

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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IN RE:  
PETITION FOR INCREASE IN RATES  
BY PROGRESS ENERGY FLORIDA, INC.

Docket No. 090079-EI  
Submitted for filing: July 21, 2009

**PEF'S 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**

Progress Energy Florida, Inc. ("PEF" or the "Company"), pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006(3), Florida Administrative Code, hereby requests confidential classification for portions of the response to the Public Service Commission's Staff's ("Staff") Tenth Set of Interrogatories (Nos. 123-26). PEF further asks that this confidentiality request be considered by the full Commission concurrently with the consideration of similar requests by Florida Power and Light Company ("FPL") and Tampa Electric Company ("TECO") for protection of similar information owned or controlled by those companies. In support thereof, PEF states as follows:

**REQUEST FOR CONFIDENTIAL CLASSIFICATION**

Pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006(3), Florida Administrative Code, PEF hereby requests confidential classification of the information described below. PEF filed its First Notice of Intent to Request Confidential Classification for

\_\_\_\_\_ this information on June 29, 2009. Pursuant to Rule 25-22.006(3)(a), Florida Administrative Code, this request is timely.

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## The Information

PEF's confidential response to Staff's Interrogatories Nos. 123 and 124 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 \$200,000.<sup>1</sup> PEF does not claim confidentiality for the names and job titles of such individuals or for the total compensation paid to such individuals as a group. PEF claims confidentiality only to the extent the information discloses the specific compensation paid to specific employees.

## The Statute

Section 366.093(1), Florida Statutes, provides that “any records received by the commission which are shown and found by the commission to be proprietary confidential business information shall be kept confidential and shall be exempt from [the Public Records Act].”

Section 366.093(3) provides in pertinent part that:

Proprietary confidential business information means information... which is [i] owned or controlled by the person or company, [ii] is intended to be and is treated by the person or company as private [iii] in that disclosure of the information would cause harm to the ratepayers or to the person's or company's business operations, and [iv] 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.

Under Section 366.093(3), such proprietary confidential business information includes, *but is not limited to*, six specific categories of information. The two specific categories pertinent to the analysis of PEF's claim of confidentiality are:

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<sup>1</sup> A subsequent interrogatory, to which a response is due on July 24, 2009, requests similar information for all employees earning \$165,000 or more. PEF will seek similar confidential treatment when such response is filed.

(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.

It is important to note that protection under Section 366.093(3) is *not* limited to information that falls into one of the six categories enumerated in paragraphs (a) to (f). Protection is available to any information that meets the general definition in that section.

### **Basis for Claim of Confidentiality**

PEF claims confidentiality for information that would disclose the compensation of specific employees under both the general language of Section 366.093(3) and particularly under Section 366.093(3)(e). As discussed below, the fact that such information would not qualify for protection under subsection (3)(f) related to employee personnel information does not make it ineligible for protection under these other provisions.

The attached Affidavit of Masceo S. DesChamps, the Director of Compensation and Benefits for Progress Energy Service Company (“Affidavit”) is incorporated herein by reference. The Affidavit demonstrates that the information for which PEF claims confidentiality meets each of the requirements of Section 366.093(3): (i) the information is controlled by Progress, (ii) it is treated by the Company as private, (iii) disclosure of the information would cause harm to both the Company and ultimately its ratepayers, and (iv) the information has not been publicly disclosed. In addition, as shown by the Affidavit and discussed in more detail below, the information also meets the specific requirements of Section 366.093(3)(e) in that it relates to PEF’s competitive interests and disclosure of the information would impair PEF’s competitive business interests.

The issue the Commission must determine in ruling on this request is whether public disclosure of individual compensation information for specific employees would cause harm to either the ratepayers or to the Company's business operations under Section 366.093(3). This can be harm to the Company's competitive business interests under Section 366.093(3)(e), or harm its business operations and ratepayers under the overall definition of proprietary confidential business information.

**Effect of Disclosure on Business Operations, Ratepayers and Competitive Interests**

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 distinct ways. First, public disclosure of the information would make it available to other utilities and businesses with which the Company competes for acquiring and retaining qualified executives, managers and employees. 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. This could severely impact the Company's ability to retain qualified employees and would make it more difficult to compete with other businesses, particularly those that do not disclose such competitively valuable information. 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 the Company's business operations and increase the rates paid by PEF's ratepayers. *See* Affidavit, ¶5.

Second, public disclosure of the information would make it available to prospective employees. This would give such individuals an advantage in negotiating compensation

packages, leading to increases in the overall amount of compensation paid to employees. As above, this would adversely impact the Company's business operations and increase the rates paid by PEF's ratepayers. *See* Affidavit, ¶6.

Third, public disclosure of such information would make it available to current employees. As explained in more detail in the Affidavit, ¶7, such disclosure would be detrimental to PEF's business operations, particularly its ability to retain key employees and to maintain the efficient incentive pay system that the Company currently uses. If PEF's employees were to learn the compensation of their colleagues, there would be a detrimental effect on PEF's current employees, which could lead to increased employee turnover, increased recruitment and training costs, increased labor costs, and lower employee morale and productivity. Any of these results has an adverse impact on the Company's business operations, its competitive interests, and ultimately its ratepayers.

### **Commission Precedent**

The Commission precedent on the protection of detailed compensation information is mixed. Such information has been protected in several Commission orders. In granting such protection to information showing compensation by job title, both for the company and the market at large, the Commission stated that disclosure "would hamper the Company's ability to negotiate compensation with new executives and other management personnel" and "would also enable competing employers 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 purposes of retaining their services, either of which would cause harm to the Company and its ratepayers." *In re: Petition for rate increase by Peoples Gas System*, Docket No. 020384-GU, Order No. PSC-02-1755-CFO-GU at 5 (December 12, 2002). As demonstrated

by the Affidavit, these same potential impacts on business operations underlie PEF's current confidentiality request.

In the annual fuel docket, the Commission similarly granted confidential classification to the "otherwise unavailable knowledge regarding the names and positions of [FPC's power marketing] traders and factors considered in their compensation." As PEF now contends, FPC argued that such knowledge "would impair FPC's competitive interests in retaining its skilled power marketing personnel and in protecting its investment of time, money and resources for the training of such personnel . . . ." The Commission agreed with that assessment, granting the information confidentiality pursuant to Section 366.093(3)(e) as "information relating to competitive business interests, the disclosure of which would impair the competitive business of the provider of the information." *In re: Fuel and purchased power cost recovery clause*, Docket No. 010001-EI, Order No. PSC-01-2528-CFO-EI at 2, 5 (December 28, 2001). The information at issue in PEF's current request for confidentiality is even more sensitive, since it contains detailed information on the compensation of specific employees, not merely the factors considered in their compensation.

Even when *denying* confidential classification to portions of a witness's testimony related to "compensation levels and compensation plans" which Gulf Power Company considered to be confidential, this Commission stated:

The requested confidential information found on the specified pages of [the witness's testimony and exhibit] does not reveal any specifics of compensation plans or compensation levels that would cause irreparable harm to Gulf's competitive plans. *Further, the information is given in total dollar amounts and percentages and does not reveal individual employees' names, levels, incentive compensation, or bonuses which would be competitively sensitive or confidential in nature.* Finally, the total dollar amounts and percentages do not explain or reveal the management goals or the compensation plans and should not be regarded as trade secrets.

*In re: Request for Rate Increase by Gulf Power Company*, Docket No. 010949-EI, Order No. PSC-02-0235-CFO-EI at 2 (February 25, 2002) (emphasis supplied). It is clear from this passage that the Commission was cognizant of the sensitive nature of the type of information at issue in this request, and was only denying Gulf Power's request because the requested information *did not* include the specific, detailed information Staff has obtained from PEF.

**Section 366.093(3)(f) Does Not Prohibit Protection**

PEF recognizes that there are also Commission orders that deny confidential classification to compensation information, but those orders should be rejected for the following reasons. In a 2007 order denying confidential classification to a schedule showing base pay and overtime for water and wastewater company employees, the Commission ruled that Section 367.156(3)(f) 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, Florida Statutes.<sup>2</sup> *In re: Application for increase in water and wastewater rates by Aqua Utilities, Florida, Inc.*, Docket No. 060368-WS, Order No. PSC-07-0579-CFO-WS at 3 (July 13, 2007).

PEF respectfully submits that the conclusion in this order, and the other orders denying confidentiality cited therein, is incorrect. 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). Because of the exclusion in subsection (3)(f), the company bears the burden to make a higher showing of competitive impact

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<sup>2</sup> This order involved a water and wastewater company, and hence the confidentiality provisions of Chapter 367, rather than Chapter 366. Except for their applicability to different types of utilities, the sections are identical in all material respects.

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. Indeed, 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. 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. However, as the statute is worded, the requesting utility can still prove that the compensation information harms its competitive business interests under Section 366.093(3)(e) or otherwise harms its ratepayers or business operations under the general language of Section 366.093(3).

PEF has made the requisite showing of competitive impact and therefore requests that the Commission grant confidential classification to its employee-specific compensation information.

### **Conclusion**

The competitive, confidential information at issue in this request fits the statutory definition of proprietary confidential business information under Section 366.093, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, and that information should be afforded confidential classification. The Company regards such information as private and at no time has the Company publicly disclosed that information.

In support of this request, PEF has enclosed the following:

(1) A separate, sealed envelope containing a CD of the confidential Attachment A to PEF’s Request for Confidential Classification for which PEF has requested confidential classification with the appropriate section, pages, or lines containing the confidential information highlighted. **This information should be accorded confidential treatment pending a decision on PEF’s request by the Florida Public Service Commission;**



(2) Two copies of the documents with the information for which PEF has requested confidential classification redacted by section, page or lines, where appropriate, as Attachment B; and,

(3) A justification matrix supporting PEF's Request for Confidential Classification of the highlighted information contained in confidential Attachment A, as Attachment C.

WHEREFORE, PEF respectfully requests that the confidential and proprietary business information produced in response to Staff's Tenth Set of Interrogatories be classified as confidential for the reasons set forth above.

#### **REQUEST FOR CONSIDERATION BY FULL COMMISSION**

Rule 25-22.006(3)(c), F.A.C., states that requests for confidential classification shall be ruled on by the Prehearing Officer assigned to the docket and, if the request is outside a docketed proceeding, the request itself will be docketed. PEF understands that FPL has responded to a comparable discovery request for compensation information in Docket No. 080677-EI and that TECO has responded to a comparable request outside of a docketed proceeding. PEF further understands that both FPL and TECO will be filing requests for confidential classification of their respective information. There are different prehearing officers assigned to the PEF and FPL rate cases, and a third Commissioner could be assigned to the docket established to process TECO's confidentiality request. These circumstances give rise to the possibility of differing rulings on identical issues. Because such rulings are subject to review by the full Commission under a deferential reconsideration standard, it is possible that different results might apply even after reconsideration by the full Commission.

Because of the similarity of the issues, and to promote administrative efficiency and consistency of results, PEF respectfully requests that the Prehearing Officer refer this matter to

the full Commission for initial consideration and that the Commission simultaneously hear the requests of all three utilities. If this request is granted, and the matters are heard at an agenda conference, PEF intends to participate at the agenda to present its arguments pursuant to Rule 25-22.0021(2), F.A.C

WHEREFORE, PEF requests that the prehearing officer refer its request for confidential classification to the full Commission for initial consideration, and that the Commission simultaneously hear the requests of PEF, FPL and TECO for protection of their respective compensation information.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of July, 2009.

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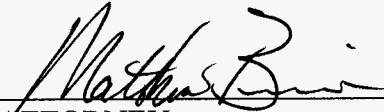
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic and U.S. Mail to the following counsel of record as indicated below on this 21st day of July, 2009.

  
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# Public Service Commission

## ACKNOWLEDGEMENT

DATE: July 21, 2009

TO: Michael Walls, Carlton Fields Law Firm

FROM: Ruth Nettles, Office of Commission Clerk

RE: Acknowledgement of Receipt of Confidential Filing

This will acknowledge receipt of a CONFIDENTIAL DOCUMENT filed in Docket Number 090079 or, if filed in an undocketed matter, concerning portions of responses to staff's 10<sup>th</sup> set of Interrogatories (Nos. <sup>126</sup>123-26), and filed on behalf of Progress Energy. The document will be maintained in locked storage.

If you have any questions regarding this document, please contact Marguerite Lockard, Deputy Clerk, at (850) 413-6770.

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