  
Commission Clerk

( S E A L )

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CONCURRENCE BY: COMMISSIONER SKOP

COMMISSIONER SKOP, concurring specially with a separate opinion:

The instant case arises from the failure of PEF 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. PEF advanced several legal arguments in opposition to providing the requested information. First, PEF argued that the compelled production of employee identifiable compensation information would violate the PEF Employee Intervenors' fundamental right of privacy afforded under Article I, Section 23 of the Florida Constitution. Second, PEF further asserted that the amount of compensation received by a specific PEF employee is irrelevant to the Commission's vested ratemaking authority and beyond the scope of the Commission's power to compel discovery. Third, PEF argued that competitively sensitive data linking particular employees to their compensation is entitled to protection pursuant to subsection 366.093(3)(e), Florida Statutes. Finally, PEF argued that even if the information sought by the Motion to Compel were relevant, PEF would be entitled to protection for such information under Rule 1.280(c), Florida Rules of Civil Procedure. Based upon the record evidence before the Commission, I find the PEF 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.<sup>12</sup> The fundamental right of privacy must be asserted by a natural person.<sup>13</sup> 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.<sup>14</sup> Furthermore, when seeking discovery necessary to perform a regulatory function, it is the purview of the Commission, not PEF, to determine what information is relevant.<sup>15</sup>

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<sup>12</sup> 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.")

<sup>13</sup> Id.; see also Sieniarecki 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).

<sup>14</sup> 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 PEF 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.

<sup>15</sup> Winfield, 477 So. 2d 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, the Motion to Compel only required PEF to produce the relevant compensation information for each individual job title or position having a total compensation level equal to or exceeding \$165,000. PEF was not required to produce the individual employee names in conjunction with their respective compensation. It further stands to reason that PEF employee compensation information ceases to become personal information when the individual is not specifically named in relation to their compensation, and that PEF employees do not have a reasonable expectation of privacy with respect to their job title or position.<sup>16</sup> Accordingly, the 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 PEF and the PEF Employee Intervenors thereby rendering the constitutional question moot.<sup>17</sup>

*The Requested Discovery is Relevant*

It suffices to say that employee compensation is a major component of PEF operating expenses and represents a significant component of PEF base rates. In order to determine whether the portion of an employee's compensation allocated to PEF is reasonable, the Commission must assess whether the total compensation for that employee is reasonable. Based upon the failure of PEF 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 PEF and Progress Energy affiliates. 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.<sup>18</sup>

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<sup>16</sup> PEF 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. PEF employees do not have a 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.

<sup>17</sup> 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.

<sup>18</sup> The requested discovery would become irrelevant only if PEF 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.<sup>19</sup> 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.

PEF 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 PEF argument would fail even if the rules of statutory construction were to apply in this instance.

PEF 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. PEF is incorrect. Subsection 366.093(3)(f), Florida Statutes, clearly and unambiguously excludes such information from the definition of proprietary confidential business information. Additionally, the Commission may not use a Florida Rule of Civil Procedure to impede the plain language and intent of a statutory provision enacted by the Florida legislature.<sup>20</sup> Furthermore, while the Commission clearly lacks

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<sup>19</sup> Daniels v. FDOH, 898 So. 2d 61, 64 (Fla. 2005).

<sup>20</sup> Accordingly, the Protective Order sought by PEF under Fla. R. Civ. P. 1.280(c)(7) was properly denied by the Commission.

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 need to safeguard competitively sensitive information.<sup>21</sup> In the instant case, the Commission properly exercised this discretion to the extent that it only required PEF to produce the relevant compensation information for each individual job title or position having a total compensation level equal to or 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 PEF operating expenses and impacts base rates. In articulating such a test, I would adopt the following guiding principals:

- Recognition of the fact that PEF 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 PEF to produce the relevant compensation information for each individual job title or position having a total compensation level equal to or 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.

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<sup>21</sup> 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.”).

- Narrowly tailoring the discovery request to respect the fundamental right of privacy afforded under Article I, Section 23 of the Florida Constitution.
- 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 PEF 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."<sup>22</sup> Based upon the record evidence before the Commission, the PEF 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.

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<sup>22</sup> 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.