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-09-0613-PCO-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 GRANTING MOTION FOR ORDER COMPELLING RESPONSES TO INTERROGATORIES AND DENYING MOTION FOR PROTECTIVE ORDER AND CONDITIONAL MOTION FOR STAY

BY THE COMMISSION:

Background

Our staff has sought discovery concerning executive compensation in this rate case, ultimately seeking compensation information for the executives of Progress Energy Florida, Inc. (PEF or company) whose total compensation exceeds $165,000. On August 6, 2009, staff filed a Motion for Order Compelling Responses to Interrogatories (Motion to Compel), requesting that we compel PEF to fully respond to the discovery requests within seven days, and requesting that the company file its response to the Motion to Compel no later than noon on Monday, August 10, 2009. PEF filed its and its employee intervenors' Response to Motion to Compel, Motion for Protective Order, and Conditional Motion for Stay on August 10, 2009.

At issue are Interrogatory Nos. 123-126 from Staff's Tenth Set of Interrogatories to PEF, and Interrogatory Nos. 197-198 from Staff's Eighteenth Set of Interrogatories to PEF. We have jurisdiction pursuant to sections 120.569 and 120.57, Florida Statutes (F.S.), and Rule 28-106.211, Florida Administrative Code (F.A.C.).

Staff's Motion to Compel

Staff served its Tenth Set of Interrogatories (Nos. 123-126) upon PEF on May 28, 2009. PEF did not file any objections to those interrogatories and served its responses to them on June 25, 2009. By Interrogatory Nos. 123 and 124, staff requested that PEF provide the following information for each employee of Progress Energy, Inc., (Interrogatory No. 123) and PEF (Interrogatory No. 124) whose total compensation during 2008, 2009, and 2010, is $200,000 or greater:

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

By Interrogatory Nos. 125 and 126, staff requested that PEF provide the following information for each director of Progress Energy, Inc., (Interrogatory No. 125) and PEF (Interrogatory No. 126) whose total compensation during 2008, 2009, and 2010, is $200,000 or greater:

a. Name/Title
b. Principal Business Affiliation
c. Base Compensation
d. Travel
e. All Other Compensation
f. Total Compensation
g. Amount of Total Compensation Allocated to Progress Energy Florida, Inc.
h. Amount of Total Compensation Included in Adjusted Jurisdictional Other O&M Expenses on MFR Schedule C-1, Pages 1, 2 and 3.

Staff argues that PEF's responses to Interrogatory Nos. 123, 124, 125, and 126 were evasive or incomplete as follows:

1. The responses to Interrogatory Nos. 123 a), 124 a), 125 a), and 126 a) (Name/Title for each officer and director) need to be matched by line number with the compensation dollar amounts provided in the responses to Interrogatory Nos. 123 a) through k), 124 a) through k), 125 a) through h), and 126 a) through h). Although they appear to be matched by line number, the Name/Title responses and the compensation dollar amount responses are on different pages, and there is no statement that these Names/Titles and dollar amounts do match.

2. The responses to Interrogatory Nos. 123 k), 124 k), 125 h), and 126 h) do not identify the compensation amount included in "Adjusted Jurisdictional Other O&M Expenses" on MFR Schedule C-1, Pages 1, 2, and 3. It would be acceptable for PEF to provide all worksheets showing how the total included in O&M expense was calculated along with the assumptions made and an explanation of how the assumptions were developed.

Staff served its Eighteenth Set of Interrogatories (Nos. 197-198) upon PEF on June 24, 2009. PEF did not file any objections to those interrogatories and served its responses to them on July 24, 2009. By those interrogatories, staff requested that PEF provide the actual or projected compensation amounts for each employee of Progress Energy, Inc. (Interrogatory No. 197) and PEF (Interrogatory No. 198) during 2008, 2009, and 2010, whose total annual compensation is $165,000 or greater but less than $200,000:

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

Staff argues that PEF's responses to Interrogatory Nos. 197 and 198 were evasive or incomplete as follows:

1. The responses to Interrogatory Nos. 197 a) and 198 a) (Name/Title for each employee) are not matched with the responses to Interrogatory Nos. 197 b) through k) and 198 b) through k) concerning compensation amounts; and

2. PEF did not respond fully to Interrogatory Nos. 197 k) and 198 k). The responses to these interrogatories should identify the compensation amount included in "Adjusted Jurisdictional Other O&M Expenses" on MFR Schedule C-1, pages 1 – 3. It would be acceptable for PEF to provide all worksheets showing how the total included in O&M expense was calculated along with the assumptions made and an explanation of how the assumptions were developed.

Staff argues that it requires complete responses to these interrogatories as part of staff's analysis in this docket. All operating expenses are subject to this Commission's review for reasonableness. Compensation is a major component of PEF's operating expenses which may be recoverable from ratepayers and therefore is a significant component of base rates. In order to determine if the portion of an employee's compensation allocated to PEF is reasonable, this Commission needs to know if the total compensation for that employee is reasonable. Staff states that it is unable to determine the reasonableness of compensation allocations between PEF and its corporate affiliates. The purpose of requiring this information is to show the revenue effect on rates. Ultimately, this information impacts the revenue requirement which translates into rates and charges.

Staff states that counsel for PEF has informed staff that it does not intend to provide the information staff requires in order to make its interrogatory responses complete. Counsel for PEF has also informed staff that a "key" exists that would allow staff to "match" the Name/Title responses with compensation amounts, but that PEF will not provide this key in response to the interrogatory requests. Staff argues that PEF's position is unsupportable and that PEF is required to provide complete responses to the interrogatories at issue pursuant to Rule 1.280, Florida Rules of Civil Procedure, and Rule 28-106.206, F.A.C. Staff further states that it has notified PEF of its failure to respond and has conferred in good faith with PEF in an effort to secure the requested discovery without Commission action, but to no avail.

Staff requests that we enter an order compelling PEF to respond within seven days to each interrogatory and each subpart with answers that are specifically responsive and that are individually and clearly labeled to identify to which interrogatory and specific subpart the answer is responsive. In response to PEF's concerns about employee privacy, staff stated at the August 18, 2009, agenda conference that it only needed employee title/positions matched with the compensation information and does not need employee names.

PEF's Response

On August 10, 2009, PEF filed its and its employee intervenors' (collectively referred to herein as "PEF") Response to Motion to Compel, Motion for Protective Order, and Conditional Motion for Stay. PEF states that by way of the Motion to Compel, staff seeks to compel PEF to supplement its response to Interrogatory Nos. 123-126 and 197-198 so as to link previously provided names and job titles of PEF or affiliate company personnel who earn in excess of $165,000 per year to the confidential spreadsheets that provide the details of individual compensation. PEF further states that it and its employee intervenors file their Motion for Protective Order to protect such supplemental information from discovery. PEF further requests that in the event we enter an order denying the Motion for Protective Order or granting staff's Motion to Compel, that we stay the order pending judicial review provided that PEF and/or its employee intervenors timely file for such review.

In its Response, PEF states that it has provided a non-confidential list of names and a detailed job title for each individual in the requested classes. PEF also provided, subject to a claim of confidentiality, a spreadsheet containing the requested compensation details for each of those individuals. PEF states that it did not link the names/job titles to specific line items in the compensation spreadsheet in order to preserve the privacy interests of its employees and the business interests of the company. PEF argues that its responses to the interrogatories were complete as filed since they contain every item of information requested, and that compelled disclosure of information identifying employee-specific compensation information is not relevant to the performance of our ratemaking responsibilities and is beyond our authority and jurisdiction.

According to PEF, its Motion for Protective Order shows that the level of detail requested by our staff constitutes a trade secret or other confidential commercial information which should be protected from discovery. Further, PEF argues that the information implicates the privacy rights of its individual employees, including the PEF employee intervenors, under Article 1,

Section 23 of the Florida Constitution. PEF argues that we must weigh the impact on such privacy rights in resolving the underlying discovery dispute.

PEF states that in the Motion to Compel, staff indicates its willingness to accept certain specified worksheets in lieu of the originally requested information concerning employee-by-employee "Amount of Total Compensation Included in Adjusted Jurisdictional Other O&M Expenses." PEF is working to prepare worksheets that provide the alternative information in a form acceptable to staff, and states that this portion of the Motion to Compel is therefore moot.

PEF's Motion for Protective Order

In this Motion, PEF argues that in its Motion to Compel, staff fails to demonstrate that employee-specific compensation information is relevant to the discharge of our responsibility to determine and fix fair, just and reasonable rates pursuant to section 366.06(1), F.S. PEF agrees that overall compensation information is relevant to the rate proceeding. However, PEF argues that it has already provided the relevant compensation information in its existing responses to the interrogatories, in prefiled testimony and exhibits, and in responses to discovery by the Office of Public Counsel (OPC). The interrogatory responses provide names and job titles of each PEF or Progress Energy, Inc. employee earning $165,000 or more and a spreadsheet which discloses, on a confidential basis, the detailed make-up of that compensation for individual employees, the total compensation paid to such employees as a group, and the portion of the total compensation allocated to PEF. The prefiled testimony of PEF witness Masceo S. DesChamps describes PEF's compensation philosophy and the reasonableness of its approach to compensation, which targets its compensation levels to be at the 50th percentile of its peer utilities. PEF's responses to numerous discovery requests by OPC include information on payroll by cost center, total payroll and fringe benefits, bonuses and incentive compensation, budgeted salary increases, increases in overtime, and other compensation matters.

PEF argues that the reasonableness of compensation paid by PEF is also subject to analysis using this Commission's benchmark test, which compares growth in PEF's O&M expenses (including compensation) to the compound rate of customer growth and inflation since its last rate proceeding. PEF argues that the information already provided is more than sufficient to enable us to discharge our regulatory responsibility to set fair, just and reasonable rates.

According to PEF, employee-specific compensation information is not relevant to the subject matter of the case, as evidenced by the fact that this Commission has successfully set rates in numerous cases over the past decades without the need for such employee-specific information. PEF argues that even if we were to determine that the information sought by the Motion to Compel were relevant, PEF is entitled to protection for such information under Rule 1.280(c), Florida Rules of Civil Procedure. The introductory language in Rule 1.280(b) provides that discovery can be limited by order of the court, including a protective order under Rule 1.280(c)(7), to protect a trade secret or other confidential commercial information from being disclosed, or to be disclosed only in a designated way. PEF requests that we enter a protective order that the information not be produced in any way other than the current list of names/job titles and the separate (confidential) spreadsheet of detailed compensation information.

PEF further argues that in accordance with Alterra Healthcare Corp. v. Estate of Shelley,[1] in considering whether the level of employee-specific detail sought by our staff is relevant, we are required to weigh the privacy rights of the individual employees against the need for the discovery. Moreover, in Rasmussen v. South Fla. Blood Service, a case involving the privacy rights of blood donors, the Florida Supreme Court stated that "there can be no doubt that the Florida amendment [Article 1, Section 23] was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others."[2] In that case, the Court stated that the discovery rules "confer broad discretion on the trial court to limit or prohibit discovery in order to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'"[3]

PEF argues that since Rasmussen, courts have held that personal financial information is within the scope of the constitutional right of privacy, and that when confronted with a discovery dispute concerning disclosure of such information, a court should weigh the privacy rights of the affected individuals in ruling on the relevancy of the requested materials. PEF cites to Woodward v. Berkery,[4] in which the court quashed an order compelling discovery of singer Tom Jones' detailed personal financial information when relevant higher level information had already been provided. In doing so, the court stated that "[a]lthough there is no catalogue in our constitutional provision as to those matters encompassed by the term *privacy,* it seems apparent to us that personal finances are among those private matters kept secret by most people."[5] PEF argues that its employees have a right to expect that their detailed compensation information will remain private.

PEF states that on information and belief, a reporter has already made a public records request for compensation information provided by Florida Power & Light Company under a request for confidential classification in its pending rate case in Docket No. 080677-EI. PEF argues that media exposure of this type of private information would not only violate the privacy rights of its employees, including its employee intervenors, it would also adversely affect its business interests, as described in its Fifth and Sixth Requests for Confidential Classification filed in this docket.

Finally, PEF argues that the second sentence of Article 1, Section 23, which states that "[t]his section shall not be construed to limit the public's right of access to public records and meetings as provided by law," is not involved in this discovery dispute because the standard to prevent or restrict discovery of irrelevant, trade secret or other confidential information under Rule 1.280(c), Florida Rules of Civil Procedure, is separate and distinct from the standard for determining whether such information is exempt from public disclosure under section 366.093, F.S., once it has become a public record. If PEF justifies the entry of a protective order, then the information is never produced, never enters the Commission's possession, and never becomes a public record to which the public may have a right to access.

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[1] 827 So. 2d 936 (Fla. 2002).
[2] 500 So. 2d 533, 536 (Fla. 1987).
[3] Id. at 535.
[4] 714 So. 2d 1027 (Fla. 4th DCA 1997).
[5] Id. at 1035.

According to PEF, we should exercise our authority under the discovery rules to prevent information that is not required for the full discharge of our regulatory responsibilities from becoming a public record in the first instance. PEF requests that we enter an order protecting PEF from associating employee names/titles with their detailed compensation information on the grounds that such information is not relevant, would unnecessarily invade the privacy rights of its employees, and constitutes trade secret or other confidential commercial information that should be protected from disclosure.

PEF's Conditional Motion for Stay Pending Judicial Review

In the event we deny PEF's Motion for Protective Order or grant our staff's Motion to Compel, PEF requests that we stay our order pending judicial review pursuant to Rule 25-22.061, F.A.C., provided that PEF and/or its employee intervenors timely file for such review. PEF argues that unless a stay is granted, it could be required to produce a link between the names/titles of its employees and the detailed compensation information prior to obtaining judicial review of the discovery order. According to PEF, this would constitute irreparable harm under Rule 25-22.061(2)(b), F.A.C., because, once produced, the information would become a public record, a status that could not be undone even if the appellate court ultimately agreed that production should not have been compelled.

Analysis and Ruling

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

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to a claim or defense of the party seeking discovery or the claim or defense of any other party. . . . It is not ground for objection that the information sought will be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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

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

PEF argues that we are required to weigh the privacy rights of the individual employees against the need for the discovery in determining the relevancy of the requested materials. PEF is incorrect. At issue in the Alterra opinion cited by PEF on this point was whether a private employer had standing to challenge a discovery request based exclusively upon the privacy interest of its employees in their personnel files.[6] The Court answered that question in the negative, and in so doing, recognized that nonpublic employees may have a privacy interest in certain information contained in their personnel files, which they may assert as intervenors in the litigation.[7] The Court found that, "in the appropriate case, the trial court should fully consider the employees' alleged privacy interest -- in the context of determining the relevancy of any discovery request which implicates it -- regardless of whether the subject employees have intervened or not."[8]

This is not an appropriate case in which to engage in this type of consideration. First, the employee compensation information at issue is clearly relevant here. PEF has requested the inclusion of the employee compensation information at issue in its base rates, and this is therefore an issue in the rate case. Second, section 366.093, F.S., clearly excludes employee compensation information from the definition of proprietary confidential business information. Section 366.093(3)(f), F.S., provides that "[e]mployee personnel information unrelated to compensation, duties, qualifications, or responsibilities" falls within the definition of proprietary confidential business information. Conversely, pursuant to that section, employee personnel information that is related to compensation, duties, qualifications, or responsibilities is not proprietary confidential business information. Therefore, PEF's employees do not have a basis upon which to expect that their detailed compensation information will be protected from disclosure under a public records request made at the Commission.

Nor may we ignore section 366.093, F.S., simply because Rule 1.280(c), Florida Rules of Civil Procedure, confers broad discretion on the trial court to limit or prohibit discovery in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Pursuant to Rule 25-22.006(6)(a), F.A.C.,

> In any formal proceeding before the Commission, any utility or other person may request a protective order protecting proprietary confidential business information from discovery. Upon a showing by a utility or other person and a finding by the Commission that the material is entitled to protection, the Commission shall enter a protective order limiting discovery in the manner provided for in Rule 1.280, Florida Rules of Civil Procedure. The protective order shall specify how the confidential information is to be handled during the course of the proceeding and prescribe measures for protecting the information from disclosure outside the proceeding.

(Emphasis added). Because the material at issue is not proprietary confidential business information, it is not protected under this rule. Nevertheless, providing information to this

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[6] Alterra HealthCare Corp v. Estate of Shelley, 827 So. 2d 936 at 940, 947.
[7] Id. at 947.
[8] Id.

Commission through discovery does not automatically open the records to the public. This Commission has statutory and rule provisions that maintain the confidentiality of documents upon request pending our decision on the confidentiality request. Section 366.093(2), F.S., provides in part:

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

PEF's argument that the compelled disclosure of employee-identifiable compensation violates its employee-intervenors' right to privacy under Article I, Section 23 amounts to an argument that section 366.093(3)(f), F.S., is unconstitutional. As an administrative agency, however, we have only those powers delegated to us by statute.[9] This Commission is not the proper forum in which to challenge the facial constitutionality of a statute.[10] Therefore, we decline to address this constitutional question.

With respect to PEF's Conditional Motion for Stay Pending Judicial Review, because no order yet exists, this Motion is premature. PEF may request a stay under Rule 25-22.061, F.A.C., as it deems appropriate, after an order is issued. PEF's argument that unless a stay is granted, it could be required to produce the information at issue prior to obtaining judicial review is flawed. Pursuant to Rule 25-22.006(10), F.A.C.,

> [w]hen the Commission denies a request for confidential classification, the material will be kept confidential until the time for filing an appeal has expired. The utility or other person may request continued confidential treatment until judicial review is complete. . . . The material will thereafter receive confidential treatment through completion of judicial review.

We note that on August 10, 2009, PEF filed supplemental information regarding the allocation of employee compensation costs to jurisdictional O&M. We have reviewed this information and find it to be responsive to Interrogatory Nos. 123 k), 124 k), 125 h), 126 h), 197

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

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

k) and 198 k). However, PEF remains deficient with respect to the matching of total compensation levels with position titles.

Rule 28-106.211, F.A.C., grants us broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case." Based upon this authority, we hereby grant Staff's Motion for Order Compelling Responses to Interrogatories. We have consistently recognized that discovery is proper and may be compelled if it is not privileged and is, or likely will lead to, relevant and admissible evidence. PEF is directed to provide its full and complete responses to Interrogatory Nos. 123-126 and 197-198 within seven days from the issuance date of this Order. PEF is required to provide staff with the individual compensation information by each individual job title or position, but PEF is not required to provide the names of the employees. PEF and its employee intervenors' Motion for Protective Order and Conditional Motion for Stay are denied.

It is, therefore,

ORDERED by the Florida Public Service Commission that Staff's Motion for Order Compelling Responses to Interrogatories is granted. It is further

ORDERED that PEF is directed to fully and completely respond to the interrogatories at issue within seven days from the issuance date of this Order. It is further

ORDERED that PEF and its employee intervenors' Motion for Protective Order and Conditional Motion for Stay are denied. It is further

ORDERED that this docket shall remain open.

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

ANN COLE
Commission Clerk

(SEAL)

RG

CONCURRENCE BY: COMMISSIONER SKOP

COMMISSIONER SKOP, concurring specially with a separate opinion:

The instant case arises from the failure of 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.[11] The fundamental right of privacy must be asserted by a natural person.[12] 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.[13] 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.[14]

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[11] 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.").

[12] 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).

[13] 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.

[14] 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.[15] 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.[16]

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.[17]

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[15] 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.

[16] 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.

[17] 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.[18] 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.[19] Furthermore, while the Commission clearly lacks

[18] Daniels v. FDOH, 898 So. 2d 61, 64 (Fla. 2005).

[19] 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.[20] 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.

[20] 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."[21] 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.

[21] 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.