

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for increase in Rates
by Florida Power & Light Company

Docket No. 080677-EI

In Re: 2009 depreciation and dismantlement
study by Florida Power & Light Company

Docket No. 090130-EI

Filed: August 7, 2009

**FLORIDA POWER & LIGHT COMPANY'S AND FPL EMPLOYEE INTERVENORS'
RESPONSE AND MEMORANDUM IN OPPOSITION TO
STAFF'S MOTION TO COMPEL**

This Response and supporting Memorandum of Law are filed on behalf of Florida Power & Light Company ("FPL" or the "Company") and on behalf of FPL Employee Intervenors, Maria E. Gomez, William Ho, Rudy M. Sanchez, William Reichel, Manuel B. Miranda, M. Beth Farr, Robert J. Hughes, C.L. Weaver, John E. Kirkpatrick, C.A. Pell, Irene White, Rob Adams, Susan Gampfer, William J. Burrows and Alejandro Zappani, (hereinafter "FPL Employee Intervenors")¹ acting in their individual capacities.

The Staff's motion to compel should be denied for the following reasons:

1. Compelled disclosure of the amounts employee-identifiable compensation would violate the FPL Employee Intervenors' fundamental rights of privacy as guaranteed by Article I, Section 23 of the Florida Constitution.
2. Compelled disclosure of employee-identifiable compensation is unnecessary to the performance of any authorized Commission function and is therefore irrelevant and outside the jurisdiction and powers of the Commission.

¹ The named individuals have filed a motion to intervene simultaneously with the filing of this memorandum.

GREENBERG TRAUIG, P.A.

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3. Compelled disclosure of employee-identifiable and even employee-specific compensation information in any form would violate FPL's long-standing policy of maintaining confidentiality of such information and would have an adverse impact upon employees' morale, drive up compensation costs paid to employees, and would 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.

Notwithstanding the above, FPL 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 FPL's 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 information (in addition to information previously provided), the Commission will have all the information it needs to fulfill its ratemaking responsibilities as described below.

**COMPELLED DISCLOSURE OF EMPLOYEE IDENTIFIABLE
COMPENSATION WOULD VIOLATE EMPLOYEE PRIVACY RIGHTS**

All of the FPL Employee Intervenors are current employees of FPL. Their individual compensation has been maintained by FPL as confidential and, with the exception of a small number of Company executives and employees who have responsibilities relating to the setting and administration of compensation, the information has not been disclosed to third persons inside or outside the Company, but has been made available on a confidential basis to the

Commission. That information, as well as the additional information that is subject to the Staff's motion to compel, would possibly be made available to the public at large, if the motion to compel is granted. The position stated herein reflects the position of most, if not all, of FPL's more than 300 employees who would be affected by Staff's motion to compel.

Embodied in Article I, Section 23 of the Florida Constitution is a guarantee to every natural person of the right of privacy from governmental intrusion. The significance of that right and the stringent standard by which governmental intrusions on privacy are judged was discussed by the Florida Supreme Court in *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998):

While an implicit right of privacy is recognized under our federal constitution, Floridians enjoy an explicit right of privacy under article I, section 23 of the Florida Constitution, which provides in pertinent part that "every natural person has the right to be let alone and free from governmental intrusion into his private life." In enacting this freestanding constitutional provision, the "citizens of Florida opted for more protection from governmental intrusion" than that afforded under our federal constitution. The state constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart.

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:

The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

(internal citations omitted) *Accord: B.B. v. State*, 659 So. 2d 256 (Fla. 1995); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985); *Shaktman v. State*, 553 So. 2d 148 (Fla. 1989).

Thus, the burden rests with the government to justify an intrusion on privacy by meeting a two-part test. First, the agency must demonstrate that the challenged regulation or requirement serves a compelling governmental interest. If it succeeds in meeting this first prong, it must then demonstrate 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, *Mogul v. Mogul*, 730 So. 2d 1287 (Fla. 5th DCA 1999), and it is judicially recognized that the disclosure of such information when not justified can cause irreparable injury. *Spry v. Professional Employer Plans*, 985 So. 2d 1187 (Fla. 1st DCA 2008).

FPL has already provided the Commission with detailed information that discloses total compensation paid, and compensation paid to particular employment positions without personal identifying information (vice president, executive, director, manager, etc.). 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 strictly confidential basis. In addition, FPL publicly discloses compensation paid to named top-level corporate officers. In short, the only thing that FPL 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. In order to meet its heavy burden, the Commission would be required to demonstrate that such information is essential to 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. Given the limitation of the Commission's interest to its ratemaking power as discussed below, such a demonstration cannot be made. In short, Staff's allegation in its Motion to Compel that "FPL is required to provide

complete responses to interrogatory Nos. 16, 17, 32 and 97 pursuant to Fla. R. Civ. Pro. 1.280 and 28-106.206, F.A.C.” and that making a “key” available is not sufficient to meet this requirement is legally incorrect. (Motion to Compel ¶ 9). Staff and the Commission have made no demonstration that compelling FPL to provide employee-specific, identifying information at the PSC is the least intrusive means of fulfilling its ratemaking duties and they cannot do so. Having made the employee-specific information available to Staff for review at their convenience, FPL has provided responses to Staff’s discovery using the least intrusive means.

**COMPELLED DISCLOSURE OF EMPLOYEE IDENTIFIABLE
COMPENSATION WOULD EXCEED THE COMMISSION’S POWERS AND
JURISDICTION AND INTERFERE WITH FPL’S PROTECTION
OF ITS LEGITIMATE BUSINESS INTERESTS**

The Commission has broad regulatory powers, but those powers are not unlimited in scope. Of the jurisdiction and powers set forth in Section 366.04, Florida Statutes, the only power to which employee compensation is relevant is the power to prescribe just, reasonable and compensatory rates. Sec. 366.041, F.S.² In furtherance of its ratemaking authority, the Commission is empowered to “require the filing of reports and other data by a public utility or its affiliated companies ... regarding transactions, or allocations of common costs, among the utility

² See also Sections 366.041(1) (“In fixing the just, reasonable, and compensatory rates ... the commission is authorized to give consideration, among other things, to the ... the cost of providing such service”); 366.05 (“In the exercise of its jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges”); 366.06 (“... the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested”)’ 366.07 (“Whenever the commission ... shall find the rates, rentals, charges or classifications ... are unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential ... the commission shall determine and by order fix the fair and reasonable rates”).

and such affiliated companies” and “necessary to ensure that a utility’s ratepayers do not subsidize nonutility activities.” Sec. 366.05(9), 366.093(1), F.S.

Information relating to overall compensation and compensation paid to particular employment levels or positions is arguably necessary to make the determinations called for by the above ratemaking responsibilities. That information has already been produced by FPL. In short, FPL has provided all information necessary for the Commission to discharge its statutory responsibility to establish rates. On the other hand, 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. Numerous prior Commission orders have recognized this distinction and provided confidential treatment for employee-specific compensation information. See paragraphs 8-10 of FPL’s Revised Request for Confidential Classification filed July 27, 2009, incorporated herein by reference. Indeed, never before has FPL been compelled to produce employee-specific information in order to enable the Commission to fulfill its ratemaking responsibilities.

FPL has conscientiously maintained the confidential nature of employee compensation in the furtherance of its substantial business interests. The amount of compensation paid to particular employees is not disclosed to any but a small number of FPL executives and employees who set and administer compensation within FPL. FPL maintains this policy for three reasons: First, the Company reasonably believes that knowledge within the Company of comparative employee compensation would be contrary to the atmosphere of workplace good will that FPL seeks to foster and which is important for overall job satisfaction, morale, and employee retention. Second, certain of FPL’s operations require employment of persons with special skills. The availability of persons who possess such skills is often in short supply and the

market for such persons is highly competitive. The availability to FPL's competitors of information disclosing the amount of compensation paid by FPL to particular employees would likely increase the cost to FPL of obtaining and retaining such employees, with resulting increase in costs to FPL's customers. Third, while FPL is not bound by the Florida constitutional privacy provision, the Company desires to respect the privacy rights of its employees and to support their assertion of their constitutional guaranty.³

No legitimate state interest is served by filing specific employee-identifiable titles or even generic titles. The same privacy concerns as well as concerns about driving up compensation costs paid by customers exist because many job titles are held by only one or two people, so it is the equivalent of providing specific names from a privacy perspective. Even in regard to generic titles, employees would learn where their compensation falls relative to others with the same generic title, which would have the effect of driving up compensation costs and likely would cause FPL to lose employees if some are disappointed with where their compensation sits relative to others with the same job title. This is not in the interest of FPL employees, FPL customers or the public at large.

Fundamentally, the request to file individual names and salaries is a distraction from the real issues in this case. FPL pays its employees competitive market rates, and they, in return, are delivering industry-leading performance that benefits its customers. According to testimony submitted in this docket 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. In fact, for 2007 alone, FPL saved its customers between \$700 million and \$1.3 billion

³ See Affidavit of James Poppell attached hereto as Exhibit 1.

in operating costs compared to what those costs would have been if FPL were merely an average performer, according to the Concentric research. That didn't happen by accident; it happened because FPL employs some of the best people in the industry and pays for performance. Granting the Staff's 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.

CONCLUSION

For the foregoing reasons, the Commission is respectfully urged to deny the Staff's motion to compel.

s/ Barry Richard
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and electronically this 7th day of August, 2009 to the individuals listed on the attached service list.

s/ Barry Richard
BARRY RICHARD

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by)
Florida Power & Light Company)

Docket No. 080677-EI

In re: 2009 depreciation and dismantlement)
study by Florida Power & Light Company)

Docket No. 090130-EI

STATE OF FLORIDA)
)
PALM BEACH COUNTY)

AFFIDAVIT OF JAMES POPPELL

BEFORE ME, the undersigned authority, personally appeared James W. Poppell who, being first duly sworn, deposes and says:

1. My name is James W. Poppell. I am currently employed by FPL Group, Inc. as Executive Vice President of Human Resources. My business address is 700 Universe Boulevard, Juno Beach, Florida 33408. I have personal knowledge of the matters stated in this affidavit.

2. The FPL documents at issue are owned and controlled by FPL and contain proprietary confidential business information consisting of competitively sensitive employee compensation details and records.

3. This information is used by FPL in the conduct of its business operations. FPL considers this information as commercially valuable and maintaining the confidentiality of same provides an advantage or an opportunity to obtain an advantage over those not in possession of such information.

4. FPL operates within a highly competitive market for skilled and trained executive employees. Public disclosure of employee compensation details and records would cause harm to FPL's business operations by providing competing employers with access to specific information useful in hiring away these skilled and trained executives. Any resulting loss of talented employees, many of whom have gained significant experience with FPL and have received significant training and instruction from FPL would damage FPL's business and cause FPL to lose the substantial investment it has in its workforce.

5. Additionally, public disclosure of this information would cause damage to FPL's business operations by impeding FPL's ability to attract new talent on a cost effective basis, and to retain current employees at existing salary levels.

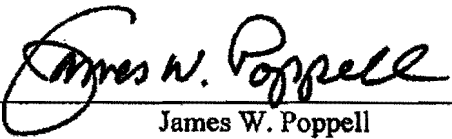
6. The resulting damage to the quality of service and the cost of service would be detrimental to both FPL and to its ratepaying customers by reducing the level of workforce talent available to perform the necessary corporate functions, by increasing the cost of such workforce talent, or both.



7. FPL controls access to and maintains the confidentiality of this information both as to the public and within the FPL corporate structure. The information has not been and is not made available to the public. Moreover, within the corporate structure, FPL has policies and procedures in place preventing the disclosure of this information to anyone other than specifically authorized personnel who have access to same for limited business purposes.

8. Finally, compensation information regarding specific individual employees is private as to each respective employee and FPL safeguards such information from disclosure to protect the individual privacy interests of those employees. Any public disclosure of such individual compensation information would violate the employee's right to privacy and the reasonable expectation that such information would not be the subject of public disclosure.

9. Affiant says nothing further.


James W. Poppell

SWORN TO AND SUBSCRIBED before me this 6th day of August, 2009, by James W. Poppell who is personally known to me or who has produced _____ (type of identification) as identification and who did take an oath.


Notary Public, State of Florida

My Commission Expires: August 6, 2013

