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ORIGINAL
FILE COPY

November 13, 1989

Steve Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0850

Re: Docket No. 890252-PU

Dear Mr. Tribble:

Enclosed for filing in the above-captioned proceeding on behalf of the Citizens of the State of Florida are an original and 12 copies of Citizens' Request for Hearing in this docket.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Darlene Driscoll

- ACK _____
- AFA 1
- APP 1 Enclosures
- CAF _____
- CMU 1
- CTR _____
- EAG 1
- LEG _____
- LIN 6
- OPC _____
- RCH 1
- SEC 1
- WAS 1
- OTH _____

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amendment of Rule 25-22.006,)
FAC, pertaining to confidential)
information)

Docket No. 890252-PU
Filed: November 13, 1989

CITIZENS' REQUEST FOR HEARING

Pursuant to Order No. 22054 and Commission Rule 25-22.016 the Citizens of the State of Florida, through Jack Shreve, Public Counsel, hereby request this Commission to conduct a hearing pursuant to Chapter 120.54, Fla. Stat. The purpose of this hearing request is to allow the Commission to consider all issues relevant to its Notice of Rulemaking issued October 13, 1989 in Order No. 22054. In support the Citizens state as follows.

1. This Commission has proposed to amend, through substantial revision, Commission Rule 25-22.006, F.A.C., relating to confidential information. Having reviewed the Commission's proposed changes, the Citizens believe that the Commission's proposed changes are in some respects contrary to the intent of Chapter 119, Fla. Stat. (the Public Records Law), as well as the provisions of Chapters 364, 366 and 367, Fla. Stat. The Citizens have several significant concerns regarding the Commission's proposed revisions.

2. First, the rule continues, and perhaps exacerbates, the unnecessary and possibly illegal delay associated with the simple failure to rule or even hold hearings on confidentiality requests or disputes. The rule simply does not provide for a time certain within which to expediently rule on or dispose of confidentiality questions. Second, and closely related to the delay problem, is the revised rule's perpetuation of the layered appeals process which contributes to additional delay once hearings have been scheduled. Third, the rule revision imposes no penalty on the requesting party for noncompliance. This oversight encourages delay. Fourth, the revision is contrary to the provisions of Chapters 364, 365 and 367 which mandate that the Commission make an affirmative finding of confidentiality before exempting public records from public inspection. Fifth, the Commission's rule improperly excludes the public at large from the crucial point in the confidentiality proceedings where the company or person requesting confidentiality has the burden of proof. Essentially, the Commission fails to recognize that since the rule operates as an exemption to the Public Records Law, "substantially affected parties" may mean more than those parties who have formally intervened in the proceeding. Sixth, the Citizens are concerned that record return portion of the rule revision is, at least in part, premature since the Sunset revisions to Chapter 364 have not yet been addressed. Additionally, the Citizens are concerned that the Commission language establishing standards for the return of public records may be too vague. Finally, the Citizens believe that

the portion of the rule regarding confidential Commission inquiries was not changed to comport with high-level staff representations that the Public Counsel has been, and always should be, able to participate in Commission inquiries. Each of these major points are addressed more specifically below.

RULINGS DELAY

3. The Citizens concern about this aspect of the rule is one which has been manifested more and more frequently over the last two years. While the proposed revisions to the confidentiality rule contain numerous references to requirements that confidentiality requests be ruled upon, there are absolutely no provisions which require that the rulings be made under a time schedule. The Citizens believe this failure is a fundamental flaw in both the proposed rule and the Commission's current practice. It is Citizens' position that the legislature in granting the Commission its limited exemption from the Public Records Law, intended that any exemption to the Public Records Law be carefully and sparingly made and certainly should not be given for extended periods of time simply through Commission inaction. The Commission is aware that there is a presumption in the law against closing public records from public inspection. See Wait v. Florida Power & Light Company, 372 So.2d 420 (1979); Wolfson v. State, 344 So.2d 611 (1977). Furthermore, the granting of exemptions contrary to legislative intent could subject the Commission to loss of its

exemption pursuant to periodic review by the legislature. See Section 119.14.

4. Specifically on this point, the Citizens note that proposed Rule 25-22.006(3)(c) states in part that:

[A]ny request for confidential classification and any objection 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.

5. This provision has no time certain within which a ruling must be made. The problem is evident when reference is made to the provisions of rule paragraph (3)(a), for example, which allows a company to receive a temporary exemption from the Public Records Law, if the staff obtains any material. Clearly the existence of a temporary exemption (granted with no showing or finding and of questionable legality) could theoretically result in extended confidential status of documents with no affirmative action by the Commission.

6. Likewise, with respect to information received during discovery, there is again no time certain for the Commission to rule. Again, paragraph (5)(b) of the proposed rule provides a temporary exemption from the Public Records Law pending a ruling by the Commission. Similarly, paragraph (5)(c) of the rule

provides an automatic temporary protective order for the purpose of determining what information is to be used in a proceeding before the Commission. Under the Commission's proposed rule, both types of temporarily protected information would continue to be confidential until, if, and when the Commission ever issued a ruling on the information.

7. The Citizens suggest that no later than a time certain period of no more than 7 days after a response to a request is received, the Commission hold a hearing and rule on a company's request.

APPEAL PROCESS

8. Under the current procedure and under the proposed revisions, significant delay is built into the process of reaching any final ruling on confidential classification through the multilayered appeal process utilized by the Commission. Proposed rule paragraph (3)(c) mandates that the initial ruling on confidentiality be made by the Prehearing Officer and that any protest or appeal of that ruling be heard by the full Commission Panel. The Citizens believe this process builds unnecessary and unreasonable delay into the process. This could be remedied if one of the two steps could be cut out and the Prehearing Officer's decision be final for purposes of judicial review. Or the Commission Panel could make the decision. As it stands now, the

proposed rule does not foreclose the situation where the Prehearing Officer issues a proposed finding which can itself then be protested by either or both of the parties, necessitating the scheduling of an additional hearing, and issuance of an additional order by the Prehearing Officer which is then appealable to the full Commission, whose order can be revisited on reconsideration before becoming final for judicial review purposes. All of these procedures take time and virtually guarantee a de facto classification of confidentiality for many months.

LACK OF PENALTY FOR NONCOMPLIANCE

9. The Citizens also believe that the Commission's rule revision is loosely drafted in a way which allows a utility to make numerous and insufficient requests for confidentiality without suffering any adverse consequences. Under paragraph (3)(b) of the current rule, for example, a temporary exemption from Section 119.07(1), Fla. Stat., lapses if a timely request for confidential treatment is not filed for materials provided to the staff. Likewise, Subsections (3)(d) and (2)(f) provide for waiver of confidentiality if no timely request for confidential classification is filed. No such waiver or lapse provisions are found in the revision. Also, under the current rule, failure to serve a copy or summary of the request on all parties of record does not subject a utility to waiver of confidentiality or other

adverse consequences. Likewise, paragraph (4)(e) of the revision which addresses the utility's burden of proof, states in part:

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.

[Emphasis added].

10. Once again there is no waiver provision here. There is only the suggestion that a company may file repeated insufficient requests which may be denied (or perhaps may even be granted) while in each instance confidentiality is "temporarily" assured.

FAILS TO REQUIRE A FINDING

11. Paragraph (5)(a) of the rule revision clearly does not comport with the statutory law. In fact the rule violates the most recently expressed intent of the legislature. Currently, Chapter 364.183(2) requires the company to make a showing and the Commission to make a finding that a protective order granting exemption from the Public Records Law should be issued. Previously Sections 366.093 and 367.156, dealing with electric utilities and water/sewer utilities, respectively, required only that the company

make a showing that confidentiality exists. However, pursuant to Chapters 89-292 and 89-353, the 1989 legislature added language to specifically require a finding by the Commission that exemption from the Public Records Law should occur. Clearly the provisions of paragraph (5)(a) which require only that the company make a showing are contrary to the current telephone statute as well as the electric and water and sewer statutes recently amended by the legislature. This language should be changed to ensure that the Commission make an affirmative finding when and if confidentiality is ever granted.

THE GENERAL PUBLIC IS THE TRUE PARTY IN INTEREST

12. Paragraph (3)(b) provides that requests for confidentiality obtained incident to a formal proceeding shall be served upon all parties of record. Any party is then allowed under the rule to file an objection to the request for confidential classification. At this point in the proceeding the burden of proof is clearly upon the company to show that the material is bona fide proprietary confidential business information. See Section (4)(e). Pursuant to proposed paragraph (6)(a) any person may then file a request to inspect and examine any materials previously exempted under the rule. The affected utility would then have the opportunity within ten days to file a response as to why the material should remain exempt. The Commission then, apparently at its discretion may hold a hearing on the dispute.

13. It occurs to Citizens that the most substantially affected party to a confidentiality request proceeding is the general public at large and not necessarily just the parties of record to the formal proceeding. The Citizens believe that by restricting notice to just the parties to the proceeding, the Commission may be foreclosing meaningful participation by the general public at a time when the burden of proof is clearly upon the company or person requesting confidentiality. Additionally, absent any delay problems, the Commission has a clear obligation to hold a hearing at the initial request stage. Of course, at this stage only formal parties have the right to such a hearing.

14. Circumstances are different once confidentiality is granted. The burden is then on the person seeking inspection to file a petition seeking inspection. The rule is silent as to the showing that must be made. Conceivably the burden of proof could be on the petitioner.¹

15. Once a petition to inspect is made, under the Commission's proposed rule an affected utility or person is only required to "file a response as to why the material should remain exempt," when a request to inspect and examine is filed by any

¹Also no clear provision is made for situations involving temporary exemptions, although paragraph (6)(a) relates to "material the Commission has exempted" from the public records. A temporary exemption is, under the rule, given by the Commission.

person (presumably a nonparty). Furthermore, the language of paragraph (6)(a) apparently leaves it up to the Commission whether to hold a hearing or issue a ruling on the pleadings. Of course, the same problem with respect to lack of time certainty for hearings or rulings, exists at this stage of the confidentiality proceedings.

16. The Citizens suggest that the Commission incorporate into the proposed rule some mechanism for providing meaningful and effective notice to the general public of all requests for confidentiality. This mechanism could take the form of a specialized docket available for inspection by the general public and other interested parties. This docket could spell out the nature of the request and the status of the hearing process, for example. Clearly the general public should have the opportunity to participate in the process before the burden has been shifted away from the person requesting confidentiality.

PUBLIC COUNSEL'S USE OF INFORMATION AT HEARING

17. Paragraph (5)(c) is a completely new addition to the confidentiality rule. As Citizens understand it, the provision is an effort to formalize an informal procedure developed by the Public Counsel and Southern Bell in handling the voluminous document requests which involved, at least in part, information the company claimed to be confidential. Under the informal procedure,

the Citizens would execute a nondisclosure agreement solely for purposes of determining what information was needed at the Offices of the Public Counsel or its consultants for use in preparation for a proceeding. The documents and information were reviewed on the utilities' premises² prior to the discovery due date, necessary documents or identified, and the company immediately filed a motion for a temporary protective order on the discovery due date. Under the arrangement with the company and the Public Counsel, the parties were to seek an immediate (maximum of two or three days turn around) temporary protective order from the Commission to be followed within 21 days by a request for a permanent protective order by the company requesting confidentiality. Although this procedure has not worked because of the lengthy delays in issuance of protective orders, the initial portion, wherein document requests were more specifically tailored to Public Counsel's needs, have worked. It is Citizens belief that this "winnowing" process is what is intended by the rule. The Citizens further believe that it is the Commission's intention that the words "to be used in a proceeding" are at the sole discretion of the Public Counsel. In other words, documents which are "used" in a proceeding are documents which the Public Counsel uses to determine the scope, strategy, and approach to the proceeding, including, but not

²The public inspection implications of this practice are currently being tested in Hillsborough County Circuit Court in litigation involving a local government and the Tampa Tribune. The Citizens have utilized this procedure in an effort to receive documents before hearing.

limited to, actual introduction of evidence at the proceeding.

18. The Citizens object to any effort by the Commission to restrict Public Counsel's access to, and full effective use of, information necessary to his representation of utility customers pursuant to Section 350.0611, Fla. Stat.

PUBLIC COUNSEL PARTICIPATION IN INQUIRIES

19. The Citizens further take issue with portion of the confidentiality rule which defines an inquiry pursuant to Section 350.121, Fla. Stat. The Citizens do not take issue with any confidentiality aspect of the inquiry provisions of the proposed rule revisions, apart from any general objection listed above. However, the Citizens request the Commission to take this opportunity to clarify its understanding of who may participate in a Commission inquiry. Currently Section 350.121, Fla. Stat. is silent on the participants to a Commission inquiry. Likewise, the proposed revisions to Commission Rule 25-22.006 are silent as to who may participate. It has always been the Public Counsel's desire to participate in, or at least be kept abreast of the nature and extent of any Commission inquiry. To date the Public Counsel has not been made aware of any Commission inquiry until after the conclusion of such inquiry. Certainly the Public Counsel has never participated in an inquiry.

20. In a recent meeting with the Executive Director of the Public Service Commission and certain other staff members, the Public Counsel was told that it was staff's interpretation of the Commission rule and statutes that the Public Counsel could participate in a Commission inquiry. This opinion even went so far as to suggest that the Public Counsel could participate as an agent of the Commission. While the Public Counsel does not believe that it would be proper for him to act as the Commission's agent in an inquiry, or any other proceeding, he would request that he be allowed to participate in any inquiry by the Public Service Commission, as well as being notified at the time of initiation of any inquiry undertaken by the Commission.

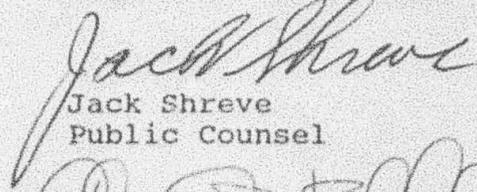
CONCLUSION

21. The Citizens have set out above their major objections to the Commission's proposed confidentiality rule -- Commission Rule 25-22.006, FAC. The Citizens hereby formally request that this Commission conduct a rulemaking hearing pursuant to Chapter 120 and applicable Commission rules, so that the Citizens and other interested and affected parties may present testimony and evidence to the Commission regarding its proposed rule.

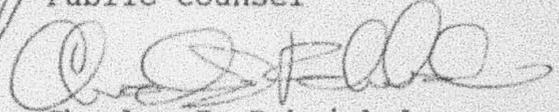
WHEREFORE, the Citizens of the State of Florida respectfully request this Commission to hold a public hearing to determine the

best method for handling confidential material, confidentiality requests and Commission inquiries.

Respectfully submitted,



Jack Shreve
Public Counsel



Charles J. Rehwinkel
Associate Public Counsel

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c/o The Florida Legislature
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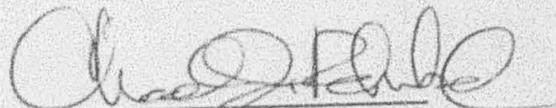
(904) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 890252-PU

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties this 13th day of November, 1989.

Bill Bakstran
Division of Legal Services
Fla. Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301



Charles J. Rehwinkel