

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: August 6, 2009

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Gervasi, Bennett, Fleming)
Division of Regulatory Compliance (Salak)
Division of Economic Regulation (Slemkewicz)

RE: Docket No. 080677-EI – Petition for increase in rates by Florida Power & Light Company.
Docket No. 090079-EI – Petition for increase in rates by Progress Energy Florida, Inc.

AGENDA: 08/18/09 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian (080677-EI)
Skop (090079-EI)

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\080677.RCM.DOC

Case Background

Staff has sought discovery concerning executive compensation in the Florida Power & Light Company (FPL) and Progress Energy Florida (PEF) rate cases, ultimately seeking certain compensation information for executives whose total compensation exceeds \$165,000. Both utilities filed requests for confidential treatment for certain information they provided in response to the discovery. Both utilities also asked for their requests to be heard by the full Commission.

On May 1, 2009, in Docket No. 090079-EI, PEF timely filed its Second Request for Confidential Classification of certain information produced in response to Staff's Second Request for Production of Documents (PODs) and of certain dollar amounts provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2). On July 21, 2009, also in Docket No. 090079-EI, PEF filed its 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. And on July 24, 2009, in the same docket, PEF filed its Sixth Request for Confidential Classification for Portions of its Response to Staff's Eighteenth Set of Interrogatories (Nos. 197-198) and Request for Consideration by Full Commission. PEF's Confidentiality Justification Matrices are attached to this recommendation as Attachment A.

On July 21, 2009, in Docket No. 080677-EI, FPL timely filed a Request for Confidential Classification of Staff's Third Set of Interrogatories No. 16 and Staff's Fourth Set of Interrogatories No. 32 and Request for Determination by Full Commission. On July 27, 2009, FPL filed its Revised Request for Confidential Classification of Staff's Third Set of Interrogatories No. 16, Staff's Fourth Set of Interrogatories No. 32, and Staff's Eighth Set of Interrogatories No. 97 and Request for Determination by Full Commission. FPL's Confidentiality Justification Matrices are attached to this recommendation as Attachment B.

By these filings, PEF and FPL request that certain employee salary information be afforded confidential classification pursuant to section 366.093, Florida Statutes (F.S.), and Rule 25-22.006, Florida Administrative Code (F.A.C.). Section 366.093, F.S., sets out exceptions from Chapter 119, F.S. (the Public Records Act), for certain proprietary confidential business information filed with the Commission, and states, in relevant part, that

[p]roprietary confidential business information includes, but is not limited to:

(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.

Pursuant to Rule 25-22.006(10), F.A.C., if the Commission denies a request for confidential classification, the material at issue is kept confidential until the time for filing an appeal has expired, and the utility or other person may request continued confidential treatment until juridical review is complete.

This recommendation addresses PEF and FPL's requests for confidentiality. The Commission has jurisdiction pursuant to section 366.093, F.S.

Discussion of Issues

Issue 1: Should PEF and FPL's Requests for Determination by Full Commission be granted?

Recommendation: Yes, PEF and FPL's Requests for Determination by Full Commission should be granted. PEF did not request a full Commission ruling on its Second Request for Confidential Classification pertaining to certain salary information provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2). The full Commission should also consider that request, which is addressed within Issue 2 of this recommendation. (Gervasi)

Staff Analysis: PEF requests that the full Commission consider its Fifth and Sixth Requests for Confidential Classification concurrently with the consideration of similar requests for protection of similar information. PEF states that there are different prehearing officers assigned to the PEF and FPL rate cases. PEF states that these circumstances give rise to the possibility of differing rulings on identical issues, and that 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. PEF requests that the requests at issue be considered by the full Commission because of the similarity of the issues, and to promote administrative efficiency and consistency of results, and states that it will participate at the agenda conference on this item pursuant to Rule 25-22.0021(2), F.A.C.

FPL also seeks the determination of the full Commission on its Request for Confidential Classification because of the need for consistency in regulatory determinations on similar issues and because of the harm to customers and to its business operations which FPL states would result from the disclosure of the information.

Because of the similarity of the issues and to promote administrative efficiency and consistency of results, staff recommends that PEF and FPL's Requests for Determination by Full Commission should be granted. PEF did not request a full Commission ruling on its Second Request for Confidential Classification pertaining to certain salary information provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2). Nevertheless, for the same reasons, staff recommends that the full Commission should also consider that request, which is addressed within Issue 2 of this recommendation.

Issue 2: Should the portion of PEF's Second Request for Confidential Classification pertaining to the information provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2) (contained within, but not comprising all of DN 04092-09), PEF's Fifth Request for Confidential Classification for Portions of its Response to Interrogatory Nos. 123-124 from Staff's Tenth Set of Interrogatories (Nos. 123-126) (DN 07388-09), and PEF's Sixth Request for Confidential Classification for Portions of its Response to Staff's Eighteenth Set of Interrogatories (Nos. 197-198) (DN 07595-09) be granted?

Recommendation: No, the portion of PEF's Second Request for Confidential Classification pertaining to the information provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2) (contained within, but not comprising all of DN 04092-09), PEF's Fifth Request for Confidential Classification for Portions of its Response to Interrogatory Nos. 123-124 from Staff's Tenth Set of Interrogatories (Nos. 123-126) (DN 07388-09), and PEF's Sixth Request for Confidential Classification for Portions of its Response to Staff's Eighteenth Set of Interrogatories (Nos. 197-198) (DN 07595-09) should be denied. PEF should be required to provide in a publicly available manner, spreadsheets which, at a minimum, match the compensation information at issue to the specific job titles previously provided. (Gervasi, Salak, Slemkewicz)

Staff Analysis:

Second Request for Confidential Classification

By its Second Request for Confidential Classification, PEF requests confidential classification of certain information produced in response to Staff's Second Request for Production of Documents (PODs) and of the dollar amounts provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2). Because the information produced by PEF in response to Staff's Second Request for PODs does not contain employee salary information, that portion of PEF's Second Request for Confidential Classification (contained within, but not comprising all of DN 04092-09) is not addressed herein and will be ruled upon separate and apart from the ruling arising from this recommendation. The information provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2) (also contained within, but not comprising all of DN 04092-09) includes executive compensation data, which PEF states contains confidential information, the disclosure of which could seriously impair its competitive business interests. That information is the subject of this issue.

According to PEF, the disclosure of the amount of salary, bonuses, and overall compensation that it is willing to pay its executives would have an adverse impact on its ability to contract with and retain qualified individuals, by allowing other companies an advantage in negotiating with such employees. PEF states that at no time has it publicly disclosed the confidential information or documents at issue, and that it has treated and continues to treat this information as confidential. PEF argues that this information fits the statutory definition of proprietary confidential business information under subsection 366.093(3)(e), F.S.,¹ and Rule 25-

¹ See pages 33-34 of Attachment C to PEF's Second Request for Confidential Classification, Confidentiality Justification Matrix.

22.006, F.A.C., and requests that the redacted portions of Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2) be classified as confidential. Subsection 366.093(3)(e), F.S., provides that proprietary confidential business information includes "[i]nformation relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information." Rule 25-22.006, F.A.C., sets forth the Commission's procedures for the filing and handling of confidential information.

In an Affidavit attached to its Request, Mr. Masceo DesChamps, Director of Compensation and Benefits, Progress Energy Service Company, states that if disclosed to the public or to other utilities, this information could provide firms with which PEF competes for qualified employees with a competitive advantage in acquiring and retaining such employees, and could also give prospective employees an advantage in negotiating compensation packages, leading to increases in the overall amount of compensation paid to employees. He further states that this overall increase in the amount paid in compensation could adversely impact rates paid by PEF's ratepayers, or make the Company a less attractive investment to potential investors.

Fifth Request for Confidential Classification

By its Fifth Request for Confidential Classification, PEF requests confidential classification of certain numerical information contained within its Response to Staff Interrogatory Nos. 123 and 124 from Staff's Tenth Set of Interrogatories (Nos. 123-126) (DN 07388-09). PEF's Response to Interrogatory Nos. 123 and 124 contains names, job titles, and compensation information, including base salaries, bonuses, and other compensation for all employees of Progress Energy, Inc. and PEF whose total compensation exceeds \$200,000. PEF does not claim confidentiality for the names and job titles of these employees or for the total compensation paid to them as a group. PEF does claim confidentiality to the extent the information discloses the specific compensation paid to specific employees.

PEF points out that subsection 366.093(3), F.S., provides, in pertinent part, that:

[p]roprietary confidential business information means information . . . 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.

PEF further points out that under subsection 366.093(3), F.S., proprietary confidential business information includes, but is not limited to, six specific categories of information. PEF states that the two specific categories pertinent to the analysis of its claim of confidentiality are subsections 366.093(3)(e) and (f), F.S. Subsection 366.093(3)(e), quoted above, addresses information related to competitive interests. Subsection 366.093(3)(f), F.S., provides that proprietary confidential business information also includes "[e]mployee personnel information unrelated to compensation, duties, qualifications or responsibilities." PEF argues that because protection under subsection 366.093(3), F.S., is not limited to information that falls into one of the six

categories enumerated in subsections (3)(a) to (f), protection is available to any information that meets the general definition in that subsection.

PEF argues that the fact that information disclosing the compensation of specific employees does not qualify for protection under subsection 366.093(3)(f), F.S., does not make it ineligible for protection under the general language of subsection 366.093(3), F.S., and particularly under subsection 366.093(3)(e), F.S. PEF states that the Affidavit of Mr. DesChamps attached to its Request shows that the information for which PEF claims confidentiality meets each of the requirements of subsection 366.093(3), F.S., in that the information is controlled by PEF, is treated by PEF as private, the disclosure of the information would cause harm to both PEF and ultimately its ratepayers, and the information has not been publicly disclosed. PEF further states that the Affidavit also shows that the information meets the requirements of subsection 366.093(3)(e), F.S., in that it relates to PEF's competitive interests and disclosure of the information would impair PEF's competitive business interests.

PEF argues that 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 ways. First, 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. 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 its business operations and increase rates. Second, public disclosure of the information would make it available to prospective employees, giving them an advantage in negotiating compensation packages, leading to increases in the overall amount of compensation paid to employees. This would adversely impact the Company's business operations and increase rates. Third, public disclosure of such information would make it available to current employees. If PEF's employees were to learn the compensation of their colleagues, there would be a detrimental effect on its current employees that could lead to increased employee turnover, increased recruitment and training costs, increased labor costs, and lower employee morale and productivity.

PEF argues that the Commission precedent on the protection of detailed compensation information is mixed and that such information has been protected in several Commission orders. In granting such protection, the Commission has stated that disclosure "would hamper the Company's ability to negotiate compensation with new executives and other management personnel" and "would also enable competing employees 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 purpose of retaining their services, either of which would cause harm to the Company and its ratepayers."² And in the annual fuel docket, the Commission similarly granted confidential classification to the names and positions of Florida Power Company's power marketing personnel and factors considered in their compensation,

² Order No. PSC-02-1755-CFO-GU at 5, issued December 12, 2002, in Docket No. 020384-GU, In Re: Petition for rate increase by Peoples Gas System.

pursuant to subsection 366.093(3)(e), F.S.³ PEF argues that the information at issue in its current Request is even more sensitive, since it contains detailed information on the compensation of specific employees, not merely the factors considered in their compensation.

PEF further argues that even when denying confidential classification to portions of a witness's testimony related to "compensation levels and compensation plans" that Gulf Power Company considered to be confidential, the Commission was cognizant of the sensitive nature of the type of information at issue, and only denied the request because the information did not "reveal any specifics of compensation plans or compensation levels that would cause irreparable harm to Gulf's competitive plans. Further, the information [was] given in total dollar amounts and percentages and [did] not reveal individual employees' names, levels, incentive compensation, or bonuses which would be competitively sensitive or confidential in nature."⁴

PEF recognizes that there are also Commission orders that deny confidential classification to compensation information, but argues that those orders should be rejected. PEF points to Order No. PSC-07-0579-CFO-WS at 3,⁵ in which the Commission ruled that subsection 367.156(3)(f), F.S., 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, F.S.⁶ PEF argues that the conclusion in that order, and in the orders denying confidentiality cited therein, is incorrect. PEF argues that 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). According to PEF, because of the exclusion in subsection (3)(f), the company bears the burden to make a higher showing of competitive impact 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. PEF argues that 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. PEF argues that 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. According to PEF, as the statute is worded, the requesting utility can still prove that the compensation information harms its competitive business interests under subsection 366.093(3)(e) or otherwise harms its ratepayers or business operations under the general language of subsection 366.093(3).

³ Order No. PSC-01-2528-CFO-EI at 2, 5, issued December 28, 2001, in Docket No. 010001-EI, In Re: Fuel and purchased power cost recovery clause.

⁴ Order No. PSC-02-0235-CFO-EI at 2, issued February 25, 2002, in Docket No. 010949-EI, In Re: Request for rate increase by Gulf Power Company.

⁵ Issued July 13, 2007, in Docket No. 060368-WS, In Re: Application for increase in water and wastewater rates by Aqua Utilities, Florida, Inc.

⁶ PEF notes that this order involved a water and wastewater company, and hence the confidentiality provisions of Chapter 367, rather than Chapter 366. PEF further notes that except for their applicability to different types of utilities, the sections are identical in all material respects.

Sixth Request for Confidential Classification

By its Sixth Request for Confidential Classification, PEF requests confidential classification of certain numerical information contained within its Response to Staff's Eighteenth Set of Interrogatories (Nos. 197-198) (DN 07595-09). PEF's Response to Interrogatory Nos. 197 and 198 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 \$165,000. PEF does not claim confidentiality for the names and job titles of these employees or for the total compensation paid to them as a group. PEF does claim confidentiality to the extent the information discloses the specific compensation paid to specific employees.

PEF's arguments for the confidential classification of this information are the same arguments that it raised in its Fifth Request for Confidential Classification, which are summarized above.

Analysis and Recommendation

When a statute is clear and unambiguous, the courts will not look behind its plain language for legislative intent or resort to rules of statutory construction to ascertain intent.⁷ Subsection 366.093(3), F.S., clearly and unambiguously defines what constitutes proprietary confidential business information. Pursuant to this subsection, proprietary confidential business information is information that 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 must not have been disclosed except under certain circumstances as defined therein. The statute further provides, in subsection 366.093(3)(a)-(f), that proprietary confidential business information includes, but is not limited to, six specific types of information. Subsection 366.093(3)(f) plainly states that proprietary confidential business information includes "[e]mployee 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 so 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. The information at issue pertains to employee compensation. Therefore, it is unnecessary for the Commission to determine whether disclosure of the information would cause harm to PEF's ratepayers or to its business operations, regardless of the fact that PEF argues that it would cause such harm.

⁷ Daniels v. FDOH, 898 So. 2d 61, 64 (Fla. 2005).

By Order No. PSC-07-0579-CFO-WS at 3, the Commission found that it “has repeatedly, with very few exceptions, [including those cases cited by PEF] denied confidential classification for information relating to salaries, compensation, duties, qualifications, or responsibilities.”⁸ Also by Order No. PSC-07-0579-CFO-WS at 3, the Commission ruled that “[b]ecause the salary information at issue is employee personnel information related to compensation, and the legislature in section 367.156(3)(f) specifically excluded that category of information from the statutory definition of proprietary business information, the information must be treated as public record pursuant to section 119.01, Florida Statutes.”

PEF argues that, because the general language of subsection 366.093(3) states that proprietary confidential business information “is not limited to” the types of information enumerated in the following paragraphs, the utility may prove that the compensation information harms its competitive business interests under subsection 366.093(3)(e) or otherwise harms its ratepayers or business operations under the general language of subsection 366.093(3). PEF is incorrect. The language of 366.093(3)(f) 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.⁹ 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), the specific language of subsection 366.093(3)(f) would control over the general language of subsection 366.093(3). Therefore, PEF’s argument would fail even if the rules of statutory construction were to apply in this instance.

PEF is also incorrect that, because of the exclusion in subsection (3)(f), the company bears the burden to make a higher showing of competitive impact in order to obtain protection for personnel information related to compensation, and that nothing in the language or structure of the statute precludes such a showing. Nothing in the language or structure of the statute permits such a showing. PEF is reading language into the statute that does not exist. Courts lack the power to construe an unambiguous statute in a way that would extend or modify its express terms or its reasonable and obvious implications, as to do so would be an abrogation of legislative power.¹⁰

PEF further argues that, 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. That is precisely what the Legislature did by enacting subsection 366.093(3)(f).

For the foregoing reasons, staff recommends that the portion of PEF's Second Request for Confidential Classification pertaining to certain information provided in response to Interrogatory No. 1 from Staff's First Set of Interrogatories (Nos. 1-2) (contained within, but not

⁸ See Order No. PSC-07-0579-CFO-WS at 3, fn 2, for a string of citations to Commission orders denying confidential classification for such information.

⁹ State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1073 (Fla. 2006).

¹⁰ University of Florida, Bd. Of Trustees v. Sanal, 837 So. 2d 512, 516 (Fla. 1st DCA 2003).

Docket Nos. 080677-EI, 090079-EI

Date: August 6, 2009

comprising all of DN 04092-09), PEF's Fifth Request for Confidential Classification for Portions of its Response to Interrogatory Nos. 123-124 from Staff's Tenth Set of Interrogatories (Nos. 123-126) (DN 07388-09), and PEF's Sixth Request for Confidential Classification for Portions of its Response to Staff's Eighteenth Set of Interrogatories (Nos. 197-198) (DN 07595-09) should be denied. PEF should be required to provide in a publicly available manner, spreadsheets which, at a minimum, match the compensation information at issue to the specific job titles previously provided.

Issue 3: Should FPL's Revised Request for Confidential Classification of Staff's Third Set of Interrogatories No. 16, Staff's Fourth Set of Interrogatories No. 32, and Staff's Eighth Set of Interrogatories No. 97 (DN 07400-09 and DN 07694-09) be granted?

Recommendation: No, FPL's Revised Request for Confidential Classification of Staff's Third Set of Interrogatories No. 16, Staff's Fourth Set of Interrogatories No. 32, and Staff's Eighth Set of Interrogatories No. 97 (DN 07400-09 and DN 07694-09) should be denied. FPL should be required to provide in a publicly available manner, spreadsheets which, at a minimum, match the compensation information at issue to the specific job titles previously provided. (Gervasi, Salak, Slemkewicz)

Staff Analysis:

Request for Confidential Classification

By its Request, FPL seeks confidential classification of certain employee compensation information which it claims is competitively sensitive and private information produced in response to Interrogatory No. 16 from Staff's Third Set of Interrogatories (Nos. 9-19), Interrogatory No. 32 from Staff's Fourth Set of Interrogatories (Nos. 20-35), and Interrogatory No. 97 from Staff's Eighth Set of Interrogatories (Nos. 96-97) (DN 07400-09 and DN 07694-09). In support of its request, FPL argues that the Legislature has determined that certain categories of information listed in subsections 366.093(3)(a) through (f), F.S., are automatically entitled to confidential treatment. FPL argues that the statute is equally clear that any information that meets the criteria of the statute as set forth in subsection 366.093(3) is entitled to be protected. That criteria includes that the information is owned or controlled by the company, is intended to be and is treated by the person or company as private, would cause harm to the ratepayers or the person or company's business operations, and has not been disclosed unless disclosed pursuant to some order or agreement that further protects the information from public disclosure. FPL argues that the information subject to this Request meets these criteria and should be afforded confidential protection.

According to FPL, subsection 366.093(3)(f), F.S., entitles automatic protection to personnel information unrelated to compensation and nothing in that subsection precludes a determination that information related to compensation should be afforded confidential treatment if the relevant criteria are met, particularly given the competitively sensitive nature of the information and the harm to customers and the company's operations which would be a direct result of the disclosure.

FPL cites to a number of Commission orders in which the Commission has granted confidential classification to competitively sensitive compensation information from public disclosure under subsection 366.093(3)(e), F.S.¹¹ FPL argues that the Commission, while having full access to as much individual compensation information as it deems appropriate to fulfill its regulatory functions, has thus consistently agreed that individual compensation information should not be (nor need be) publicly disclosed. FPL argues that the same principles should be upheld and applied in this instance. According to FPL, to do otherwise would be to disregard a

¹¹ See FPL's Request for Confidential Classification at 3-4.

longstanding fundamental respect for privacy that the Commission's actions in the past have maintained. FPL cites to Order No. PSC-02-0235-CFO-EI¹² as an example of where the Commission has recognized the competitively sensitive nature of certain types of compensation information in the past. By that Order, in denying confidential treatment over summary-level compensation information, the Commission stated that the information that was the subject of that request did not reveal "any specifics of compensation plans or compensation levels that would cause irreparable harm to [the utility's] competitive plans." The Commission further stated that "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."

FPL states that it has provided, in a publicly available manner, a variety of information related to employee compensation. Consistent with the requirements of the Securities Exchange Commission, FPL publicly discloses specific compensation information for its top officers. In this proceeding, FPL has provided data related to employees with salaries over \$165,000 as requested. FPL provided summary-level or aggregated data in a publicly available manner, and has made the detail-level information, including names and positions, available to the Commission and Staff. FPL states that it is requesting protection only for information whose public disclosure would cause the Company and its customers irreparable harm.

FPL has filed as Exhibit D to its Request a copy of an Affidavit of Ms. Kathleen Slattery, attesting to the detrimental impacts one would expect to see as a result of the public disclosure of this compensation information. FPL states that it operates within a highly competitive market for talented employees. Disclosure of compensation and incentive compensation information would enable competing employers to meet, or beat, the compensation offered by FPL. This would result in the loss of highly skilled and trained employees to competitors and the inability to attract new talent, or the need to increase the level of compensation and incentives already paid in order to retain these employees and attract new talent. Overall costs and performance will be affected by such disclosure as the Company is forced to pay to retain, or pay to replace and train new employees. FPL states that for these same reasons, compensation information not otherwise required to be publicly disclosed by Securities and Exchange Commission rules is held to be confidential by any major company in the United States. According to FPL, such competitively sensitive information is entitled to protection pursuant to subsection 366.093(3)(e), F.S.

FPL further argues that confidential treatment for salary information linked with employee names is also necessary to protect the individual employees' rights to privacy. In Florida, a citizen's right to privacy is independently protected by Art. V, § 23 of the state constitution. To protect the privacy interests of its employees who are not subject to the mandatory disclosure requirements of the Securities and Exchange Commission, FPL will continue to request confidential treatment for individual employees' salaries linked to their names and titles. FPL maintains this information as confidential and it has not been disclosed.

FPL requests that the Commission determine that the information linking particular employees to their compensation information is entitled to protection pursuant to subsection

¹² Issued February 25, 2002, in Docket No. 010949-EI, In Re: Request for rate increase by Gulf Power Company.

366.093(3)(e), F.S., or alternatively, that this information should be protected as confidential pursuant to the Commission's general authority granted by subsection 366.093(3), F.S.

Analysis and Recommendation

When a statute is clear and unambiguous, the courts will not look behind its plain language for legislative intent or resort to rules of statutory construction to ascertain intent.¹³ Subsection 366.093(3), F.S., clearly and unambiguously defines what constitutes proprietary confidential business information. Pursuant to this subsection, proprietary confidential business information is information that 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 must not have been disclosed except under certain circumstances as defined therein. The statute further provides, in subsection 366.093(3)(a)-(f), that proprietary confidential business information includes, but is not limited to, six specific types of information. Subsection 366.093(3)(f) plainly states that proprietary confidential business information includes "[e]mployee 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 so 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. The information at issue pertains to employee compensation. Therefore, it is unnecessary for the Commission to determine whether disclosure of the information would cause harm to FPL's ratepayers or to its business operations, regardless of the fact that FPL argues that it would cause such harm.

By Order No. PSC-07-0579-CFO-WS at 3, the Commission found that it "has repeatedly, with very few exceptions, [including those cases cited by FPL] denied confidential classification for information relating to salaries, compensation, duties, qualifications, or responsibilities."¹⁴ Also by Order No. PSC-07-0579-CFO-WS at 3, the Commission ruled that "[b]ecause the salary information at issue is employee personnel information related to compensation, and the legislature in section 367.156(3)(f) specifically excluded that category of information from the statutory definition of proprietary business information, the information must be treated as public record pursuant to section 119.01, Florida Statutes."

FPL argues 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), F.S., or alternatively, that this information should be protected as confidential

¹³ Daniels v. FDOH, 898 So. 2d 61, 64 (Fla. 2005).

¹⁴ See Order No. PSC-07-0579-CFO-WS at 3, fn 2, for a string of citations to Commission orders denying confidential classification for such information.

pursuant to the Commission's general authority granted by subsection 366.093(3), F.S. However, the language of 366.093(3)(f) 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.¹⁵ 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), the specific language of subsection 366.093(3)(f) would control over the general language of subsection 366.093(3). Therefore, FPL's argument would fail even if the rules of statutory construction were to apply in this instance.

FPL argues that subsection 366.093(3)(f), F.S., entitles automatic protection to personnel information unrelated to compensation and nothing in that subsection precludes a determination that information related to compensation should be afforded confidential treatment if the relevant criteria are met. FPL is incorrect. Subsection 366.093(3)(f) clearly and unambiguously excludes such information from the definition of proprietary confidential business information. Courts lack the power to construe an unambiguous statute in a way that would extend or modify its express terms or its reasonable and obvious implications, as to do so would be an abrogation of legislative power.¹⁶

For the foregoing reasons, staff recommends that FPL's Revised Request for Confidential Classification of Staff's Third Set of Interrogatories No. 16, Staff's Fourth Set of Interrogatories No. 32, and Staff's Eighth Set of Interrogatories No. 97 (DN 07400-09 and DN 07694-09) should be denied. FPL should be required to provide in a publicly available manner, spreadsheets which, at a minimum, match the compensation information at issue to the specific job titles previously provided.

¹⁵ State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1073 (Fla. 2006).

¹⁶ University of Florida, Bd. Of Trustees v. Sanal, 837 So. 2d 512, 516 (Fla. 1st DCA 2003).

Docket Nos. 080677-EI, 090079-EI

Date: August 6, 2009

Issue 4: Should these dockets be closed?

Recommendation: No, these dockets should remain open to process PEF and FPL's pending rate cases. (Gervasi)

Staff Analysis: These dockets should remain open to process PEF and FPL's pending rate cases.