

FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 890252-PU

RULE TITLE:

Confidential Information

ORIGINAL  
FILE COPY

RULE NO.:

25-22.006

PURPOSE AND EFFECT: The substantially reworded rule clarifies and simplifies the process of determining whether material should be classified as confidential. It also incorporates certain changes required by the Legislature during its 1989 session.

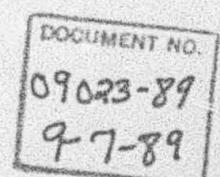
SUMMARY: The proposed rule, which is a substantial rewording of Rule 25-22.006 (see Florida Administrative Code for present text), eliminates the unnecessary distinction between general and specified confidential classifications.

Under the proposed rule, all confidentiality requests will be ruled on by the prehearing officer and any protest to the ruling will be heard by the panel of commissioners assigned to the case. The Commission's Office of general Counsel will no longer make tentative rulings on undocketed confidentiality requests. Such requests will themselves be docketed.

The utility or person requesting confidential classification will 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 will have to be highlighted. The request must be accompanied by a line-by-line justification for classification. Thus, only actual confidential information will be granted exemption from public disclosure and an edited version of the material will be available for immediate public inspection.

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 will have ten days to file a response stating why the information should be kept confidential, and the petitioner will have seven days to file a reply to the response. The Commission will then have the option of ruling on the pleadings or setting the matter for hearing.

Every confidentiality request must contain an affirmative



statement that the information has not been publicly disclosed.

Utilities and other persons 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 they will have 21 days to file their confidentiality request.

When utilities or other persons agree to allow Public Counsel to inspect or take possession of documents for the purpose of determining what information Public Counsel would like to use in a proceeding before the Commission, they will be able to get a temporary protective order exempting the information from public disclosure. When Public Counsel decides what information it wants to use, then the utility or other person can file a specific request for a protective order.

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.

Orders granting confidential classification will 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 will no longer be exempt from the Public Records Law unless the utility or affected person shows, and the Commission 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.

RULEMAKING AUTHORITY: 350.127, F.S.

LAW IMPLEMENTED: 350.121, 364.183, 366.093, and 367.156, F.S.

SUMMARY OF THE ESTIMATE OF ECONOMIC IMPACT OF THESE RULES:

Companies filing requests for confidential treatment of information would experience an increase in net costs for such requests. In sum, the total estimated first year increase in costs would be approximately \$314,435 falling to 4311,185 annually. Estimated

savings 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 resulting 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.

WRITTEN COMMENTS OR SUGGESTIONS ON THE PROPOSED RULE MAY BE SUBMITTED TO THE FPSC, DIVISION OF RECORDS AND REPORTING, WITHIN 21 DAYS OF THE DATE OF THIS NOTICE FOR INCLUSION IN THE RECORD OF THE PROCEEDING. IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE HELD AT THE DATE AND PLACE SHOWN BELOW:

TIME AND DATE: 9:30 A.M., Wednesday, November 1, 1989

PLACE: Room 122, 101 East Gaines Street, Tallahassee, Florida.

THE PERSON TO BE CONTACTED REGARDING THIS RULE AND THE ECONOMIC IMPACT STATEMENT IS: Director of Appeals, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399

THE FULL TEXT OF THE RULES IS: (Substantial rewording of Rule 25-22.006. See Florida Administrative Code for present text.)

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 367.196, 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.

(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.

(a) If the utility or other person believes information requested by staff is confidential, the utility or other person may require that the staff request be in writing. 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. The notice of intent to request confidential classification shall be filed with the Division of Records and Reporting and shall have appended thereto a copy of any written request for the material to which it relates. A copy of the notice shall be provided to the division(s) requesting the material. To obtain continued confidential handling of the material the utility or other person must, within 21 days after the staff takes possession of the material (or in the case of material obtained during the course of an audit, within 21 days after the field audit exit conference), file a request for confidential classification with the Division of Records and Reporting.

(b) When the material is obtained incident to a formal proceeding, the utility or other person requesting confidential classification shall also serve a copy or 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. Any party to a formal proceeding may file an objection to the request for confidential classification within 14 days after service of the summary.

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

(d) All material that has been classified as 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. Any staff or consultant reports or work products containing confidential information extracted from material having been classified as confidential, or for which a ruling on confidentiality is pending, shall be handled in the same manner as the material so classified. The Commission shall have discretion to retain any confidential material in its possession. Upon the consent of the Department of State, the Commission may return or, after consulting with the source, destroy any material that is no longer needed.

(4) Requests for confidential classification.

(a) A request for confidential classification of material shall be filed in writing with the Division of Records and Reporting. The utility or other person shall file with the request one copy of the material for which confidential treatment is requested. On this copy, the specific information asserted to be confidential shall be highlighted. Along with the highlighted copy, the utility or other person shall file two or more edited copies as required by the type of proceeding, which will be made available for public inspection. In the edited copies, the specific information asserted to be confidential shall be blocked

out by the use of an opaque marker or other masking device. The utility or other person shall identify the page(s) and line(s) at which the confidential material is found and shall correlate the page(s) and line(s) identified with the specific justification proffered in support of the classification of such material.

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

(c) In the line-by-line or field-by-field justification for confidential classification, the utility or other person must demonstrate how the information asserted to be confidential qualifies as one of the statutory examples listed in section 364.183(3), 366.093(3), or 367.156(3), F.S. If no statutory example is applicable, then the utility or other person shall include a statement explaining how the ratepayers or the person's or utility's business operations will be harmed by disclosure.

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

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

(5) Discovery.

(a) In any formal proceeding before the Commission, any utility or other person may request a protective order protecting proprietary confidential business information from discovery. Upon a showing that the material is entitled to protection the

Commission shall enter a protective order limiting discovery in the manner provided for in Rule 1.280, Florida Rules of Civil Procedure. The protective order shall specify how the confidential information is to be handled during the course of the proceeding and prescribe measures for protecting the information from disclosure outside the proceeding.

(b) The Commission's protective orders shall exempt proprietary confidential business information from section 119.07(1), F.S. While a request for a protective order is pending, the information asserted to be confidential shall also be exempt from section 119.07(1), F.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 or other person 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), F.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), F.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 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 persons are urged to seek mutual agreement regarding access prior to bringing a controversy to the Commission.

(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) Duration of Confidential Classification.

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

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

(c) Confidential information not returned at the conclusion of the period established under paragraph (a) of this subsection,

shall no longer be exempt from s. 119.07(1), F.S., unless the utility or affected person shows, and the Commission finds, that the information continues to be confidential. Upon such finding, the duration of confidential classification may be extended for a period of up to 18 months, or for a longer period if the Commission finds, for good cause, that such longer period is necessary to protect the business operations of the utility or affected person. While the Commission is considering an extension under this paragraph, the information in question shall remain exempt from s. 119.07(1), F.S.

(9) Judicial Review. When the Commission denies a request for confidential classification, the material will be kept confidential until the time for filing an appeal has expired. The utility or other person may request continued confidential treatment until judicial review is complete. The request shall be in writing and filed with the Division of Records and Reporting. The material will thereafter receive confidential treatment through completion of judicial review.

Specific Authority: 350.127, F.S.

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

History: New 7/1/85, Amended

NAME OF PERSON ORIGINATING PROPOSED RULE: David E. Smith,  
Division of Appeals

NAME OF SUPERVISOR OR PERSON(S) WHO APPROVED THE PROPOSED RULES:  
Florida Public Service Commission

DATE PROPOSED RULES APPROVED: August 29, 1989

If any person decides to appeal any decision of the Commission with respect to any matter considered at the rulemaking hearing, if held, a record of the hearing is necessary. The appellant must ensure that a verbatim record, including testimony and evidence forming the basis of the appeal is made. The Commission usually makes a verbatim record of rulemaking hearings.