I. Meeting Packet

State of Florida

Public Service Commission

INTERNAL AFFAIRS AGENDA

Tuesday - March 16, 2010
Immediately Following Agenda Conference
Room 140 - Betty Easley Conference Center

1. Approve February 9, 2010, Internal Affairs Meeting Minutes. (Attachment 1).

2. Presentation on Concrete and Lighter Color Horizontal Surfaces Reducing the Heat Island Effect and, in Turn, Energy Consumption by the Florida Concrete and Products Association. Presenter: Karl Watson, Jr. (Attachment 2).

3. Discussion of First District Court of Appeal's March 3, 2010 Opinion in *Florida Power & Light Company, et al. v. Florida Public Service Commission,* Case No. 1D09-4779, and *Progress Energy Florida, Inc. et al. v. Florida Public Service Commission,* Case No. 1D09-5145. (Attachment 3).

4. Legislative Update. (No Attachment).

5. Other matters, if any.

TD/sa

OUTSIDE PERSONS WISHING TO ADDRESS THE COMMISSION ON ANY OF THE AGENDAED ITEMS SHOULD CONTACT THE OFFICE OF THE EXECUTIVE DIRECTOR AT (850) 413-6068.

Attachment 1

Attachment 1

State of Florida
Public Service Commission
INTERNAL AFFAIRS AGENDA
Tuesday - February 09, 2010
4:00 p.m. – 6:05 p.m.
Room 140 - Betty Easley Conference Center

COMMISSIONERS PRESENT: Chairman Argenziano
Commissioner Edgar
Commissioner Skop
Commissioner Klement
Commissioner Stevens

STAFF PARTICIPATING: Devlin, Hill, Kiser, Helton, Pennington, Shafer, Hunter

OTHERS PARTICIPATING: JR Kelly - Office of Public Counsel

The Florida Concrete Products Association's presentation has been deferred. Please note the following change in order of items to be heard:

1. Approve January 25, 2010, Internal Affairs Meeting Minutes.

   The minutes were approved.

   Commissioners participating: Argenziano, Edgar, Skop, Klement, Stevens

2. Discussion of Potential Legislative Proposals for the 2010 Session.

   The Commissioners approved the issues reviewed for the Legislative Proposal, with technical discretion to make changes discussed at the Internal Affairs Meeting.

   Commissioners participating: Argenziano, Edgar, Skop, Klement, Stevens

3. Draft Comments in Response to FCC Public Notice Regarding Universal Service Forbearance Petition of Partner Communications Cooperative. Approval is sought.

   The Commissioners approved the draft comments. Staff was authorized to make necessary grammatical corrections.

   Commissioners participating: Argenziano, Edgar, Skop, Klement, Stevens

4. Briefing on EPA rulemaking

   Briefing by Tabitha Hunter. Staff Will keep the Commission updated.

   Commissioners participating: Argenziano, Edgar, Skop, Klement, Stevens

5. Other matters if any.

   No other matters were discussed.

Attachment 2

URBAN HEAT ISLAND

Public Service Commission

January 25, 2010

Attachment 2

RESEARCH ON URBAN HEAT ISLAND HAS PROVEN THIS IS A FUNDAMENTAL ASPECT FOR CLIMATE CHANGE

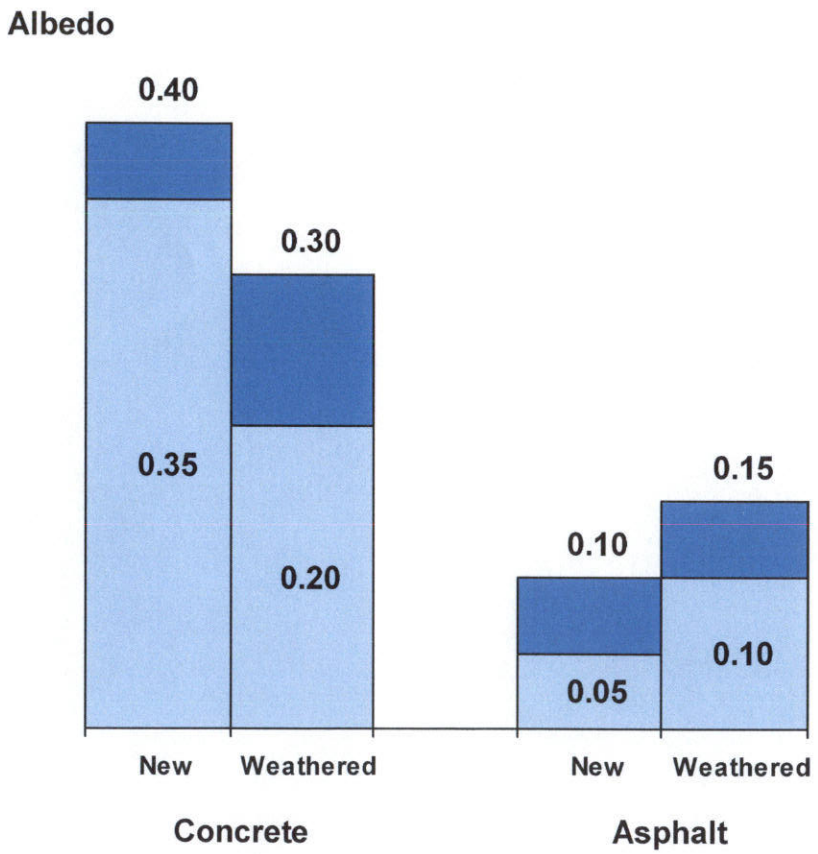
Definition	**Increase in ambient temperature that occurs in cities because paved areas and buildings absorb more heat from the sun than natural landscape**
Main Contributing Factor	**Solar reflectivity is the single most important factor contributing to heat island effect** • **This reflectivity is measured in Albedo, the degree to which a material reflects incoming solar radiation** • **It is a function of a surface's color (i.e. dark surfaces absorb radiation and release heat)** **"In urban areas, pavements and roofs constitute over 60% of urban surfaces (roofs 20-25%, pavements about 40%)."(1)**
Environmental Impact	• **Additional energy needed to cool warmer cities, emitting additional CO2** • **Greater frequency and severity of smog episodes**

Steven Chu(2) U. S. Secretary of Energy	**"If you look at all the buildings and make all the roofs white, and if you make the pavement a more concrete-type of color than a black-type of color, and you do this uniformly… It's the equivalent of reducing the carbon emissions due to all the cars in the world by 11 years"**

(1) NREL- "The Effect of Pavements' Temperatures on Air Temperatures in Large Cities"
(2) Financial Times, May 27, 2009

HIGHER ALBEDO VALUES PRODUCE GREATER REFLECTANCE THAT REDUCES THE HEAT ISLAND EFFECT

Average Albedo for Pavements[1]



Comments

Light colored pavements become darker as the road ages due to oil drips, tire marks, debris, etc

- **Studies suggest this is not a great concern as "residual reflectivity is still much greater than reflectivity from darker colored materials"[2]**

Dark colored pavements become lighter with time and increase their albedo

- **As asphaltic coating wears down, aggregates are exposed revealing a higher albedo surface**
- **By this time, IRI of pavement decreased to a point where resurfacing must be planned**

Color of aggregates can impact Albedo

(1) ACPA "Albedo: A measure of pavement surface reflectance" (LBNL, Levinson, Akbari)
(2) "Cooling Our Communities" USEPA
Source: PCA (Gajda, VanGeem); "Spectra Solar Reflectance of Various Materials" Berdahl, Bretz

HIGH ALBEDO PAVEMENTS COULD PROVIDE SIGNIFICANT ENVIRONMENTAL BENEFITS TO THE STATE OF FLORIDA

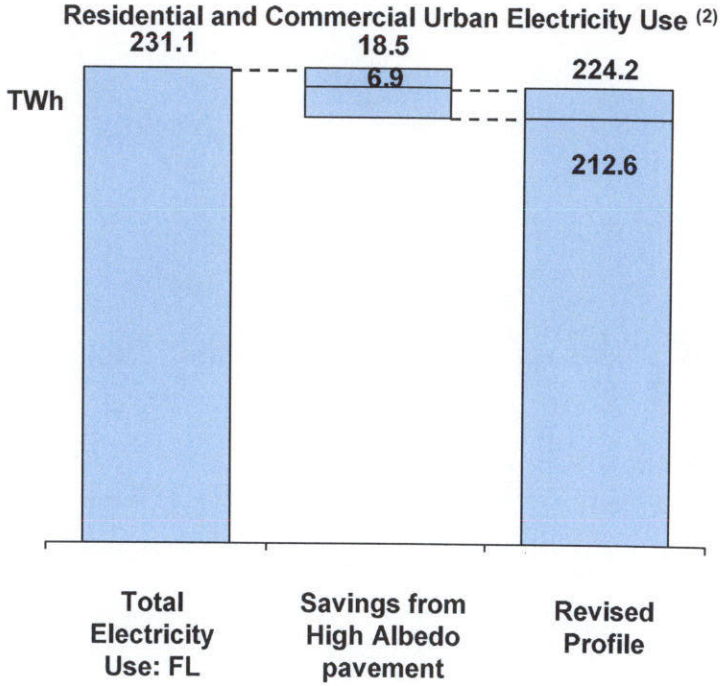
Pavements, Air Temperature, and Electricity Usage

Lawrence Berkeley National Laboratory:

The Effects of Pavement's Temperatures on Air Temperatures in Large Cities

- **Lawrence Berkeley National Laboratory conducted study measuring impact of pavement albedo on Urban Heat Island reductions**
- **Findings prove that concrete pavements would reduce energy consumption in LA by 100 MW or 71.8 MT CO2 annually**
- **Estimated that 3 – 8% of electricity in cities (pop. 100,000+) is used to offset the heat from the heat island effect**

Extrapolating to FL



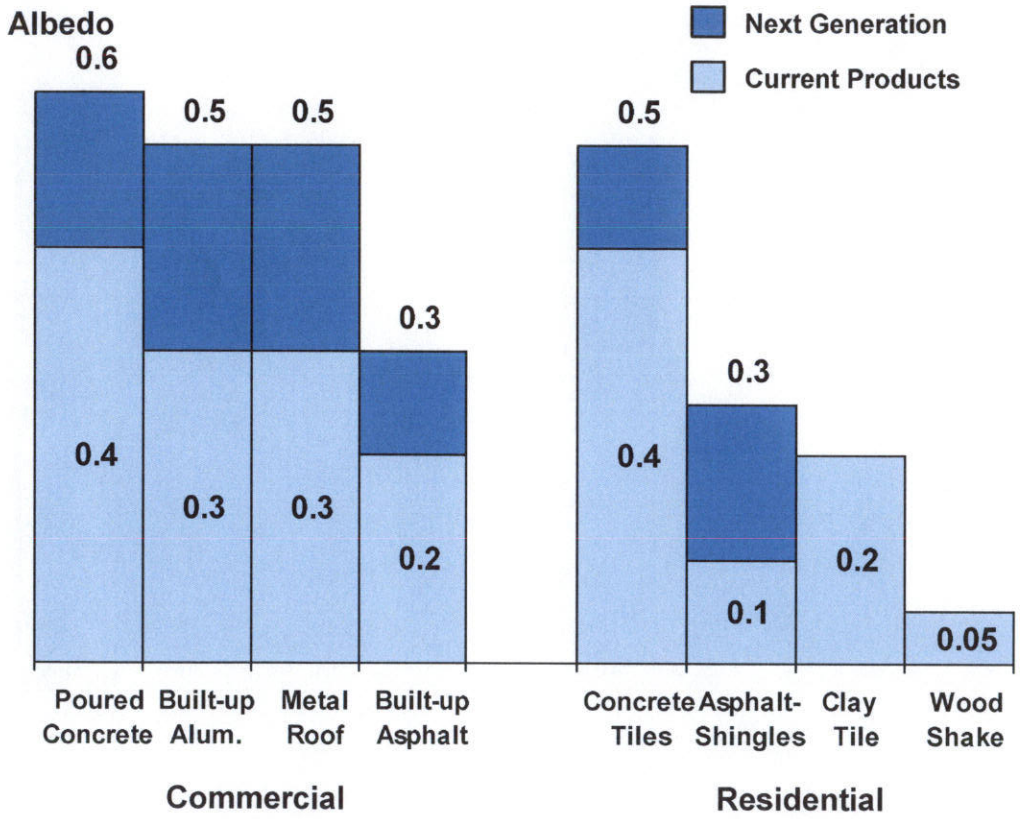
Concrete pavements could save Floridians 6.9 – 18.5 TWh (5.0 – 13.3 MMT CO2), which is equivalent to annual emissions of 1.0 M – 2.7 M vehicles (1)

- U.S.EPA – Energy Information Administration – 0.718 MT CO2/ MWh
- American Council for Energy Efficient Economy

MATERIALS CHOICE FOR ROOFS ALSO HAVE A SIGNIFICANT IMPACT ON URBAN HEAT ISLAND EFFECT

Estimates indicate roofs cover 20 – 25% of a city's surface

Average Albedo for Rooftops[1]



Comments

Commercial rooftops are characterized by expansive, flat roofs which reflect solar energy vertically

Residential rooftops have an angled profiles which reflect solar energy laterally into the atmosphere

Next Generation products are currently being developed to increase reflective properties while reducing the emittance of heat into the atmosphere

For every 1,000SF of rooftop, an increase in albedo of 0.04 will eliminate 10 tons of CO_2 over the life of the building [3]

(1) LBNL-Production of Cool Concrete Tile & Asphalt Shingle Roofing Products
(2) U.S. EPA- Reducing Urban Heat Islands: A Compendium of Strategies
(3) LBNL, Akgari, et al 2009, Climate Change

HIGHLY REFLECTIVE ROOFTOPS ARE A PASSIVE SOLUTION THAT PROVIDES EXCEPTIONAL ENVIRONMENTAL BENEFITS

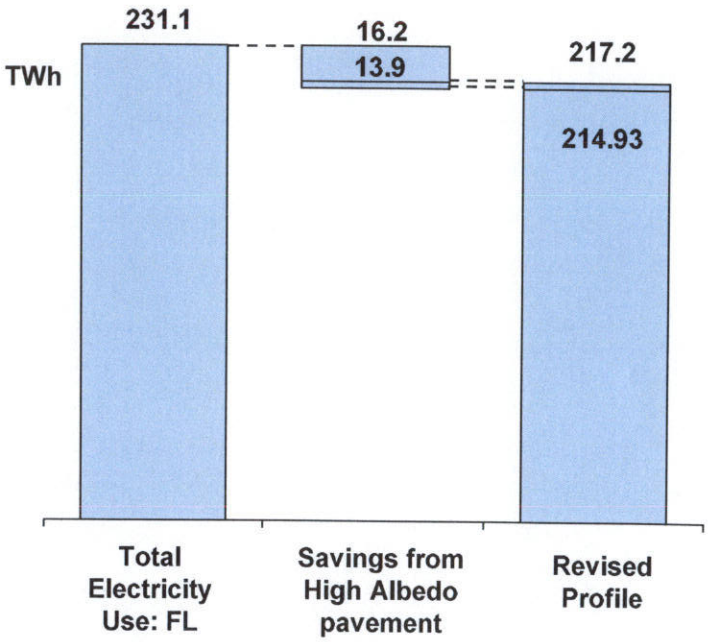
Roofs, Air Temperature, and Electricity Usage

Lawrence Berkeley National Laboratory:

Energy Savings for Heat Island Reduction Strategies

- **Study focused specifically on the benefits of reflective rooftops**
- **Estimates that cool roofs would lead to a CO2 reduction of 6 – 7% (2)**
- **Study estimated that widespread use of cool roofs could reduce the national peak demand for electricity by 6.2 to 7.2 GWh (2)**

Extrapolating to FL



Cool roofs could save Floridians 13.9 -16.2 TWh (9.9 – 12.8 MMT CO2), which is equivalent to annual emissions of 2.0 – 2.6 M vehicles

(1) NREL- "The Effect of Pavements' Temperatures on Air Temperatures in Large Cities"

(2) LBNL - Energy Savings for Heat Island Reduction Strategies.

(3) U.S.EPA – Energy Information Administration – 0.718 MT CO2/ MWh

(4) USDA – Economic Research Service

IMPORTANT FIRST STEP WAS TAKEN BY THE CITY OF MIAMI

Ordinance will apply to all new construction and to replacement of 50% of site hardscape

Miami Ordinance Requirements

Option to choose between following two alternatives:

	Comments
1 Provide any combination of following strategies for 50% of site hardscape	
• Shade from solar panels or roofing materials with solar reflectance (albedo) of at least 0.30	
• Shade from trees within 5 years of occupancy	No monitoring mechanism specified
• Paving materials with a solar reflectance of at least 0.30	
• Pervious pavement system	Lack of performance requirements
2 50% of parking spaces under cover with parking roof minimum solar reflectance (albedo) of 0.30	

Implications for Florida

State could adopt a similar piece of legislation

- Concerns such as monitoring mechanism for trees within 5 years or performance requirements for pervious pavements
- Ensure that spirit of the law cannot be bypassed

This would be a major contribution to the environment and quality of life

- Cool pavements could save 6.9 – 18.5 TWh (5.0 – 13.3 MMT CO2)
- Cool roofs could save 13.9 - 16.2 TWh (9.9 – 12.8 MMT CO2)
- These would equate to putting 3.0 – 5.3 M vehicles out of circulation

Attachment 3

State of Florida

Public Service Commission

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

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

DATE: March 8, 2010

TO: Timothy J. Devlin, Executive Director

FROM: Samantha M. Cibula, Attorney Supervisor, Office of the General Counsel SMC.
Rosanne Gervasi, Senior Attorney, Office of the General Counsel RG

RE: Discussion of First District Court of Appeal's March 3, 2010 Opinion in *Florida Power & Light Company, et al. v. Florida Public Service Commission*, Case No. 1D09-4779, and *Progress Energy Florida, Inc., et al. v. Florida Public Service Commission*, Case No. 1D09-5145.
Critical Information: Guidance requested at March 16, 2010, Internal Affairs meeting in response to the Court's Opinion.

This item addresses the First District Court of Appeal's March 3, 2010, Opinion in *Florida Power & Light Company, et al. v. Florida Public Service Commission*, Case No. 1D09-4779, and *Progress Energy Florida, Inc., et al. v. Florida Public Service Commission*, Case No. 1D09-5145. The purpose of this item is to make the Commission aware of the Court's Opinion and provide information as to the Commission's potential options in response to the Court's Opinion.

Background

Pursuant to section 366.093, Florida Statutes (F.S.), Florida Power & Light Company (FPL) and Progress Energy Florida, Inc. (Progress) filed separate requests for confidential classification of employee compensation information provided to the Commission. In support of their requests for confidential classification, the companies asserted that the compensation information was proprietary confidential business information under subsection (3)(e) of section 366.093, F.S., because the information related to competitive interests, the disclosure of which would impair their competitive business. Included with their requests for confidential classification were affidavits attesting that the information met the requirements of section 366.093(3)(e), F.S.

The Commission found that the employee compensation information should not be kept confidential and was not exempt from disclosure under section 119.07, F.S., (Florida's Public Records Law) based on its interpretation of subsection (3)(f) of section 366.093. Section 366.093(3)(f), F.S., states that proprietary confidential business information includes, but is not limited to, "[e]mployee personnel information unrelated to compensation, duties, qualifications, or responsibilities." The Commission reasoned that subsection (3)(f) specifically addressed employee compensation information and expressly stated that employee compensation

information pertaining to compensation was not exempt from disclosure under Florida's Public Records Law.

Summary of the Court's Opinion

FPL and Progress requested that the First District Court of Appeal review the Commission's decisions. The issue before the Court in both cases was whether the employee compensation information is proprietary confidential business information under section 366.093, F.S., and should be kept confidential and exempt from disclosure under Florida's Public Records Law. On March 3, 2010, the First District Court of Appeal issued its Opinion, wherein it reversed the Commission's orders and ordered the Commission to keep the records confidential pursuant to section 366.093(3)(e), F.S.

The Court's decision hinged on the correct interpretation of section 366.093, F.S. While the Court agreed with the Commission that "there is some indication that employee compensation information may not be confidential proprietary business information, as evidenced by the Legislature's use of the phrase 'unrelated to compensation' in sub-subsection (f)," the Court found that "[s]ubsection (3) clearly and unambiguously indicates that confidential proprietary business information 'includes, but is not limited to' the types of information listed in sub-subsections (a) through (f)." The Court reasoned that "[t]he phrase 'includes, but not limited to' means information not described in subsections (a) through (f) could be confidential business information."

The Court held that "[t]he Commission clearly erred by refusing to consider whether the compensation information fell within any of the listed examples of proprietary confidential business information in subsections (3)(a) through (3)(e), and by failing to consider whether the information otherwise fell within the definition of proprietary confidential business information in subsection (3)." The Court further held that, because the companies put forth uncontradicted evidence, i.e., affidavits, showing that the disclosure of the information would impair their competitive interests, "the Commission should have granted the motions for confidentiality under section 366.093(3)(e), Florida Statutes."

A copy of the Court's Opinion is appended as Attachment A. A copy of section 366.093, F.S., is appended as Attachment B.

Potential Options in Response to the Court's Opinion

1. The Commission can take no further action in the matter and comply with the Court's order to keep the records confidential.

2. The Commission can make the Legislature aware of the First District Court's Opinion and let the Legislature decide if it wants to make changes to section 366.093, F.S., in response to the Court's interpretation of section 366.093, F.S.

3. Pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure, a motion for rehearing, clarification, or certification may be filed within 15 days of the order or within such other time set by the Court. In the Opinion, the Court did not set a specific time as to when such motions must be filed, thus, the 15-day timeframe set forth in Rule 9.330(a) governs. If the Commission chooses to file any such motions, the Commission has until March 18, 2010, to do so.

a. Rehearing – "A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding." *See* Rule 9.330(a).

b. Clarification – "A motion for clarification shall state with particularity the points of law or fact in the court's decision that, in the opinion of the movant, are in need of clarification." *See* Rule 9.330(a).

c. Certification – Certification is the means by which the District Court would inform the Florida Supreme Court that it believes the matter is worthy of discretionary review by the higher court. A motion for certification should present a complete statement of the reasons for requesting certification. *See* §20:4, *Florida Appellate Practice*, Philip J. Padovano (2010). A motion for certification can been filed in conjunction with a motion for rehearing or clarification. *See* Rule 9.330(b).

4. Pursuant to Rule 9.331, Florida Rules of Appellate Procedure, "Within the time prescribed by rule 9.330, a party may move for an en banc rehearing solely on the grounds that the case is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions. A motion based on any other ground shall be stricken." Rule 9.331 emphasizes that "[a] rehearing en banc is an extraordinary proceeding." Thus, the rule requires the attorney filing the motion for rehearing en banc to certify that it is the attorney's expressed belief that, "based on a reasoned and studied professional judgment," the matter warrants en banc review.

5. Pursuant to Rule 9.030(a)(2)(A), Florida Rules of Appellate Procedure, the discretionary jurisdiction of the Florida Supreme Court may be sought to review decisions of the district courts of appeal that

(i) expressly declare valid a state statute;
(ii) expressly construe a provision of the state or federal constitution;
(iii) expressly affect a class of constitutional or state officers;
(iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;
(v) pass upon a question certified to be of great public importance;
(vi) are certified to be in direct conflict with decisions of other district courts of appeal.

Just because the district court's decision falls into one of the above categories does not mean that the Florida Supreme Court must review the decision, hence the term "discretionary jurisdiction."

Pursuant to Rule 9.120, Florida Rules of Appellate Procedure, the notice to invoke the discretionary jurisdiction of the Florida Supreme Court must be filed within 30 days of rendition of the order to be reviewed. Rule 9.020(i), Florida Rules of Appellate Procedure, states that orders shall not be deemed rendered until all timely and authorized motions under Rule 9.330 or 9.331 are either abandoned or resolved by the filing of a written order. Thus, the filing of a motion for rehearing, clarification, or certification will toll the time for filing a notice to invoke the discretionary jurisdiction of the Florida Supreme Court. Thus, the Commission would have to file any notice to invoke the discretionary jurisdiction of the Florida Supreme Court by April 2, 2010, unless the Commission files a motion pursuant to Rule 9.330 or 9.331.

cc: Curt Kiser, General Counsel
Mary Anne Helton, Deputy General Counsel

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

FLORIDA POWER & LIGHT COMPANY and FPL EMPLOYEE INTERVENOR,

Petitioners,

v.

FLORIDA PUBLIC SERVICE COMMISSION,

Respondent.
_____/

CASE NO. 1D09-4779

PROGRESS ENERGY FLORIDA, INC.,

Petitioner,

and

MARTIN DRAGO, MARK RIGSBY, GARY ROEBUCK, and JAMES TERRY, JR.,

Petitioners-Employees-Intervenors,

v.

FLORIDA PUBLIC SERVICE COMMISSION,

Respondent,

and

OFFICE OF THE PUBLIC COUNSEL, OFFICE OF THE ATTORNEY GENERAL, FLORIDA INDUSTRIAL

CASE NO. 1D09-5145

POWER USERS GROUP, WHITE SPRINGS AGRICULTURAL CHEMICALS, INC., FLORIDA RETAIL FEDERATION, FEDERAL EXECUTIVE AGENCIES, and ASSOCIATION FOR FAIRNESS IN RATE MAKING,

Respondents-Intervenors.

_____/

Opinion filed March 3, 2010.

Petition for Writ of Certiorari and Petition for Writ of Mandamus – original jurisdiction.

Arthur J. England, Jr., of Greenberg Traurig, P.A., Miami; Barry Richard of Greenberg Traurig, P.A., Tallahassee, for Petitioners Florida Power & Light Company and FPL Employee Intervenor.

R. Alexander Glenn and John T. Burnett of Progress Energy Service Company, LLC, St. Petersburg; Christine Davis Graves of Carlton Fields, P.A., Tallahassee; Robert E. Biasotti, James Michael Walls and Dianne M. Triplett of Carlton Fields, P.A., St. Petersburg, for Petitioners Progress Energy Florida, Inc., and Petitioners-Employees-Intervenors Martin Drago, Mark Rigsby, Gary Roebuck, and James Terry, Jr.

Rosanne Gervasi, Office of General Counsel, Florida Public Service Commission, Tallahassee, for Respondent Florida Public Service Commission.

THOMAS, J.

Progress Energy Florida, Inc. (Progress Energy) and several of its employees petition for writ of certiorari to quash an order entered by the Florida Public Service Commission (the Commission). The Commission's order denied Petitioners' request to treat certain employee compensation information as confidential and exempt from

public disclosure under Florida's Public Records Law. Florida Power & Light Company (Florida Power) also petitions for a writ of certiorari to quash a similar order entered by the Commission regarding its employees' compensation information. Florida Power's employees petition for a writ of mandamus to prevent the disclosure of their compensation information, arguing such disclosure would violate their right to privacy guaranteed by Article I, section 23 of the Florida Constitution.

We consolidated these petitions for disposition because the facts, issues, and arguments are substantially the same. For the reasons discussed below, we reverse the Commission's orders and order the Commission to keep the compensation information at issue confidential, in accordance with the procedures in section 366.093, Florida Statutes (2008).

Background

In March 2009, Progress Energy and Florida Power applied to the Commission for increases in the base rates they charge consumers. The Commission has jurisdiction over the regulation of electric utilities with respect to rates and service, and is charged with considering and investigating the legitimate costs associated with a requested utility rate increase. §§ 366.04(1)-(2), 366.041(1), & 366.06, Fla. Stat. (2008). Progress Energy and Florida Power included employee compensation as costs associated with the increased rate change. Information relating to the rates or costs of services is relevant in a ratemaking proceeding for discovery purposes. § 366.093(2),

Fla. Stat. Discovery in a ratemaking proceeding is governed by Florida Rule of Civil Procedure 1.280. See id.

In response to Progress Energy's and Florida Power's requests for increased rates, the Commission's staff issued a series of interrogatories requesting the following information for all Progress Energy and Florida Power employees who earned $165,000 or more per year: name and title; base salary; overtime; bonuses; stock options; option awards; non-equity incentive plan compensation; all other compensation; total compensation; amount of total compensation allocated to the utility; and amount of total compensation included in adjusted jurisdictional other operation and management expenses.

Progress Energy and Florida Power answered the interrogatories and provided some of the information, but filed contemporaneous motions seeking to protect the confidentiality of the compensation information under section 366.093(3), Florida Statutes. The utility companies argued the information should be kept confidential because it was sensitive competitive business information, and disclosure of the information to the public would invade their employees' right to privacy. Section 366.093, Florida Statutes, allows documents produced in a ratemaking proceeding to be exempt from public disclosure if the Commission determines the information is proprietary confidential business information. The Commission's staff responded with

motions to compel all employee compensation information included in the interrogatories.

Several of Progress Energy's and Florida Power's employees moved to intervene in the proceeding on the basis that their constitutional privacy rights were at risk. The Commission granted the motion.

The Commission held a full hearing to consider the staff's motions to compel and the utility companies' requests for confidentiality. At the hearing, Progress Energy and Florida Power argued together that the compensation information previously provided was adequate to determinate the reasonableness of their rate requests. The gist of the companies' argument was that the salary information needed to remain confidential to prevent the loss of high-level employees and internal strife between employees.

After the hearing, the Commission entered two interlocutory orders in each ratemaking case. The first order compelled production of all compensation information. The Commission determined the information was necessary to complete its ratemaking function. In addition, the Commission ruled it lacked jurisdiction to consider the intervenors' constitutional argument. The second order denied the confidentiality requests. The Commission determined the utility companies' compensation information could not be confidential because section 366.093(3)(f),

Florida Statutes, expressly excluded such information from being considered proprietary confidential business information.

Following entry of the orders, Progress Energy and Florida Power filed requests with the Commission that the information be kept confidential until judicial review is complete. See Fla. Admin. Code R. 25-22.006(10).

Analysis

We first address our jurisdiction to consider the merits of Petitioners' issues. Next, we turn to the correct statutory interpretation and application of section 366.093, Florida Statutes. Finally, we briefly discuss the constitutional argument raised by Petitioners.

A. Jurisdiction and Scope of Review

We have jurisdiction even though these cases arise out of electric utility ratemaking proceedings at the Commission. The specific "action" at issue is the Commission's determination that certain information provided by the utilities during discovery is not confidential under section 366.093(3), not the Commission's ultimate determination of the utilities' rates or services. See § 350.128(1), Fla. Stat. (2008); Fla. Soc'y of Newspaper Editors, Inc. v. Fla. Pub. Serv. Comm'n, 543 So. 2d 1262, 1264 n.2 (Fla. 1st DCA 1989); see also England, et al., Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 Fla. L. Rev. 147, 175 (1980) (explaining one purpose of the 1980 amendments to Article V, section 3(b)(2) of the

Florida Constitution was to limit scope of the supreme court's jurisdiction to review commission action).

We treat the petitions for writ of certiorari and mandamus as appeals from non-final agency action. See § 120.68(1), Fla. Stat. (2008); Fla. R. App. P. 9.100, 9.190; see also Fla. Soc'y of Newspaper Editors, 543 So. 2d at 1267. However, our scope of review on appeal over a non-final order is analogous to and no broader than review by common law certiorari. See State, Dep't of Fin. Servs. v. Fugett, 946 So. 2d 80, 81 (Fla. 1st DCA 2006); Charlotte County v. Gen. Dev. Utils., Inc., 653 So. 2d 1081, 1084 (Fla. 1st DCA 1995). Thus, Petitioners must demonstrate that the orders on review depart from the essential requirements of the law and cause material injury that cannot be remedied on appeal. See Charlotte County, 653 So. 2d at 1084.

Petitioners argue that the material harm caused by the orders is irreparable and cannot be remedied on appeal of the final orders in the ratemaking proceedings because by that point the confidential information will have already been made public. See Cordis Corp. v. O'Shea, 988 So. 2d 1163, 1165 (Fla. 4th DCA 2008) (quashing discovery order requiring production of confidential information and recognizing the irreparable "cat out of the bag" harm that results from release of such information). The Commission argues Progress Energy and Florida Power cannot show irreparable harm because the utility companies will be able to appeal the interlocutory orders after

a final order is issued.[1] Florida Administrative Code Rule 25-22.006(10) provides, however, that

> [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 . . . may request continued confidential treatment until judicial review is complete. . . . The material will thereafter receive confidential treatment through completion of judicial review.

The rule clearly contemplates an appeal directly from the non-final order and does not mention review after final agency action. Section 120.68(1), Florida Statutes, requires an appeal from non-final agency action to be filed within 30 days. The Commission could have released the utilities' compensation information after 30 days, had the utilities not filed these petitions and requested continued confidentiality of the information pending our review. Thus, we reject the Commission's argument that irreparable harm could not result if review of the orders were denied.

B. Statutory Construction

Although the Legislature has given the Commission broad authority to inspect a utility company's records in ratemaking proceedings, any information which is shown to be proprietary confidential business information "shall be kept confidential and shall be exempt" from section 119.07(1), Florida Statutes. § 366.093(1), Fla. Stat. What

[1] At oral argument, the parties informed the court that the Commission has ruled on the merits of Progress Energy's and Florida Power's requests for rate increases, but has not issued a final order.

constitutes proprietary confidential business information is detailed in section 366.093(3), Florida Statutes:

> (3) Proprietary confidential business information means information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public. **Proprietary confidential business information includes, but is not limited to:**
>
> (a) Trade secrets.
>
> (b) Internal auditing controls and reports of internal auditors.
>
> (c) Security measures, systems, or procedures.
>
> (d) Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms.
>
> (e) Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.
>
> **(f) Employee personnel information unrelated to compensation, duties, qualifications, or responsibilities.**

(Emphasis added.)

The Commission denied Progress Energy's and Florida Power's confidentiality requests after construing sub-subsection (f) to expressly exclude compensation information from the definition of proprietary confidential business information. The Commission found the statute was unambiguous, but went on to find that even if the statute were ambiguous, the specific provisions of sub-subsection (f) prevailed over the general definition in subsection (3). As explained below, the Commission's interpretation of section 366.093(3)(f) is clearly erroneous; therefore, we must depart from the Commission's construction. See PW Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988) (explaining the Commission's construction of statute it is charged with enforcing is entitled to great deference and the court will not depart from such construction unless clearly erroneous).

Legislative intent is the polestar that guides a court's statutory construction analysis. See Knowles v. Beverly Enters.-Fla., Inc., 898 So. 2d 1, 5 (Fla. 2004). To determine intent, we first look to the statute's plain meaning. Id. (quoting Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996)). If the statute is clear and unambiguous, there is no need to resort to the rules of statutory construction, and the statute should be given its plain meaning. Id. (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)); cf. Murray v. Mariner Health, 994 So. 2d 1051, 1061 (Fla. 2008) (explaining if statute is unclear or ambiguous, the court must resort to traditional rules of statutory construction to determine legislative intent).

We agree there is some indication that employee compensation information may not be confidential proprietary business information, as evidenced by the Legislature's use of the phrase "unrelated to compensation" in sub-subsection (f). Our inquiry does not end by reading this subsection in isolation. Subsection (3) clearly and unambiguously indicates that confidential proprietary business information "includes, but is not limited to" the types of information listed in sub-subsections (a) through (f). The phrase "includes, but is not limited to" means information not described in sub-subsections (a) through (f) could be confidential business information. See State v. Hobbs, 974 So. 2d 1119, 1121 (Fla. 5th DCA 2008), aff'd sub nom., 999 So. 2d 1025 (Fla. 2008). In Hobbs, the court interpreted the phrase "include, but are not limited to." The court's interpretation is on point and instructive.

The Fifth District in Hobbs construed section 92.565, Florida Statutes, which eliminates the *corpus delicti* precondition for the introduction of a confession in sexual abuse cases when the State is otherwise unable to prove the crime. See Hobbs, 974 So. 2d at 1120. Section 92.565 provides that factors relevant in determining whether the State is unable to show the existence of each element of a crime "include, but are not limited to" the fact that, when the crime was committed, the victim was "(a) Physically helpless, mentally incapacitated, or mentally defective . . . ; (b) Physically incapacitated due to age, infirmity, or any other cause; or (c) Less than 12 years of age." § 92.565(2), Fla. Stat. The Hobbs court determined the phrase "include, but are

not limited to" was plain, unambiguous, and thus not subject to the maxims of statutory construction. See Hobbs, 974 So. 2d at 1121-22 (citing Kelly v. State, 946 So. 2d 591, 593-98 (Fla. 1st DCA 2006) (Thomas J., dissenting)). The court held that the list enumerated in section 92.565(2) was a list of factors a trial court could consider, but that the list was not exhaustive. See id. Likewise, we hold that the categories listed in section 366.093(3)(a)-(f), Florida Statutes, are not exhaustive, as evidenced by the Legislature's use of the phrase "includes, but is not limited to." The Commission may consider whether information not expressly listed in sub-subsections (a)-(f) should be classified as confidential.

In addition, any ambiguity created by the implication of "unrelated to" is remedied by reading sub-subsection (f) *in pari materia* with the rest of subsection (3). See generally Borden v. E.-European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006) (rejecting interpretation of statutory subsection as a freestanding provision because all parts of a statute must be read together to achieve consistent whole). Sub-subsection (f) cannot be read in a vacuum; it must be considered in conjunction with the rest of subsection (3). See Dep't of Highway Safety & Motor Vehicles v. Rife, 950 So. 2d 1288, 1289-90 (Fla. 5th DCA 2007) (holding trial court erred by applying specific definition where more general definition within the same subsection applied).

In sum, the Commission clearly erred by refusing to consider whether the compensation information fell within any of the other listed examples of proprietary

confidential business information in subsections (3)(a) through (3)(e), and by failing to consider whether the information otherwise fell within the definition of proprietary confidential business information in subsection (3).

C. Application

Progress Energy and Florida Power put forth uncontradicted evidence at the hearing that they complied with the general requirements in section 366.093(3) and that their compensation information warranted confidential classification under subsection (3)(e) because disclosing the information would impair their competitive interests. According to the companies' affidavits and testimony, such information is kept strictly confidential to prevent other utility companies from stealing their employees. The utility companies were also concerned about morale and infighting among employees who have the same position but varying wages. The utility companies argued that higher wages would ultimately result in higher rates for consumers. Thus, the Commission should have granted the motions for confidentiality under section 366.093(3)(e), Florida Statutes.

D. Right to Privacy

We decline to address arguments made by Petitioners under Article I, section 23 of the Florida Constitution. Petitioners' only argument under this claim is that disclosure of their compensation information to the public under Florida's Public Records Law would violate their constitutional right to privacy. By reversing the

Commission's orders, and by ordering the Commission to keep Petitioners' compensation information confidential, the Petitioners' constitutional arguments have been rendered moot. See State v. Mozo, 655 So. 2d 1115, 1117 (Fla. 1995) (adhering to the settled principle that courts should endeavor to implement legislative intent of statutes and avoid constitutional issues).

Conclusion

We reverse the Commission's orders denying Petitioners' motions to protect their employee compensation information, and order the Commission to keep the records confidential until such time as they are no longer needed, in accordance with section 366.093, Florida Statutes.

LEWIS and WETHERELL, JJ., CONCUR.

Select Year: 2009

The 2009 Florida Statutes

Title XXVII — RAILROADS AND OTHER REGULATED UTILITIES
Chapter 366 — PUBLIC UTILITIES
View Entire Chapter

366.093 Public utility records; confidentiality.--

(1) The commission shall continue to have reasonable access to all public utility records and records of the utility's affiliated companies, including its parent company, regarding transactions or cost allocations among the utility and such affiliated companies, and such records necessary to ensure that a utility's ratepayers do not subsidize nonutility activities. Upon request of the public utility or other person, 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 s. 119.07(1).

(2) Discovery in any docket or proceeding before the commission shall be in the manner provided for in Rule 1.280 of the Florida Rules of Civil Procedure. Information which affects a utility's rates or cost of service shall be considered relevant for purposes of discovery in any docket or proceeding where the utility's rates or cost of service are at issue. The commission shall determine whether information requested in discovery affects a utility's rates or cost of service. Upon a showing by a utility or other person and a finding by the commission that discovery will require the disclosure of proprietary confidential business information, the commission shall issue appropriate protective orders designating the manner for handling such information during the course of the proceeding and for protecting such information from disclosure outside the proceeding. Such proprietary confidential business information shall be exempt from s. 119.07(1). 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. The commission shall adopt the necessary rules to implement this provision.

(3) Proprietary confidential business information means information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that

provides that the information will not be released to the public. Proprietary confidential business information includes, but is not limited to:

(a) Trade secrets.

(b) Internal auditing controls and reports of internal auditors.

(c) Security measures, systems, or procedures.

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

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

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

(4) Any finding by the commission that records contain proprietary confidential business information is effective for a period set by the commission not to exceed 18 months, unless the commission finds, for good cause, that the protection from disclosure shall be for a specified longer period. The commission shall order the return of records containing proprietary confidential business information when such records are no longer necessary for the commission to conduct its business. At that time, the commission shall order any other person holding such records to return them to the person providing the records. Records containing proprietary confidential business information which have not been returned at the conclusion of the period set pursuant to this subsection shall no longer be exempt from s. 119.07 (1) unless the public utility or affected person shows, and the commission finds, that the records continue to contain proprietary confidential business information. Upon such finding, the commission may extend the period for confidential treatment for a period not to exceed 18 months unless the commission finds, for good cause, that the protection from disclosure shall be for a specified longer period. During commission consideration of an extension, the records in question will remain exempt from s. 119.07(1). The commission shall adopt rules to implement this provision which shall include notice to the public utility or affected person regarding the expiration of confidential treatment.

History.--ss. 2, 15, ch. 82-25; ss. 11, 20, 22, ch. 89-292; s. 4, ch. 91-429.

II. Outside Persons Who Wish to Address the Commission at Internal Affairs

OUTSIDE PERSONS WHO WISH
TO ADDRESS THE COMMISSION AT

INTERNAL AFFAIRS
March 16, 2010

Speaker	**Representing**	**Item #**
Mike Murtha	Florida Concrete and Products Association	2
Diep Tu	Florida Concrete and Products Association	2

III. Supplemental Materials Provided During Internal Affairs

<u>NOTE</u>: The records reflect that there were no supplemental materials provided to the Commission during this Internal Affairs meeting.