		concerning service quality
James L. Raleigh	Revenue Requirement	Competitive Issues Phase concerning service quality
Greg Bostwick	Revenue Requirement	Competitive Issues Phase concerning service quality
Jerry W. Yelverton Supplemental direct page 1 line 16 through line 17 and page 1, line 21 and page 2, line 21 through page 6	Competitive Issues	Revenue Requirement
James R. Thornton Supplemental direct, page 2, lines 2 and 5, and page 4, lines 10-18	Rate Design	Competitive Issues

EGS objects to the transfer of Louis E. Buck's supplemental direct testimony as proposed by General Counsel. The ALJ agrees with EGS that Mr. Buck's testimony addresses affiliate issues and should remain in the revenue requirement phase. To a certain extent, however, Mr. Buck's supplemental testimony addresses service quality. That issue will be addressed in the competitive issues phase; therefore, Mr. Buck's supplemental testimony at page 17, line 14 through page 23, line 12 will be taken up in the competitive issues phase along with service quality issues.

Finally, the General Counsel requested that the testimony of Narinder K. Saini be moved from the revenue requirement phase. Based on EGS' explanation, this testimony shall remain in the revenue requirement phase. However, when Mr. Saini takes the stand, EGS shall identify those portions of his testimony that relate solely to revenue requirement issues and shall offer to strike those portions that overlap and will be addressed in the fuel phase portion of the Proposal for Decision. The following is stricken from Mr. Saini's testimony: page 3, lines 8-9

IV. Testimony and documents provided under seal

OPC and Cities filed testimony and supporting documents containing portions that were redacted and/or filed under seal. Prior to the start of the revenue requirement phase, OPC and Cities shall determine which portions of those confidential materials EGS agreed to declassify or was ordered to declassify by the ALJ, and shall indicate at the beginning of their direct cases what portions should be released from seal. If there are any portions that remain classified by order of the ALJ or the Commission, then the parties shall propose to the ALJ at the beginning of the hearing how they plan to use these materials in cross-examination without closing the hearing to the public.

V. Cities request to present testimony by panels

Cities requested that their witnesses Mr. Arndt and Mr. Larkin be permitted to present their testimony on affiliate issues in a panel at the hearing. No party objected to this request, except that EGS requested that Mr. Arndt's income tax testimony (pages 74-85) not be part of the panel. Cities' request to use this panel is granted. Mssrs. Arndt and Larkin shall review the guidelines for panel presentation discussed in Order No. 34 in this docket and be prepared to follow those guidelines when responding to cross-examination. Mr. Arndt's income tax testimony will be taken up outside the panel.

VI. Cities objection to EGS witness Peters' supplemental testimony

Mr. Peters' supplemental testimony requests a rate increase of $25.353 million in the event the Commission does not approve EGS' transition to competition plan. Cities argue that no such request was advertised in EGS' legal notice in this proceeding and should therefor be excluded from the record. EGS responded saying that Mr. Peters' testimony was filed to address subpart (a) of Specific issue B.1 in the Commission's Preliminary Order, which stated, "What is the

appropriate revenue requirement (and components thereof) to use in setting Texas jurisdictional rates for EGS . . .(a) absent approval of a transition to competition plan?" Prel. Order at 25.

The ALJ finds that the rate increase amount is responsive to the Commission's question and will not be stricken. Whether it is meaningful in any way, given the limitation in the notice, is an issue that EGS will have to address if it proposes to collect such a rate increase.

VII. OPC's request to late-file supporting documents

OPC's request to late-file the supporting documents omitted by mistake from the testimony of witness Kenan Ogelman is unopposed and is granted.

VIII. Hearing on the merits

The hearing on the merits in the revenue requirement phase will begin at 10:00 a.m. on 28 July 1997.

SIGNED AT AUSTIN, TEXAS the 8th day of July 1997.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

Kathleen Sanford

KATHLEEN SANFORD
ADMINISTRATIVE LAW JUDGE

SOAH DOCKET NO. 473-96-2285
PUC DOCKET NO. 16705

APPLICATION OF ENTERGY TEXAS FOR APPROVAL OF ITS TRANSITION TO COMPETITION PLAN AND THE TARIFFS IMPLEMENTING THE PLAN, AND FOR THE AUTHORITY TO RECONCILE FUEL COSTS, TO SET REVISED FUEL FACTORS, AND TO RECOVER A SURCHARGE FOR UNDER-RECOVERED FUEL COSTS	§	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

ORDER NO. 100
DENYING MOTION TO INTERVENE OUT OF TIME OF KOCH ENERGY TRADING INC.

On June 12, 1997, Koch Energy Trading Inc. (KET) filed a motion to intervene out of time in the above-captioned proceeding, approximately five months after the intervention deadline of January 13, 1997. The applicant, Entergy Gulf States, Inc. (EGS), timely objected to the motion.

KET states that it produces, gathers, transports, distributes, markets and trades electricity. KET attributes its late filing to the merger of KET and Koch Power Services, Inc. and the resulting change in management and realignment of company objectives. In support of its motion KET asserts that it has a direct and substantial interest in the outcome of this docket because the Commission's order on EGS' transition to competition plan will directly affect KET. KET alleges that intervention is necessary to protect its interest and the public interest. Because it is willing to accept the record as it now exists, KET asserts that its intervention will not affect or delay this proceeding, nor prejudice the rights of any party.

EGS opposes the intervention alleging that KET has failed to meet the criteria of P.U.C. PROC. R. 22.104(d)(1). EGS argues particularly that KET has failed to present good cause for failing to file within the time prescribed. EGS claims that KET's intervention could disrupt the proceeding and impose additional burdens on the current parties. EGS also challenges KET's assertion that its intervention would be in the public interest.

Under P.U.C. PROC. R. 22.104(d)(1) the Administrative Law Judge (ALJ) must consider the

following issues in acting on a late filed motion to intervene:

(A) any objections that are filed;

(B) whether the movant has good cause for not filing the motion prior to the intervention deadline;

(C) whether any prejudice to, or additional burdens upon, the existing parties might result from permitting later intervention;

(D) whether any disruption of the proceeding might result from permitting late intervention; and

(E) whether the public interest is likely to be served by allowing the intervention.

As EGS asserts, KET has failed to meet the criteria of P.U.C. PROC. R. 22.104(d)(1). Although intervention by KET would not likely disrupt this proceeding or impose additional burdens on the current parties, particularly if KET were allowed to intervene only in the competitive issues phase, KET has failed to demonstrate sufficient good cause for its late intervention. The merger of KET and Koch Power Services, Inc., and the resulting change in management and realignment of company objectives fail to explain the five month delay in intervening. This matter has received sufficient publicity that it is hard to imagine either KET or Koch Energy Trading, Inc. being unaware that the case was proceeding.

The ALJ is also not swayed by KET's assertion that it has a direct and substantial interest in the outcome of this docket because the Commission's order on EGS' transition to competition will directly affect KET. The assertion is conclusory and lacks justification. As EGS argues, KET does not explain the basis for its direct and substantial interest.

The ALJ is also not convinced that KET's participation will advance the public interest. For one thing, KET does not state how its participation will advance the public interest. And as EGS stated, there are sufficient disparate entities, including potential competitors, present in this proceeding to advance the public interest.

KET's motion to intervene out of time lacks merit and is, therefore, DENIED.

SIGNED AT AUSTIN, TEXAS the 7th day of July 1997.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

Katherine L. Smith

KATHERINE L. SMITH
ADMINISTRATIVE LAW JUDGE

SOAH DOCKET NO. 473-96-2285
PUC DOCKET NO. 16705

APPLICATION OF ENTERGY TEXAS FOR APPROVAL OF ITS TRANSITION TO COMPETITION PLAN AND THE TARIFFS IMPLEMENTING THE PLAN, AND FOR THE AUTHORITY TO RECONCILE FUEL COSTS, TO SET REVISED FUEL FACTORS, AND TO RECOVER A SURCHARGE FOR UNDER-RECOVERED FUEL COSTS	§ § § § § § § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

ORDER NO. 97
RULING ON GENERAL COUNSEL'S MOTION TO LIMIT REQUESTS FOR INFORMATION TO THE GENERAL COUNSEL

General Counsel's Motion

General Counsel (GC) requests the Administrative Law Judges (ALJs) to limit each party to 20 requests for information (RFIs) per GC witness on a going forward basis (Revenue Requirement, Rate Design, and Competitive Issues Phases). GC states that filings made before its motion would not count towards the 20. GC plans to have 10 witnesses in the Revenue Requirement Phase, 3 witnesses in the Rate Design Phase, and 17 witnesses in the Competitive Issues Phase, for a total of 30 witnesses. If the motion is granted, each party would be limited to a total of 600 questions on a prospective basis.

GC Justification for Motion

GC claims that the granting of this motion will prevent it from possibly being overwhelmed by a large number of RFIs after its testimony is filed. Even if the motion is granted, because of the deadlines established for filing responses, GC may still be faced with answering a large number of RFIs in a relatively short period of time. GC expects that a large amount of information will be provided in its witnesses' testimony, obviating the need for numerous RFIs from the other parties. Also, the other parties to the case will have already filed their own direct testimony before GC files its testimony. Plus, there is always the opportunity for parties to depose GC to obtain more information. In conclusion, GC appeals to the ALJs to consider its limited resources and the fact that it is required by law to represent the public interest before the Commission.

Cities' Reply to the Motion

Cities reply that imposing limitations on Staff has never occurred before--to its knowledge. Cities claim that the deadline for filing RFIs in the Fuel Phase has already passed and that no problem developed then. Cities maintain that if a problem develops, it can be dealt with at the time. Furthermore, GC is assuming that each party in the proceeding will ask Staff questions. Although the service list is long, says Cities, there are fewer than half a dozen active parties.

Cities also opine that resorting to depositions is not viable; they are too expensive due to the high cost of transcription, and they should not be considered as an alternative to RFIs. The use of RFIs has long been a Commission precedent.

Cities request that if the motion is granted, that it not be limited on a per witness basis. If the ALJs are going to limit the total number of questions, then Cities should at least be allowed to make its own tactical choices and direct questions to the witnesses it chooses.

If the ALJs are inclined to limit discovery, Cities request a 750 RFI limit, with no more than 75 questions being directed at any one Staff witness. Cities further maintain that when it does ask questions of Staff, it is usually the result of an unsupported statement, an unexplained calculation, or an unclear adjustment. Because the Commission gives special deference to Staff witnesses, the parties should be allowed to fully probe their testimony.

EGS's Reply to the Motion

EGS replies that it concurs with Cities' reply, and reiterates that no problem has actually yet occurred. Furthermore, EGS doesn't believe that the GC should be elevated to some loftier position in the discovery process than has been granted to the other parties to this proceeding. EGS also points out that GC misses the point when it says that the other parties don't need as many RFIs to formulate their direct testimony because the other parties will have already filed their direct testimony. The other parties need the answers to RFIs to formulate their cross examination.

Although it is opposed to limiting discovery, EGS requests that if the ALJs choose to limit it, that they not restrict the RFIs to a particular phase or to a particular witness--the limitation should be on the basis of the total number of RFIs per party. Specifically, EGS proposes a 900 RFI limitation per party, unrestricted by witness or phase. If there is a per witness limitation, EGS agrees

with Cities that the limitation should be 75 RFIs per witness per phase.

ALJs' Recommendation

The ALJs share GC's concern of having to answer a large number of RFIs in a short period of time, given the limited resources of the Commission Staff. The ALJs, however, also realize that a problem has not developed in this docket concerning the number of RFIs sent to the GC. GC may be concerned about something that may never occur. The ALJs are also persuaded by EGS's argument that the Commission gives great weight to the Staff's testimony on policy and technical issues; therefore, the parties should have the opportunity to conduct sufficient discovery on Staff's testimony. After considering the arguments of the parties, the ALJs find that Cities offer a reasonable solution to this issue. Therefore, discovery on GC's witnesses will be limited to 750 questions (including subparts) for Cities and Office of Public Utility Counsel, 500 questions (including subparts) for EGS[1], and 375 questions (including subparts) for all other parties for all remaining phases (Revenue Requirement, Rate Design, and Competitive Issues) beginning July 1, 1997, with the restriction that no more than 75 questions (including subparts) be directed to any one witness.

SIGNED AT AUSTIN, TEXAS the 27th day of June 1997.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

Michael J. O'Malley

MICHAEL J. O'MALLEY
ADMINISTRATIVE LAW JUDGE

[1] EGS was limited to 500 RFIs of any party in Order No. 54.

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SOAH DOCKET NO. 473-96-2285
PUC DOCKET NO. 16705

APPLICATION OF ENTERGY TEXAS FOR APPROVAL OF ITS TRANSITION TO COMPETITION PLAN AND THE TARIFFS IMPLEMENTING THE PLAN AND FOR THE AUTHORITY TO RECONCILE FUEL COSTS, TO SET REVISED FUEL FACTORS, AND TO RECOVER A SURCHARGE FOR UNDERRECOVERED FUEL COSTS	**§**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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Decision List

RFI	Ruling
Cities 3-1 and 3-2:	Certain Bates pages declassified--See Section I.
3-8 and 3-63	Declassified by EGS
3-62, Bates pages 0023527 and 0061847	Declassified
Cities 33-11	Generally declassified, See Section II
Internal audits:	
95016, 96010	Declassified
94025, 94042, 95033	Declassified
95047	Reclassified to confidential
96017	Declassified
96030	Declassified
Cities 18-7	See discussion at Section III.
Bates pages 56051-56053 & 56615	--Declassified (redact employee names)
OPC 5-6	See discussion at Section III.
PUCT 23-378	Cities withdrew request for declassification
Cities 25-9	Declassified (see discussion)
Cities 50-16	Declassified (see discussion)
Cities 87-6	Declassified
Citeis 87-9 and 87-18	Declassified (redact employee names)
Cities 50-21 & 50-25	Declassified (redact names)
Cities 73-23 & 73-13	Declassified (redact names)
PUCT 20-350, Bates 1123590-2	Declassified
PUCT 23-375	Declassified
Cities 18-13	Declassified
Cities 18-11	See Section VII--partial declassification
Cities 32-12	Reclassified confidential subject to reconsideration
Cities 32-16, 32-17 & 32-20	Declassified
Cities 87-12	Declassified (redact names)
Cities 51-18 and addendum	Declassified
PUCT 1-18 and addendum	Declassified
PUCT 13-256	Declassified
PUCT 44-589	Remains classified
Citiees 7-4	Declassified
PUCT 16-285	Remains classified confidential
PUCT 35-512	Declassified
Cities 38-38 & 38-66	Declassified
PUCT 1-13	See Section XIII--partial declassification
PUCT 14-264	No ruling
Cities 11-1	Reclassified confidential
PUCT1-2	Classified confidential
Cities 38-36	Remains confidential subject to reconsideration

SOAH DOCKET NO. 473-96-2285
PUC DOCKET NO. 16705

APPLICATION OF ENTERGY TEXAS FOR APPROVAL OF ITS TRANSITION TO COMPETITION PLAN AND THE TARIFFS IMPLEMENTING THE PLAN AND FOR THE AUTHORITY TO RECONCILE FUEL COSTS, TO SET REVISED FUEL FACTORS, AND TO RECOVER A SURCHARGE FOR UNDERRECOVERED FUEL COSTS	§	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

ORDER NO. 95
CONCERNING CITIES' MOTIONS TO DECLASSIFY CERTAIN DOCUMENTS
REVENUE REQUIREMENT PHASE

Cities seek to disclose approximately 75 documents which Entergy Gulf States, Inc. (EGS or the Company) had classified as either confidential or highly sensitive confidential and provided to Cities under the Protective Order. On 4 June 1997, EGS timely filed its Motion for an Order to Preserve the Confidential and Highly Sensitive Designation of Documents Listed in Cities' Notice to Disclose (Phase 2), in which it indicated it had declassified all or parts of 13 of the 75 documents, noted that Judge Stewart had permitted EGS to maintain its original classification of four of the documents in Order No. 82; on June 11, indicated that it had declassified three additional documents from Cities' list, and on that date provided the Administrative Law Judge (ALJ) with three file boxes of documents for *in camera* review. Cities filed a response on June 17 containing affidavits to support their position that the public interest requires public disclosure of the documents.

The standard governing protection of trade secret information was discussed in Order Nos. 77 and 81 in this docket. The elements of a trade secrets are found at the Restatement of Torts §757, comment b (1939) and adopted by the court in *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958).[1] They include

[1] *See also Computer Assoc. Int'l v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996); *Incinomode, Inc. v. Research Products Mfg. Co.*, 332 S.W.2d 805, 806 (Tex.App. 1960, no writ).

> any formula, pattern, device or compilation of information which is used in one's business, and which give him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business.

Trade secrets are not generally known or readily ascertainable by independent investigation.[2] The Restatement includes the following that may be considered in determining the existence of a trade secret:

1. the extent to which the information is known outside the business;
2. the extent to which the information is known by employees and others involved in the business;
3. the extent of measures taken by the company to guard the secrecy of the information;
4. the value of the information to the company and competitors;
5. the ease or difficulty with which information in the company's possession could be properly acquired or duplicated by others; and
6. the amount of effort expended in developing the information.

The Texas Rules of Civil Evidence, Rule 507 also governs the review of trade secret information. The rule provides:

> A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

EGS claims there is no basis in any of its classifications to conclude that it is trying to conceal fraud.

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[2] *Rugen v. Interactive Business Systems, Inc.*, 864 S.W.2d 548, 552 (Tex.App.--Dallas 1993, no writ).

Following determination that a document is properly classified as a trade secret, a balancing test should be applied to ascertain whether the public's interest in knowing the information outweighs the harm that would result from disclosure.[3] The courts have considered three factors:

1. whether disclosure will significantly aid the Commission in fulfilling its function;
2. the Commission should consider not only the harm done to the producers by releasing the information but the harm to the public generally; and
3. most importantly, whether there are alternatives to full disclosure that will provide consumers with adequate knowledge to fully participate in the proceedings but at the same time protect the interest of the producers of the information.[4]

Where the initial determination by the ALJ is that the document is not a trade secret or subject to protection, then the second inquiry, the balancing test, will not be employed.

The *Pennzoil* balancing of interests, according to EGS, strongly disfavors mandating public disclosure. The ALJ disagrees with this conclusion as a general proposition. Each trade secret must be evaluated based on the public's need to know. If the information is necessary to a determination on issues arising in the case, then great weight will be given to public disclosure, or at least to an amount of disclosure required to fully litigate the issue.[5]

EGS raised, in its June 4 motion, a second category, "Non-trade secret information". Apparently the standard it wishes to use in this category is "whether the information is proprietary and subject to having its value or substance negated or expropriated," and denial of Cities' Notice does not turn on whether EGS has in each instance satisfied the stringent trade secrets test. June 4 Motion at 9. The basis EGS provides for this standard is the Commission's decision in an old

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[3] *Pennzoil Co. v. Federal Power Comm'n*, 534 F.2d 627 (5th Cir. 1976).

[4] *Id.* at 632.

[5] *See, e.g., Automatic Drilling Machines, Inc. v. Miller*, 515 S.W.2d 256, 259 (Tex. 1974).

Southwestern Bell Telephone Company (SWB) case,[6] where the Commission applied the Texas Open Records Act (TORA)[7] which provides as follows:

> All information collected, assembled, or maintained by governmental bodies . . . in connection with the transaction of official business is public information and available to the public during normal business hours if any governmental body, with the following exceptions only:
>
> 1. information deemed confidential by law, either Constitutional, statutory, or by judicial decision; [§552.101]
>
> . . .
>
> 4. information which, if released, would give advantage to competitors or bidders; [§552.104]
>
> . . .
>
> 10. trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. [§552.110]

Little value should be given the Docket No. 6588 proceeding much weight in this docket, because the Commission ruled in Docket No. 6588 that vast quantities of information were confidential apparently without balancing the public's need to access the information.

Finally, EGS proffers a "self-critical analysis privilege" related to internal audits which is discussed later in this order.

In all cases, the party seeking to retain a proprietary classification has the burden to prove that the classification is proper.[8]

With regard to most documents, EGS provided testimony by affidavit that indicated the information is not known outside the company; the information is not known by employees and others

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[6]*Request for Declassification of Documents Covered by Protective Order Entered in Docket No. 6200*, Docket No. 6588, 13 P.U.C. BULL. 1558 (Sept. 25, 1987).

[7]TEX. GOV'T CODE, Ch. 552, (Vernon Supp. 1997).

[8]*Peeples v. Fourth Supreme Judicial District*, 701 S.W.2d 635, 637 (Tex. 1985).

involved in the company's business except for those who need to know; the company took strong measures to guard the secrecy of the information; and it would be difficult for others outside the company to acquire the information. These are four of the six criteria indicative of a trade secret. In most cases, EGS discussed harm resulting to the company and/or the rate payers if competitors gained access to the information, and in some instances discussed the effort, including cost, expended by the company in developing the information. The element most acutely subject to question is whether disclosure would indeed put Entergy Corporation or EGS at a competitive disadvantage. In many instances EGS failed to meet its burden of proof in this regard. EGS merely restated within each affidavit, as if each affidavit were not separately prepared by the testifying witness, the same language generally indicating that EGS would be harmed if competitors had access to the information.

The following rulings follow the sequence EGS used in its motion to preserve.

I. Income Tax Returns
Cities 3-1, 3-2, 3-62, 33-11 (CR-22)

EGS provided the affidavit of Nathan E. Langston to support nondisclosure of Entergy Corporation's 1994 and 1995 federal income tax returns (FITs)(Form 1120); a schedule of the net taxable income for each Entergy affiliate for tax years 1991 through 1995, segregated by service and non-service company; and schedules of allocated consolidated FITs for the 1990 through 1994 tax years. EGS claims tax returns are trade secrets, and Mr. Langston testified that if divulged to competitors or suppliers of Entergy, the consequences would be "immediate and significant." Entergy does not disclose this information to the public and keeps it locked in its offices. Mr. Langston claims Entergy's tax position would allow competitors significant insight into the cost structure of Entergy and its affiliates and would assist in the valuation of Entergy Corporation in the context of an unsolicited acquisition and may adversely affect the market valuation. He adds that the Internal Revenue Code Section 6103(a) states that returns are to be kept confidential and shall not be disclosed. EGS has classified this material highly sensitive confidential.

Cities 3-1 and 3-2: Cities expert Mr. Michael L. Arndt responded indicating that the Cities are interested in declassifying only certain portions of the FITs, and he lists the Bates numbers of those portions in his affidavit at 3-4. Mr. Arndt testified that because the Commission's findings concerning consolidated tax issues require reliance on specific dollar amounts from the tax returns, it would be impossible to mask the confidential information or offer non-confidential summaries and still meet the Cities' burden of proof. He also testified that to his knowledge federal income tax information has never been designated highly sensitive and its disclosure has not resulted in any financial harm. The same information he seeks declassified was made public in the recent Central Power and Light Company (CPL) case, Docket No. 14965, pending, and according to Cities' counsel, EGS provided the same information in its last rate case at the Commission. Mr. Arndt also explained that some of the documents classified by EGS as highly sensitive should be reclassified as confidential so that he can take copies to his office in preparation for hearing.

After review of the documents *in camera*, the 1994 and 1995 Form 1120 and various sub-forms, the ALJ finds that the information contained in the tax returns is of the type routinely used in Commission proceedings to evaluate the earnings of utilities and their subsidiaries. While EGS and Entergy may indeed keep these documents confidential, the ALJ is not persuaded that EGS or Entergy would be harmed by their disclosure to the public. Furthermore, they do not appear to be the type of information that fits within the definition of a trade secret--used in one's business and presents an opportunity to obtain an advantage over competitors. Therefore, the Bates pages listed by Mr. Arndt are hereby declassified for use at hearing. To the extent the Cities determine that disclosure of various pages is not necessary to its recommendations, then those pages shall be classified confidential.

Cities 3-8 and 3-63 were declassified by EGS. Cities 3-62: This is a schedule of net taxable income or loss for each Entergy subsidiary for the tax years 1994-1995. Mr. Arndt testified that the information is necessary to the income tax determination and to affiliated transaction issues, and it is necessary to know how much tax has been transferred to non-regulated affiliates under the tax

allocation agreement. The ALJ finds that while the information may indeed provide insight into Entergy's cost structure, the overriding need to be able to disclose this information in a public forum for scrutiny by the Commission and the parties prevails. Affiliate allocations are an essential element of the review in this docket and the ALJ, the Commission, and the parties should not be constrained by EGS' global assertions regarding competitive harm. Therefore, responsive documents, Bates pages 0023527 and 0061847, are hereby declassified.

II. Corporate Plans
Cities 33-11 (JG-07)

This item contains 1995 and 1996 corporate plans. EGS declassified Bates pages 0102292 through 0102308. Mr. Louis E. Buck supplied an affidavit in support of EGS' motion, testifying that if the information were disclosed the negative consequences would be significant, and the Company does not disclose forecast data. He said that potential competitors such as independent power producers, other utilities, and existing customers, could use information gleaned from the forecasts to their advantage in negotiating with the Company for future deliveries of power and services. Mr. C. Gary Clary testified for EGS that salary information contained in this response should not be declassified because disclosure would harm the publishers who license the information to subscribers; they might not license use of their publications in the future; and the Company's salary range and actual salary information should not be disclosed because the information would allow competitors to structure job offers to Entergy employees.

Mr. Arndt testified that Cities do not seek to declassify employee salary and compensation information that would result in disclosing employee names. Cities seek to declassify information related to Entergy Services, Inc.'s (ESI's) time reporting and ESI's billing to its regulated and non-regulated affiliates. According to Mr. Arndt, the Company has not made any claim that this type of information would be harmful to EGS or Entergy.

The response to Cities 33-11 is voluminous. The ALJ cannot tell which pages Cities are

referring to that contain the ESI information. She has reviewed the filing *in camera*. Bates pages 0100668-1000669, 0102105-0102118, 0102309-0102493 are intercompany cost allocations, budget information, various goals and incentive plans for 1996 and earlier years. Bates pages 0102137-0102291 are GSU affiliate audit for 1995 and 1996, audit report on intra-system billings dated November 1995, ESI Billings to the system companies dated September 1994, various other documents including allocation of consolidated taxes and tax liability for years prior to 1996. Bates pages 0102494-0103507 are business plans that include projections for 1997 AGM revenue, sales, non-fuel O&M, capital expenditures, (also for 1998), 1997 projected financial results (ROE/debt ratio, etc.), spending responsibility. The ALJ finds that most of the information is historical data which Mr. Buck does not contend would put the Company at a competitive disadvantage. It appears that Mr. Arndt does not seek disclosure of projections for 1997 and 1998. Finding that the information does not warrant trade secret protection, Cities 33-11 is declassified, except for the 1997 and 1998 projections. Cities has not shown that their need for public disclosure of the projections outweighs the protection EGS seeks. Therefore, Cities shall mask those projections should they use the documents at hearing.

Salaries are not necessarily considered trade secret information (see discussion elsewhere in this order), and Cities 33-11 does not appear to contain employee names, therefore privacy concerns are not relevant. Nevertheless, if names are included, then parties shall mask those names if they use the information at hearing. The ALJ finds that it is specualtive at best to consider that job seekers with knowledge of Entergy's or EGS' salary ranges could harm the company. Obviously, the utility must pay competitive wages. And speculation about publishers' license options is just that, speculation. None of these arguments make the information trade secret.

Mr. Langston testified that disclosure of the consolidated tax information would give competitors significant insight into the cost structure of Entergy and its affiliates; such disclosure would assist in the valuation of Entergy Corporation in the context of an unsolicited acquisition. Because of security measures taken, it is difficult for this informtion to be acquired or duplicated by

the general public. Cities argued that tax returns are a single event in the conduct of business and not trade secrets. The ALJ observes that Entergy is an enormous company; a takeover would be exceedingly difficult, and it is unlikely that historical tax information would leverage that process against Entergy. Even if this information were a trade secret, the tax allocations are very important to dispositive issues in this docket and the information may be needed at hearing. Again, however, parties shall disclose publicly *only* those pages, or portions of pages, necessary to their recommendations on specific issues.

Cities 33-11 is referenced in various categories below, but no further ruling will be made on this item.

III. Internal Audit Reports
OPC 5-6 (incorporating PUCT 10-177 & PUCT 10-178 by reference)
Cities 71-6, 71-7, 71-12, 71-13, 71-16, 71-17, 71-22, 71-23,
71-24, 71-25, 71-26, 71-27, 71-28, 71-29, 71-20, 71-30, 71-31
Cities 18-6, 18-7 and Cities 33-11 (BLH-7 & BLH-16)

These items include internal audits of ESI from 1994 to 1996. EGS lists those reports in Appendix B to its motion.

EGS proffered a "self-critical analysis privilege" in support of its classification of these audits. This "privilege" is invoked when a party prepares the information for its own use, and the information should be disclosed only upon a showing of "exceptional necessity." The policy underlying the qualified privilege is that critical self-analysis should be encouraged, but will be chilled if the results are used against the evaluator.[9] A case somewhat analogous to the information in question here, cited by EGS, involved the discovery of a report prepared by outside consultants concerning equal

[9]EGS cited as support *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C.Cir. 1973).

employment opportunity at Consolidated Edison.[10] The court explained that the self-critical analysis privilege is based upon the notion that disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations. Documents subject to this protection must (1) be the result of a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; and (3) the information must be of the type whose flow would be curtailed if discovery were allowed. Furthermore, the party resisting discovery must make a detailed and convincing showing of the harm to be anticipated from the disclosure.[11] The court held in *Sheppard* that discovery was permissible as to the facts underlying the report, but that the remainder of the report was protected by the self-critical analysis privilege to the extent it contained evaluative material. Disclosing the material, the court said, would not only curtail the flow of such information, but may also diminish its value if companies fail to circulate the information to persons responsible for employment decisions. EGS seeks a privilege limited to preventing the public dissemination of the self-critical analyses performed by Entergy's Internal Audit department. It argues that without confidence in the privacy of these reports, the openness and candor of the individuals being interviewed and evaluated will be significantly reduced.

Cities responded pointing out that Texas has not adopted this limited privilege either in the rules of procedure or evidence, or in case law. As discussed above, the privilege arose in the context of internal hospital staff committee meetings in the Washington, D.C. circuit. In Texas, the legislature protects such records by statute. *See Tex. Health and Safety Code*, Sec. 161.032(a). Other privileges found in the rules of civil procedure include attorney work product, non-testifying expert privilege,

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[10] *Sheppard v. Consolidated Edison Co.*, 893 F.Supp. 6 (E.D.N.Y. 1995)(*Sheppard*). EGS also cited *Florida Power Corp. v. Public Service Commission*, 424 So.2d 745 (Fla. 1982), where the court criticized the Commission's reliance on a report issued by the utility's nuclear general review committee after an accident to support a disallowance of replacement fuel costs. The court said that the PSC relied *excessively* on the internal report, but it added that use of the report also violated Florida's strong public policy in favor of post-accident investigations. In this instance, the report was only incidental to the determination on the issues, and therefore any public policy favoring disclosure was not controlling.

[11] *Id.* at 7.

witness statement privilege, party communications. *See also* Article V of the Texas Rules of Civil Evidence. Cities suggest that neither the State Office Of Administrative Hearings nor the Commission has the authority to create a new evidentiary privilege not otherwise recognized under the laws of this state.

The ALJ concludes that even though Texas does not recognize the self-critical analysis theory as a "privilege", the theory can be applied as a tool in balancing the public's need to have the information against the Company's need to protect it from disclosure.

Mr. Jack D. Harrington testified in support of nondisclosure of these documents. In substance, he stated that the value of the information to Entergy Corporation, its suppliers, and its competitors is significant. Disclosure could result in a security risk to Entergy because sensitive business information is included in the audit workpapers, including employee records, EGS' bank account numbers, descriptions of ESI's computer security systems, and the terms and conditions of material and fuel supply agreements. Included are employee names, social security numbers, and compensation information.

Cities seek disclosure of the following documents. The ALJ will rule only on these items, although there are dozens more listed in EGS' document list and provided for *in camera* review.

Audit No. 95016 Entergy Incentive Plans, Bates pages 0071247-68 and Audit No. 96010, Bates pages 0071001-17:

The purpose of Audit No. 95016 was to evaluate the effectiveness of internal controls and procedures related to incentive plans; determine eligibility and proper approval methods; determine whether goal results were adequately documented; and whether the incentive plan payouts were accurately computed. When errors were found, the audit report recommended changes to correct the situation. Review of this audit revealed such problems as overtime paid in error or not documented; incorrect calculations for 140 fossil participants resulting in overstated payouts and

corrections to this error; and problems with security of mainframe files. Audit No. 96010 regarding incentive plans was done to evaluate the effectiveness and efficiency of the internal controls and procedures. It included an audit on the sales incentive plan, non-regulated incentive plans for Entergy Enterprises, Inc. and Entergy Systems and Services, Inc., Entergy executive annual incentive plan, management plan, and teamsharing plans. The documents are fairly general in nature in that they don't name names or, in most cases, amounts of discrepancies found.

Mr. Clary testified that knowledge of Entergy's incentive compensation plans would provide its competitors with the opportunity to structure competing job offers to Entergy's employees. Cities witness Mr. Richard B. Hubbard testified that the information is relevant in evaluating the reasonableness of the incentive compensation program costs in 1995 and 1996.

The ALJ finds that EGS' fear of competitors taking away employees is speculative and unpersuasive. These audits are not trade secrets and even if disclosed in this case, the ALJ is confident Entergy will continue to evaluate its compensation plans in the future to ensure that they are competitive. Audits 95016 and 96010 are declassified.

Audit No. 94025 Bar-Coding M&S Inventory, Bates pates 0071449-56; Audit No. 94042 River Bend Storeroom, Bates pages 0071521-23; and Audit No. 95033, Bates pages River Bend Storeroom Follow-up Audit, Bates pages 0071687-91:

The ALJ can find no affidavit supporting either party's position with regard to these audits. Mr. Jack D. Harrington refers to them by Cities 71 RFI group and makes only general assertions regarding the propriety of these documents. He did not refer to these audits separately or specifically identify the nature of the trade secret status. Cities' witness Mr. Hubbard lists the audit numbers at p. 21 of his affidavit, but he fails to provide supporting testimony. Nevertheless, EGS has the burden to prove that a trade secret exists. From review of the documents, the ALJ finds that they appear to be relevant to this proceeding and do not contain any apparent or particular trade secret information. Revealing the names of employees contained in these audits would not disturb any privacy concerns,

because the information does not involve compensation, personnel evaluations, or other personal information. These audits are therefore declassified.

Audit No. 95047 Coopers & Lybrand MIS Inventory Audits, Bates pages 0070863-932:

Entergy witness John J. Gillen testified that Coopers & Lybrand (C&L) considers these audits and its workpapers to be trade secrets. They requested confidential treatment by the General Counsel and written notice be given before distribution of the information in the working papers to others, except when such distribution is required by law or regulation. C&L claims that public disclosure of its auditing methodology, audit fees, and budgets could result in competitive harm to C&L. These tools provide C&L a competitive advantage in its business of providing accounting and auditing services, and knowledge of these matters by competitors could eliminate that competitive advantage. C&L's auditing techniques have been refined during the course of providing auditing services to its clients and maximize the intellectual capital accumulated over millions of hours of research and development.

Mr. Hubbard testified that the information is relevant to evaluating the reasonableness of the inventory control program costs in 1995 and 1996 and for assessing future operating costs for River Bend relative to EGS' requested performance based pricing. Mr. Hubbard argued that the reports are normal business records used to justify the reasonableness of managements' actions. The Commission will benefit from the information in evaluating the reasonableness and effectiveness of Entergy's inventory control programs and for ruling on an adjustment set forth in Cities' recommendations.

The ALJ finds that the audit reports would disclose the methodology used by C&L in conducting its review of storerooms and inventories. In addition, these reports are replete with information that could be very valuable is assessing EGS' costs, assuming there is a connection or link between these inventories and River Bend costs, for example. The ALJ concludes that the Cities'

need to use the audit information at hearing is important but does not outweigh necessary trade secret protection. To the extent these audits have been classified highly sensitive, they shall be reclassified to confidential. The ALJ is concerned that disclosure of the audit workpapers will have a chilling effect on the audit process. If particular information is essential to Cities' recommendation on a dispositive issue, it may provide that information at hearing without disclosing the audit report/workpapers themselves.

Audit No. 96017 Capital Approval & Spending, Bates pages 0071037-64:

Mr. Harrington did not cite any specific confidential information in this audit report, but only generally asserted that harm could befall EGS or Entergy if the information were disclosed. Furthermore, Mr. Harrington's use of the self-critical analysis is misplaced. That analysis requires a specific explanation of the need for protection from public disclosure. EGS has not provided that level of explanation. Mr. Hubbard testified for Cities that this information is relevant in evaluating the reasonableness of the 1995 and 1996 projects included in EGS' proposed capital additions to rate base.

A review of the materials indicates they were probably used as slides for a presentation. They contain very general outlines discussing business objectives, money saving or cost cutting actions, risk assessment and definition, performance assessment, etc. In and of themselves, they are not competitively harmful to EGS and are not entitled to trade secret protection. This audit is therefore declassified.

Audit No. 96030 Nuclear Fuel Procurement Process, Bates pages 0071118-27:

Again, Mr. Harrington provided no specific reason for classifying this audit as trade secret. He merely referenced it along with all the others he addressed in his affidavit. For the reasons discussed above, EGS has failed to meet its burden to prove that this audit is trade secret information.

Cities contend the information is relevant in evaluating the reasonableness of the nuclear fuel procurement process in 1995 and 1996 and for assessing the future operating costs by EGS' requested performance based pricing for River Bend's output.

The ALJ found the report contained nuclear fuel costs and recommendations for better processing of bids, evaluating suppliers, planning for contingencies, ensuring continuity of operations, etc. None of this would likely put EGS or Entergy in jeopardy if disclosed to competitors. The audit report is hereby declassified.

Cities 18-7: **Please note, Cities 18-6 was not provided for *in camera* review. In addition, Cities shall also clarify whether Mr. Arndt wants the entire 18-6 and 18-7 disclosed. His explanation for seeking to declassify the entire voluminous material is cursory at best, as is Mr. Harrington's explanation of why it should not be disclosed. The Cities and EGS are hereby ORDERED to meet and discuss this request for declassification, come to some agreement on the Bates pages to be declassified and either agree that they can be declassified for the use to which Cities intend to put them or plead more specifically as to which specific pages are needed, why they are needed, and why they should not be declassified, and in this case EGS should provide the 18-6 disputed pages for *in camera* review. For this purpose alone, Cities 18-6 and 18-7 are hereby classified as confidential so that Mr. Arndt may take a copy, if he needs it, to pare down his request for declassification.**

It appears from Mr. Hugh Larkin, Jr.'s affidavit on behalf of Cities, that he wants declassified only Bates pages 56051 through 56053 and 56615 from Cities 18-7. (Mr. Larkin uses both 56501 through 56503 as well as 56051 through 56053. The ALJ assumes, subject to correction, that he means the latter two numbers.) It is not clear from a review of the pages or from EGS' affidavits why EGS wants to maintain the classification for 56051 through 56053. Finding that EGS has failed to support a trade secret privilege, these three pages are declassified.

Bates page 56615 contains employee names. Mr. Clary testified that EGS considers employee names associated with sales incentives to be an invasion of privacy. Based on the discussion of this issue elsewhere in this order, and Mr. Larkin's testimony that he does not need to disclose the names to discuss the provisions of the sales incentive program, this page is declassified, but any parties using it at hearing shall mask or redact the employee names.

OPC 5-6: **The ALJ assumes that no ruling is necessary regarding OPC 5-6 because of the rulings above referencing Bates pages from PUCT 10-178. If this is an erroneous assumption, the parties should explain in a follow-up pleading, identify which pages need ruling, and identify where in the previous pleadings and affidavits the declassification arguments are made.**

IV. Compensation of Individual Employees
PUCT 23-378; Cities 25-9, 50-16, 50-21, 50-25,
73-12, 73-13, 87-6, 87-9, and 87-18

Each of these documents contains the salary and/or other compensation of individual employees. Some of the documents disclose names of employees, and EGS argues that privacy interests mandate maintaining the confidential nature of the information. Cities argue that there is no trade secret protection for salaries.

EGS appropriately asserts the privacy argument. In a 1994 case, the court found that nonparty employees had standing to assert a right to privacy to the performance evaluations.[12] The issue here is whether EGS can assert a privacy right on behalf of nonparty employees. The court in *Kessell* noted the following: We found no case in which a nonparty has been granted standing to assert a right of privacy in records in the possession of and belonging to another. The cases cited by [the employees] involve (1) persons in possession of documents asserting their own rights or (2)

[12] *Kessell v. Bridewell*, 872 S.W.2d 837 (Tex.App.--Waco 1994, no writ)(*Kessell*).

persons in possession of documents asserting rights on behalf of other persons.[13]

Here, the information is certainly relevant to issues in this proceeding; the court's reckoning in *Kessell* is noteworthy. The court cited *Industrial Foundation of the South v. Texas Industrial Accident Board*, et al., 540 S.W.2d at 679, "Just as the State's intrusion into the individual's zones of privacy must be carefully limited, so must the State's right to reveal private information be closely scrutinized as well." The *Industrial Foundation* court looked at such personal information as marital relations, procreation, and other family relationships. However, the ALJ found no similar protection in the context of utility rate cases regarding an employee's compensation, level of merit raises, and other such benefits. These are not privacy interests that merit protection. Nevertheless, out of an abundance of caution, and finding no public need for release of the names, all parties using the below-declassified documents shall redact the names of employees, or when referring to the documents, find some way to provide the evidence without disclosing the names.

PUCT 23-378: Cities withdrew their request for declassification.

Cities 25-9: EGS witness Mr. C. Gary Clary testified that the documents contain various information about each ESI employee, their job title, salary, etc. and public disclosure would harm the privacy interests of the employees. Cities explained that it requested the information by job title, not employee name or social security number, and they have no interest in that information. The ALJ reviewed the documents *in camera* and found that they disclose no employee names or social security numbers, only job descriptions and information related to the job. The information is not a trade secret, and no privacy interests are involved. Therefore, Cities 25-9 is hereby declassified.

Cities 50-16: This RFI seeks compensation allocated to EGS broken down into gas operations, electric-Texas, and electric-Louisiana. EGS declassified all of the salary information except that

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[13] *Id.* at 840.

pertaining to two people, Mr. Niggli and Mr. Colston. Mr. Clary made no distinction between the other salaries that were declassified and those of these two gentlemen. As Cities point out, Mr. Clary's affidavit regarding privacy interests is contradicted by the fact that EGS declassified the compensation information for eleven other officers in response to this RFI. Finding that EGS has failed to meet its burden to prove that Mr. Niggli and Mr. Colston's salaries are any more proprietary than the other officers of Entergy, these compensation allocations are hereby declassified. Because Cities will not use this specific information in their direct testimony, they shall use the compensation information of these gentlemen only *as necessary* to address affiliate issues on cross-examination.

Cities 87-6: These documents contain compensation information regarding ESI vice presidents, some of whom EGS designates as non-confidential without explaining why the others are different and therefore confidential. Mr. Clary's affidavit does not specifically address this RFI. The ALJ finds that EGS has failed to meet its burden to prove that the information is confidential. It is hereby declassified.

Cities 87-9 and 87-18: Mr. Clary does not specifically mention these RFIs. They contain employee incentive compensation amounts and ESI officers' compensation charges allocated to EGS. Again, EGS failed to demonstrate how that harm would occur, beyond a blanket statement in the confidential file that the disclosure would result in competitive or business harm. The information is declassified. Cities should use the information without disclosing the individuals' names; the names themselves are not necessary to resolution of issues in this docket.

Cities 50-21, 50-25: These RFIs contain information regarding ESI officers' salary increases. Mr. Clary testified that information about ESI's historic salary increases would provide its competitors with the opportunity to structure competing job offers to Entergy Operations, Inc. (EOI) employees to the detriment of EOI and ultimately to the detriment of the customers of Entergy's operating companies. Indeed, certain of the employees can be identified by the job title, and Entergy's claims could have some value. RFI 50-25 contains bonus information for ESI, EOI, ELI, and EAI officers

and the allocation of those bonuses to EGS and to Texas. Cities anticipate using the documents in cross-examination to demonstrate the "extraordinary bonuses being granted". Cities response at 14. Cities intend to recommend a disallowance of these costs. The ALJ finds that the public interest and the Commission's determination of the level of bonuses that rate payers should be required to pay outweigh competitive interests, if any, that may exist. Therefore, the information is hereby declassified.

Cities 73-12 and 73-13: These relate to payments to affiliates--bonus amounts/incentive compensation payments paid to their employees for lobbying and allocated to EGS. While it may be inappropriate to recover the amount of lobbying *bonuses* from rate payers, EGS claims there are privacy interests involved. The ALJ finds that the names of the employees are not relevant to the issue and declassifies these documents but again orders Cities to redact the employee names from any documents presented at hearing. Further, Cities shall not reveal the employee names in cross-examination but may elicit testimony that the persons named in the documents were indeed lobbyists for the Company.

V. Compensation Studies
PUCT 20-350, 23-375, Cities 18-13, 33-11 (JH-07)

PUCT-20-350 has utility specific and general market comparisons to analyze compensation levels. *PUCT 23-375* contains similar information for Entergy Operations, Inc. As discussed in Section II above, Mr. Clary testified that the information should not be declassified because disclosure would harm the publishers who license the information to subscribers. Also, the Company would be harmed as these publishers may not license use of the publications to the Company if they have an expectation that the Company would in turn be compelled to reproduce it to the general public in regulatory proceedings. Cities explained that the response to RFI 20-350 consists of four boxes of documents, and Cities want to disclose only one summary page, Bates No. 123590-2. The ALJ reviewed the document, which does not disclose any names, but which does list the employment positions, i.e. "Top Marketing Exec". The ALJ is not convinced that the information is trade secret. Mr. Clary's

assertions that the Company may be harmed because publishers might do something is speculative. Cities claim they need to disclose this information because the summary sheet contradicts EGS' rationale in requesting recovery from rate payers for compensation payments. The Bates page in question is declassified.

With regard to *23-375*, Cities' witness Jacob Pous testified that the Company is laying off or offering early retirement packages to hundreds of employees. Whether it is paying too little or too much for its employees becomes irrelevant from a competitive standpoint in such a situation. Cities will use the study to demonstrate the Company's continual decline in personnel beyond the test year level. The ALJ reviewed the documents *in camera* and found they contain a survey of compensation packages. Based on Mr. Clary's affidavit, the response to 23-375 is no more a trade secret than 20-350. PUCT 23-375 is declassified.

Cities 18-13: Mr. Clary does not specifically address this RFI, but EGS indicates his discussion of 33-11 applies. In that testimony, he asserts the same publisher-related harm as described above. In addition, he stated that disclosure would reveal the Company's salary range and actual salary information to the public which would harm the Company as prospective employees would have prior knowledge of the actual salary ranges paid by ESI. The documents include executive and management annual incentive plan summaries, teamsharing incentive plans, and other incentive plans and goals. They outline goals, presumably for production, service orders, projects, budget goals, performance. The response does not contain salaries or job titles. With regard to Cities RFI 71-6, for example, Mr. Clary testified that knowledge of Entergy's incentive compensation plans would provide competitors with the opportunity to structure competing job offers to Entergy's employees to the detriment of Entergy and its customers. Cities' witness Hugh Larkin, Jr. noted that Mr. Clary discusses the incentive plans in his testimony, saying they provide reasonable levels of compensation. The ALJ reviewed that testimony, and notes that Mr. Clary does not discuss the goals with any specificity, but merely mentions them. While the incentive plans may give some information to competitors, because no employees or their titles are mentioned in the documents, the ALJ finds that

Mr. Clary's stated fears are not applicable to Cities 18-13. Therefore, the information is not trade secret or competitively harmful and is hereby declassified.

VI. External Audit Workpapers
OPC 5-6 (incorporating PUCT 10-177 and 10-178 by reference)
PUCT 78-997 and 78-998, and Cities 33-11

EGS declassified 78-997 and provided 78-998, the 1996 audit, for Cities' review. It is not clear exactly what else Cities want among these documents. EGS stated in its motion that Cities sought disclosure of the following audits performed by Entergy's internal audit staff in support of the external audit. These documents were produced in response to PUCT 10-177 and 10-178:

Audit No. 94056, Payroll Cycle of 1994, Bates page 0071561
Audit No. 94056, Payroll Process Review, Bates pages 0071562-65
Audit No. 96019, Purchases & Accounts Payable, Bates pages 0071065-70
Audit No. 96020, Payroll Cycle, Bates pages 0071071-76
Audit No. 96021, Intercompany Cost Allocations, Bates pages 0071077-80

Cities did not include these audits in their list discussed in Section III above and do not specifically request disclosure of these audits. Therefore, until Cities advise the ALJ differently, no decision will be made on disclosure of these items.

VII. Nuclear Budget Information
Cities 18-11

EGS witness Jeanne J. Kenney supports continued designation of the response as confidential. The RFI contains the 1997 River Bend budget, and EGS seeks confidential treatment of Bates pages 0053366 through 0053371. Ms. Kenney testified that disclosure of the budget in the detail contained in those Bates pages, (1) capital, (2) outages, and (3) non-capital, non-outage, with sub-totals for each category, would cause significant adverse and irremediable harm to EGS and its rate payers, because this detail reveals critical aspects of EGS's ongoing and upcoming plans and strategies for River Bend. It will enable nuclear plant suppliers, vendors and contractors to structure their bids

and/or proposals to the detriment of EGS because they will be better able to predict the top dollar they can charge EGS for goods and services. It will also give competitors the ability to discern activities and strategies at River Bend and allow them to adjust their budgets and plans to attempt to gain an advantage over River Bend in terms of attaining cost efficiencies and improved performance.

Mr. Hubbard testified that the information is relevant in evaluating the reasonable level of the overall expenses to be included in River Bend's non-fuel O&M costs for the rate effective period and for assessing the potential future operating and capital costs of River Bend that may be encompassed by EGS' requested performance-based pricing for River Bend's output.

The ALJ finds that the information, if disclosed to the public, would be competitively harmful to EGS. It is very possible that suppliers will structure their bids based on the top dollar that the budget reveals is planned for to the detriment of EGS. Mr. Hubbard indicated he would be able to mask the project-specific cost information in his recommendation. Therefore, Cities 18-11 will retain its confidential classification as to those costs. The revenue requirement is based on an historical test year adjusted for known and measurable changes. EGS has apparently declassified most of the information responsive to this RFI. Beyond the total O&M projection contained in the 1997 budget, it does not appear that need for public disclosure of the information outweighs trade secret protection. Therefore, only the total amount on the document is declassified.

VIII.
Nuclear Operational Information
Cities 32-12, 32-16, 32-17, 32-20, 87-9, 87-12

Jerry W. Yelverton addressed the sensitivity of the information for EGS. Cities' 32 RFI group seeks information about Maine Yankee and budgeted refueling outage O&M and outage durations scheduled for 1997, 1998, and 1999 for each nuclear plant that Entergy/EOI manages Cities' 87 seeks payroll and incentive compensation information regarding specific individuals who have transferred from ESI or EOI to Entergy Nuclear, Inc. (ENI) and specific individuals involved in the

Maine Yankee negotiation in connection with ENI's contractual arrangement with Maine Yankee. Mr. Yelverton testified that each document contains Entergy's or ENI's long-term future business plans and strategies in the nuclear industry. The harm to Entergy and EGS as a result of disclosure would be the same as that testified to by Ms. Kenney directly above. Furthermore, disclosure of individuals' names, the level of compensation paid them and incentive pay opportunities afforded them would enable competitors to gain insight into Entergy's compensation plan and attract people away from Entergy. Not only will the Company risk losing talented and experienced people, but the price to be paid for their retention would increase. Disclosure would violate the privacy rights of these individuals.

EGS witness Carolyn C. Shanks testified that public disclosure of the agreement to provide management services to Maine Yankee would result in competitive harm to Entergy and ENI. Specifically she states:

> The business of providing limited management services to nuclear plant owners and operators on a contract basis is in its infancy. As a consequence, there is virtually no available information on the market pricing of these kinds of services. This shortage of information makes the transaction details of the contract even more valuable to potential competitors in the management services area, as well as to ENI. Public disclosure of the terms that have been negotiated by and between ENI and Maine Yankee would provide an unfair advantage to competitors who desire to enter the management services business, and who would then have information concerning ENI's pricing and negotiation practices. Disclosure would further irreparably prejudice ENI in any future negotiations with potential consumers of management services it might offer, who would be able, by virtue of knowing the terms of the Maine Yankee deal, to drive ENI's pricing down.

Cities 32-12: Cities have received a copy of the Phase I Maine Yankee management services agreement classified as highly sensitive. It is possible that the information contained in the agreement, including the price for the services, will inform the Commission in evaluating pricing of services for River Bend, as contemplated by the Preliminary Order at page 26. Mr. Hubbard, testifying for Cities, suggested that the classification should be downgraded to confidential to permit Cities' experts to readily review the terms of the agreements.

The ALJ finds that the Maine Yankee agreement meets the trade secret standard for protection from public disclosure. She also finds that the information could assist the Commission in making decisions regarding the relative cost of management services for River Bend. At this time, the agreement will be reclassified to confidential. If necessary, a subsequent determination will be made at hearing regarding whether any portions of the agreement should be declassified.

Cities 32-16, 32-17, 32-20: These are projected budget totals for non-fuel O&M expenses for Entergy's nuclear plants for 1997, 1998, and 1999 and refueling outage O&M expenses and durations at Entergy's nuclear plants in 1997, 1998, and 1999. EGS classified this information as confidential. With regard to 32-20, the Company waived its confidentiality objection to future outage durations, but not with respect to future budgeted O&M expenses. Mr. Hubbard testified that the information is relevant in evaluating the reasonable level of the expense to be included in River Bend's non-fuel O&M costs. He stated that the fact that Entergy plans to reduce O&M expenses is generally consistent with that trend in the industry and little harm will be incurred by EGS as a result of disclosure of this information.

The ALJ concludes that projections have some value for determining reasonable rates, but because these are only projections, that value may be limited. Also, total projections by themselves are not likely to cause competitive harm because the component costs are not included, which is where the harm might arise. Therefore, on balance, the Commission's use of the information in its decision making outweighs any potential harm that may arise, and 32-16, 32-17, and 32-20 are declassified.

Cities 87-9 & 87-12: 87-9 was declassified above. Cities 87-12 contains compensation information and allocation to EGS for only one individual. It is not a trade secret; disclosure of the name will not adversely affect EGS or Entergy. However, to the extent that Cities can use the compensation information without disclosing the employee name, they shall do so. The information is declassified with that caveat.

IX. Fossil Plant Maintenance, Outage, and Process Information
Cities 51-18(e), PUCT 1-LK-18, PUCT 13-GVS-256, PUCT 44-GVS-589 (Highly Sensitive)

Michael D. Bakewell testified in support of maintaining the highly sensitive designation of these responses. 51-18(e) and PUCT 1-18 contain plant maintenance schedules and outage costs. Mr. Bakewell stated that if fuel suppliers knew when certain units were scheduled out of service, fuel prices might increase. If coal units were scheduled to be on a planned outage, the Company's gas prices might increase.

PUCT 13-256 and PUCT 44-589 contain bench-marking studies with information about internal programs and processes that Entergy has developed to reduce its costs. They include Best-In-Class Programs, Game Plan 1996 and 1997, Routine Maintenance Process, Outage Refocus Program, and Training Programs. These programs divulged to competitors would allow them to achieve their own cost reduction goals and prove a competitive disadvantage to Entergy, according to Mr. Bakewell.

A review of 51-18 and 51-18 addendum reveals only historical scheduled outage information and projected costs for Lewis Creek, Nelcoal, Nelson, Sabine, and Willow Glen. None of this appears to be the kind of information that would cause harm. The projected costs do not include dates for outages, which is Mr. Bakewell's concern. The information is hereby declassified.

PUCT 1-18 and 1-18 addendum provide maintenance start and end dates by unit by FERC account for ten years hence. Mr Pous testified that this information is useful in demonstrating the need to adjust requested service lives and net salvage value. The information would assist the Commission in determining an annualized maintenance outage expense and depreciation expense.

Outage information is used in utility rate cases on a regular basis. The ALJ is not convinced that the information contained in these responses is different from that produced in other cases, but

is also not persuaded that the Cities would be unable to project services lives and salvage value without the exact outage dates. OPC filed a response to EGS' motion to preserve in which OPC argued that unit outage information should be public because it provides monthly reserve margin information which OPC ordinarily uses in rate design/cost allocation issues. OPC indicated it will get monthly reserve margin information from the outage information which is relevant to the analysis of cost allocation factors. Further, OPC stated that gas prices will rise only where gas suppliers have the ability to exercise market power, and EGS' testimony in the fuel phase does not characterize the gas market in that fashion, at least currently. PUCT 1-18 and addendum may provide gas suppliers with information of interest to them, but it is not clear that Entergy/EGS will be harmed by that knowledge, at least in the near future. Therefore, this information is hereby declassified.

Review of PUCT 13-256 reveals, not what Mr. Bakewell indicated, but rather is a listing of what EGS thinks are the top producing plants in the country. EGS obtained the information from the Utility Data Institute, and it is clearly not accorded protections required for trade secret status. Furthermore, disclosure of the information will in no way put EGS or Entergy at a competitive disadvantage. PUCT 13-256 is declassified.

PUCT 44-589 details the internal programs as discussed by Mr. Bakewell, and if the information were publicly disclosed, the ALJ finds it could be useful to competitors. Cities explanation for disclosure is wholly unpersuasive. Therefore, the information shall remain classified.

X. Repowering/Refurbishment Studies and Plans
Cities 7-4

Kenneth M. Turner testified for EGS. This RFI contains detailed repowering and refurbishment studies for two of EGS's existing production units. The study was done in 1992. Knowledge of this information, according to Mr. Turner, would give competitors insight into the present and future production cost structure of the Company, and power supply competitors could

structure power supply offers with the knowledge of the Company's present and anticipated production costs. Further, this knowledge would assist in the valuation of Entergy Corporation in the context of an unsolicited acquisition. These studies cost the Company in excess of $50,000.

Upon review, the ALJ finds that the studies include information regarding increase to capacity at the plants and the cost of that repowering work, including labor, engineering, material, equipment, etc. It is highly unlikely that studies that are now five years old will impact the value of the Company for takeovers or provide valuable insight into production cost structure. The information is stale; the ALJ speculates that if the plants were not refurbished within the last five years, by now a new study would need to be conducted as costs and the condition of the plants have likely changed in that time. EGS has failed to prove that this information should be accorded trade secret protection, and Cities 7-4 is hereby declassified.

XI. Lease Information
PUCT 16-PM-285 and PUCT 35-PM-512

EGS witness Lynda C. Burgess testified in support of the designation of these documents as confidential. These documents contain a schedule documenting when certain leases expire, copies of lease agreements, and other detailed information regarding Entergy's leases. In an increasingly competitive environment for leased building space, detailed public knowledge of the terms and conditions of Entergy's leases and a schedule of lease rates would disadvantage the Company in obtaining competitively priced leased facilities in the future, according to Ms. Burgess..

Mr. Pous testified that EGS has requested over $10 million in A&G rent expense and EGS has stated that several leases have not been renewed. Declassifying this response would aid the Commission in determining the proper level of rent expense that should be granted to EGS.

PUCT 35-512 is a summary of lease information, expiration dates, location of property, purpose of the lease, and portion of the lease amount allocated to EGS. Several of the leases are

shown to have expired. It is highly unlikely that knowledge of EGS' current lease amounts would disadvantage the Company in obtaining competitively priced leased facilities in the future. When supply is high and demand is low, rental rates decline; when the reverse is true they increase. Leased facilities compete for renters at the rates the market will bear. It is doubtful that EGS will be harmed by disclosure of this information. On the other hand, PUCT 16-285 contains the lease documents and other information that may be of interest to lessors in structuring lease agreements with EGS or Entergy. Cities have provided no reasoning as to why they might need to disclose copies of the leases themselves. Therefore, PUCT 35-512 is declassified and 16-285 shall remain classified confidential.

XII. Nuclear Information
Cities 10-1, 10-86, 10-87, 38-38, 38-44, 38-45, 38-66

Mr. John R. McGaha testified on behalf of the Company. Judge Stewart ruled in Order No. 82 that Cities 10-86 and 10-87 should remain classified as confidential and that 10-1 is to be declassified. Neither party appealed that order. Cities 38 series contain non-fuel O&M costs in River Bend's 1997 responsibility budget with the test year O&M costs by major accounts; those written off as obsolete, etc. in 1994, 1995, and 1996 and budgeted to be written off in the 1997 non-fuel O&M budget for River Bend; a comparison of the A&G yearly expenses for the Company's 70 percent ownership of River Bend by major cost categories for 1994, 1995, and 1996 and the test year. EGS is willing to declassify the historical data found in these RFIs, but refuses to declassify projected data for 1997. The objection to the projected figures is the same as that described by Ms. Kenney above. Mr. John R. McGaha testified that the value of budget information to EGS' suppliers and competitors is significant. It provides nuclear plant suppliers, contractors and vendors information to enable them to structure bids and/or proposals to the detriment of EGS. They will be able to predict the top dollar they can charge EGS for goods and services.

Only Cities 38-38 and 38-66 were provided for *in camera* review. 38-38 contains 1997 budget for River Bend non-fuel O&M costs. 38-66 contains 1997 budget for River Bend A&G costs. The ALJ believes that EGS overstates its case on competitive harm. First of all, the 1997 budget

information is not broken out by account number or detail regarding what needs to be contracted for, supplied or vended. Second, one wonders to what competitors Mr. McGaha is referring when he says disclosure would allow competitors to know what cost levels they need to achieve to undercut EGS. EGS owns River Bend; it will be looking for the lowest costs it can find; it has a monopoly of retail service and will do what it takes to keep industrial customers. Retail competition is not here. EGS' boilerplate arguments are unpersuasive. The forecasted information contained in Cities 38-38 and 38-66 are hereby declassified.

XIII. Generating Unit Information
PUCT 1-LK-13

Ms. Sallie Rainer testified in support of the highly sensitive designation. The information requested is generating unit data, projections of fuel costs for all fuel supplies at all units, projections of fuel limits by fuel supply, projections of certain purchase power costs, projections of energy revenues from certain sales, projection of unit heat rates, unit availability, generation unit must-run status, and unit loading strategy. Ms. Rainer testified that the nature of the information does not lend itself to cost analysis. However, the Company's various suppliers compete vigorously with each other for EGS' business, and if they have access to generating unit data or projections of what it might pay for fuel, or the names of other suppliers and the terms and conditions of those contracts, EGS will be disadvantaged in its dealing with the suppliers. According to Ms. Rainer, occasionally suppliers offer attractive pricing to EGS upon the condition that EGS maintain the favorable pricing in confidence. Disclosure of the information would be viewed by these suppliers as a breach of these agreements.

Ms. Rainer testified that if competitors have access to the information, they will be better able to determine what EGS can and cannot do in a competitive bidding situation. For example, unit incremental and average heat rate data provides key competitive information regarding how efficiently the Company converts input fuel into electrical energy. This information could provide competitors with the Company's short-run marginal energy cost and average energy cost.

Cities apparently need the information for a limited purpose. Mr. Pous testified that it will provide information regarding salvage lives.

Review of the PUCT 1-13 materials reveals that they contain highly detailed information identified by Ms. Rainer, which appear to meet the standard for trade secret protection. Nevertheless, the information contained in this response that is relevant to salvage lives is declassified; for now, the remainder of the materials shall remain classified as confidential, but a copy shall be produced only to consultants or witnesses for Cities, OPC and to the Commission Staff. In using the salvage life information at hearing, parties may provide a summary of the information contained in the RFI response, which summary will be subject to optional completeness or review for accuracy by EGS. Should any party determine that it needs to disclose other parts of the information in order to support an issue in this case, then the ALJ will revisit this decision at that time.

XIV. VEBA Trust Agreement Fee Schedules
PUCT 14-PM-264

The VEBA trust agreement is the funding vehicle used to fund EGS' OPEB expenses. EGS agreed to declassify these agreements in their entirety except for the fee schedules, which is reclassified from highly sensitive to confidential. Mr. William O. Vanas testified that EGS will be placed in the position of being unable to negotiate favorable fee schedule terms if the information is disclosed to the public.

Cities do not appear to need the fee schedules as they provided no testimony or argument for disclosure of these amounts. Unless Cities, or other parties, plead to the contrary, the ALJ will not rule on the classification of the Bank of New York fee schedules.

XV. Large Power Customer Information
Cities 11-1

The information requested is the workpapers supporting Schedule E-4. They contain

individual customer billing information, load and usage data, individual customer names, and similar customer-specific material, the very information, according to Mr. Eduardo Melendreras, that the legislature deemed highly sensitive confidential under PURA95 §2.154(b). He further testified that the information is competitively sensitive between customers, and customer names are not essential for litigating this docket.

Cities only requested permission to provide a copy to their consultant. For that purpose, the portion of the RFI response classified as highly sensitive is reclassified to confidential.

XVI. Load Forecasts
PUCT 1-LK-2

The information is EGS' and Entergy's peak and total load by MW and GWH. Mr. Carl A. Monroe testified for EGS that in order to acquire or duplicate the information contained in the response to the RFI, one would be required (1) to prepare an econometric forecast for Entergy; (2) input the forecast into models that related the econometrics to the EGS and Entergy total load; (3) review the Entergy and EGS total load with the marketing organizations of the companies; (4) use independent studies of competitive threats to EGS' and Entergy's total load; (5) analyze Entergy's transmission system characteristics; (6) input the total load, load shapes, weather, and transmission system characteristics into an hourly load simulation model; (7) analyze the execution of the hourly load simulation model; and (3) interpret the results from the hourly load simulation model. The results of all this are treated by EGS and its service company affiliates as proprietary information. The information could be used by EGS' competitors for retail customers using alternative technology to undercut EGS' prices, resulting in an erosion of EGS' retail market share. Competitors could obtain insight into the Company's and Entergy's perception of its vulnerability to demand and energy load loss. With this leverage, according to Mr. Monroe, competitors and customers with technologically viable options could successfully seek deep rate discounts, thereby potentially shifting costs to core residential and commercial customers.

OPC argued in favor of disclosure of the information stating that the forecasts of EGS' and its affiliated operating companies' peak and total load is the type of information routinely made publicly available as part of the 10-year statewide energy plan prepared by the Commission and is required to be made available under PURA95 §2.051(b). OPC contends that the data has competitive value only in a world of retail competition.

Cities indicated they may not need this information for phase 2, but requested that the information be reclassified to confidential so that their consultant may have a copy for his work in phases 3 and 4 in this case. On that basis, and relative to phase 2 only, the responsive information classified as highly sensitive is reclassified to confidential.

XV. 1997-2001 River Bend Site Strategic Plan
Cities 38-36

Cities seek to declassify this 159-page strategic plan covering the years 1997-2001. Jeanne J. Kenney testified for EGS in support of the confidential designation. She stated that disclosure of the plan would cause significant adverse and irremediable harm to the Company. The data contained in the plan includes strategic business targets representing the Company's estimates of how it must perform over the next several years in order to outpace competitors. Mr. Kenney added that the document includes descriptions of specific tasks and objectives in a myriad of areas, including specific action plans, that management believes will be necessary to accomplish in order to produce and sell electricity in a highly competitive market.

Cities witness Mr. Hubbard testified that the 1997 strategic plan should be declassified because it is relevant to operating performance issues in the revenue requirements and the competitive issues phases of this docket.

The document was not produced for review by the ALJ; however, based on testimony, the strategic plan meets the test for trade secret protection. Cities have not sufficiently indicated how

they intend to use the material at hearing or how it is necessary to dispositive issues in this case. At this time, the strategic plan remains classified confidential, subject to request for reconsideration accompanied by more definitive testimony regarding the use to which Cities would put the information in this case.

SIGNED AT AUSTIN, TEXAS the 24th **day of** June **1997.**

STATE OFFICE OF ADMINISTRATIVE HEARINGS

Kathleen Sanford

KATHLEEN SANFORD
ADMINISTRATIVE LAW JUDGE

orig. Bad

SOAH DOCKET NO. 473-96-2285
PUC DOCKET NO. 16705

APPLICATION OF ENTERGY TEXAS FOR APPROVAL OF ITS TRANSITION TO COMPETITION PLAN AND THE TARIFFS IMPLEMENTING THE PLAN AND FOR THE AUTHORITY TO RECONCILE FUEL COSTS, TO SET REVISED FUEL FACTORS, AND TO RECOVER A SURCHARGE FOR UNDERRECOVERED FUEL COSTS	§	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

ORDER NO. 93
REQUIRING EGS TO PROVIDE THE C&L 1996 AUDIT WORKPAPERS UNDER THE PROTECTIVE ORDER

Cities filed a motion to compel Entergy Gulf States, Inc. (EGS) to provide the Coopers & Lybrand (C&L) 1996 audit of Entergy Corporation and workpapers under the Protective Order in this docket. In its motion, Cities indicate that EGS and C&L now require Cities' expert to sign a new agreement, which recognizes that the workpapers may contain "material errors." On 11 June 1997, EGS indicated that after the motion to compel has been resolved and Cities have designated which portions of the workpapers they wish to use in testimony or at hearing, EGS will request copies from C&L for *in camera* review submission.

The Administrative Law Judge (ALJ) rules as follows: (1) the 1995 audit workpapers were provided under the protective order and the agreement contained in that order; therefore, the 1996 workpapers should be provided under the protective order to Cities' expert, who is not required to sign any agreement that differs from that signed relative to the 1995 audit; and (2) EGS shall immediately, upon receipt by telefax of this order, make the 1996 audit/workpapers available to Cities' witness for review. If the workpapers indeed do contain material errors, and if Cities wish to use the erroneous material in this proceeding, then EGS and Cities are ordered to consult with one another once Cities has determined which pages, if any, they intend to use in hearing; EGS shall determine whether the material is erroneous and provide Cities with the correct information. If it is not possible to provide correct information, EGS shall provide Cities with a clear,

understandable and usable explanation regarding why the correct information cannot be provided. If the explanation or corrected information does not satisfy Cities' need to develop its position on a dispositive issue, the Cities may file an additional pleading explaining their dilemma.

After Cities' witness has conducted the review of the 1996 audit information, Cities shall designate which pages they wish to use in testimony or at hearing. Following that designation, EGS shall either declassify the pages or submit them for *in camera* review.

SIGNED AT AUSTIN, TEXAS the 18th day of June 1997.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

Kathleen Sanford

KATHLEEN SANFORD
ADMINISTRATIVE LAW JUDGE