

State of Florida



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Public Service Commission

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COMMISSION
CLERK

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

DATE: April 20, 2009

TO: Katherine Fleming, Attorney, Office of General Counsel

FROM: Division of Regulatory Compliance (Freeman, Vandiver)^F

RE: Docket 070626-EI, Recommendation concerning Green Mountain Energy Company's (Green Mountain's) request for confidential classification concerning a portion of the staff audit working papers prepared during the "Green Mountain Energy Review of Sunshine Energy Program Costs for the Twelve Months Ended July 31, 2008", Audit Control No. 08-086-4-1, Documents Numbered 08331-08, 09050-08 and 09334-08

On September 11, 2008, and September 29, 2008, when copies of certain portions of staff's audit report and working papers obtained or prepared during the "Green Mountain Energy Review of Sunshine Energy Program Costs for the Twelve Months Ended July 31, 2008", were delivered to Green Mountain at the audit exit conference, Green Mountain requested that these materials be temporarily exempted from public access in accordance with provisions of Rule 25-22.006(3)(a)2., Florida Administrative Code (FAC).

On September 8, 2008, staff filed those specified portions of the staff's audit report (Document No. 08330-08) and those specified portions of staff's working papers (Document 08331-08).

On September 25, 2008, and October 2, 2008, Green Mountain filed separate requests for confidentiality. Each request covered a portion of staff's working papers. Green Mountain's requests included redacted copies for public use (Documents Numbered 09051-08 and 09335-08) as well as confidential copies with the sensitive information highlighted (Documents Numbered 09050-08 and 09334-08).

On February 4, 2009, in response to discussions with the staff, Green Mountain reduced the size of its request.

Staff has reviewed the Green Mountain requests, as modified, and enters this recommendation to resolve the disposition of Confidential Documents Numbered 08330-08, 08331-08, 09050-08 and 09334-08.

- COM _____
- ECR _____
- GCL _____
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- RCP _____
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- ADM _____
- CLK McLean

DOCUMENT NUMBER-DATE

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Document numbered 08330-08 consisting of an original copy of page 5 of the PSC staff's audit report titled "Green Mountain Energy Review of Sunshine Energy Program Costs for the Twelve Months Ended July 31, 2008" was not identified as sensitive by Green Mountain. On September 30, 2008, this single page of the audit report was declassified.

Other sensitive documents associated with this audit (Documents No. 08331-08, 09050-08 and 09334-08) are currently held by the Office of the Commission Clerk as confidential pending resolution of Green Mountain's requests for confidential classification.

Pursuant to Section 119.07, Florida Statutes (F.S.), documents submitted to this Commission are public records. The only exceptions to this law are specific statutory exemptions and exemptions granted by governmental agencies pursuant to the specific items of a statutory provision. Subsection 366.093(3)(e), F.S., provides the following exemption.

Subsection 366.093(3), F.S., provides; "*Proprietary confidential business information means information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public. Proprietary confidential business information includes but is not limited to:*

....

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

According to Section 366.093, F.S., and Rule 25-22.006, FAC, Green Mountain has the burden of demonstrating that materials qualify for confidential classification. According to Rule 25-22.006, FAC, Green Mountain must meet this burden by demonstrating that the information is proprietary confidential business information, the disclosure of which will cause the utility, the provider of the information or the ratepayer harm.

Staff Analysis of the Request

Reading the filing reveals the sensitive materials consist of:

Competitively Sensitive Business Operations, Negotiations, and Contractual Information
Belonging to Green Mountain Energy Company

By way of affidavit, Paul Markovich, Green Mountain Senior Vice President, Internal Auditing, identifies information reporting sensitive competitive business information within the staff working papers titled: "Reconcile File to Last Audit Report", "Sort File Internal/External", "Summary by Type", "Compare Rothenback Park Contract to Entry", "Annual Amounts Compared to Prior Year", "Sample", "Sample with Category", "Sample with Categories" and "Allocated Costs."

Staff Analysis of the Request (Continued)

Effect of an Unidentified Public Policy

In part, while justifying the confidential nature of the competitive business information, Green Mountain argues this information as a matter of public policy not unique to Florida, ... is entitled to confidential treatment” The Commission took up a utility’s claim concerning the effect of undisclosed public policies in Commission Order No.PSC-07-0640-CFO-WS, issued on August 7, 2007, in Docket No. 060253-WS and held:

“.... the utility claims that sensitive financial information ... is otherwise considered confidential and privileged in the courts. However, the utility does not provide any further specific explanation or justification of why this situation pertains here. Nor does the utility provide a previous administrative decision of this Commission supporting the position that this type of material should be granted a confidential classification. Further, according to Section 367.156(3), F.S. [or Section 366.093(3),F.S.], and Rule 25-22.006(4)(c) and (e), FAC, before specified material may be granted a confidential classification, it must meet the specific terms of a statutory provision granting the exception. The responsibility of proof is on the utility.”
[emphasis added.]

In this case, the justification proposed by Green Mountain is identical to the justification found insufficient in this prior case. The claims that some unidentified public policy allows the Commission to grant a confidential classification are insufficient. Unidentified policies do not meet the required burden of proof placed on the petitioner.

Effect of Nondisclosure Agreements

Also, Green Mountain points out release of the information could violate non disclosure agreements with other parties. The Commission took up a utility’s claim concerning the effect of non disclosure agreements in Commission Order No. PSC-93-1311-FOF-TL, issued on September 9, 1993, in Dockets numbered 920260-TL, 910163-TL, 910727-TL and 900960-TL and held:

“.... As a threshold issue, in order to qualify for confidential classification, the information must not have been previously disclosed. Nondisclosure agreements merely provide a safe harbor for disclosure on a limited basis. Just because materials are acquired subject to non disclosure agreements does not automatically guarantee that they shall be found to be confidential: the material must also be of a type that would cause harm to the ratepayers or its owner’s business operations if disclosed.”

We recommend that the Commission should reject the claim by Green Mountain that the mere reference to undisclosed public policies is sufficient justification for material to be eligible for a confidential classification. Also, staff has considered the fact that the presence of a nondisclosure agreement increases the likelihood that this material has not been disclosed.

Staff Analysis of the Request (Continued)

Section 366.093(3)(e), F. S., provides a specific exemption such that the Commission may grant competitive business information a confidential classification if release of that material would harm the competitive business of the provider of that information.

Green Mountain asserts the identified information should be granted a confidential classification. Through his affidavit, Paul Markovich, Senior Vice President, Green Mountain Energy Company asserts the identified sensitive information discloses sensitive business operations, negotiations, and contracts Green Mountain has with other parties and release of this information could impair the competitive operations and harm the business operations of Green Mountain.

We have read the material identified by Mr. Markovich and agree it reports sensitive information relating to Green Mountain's competitive business and release of this information would be reasonably expected to harm the provider of that information. We therefore recommend this material be granted a confidential classification.

Information Held as Confidential

To qualify as proprietary confidential business information, the material must also be held as private and not released to the public. Green Mountain and its Senior Vice President Mr. Markovich assert that this sensitive information meets the statutory restrictions necessary for the material to be provided a confidential classification and assert that the information has not been disclosed to the public.

Duration of the Confidential Classification Period

Green Mountain and Mr. Markovich request that this material be held as confidential for at least 18 months and that this material should be returned to Green Mountain once the information is no longer needed for the Commission to conduct its business.

According to the provisions of Section 366.093(4), F.S., absent good cause shown, confidential classification is limited to 18 months. Without cause shown for a longer period, we recommend that the period of confidential classification be set as 18 months. After that 18 month period lapses, the material will be retained according to the established retention requirements for staff audits. As deemed necessary, Green Mountain may request an extension of the confidential classification before the classification period tolls.

Staff Recommendation

Based upon reading the filing, and for the reasons presented above, we recommend that Green Mountain's request be granted and that the identified material be granted a confidential classification for 18 months.

A detailed recommendation follows:

Staff Work Paper Number	Description	Page(s)	Line(s)	Recommend	Type of Information
Documents Numbered 08331-08 and 09050-08					
12	Reconcile File to Last Audit	1	Cols. B-H , Lines 2-15;	Grant	Sensitive Competitive Business Information
12-1	Sort File Internal/External	2	Cols. B-D	Grant	Sensitive Competitive Business Information
12-2	Summary by Type	1	All Columns except Column A	Grant	Sensitive Competitive Business Information
12-3	Compare Rothenback park Contact to Accounting Entry	1	All Lines except line 1; All Columns except line 2 of headings line	Grant	Sensitive Competitive Business Information
43	Sample	1-3	Cols. B, D-G, I-J	Grant	Sensitive Competitive Business Information
43	Sample	4	Cols. B, D-G, I-J; Lines 28-43	Grant	Sensitive Competitive Business Information
43	Sample	5	All	Grant	Sensitive Competitive Business Information
43-1	Sample with Category	1	Cols B-C, E-F	Grant	Sensitive Competitive Business Information
Document 08331-08 and 09334-08					
43-1	Sample with Categories	2-3	All	Grant	Sensitive Competitive Business Information
Document 08331-08 and 09050-08					
43-2	Allocated Costs	1	Cols. B-G; Lines 21-25	Grant	Sensitive Competitive Business Information

A temporary copy of this recommendation will be held at I:09334-08 green mountain sunshine energy cost to July 2008 raf.doc for a short period.

CC: Division of Regulatory Compliance (Welch)
 Office of the Commission Clerk (McLean, Cole)