

State of Florida



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COMMISSION CLERK

# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

**DATE:** January 15, 2009

**TO:** Anna Williams, Attorney, Office of General Counsel

**FROM:** Division of Regulatory Compliance (Freeman, Vandiver) *WV*

**RE:** Docket 080317-EI, Recommendation concerning Tampa Electric Company's (TECO's) request for confidential classification concerning a portion of the staff working papers prepared during the "Tampa Electric Company Petition for Rate Increase Audit -- Test Year Ended December 31, 2007", Audit Control No. 08-434-2-1, Documents Numbered 10567-08, 10568-08 and 10837-08

Recommendation concerning Tampa Electric Company's (TECO's) request for a temporary protective order concerning a portion of the staff working papers prepared during the "Tampa Electric Company Petition for Rate Increase Audit -- Test Year Ended December 31, 2007", Audit Control No. 08-434-2-1, Documents Numbered 10567-08, 10568-08 and 10837-08

On October 30, 2008, when copies of certain portions of staff's working papers obtained or prepared during the "Tampa Electric Company Petition for Rate Increase Audit -- Test Year Ended December 31, 2007", were delivered to TECO at the audit exit conference, the utility 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 November 13, 2008, staff filed documents numbered 10567-08 and 10568-08 consisting of those specified portions of staff's audit and working papers.

On November 20, 2008, TECO filed a request pursuant to Section 366.093, Florida Statutes (F.S) and Rule 25-22.006, FAC, that selected portions of the working papers prepared by the staff during the audit receive a confidential classification. Such a request must meet the requirements of Rule 25-22.006(4), FAC. TECO's request included public copies of the information with the sensitive portions redacted (Document No.10838-08) and the request also included copies of the material with the sensitive information fully identified and highlighted (Document No. 10837-08).

- COM \_\_\_\_\_
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On November 14, 2008, Office of Public Counsel (Poucher) requested a copy of the sensitive audit documents prepared for this case from the Clerk's Office. Thus, in addition to its request for a confidential classification for the sensitive audit working papers, TECO has motioned that pursuant to Rule 25-22.006(6)(c), FAC, the information contained in staff's confidential working papers be granted a temporary protective order such that the information may be protected from public disclosure while copies of the audit materials are in the custody of the Office of Public Counsel.

Documents numbered 10567-08, 10568-08 and 10837-08 are currently held by the Office of the Commission Clerk as confidential pending resolution of FPL's request for confidential classification. Also, the utility's request for a protective order for this information is also pending.

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)(a),(d) and (e), F.S., provide the following exemptions.

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:*

*(a) Trade Secrets.*

....

*(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 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, 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.

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TECO Request

## **Staff Analysis of the Request**

### **General Matters**

#### **Requirements of the U S Securities and Exchange Commission**

In two instances -- in matters involving (1) Board of Director's meetings and matters involving (2) projected capital structures -- TECO reports that release of sensitive information might cause the utility to notify the Security and Exchange Commission that the material has been released.

The United States Securities and Exchange Commission is regularly notified by registered public companies when important information is released in order to ensure there is a "level playing field" for each investor. While this matter is of interest and would be an indication that the material is private, the Florida Public Service Commission grants a confidential classification to material based upon Florida Law and not the requirements of the U.S. Securities and Exchange Commission (SEC).

Also because of the requirements of due process followed by the Commission in matters concerning confidential material, any company filing properly-identified sensitive documents pursuant to the instruction found in Rule 25-22.006, FAC, would have enough time, as needed, make necessary communications with the SEC. It is the company's burden to identify its sensitive documents when providing information to the Commission or its staff.

It is also the Company's burden to make those necessary filings with its federal regulators such as the SEC.

### **Extra Material Filed**

Identified within TECO's request and found within its highlighted and public redacted copies of the sensitive information (Commission documents numbered 10836-08, 10837-08 and 10838-08) TECO identifies staff working paper titled: "Audit Request TEC-62-07, Request No. 1, Page 1 of 1, Filed October 28, 2008."

There is no such staff audit working paper. This information is found at working paper numbered 10-62 in the TECO's request.

Because of this error, the utility has submitted unsolicited confidential information in its filing. However, since the information is otherwise reported at another location -- Working Paper Numbered 10-62 -- technical staff will recommend a disposition of this document but will identify the document as belonging to TECO only.

**Analysis of the The Filing**

Reading the filing reveals the sensitive material consists of:

1) Utility Documents, Not Found in the Auditor's Working Papers

TECO asserts an unsolicited document identified as Audit Request TEC-62-07, Request No. 1, Page 1 of 1, Filed October 28, 2008, contains consolidated tax information which qualifies as for a confidential classification based upon the provisions of Section 366.093(3)(e), F.S.

Staff has found that this document does not exist within staff's working paper files.

This document appears to be a duplicate document filed in error and finds that the sensitive information found upon this document is also found within working paper numbered 10-62 which is identified within item 4 below. It appears that this page is filed as a mistake with the wrong page number.

Even if filed in error, Section 366.093(3)(e), F.S., provides that sensitive business information may be granted a confidential classification if its release would harm the competitive business of the provider of that information. The Commission grants a confidential classification to federal and state income tax return information when a confidential classification is requested. Therefore, staff recommends that this material be granted a confidential classification. (Also see Commission Order No. PSC-92-1073-CFO-WS issued September 28, 1992, in docket no. 920199-WS.)

2) Board of Director's Meeting Minutes and Summaries of Meeting Minutes

TECO asserts this information from the Board of Director's Meetings contains forward looking information not made public, and TECO reports the disclosure of this information could harm the competitive interests of the provider of the information and possibly trigger Securities and Exchange Commission reporting obligations.

Sensitive information disclosing planning topics covered within the company's Director's minutes can be found within staff's working papers titled: "Audit Notes to BOD Meeting Minutes", and "Copies of Selected BOD Meeting Minutes." Section 366.093(3)(e), F.S., provides that sensitive business information may be granted a confidential classification if its release would harm the competitive business of the provider of that information.

Upon reading the portions of the minutes referred to above, we agree release of this information could be expected to harm its provider; therefore, we recommend that this information be granted a confidential classification.

However, we note meeting the notice requirements for the Securities and Exchange Commission is a responsibility of the Company.

### 3) Working Papers of Consultant PriceWaterhouseCoopers

TECO asserts public release of this material reveals trade secrets and confidential commercial and financial information of both PriceWaterhouseCoopers and the audited companies. This sensitive information is found within audit working papers titled: "Copies of PWC Work Papers."

In prior decisions, the Commission has considered the proprietary audit strategies and work program methodology of outside financial auditors to be sensitive competitive business information necessary for the auditor to compete in the marketplace. (See Commission Order 25297, issued November 5, 1991, in docket No. 890190-TL). We further note that only the proprietary audit strategies and work program of the auditor are considered to be sensitive competitive business information. Internal company documents merely provided by the company to its auditor do not automatically qualify as part of the auditor's competitive materials. Source materials from the audited company must independently qualify for a confidential classification.

In addition, TECO asks that PriceWaterhouseCoopers materials be considered "trade secrets." While this material may be competitively or contractually sensitive, the company has not met its burden of proof that this material rises to the level of a "trade secret" nor has the company provided a prior decision of this Commission where this type of material has ever been considered a trade secret. Thus, we recommend that this material not be considered to disclose "trade secrets" as the Company has not met its burden of proof.

Section 366.093(3)(d), F.S., provides that contractual information may be granted a confidential classification if release of the information would impair the ability of a utility or its affiliates to favorably contract. Section 366.093(3)(e), F.S., provides that sensitive business information may be granted a confidential classification if its release would harm the competitive business of the provider of that information.

We have examined the information obtained from PriceWaterhouseCoopers by our staff auditors during this review on the basis that proprietary audit strategies and work program be considered sensitive competitive business information. In addition, if we found source documents from the company in the possession of PriceWaterhouseCoopers, we reviewed that information separately to ascertain if the material was either contractually or competitively sensitive as described by Section 366.093(3), Florida Statutes. We did not evaluate whether the information constituted a "trade secret." Based on our review of the PriceWaterhouseCoopers' materials, we find this material is competitively sensitive and recommend that a confidential classification be granted to this material on that basis as provided by Section 366.093(3)(e), Florida Statutes.

4) Consolidated Income Tax Information

TECO asserts that if this information were public it would disclose “the nature and expenses associated with...competitive operations and business strategy.” The disclosure of this information would therefore be harmful to the competitive business of Tampa Electric Company and its affiliates, who are the provider of this information, and as such, the information is entitled to confidential treatment pursuant to Section 366.093(3)(e), Florida Statutes.

Sensitive information disclosing Consolidated Tax Information can be found within staff’s working papers titled: “WP 10-62 -- Bonus Depreciation Information.”

Section 366.093(3)(e), F.S., provides that sensitive business information may be granted a confidential classification if its release would harm the competitive business of the provider of that information.

The Commission has granted a confidential classification to federal and state income tax return information when a confidential classification is requested. Therefore, staff recommends that this material be granted a confidential classification. (Also see Commission Order No. PSC-92-1073-CFO-WS issued September 28, 1992, in docket no. 920199-WS.)

5) Service Agreements Governing Plant Operation

TECO asserts release of its service agreements governing plant operation would impair the efforts of TECO and its affiliates to contract for goods and services on favorable terms as well as impair the competitive business of the provider of the information. This sensitive information is found within staff’s working papers titled: “Contractual Services Agreement.”

Section 366.093(3)(d), F.S., provides that contractual information may be granted a confidential classification if release of the information would impair the ability of a utility or its affiliates to favorably contract. Section 366.093(3)(e), F.S., provides that sensitive business information may be granted a confidential classification if its release would harm the competitive business of the provider of that information.

Reading the sensitive contracts reveals release of this information would be expected to cause the harm the utility suggests, we therefore recommend that these contracts be granted a confidential classification.

6) Information Concerning the Projected Capital Structure of the Affiliates and the Consolidated Company.

TECO asserts release of information about the planned capital structure of affiliates and the consolidated company would harm the competitive interests of those companies in the marketplace, and would trigger Securities and Exchange Commission reporting obligations. This information is found within staff working papers titled: “Non-Regulated Adjustments and Eliminations.”

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Section 366.093(3)(e), F.S., provides that sensitive business information may be granted a confidential classification if its release would harm the competitive business of the provider of that information.

We have read the information at issue and agree with the utility that its release could reasonably be expected to impair the competitive interests of TECO's non regulated operations. Further, we note that if the Florida Public Commission were to deny a confidential classification to any sensitive material provided during the course of any case, if necessary, that company would have ample time to notify the Securities and Exchange Commission of any denial of confidential classification.

#### 7) Contractual Information Concerning TECO Plaza Lease Payments

TECO asserts this contractual information is proprietary third party, privately negotiated and proprietary contractual information and pertains to TECO Plaza lease payments, and the utility further asserts public disclosure of this information would harm the competitive interests of the owners of TECO Plaza and impair their competitive business as well as have an adverse effect on Tampa Electric's ability to renegotiate these payments in the future.

Section 366.093(3)(d), F.S., provides that contractual information may be granted a confidential classification if release of the information would impair the ability of a utility or its affiliates to favorably contract. Section 366.093(3)(e), F.S., provides that sensitive business information may be granted a confidential classification if its release would harm the competitive business of the provider of that information.

We have read the sensitive leasehold materials at issue here and agree with TECO that release of this information would cause the harm that TECO suggests; therefore, we recommend that a confidential classification be granted to this material.

#### **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. TECO asserts: "The material for which confidential classification is sought is intended to be and is treated by Tampa Electric as private and has not been disclosed."

#### **Duration of the Confidential Classification Period**

TECO requests that this information be held in a confidential classification for at least 18 months as prescribed in Rule 25-22.006(9)(a), Florida Administrative Code.

According to the provisions set out in Section 366.093(4), F.S., absent good cause shown, confidential classification is limited to 18 months. We therefore recommend that the Commission limit the confidential classification period to 18 months. TECO may request an extension of this classification period before it 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.

Further, we recommend that a temporary protective order be prepared to maintain confidentiality of this sensitive information during the confidential classification period while the material is in the possession of the Office of Public Counsel. As noted above this information was provided to the Office of Public Counsel on or about November 14, 2008.

A detailed recommendation follows:

**Detailed Recommendation**

Staff Work Paper Number	Description	Page(s)	Line(s)	Recommend	Type of Information
Document Numbered 10837-08					
TECO Document	Audit Request TEC-62-07, Request No. 1, Page 1 of 1, Filed October 28, 2008	1	1 column	Grant	Sensitive Competitive Business Information
Documents Numbered 10567-08 and 10837-08					
8, page 1	Audit Notes to BOD Meeting Minutes	1	10 Areas	Grant	Sensitive Competitive Business Information
8, page 2	Audit Notes to BOD Meeting Minutes	1	6 Areas	Grant	Sensitive Competitive Business Information
8-1, page 4	Copies of Selected BOD Meeting Minutes	1	All	Grant	Sensitive Competitive Business Information
8-1, page 5	Copies of Selected BOD Meeting Minutes	1	All	Grant	Sensitive Competitive Business Information
8-1, page 12	Copies of Selected BOD Meeting Minutes	1	1 area	Grant	Sensitive Competitive Business Information
9-1/1	Copies of PWC Working Papers	1	All	Grant	Sensitive Competitive Business Information
9-1/2, page 1 through page 5	Copies of PWC Working Papers	1-5	All	Grant	Sensitive Competitive Business Information
9-1/3, page 1 through page 2	Copies of PWC Working Papers	1-2	All	Grant	Sensitive Competitive Business Information
10-62	Bonus Depreciation Information	1	1 column	Grant	Sensitive Competitive Business Information



Staff Work Paper Number	Description	Page(s)	Line(s)	Recommend	Type of Information
Documents Numbered 10568-08 and 10837-08					
19-9A	Contractual Services Agreement	1-132	All	Grant	Sensitive Contractual and Competitive Business Information
19-9B	Contractual Services Agreement	1-138	All	Grant	Sensitive Contractual and Competitive Business Information
19-9C	Contractual Services Agreement	1-109	All	Grant	Sensitive Contractual and Competitive Business Information
19-9D	Contractual Services Agreement	1-221	All	Grant	Sensitive Contractual and Competitive Business Information
Documents Numbered 10567-08 and 10837-08					
39-1	Non Regulated Adjustments and Eliminations	1-2	4 Areas	Grant	Sensitive Competitive Business Information
43-8/2-1, page 1	Plaza Lease	1	4 lines	Grant	Sensitive Contractual and Competitive Business Information
43-8/2-1, page 2	Plaza Lease	2	4 lines	Grant	Sensitive Contractual and Competitive Business Information
43-8/2-1, page 3	Plaza Lease	3	4 Columns	Grant	Sensitive Contractual and Competitive Business Information

A temporary copy of this recommendation will be held at 1:10837-08 TECO ratecase TYE 2007 raf.doc for a short period.

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