

PUBLIC SERVICE COMMISSION

Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0861

M E M O R A N D U M

August 17, 1989

TO : DIRECTOR OF RECORDS AND REPORTING

FROM : DIVISION OF APPEALS (SMITH, BAKSTRAN) *243 DES*
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (DOUD) *19X*
DIVISION OF COMMUNICATIONS (MAILHOT) *DM*
DIVISION OF ELECTRIC AND GAS (TAYLOR) *ST*
DIVISION OF WATER AND SEWER (LOWE) *68*
DIVISION OF RESEARCH (HEWITT) *CBH*

RE : DOCKET NO.: 890252-PU, AMENDMENT OF RULE 25-22.006, F.A.C.,
PERTAINING TO CONFIDENTIAL INFORMATION

AGENDA: 08/29/89 - CONTROVERSIAL AGENDA - PARTIES MAY PARTICIPATE

PANEL : FULL COMMISSION

CRITICAL DATES: RULE MUST BE FILED OR WITHDRAWN WITHIN 90 DAYS OR 21 DAYS
AFTER THE LAST PUBLIC HEARING OR MEETING ON RULE AMENDMENT

RULE STATUS: PROPOSAL DEADLINE: MAY BE POSTPONED

ISSUE AND RECOMMENDATION SUMMARY

ISSUE 1: Should the Commission propose to adopt the amendment of Rule 25-22.006?

RECOMMENDATION: Yes. The substantially reworded rule recommended by staff clarifies and simplifies the process of determining whether material should be classified as confidential. The reworded rule also incorporates certain changes required by the Legislature during its 1989 session.

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FPSC-RECORDS/REPORTING

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ISSUE 2: May staff file this rule with the Secretary of State for adoption without further consideration, if no hearing is requested or comments filed?

RECOMMENDATION: The Commission should direct staff to file the rule with the Secretary of State, if no hearing is requested and no comments are filed.

BACKGROUND

Under Florida's Public Records Law, state agencies are required to permit inspection of their public records by any person desiring to do so pursuant to section 119.07, Florida Statutes, unless the records are exempted by subsection (3) of that statute or by some other law. Public records are defined essentially as all documents or other material, regardless of physical form or characteristics, which are made or received in connection with the transaction of official business by the agency. By sections 364.183, 366.093, and 367.156, F.S., the Legislature exempted certain records received by the Commission from the disclosure requirements of the Public Records Law. Upon request of the utility, records received by the Commission which are shown to be proprietary confidential business information are exempt from disclosure and must be kept confidential by the Commission. Also, material received by the Commission in connection with an inquiry is exempt by virtue of s. 350.121, F.S.

Unfortunately, these statutes, until recently, did not define proprietary confidential business information. Rather, they presented a nonexclusive list of examples of confidential information. Consequently, the present Rule 25-22.006 requires a utility seeking confidential classification of its records to show how the records qualify as one or more of the statutory

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examples or, if none of the examples applies, to show how disclosure of the records will harm the utility or its ratepayers.

The rule worked fairly well until last year when the Commission was flooded with confidentiality requests, which were the result of increased competition among utilities, particularly in the telecommunications industry. In several dockets, the prehearing officers and the full Commission itself, were having to devote an inordinate amount of time to hearing motions on confidentiality. At that time, a law suit filed by a group of newspapers seeking access to documents, which had already been classified as confidential, only complicated the situation. With the overload of confidentiality requests, problems with the confidentiality rule began to emerge.

To resolve these problems and the ever increasing backlog of confidentiality requests, the General Counsel and the Executive Director convened a task force to review the Commission's procedure relating to confidential information. After thoroughly examining the confidentiality rule in light of the problems resulting from the increasing number of confidentiality requests, the task force issued its final report which recommended revising the rule to simplify and clarify the Commission's procedures.

The task force's prescriptions for improving the rule, as well as some of the suggestions offered by utilities at the staff's workshop, are incorporated in the rule revision recommended by staff.

Subsequent to the inception of this docket, the Legislature significantly amended sections 366.093 and 367.156, F.S., which deal with

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confidentiality of utility records in the electric and gas and in the water and sewer industries, respectively. Significantly, the statutes now contain a definition of proprietary confidential business information which will give the Commission better guidance in making its determinations regarding confidentiality requests. Also, the law will now allow persons other than utilities to request confidential classification of their documents. The Legislature directed the Commission to adopt rules implementing the changes made to these statutes.

Many of the statutory changes had been anticipated by staff and were already a part of the rule revision. Some of the changes, such as the 18-month limit on the duration of confidential classification and the specified time for returning certain classified documents to their sources had not been anticipated. Upon returning to the "drawing board," staff studied these changes and included them in the recommended rule.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission propose to adopt the amendment of Rule 25-22.006?

RECOMMENDATION: Yes. The substantially reworded rule recommended by staff clarifies and simplifies the process of determining whether material should be classified as confidential. The reworded rule also incorporates certain changes required by the Legislature during its 1989 session.

DISCUSSION: One of the problems with the present confidentiality rule is that it contains an unnecessary distinction between general and specified confidential material. The general classification applies to all materials acquired as a result of an inquiry under section 350.121, F.S. The specified confidential classification applies to all other confidential material received by the Commission and to confidential discovery information in the custody of a party to a proceeding.

The two types of confidential classification were supposed to have two different levels of security with the general confidential material being less stringently protected than the specified. Thus, when general confidential information has been received by the Commission, the affected utility oftentimes would immediately seek to upgrade the classification to specified. This was unnecessary, because the utilities could have waited until the end of the inquiry to request upgrade of their material. The new version of the rule recommended by staff would eliminate the distinction between general and specified confidential classifications. Under staff's recommended rule, there will only be confidential information which will

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always be given stringent protection regardless of how the Commission acquires it.

Under the present rule, when a company filed a confidentiality request regarding material filed outside of a docket, a tentative ruling on the request would be made by the Office of General Counsel. If the company protested the tentative ruling, the dispute would be docketed and set for agenda. At agenda, the Commission would sometimes assign the matter for hearing before the prehearing officer. However, the prehearing officer's ruling would be subject to appeal back up to the full Commission. This would involve another trip to agenda and maybe one or more hearings. Under staff's recommended rule, a confidentiality request for documents received outside of a docket would itself be docketed and ruled on by the prehearing officer. Any protest of that ruling would be heard by the panel assigned to the case. By taking General Counsel out of the loop and avoiding repeat trips to agenda, much of the Commission's time can be saved and decisions regarding confidentiality can be made more quickly.

Another change staff is recommending involves the procedures for requesting access to and editing of confidential material. Under a literal reading of subsection (4) of the present rule, an entire document could be classified as confidential just because one word, such as the password to a computer system, needed to be kept secret. Such an overbroad classification could go unchallenged unless someone filed a request for determination of nonconfidentiality of material. The burden of meeting any allegations of confidentiality would be on the person seeking access to the material. There is no provision in the present rule for how or when the utility is to respond

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to the request. There is also ambiguity in the rule suggesting that some people may be precluded from seeking access, e.g., if they had an earlier opportunity to protest the confidentiality ruling. Under staff's recommended rule, any person may file a petition to inspect confidential material and shall serve a copy of the petition on the affected utility or person. The utility or person would have ten days to file a response stating why the information should be kept confidential, and the petitioner would have seven days to file a reply to the response. The Commission would then have the option of ruling on the pleadings or setting the matter for hearing.

Under the present rule, another complication can arise when someone seeks an edited version of a confidential document, i.e., the same document with the specific confidential information deleted. The person must serve a copy of his request for editing on the source of the material. The source would then have 21 days to submit a "proposal to edit material" with the confidential information highlighted with "transparent ink." The burden would be on the source to show why the highlighted information qualified for confidential treatment. Upon a ruling on the proposal to edit, the source would provide an edited copy which would be subject to public inspection pursuant to the Public Records Law. Under the change recommended by staff, the utility or person requesting confidential classification would have to submit one unedited and at least two edited versions of the material. On the unedited version, the specific information for which confidential classification is sought would have to be highlighted. The request must be accompanied by a line-by-line justification for classification. Thus, under staff's recommended rule, only actual confidential information will be granted

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exemption from public disclosure and an edited version of the material would be available for immediate public inspection. This will save time for the Commission and members of the public seeking access to edited material. It may also help avoid litigation.

Staff's recommended rule will require that the confidentiality request contain an affirmative statement that the information has not been publicly disclosed.

Staff's recommended rule includes improved audit procedures that will allow utilities to hold off on their confidentiality requests until field auditors know exactly what documents they actually need. Under the present rule, when auditors indicate their interest in a variety of utility documents, the utilities immediately file a notice of intent to request confidentiality and then have 21 days to actually file the request. This is often a wasted effort because, several weeks later, the auditors may determine that the bulk of the documents they had been inspecting were really not needed. Under the procedures recommended by staff, the utilities will be able to get temporary exemption from the Public Records Law for all the documents being inspected by Commission auditors until the exit conference. Then the utilities will have 21 days to file their confidentiality request. This should greatly reduce the number of requests filed by utilities that are being audited.

Staff is also recommending a significant change to the discovery process. Under staff's rule, when a utility agrees to allow Public Counsel to inspect or take possession of its documents for the purpose of determining what information Public Counsel would like to use in a proceeding before the Commission, it will be able to get a temporary protective order exempting the

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information from public disclosure. When Public Counsel decides what information it wants to use, then the utility can file a specific request for a protective order. This should greatly reduce the number of confidentiality requests in cases involving the Public Counsel.

Another change regarding discovery is that protective orders will clearly apply to the Office of Public Counsel making confidential information in its possession exempt from the Public Records Law. This is one of the changes staff was working on when the Legislature amended the law to specifically make Public Counsel subject to the Commission's protective orders. Continuing disputes over this issue last year helped complicate discovery in Southern Bell's rate stabilization case (880069-TL).

Another change required by the Legislature limits how long confidential material, which is not made part of the record, can be kept by the Commission: not longer than 60 days after the final order, unless it is appealed; if appealed, not longer than 30 days after the decision on appeal.

One more significant change made by the Legislature involves the duration of confidential classification. This was a change not anticipated by staff and required substantial rewriting of subsection (8) of the rule. In accordance with the directions of the Legislature, orders granting confidential classification will have to limit such classification to a period not exceeding 18 months unless, for good cause, the Commission determines that a longer period is necessary to protect the ratepayers or the business operations of the utility or affected person. At the conclusion of the period of classification, the information would no longer be exempt from the Public Records Law unless the utility or affected person shows, and the Commission

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finds, that the information continues to be confidential. The Commission may then extend the period of classification another 18 months or for a longer period, if the Commission finds that such longer period is necessary.

A copy of the present confidentiality rule is attached as Appendix A. Staff's recommended rule amendment, which is a substantial rewording of the present rule, is attached as Appendix B.

The economic impact statement is attached as Appendix C.

Essentially, there should be only a slight increase in copying and docketing costs to the Commission, which should be offset by cost savings attributable to the time saved by staff and the Commission in evaluating confidentiality requests. With the clarified procedures for requesting confidentiality, the utilities should have better guidelines for filing their requests.

Consequently, staff should spend less time identifying confidential information and the Commission should spend less time holding hearings to determine what is actually confidential.

According to utilities responding to data requests, there would be some increase in costs to regulated utilities and their affiliates resulting from the rule change, ranging from a few dollars per page to total costs of several thousand dollars annually. The increase in costs would mainly arise from the line-by-line justification for confidential treatment and from highlighting and editing confidential information. Offsetting these costs would be savings resulting from: eliminating the need to upgrade general confidential information to specified; reduction in the number of requests

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associated with material obtained during audits; and avoided hearings. The net increase to all utilities operating in Florida and their affiliates should, in the aggregate, amount to a little over \$200,000 annually.

The proposal of staff's recommended changes may be postponed, but the Commission will need to draft and formally propose rules regarding the changes required by the Legislature within 180 days of the effective date of legislation, i.e., by March 30, 1990.

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ISSUE 2: May staff file this rule with the Secretary of State for adoption without further consideration, if no hearing is requested or comments filed?

RECOMMENDATION: The Commission should direct staff to file the rule with the Secretary of State, if no hearing is requested and no comments are filed.

DISCUSSION: If there are no suggested changes for the Commission to consider, Commission and staff time will be conserved by proceeding with the filing without consideration at a second agenda.

WJB:kp

Attachment

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25-22.006 Confidential information.

(1) Definitions.

(a) "Confidential" means exempt from Section 119.07(1),

Florida Statutes.

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

(c) "Formal ruling" means a determination by the Commission as to whether material contains proprietary confidential business information. A formal ruling may resolve a protest to a tentative ruling or may be the initial and only ruling on the question of confidentiality.

(d) "General confidential information" means material obtained by the Commission, its staff or a Commission employed consultant incident to a Commission inquiry.

(e) "Inquiry" means the first step toward what may become a formal proceeding. An inquiry is designed to evaluate an allegation or complaint, or to develop information as a basis for initiating an action on, or disposition of, any matter within the Commission's jurisdiction.

(f) "Material" means any record, document, paper, map, book, tape, photograph, file, sound recording or other business material, regardless of form or characteristics, including reports, analyses and work papers developed by the Commission staff and consultants.

(g) "Protest" means a request that the Commission formally reverse a tentative ruling. A protest may be filed by the source of the material or by a person who has filed a request for access.

(h) "Request for determination of nonconfidentiality" means a request for a determination that the material is not confidential and, pursuant to Section 119.07(1), Florida Statutes, to inspect

1 or examine material in the Commission's files or in the possession
2 of a person employed by the Commission, which material has
3 previously been classified as specified confidential material or
4 is subject to a request for specified confidential treatment.

5 (i) "Source" means the person, corporation or other entity
6 who created, owns or is described by the material and whose
7 interests may be affected by the disclosure of the material.

8 (j) "Specified confidential information" means material that
9 has been determined, pursuant to this rule, to be proprietary
10 confidential business information under Section 350.121, 364.183,
11 366.093, or 367.156, F.S.

12 (k) "Tentative ruling" means a ruling by the Office of the
13 General Counsel as to whether material contains proprietary
14 confidential business information.

15 (2) Material received during an inquiry. Inquiries are set
16 into motion by the Commission Chairman, the Executive Director or
17 the General Counsel. Inquiries are normally carried out by the
18 Commission Staff, but may be conducted by any person designated by
19 the Commission to do so. For purposes of this rule, any inquiry
20 taking place during the pendency of a continuing docket, such as
21 the fuel adjustment proceeding, shall remain an inquiry and
22 separate from the formal proceeding until the subject matter of
23 the investigation is explicitly made a part of the formal
24 proceeding by the Commission.

25 (a) All material obtained incident to an inquiry by the
26 Commission, its staff or any consultant employed by the Commission
27 is classified as general confidential and is exempt from Section
28 119.07(1), F.S., during the pendency of the inquiry. Those
29 portions of staff work papers, analyses and reports containing
30 general confidential material shall remain so classified during
31 the pendency of the inquiry. When the Commission or its staff is

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requesting information incident to an inquiry, the source shall be informed in writing that the request is made incident to an inquiry.

(b) If at any time during the inquiry the quantity of general confidential material in Commission files has become burdensome, the responsible Department Director may request that the source(s) of the material file a written waiver of the confidential treatment afforded by Section 350.121, F.S. If a written waiver is filed, the material may then be declassified, at which time it will no longer be exempt from Section 119.07(1), F.S.

(c) The Commission will maintain the confidentiality of all general confidential material obtained incident to an inquiry. If general confidential material is to be reviewed by a consultant employed by the Commission, the source shall be notified of the identity of the consultant and the materials to be reviewed. General confidential information will be accorded reasonable internal procedural safeguards against public disclosure. The confidentiality requirements of this paragraph shall be applicable to the Commission, its staff and any consultants employed by the Commission.

(d) At any time during an inquiry a source may request specified confidential handling of specific material. The request shall be in writing and filed with the Commission Clerk. A copy of the request shall be provided to the department(s) requesting or inspecting the material in question. Upon receipt of the request, the material will be subject to the internal safeguards applied to specified confidential material until the inquiry is terminated. A source may file a request for specified confidential classification under subsection (4) at any time during an inquiry. If such a classification is granted it will continue after the inquiry is terminated.

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1 (e) During an inquiry the Commission may in its discretion
2 retain or, after consulting with the source(s), destroy or return
3 to its source any general confidential material obtained during
4 the inquiry. Except as provided in paragraph (2)(f), all general
5 confidential materials remaining in the Commission's possession
6 shall become subject to inspection and examination pursuant to
7 Section 119.07(1), Florida Statutes, at the termination of the
8 inquiry.

9 (f) An inquiry will terminate 40 days after the Clerk
10 transmits a notice thereof to any source from whom material has
11 been obtained incident to the inquiry. The notice will include a
12 list of all materials obtained from the source during the inquiry
13 and all portions of staff work papers, analyses and reports
14 containing materials obtained from the source during the inquiry.
15 The notice will indicate whether the Commission intends to retain,
16 destroy or return the materials listed. A source may, within 30
17 days after issuance of the notice, file with the Clerk a written
18 request that the material, staff work papers, analyses and reports
19 that the Commission intends to retain be classified as specified
20 confidential. The request shall conform to subsection (4) of this
21 rule. The written request may also specify an alternative
22 treatment for material the Commission has indicated in its notice
23 it does not wish to retain. The Clerk will transmit the
24 request(s) to the Office of the General Counsel, which will issue
25 a tentative ruling. If no timely request for specified
26 confidential classification is filed, confidentiality is waived
27 and the material becomes subject to inspection and examination
28 pursuant to Section 119.07(1), Florida Statutes. Within 14 days
29 after issuance of a tentative ruling, the source may file with the
30 Clerk a written protest to the tentative ruling. The Commission
31 will thereafter make a formal ruling on the confidentiality of the

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material. If no timely protest is filed, the tentative ruling shall become final.

(g) All material that has been classified as specified confidential or for which a ruling on confidentiality is pending shall be exempt from Section 119.07(1), F.S., and will be accorded stringent internal procedural safeguards against public disclosure. Subject to subsection (8), if the material is determined not to be confidential it shall become subject to inspection and examination pursuant to Section 119.07(1), Florida Statutes. The Commission may, in its discretion, retain or, after consulting with the source(s), return specified confidential material to its source or destroy it.

(3) Material received outside of an inquiry. Material received by the Commission or its staff outside of an inquiry shall be subject to inspection and examination pursuant to Section 119.07(1), Florida Statutes, unless the utility requests that it be classified as specified confidential material. If the material is received from a person or entity other than a utility and appears to be proprietary confidential business information belonging to a utility, the Commission will notify the utility in writing of its receipt and permit the utility to file a request for confidential classification.

(a) Prior to the staff taking any material from the control of a utility, the staff shall inform utility personnel in writing of the nature of the material and that the material will be received outside of an inquiry to allow the utility a reasonable time in which to determine whether it will request specified confidential treatment. A claim of confidentiality shall not stand as a bar or delay to Commission inspection, copying or possession of any books or records of the utility. A utility may obtain temporary exemption from Section 119.07(1), Florida

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Statutes, as provided in paragraph (3)(b). If the utility seeks to have the material classified as specified confidential it shall, within 21 days after the utility receives the written notice, file with the Commission Clerk a request for specified confidential classification. A copy of the request shall be provided to the department(s) requesting or inspecting the material in question. The request shall conform to subsection (4) of this rule.

(b) Material may be temporarily exempted from Section 119.07(1), F.S., upon the filing of a notice of intent to request specified confidential classification. The notice shall be filed with the Commission Clerk and shall specify the material to which it relates. A copy of the request shall be provided to the department(s) requesting or inspecting the material in question. The temporary exemption shall lapse if a timely request for specified confidential classification is not thereafter filed.

(c) Where the material is received incident to a formal proceeding, the utility requesting specified confidential classification pursuant to paragraph (3)(a) or (b) shall also serve a summary of its request on all parties of record. The summary shall describe the material in sufficient detail so as to reasonably inform the reader of the nature of the material and shall otherwise conform to paragraph (4)(a). Any party to a formal proceeding may file a request for determination of nonconfidentiality of the material within 14 days after service of the summary.

(d) The request for specified confidential classification and any request for determination of nonconfidentiality filed in response thereto shall be disposed of in the same manner as under paragraph (2)(f), except that in formal proceedings the prehearing officer shall issue the tentative ruling on the question of

1 confidentiality and the Commission panel sitting on the case will
2 bear any protest to the ruling.

3 (e) All material that has been classified as specified
4 confidential or for which a ruling on confidentiality is pending
5 shall be exempt from Section 119.07(1), F.S., and will be accorded
6 stringent internal procedural safeguards against public
7 disclosure. Any staff or consultant reports or work product
8 containing information derived from material having been
9 classified as specified confidential shall be so classified,
10 provided that the information in question was identified as
11 proprietary confidential business information in the request for
12 classification of the material. The Commission may in its
13 discretion retain or, after consulting with the source(s), destroy
14 or return to its source any specified confidential material in its
15 possession. Material received during a formal proceeding and
16 classified as specified confidential shall remain so classified
17 after the formal proceeding is terminated.

18 (4) Requests for specified confidential classification.

19 (a) A request for classification of material as specified
20 confidential shall be filed in writing and shall identify the
21 specific information which justifies the classification.
22 Classification of the material as proprietary confidential
23 business information is to be justified by demonstrating how the
24 information it contains falls under one or more of the statutory
25 examples or, if no statutory example is applicable, by including a
26 justifying statement indicating what penalties or ill effects upon
27 the company or its ratepayers will result from disclosure of the
28 information to the public. The justification shall include a date
29 by which the material is no longer proprietary confidential
30 business information or a statement that such a date cannot be
31 determined and the reasons therefor.

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(b) Where a request for specified confidential classification actually contains the material to which the request is directed, the request shall be accompanied by a copy of the material as well as a summary under paragraph (3)(c) that identifies the location of the material. The request shall be treated as specified confidential material until the request is disposed of and will then be classified according to the final ruling. In the alternative, where disclosure of a written justification for confidential classification would be as damaging as disclosure of the material to which it relates, the utility may, in writing, request an opportunity to provide an oral justification.

(c) The burden of proof shall be on the source to show that the document or other material in question contains bona fide proprietary confidential business information. A request for specified confidential classification that fails to identify the proprietary information in sufficient detail to permit a reasoned analysis or which fails to provide a detailed justification for classification may be denied as insufficient on its face. In the alternative, the source may be directed to file a more detailed request before a ruling is made.

5) Discovery.

(a) Discovery of confidential material by parties of record during the course of a formal proceeding is governed by Rule of Civil Procedure 1.280. The fact that the object of discovery may contain confidential proprietary business information does not necessarily preclude discovery. However, such limitations as are deemed necessary under the circumstances to protect the confidentiality of the material. A party objecting to discovery on the grounds of confidentiality shall file a motion for a protective order no later than the date the response is

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4 otherwise due. All parties are urged to seek mutual agreement
5 regarding discovery of such material before bringing a controversy
6 to the Commission.

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8 (b) Except as to material which it is legally prohibited from
9 disclosing, a utility may not object to discovery by the
10 Commission staff on the grounds of confidentiality but shall fully
11 respond within the time provided for discovery. In providing its
12 response, the utility may request, under subsection (3), specified
13 confidential classification of the material provided to the
14 Commission. In its request, the utility shall also request terms
15 and conditions under which the response shall be provided to
16 parties to the proceeding, including any limitations of the
17 distribution of the response to parties.

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19 1. If the material is classified as specified
20 confidential the prehearing officer shall issue a
21 protective order consistent with the provisions of
22 the Florida Rules of Civil Procedure governing the
23 issuance of protective orders incident to
24 discovery. If the prehearing officer determines
25 that the material shall be provided to some or all
26 other parties to the proceedings, the protective
27 order shall specify the terms and conditions for
28 production of the material to such parties. At a
29 minimum, the protective order shall include
30 provisions which:
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- a. Insure that the confidentiality of the material is maintained;
 - b. Provide reasonable access only to a party who demonstrates a bona fide need for access to the material and who produces an adequate assurance that the materials will not be disclosed to third

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persons; and

1. Provide for the physical disposition of the material by all the parties at the end of the case.
2. Parties gaining access to the material pursuant to a protective order shall maintain it in strict confidence, not disclose it to any third party or consultant without the express written consent of the utility, which consent will not be unreasonably withheld by the utility, and will treat in the same manner any notes, memoranda or analyses prepared from the material.
3. Parties gaining access to the material pursuant to a protective order may disclose the information to their witnesses in the case for preparation of testimony and such witnesses shall maintain the material in strict confidence.
4. Prior to presenting the material or information contained therein as evidence, parties gaining access to the material pursuant to a protective order shall confer with the affected utility in order to arrive at a mutual agreement regarding such presentation and, absent such agreement, shall submit the matter to the prehearing officer for resolution.
5. Any party gaining access to the material pursuant to a protective order shall provide the affected utility a written agreement signed in advance by each person who is to review the material agreeing not to disclose the material in any manner which violates any provision of this rule or any order issued pursuant to this rule. The Commission may

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1 impose any sanctions authorized by the Rules of
2 Civil Procedure on any party gaining access to the
3 material pursuant to a protective order who violates
4 any of the protections afforded the material by
5 these rules or by any order issued pursuant to these
6 rules, said sanctions being in addition to any other
7 remedies which any person injured by such violation
8 may have against the party committing such
9 violation. A party shall be responsible for any
10 such violation committed by a witness or consultant
11 sponsored or retained by the party.

12 (c) Except when not available from any other authorized
13 source, specified confidential material in the possession of the
14 Commission, its staff or consultants is not discoverable by a
15 request directed to the Commission or its staff, but may be the
16 subject of a request for access.

17 (6) Request for determination of nonconfidentiality of
18 material, editing.

19 (a) Subject to paragraph (6)(b), any person may file a
20 written request with the Commission Clerk for Determination of
21 non-confidentiality of access to confidential material in the
22 possession of the Commission, its staff or consultant(s) pursuant
23 to Section 119.07(1), Florida Statutes. Such a request shall
24 specify the material to be inspected or examined. If the
25 Commission thereafter determines that the material is not
26 proprietary confidential business information, the material shall
27 become subject to inspection and examination pursuant to Section
28 119.07(1), Florida Statutes. Material obtained by the Commission
29 incident to an inquiry shall not be subject to inspection or
30 examination until after the inquiry is terminated.

31 (b) Where material is subject to a request for specified

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1 confidential classification under paragraph (3)(a), a request for
2 determination of nonconfidentiality pursuant to Section 119.07(1),
3 Florida Statutes, that is filed as a response to a request for
4 confidential classification shall be served on counsel for the
5 source and shall fairly meet any allegation of confidentiality.
6 Where material has previously been classified as specified
7 confidential, a person who has not previously filed an
8 unsuccessful request for determination of nonconfidentiality, or
9 who did not have an opportunity to do so under paragraph (3)(a),
10 may file a request for determination of nonconfidentiality of the
11 material. The request shall fairly address any earlier finding of
12 confidentiality and state why it should be overturned.

13 (c) A finding of confidentiality notwithstanding, a source
14 may consent to inspection or examination by any person. Such
15 consent shall not constitute a waiver of confidentiality and only
16 the person(s) specified in the consent may inspect or examine the
17 material. The Commission may be requested to issue a protective
18 order to recognize the terms and conditions of the consent. All
19 persons are urged to seek mutual agreement regarding access prior
20 to bringing a controversy to the Commission.

21 (d) Any person may request that the Commission edit material
22 that has been classified as specified confidential to produce a
23 copy appropriate for inspection or examination under Section
24 119.07(2), F.S. The request shall be filed with the Clerk and
25 served on the source. Within 21 days after service, the source
26 shall submit a proposal to edit the material. Where possible,
27 information to be edited out shall be identified by underlining
28 or by "highlighting" with transparent ink, only those words,
29 numbers, lines of text and data elements on magnetic files which,
30 unless deleted, would cause the disclosure of confidential
31 proprietary business information. Upon a ruling on the proposal

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to edit, the source shall provide an edited copy of the material which shall be subject to inspection and examination pursuant to section 1'9.07(1), Florida Statutes. The Commission staff or consultant(s), however, shall be responsible for providing an edited copy of their own work product in accordance with the ruling.

(e) In editing material for inclusion in the public record, the burden of proof shall be on the source to show which words, numbers, lines, paragraphs (and, in certain cases, columns, whole pages or groups of pages) do in fact constitute bona fide proprietary confidential business information which must be edited from the material. The Commission will not undertake nor permit the wholesale editing of entire multi-page documents, testimony or the like merely because a certain few lines, paragraphs or pages of such material contain information which may properly be so classified. In cases where edited material would be so replete with omissions as to be unintelligible or meaningless or where editing would be particularly onerous, the Commission may waive or limit the requirement to provide an edited copy.

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

(8) Judicial Review. When the Commission denies a request for specified confidential classification or disapproves a proposal to edit, the utility or other source may request continued confidential treatment until judicial review is complete. The request shall be in writing and filed with the Commission Clerk and the affected department(s). The material

1 will thereafter receive confidential treatment through completion
2 of judicial review.

3 (9) On the effective date of this rule, any material in the
4 Commission's possession which has previously been classified as
5 general confidential or specified confidential and any staff or
6 consultant reports or work papers containing information derived
7 from such classified material shall retain its confidential
8 status. However, future proceedings with respect to that
9 material, such as requests for access or disposition of the
10 material, shall be in accordance with this rule.

11 Specific Authority: 350.127, F.S.

12 Law Implemented: 350.121, 364.183, 366.093, 367.155, F.S.

13 History: New 7/1/89, formerly 25-22.06.
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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 docketed in the Commission's Division of Records and Reporting.

(c) "Inquiry" means an investigation pursuant to section 350.121, F.S. An inquiry is set in motion by the Commission Chairman, the Executive Director, or the General 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 recorded information regardless of physical form or characteristics.

(e) "Obtaining material" means receiving material pursuant to filing or taking physical control of material by removing the original material or a copy of it from the utility's or other person's premises. Obtaining material also means the extraction of data from material for inclusion in working papers or memoranda.

(2) Material obtained 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 is made incident to an inquiry.

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

(3) Material obtained outside of an inquiry. Material obtained by the Commission or its staff outside of an inquiry shall be subject to inspection and examination pursuant to Section 119.07(1), F.S., unless the utility or other person requests that it be classified as confidential information.

(*) Prior to the staff obtaining any material, a utility or other person may receive temporary exemption from Section 119.07(1), F.S., by filing a notice of intent to request confidential classification. If the utility or other person believes the requested information is confidential, the utility or other person may require that the request be in writing. The notice of intent to request confidential classification shall be

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

11 (b) When the material is obtained incident to a formal
12 proceeding, the utility or other person requesting confidential
13 classification shall also serve a copy or summary of its request
14 on all parties of record. The summary shall describe the material
15 in sufficient detail so as to reasonably inform the reader of the
16 nature of the material. Any party to a formal proceeding may file
17 an objection to the request for confidential classification within
18 14 days 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 prehearing
23 officer's ruling. If a request is received outside a docketed
24 proceeding, the request 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), P.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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1 classified as confidential, or for which a ruling on
2 confidentiality is pending, shall be handled in the same manner as
3 the material so classified. The Commission shall have discretion
4 to retain any confidential material in its possession. Upon the
5 consent of the Department of State, the Commission may return or,
6 after consulting with the source, destroy any material that is no
7 longer needed.

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 or other person shall file with the
12 request one copy of the material for which confidential treatment
13 is requested. On this copy, the specific information asserted to
14 be confidential shall be highlighted. Along with the highlighted
15 copy, the utility or other person shall file two or more edited
16 copies as required by the type of proceeding, which will be made
17 available for public inspection. In the edited copies, the
18 specific information asserted to be confidential shall be blocked
19 out by the use of an opaque marker or other masking device. The
20 utility or other person shall identify the page(s) and line(s) at
21 which the confidential material is found and shall correlate the
22 page(s) and line(s) identified with the specific justification
23 proffered in support of the classification of such material.

24 (b) In the case of electronically stored material, one
25 unedited version shall be submitted along with a written
26 identification of the specific data fields for which confidential
27 classification is requested along with a field-by-field
28 justification for the confidential classification.

29 (c) In the line-by-line or field-by-field justification for
30 confidential classification, the utility or other person must
31 demonstrate how the information asserted to be confidential

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1 qualifies as one of the statutory examples listed in section
2 164.181(3), 166.091(3), or 167.156(3), F.S. If no statutory
3 example is applicable, then the utility or other person shall
4 include a statement explaining how the ratepayers or the person's
5 or utility's business operations will be harmed by disclosure.

6 (d) The request shall include an affirmative statement that
7 the material for which confidential classification is sought is
8 intended to be and is treated by the utility or other person as
9 private and has not been disclosed.

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

18 (5) Discovery.

19 (a) In any formal proceeding before the Commission, any
20 utility or other person may request a protective order protecting
21 proprietary confidential business information from discovery.
22 Upon a showing that the material is entitled to protection the
23 Commission shall enter a protective order limiting discovery in
24 the manner provided for in Rule 1.780, Florida Rules of Civil
25 Procedure. The protective order shall specify how the
26 confidential information is to be handled during the course of the
27 proceeding and prescribe measures for protecting the information
28 from disclosure outside the proceeding.

29 (b) The Commission's protective orders shall exempt
30 proprietary confidential business information from section
31 119.07(1), F.S. While a request for a protective order is

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pending, the information asserted to be confidential shall also be exempt from section 119.07(1), P.S. 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 utility agrees to allow Public Counsel to inspect or take possession of utility information for the purpose of determining what information is to be used in a proceeding before the Commission, the utility may request a temporary protective order exempting the information from section 119.07(1), P.S. If the information is to be used in a proceeding before the Commission, then the utility must file a specific request for a protective order under paragraph (a) above. If the information is not to be used in a proceeding before the Commission, then Public Counsel shall return the information to the utility in accordance with the record retention requirements of the Department of State.

(d) Confidential information which has not been entered into the official record of the proceeding shall be returned to the utility or person who provided the information no later than 60 days after the final order, unless the final order is appealed. If the final order is appealed, the confidential information which has not been made a part of the record shall be returned no later than 30 days after the decision on appeal.

(6)(a) Any person may file a petition to inspect and examine any material the Commission has exempted from s. 119.07(1), P.S. A copy of the petition must be served on the affected utility or person which shall have 10 days to file a response as to why the material should remain exempt. The petitioner shall have 7 days to file a reply to the filed 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

1 shall not be subject to requests for inspection and examination
2 until after the inquiry is terminated.

3 (b) A finding of confidentiality notwithstanding, a source
4 may consent to inspection or examination by any person. Such
5 consent shall not constitute a waiver of confidentiality and only
6 the person(s) specified in the consent may inspect or examine the
7 material. The Commission may be requested to issue a protective
8 order to recognize the terms and conditions of the consent. All
9 persons are urged to seek mutual agreement regarding access prior
10 to bringing a controversy to the Commission.

11 (7) Use of confidential material during formal proceedings.
12 The Commission may rely upon confidential material during a formal
13 proceeding and such material, if otherwise admissible, will be
14 received in evidence. In such event, reasonable precautions will
15 be taken to segregate confidential material in the record and
16 otherwise protect its integrity.

17 (8) Duration of Confidential Classification.

18 (a) Orders of the Commission granting confidential
19 classification shall limit the duration of such classification to
20 a period not exceeding 18 months. The Commission may approve a
21 longer period if it finds, for good cause, that such longer period
22 is necessary to protect the ratepayers or the business operations
23 of the utility or affected person.

24 (b) When confidential information is no longer needed for the
25 Commission to conduct its business, the Commission shall order all
26 persons holding such information to return it to the utility or
27 person providing the information.

28 (c) Confidential information not returned at the conclusion
29 of the period established under paragraph (a) of this subsection,
30 shall no longer be exempt from s. 119.07(1), P.S., unless the
31 utility or affected person shows, and the Commission finds, that

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1 the information continues to be confidential. Upon such finding,
2 the duration of confidential classification may be extended for a
3 period of up to 18 months, or for a longer period if the
4 Commission finds, for good cause, that such longer period is
5 necessary to protect the business operations of the utility or
6 affected person. While the Commission is considering an extension
7 under this paragraph, the information in question shall remain
8 exempt from s. 119.07(1), F.S.

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

17 Specific Authority: 350.127, F.S.

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

19 History: New 7/1/85, Amended
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M E M O R A N D U M

August 17, 1989

TO: DIVISION OF APPEALS (BAKSTRAN)
 FROM: DIVISION OF RESEARCH (HEWITT) *CBH WJ* *YMAB*
 SUBJECT: ECONOMIC IMPACT STATEMENT FOR PROPOSED REVISIONS TO
 RULE 25-22.006, FAC, CONFIDENTIAL INFORMATION

SUMMARY OF THE RULE

Current Rule. Rule 25-22.006, FAC, addresses treatment of confidential information obtained by the Commission from regulated companies. "Confidential" means exempt from disclosure under the public records law, Section 119.07(1), FS. A confidential designation is currently created in one of two ways: first, "general confidential information" is material obtained by staff incident to a Commission inquiry; or second, "specified confidential information" is material that has been determined, pursuant to Rule 25-22.006, to be proprietary confidential business information.

Currently, material gathered in the course of an inquiry is automatically designated as general confidential and becomes exempt from disclosure under Section 119.07(1), FS. The material is then subject to internal Commission safeguards against public disclosure identical to those applied to specified confidential information until the inquiry is terminated. Utilities have 21 days from receipt of a written request for information from staff to request specified confidential treatment of material gathered outside of an inquiry. At the conclusion of an

inquiry, a notice of termination is sent to the utility. This notice lists material obtained during the inquiry and indicates whether the Commission intends to retain, destroy, or return it. The utility then has 30 days to file a written request for specified confidential classification of material the Commission intends to retain. If no request is filed, the material becomes public record. The exception to this procedure is general confidential information designated as specified confidential within a Commission formal proceeding: that information remains so classified following conclusion of the formal proceeding without (additional) utility request.

Currently, when material is received incident to a formal proceeding, the utility that requests specified confidential classification must send a summary describing the material in "sufficient" detail to all parties of record. Any such party may file a request for determination of nonconfidentiality of the material within 14 days after service of the summary; the prehearing officer would issue a ruling on the request. If the ruling was protested, then the Commission would determine whether the material is proprietary confidential business information, usually after a hearing.

Currently, requests for specified confidential classification must be submitted in writing, must identify the specific information that justifies such classification, and must demonstrate how the information qualifies as one of the statutory examples of proprietary confidential business information. When requests for specified confidential classification actually contain the confidential material, a cover letter stating such must accompany the request. Companies are required to

submit copies that highlight and edit specified confidential material only upon request by outside parties for documents containing that information.

Utility requests for confidential treatment of material or outside party requests for nonconfidentiality are ruled upon by the Commission after determination of the merit of the requests. A finding of confidentiality notwithstanding, a source may consent to an inspection of the material by any person, but that consent does not constitute a waiver of confidentiality.

Proposed Changes. The proposed revisions would substantially rewrite Rule 25-22.006, eliminating duplicative language and clarifying confidential classification requirements. References to the Commission Clerk would be replaced by references to the Division of Records and Reporting. Also, statutory changes regarding reasonable Commission access to utility affiliates' records of transactions with utilities would be included in the rule.

Rule revisions would codify current Commission practice of consulting with the Department of State for consent to return or destroy materials that are no longer needed by FPSC personnel. Also codifying current practice in some instances, staff requests for utility information would only have to be in writing when the utility believes the material is confidential and requires a written request.

Another statutory change would be included in the rule revisions pertaining to records provided to the Commission pursuant to discovery. Upon request and showing by a utility involved in a formal proceeding that asserted proprietary confidential business information is

entitled to protection, the Commission enters a protective order limiting discovery in the manner provided for in Rule 1.280, Florida Rules of Civil Procedure. The protective order specifies how the confidential information is to be handled during the course of the proceeding. All parties, including the Office of Public Counsel and any other party subject to the public records law who gains access to the confidential information, would be prohibited from disclosing it outside the proceeding.

The proposed revisions would label all material determined to be confidential the same, regardless of the source or use of the information. Material would not have an initial designation of "general confidential" with the possibility of a subsequent request, hearing, and ruling on "specified" confidential classification. Utilities would file requests for confidential classification following the new procedures that require each request to be accompanied by a line-by-line and page-by-page justification. The proposed revisions would permit the utilities to file such requests within 21 days of an audit exit conference. Then, as is the current practice, requests and any objections filed in response would be ruled on by the prehearing officer assigned to the docket, and the Commission panel assigned to the case would hear any protest to the rulings.

The proposed rule changes would require at least three copies of material allegedly containing asserted confidential information to be submitted with any request for confidential classification: one with asserted confidential information highlighted and two or more edited copies as required by the type of proceeding. Confidential information

would be blocked out by opaque marker or other masking technique. The request for confidential treatment would have to be justified line-by-line with applicable statutory authority cited.

Any person may file a petition to inspect material the Commission has exempted from Section 119.07(1), FS. Utilities would have ten days to file a response as to why the material should remain exempt. In the current rule, the Commission determines if the material should remain proprietary confidential business information without any specified length of time for utility intervention.

Recent legislative changes to Sections 366.093 and 367.156, FS, would be codified with additional rule revisions. Among these would be the ability of the FPSC to have reasonable access to records of utilities' affiliated companies regarding transactions or cost allocations among the utilities and such affiliated companies; and such records as are necessary to ensure that ratepayers do not subsidize nonutility activities. The definition of proprietary confidential business information would be broadened to mean information, regardless of form or characteristics, which is owned or controlled by the person or company, and which is intended to be and is treated as private in that the disclosure of the information would cause harm to the ratepayers or to business operations of the person or company. Also, proprietary confidential business information would include information related to competitive interests, the disclosure of which would impair the competitive business of the provider of the information; and the exemption for bids and other contractual information regarding services would be expanded to include contracts for goods. Also exempt from

disclosure would be contractual data, which, if disclosed, would impair efforts of affiliates to contract for goods or services.

Any finding of proprietary confidential business information by the FPSC would be effective for 18 months or longer if the Commission determined, for good cause, the period should be extended. Also, any information that has been determined to be proprietary confidential business information and is not entered into the official record of a proceeding would have to be returned no later than 60 days after issuance of the final order, unless the order is appealed. If appealed, any such confidential information would have to be returned no later than 30 days after the decision on appeal.

DIRECT COSTS TO THE AGENCY

Some additional costs would be incurred by Commission staff following adoption of the proposed rule revisions. Currently, requests for confidentiality received outside a docketed proceeding are handled informally by staff. After adoption, such requests would themselves be docketed. Division of Records and Reporting staff indicate that the division would incur additional labor and paperwork costs. Staff time involved for each new docket would be approximately one hour. Copies of relevant documents would be made and distributed to appropriate Commission divisions and Commissioners with a slight increase in reproduction costs. The number of copies required would be determined by the type of filing and the number of Commissioners assigned in a particular docket. The additional costs should be minimal and absorbed within existing staff and budget unless the number of confidential filings increases substantially.

The amount of detail supplied as justification of confidentiality requests has occasionally been inadequate, and FPSC staff have had difficulty in identifying truly confidential material. Commission staff may realize cost savings from adoption of the proposed rule changes since clarification of required justification and of information that is asserted to be confidential may save staff time spent evaluating confidentiality requests. Additional benefits from the proposed rule revisions may derive from avoidance of hearings and appeals held to decide what is confidential information because staff and the utilities would have better guidelines for requests of confidential treatment. Also, auditing or industry division staff would not be required by rule to request utility material in writing outside of an inquiry except when utilities believe the material is confidential.

It is difficult to quantify likely Commission costs and savings from adoption of the proposed rule revisions. However, staff indicate the likely net effect would be time (labor) savings because they would have less difficulty evaluating what is confidential and the Commission may spend less time holding hearings to determine what is actually confidential.

COSTS AND BENEFITS TO THOSE PARTIES DIRECTLY AFFECTED BY THE RULE

General Discussion. Regulated companies and their affiliates that desire confidential treatment of proprietary business information by the Commission would be affected by the proposed rule changes. More effort would be required initially to highlight and edit material submitted in requests for confidential treatment. However, there would

be no need for the utilities to request a change from general confidential to specified confidential in the middle of an inquiry. Clarification of the time frame for requesting determination of nonconfidentiality should remove uncertainty for utilities and interested parties about when such requests must be made.

Most of the forty-two utility companies that responded to our data requests reported little or no previous need to request confidential treatment of information supplied to the Commission. Therefore, they expect minimal impact from the proposed changes. Some larger companies, along with their affiliates, have had more numerous occasions to seek confidential information classification. They have experience seeking confidential treatment and expect to incur additional costs to comply with the proposed rule changes. Specifically, they expect the additional line-by-line and page-by-page justification plus the highlighting and editing to add much time to preparing a confidential request filing.

Firms with competitive aspects to their businesses and firms that have affiliates with such business aspects are most likely to request confidential treatment of information provided to the Commission. Some firms could have substantial additional costs associated with compliance with the rule revisions because they must either have their employees work overtime or hire additional labor, outside consultants, or legal help to process material for confidential request filings.

Many of the confidentiality requests involve contracts that contain proprietary business information such as fuel costs, and that are filed on a regular basis. Economies of scale in filing are therefore

possible for companies with many filings because of relatively fixed costs of staff or consultant experience in preparing necessary documents, etc. Thus, companies that expect to acquire expertise with multiple filings could report lower per page costs of compliance.

If rule changes decrease the number of confidentiality proceedings or requests, companies could expect savings to arise. Such savings could arise in two ways: First, a clearer definition and more complete justification of confidential material could lead to fewer hearings to debate what is truly confidential. Second, permission to wait until after an audit exit conference before filing a request may permit utilities to avoid filing requests for information staff reviews during audits, decides is not relevant to audit findings, and returns. Most companies could not estimate potential savings, however, because of their uncertainty about the number or lengths of avoided filings and proceedings.

Electric Utility Estimates. Florida Power Corporation (FPC) did not quantify the number of confidential request filings per year but FPSC records indicate FPC had 54 in 1988. The company expected minimal costs to comply with the proposed changes because it now justifies confidential requests line by line.

Florida Power and Light (FPL) routinely requests confidential classification of its monthly fuel contract reports but does not expect those requests to involve extra expense following the proposed rule changes because the confidential nature of the contracts has been established and additional handling would be minimal. The company has filed approximately 17 other confidential requests annually. These

latter requests, concerning bids, studies, reports, contracts, etc., would involve increased costs with the adoption of rule changes. Based on 25 pages per filing, FPL estimated compliance would cost \$115.44 per page more for professional and clerical labor and overhead. FPL also anticipates annual savings associated with the possibility of four fewer filings arising from the ability to delay requests for confidential treatment of material obtained during audits until after the audit conference. The total net cost for FPL to comply with proposed rule revisions would be approximately \$37,778 annually.

Gulf Power Company (GULF) reported that confidentiality requests have involved personnel from the utility, the service company, and the company law firm. Because several levels of personnel are involved, Gulf expects compliance to increase costs by \$300 per page or \$3,600 annually. Gulf expects savings of \$500 annually from fewer confidentiality requests during audits, for a net increase in costs of \$3,100 annually. Gulf also reported an additional \$2,500 for each hearing avoided, but could not predict the number avoided annually.

Tampa Electric Company (TECO) estimated the greatest increase in per page costs at \$427.27 for recurring costs and \$463.20 per page counting nonrecurring "learning" costs. Most of the recurring costs would be attorneys' time reviewing and justifying items line by line. TECO does not believe there would be any savings from the proposed rule changes since generally all confidential information requests filed during field audits are retained in the auditors' work papers. Based on TECO's estimated 16 filings per year, TECO reported likely increased costs of \$40,850 the first year and \$37,600 in annual costs thereafter.

Florida Public Utilities anticipated no additional costs or savings from compliance since it does not anticipate the need to request confidential treatment of any information it submits on its own operations.

Local Exchange Company Estimates. Southern Bell filed the most requests for confidential treatment of any Florida utility in 1988: 355 filings, averaging 45 pages each. The company reported that line and page justification, where confidential data appear, would be tedious, time consuming, and expensive. Specifically, Southern Bell estimated incremental costs to comply with proposed rule changes would be \$2.86 per page: highlighting and editing would increase the costs of producing documents approximately 15 percent, raising them \$1.64 per proprietary page. Of this 15 percent recurring cost increase, 49 percent would be associated with a subject matter expert; 34 percent for legal department time; 14 percent for clerical time; and 3 percent for reproduction costs. Identification and justification with correlation to statute would increase costs an additional \$1.22 per page, predominantly associated with subject matter experts' time. Southern Bell did not anticipate savings because, according to the utility, the revised rule would formalize existing field audit procedures and Southern Bell usually relies on general confidential classification without filing for specified confidential classification. Thus, the total expected increase in costs for Southern Bell would be approximately \$45,688 annually.

GTE Florida (GTE) reported a "large" (5004) average number of pages per filing, but included one unusual case of over 25,000 pages as a "base" case. GTE estimated that its costs would increase an additional

\$6.24 per page. This would be for highlighting and individually identifying and correlating each line or page designated to be confidential with specific justification. Savings estimates were based on the assumption that 50 percent of the base case data would be deemed irrelevant and not subject to editing, highlighting, and identification activities. GTE also believes the additional legal work would require another attorney at \$55,000 to \$60,000 annually for total increased costs of \$156,124 per year. GTE savings are estimated at \$3.12 per page for a net increase in costs of \$3.12 per page or \$78,062 annually.

United Telephone had five filings in two years averaging 4.5 pages each. The utility estimated \$40 a page additional costs for highlighting and editing with minimal net savings expected for a total net cost of \$450 annually. It should be noted that United expects the elimination of a distinction between "general" and "specified" confidentiality treatment to result in more times when the company will request confidential treatment. The utility claimed that under the current rule it occasionally supplies confidential material to staff for review during discovery without filing a request for confidential treatment until after staff determines the information is necessary. United anticipates that the revisions would preclude this procedure except during an inquiry. Hence the company expects its costs to increase beyond the \$450 estimate, but did not provide an estimate of the increase.

The remaining LEC survey respondents reported either qualitative estimates of likely costs and savings associated with the revisions or too little experience with filing for confidentiality to

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The remaining LEC survey respondents reported either qualitative estimates of likely costs and savings associated with the revisions or too little experience with filing for confidentiality to

provide estimates. Central Telephone Company claimed they would incur substantial additional costs. Southland Telephone Company, St. Joseph Telephone and Telegraph Company, Florida Telephone Company, and Vista-United Telecommunications reported minimal anticipated costs. Northeast Florida Telephone Company, Alltel Florida, Indiantown Telephone System, Quincy Telephone Company, and Gulf Telephone Company anticipated that some additional costs could arise, but did not attempt to assess their magnitude.

Interexchange Company Estimates. ATT Communications (ATT-C) files confidential requests about ten times a year. ATT-C estimated that costs would increase \$167.50 per page with implementation of the proposed rule changes because of the substantial number of hours necessary to provide line-by-line justification. Some savings might accrue from any reduction in the amount of material, but the likely magnitude of those savings is unknown. ATT-C reported likely savings of \$222 per page for each audit but also reported that such audits have been performed infrequently; Division of Communications staff indicated that audits have been performed about every two years, thus an average savings of \$111 per page annually. Using these figures, total net increased costs to ATT-C would be approximately \$14,075 annually.

US Sprint has filed infrequent requests for confidential treatment: once a year for approximately six pages of proprietary construction cost information. The company estimated an additional \$250 per page (\$1,500 annually) increase in costs for page and line identification and correlation with specific justification offered in support of confidential classification. Savings from the proposed

revisions would be \$126.67 per page, or \$760 annually, for a net increase of \$740 per year.

MCI Telecommunications Corporation reported that its small number of confidential treatment requests annually would ensure that additional costs or savings that may accrue from the revisions would be insignificant. Similarly, Cable and Wireiess Communications, National Telephone Services, United Telephone Long Distance, Corporate Executive Offices, Executive Suites of Fort Lauderdale, and Biztel Long Distance Telephone Company all reported either minimal or no costs or savings from the revisions.

Telus estimated additional filing costs of \$1,086 (\$543 for each of two pages) annually. The company reported that additional savings were unquantifiable.

Gas Utility Estimates. Seven investor-owned gas utilities responded to our survey: Peoples Gas System, Gainesville Gas Company, Central Florida Gas Company, Plant City Natural Gas Company, City Gas Company, Miller Gas Company, and St. Joe Natural Gas Company.

In general, gas utilities reported too little experience with filing requests for confidential treatment to provide meaningful estimates of additional costs and savings from the proposed revisions. While most anticipated some additional costs, only Central Florida, Plant City, and Gainesville assessed the potential magnitudes of those costs. Both Central Florida and Plant City reported that the additional costs would most likely be insignificant, while Gainesville estimated an additional cost of \$50 to \$67 per page, or \$1,000 per each 15-20 page request. Central Florida and Plant City also reported that savings from

compliance would probably be minimal.

Water and Wastewater Utility Estimates. Of the seven Water/wastewater (WAWA) companies that responded to the survey, only General Development Utilities (GDU) and Seminole Utility have had experience filing confidentiality requests. GDU reported that additional compliance costs and savings would be minimal. Seminole, along with Clay Utility Company, Regency Utilities, Mid-Clay Service Corporation, and Hobe Sound Water Company, reported that they do not foresee a need to request such data treatment in the future and therefore anticipate no additional costs or savings from the proposed amendments. Lindrick Service Corporation and Florida Cities Water Company reported that justification, highlighting, and editing could result in additional costs, primarily from legal and consulting fees, but did not estimate the magnitude of such potential increases.

Affiliate Costs. Changes in statutory law allow the FPSC reasonable access to related transaction or cost records of regulated companies' affiliates. Most utilities indicated that they now handle confidential data requests for their affiliates and expect to continue to do so. The affiliates must gather the information in their possession but regulated utilities handle filings for them. Utilities would have similar costs for line-by-line and page-by-page justification and correlation, highlighting and editing, of confidential classification filings for their affiliates. Affiliates would benefit explicitly from having the protection of confidentiality classification for any eligible transactions with regulated utilities. They would be assured that their proprietary confidential business information would not be subject to the

public records law, but no reasonable estimate of the value of this assurance can be made because of lack of data. Total increased costs to affiliates would depend on the volume and type of confidential material that requires treatment by the Commission but is not quantified in an aggregated estimate here because there were no estimates of number of filings or number of pages.

Most utility respondents who expect increased costs associated with their filings also expect significant increased costs from helping their affiliates to meet new requirements of the confidential information rule. Gulf estimated that additional costs to handle data requests for affiliates would be about \$75 per page because of additional personnel attention at the divisional level, its service company, and its law firm. Gulf estimated its affiliates' costs to comply would increase \$275 per page for the same reasons. FPC reported its own costs would be minimal for its affiliates' filings, but estimated its Electric Fuels Corporation affiliate would require an additional 200 to 300 man-hours (at about \$40 per hour total loaded costs) or \$3 per page on average more to meet the new requirements for filing confidential requests. FPL indicated that it was unable to ascertain what costs would be incurred by its affiliates upon adoption of the rule changes.

Southern Bell's additional costs would be about \$3 per page to review its affiliates' filings and would include legal and clerical time, copying costs, etc. Central Florida Gas and Plant City Gas estimated an additional \$200 per request for affiliates but have no experience with affiliate filings to date.

Other Benefits. Public Counsel requests for proprietary

business information could explicitly be afforded confidential treatment and exempted from public disclosure following adoption of the proposed rule revisions. This could avoid the current question of whether information, determined by the Commission to be confidential and in the possession of the Public Counsel's office, is subject to public access. This could save additional time that might be spent determining the accessibility of confidential material held by the Public Counsel's office.

Utilities would benefit insofar as they are better able to keep confidential proprietary business information from their competitors. This could benefit shareholders by reducing litigation expense (about \$2,500 per proceeding) and maintaining a competitive and profitable business.

Ratepayers would benefit from rule revisions to the extent that the Commission is better able to fulfill its function as utility regulator in matters involving confidential information by keeping rates reasonable and enabling utilities to obtain the best terms possible, e.g., for fuel purchases and bids on contracts.

Net Effects. Companies filing requests for confidential treatment of information would experience an increase in net costs for such requests. Total estimated costs and savings are based on utilities' responses to a data request and, since most responses did not quantify the likely net effects of the proposed revisions, the estimates reported here should be considered "minimums." In sum, the total estimated first year increase in costs would be approximately \$314,435 falling to \$311,185 annually. Estimated savings, not including Gulf's estimated

\$2,500 per hearing, would be \$91,606 due to rule changes, for a net increase of about \$220,829 during the first year and \$217,579 per year thereafter. Most of the additional costs would be associated with line-by-line and page-by-page justification for requesting confidential treatment and with highlighting and editing the confidential information. Costs would include clerical and managerial labor, subject matter experts' involvement, and legal review. Utility estimates were based on past experience and volumes of filings. Affected utilities believe that future filings would require more detailed research, analysis, and review. Actual future costs and savings due to revision of the rule would vary with the number and magnitude of confidential information classification requests.

Benefits to ratepayers are unquantifiable with the data available, but are expected to offset increased utility costs from compliance. This is because the rule changes should enhance the Commission's ability to review and receive relevant confidential materials and to determine reasonable rates while better protecting truly proprietary confidential business information.

IMPACT ON SMALL BUSINESSES

Most companies regulated by the Commission are not small businesses as referred to in Chapter 120.54, FS. The small businesses in telecommunications (interexchange companies) or water and wastewater companies that responded to our survey have not had occasion to require confidential treatment and indicate that they are unlikely to do so in the future. Therefore, there should be no significant impacts on small

utility businesses from adoption of proposed rule changes. However, some utilities indicated that their affiliates could experience substantial costs to comply with information requests for confidential material. Some of these affiliates could be small businesses and could incur additional costs complying with providing access to confidential records.

IMPACT ON COMPETITION

The purpose of confidential treatment of proprietary business information is to prevent giving unfair competitive advantage or causing harm to the company and ratepayers through disclosure. These rule revisions should strengthen the process of providing confidential treatment of business information for regulatory purposes without damaging the competitive positions of companies involved in Commission inquiries or investigations. There should be no impact on competition within or among regulated industries or between regulated and unregulated industries for those companies which do not have confidential information to protect because no additional costs would be incurred.

Those companies that have to file requests for confidential information classification would have increased net costs in aggregate to meet proposed changes in the rule. Increases in costs would be absorbed by those companies in the short run but could be passed on to ratepayers in the long run if the confidential requests were shown to benefit or protect ratepayers from direct harm. Anticipated cost differentials from compliance are relatively small for the larger electric utilities and telecommunications companies. Those costs should not significantly harm their relative competitive positions because they would be spread over millions of customers.

Some smaller companies that have had confidential filings were not able to separate costs and did not itemize expected increased costs for future confidential requests. Some of these smaller companies indicated that costs for affiliate filings could be relatively substantial but were unable to quantify them. Increased costs for confidential treatment of affiliate filings could diminish the competitiveness of small companies somewhat because the cost would be spread over their relatively smaller customer base, but without better cost estimates the magnitude cannot be determined.

Investors and capital markets may be better assured that proprietary business information of utilities and their affiliates would be better protected with adoption of the rule changes.

IMPACT ON EMPLOYMENT

Most respondent companies indicated that additional man-hours needed to comply with new rule requirements would be met with existing staff, using overtime as needed. Some companies stated that additional outside legal or consulting help would be required for any litigation or extraordinary hearings. Those firms with many confidential information classification requests indicated that additional help may be necessary; one firm, GTE, indicated that the proposed revisions would require an additional full-time attorney on the staff. Thus, some new employment opportunities could arise within regulated industries or their affiliates from adoption of the revised rule. In the long run, if ratepayers have slightly higher bills due to increased utility costs, employment may decrease fractionally in relatively labor-intensive consumer markets.

METHODOLOGY

Data requests were sent to public utilities, regulated IXC's, and potentially affected affiliates to request information on costs and benefits of compliance with the proposed rule revisions. Forty-two utility companies responded; their responses were summarized in the text. Workshops were held and written comments made by affected companies. Industry division staff were contacted for their assessment of confidential treatment and possible costs and savings of the proposed changes. Standard microeconomic analysis was applied to the data to determine the net effect of the proposed rule revisions.

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