



ORIGINAL

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

RECEIVED-FL-
07 MAY 25 AM 9:17
COMMISSION
CLERK

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

DATE: May 23, 2007

TO: Ralph Jaeger, Attorney, Office of General Counsel

FROM: Division of Regulatory Compliance and Consumer Affairs (Freeman, Vandiver)

RE: Docket 060253-WS, Recommendation concerning the request for confidential classification by Utilities Inc. & its Affiliates concerning staff's working papers prepared during the audit entitled "Utilities, Inc. Affiliate Transaction Investigation as of December 31, 2005", Audit Control No. 06-135-2-1, Documents Numbered 06381-06 and 07990-06

On July 15, 2006, at the audit exit conference, Utilities, Inc. of Florida requested that certain portions of staff's working papers prepared during the audit entitled "Utilities, Inc. Affiliate Transaction Investigation as of December 31, 2005", be held in a temporary confidential status in accordance with Rule 25-22.006(3)(a)2., Florida Administrative Code (FAC).

On July 20, 2006, staff filed those working papers with the Commission's Division of the Commission Clerk and Administrative Services (Document 06381-06).

On August 31, 2006, Utilities, Inc. & its Affiliates (collectively Utilities, Inc. or UI) filed its request for confidential classification for certain portions of the working papers pursuant to Section 367.156, Florida Statutes (F.S.), and Rule 25-22.006, FAC. Utilities, Inc.'s request included redacted copies of the materials for public use (Document 11262-06 filed December 2006) and copies of the materials with the sensitive portions highlighted (Document 07990-06 filed August 31, 2006).

On December 15, 2007, by a three page letter, Staff Attorney Ralph Jaeger advised Valerie Lord, Counsel for Utilities, Inc. that "...the utility has not justified and demonstrated that release of all the information contained within the 14 pages of financial information described ... would cause harm as required by Rule 25-22.006(4)(c) and (e), Florida Administrative Code..." This detailed letter also provided 21 days for the utility to respond to the specific deficiencies identified in the letter. Further, staff advised Utilities, Inc. that if the utility failed to respond to the letter, a recommendation would be presented to the hearing officer based upon the existing record. When the utility failed to respond to the letter, staff counsel followed up this matter twice by telephone with the utility and technical staff has followed up this matter once by telephone, but to date, the utility has not responded to staff's letter.

- CMP _____
- COM _____
- CTR _____
- ECR _____
- GCL _____
- OPC _____
- RCA _____
- SCR _____
- SCA _____
- SEC _____
- OTH _____

Arguier

Documents 06381-06 and 07990-06 are currently held by the Office of the Commission Clerk as confidential pending resolution of the Utilities, Inc. request for confidential classification.

DOCUMENT NUMBER-DATE

04302 MAY 25 06

FPSC-COMMISSION CLERK

May 23, 2007
Utilities, Inc.

Pursuant to Section 119.07, F.S., documents submitted to this Commission are public records. The only exceptions to this law are specific statutory exemptions and exemptions granted by governmental agencies pursuant to the specific items of a statutory provision. Subsections 366.156(3)(d) and (e), F.S., provide the following exemptions.

Subsection 367.156, F.S., provides; "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:

....

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

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

According to Section 367.156, F.S., and Rule 25-22.006, FAC, the utility has the burden of demonstrating that materials 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.

May 23, 2007
Utilities, Inc.

Staff Analysis of the Request

Background

Utilities, Inc. of Florida is a Commission-regulated water and wastewater utility company, which serves portions of 5 Florida counties and is 100% owned by Utilities, Inc. (parent). The parent company, Utilities, Inc., and certain affiliates allocate costs to the over 80 subsidiary companies in the group including Utilities, Inc. of Florida and several other Commission-regulated utilities. During 2006, rate increases were requested in Florida by the following systems which are all 100% owned by Utilities, Inc.:

Utilities Inc. of Florida	Mid-County Services, Inc.
Marion County System	Tierre Verde Utilities, Inc.
Orange County System	Lake Placid Utilities, Inc.
Pasco County System	Alafaya Utilities, Inc.
Pinellas County System	Cypress Lakes Utilities, Inc.
Seminole County System	Sanlando Utilities Corp.
	Utilities Inc. of Sandalhaven
	Labrador Utilities Inc.
	Utilities Inc. of Pennbrooke

The parent company, Utilities, Inc., is wholly owned by a third company. This “grandparent” was nvNuon, a Dutch company, and early in 2006, HydroStar LLC, bought nvNuon’s stock.

Timeliness

In this docket, the audit exit conference was held on July 15, 2006. Utilities, Inc. filed its request for a confidential classification on August 31, 2006. Rule 25-22.006(3)(a)2., FAC, provides that absent cause shown for failure to file a request for confidentiality more than 21 days after the audit exit conference constitutes a waiver of confidentiality. This filing appears to be late.

Explaining the reason for the late filing, the utility states: “Since the beginning of the year, UI and its affiliates have filed 14 rate proceedings in the State of Florida alone. In the course of assisting Staff in conducting this audit, correcting deficiencies and responding to data requests, UI inadvertently overlooked the filing of this Request for Confidential Classification within the 21 days provided by the rule. The delay in filing this Request for Confidential Classification was the result of an oversight during a period of time when UI was experiencing an overwhelming amount of activity. The period of delay is not significant. Allowing filing at this time will not impair the rights of any interested person.”

The recommendation concerning if a filing is timely is the responsibility of the Office of the General Counsel. Technical staff has no objection to considering the filing timely.

May 23, 2007
Utilities, Inc.

General Matters Argued by Utilities Inc.

In its pleading for a confidential classification, Utilities, Inc. questions the fairness and relevancy of materials obtained or prepared by the commission's audit staff in testing the utility's assertions.

Further Utilities, Inc. seems to question the Commission's need to release records to the public claiming that the utility treats this material as confidential and privileged, and, outside of this proceeding, the courts would likewise treat the information as confidential and privileged.

Staff asserts the material it obtained during this audit is appropriate, fair and relevant to this case.

Appropriateness and Relevancy

Section 367.156(1), F.S., provides the Commission may have reasonable access to the records of the utility's parent and affiliate companies to test transactions and allocations affecting the utility. Corporate costs of the parent and affiliate companies were allocated to the 14 Florida systems that asked for rate increases. Information concerning the allocated costs were agreed to balances reported within consolidated financial information and traced to the companies' requests for rate increases. During the review of parent and affiliate cost allocations, staff identified certain allocated costs which are out of period and reduced the need for increased rates charged to the Florida ratepayer. In addition, debt and equity levels used in the 14 rate cases were established based upon information reported within the consolidated financial statements. Lastly, Staff examined Utilities, Inc. representations made to its external auditor during the financial audit of the year ended December 31, 2005 and retained this material. The year 2005 was used in the 14 rate case filings.

Fairness

Audit staff investigations of utility assertions are requested by the commission staff for all rate cases. Utilities, Inc. has not been singled out or treated differently in any way during the staff investigation. Audit staff is considered neutral during these matters. The documents obtained from Utilities, Inc. were obtained based upon the need to gather evidence to test assertions in the 14 rate cases.

May 23, 2007
Utilities, Inc.

Public Records Requirements for the Florida Public Service Commission

Information filed with this Commission without a Notice that the material is confidential cannot later be claimed as confidential. Excluding the rarely-used Commission inquiry, there are two main ways to Notice the Commission that confidential materials are filed. These methods are described in Rule 25-22.006(3), FAC.

The custodian of confidential information held by the Florida Public Service Commission is the Commission Clerk. Once material is held in a Noticed confidential status by the Clerk, these materials are held closely and are individually tracked until they are destroyed or declassified. In the case of materials merely provided to the staff without a confidential Notice, these materials are held as public record and the information may be used in the public recommendations by the staff, or placed in the public docket files maintained by the Clerk; and the materials may be released publicly.

Florida Law presumes that records submitted to government agencies shall be public records. The only exemption to this presumption are the specific statutory exemptions provided in the law and exemptions granted by government agencies pursuant to the specific terms of a statutory provision. This provision is based upon the presumption that government should operate in the "sunshine."

Confidential and privileged, but for use in this proceeding

The utility claims that sensitive financial information in its filing is otherwise considered confidential and privileged in the courts. However, the utility does not provide any further specific explanation or justification of why this situation pertains here. Nor does the utility provide a previous administrative decision of this Commission supporting the position that this type of material should be granted a confidential classification

As described in Section 367.156(3), F.S., for the Commission to grant a confidential classification, the material must not have been previously 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. Further according to Section 367.156(3), F.S., before specified material may be granted a confidential classification, it must meet the specific terms of a statutory provision granting the exemption. The burden of proof is the responsibility of the utility.

Staff recommendation regarding the utility's arguments concerning general matters

Staff recommends that the Commission find that the utility's general arguments have not proven their case to keep this information confidential and recommends that the Commission consider the provisions of Section 367.156(1), F.S., and find that the sensitive materials obtained in support of staff's comments and conclusions are appropriate, fair and relevant to this case. Further staff recommends that the Commission find that if the material is to be granted a confidential classification, the utility must prove the sensitive material meets the requirements of Section 367.156(3), F.S., and Rule 25-22.006(4)(c) and (e), FAC.

May 23, 2007
Utilities, Inc.

Listing of Sensitive Information

Reading the filing reveals the sensitive information pertains to:

A.) Portions of a Management Representation Letter

Section 367.156(3)(e), F.S. provides that the Commission may grant a confidential classification to sensitive competitive business information if release of that information would harm competitive business of the provider of that information.

Utilities, Inc., argues that release of portions of the management representation letter sent to its auditors would harm the ability of Utilities, Inc. to contract for goods and services in the future. We do not agree with this assertion. However, we do recommend that this material be granted a confidential classification on the basis that the material is sensitive competitive business information.

During the course of an audit conducted according to Generally Accepted Auditing Standards, the company being audited sends a letter to its auditor describing management actions and conduct during the period under audit. This letter is called a Management Representation Letter. Of the many representations made by a company, a representation may reflect the proprietary audit strategy and work plan of the auditor. Here, UI makes such a proprietary representation in this management letter to its auditor, release of which would harm the competitive business of the auditor. See Commission Order 25297, issued November 5, 1991, in Docket 890190-TL.

After reading the material requested for confidential treatment here, we recommend the material be granted a confidential classification according to the provisions of Section 367.156(3)(e), F.S., because this information is sensitive competitive business information the release of which would cause harm to the competitive business of the utility's external financial auditor.

May 23, 2007
Utilities, Inc.

B.) Portions of a 401(k) audit engagement letter

Section 367.156(3), F.S., in defining “proprietary confidential business information” provides: that the information has not been disclosed to the public.

An audit engagement letter is a contract executed between the external auditor and its client (the utility). The information identified here is part of the public record and is therefore not eligible for a confidential classification. Information filed with this Commission without a Notice that it is confidential cannot later be claimed as confidential.

Utilities, Inc., supplied this information to Commission staff without a Notice that the information is confidential. As a public record, this information was communicated among the staff and the material has been communicated publicly.

Florida law presumes that documents submitted to governmental entities shall be public records. The only exceptions to this presumption are the statutory exemptions provided in the law and exceptions granted by governmental agencies pursuant to the specific terms of a statutory provision. This presumption is based on the concept that government should operate in the “sunshine.” Rule 25-22.006(4)(c), FAC, provides that if the Commission is to grant a confidential classification to information submitted, then this information must fall into one of the statutory examples set out in section 367.156, Florida Statutes, or to demonstrate that the information is proprietary confidential information, the disclosure of which will cause the company or its ratepayers harm.

Section 367.156(3) Florida Statutes, in pertinent part, provides: “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....” See Commission Order PSC-05-0353-CFO-TP, issued April 1 , 2005 in Docket No. 040732.

May 23, 2007
Utilities, Inc.

C.) Audited Consolidated Financial Statements

Utilities, Inc. requests that its audited consolidated financial statements be granted a confidential classification for the following general and specific reasons:

Generally, concerning Audited Consolidated Financial Statements

- 1) Utilities, Inc., is not publicly traded, and otherwise, these financial statements would not be released to the public.
- 2) Utilities, Inc. treats this information as confidential and privileged, and but for the use in this proceeding, the courts would treat the information as confidential and privileged.
- 3.) It is unfair to release sensitive information which is irrelevant and has no impact on this proceeding.

Staff discussed the utility's 3 general concerns above, and recommends that the Commission find that the sensitive material obtained during the staff investigation is appropriate, fair and relevant. Further staff recommends that the Commission find that if the material is to be granted a confidential classification, the utility must prove the sensitive material meets the requirements of Section 367.156(3), F.S., and Rule 25-22.006(4)(c) and (e), FAC.

Staff Issue -- Audited Consolidated Financial Statements are Publicly Disclosed

The utility's audited consolidated financial statements were provided to the staff without a Notice that the material was confidential. Subsequently, this material has been discussed among the staff without the benefit of a confidential classification and extracts from this document have been disclosed publicly.

Because the consolidated financial statements were publicly disclosed, they cannot qualify for a confidential classification.

Specific Exemptions Requested by the Utility concerning its Audited Consolidated Financial Statements

- 4.) The Audited Consolidated Financial Statements are competitively sensitive.

Section 367.156(3)(e), F.S., provides the Commission may grant a confidential classification to sensitive competitive business information release of which would impair the competitive business of the provider of that information.

The utility asserts the information contained in all 14 pages of management's financial statements would provide other buyers and sellers competitively sensitive information regarding the sales price at which Utilities, Inc. would sell a system and insight into a what price Utilities, Inc. would be willing to pay to acquire a new system.

May 23, 2007
Utilities, Inc.

The Commission requires that any request for a confidential classification specify the location of the sensitive information by page and line (Rule 25-22.006(4)(c), FAC) (Also see Commission Order No. PSC-94-0391-CFO-WS, issued July 11, 1994, in docket No. 921261-WS). We found that the utility did not separately identify any of the information in its financial statements, but instead requested that the entire 14 pages of its financial statements be granted a confidential classification.

Financial statements typically consist of summarized and itemized reports such as a Balance Sheet, Income Statement, Statement of Cash Flows, and perhaps a Statement of Changes in Retained Earnings, and since the statements are audited, the materials include Notes to the Financial Statements. In these 14 pages of material, all of it is claimed to cause competitive or contractual harm if it is released.

Staff does not agree with the utility's assertion that release of its consolidated financial statements would harm the utility's ability to buy or sell utility systems in the future. Prudent buyers of a business would seek full financial information about the business they are about to buy. In the case where Utilities, Inc., was selling a system, the company would be expected to furnish financial information to the buyer. Without cooperation between the two parties, a prudent sales price could not be reached.

In the case where Utilities, Inc. is seeking to buy a utility system, there is a wealth of information concerning the sale and purchase of hundreds of utility systems in the Florida jurisdiction alone. Public information in Florida is also available concerning the income statement, or rate base, or balance sheet of a utility system. This type of summary financial information becomes typically available each time a system is sold, each time a rate request is heard, and each time an annual report is filed. Also public is that Utilities, Inc. operates over 80 utilities. In the 14 rate cases being processed in 2005, it is public record that Utilities, Inc. was allowed to secure over \$1,000,000 in interim rates through a corporate undertaking. Simply put, Utilities, Inc., was considered sufficiently sound to post a very large refund if final rates were less than expected.

In the private market place, a prudent buyer of a non utility business would also request financial information from the seller before purchasing that business. A prudent seller of a non utility business could draw its own judgments concerning a buyer that operates 80 utility systems in 17 states that was allowed a \$1,000,000 corporate undertaking in lieu of a performance bond.

Because of the fact that financial information would be exchanged in the prudent purchase of any business, and because of the large amount of information already public and the lack of justification supporting the utility's case, we recommend that the Commission find that this utility has not proven its case that release of its financial statements would cause competitive harm.

May 23, 2007
Utilities, Inc.

5.) The Audited Consolidated Financial Statements are contractually sensitive;

The utility argues that release of its audited consolidated financial statements would harm the ability of Utilities, Inc. to contract favorably both locally and on a national basis.

Financial information in consolidated financial statements is highly summarized. Financial transactions are summed up into cost categories called double entry accounts, and then the cost categories for each entity in the consolidated group are summed to reach consolidated balances. After necessary adjustments are made to the consolidated balances, required notes to the statements are prepared. As a result of this high degree of summarization, it is difficult to determine which detailed transactions make up the reported balances in the statements. It is speculative to assume that release of this summarized general information provides enough detail of the underlying transactions to impair the ability of a company to fairly contract for goods and services in the open marketplace.

Each year, 15,000 to 17,000 public companies file public financial statements with the U.S. Securities and Exchange Commission (SEC). If the mere filing of financial statements caused competitive or contractual impairment, this long-term SEC policy would not exist or persist. Here at the Commission, there are a number of rate-regulated companies that regularly file audited financial statements and have done so for a number of years. In the Water and Wastewater industry, a large number of rate-regulated companies file detailed annual reports each year, and there are no reported and demonstrated instances of competitive or contractual harm due to the mere filing of these reports.

Staff Issue -- Financial Statements of Telecommunications Companies

The Commission has not previously taken up the question of whether audited consolidated financial statements pertaining to a rate-regulated utility are confidential.

The Commission has determined that the audited financial statements of telecommunications companies qualify for a confidential classification. These telecommunications companies operate in a fully competitive market where technological innovations are present and customers may readily replace the provider of his or her telecommunications service. In a fully competitive market like the telecommunications industry, information regarding gain or loss of competitive market share and profitability margins are extremely sensitive. Telecommunications industry information is so sensitive the Commission has adopted Rule 25-22.006(5), FAC, titled "Claim of Confidential Treatment" granting special provisions in processing telecommunications information. Similar provisions do not exist in other industries.

In a rate-regulated industry, technological innovations have not provided competitive options of the customers to switch their water or wastewater service company; therefore, it is technical staff's opinion that the release of general financial information from a water and wastewater utility should not be considered to cause competitive or contractual harm, and the utility has not provided any justification to the contrary.

May 23, 2007
Utilities, Inc.

Recommendation regarding granting a confidential classification to audited financial statements

We recommend that the Commission find:

Pursuant to Section 367.156(1), F. S., the material gathered and retained during staff's investigation of the utility's rate case assertions was appropriate, fair and relevant.

Utilities, Inc. provided its audited consolidated financial statements to the staff without a Notice that the material was confidential, and the material without the benefit of a confidential classification was subsequently used and publicly released. Since the material has been publicly released, therefore according to Section 367.156(3), F.S., the material does meet the definition of materials that qualify for a confidential classification.

Audited consolidated financial statements are highly summarized. At the Securities and Exchange Commission, thousands of audited consolidated financial statements are public, and within the rate-regulated water and sewer industry, release of financial information is routine. Absent demonstrated extraordinary circumstances, it does not appear that the mere release of consolidated financial statements causes competitive or contractual harm.

Financial information is expected to be readily exchanged between the prudent buyer and seller in all different types of industries when purchasing or selling a business entity. Once again, absent an extraordinary circumstance, it does not appear that the mere release of consolidated financial statements causes competitive or contractual harm concerning the purchase or sale of a rate-regulated utility company or a general business enterprise.

Financial statements of rate-regulated companies are less sensitive than the financial statements of telecommunications companies which operate in extraordinarily competitive markets.

In conclusion, these audited consolidated financial statements were provided to and used by the staff without a proper Notice that the information was confidential. Such information is considered public record and does not qualify for a confidential classification.

Furthermore, the utility did not meet their burden of proof required for the entire 14 pages of financial statements to be granted a confidential classification absent a compelling justification to do so.

Information Held as Confidential

To qualify as proprietary confidential business information, the material must also be held as private and not released to the public. For two of the three documents considered here, Utilities, Inc. has provided this information to the Commission staff without a Notice that the information was confidential. These two documents do not qualify for a confidential classification; they are considered public.

May 23, 2007
Utilities, Inc.

Duration of the Confidential Classification Period

Utilities, Inc., has not specified how long any confidential classification should last. According to the provisions of subsection 367.156(4), F.S., absent good cause shown, confidential classification is limited to 18 months. Without cause shown for a longer period, and for material recommended for confidential treatment, the classification period should be set as 18 months. As deemed necessary, the utility may request an extension of the confidential classification before the period tolls.

Summary Staff Recommendation

As discussed above, we recommend that staff's processing and access to the utility's financial records be found to be authorized by the provisions of Section 367.156(1), Florida Statutes, and further, gathering the information was appropriate, fair and relevant. Specifically, the information obtained by the auditor at issue here is;

Management's Representation Letter provided to its External Auditor,

External Auditor's Engagement Letter, and

Audited Consolidated Financial Statements.

As discussed above, we recommend that portions of the management representation letter should be granted a confidential classification because release of this sensitive information would harm the competitive business of the utility's external auditor.

As discussed above, we recommend that a confidential classification of portions of the 401(k) audit engagement letter be denied because the information is public.

As discussed above, we recommend that a confidential classification be denied for the audited consolidated financial statements (1) because the information was provided without a Notice that it was confidential and therefore the information is considered to be publicly released and (2) because the utility did not demonstrate and justify why the entire 14 pages of the audited financial statements should be considered "proprietary confidential business information" the release of which would cause harm as defined in Section 367.156(3), F.S. Nor did the utility attempt to identify any specific portions by page and line within the financial statements which qualify for a confidential classification. The utility must demonstrate and justify which materials by page and line are qualified for a confidential classification and it did not do so.

Detailed Recommendations

Working Paper Number	Description	Page(s)	Line(s)	Recommend 18 Months Classification	Type of Information Classified Confidential
Documents 07990-06-06 and 08499-06					
WP 31-4	Management Representation Letter	1	1	Grant	Sensitive competitive business information
WP 48-7/6	401(k) audit engagement letter	4	1	Deny	Fails to qualify, information is public record
WP 31-4	Audited Financial Statements	3-16	All	Deny	Fails to qualify, information is public record. Fails to qualify, information was not demonstrated and justified to qualify for a confidential classification on the basis that the material was contractually or competitively sensitive.

A temporary copy of this recommendation is held at file: I:07990-06. affiliate util inc raf.doc

CC: Division of Regulatory Compliance and Consumer Affairs (Welch, Rohrbacher)
 Division of Commission Clerk and Administrative Services (Cole, Lockard)