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March 29, 1989

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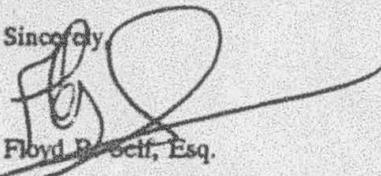
Re: Docket No. 890252-PU

Dear David and Bill:

Attached are the Proposed Revisions to the Staff Draft and an Explanation of those revisions submitted on behalf of Telus Communications, Inc. pertaining to the proposed revisions to Florida Administrative Code Rule 25-22.006.

In addition to the attached materials, we are also in the process of evaluating the need for additional revisions to address: (1) differences between monopoly versus competitive services information; (2) a different standard for nonregulated entity information; and (3) the burden of proof once a prima facie showing has been made. We hope to have any proposed language on these issues to the Commission in the next several days.

Thank you for your assistance in this matter. If there are any questions or we can provide further information, please advise.

Sincerely,

Floyd B. Self, Esq.

- ACK _____
- AFA _____
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG _____ FRS:llb
- LEG _____ Attachments
- LIN 6 cc: Steve Tribble
- OPC _____ Mr. Mark T. Neptune
- RCH _____
- SEC 1 _____
- WAS _____
- OTH _____

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PROPOSED REVISIONS TO
STAFF DRAFT

DOCUMENT

25-22.006 Confidential information.

(1) Definitions.

(a) "Confidential Information" means material that has been determined, pursuant to this rule, to be proprietary confidential business information under Section 350.121, 364.183, 366.093, or 367.156, F.S.

(b) "Formal proceeding" means a proceeding in which the substantial interests of a party may be determined by the Commission.

(c) "Inquiry" means an investigation ^{pursuant to section 350.121, F.S.} set in motion by the Commission Chairman, the Executive Director, or the General ~~and formally designated as an "Inquiry" by the Commission's~~ Counsel to evaluate a complaint, allegation, or to develop information as a basis to initiate action on or dispose of any matter within the Commission's jurisdiction.

(d) "Material" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material regardless of physical form or characteristics, made or received by the Commission, its staff or consultants pursuant to law or in connection with the transaction of official business of the agency.

(e) "Taking possession of material" means obtaining physical control of material by taking the original material or a copy from the company's premises, or by the extraction of data by inclusion into working papers or memoranda.

(f) "Trade secret" means "trade secret" as defined by (2) Material received during an inquiry.

(a) All material obtained incident to an inquiry by the Commission, its staff or any consultant employed by the Commission is exempt from the public access requirements of Section 119.07(1), F.S. during the pendency of the inquiry. When the Commission or its staff is requesting information incident to an inquiry, the source shall be informed in writing that the request

section 688.002(4).

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1 is made incident to an inquiry.

2 (b) An inquiry will terminate 40 days after the transmittal
3 of a notice of termination by the Division of Records and
4 Reporting. This notice will be sent to all sources from whom
5 confidential material was received during the inquiry and will
6 include a list of all materials obtained from the source(s) during
7 the inquiry and any portions of staff work papers, analyses and
8 reports containing materials obtained from the source during the
9 inquiry. The notice will indicate whether the Commission intends
10 to retain, destroy or return the materials listed. A source may,
11 within 30 days after issuance of the notice, file with the
12 Division of Records and Reporting a written request that the
13 material the Commission intends to retain be classified as
14 confidential and exempt from Section 119.07 (1) F.S. Requests
15 filed in response to this notice shall meet the same criteria and
16 be processed in the same manner as other requests for confidential
17 classification under this rule (see subsection 4). If no timely
18 request for confidential classification is filed, confidentiality
19 is waived and the material becomes subject to inspection and
20 examination pursuant to Section 119.01 (7) F.S.

21 (3) Material received outside of an inquiry. Material
22 received by the Commission or its staff outside of an inquiry
23 shall be subject to inspection and examination pursuant to Section
24 119.07(1), Florida Statutes, unless the utility requests that it
25 be classified as confidential information.

26 (a) Prior to the staff taking possession of any material, from
27 ~~a utility the staff will inform the utility in writing of the~~
28 ~~right to have confidential information exempted from the public~~
29 ~~access requirements of the Public Records Law by following the~~
30 ~~procedures in Section (4) of this Rule.~~ ^a utility may obtain
31 temporary exemption from Section 119.07(1), Florida Statutes by

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If the requested information is believed
confidential, then the utility may require the
request be in writing.

filing a notice of intent to request confidential classification. [^]

1 This notice shall be filed with the Division of Records and
2 Reporting and shall have appended thereto a ^{NY} copy of the staff's
3 written request for the material to which it relates. A copy of
4 the notice shall be provided to the division(s) requesting the
5 material. To obtain continued confidential handling of the
6 material the utility must within 21 days after the staff takes
7 possession of the material, or in the case of material obtained
8 during the course of an audit, within ~~three~~ ²¹ days after the field
9 audit exit conference, file a request for confidential
10 classification with the Division of Records and Reporting.

11 (b) When the material is received incident to a formal
12 proceeding, the utility requesting confidential classification
13 shall also serve a summary ^{OR A COPY} of its request on all parties of
14 record. The summary shall describe the material in sufficient
15 detail so as to reasonably inform the reader of the nature of the
16 material. Any party to a formal proceeding may file an objection
17 to the request for confidential classification within 14 days
18 after service of the summary.

19 (c) Requests for confidential classification and any
20 objections filed in response thereto shall be ruled on by the
21 prehearing officer assigned to the docket and the Commission panel
22 assigned to the case will hear any protest to the ruling. If a
23 request is received outside a docketed proceeding, the request
24 itself will be docketed.

25 (d) All material that has been classified as confidential or
26 for which a ruling on confidentiality is pending shall be exempt
27 from Section 119.07(1), F.S., and will be accorded stringent
28 internal procedural safeguards against public disclosure. Any
29 staff or consultant reports or work products containing
30 confidential information extracted from material having been
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or for which a ruling on confidentiality is pending,

1 classified as confidential shall be handled in the same manner as
2 the material so classified. The Commission may ~~in its discretion~~
3 retain or, after obtaining the consent of the Department of State,
4 destroy or return ~~to its source~~ any confidential material in its
5 possession. Material received during a formal proceeding and
6 classified as confidential shall remain so classified after the
7 formal proceeding is terminated.

8 (4) Requests for confidential classification.

9 (a) A request for confidential classification of material
10 shall be filed in writing with the Division of Records and
11 Reporting. The utility shall file with its request ~~two copies~~ ^{one copy} of
12 the material for which confidential treatment is requested. On
13 ~~each~~ ^{this} copy, the utility shall highlight the specific information it
14 is asserting to be confidential. Along with the highlighted
15 copies, the utility shall file two or more edited copies as
16 required by the type of proceeding, which will be made available
17 for public inspection. In the edited copies, the specific
18 information the utility is asserting to be confidential shall be
19 blocked out by the use of an opaque marker or other masking
20 device. The utility shall file with its request a ~~line-by-line~~
21 justification for confidential classification ^{which relates} of the specific
22 information ~~it is asserting to be confidential~~ ^{ed} ~~with the particular basis~~ ^{supporting the confidential}

23 (b) In the case of ^{electronically stored} ~~computerized~~ material, such as magnetic ~~disks~~ ^{disks}
24 tape, the utility may submit one unedited version with a written
25 identification of the specific data fields for which confidential
26 classification is requested along with a ~~field-by-field~~
27 justification for the confidential classification. ^{which relates the specific}
28 ~~information asserted to be confidential with the particular basis~~

29 (c) In its ~~line-by-line or field-by-field~~ justification for
30 confidential classification, the utility must demonstrate how the
31 information it is asserting to be confidential qualifies as one of
the statutory examples listed in section 364.183(3), 366.093(3),

Supporting the confidential designation.

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1 or 367.156(3), Florida Statutes. If no statutory example is
2 applicable, then the utility shall include a statement explaining
3 how the utility or its customers will be harmed by disclosure.
4 The utility shall also specify a date by which the material will
5 no longer be confidential or shall explain why such a date cannot
6 be determined.

7 (d) The request shall include an affirmative statement that
8 the material for which confidential classification is sought is
9 not available in any other public forum such as Federal
10 Communications Commission, Federal Energy Regulatory Commission,
11 or other state commission ~~and that the material is of the type~~
~~normally treated as confidential by the industry.~~

12 (e) The burden of proof shall be on the utility to show that
13 the material in question contains bona fide proprietary
14 confidential business information. A request for confidential
15 classification that fails to identify the proprietary information
16 in sufficient detail to permit a reasoned analysis or which fails
17 to provide a detailed justification for classification may be
18 denied as insufficient on its face.

19 (5) Discovery.

20 (a) In any proceeding before the Commission, any ^{party} utility may
21 request a protective order protecting proprietary confidential
22 business information from discovery. Upon a showing by the
23 ~~utility~~ ^{party} that such protection is necessary, the Commission shall
24 issue the protective order. If the Commission determines that
25 discovery of proprietary confidential business information is
26 necessary to protect the public interest, the Commission shall
27 enter a protective order limiting discovery in the manner provided
28 for in Rule 1.280, Florida Rules of Civil Procedure.

29 (b) The Commission's protective orders shall exempt
30 proprietary confidential business information from section
31

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in a docket or proceeding

119.07(1), Florida Statutes. Such exemption shall apply whether the information is in the possession of an entity, individual, or state agency, including the Office of Public Counsel.

(c) When a ^{party} utility agrees to allow Public Counsel to inspect ~~for the purpose of determining what information is to be used~~ or take possession of utility information with the understanding that Public Counsel agrees to keep the information confidential, either the ^{party} utility or Public Counsel may request a protective order exempting the information from section 119.07(1), Florida Statutes. ~~If the information is not to be used in a docket or proceeding before the Commission, it may be destroyed or returned to the utility in accordance with the record retention requirements of the Department of State. If the information is to be used in a docket or proceeding before the Commission, then the utility must file a specific request for a protective order under paragraph (a) above.~~ within 21 days of service of written notice of such material by Public Counsel in the situation, the temporary

(6)(a) Any person may file a petition to inspect and examine any material the Commission has exempted from s. 119.07(1), Florida Statutes. A copy of the petition must be served on the affected utility which shall have 14 days to file a response as to why the material should remain exempt. The petitioner shall have ten days to file a reply to the utility's response. The Commission may set the matter for hearing or may issue a ruling on the pleadings. Material obtained by the Commission in connection with an inquiry shall not be subject to requests for inspection and examination until after the inquiry is terminated.

(b) A finding of confidentiality notwithstanding, a source may consent to inspection or examination by any person. Such consent shall not constitute a waiver of confidentiality and only the person(s) specified in the consent may inspect or examine the material. The Commission may be requested to issue a protective order to recognize the terms and conditions of the consent. All

protective order shall remain effective pending the issuance of a final order granting or denying a protective order.

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1 persons are urged to seek mutual agreement regarding access prior
2 to bringing a controversy to the Commission.

3 (7) Use of confidential material during formal proceedings.
4 The Commission may rely upon confidential material during a formal
5 proceeding and such material, if otherwise admissible, will be
6 received in evidence. In such event, reasonable precautions will
7 be taken to segregate confidential material in the record and
8 otherwise protect its integrity.

9 (B) Substantial revision, see next page
10 ~~judicial review. When the Commission denies a request~~
11 ~~for specified confidential classification or disapproves a~~
12 ~~proposal to edit, the utility or other source may request~~
13 ~~continued confidential treatment until judicial review is~~
14 ~~complete. The request shall be in writing and filed with the~~
15 ~~Division of Records and Reporting. The material will thereafter~~
16 ~~receive confidential treatment through completion of judicial~~
17 ~~review.~~

18 Specific Authority: 350.127, F.S.

19 Law Implemented: 350.121, 364.183, 366.093, 367.156, F.S.

20 History: New 7/1/85, Amended
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EXPLANATION OF PROPOSED REVISIONS TO STAFF DRAFT

<u>Page/Line(s)</u>	<u>Comments</u>
1/10, 12	An "Inquiry" is specifically authorized by Florida Statutes section 350.121 and is formally designated by the Commission as an "Inquiry." Addition of this language will clarify this fact and eliminate any confusion with the common understanding of the word inquiry or those dockets captioned "In re: investigation into".
1/25	The absence of a definition for a trade secret has been a contentious point in Commission proceedings. Adoption of the definition previously approved by the Legislature should help to provide some clarity as to the party's burden.
2/26-29	After extensive discussion at the workshop, it was generally agreed that the PSC has no affirmative duty to provide notice of the right to request confidential classification. However, to better inform all utilities, the PSC will consider providing a general notice on all annual reports. To the extent the utility is of a size where a Commission Staff person contacts a utility employee to request information, it is up to the utility to have in place procedures to ensure that confidential information is not disclosed outside of the company's procedures. These procedures may also include the utility requiring the Commission Staff to submit all requests in writing prior to disclosure of any information.
3/1	Several participants at the meeting expressed a concern for requests for confidential classification, and the confidential information provided, not agreeing with the terms of a verbal request, or the utility otherwise being able to control the propounding of verbal requests from the Staff or Commission. Consequently, several participants suggested inclusion of a statement authorizing the utility to require written requests. We agree. The statutes specify that the Commission shall have "reasonable" access to utility information, and such an option to require written requests seems reasonable.
3/3	This change is for consistency with the prior change.
3/9	There was extensive discussion at the workshop about material requested during an audit. It was ultimately determined that the Staff may obtain information during an audit and the utility not be fully informed as to which information would be used in the audit report until the exit conference. All parties present agreed to some lengthening of the 3 day provision. Given the potential lack of notice until the exit conference, 21 days would be consistent with the other requirements of the rule.

- 3/14 Given the work involved in preparing a request for confidential classification, the request is usually what is served, though a summary may be appropriate if the request itself states confidential information. This change recognizes the alternative practices available and was agreed to by all present at the workshop.
- 4/1 This change was proposed by the Staff and agreed to by all present at the workshop. The addition recognizes that while a ruling may still be pending the information will be accorded confidential status.
- 4/2-5 The Commission should have a reason for retaining confidential information, otherwise it should be destroyed or returned pursuant to the instructions of the provider of the information. At the workshop it was suggested that the Commission's internal procedures specify consultation with the provider. However, to the extent any procedure involves interaction with the provider, such a procedure should be specified in the rule, not an internal procedure since the person has no notice under chapter 120 of internal procedures. Indeed, by definition, such a procedure is not internal and should be in the rule.
- 4/11-15 The present procedure is to submit one copy of the confidential information and there has not been any pronounced difficulty in Staff or Commission access to the single copy. At the workshop, the Staff could offer no explanation for two copies. Moreover, depending upon the volume of material involved, it may be too burdensome to require two highlighted copies of the confidential information.
- 4/21-22, 25-27 The line-by-line process can be particularly burdensome when there are lengthy or numerous materials involved. In the discussion at the workshop, the objective of the Staff's proposed language was to match the information with the appropriate basis for the claimed confidentiality. This change eliminates a potentially lengthy process while still meeting the objective.
- 4/23 "Electronically stored" material is the more general and broad designation. Reliance on the "computerized" language may serve to limit the reach to optical disc stored information or other technologies.
- 5/11-12 Industry standards may certainly be helpful, but the absence of an industry standard or practice still does not address the particular problems of the individual provider, which is what the 350, 364, 366, and 367 statutes are concerned with. Moreover, under the Uniform Trade Secrets Act adopted by the Florida Legislature in 1988, the criteria is how the possessor of the information treats the material. There was a general consensus at the workshop that the stricken language be deleted.

5/20 to 6/15

All references to "utility" in section (5) Discovery should be changed to "party." Utilities are not the only parties to a proceeding, which may include utility customers, nonjurisdictional utilities, or others (e.g., Florida Ad Hoc Users Group, cellular carriers, an exempt homeowners association under Florida Statutes section 367.022(7) may be participating in an objection to an extension request, or a nonjurisdictional corporate parent, subsidiary, or affiliate of a utility may be requested to produce information.). At least with respect to a party that was not a regulated telephone company under 364.02(4), the Commission has ruled it can issue a protective order for that party. Moreover, while Florida Statutes sections 364.183, 366.093, and 367.156 may appear limited in scope, there is ample authority under chapter 120 and the Commission's incorporation of the Florida Rules of Civil Procedure (by Florida Administrative Code Rule 25-22.034 and 25-22.035(3)) to authorize the Commission to protect any party's data. We are preparing further revisions to clarify this point. Please note, however, that to the extent section 364.183, 366.093, and 367.156 are amended by the Legislature to clarify this fact, then all reference in the proposed rule to "utility" should be changed to "information custodian" or "party," as appropriate.

6/4-15

The proposed additions to lines 5 and 9 clarify that the Commission shall issue a temporary protective order to afford Public Counsel an opportunity to determine those materials necessary for use in the docket or proceeding. The addition after line 15 sets a specific timetable for when the utility must file its request and that the temporary protective order will remain effective until a final order granting or denying the protective order issued.

7/9-16

Substantial rewording of the judicial review section is required to establish a procedure for maintaining the confidentiality of the material pending reconsideration by the full Commission or an appeal to a court of competent jurisdiction, as appropriate, of a denial of confidential treatment. The recommended rewrite provides express procedures and timeframes, consistent with those already established for the reconsideration and notice of appeal rules, to make clear that a final order denying confidential treatment is stayed during the period in which the party seeks reconsideration or appeal, as applicable.