

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 11, 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: This item should be taken up immediately after Item 4.

FILE NAME AND LOCATION: S:\PSC\GCL\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 compensation information for executives whose total compensation exceeds \$165,000. On August 6, 2009, in both rate case dockets, staff filed a Motion for Order Compelling Responses to Interrogatories (Motions to Compel), requesting the Commission to compel PEF to fully respond to the discovery requests within seven days, FPL to fully respond to the discovery

requests within two days, and requesting that the companies file their responses to the Motions no later than noon on Monday, August 10, 2009. On August 7, 2009, FPL filed its and its employee intervenors' Response and Memorandum in Opposition to Staff's Motion to Compel, and filed its and its employee intervenors' Supplemental Response in Opposition to Staff's Motion to Compel on 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.

This recommendation addresses staff's Motions to Compel and FPL and PEF's responsive filings thereto. At issue are Interrogatory Nos. 16-17 from Staff's Third Set of Interrogatories to FPL, Interrogatory No. 32 from Staff's Fourth Set of Interrogatories to FPL, Interrogatory No. 97 from Staff's Eighth Set of Interrogatories to FPL, 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.

Staff Interrogatory Nos. 16, 32, and 97 to FPL and Staff Interrogatory Nos. 123-124 and 197-198 to PEF are also the subject of the staff recommendation filed August 6, 2009, in both dockets, addressing the companies' requests for confidential classification for certain information contained within their responses to those interrogatories. In its Motions to Compel, staff states that the requests for confidentiality and Motions to Compel are integrally related and requests that they be considered at the same agenda conference.

The Commission has jurisdiction pursuant to sections 120.569 and 120.57, Florida Statutes (F.S.), and Rule 28-106.211, Florida Administrative Code (F.A.C.).

Discussion of Issues

Issue 1: Should Staff's Motion for Order Compelling FPL to Respond to Interrogatory Nos. 16-17, 32 and 97 be granted?

Recommendation: Yes, Staff's Motion for Order Compelling Responses to Interrogatories should be granted. FPL should be directed to fully and completely respond to the interrogatories as revised by staff in Attachment B of its Motion within two days of the issuance date of the order arising from this recommendation. (Gervasi, Salak, Slemkewicz)

Staff Analysis:

Motion to Compel

Staff served its Third Set of Interrogatories (Nos. 9-19) upon FPL on May 22, 2009. FPL served its responses and "General Objections" to those interrogatories on June 11, 2009, and made no specific objections to Interrogatory Nos. 16-17. By Interrogatory Nos. 16-17, staff requested that FPL provide, for each officer of FPL Group (Interrogatory No. 16) and FPL (Interrogatory No. 17), the name and title of the officer and the actual or projected compensation amounts for 2008, 2009, and 2010 for the following:

- a) Base Salary
- b) Stock Awards
- c) Option Awards
- d) Non-Equity Incentive Plan Compensation
- e) All Other Compensation
- f) Total Compensation
- g) Amount of Total Compensation Allocation to FLORIDA POWER & LIGHT COMPANY
- h) Amount of Total Compensation Included in Adjusted Jurisdictional Other O&M Expenses on MFR Schedule C-1, Pages 1, 2, and 3.

Staff states that FPL's responses to these interrogatories were evasive or incomplete as follows:

1. The responses provided for a) through f) are incomplete because the name and title for each officer are not matched with the dollar amounts provided, except for 5 officers. Staff needs this information to evaluate the appropriateness of the employee compensation to be included in base rates;

2. The responses provided for a) through f) are incomplete because compensation amounts provided for a) through f) above were developed by applying an "affiliation allocation rate" and represent the net "expense to FPL for each individual." The amounts for a) through e) should be gross amounts before any allocations. The total of a) through e) should be provided as the response to f). The responses to g) should then show the amounts allocated to FPL. Staff needs this information to evaluate the appropriateness of the employee compensation and its

allocation between FPL Group and FPL for purposes of including such amounts in base rates; and

3. FPL did not respond to h). The responses to h) should identify the amount included in “Adjusted Jurisdictional Other O&M Expenses” shown on MFR Schedule C-1, pages 1 – 3. It would be acceptable for FPL to provide a reasonable estimate and an explanation of how the estimate was developed. Staff needs this information to evaluate FPL’s request for inclusion of portions of employee compensation in base rates.

Staff served its Fourth Set of Interrogatories (Nos. 20-35) upon FPL on May 29, 2009. FPL served its responses and “General Objections” to those interrogatories on June 18, 2009, and made no specific objections to Interrogatory No. 32. By Interrogatory No. 32, staff requested that FPL provide the following information for each employee of FPL whose total compensation is \$200,000 or greater:

- a. Name/Title
- b. Base Salary (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- c. Overtime Pay (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- d. Bonuses (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- e. Stock Awards (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- f. Option Awards (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- g. Non-Equity Incentive Plan Compensation (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- h. All Other Compensation (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- i. Total Compensation (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- j. Amount of Total Compensation Allocated to Florida Power & Light Company (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011)
- k. Amount of Total Compensation Included in Adjusted Jurisdictional Other O&M Expenses on MFR Schedule C-1, Pages 1, 2 and 3 (the actual or projected compensation amounts for 2008, 2009, 2010 and 2011).

Staff states that FPL’s responses to Interrogatory No. 32 were evasive or incomplete as follows:

1. The name and title a) for each employee are not matched with the dollar amounts provided for b) and k). Staff needs this information to evaluate the appropriateness of the employee compensation to be included in base rates;

2. The responses provided for b) through i) are incomplete because compensation amounts provided for b) through i) were developed by applying an “affiliation allocation rate” and represent the net “expense to FPL for each individual.” The amounts for b) through h) should be gross amounts before any allocations. The total of b) through h) should be provided as the response to i). The response to j) should then show the amounts allocated to FPL. Staff needs this information to evaluate the appropriateness of the employee compensation and its allocation between FPL Group and FPL for purposes of inclusion in base rates;

3. FPL originally did not respond to k). The response necessary should have identified the amount included in “Adjusted Jurisdictional Other O&M Expenses” shown on MFR Schedule C-1, pages 1 – 3. In discussions with FPL, staff concurred that it would be acceptable for FPL to provide a reasonable estimate and an explanation of how the estimate was developed. FPL provided a supplemental response on August 5, 2009, which gave staff a reasonable estimate. Staff needs an explanation of how the estimate was developed; and

4. FPL only provided responses to Interrogatory No. 32 for the year 2008. In its response to the Interrogatory, FPL stated:

With respect to the requested estimates for 2009 through 2011, FPL does not budget total compensation or its components at the individual employee level. Each FPL business unit budgets for the base salary, overtime, non-equity incentive plan compensation and certain other earnings of its employees, which are aggregated. FPL also maintains a separate corporate budget location where stock awards and option awards are budgeted, also on an aggregate basis. Therefore, forecasting each component of total compensation for each employee listed on attached 2008 schedule for 2009, 2010 and 2011 cannot be done with precision. A fair estimate of 2009, 2010 and 2011 expenses would be to escalate the 2008 numbers in Attachment No. 1 by the MFR C-35 year-over-year increases of gross average payroll per employee for 2009, 2010 and 2011 of 2.64%, 3.41%, and 0.87% respectively.

With respect to the estimates for 2009 through 2011 compensation for officers provided by the Company in FPL’s response to Staff’s third Set of Interrogatories No. 16, such estimates were possible to perform because all officers are budgeted in one centralized location rather than by each respective business unit. Furthermore, in the centralized budget for officers, “base salary,” “non-equity plan compensation,” and some “other” compensation expenses are budgeted by individual. As to the “stock awards” and “options,” FPL used the estimated grants that would be awarded to each executive each year. This combination of salary, non-equity incentives, equity and other compensation estimates give a fair view of the amount of compensation each executive may receive in 2009, 2010 and 2011. However, the same individual budget data does not exist in the same format for all employees below officer level.

Staff states that FPL has only provided complete responses to staff for FPL’s 2008 historical year. FPL has presented its rate case for a projected year of 2010 and a subsequent

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projected year of 2011. Included in FPL's base rates is employee compensation. Employee compensation is an issue in the proceeding and intervenors have provided testimony questioning employee compensation. Staff states that it needs the requested information to evaluate FPL's proposed rate increase.

Staff served its Eighth Set of Interrogatories (Nos. 96-97) upon FPL on June 25, 2009. FPL served its responses and "General Objections" to them on July 15, 2009, and made no specific objection to Interrogatory No. 97. By Interrogatory No. 97, staff requested that FPL provide the actual or projected compensation amounts for each employee of FPL during 2008, 2009, 2010 and 2011, whose total annual compensation is \$165,000 or greater but less than \$200,000 for the following:

- 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 Florida Power & Light Company
- k. Amount of Total Compensation Included in Adjusted Jurisdictional Other O&M Expenses on MFR Schedule C-1, Pages 1, 2 and 3.

Staff states that FPL's response was evasive or incomplete as follows:

1. The name and title a) for each employee are not matched with the dollar amounts provided for b) and k). Staff needs this information to evaluate the appropriateness of the employee compensation to be included in base rates;

2. The responses provided for b) through j) are incomplete because compensation amounts provided for b) through i) were developed by applying an "affiliation allocation rate" and represent the net "expense to FPL for each individual." The amounts for b) through h) should be gross amounts before any allocations. The total of b) through h) should be provided as the response to i). The response to j) should then identify the amounts allocated to FPL. Staff needs this information to evaluate the appropriateness of the employee compensation and its allocation between FPL Group and FPL;

3. FPL did not provide a response to k) in its first set of responses. After discussion with staff, FPL provided a supplemental response which adequately addressed staff's question raised by 97(k). It was acceptable for FPL to provide a reasonable estimate. Staff needs FPL to include an explanation of how the estimate was developed; and

4. FPL only provided responses to Interrogatory 97 for the year 2008. In its response to the Interrogatory, FPL stated:

With respect to the requested estimates for 2009 through 2011, FPL does not budget total compensation or its components at the individual employee level. Each FPL business unit budgets for the base salary, overtime, non-equity incentive plan compensation and certain other earnings of its employees, which are aggregated. FPL also maintains a separate corporate budget location where stock awards and option awards are budgeted, also on an aggregate basis. Therefore, forecasting each component of total compensation for each employee listed on Attachment No. 1 cannot be done with precision. A fair estimate of 2009, 2010 and 2011 expenses would be to escalate the 2008 numbers in Attachment No. 1 by the MFR CC-35 year-over-year increases of gross average payroll per employee for 2009, 2010 and 2011 of 2.64%, 3.41%, and 0.87% respectively.

Staff argues that it needs the 2009, 2010, and 2011 information to evaluate FPL's proposed inclusion of employee compensation in base rates. FPL has presented its rate case for a projected year of 2010 and a subsequent projected year of 2011. Included in FPL's base rates is employee compensation. Employee compensation is an issue in the proceeding and intervenors have provided testimony questioning employee compensation. Staff states that it needs the requested information to evaluate FPL's proposed rate increase. The Commission reviews expenses for reasonableness. Compensation is a major component of FPL'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 FPL is reasonable, the Commission needs to know if the total compensation for that employee is reasonable. Staff states that it is currently unable to determine the reasonableness of compensation allocations between FPL and FPL Group. The purpose of obtaining this information is to show the revenue effect on rates. Ultimately, this information impacts the revenue requirement which translates into rates and charges.

In its responses to Interrogatories Nos. 16-17, 32, and 97, FPL states:

Once all of the expenses for 2008 through 2011 were developed, an affiliate allocation rate was then applied to more accurately reflect the amount of expense to FPL for each individual. Please refer to Attachment No. 1 of FPL's response . . . for more details. Attachment No. 1 is confidential and will be made available by FPL for inspection and review.

Upon Staff's request, FPL filed an unredacted version of Attachment No. 1 with a request for confidential classification. Staff states that it has reviewed this document and it does not provide the information necessary to respond to Interrogatories Nos. 16-17, 32, and 97.

Staff further states that in addition to Attachment 1, FPL counsel informed staff that a "key" exists which would allow staff to be able to match each employee with their compensation amounts. FPL indicated that the "key" would not provide other information responsive to staff's interrogatories, such as unallocated compensation amounts. Thus, even if the "key" is provided to staff, FPL's response will still not fully comply with staff's discovery requests. Staff has asked the utility to provide this "key." FPL takes the position that it will not file the "key" with

the Commission, but has allowed staff to view it at FPL's offices. Staff argues that FPL's position is unsupportable and that FPL 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 has notified FPL of its failure to respond and conferred in good faith with FPL in an effort to secure the requested discovery without Commission action. As Attachment B to the Motion, staff attached an e-mail dated August 6, 2009, that staff sent to FPL and all parties, and FPL's response thereto, also dated August 6, 2009. By way of that e-mail, staff indicated what information staff needs to have from FPL to satisfy its interrogatory requests, as follows:

1. For responses to Interrogatory Nos. 16 and 17, staff needs the individual job positions, total compensation levels by job position, including individual job positions and each component that comprises total compensation levels, as well as total compensation levels by each individual job position;

2. For each job position, including officers and directors, staff needs all salary and incentive information including total compensation by each individual job position before the amounts are allocated to FPL. Staff needs the information for each of the 368 job positions, including FPL and FPL Group job positions. Staff does not want the numbers to be aggregated.

Also by way of that e-mail, staff indicated that FPL had already provided the FPL-allocated amounts for each job position, which is responsive to Interrogatory Nos. 16 g) and 17 g) and 32 j) and 97 j). Staff indicated that it will accept the aggregated information for Adjusted Jurisdictional Other O&M Expenses on MFR Schedule C-1 as long as supporting workpapers and assumptions are provided with those responses, and that this will satisfy staff's requests under Interrogatory Nos. 16 h) and 17 h) and 32 k) and 97 k).

Moreover, by way of that e-mail, in consideration of FPL's concerns regarding employee privacy, staff revised its request and stated that it would be satisfied with receiving the individual compensation information by each individual job title or position, and not the names of the employees. However, staff does not want an aggregate number by groups of positions.

Finally, staff expressed its concern regarding only receiving 2008 information in response to Interrogatory Nos. 32 and 97. FPL provided staff with "per job description compensation" for 2008. FPL also provided escalation factors as a fair estimate of the increases for 2009, 2010, and 2011. To completely answer staff's interrogatories, staff requested that FPL apply those escalation factors per employee and provide staff with the excel spreadsheet.

In its response to the e-mail, FPL indicated it would provide certain supplemental responses to the discovery questions at issue, but stated it has the same employee privacy concerns and concerns about driving up compensation costs with providing specific or generic job titles as it does with providing individual names.

In the Motion, staff states that while FPL did file a supplemental response to Interrogatory Nos. 32 k) and 97 k), and indicated it was willing to provide responses to Interrogatory Nos. 32 and 97 for the years 2009 through 2011, it did not indicate it would file

complete responses. Staff states that it must have complete responses to all interrogatories except Interrogatory Nos. 32 k) and 97 k), which have been provided.

Staff requests that the Commission enter an order compelling FPL to respond within two 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.

FPL's Response

On August 7, 2009, FPL filed its and its Employee Intervenors' Response and Memorandum in Opposition to Staff's Motion to Compel (Response). The 15 FPL employees named in the Response state they are acting in their individual capacities. FPL and its employee intervenors (collectively referred to herein as FPL) state that compelled disclosure of employee-identifiable compensation would violate the employee intervenors' fundamental rights of privacy as guaranteed by Article I, Section 23 of the Florida Constitution, is unnecessary to the performance of any authorized Commission function and is therefore irrelevant and outside the jurisdiction and powers of the Commission, and would violate FPL's long-standing policy of maintaining confidentiality of such information. FPL argues that disclosure of this information would have an adverse impact upon employee morale, drive up compensation costs paid to employees, and open the door to competitors in the electric industry to poach FPL's highly skilled employees, thereby increasing recruitment, training and compensation costs and resulting rates for FPL's customers.

FPL cites to Von Eiff v. Azicri¹ and a string of other Florida Supreme Court cases in arguing that the Florida constitution is broader in scope than its federal counterpart with respect to privacy rights. FPL argues that the burden rests with the government to justify an intrusion on privacy by meeting a two-part test. The agency must demonstrate that the challenged regulation or requirement serves a compelling governmental interest and that it is seeking to accomplish such interest through the use of the least intrusive means. An individual's personal financial information is entitled to protection by Article I, Section 23.² Disclosure of such information when not justified can cause irreparable injury.³

FPL states that it has already provided the Commission with detailed information that discloses total compensation paid, and compensation paid to particular employment positions without personal identifying information. FPL also has provided access to line item (name and title) compensation information for the individual employees subject to staff's Motion to Compel on a confidential basis. And FPL publicly discloses compensation paid to named top-level corporate officers. The only thing it has not publicly disclosed is information that would enable a person to determine the identity of an employee receiving a particular amount of compensation or to compare specific compensation against the compensation of others, including other employees' as well as competitors' compensation. FPL argues that in order to meet its heavy burden, the Commission would be required to demonstrate that such information is essential to

¹ 720 So. 2d 510, 514 (Fla. 1998).

² Mogul v. Mogul, 730 So. 2d 1287 (Fla. 5th DCA 1999).

³ Spry v. Prof'l Employer Plans, 985 So. 2d 1187 (Fla. 1st DCA 2008).

meet a compelling interest of the Commission in the fulfillment of its lawful duties and that such interest cannot be served by a less intrusive means, including the disclosures already made. FPL argues that given the limitation of the Commission's interest to its ratemaking power, such a demonstration cannot be made. According to FPL, staff and the Commission have made no demonstration that compelling FPL to provide employee-specific, identifying information is the least intrusive means of fulfilling its ratemaking duties and they cannot do so. FPL states it has provided responses to staff's discovery using the least intrusive means by making the employee-specific information available to staff for review at their convenience.

FPL further argues that the amount of compensation received by a particular identifiable employee is irrelevant to the Commission's exercise of its ratemaking authority and beyond the scope of the Commission's power to compel production of information. FPL refers the Commission to the orders it cited to in its Request for Confidential Classification filed July 27, 2009, in which the Commission provided confidential treatment for employee-specific compensation information. FPL states that it has never before been compelled to produce employee-specific information in order to enable the Commission to fulfill its ratemaking responsibilities.

FPL recognizes that it is not bound by the Florida constitutional privacy provision, but states that it desires to respect the privacy rights of its employees and to support their assertion of their constitutional guaranty.⁴ FPL argues that the same privacy concerns and concerns about driving up compensation costs exist by filing specific employee-identifiable titles or even generic titles. Many job titles are held by only one or two people, so it is the equivalent of providing specific names from a privacy perspective.

FPL states that it pays its employees competitive market rates, and they, in return, deliver industry-leading performance that benefits its customers. According to testimony submitted by Concentric Energy Advisors, a consulting firm retained by FPL to conduct research comparing the performance of electric utilities, FPL consistently ranks as one of the best utilities in the country for providing reliable electric service while keeping costs under control. FPL argues that granting the Motion to Compel would increase costs and severely compromise FPL's ability to achieve efficiencies in the recruitment, training and retention of skilled employees to the detriment of FPL, its employees whose privacy rights are at stake, and its customers.

Finally, FPL argues that it has agreed to provide information requested by staff in the Motion to Compel. FPL has agreed to provide a supplemental response that supplies a more detailed explanation of how its estimate of the aggregated information for Adjusted Jurisdictional Other O&M Expenses on MFR Schedule C-1 was developed. FPL has also agreed to provide an excel spreadsheet applying escalation factors to compensation per employee for 2009, 2010 and 2011. Finally, with respect to staff's request for gross amounts before allocations on an individual employee basis for each compensation category, FPL has agreed to supply staff information that it believes will meet staff's needs. FPL believes that with the provision of this

⁴ FPL attaches as Exhibit 1 to its Response the Affidavit of Mr. James Poppell, Executive Vice President of Human Resources for FPL Group, Inc., attesting that public disclosure of the compensation information at issue would cause harm to FPL's business operations, which would be detrimental to both FPL and to its ratepayers, and that FPL safeguards such information from disclosure to protect the individual privacy interests of its employees.

information in addition to information previously provided, the Commission will have all the information it needs to fulfill its ratemaking responsibilities.

FPL's Supplemental Response

In their Supplemental Response, FPL and its employee intervenors provide a letter from H. Antonio Cuba, Director of Regulatory Accounting, asserting that from a ratemaking perspective, it is abundantly clear that the Commission has more than enough information to evaluate the appropriateness of FPL's compensation-related costs.

Mr. Cuba provides examples of compensation-related cost information that FPL has provided through the discovery process, including, among other things, its response to Staff Interrogatory No. 97, in which FPL provides in a publicly available format average total compensation by role with average adjusted jurisdictional amounts and also includes job descriptions for each role. In addition, FPL has made available to staff, on a confidential basis, line by line compensation information for each individual. Mr. Cuba asserts that these average salary amounts by description can be compared to industry and other market references to determine the reasonableness of these amounts. Mr. Cuba states that in the past, the Commission has used benchmarks and comparisons to market information to evaluate the appropriateness of FPL's projected salary levels.

Mr. Cuba further states that in FPL's response to the Office of Public Counsel's (OPC) Interrogatory No. 32, FPL provides name, title and job description of each shared executive whose costs are directly charged to FPL for the years 2006-2010. FPL also provides aggregate total gross shared executive costs, aggregate amount allocated to affiliates and aggregate amount remaining at the utility. Additionally, FPL's response to OPC's Interrogatory No. 35 provides aggregate total gross amount of 2006-2009 year to date shared executive pay and number of shared executives with high, low and average amounts for each year. Mr. Cuba asserts that from these responses, total executive compensation can be evaluated when coupled with all the other information that the company has provided related to compensation.

Attached to the Supplemental Response, as Attachment 1, is a list and brief description of discovery requests and FPL's responses thereto regarding compensation information. This list is attached to this recommendation as Attachment A.

Analysis and Recommendation

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.

FPL argues that the Article I, Section 23 of the Florida Constitution prevents the Commission from requiring FPL 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 the Commission. Staff disagrees.

With respect to whether Article I, Section 23 of the Florida Constitution prevents the Commission from requiring FPL to produce the compensation information at issue, FPL may decline to provide the information on that basis with the result being that such compensation costs may be excluded from its base rates. If FPL continues to request the inclusion of these costs in the rate case, then the Commission should grant Staff's Motion to Compel the responses to the discovery requests pertaining to them so that the Commission may fully evaluate that request.

Article I, Section 23 of the Florida Constitution provides, in pertinent part, that "every natural person has the right to be let alone and free from governmental intrusion into his private life." FPL recognizes that this provision does not apply to FPL. FPL is not a "natural person," but a business entity. FPL argues that this constitutional right to privacy does apply to its employee-intervenors acting in their individual capacities. FPL's concern about the disclosure of employee-identifiable compensation would likely disappear if the Commission had the ability to afford such information confidential treatment, thereby protecting it from public disclosure. However, section 366.093(3)(f), F.S., instructs otherwise. 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.

FPL's argument that the compelled disclosure of employee-identifiable compensation violates its employee-intervenors' fundamental rights of privacy under Article I, Section 23 amounts to an argument that section 366.093(3)(f), F.S., is unconstitutional. The Von Eiff v. Azicri case, which FPL cites to in its Response, makes this point all the more clear. At issue in that case was whether a particular statutory provision was facially unconstitutional because it impermissibly infringed on privacy rights protected by Article I, Section 23.⁵ The Court held that when analyzing a statute that infringes on the fundamental right of privacy, the applicable standard of review requires that the statute survive the highest level of scrutiny; i.e., the compelling state interest standard.⁶ As an administrative agency, however, the Commission has only those powers delegated to it by statute.⁷ The Commission is not the proper forum in which to challenge the facial constitutionality of a statute.⁸ Therefore, the Commission should decline to address this constitutional question.

⁵ Von Eiff v. Azicri, 720 So. 2d at 510.

⁶ Id. at 514.

⁷ DER v. Falls Chase Special Taxing Dist., 424 So. 2d 787, 793 (Fla. 1st DCA), review denied, 436 So. 2d 98 (Fla. 1983).

⁸ 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

FPL's reliance on Mogul v. Mogul for the proposition that an individual's personal financial information is entitled to protection by Article I, Section 23, is misplaced. In that case, the Court quashed the discovery order under review because there was no basis to conclude that the personal financial information sought was relevant.⁹ Similarly, in the Spry case, the Court found that "the Florida Supreme Court has recognized that 'the disclosure of personal financial information [via discovery] may cause irreparable harm to a person forced to disclose it, in a case in which the information is not relevant.'"¹⁰ With respect to whether the employee compensation information at issue is relevant in this case, FPL has requested the inclusion of such compensation information in its base rates, and this is therefore an issue in the rate case. Staff disagrees that FPL has provided more than enough compensation information for the Commission to evaluate the reasonableness of FPL's request. As stated in staff's Motion, compensation is a major component of FPL'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 FPL is reasonable, the Commission needs to know if the total compensation for that employee is reasonable. With the information provided thus far, staff is unable to determine the reasonableness of compensation allocations between FPL and FPL Group. 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 FPL were to withdraw its request for inclusion of these costs in rates.

With respect to whether the Commission has the jurisdiction and power to require FPL to produce the employee compensation information, Section 366.04(1), F.S., confers upon the Commission the authority "to regulate and supervise each public utility with respect to its rates and service." And section 366.041(1), F.S., authorizes the Commission, in fixing just, reasonable, and compensatory rates, to give consideration to, among other things, the cost of providing service. Employee compensation is one such cost of service.

Furthermore, providing information to the Commission through discovery does not automatically open the records to the public. The Commission has statutory¹¹ and rule¹² provisions that maintain the confidentiality of documents upon request until a decision on the confidentiality has been determined by the Commission. 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

confer authority on administrative law judges or other executive branch officers to invalidate statutes on constitutional or any other grounds.")

⁹ 730 So. 2d at 1290.

¹⁰ 985 So. 2d at 1188 (citation omitted).

¹¹ Section 366.093, F.S.

¹² Rule 25-22.006, F.A.C.

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 privacy concerns are inapplicable to the production of this information because the Commission has procedures in place to keep the information confidential until determined otherwise.

Rule 28-106.211, F.A.C., grants 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, staff recommends that Staff's Motion for Order Compelling Responses to Interrogatories should be granted. The Commission has 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. FPL should be directed to fully and completely respond to the interrogatories as revised by staff in Attachment B of its Motion within two days of the issuance date of the order arising from this recommendation.

Issue 2: Should Staff's Motion for Order Compelling PEF to Respond to Interrogatory Nos. 123-126 and 197-198 be granted?

Recommendation: Yes. PEF should be required to provide its full and complete responses to Interrogatory Nos. 123-126 and 197-198 within seven days from the issuance date of the order arising from this recommendation, and PEF and its employee intervenors' Motion for Protective Order and Conditional Motion for Stay should be denied. (Gervasi, Salak, Slemkewicz)

Staff Analysis:

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.

Date: August 11, 2009

Staff states 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 states 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. The Commission reviews all expenses 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, the 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 conferred in good faith with PEF in an effort to secure the requested discovery without Commission action, but to no avail.

Staff requests the Commission to 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.

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 the Commission enters an order denying the Motion for Protective Order or granting staff's Motion to Compel, the Commission stay such order pending judicial review provided that PEF and/or its employee intervenors timely file for such review.

In its Response to the Motion to Compel, 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 Commission performing its ratemaking responsibilities and is beyond the Commission's authority and jurisdiction.

According to PEF, its Motion for Protective Order shows that the level of detail requested by 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 PEF's individual employees, including the PEF employee intervenors, under Article 1, Section 23 of the Florida Constitution. PEF argues that the Commission must weigh the impact on such privacy rights in resolving the underlying discovery dispute.

PEF states that in the Motion, 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.

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 Commission's discharge of its 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 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 the 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 the Commission to discharge its 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 the 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 the Commission 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 the Commission 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,¹³ in considering whether the level of employee-specific detail sought by staff is relevant, the Commission is 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.”¹⁴ 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.’”¹⁵

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,¹⁶ 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.”¹⁷ 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 FPL under a request for confidential classification. 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.

¹³ 827 So. 2d 936 (Fla. 2002).

¹⁴ 500 So. 2d 533, 536 (Fla. 1987).

¹⁵ Id. at 535.

¹⁶ 714 So. 2d 1027 (Fla. 4th DCA 1997).

¹⁷ Id. At 1035.

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.

According to PEF, the Commission should exercise its authority under the discovery rules to prevent information that is not required for the full discharge of its regulatory responsibilities from becoming a public record in the first instance. PEF requests that the Commission enter an order protecting it 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.

Conditional Motion for Stay Pending Judicial Review

In the event the Commission denies its Motion for Protective Order or grants staff’s Motion to Compel, PEF requests that the Commission stay its 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 Recommendation

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 the Commission 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 the Commission.

PEF argues that it has provided more than enough compensation information for the Commission to evaluate the reasonableness of its request. Staff disagrees. As stated in staff's Motion, 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, the Commission needs to know if the total compensation for that employee is reasonable. With the information provided thus far, staff is 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 the Commission is 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.¹⁸ 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.¹⁹ 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."²⁰

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 the Commission 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

¹⁸ Alterra HealthCare Corp v. Estate of Shelley, 827 So. 2d 936 at 940, 947.

¹⁹ Id. At 947.

²⁰ Id.

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 the Commission through discovery does not automatically open the records to the public. The Commission has statutory and rule provisions that maintain the confidentiality of documents upon request until a decision on the confidentiality has been determined by the Commission. 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.

Thus, the privacy concerns are inapplicable to the production of this information because the Commission has procedures in place to keep the information confidential until determined otherwise.

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, the Commission has only those powers delegated to it by statute.²¹ The Commission is not the proper forum in which to challenge the facial constitutionality of a statute.²² Therefore, the Commission should 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,

²¹ DER v. Falls Chase Special Taxing Dist., 424 So. 2d 787, 793 (Fla. 1st DCA), review denied, 436 So. 2d 98 (Fla. 1983).

²² 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.")

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.

Staff notes that on August 10, 2009, PEF filed supplemental information regarding the allocation of employee compensation costs to jurisdictional O&M. Staff has reviewed this information and finds it to be responsive to Interrogatory Nos. 123 k), 124 k), 125 h), 126 h), 197 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 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." The Commission has 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 should be required to provide its full and complete responses to Interrogatory Nos. 123-126 and 197-198 within seven days from the issuance date of the order arising from this recommendation, and PEF and its employee intervenors' Motion for Protective Order and Conditional Motion for Stay should be denied.

Docket Nos. 080677-EI, 090079-EI

Date: August 11, 2009

Issue 3: Should these dockets be closed?

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

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