

State of Florida



Public Service Commission

-M-E-M-O-R-A-N-D-U-M-

DATE: March 5, 2002
TO: Office of the General Counsel (Espinoza)
FROM: Division of Auditing and Safety (Freeman, Vandiver)
RE: Docket 010949-EI, Request for a Rate Increase by Gulf Power Company

Recommendation concerning Gulf Power Company's (Gulf Power's) request for confidential classification for an excerpt from the staff audit report and certain staff working papers obtained during the audit numbered 01-255-1-1, entitled "Gulf Power Rate Case Audit for the projected test year ended May 31, 2003", Documents Numbered 00295-02, 00296-02 and 01089-02.

On January 9, 2002, when the excerpt from the staff audit report and certain staff working papers obtained or prepared during the audit entitled "Gulf Power Rate Case Audit for the projected test year ended May 31, 2003" were delivered to Gulf Power at the audit exit conference, the utility requested that these materials be temporary excepted from public access in accordance with the provisions of Rule 25-22.006(3)(a)(2), Florida Administrative Code (FAC).

On January 9, 2002, staff filed document 00295-02 consisting of the working papers identified as sensitive at the audit exit conference and filed document 00296-02 consisting of parts of the audit report considered sensitive.

On January 29, 2002, the utility filed a request pursuant to Rule 25-22.006, FAC, and Sections 366.093(a)(b)(d) and (e), Florida Statutes (F.S.), that selected portions of the audit report and working papers prepared by staff during the audit receive confidential classification. The utility's request includes redacted copies for public inspection (Exhibit B, document 01088-02) and full and complete copies of this material with the sensitive information highlighted (document 01089-02).

On February 22, 2002, after discussions with the staff, Gulf Power reduced and revised its request (document 02132-02) to include associated clarification of the specific reasons as to why the material needed a confidential classification.

On March 5, 2002, because the reduced utility request no longer includes a provision to protect any part of staff's audit report, the Division of Auditing and Safety has requested return of document 00296-02 for inclusion in the Division's public files.

Pursuant to Section 119.07, F.S., documents submitted to this Commission are public records. The only exceptions to this rule are specific statutory exemptions and exemptions granted by governmental agencies to the specific items of a statutory provision. Section 366.093(a)(d) and (e), F.S., provides the following exemptions:

- AUS
CAF
CMP
COM
CTR
ECR
GCL
OPC
MMS
SEC
OTH

DOCUMENT NUMBER-DATE
02733 MAR-02
FPSC-COMMISSION CLERK

"Proprietary confidential business information means information, regardless of form or characteristics, 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. Proprietary confidential business information includes but is not limited to:

(a) Trade secrets....

(d) Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms.

(e) Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information...." (Section 366.093, F.S.)

According to Section 366.093, F.S., and Rule 25-22.006, FAC, Gulf has the burden of demonstrating that information and materials provided to the staff during the rate case audit qualify for confidential classification. According to Rule 25-22.006, FAC, the utility must meet this burden by demonstrating that the information is proprietary confidential business information, the disclosure of which will cause the utility, the provider of the information or the ratepayer harm.

Staff Analysis of the Request

Reading the Gulf Power filings reveals the sensitive audit materials consist of:

1. Coal contract information;

Gulf Power asserts working paper 9-7 reports specific provisions of one or more coal contracts concerning one or more coal suppliers, such that release of this information would impair Gulf's ability to contract for coal in the future and would also harm Gulf's competitive business. We have read this working paper and agree this material should be granted protection on the basis that the material is contractually and competitively sensitive as set out in Sections 366.093(d) and (e), F.S.

2. Other working papers obtained from Gulf Power's external auditor;

As part of the examination of Gulf Power's request for a rate increase, the PSC staff auditors have read the reports and supporting documents of Gulf's external auditor, Arthur Anderson. During the course of reading Arthur Anderson's work, the PSC staff obtained copies of selected notes of Arthur Anderson. These notes, included in the PSC staff auditor working papers, are commonly referred to as the working papers of the external auditor.

Gulf Power asserts trade secrets, sensitive competitive business information of Arthur Anderson, and sensitive competitive business information of Gulf Power are revealed in the working papers of Arthur Anderson.

Concerning the assertion that this material reports a trade secret, the request does not provide a specific explanation and evidence as to why these many working papers rise to the level of a trade secret. Nor does the utility filing cite any law, statute or administrative decision which provides that this type of bulk material rises to the level of a trade secret. Therefore, we recommend the material be denied a confidential status on the basis that the material is a trade secret as set out in Section 366.093(a), F.S.

Staff Analysis of the Request (continued)

Demonstrating that material is of a sensitive competitive nature is less rigorous than the burden to demonstrate that material is a trade secret. Several prior orders issued by the Florida Public Service Commission have granted confidential protection to the working papers of an external auditor because portions of external auditor's working papers are of a sensitive competitive nature. This rationale is well described in Order 25297, dated November 5, 1991, which found an external auditor's work program and strategy is sensitive competitive information because it allows the external auditor to compete with other accountants for clients in the marketplace.

We have read this material and agree it describes the competitive audit work program and strategies of the external auditor, and therefore we recommend the material be granted a confidential classification in accordance with Section 366.093(e), F.S.

Commission Order 25297 also recognizes working papers of the external auditor can contain information about the utility which does not reveal valuable audit strategy or work plan. Such general information must qualify for protection separately.

Gulf Power states its own competitively sensitive information is contained in the Arthur Anderson's working papers. Upon reading the material, we agree these working papers contain detailed business information about Gulf Power which is sensitive, has not been released to the public, and release of this information would harm Gulf Power's competitive business. We, therefore, recommend these working papers also be granted a confidential classification.

In conclusion, we recommend the identified external auditor's working papers be granted a confidential classification because the material qualifies under Section 366.093(e), F.S., as the competitively sensitive audit program and audit strategy of an external auditor and as sensitive competitive business information of Gulf Power. We recommend denial of Gulf's assertion the material qualifies for protection as a trade secret under the provisions of Section 366.093(a), F.S.

Staff Analysis of the Request (continued)

3. Tax returns and financial information taken from the 2000 calendar year tax returns.

Gulf Power asserts tax returns and information taken from tax returns provide a highly detailed and organized picture of Gulf's financial performance that is not otherwise available such that this information is competitively sensitive. Gulf Power reports this information qualifies for protection as sensitive competitive information pursuant to the provisions of Section 366.093(e), F.S., and in addition, Gulf Power asserts tax returns are protected from disclosure under federal law.

Federal Code Section 26, USC, 6103 provides, in pertinent part; "[U.S. tax] returns and return information shall be confidential...no officer or employee of any state...who has or had access to returns or return information ... shall disclose any return or return information obtained by him in any manner...."

Section 213.053, F.S., concerning State of Florida Corporate Income Tax returns provides "...information contained in returns, reports, accounts, or declarations received by the Department [of Revenue] , including investigative reports and information and including letters of technical advice is confidential...."

"Returns and return information" are generally understood to mean the "tax book" which would include the tax return itself as well as detailed schedules used to explain or prepare the return. Reading the material at issue here reveals it is return or return information and therefore is recommended for a confidential classification.

Duration of the Confidential Classification Period

Gulf Power requests protection of this information from public disclosure. The request does not specify how long the material should be protected. Rule 22.006(9), Florida Administrative Code, and Section 366.093(4), F.S., provide that the classification period be limited to 18 months unless good cause is shown why a longer period should be granted.

Without cause shown for a longer period, we recommend that the period of classification be set as 18 months. As deemed necessary, the utility may request an extension of the confidential classification before the period tolls.

Staff Recommendation, as found

For the reasons presented above, we recommend the utility's request be granted and that the identified material be granted a confidential classification for 18 months.

A detailed recommendation regarding the material, as found, follows:

Detailed Recommendation, as found:

Staff Work Paper Number(s)	Page(s)	Line(s)	Recommend	Type of Information Classified Confidential
Documents 00295-02 and 01089-02				
9-7	1	All	Grant	Contractually and competitively sensitive information.
9-16 through 9-50	35	All	Grant	Competitively sensitive information
9-52 through 9-66	15	All	Grant	Competitively sensitive information
9-73 through 9-74	2	All	Grant	Competitively sensitive information
9-76 through 9-80	5	All	Grant	Competitively sensitive information
9-88 through 9-100	13	All	Grant	Competitively sensitive information
54-1 through 54-58	58	All	Grant	Income tax returns and return information

A temporary copy of this recommendation will be held at I:01089-02.RAF for a short period.

CC: Division of Auditing and Safety (Deamer)
 Division of Commission Clerk and Administrative Services (Flynn)