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Public Service Commission

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COMMISSION
CLERK

DATE: November 8, 2004

TO: Ralph Jaeger, Attorney, General Counsel

FROM: Division of Regulatory Compliance and Consumer Assistance (Freeman, Vandiver) *F a*

RE: Docket 040216-GU, Recommendation concerning Florida Public Utilities Company's (FPUC's) request for confidential classification concerning a portion of the staff audit working papers prepared during "Florida Public Utilities Company Rate Case Audit for the Projected Test Year Ended December 31, 2005", Audit Control No. 04-168-4-1, Documents Numbered 09134-04 and 09724-04 *DM*

On August 13, 2004, when copies of certain portions of staff's audit working papers obtained or prepared during the "Florida Public Utilities Company Rate Case Audit for the Projected Year Ended December 31, 2005", were delivered to FPUC at the audit exit conference, the utility requested that these materials be temporarily exempted from public access in accordance with the provisions of Rule 25-22.006(3)(a)2., Florida Administrative Code (FAC).

On August 20, 2004, staff filed document 09134-04 consisting of those specified portions of the staff working papers.

On September 3, 2004, FPUC filed a request pursuant to Section 366.093, Florida Statutes (F.S), that selected portions of the working papers prepared by the staff during the audit receive confidential classification. The utility's request included redacted copies for public inspection (document 09723-04) and highlighted copies (document 09724-04).

On October 7, 2004, staff notified the utility of several perceived deficiencies in its request for confidential classification for certain audit working papers (document 10795-04).

On October 21, 2004, FPUC responded to staff's letter by withdrawing its request for confidential classification for the following staff working papers: Workpaper 8, 6 pages; Workpaper 8-1, 5 pages; Workpaper 8-3, 3 pages; Workpaper 9-2, 2 pages; Workpaper 9-3, 2 pages; and Workpaper 9-12, 4 pages (document 11400-04).

Documents 09134-04 and 09724-04 are currently held by the Commission's Division of the Commission Clerk and Administrative Services as confidential pending resolution of FPUC's request for confidential classification.

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Pursuant to Section 119.07, 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. Subsections 366.093(3)(b)(d) and (e), F.S., provide the following exemptions.

Subsection 366.093, 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:

(b) Internal auditing controls and reports of internal auditors

....

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

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

According to Section 366.093, F.S., and Rule 25-22.006, FAC, the utility has the burden of demonstrating that materials qualify for confidential classification. According to Rule 25-22.006, FAC, the utility 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 FPUC filing reveals the sensitive material consists of:

1. Information from the external auditor’s working papers concerning discussion of material found, audit recommendations, and actions by the company.

WP 9, 8 pages, entitled: “External audit work papers”

WP 9A, 12 pages, entitled: “General risk assessment summary report”

WP 9-1, 5 pages, entitled: “External audit work papers”

2. Information from the external auditor's working papers concerning plans and actions of the company.

Working paper 9-4, 2 pages entitled: "External audit working papers"

Working paper 9-5, 10 pages, entitled: "Trial balance"

Working paper 9-9, 22 pages, entitled: "FASB 109"

Working paper 9-10, 3 pages, entitled: "Customer deposit"

Working paper 9-11, 3 pages, entitled: "Accounts payable search for unusual items"

For material listed above, FPUC has requested that materials obtained from the external auditor be protected on the basis that these materials report accountant-client communications between FPUC and its external auditor. Also, FPUC asserts these materials obtained from the external auditor report internal auditing controls and therefore qualify for a confidential classification provided by Section 366.093(3)(b), Florida Statutes. Lastly, FPUC requests that these materials be considered as sensitive competitive business information release of which would harm the competitive business of the provider of that information pursuant to the exemption provided by Section 366.093(3)(e), F.S.

Staff opinion to deny a confidential classification because it is accountant-client information and to deny a confidential classification to routine external auditing materials on the basis that they report internal auditing controls

Previously, the Commission has denied a confidential classification to material obtained from an external auditor on the basis that the material is subject to the accountant-client privilege. In the same decision, the Commission also denied a confidential classification on the basis that material from an external auditor reports internal auditing controls. Best described in Commission Order 25297, issued on November 11, 1991, in Docket 890190-TL,

- A. The Commission decided information from an external auditor was not confidential per se;
- B. The Commission decided information revealing the external auditor's competitive business strategies and work program qualifies for a confidential classification; and
- C. The Commission also distinguished the difference between granting a confidential classification to internal audit materials and granting a confidential classification to an external audit materials by stating: "...It is another in a series of attempts...to expand the statutory protection afforded internal audits to apply to external audits..."

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Staff recommends the Commission continue to reject the argument that the material from an external auditor per se qualifies for a confidential status.

Staff recommends the Commission also continue to reject the argument that material from an external auditor qualifies as reporting an internal auditing control.

Staff opinion that the material otherwise qualifies for a confidential classification

Staff recommends that the Commission accept the FPUC's argument that the material contains sensitive competitive business information of the external auditor and release of this material would harm the competitive business of the external auditor. Staff finds the material listed here reveals the competitive business strategies and work program of the external auditor. Therefore staff recommends that this material be granted a confidential classification on the basis of the exemption provided by Section 366.093(3)(e), F.S., in that the material is sensitive competitive business information the release of which would harm the provider of the information.

Staff also recognizes that some of the material reported by the external auditor consists of documents and information belonging to the utility. The sensitivity of this material is assessed based upon whether the information otherwise qualifies for a confidential classification. Based upon reading the sensitive materials, and because non residential gas service is subject to competition, release of this material may harm the competitive business of the FPUC and its affiliates. We therefore recommend that this sensitive utility material gathered by the external auditor be granted a confidential classification.

3. An audit opinion letter from attorneys to the Company

WP 9-6 entitled: "Threatened or pending litigation"

FPUC asserts this information should be granted confidentiality on the basis that the information is subject to the attorney-client privilege. FPUC also asserts that: "Knowledge of counsel's assessments of suits, plans and options would be of value to parties, competitors, and contractors, both present and future and therefore should be granted a confidential classification on the basis that release of this sensitive contractual and competitive business information would impair the ability of FPUC and its affiliates to favorably contract and impair the business operations of the company."

Staff opinion to deny a confidential classification on the basis that the material reports attorney client information

Staff recommends that this information not be granted confidentiality on the basis that it is privileged attorney-client information. Such extremely sensitive information such as trial strategies should not be released by the utility.

Staff opinion to otherwise grant a confidential classification

Staff does recommend that the identified litigation information be granted a confidential classification on the basis that release of this information would impair the ability of the company to contract and would impair the competitive business of the company which could ultimately harm the ratepayer. Section 366.093(3)(d), F.S., allows the Commission to grant a confidential classification to sensitive contractual or bid information. Section 366.093(3)(e), F.S. allows the Commission to grant a confidential classification to sensitive competitive business information.

4. Information from the external auditor's working papers concerning construction projects

WP 9-15 entitled: "Construction work in progress"

FPUC asserts this information drawn from the external auditors working papers reports activities associated with construction projects including non regulated projects and contractual information which could be used to identify customers and business plans.

Staff opinion to grant a confidential classification

Staff recommends that information which would allow identification of utility customers and future business plans of a utility be granted a confidential classification on the basis that the material is sensitive competitive business information release of which could harm the provider of that information pursuant to the exemption set out by Section 366.093(3)(e), F.S.

5. Communications between the external auditor and the company discussing the Company, its operations, internal controls and overall characteristics.

WP 9-16 entitled: "Related parties"

FPUC states this document is a memorandum prepared by external auditors consisting of a series of questions and answers discussing and describing: the Company, its operations, internal controls, and overall characteristics. Such information would be of value to contractors, competitors and potential bidders and if disclosed, would impair the ability of the company to contract and would impair the competitive business of the Company.

Staff opinion to grant a confidential classification

Section 366.093(3)(e), F.S., provides that the Commission may grant a confidential classification to competitive business information if release of such information would impair the competitive business of the provider of that information. The staff working paper entitled "Related parties" reports the proprietary work program and strategy used by the external auditor in assessing the impact of related party transactions have upon the external audit. This information is a valuable competitive method developed by the external auditor. Therefore this information would qualify for a confidential classification in that release of this information would harm the competitive business of the external auditor.

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Public information regarding related party transactions of a utility is reported to the Commission each year pursuant to Rule 25-7.135, FAC, upon PSC Form AFA20 (4/96). In addition, the impact of related party transactions is also reported anytime a gas utility requests an increase in rates in compliance with Rule 25-7.039, FAC, upon Form PSC/EAG 10 (11/89).

The utility asserts release of the related party information gathered by staff auditors may “harm the ratepayers and the business operations of the company.” This argument hinges upon the question of whether disclosing the business organization of the utility beyond what is already reported publicly would harm the competitive business of the Company. The company has not described how revealing such additional information concerning related party transactions would cause such harm. Therefore, because the utility has not adequately described why this related party information is sensitive, it would not qualify for a confidential classification. However because the business of the external auditor would be harmed with the release of their competitive work program and competitive strategy concerning discovery and assessment of related party transactions, we recommend that this information be granted a confidential classification in that release of this information would harm the business of the external auditor.

6. Information from the external auditor’s working papers discussing the Company’s internal auditing process.

WP 9-17, 1 page, entitled: “Customer Advances”

FPUC asserts a memorandum prepared by the utility’s external auditors discussing the internal audit process of the utility should qualify for a confidential classification because Section 366.093(3)(b), Florida Statutes allows protection for internal auditing controls and reports of internal auditors.

Staff opinion to grant a confidential classification

Section 366.093(3)(b), F.S., provides information concerning internal audit controls or internal audit reports may be granted a confidential classification. Staff agrees with the utility that this material discusses an internal audit process therefore recommends they may be granted a confidential classification.

Information Held as Confidential

To qualify as proprietary confidential business information material must also be held as private and not be released to the public. FPUC states: “...The Information contained in the documents identified in this request are intended to be and are treated by the company as private in that the disclosure of the information would cause harm to the ratepayers and/or the business operations of the company....”

Duration of the Confidential Classification Period

FPUC requests a confidential classification for this material contained in staff's audit working papers, but FPUC does not state how long the period of confidential classification should last. Commission staff's working papers for this type of audit are retained on file by the Commission for 25 years.

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. As deemed necessary, the utility may request an extension of the confidential classification before the period tolls.

Staff Recommendation

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

A detailed recommendation follows:

Detailed Recommendation

Staff Work Paper Number	Description	Page(s)	Line(s)	Recommend	Type of Information Classified Confidential
Documents 09134-04 and 09724-04					
9	External audit work papers	1-8	All	Grant	Sensitive competitive business information
9A	General risk assessment summary report	1-12	All	Grant	Sensitive competitive business information
9-1	External audit work papers	1-5	All	Grant	Sensitive competitive business information
9-4	External audit working papers	1-2	All	Grant	Sensitive competitive business information
9-5	Trial balance	1-10	All	Grant	Sensitive competitive business information
9-6	Pending or threatened litigation	1-8	All	Grant	Sensitive contractual and competitive business information
9-9	FASB 109	1-22	All	Grant	Sensitive competitive business information
9-10	Customer deposit	1-3	All	Grant	Sensitive competitive business information
9-11	Accounts payable search for unusual items	1-3	All	Grant	Sensitive competitive business information

Staff Work Paper Number	Description	Page(s)	Line(s)	Recommend	Type of Information Classified Confidential
Documents 09134-04 and 09724-04					
9-15	Construction work in progress	71	All	Grant	Sensitive contractual and competitive business information
9-16	Related parties	1-13	All	Grant	Sensitive contractual and competitive business information
9-17	Customer advances	1	All	Grant	Internal auditing controls and reports of internal auditors

A temporary copy of this recommendation will be held at I:09724-04.fpucraf.doc for a short period.

CC: Division of Regulatory Compliance and Consumer Assistance (Welch)
Division of Commission Clerk and Administrative Services (Flynn)