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October 5, 1989

Mr. Steve Tribble
Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Fletcher Building
Tallahassee, Florida 32301-8153

Re: Proposed Rule 25-22.006, F.A.C.,
Confidential Information, Docket
No. 890252-PU

Dear Mr. Tribble:

Enclosed for filing are an original and seven copies of FPL's
Comments in the above-referenced docket. An additional copy is
also enclosed, which I would appreciate having date-stamped as
"filed" and returned to me in the enclosed, postage paid envelope.

Thank you in advance for bringing this filing to the attention of
the Commission.

Sincerely,

K. Crandal McDougall
Attorney

KCM:sh

Enclosures

cc: Ellis Adger
William Bakstran
W. G. Walker
J. S. Woodall

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| ACK | <u>✓</u> |
| AFA | <u>1</u> |
| APP | <u>1</u> |
| CAF | <u> </u> |
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10044 OCT -6 1989

FPSC-RECORDS/REPORTING

BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Amendment of Rule 25-22.006,)
Florida Administrative Code,)
pertaining to confidential) Docket No. 890252-PU
information)

COMMENTS OF FLORIDA POWER & LIGHT COMPANY

Florida Power & Light Company (hereinafter FPL) files these comments to the above-captioned proposed amendment as follows:

1. These comments are provided in response to the Commission's September 15, 1989 publication in the Florida Administrative Weekly of its proposed amendment to Rule 25-22.006, F.A.C. These comments are intended to assist the Commission in redrafting its Confidentiality Rule to afford the Commission and all parties coming before it a more equitable and procedurally efficient Rule regarding the classification and handling of proprietary confidential business information, as that term is defined in §350.121, 364.183, 366.093, and 367.156, F.S.

2. FPL recommends the following change to Subsection (2)(a) of the proposed amendment:

(2)(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(a), F.S., and will be accorded stringent internal procedural safeguards against public disclosure during the pendency of the inquiry. When the Commission or its staff is requesting

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

The proposed additional language was taken directly from Subsection (3)(d) of the proposed amended rule. FPL recommends that the nondisclosure standards for confidential information should be the same whether material is reviewed "during an inquiry" (Section 2) or "outside of an inquiry" (Section 3). The proposed change will make Subsection (2)(a) consistent with Subsection (3)(d).

3. FPL recommends the following change to Subsection (3)(a) of the proposed amendment:

(3)(a) If the utility or other person believes the information requested by staff is confidential, the utility or other person may require that the 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. Material so identified in a notice of intent to request confidential classification shall be treated as confidential information. To [obtain] maintain continued confidential handling of the material the utility or other person must, within 21 days after the staff [takes possession of] has obtained 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.

FPL's proposed language is only to clarify that once the notice of intent is filed the identified material will be treated as confidential until the Commission rules on any subsequent request for confidential classification. FPL additionally recommends that wording of the last sentence of Section (3)(a) be modified to be consistent with the definitions found in Section (1). That is, the word "obtain" should be used in place of "possession" since "obtaining material" is defined in Section (1) whereas "taking possession" is not defined.

4. Subsection (3)(b) contains a typographical error in the last line. The last line should refer to filing "14 days after service of the copy or summary" since the party requesting confidential classification may serve either "a copy or summary of its request on all parties of record".

5. FPL recommends the following change to the first sentence of Subsection (3)(d):

(3)(d) All material that has been classified as confidential, or for which a ruling on confidentiality is pending, or is subject to a notice of intent to request confidential classification, shall be exempt from Section 119.07(1), F.S., and will be accorded stringent internal procedural safeguards against public disclosure.

This additional language will clarify that material which has received a temporary exemption will be accorded confidential

treatment. Otherwise, it could later be argued that material would not be exempt or treated as confidential until after a utility or other person filed its request for confidential classification, and would thereby frustrate the intent of the staff's proposed amended rule.

6. FPL recommends the following change to Subsection (4)(a) of the proposed amendment:

(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. The following statutory examples of confidential information, as found in Sections 364.183, 366.093, and 367.156, F.S. shall not require the highlighting, editing, detailed justification, and page and line identifications required by this subsection:

- i. Internal auditing controls and reports of internal auditors, and
- ii. Security measures, systems, or procedures.

Of the six statutory examples identified in Sections 364.183,

366.093, and 367.156, F.S., as amended in 1989, the two examples identified above require no analysis of whether they are what they are. For example, internal auditing reports are internal auditing reports and by statutory definition they are, in their entirety, proprietary confidential business information. One does not need a line by line analysis to determine that an internal auditing report is an internal auditing report. Conversely, a trade secret, one of the other statutory examples, is not the same. It has its own definition which must be applied to specific material. Consequently, material identified as a trade secret must be identified and described in a manner which brings it within the definition of a trade secret. Therefore, FPL recommends that the Commission adopt the changes suggested above to Subsection (4)(a).

7. FPL recommends that the following Subsection be added to the proposed amended rule:

4(f) A utility or other person may, by motion, request an extension of time to provide the justification for classification required by this section, or by motion, request an exemption to the justification for classification required by this section. Such a motion shall be filed with the utility's or other person's request for confidential classification. Upon a finding of good cause that the requested extension of time or the requested exemption is appropriate, the Commission shall grant the request by written order. If the motion is denied, the utility shall comply with the requirements of this rule within 10 days of the written order denying the motion.

As the proposed amended Confidentiality Rule is a rule of procedure, it should specify the procedures which should be

followed when, for good cause, an exception is necessary. FPL cannot affirmatively state to the Commission that in every instance in the future it will be able to meet all of the requirements of Sections 2, 3 and 4. The proposed amended rule should explicitly recognize this and specify the procedures to be followed. FPL proffers the above delineated addition to provide the needed procedure.

There will no doubt be situations where the 30 day and 21 day filing requirements of Sections 2 and 3 cannot be met in terms of providing the required justification. In an inquiry situation, there could be a voluminous amount of documents which contain confidential information that the staff has taken possession of over an extended period of time and which staff has decided to retain possession of. FPL could be faced with the task of editing, highlighting and justifying an amount of material that physically could not be accomplished in 30 days. The same could be true after an audit exit conference.

FPL also has documents which either belong to third parties, e.g. design specifications of equipment FPL has either purchased or desires to purchase, or which third parties have a vested interest in, e.g. contracts or joint venture materials. In many instances these third parties will have vested rights to the continued treatment of these documents as confidential. Consequently, where staff seeks material that is in FPL's possession that FPL has by

contract agreed to maintain the confidentiality of, it may be necessary to seek an extension of time to provide the justification required by Section (4). The extension of time may be needed for FPL to either work with the third party regarding the development of the justification or to seek the third party's intervention in the request for confidential classification. This is an important factor since information may be proprietary confidential information only within the interests of the third party (and FPL by contract). In such a situation, it may be that only the third party may have the knowledge and evidence to support the required justification while FPL by contract is charged with maintaining the confidentiality thereof. Consequently, procedures for handling requests for extensions should be explicitly provided for due to the possibility of unusual difficulties in preparing the justification required by the rule.

FPL also recommends that the rule explicitly provide a procedure to handle the possibility that some material may not lend itself to the justification required by Section (4). There may be a situation where highlighting, editing, etc., will not be practical. The rule should provide the procedure proposed herein to address such a situation. Flexibility is an important key to any rule of procedure and should be explicitly provided for.

8. FPL recommends the following change to Subsection (5)(c):

(5)(c) When a utility agrees to allow Public Counsel or staff to inspect or take possession of utility

information during the discovery process in a docketed proceeding for the purpose of determining what information is to be used in [a] that 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 or staff shall return the information to the utility in accordance with the record retention requirements of the Department of State.

The language added to this subsection will provide the Commission's staff an equal opportunity with Public Counsel to review material in the discovery process without requiring a formal protective order under Subsection 5(a). Staff, as does Public Counsel, needs to review utility material prior to determining whether the information is necessary as evidence, and consequently, staff should have the same opportunity as Public Counsel to review material in the discovery process.

9. FPL recommends that the use of the term "confidential material" in Section (7) of the proposed amended rule be changed to "confidential information". This suggestion is purely cosmetic to provide the consistent use of defined terms in the rule. The definitions section defines "confidential information" but not "confidential material".

10. FPL recommends the following Subsections be added to the proposed amended rule:

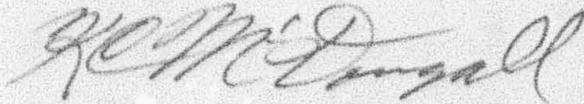
(2)(c) Material subject to subsection (2)(a) shall not be disclosed by the Commission or its staff except as provided for in a protective order in a formal proceeding.

(3)(e) Material subject to subsection (3)(d) shall not be disclosed by the Commission or its staff except as provided for in a protective order in a formal proceeding.

While FPL is confident that the nondisclosure requirements of the proposed amended rule adequately protects FPL from nondisclosure of proprietary confidential business information made available to the Commission or its staff in the exercise of the Commission's jurisdiction, FPL recommends clarifying this with the above two sections. The above sections would delineate that the phrase "safeguards against public disclosure" includes not only the protection against the publication of confidential documents themselves, but would also provide protection from the disclosure of the contents of confidential documents in any manner other than as provided for in a protective order. These sections will provide the necessary language to recognize that proprietary confidential business information is to be kept confidential as well as exempt from §119.07(1), F.S. The language also recognizes that disclosure may be necessary under certain circumstances, and may be

accomplished through the protective order process in a docketed proceeding.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "K. Crandal McDougall".

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