

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In The Matter of	:	Docket No. 890252-PU
In Re: Amendment of Rule	:	<u>RULE HEARING</u>
25-22.006, F.A.C., pertaining	:	
to confidential information.	:	

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<p><b>RECEIVED</b> Division of Records &amp; Reporting</p> <p><b>NOV 29 1989</b></p> <p>Florida Public Service Commission</p>	:	<p>FPSC Hearing Room 122 Fletcher Building 101 East Gaines Street Tallahassee, Florida 32399-0850</p> <p>Friday, November 17, 1989</p>
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Met pursuant to notice at 9:30 a.m.

BEFORE: WILLIAM HARROLD, Hearing Officer

APPEARANCES:

FLOYD SELF, of the firm Messer, Vickers, Caparello,  
French and Madsen, P. O. Box 1876, Tallahassee, Florida  
32302-1876, Telephone No. (904) 222-0720, appearing on behalf of  
Telus Communications, Inc., and the Florida Pay Telephone  
Association.

JOHN P. FONS, of the firm Ausley, McMullen, McGehee,  
Carothers and Proctor, P. O. Box 391, Tallahassee, Florida 32302,  
Telephone No. (904) 681-7766, appearing on behalf of Southern  
Telephone and Telegraph Company and Tampa Electric Company.

DOCUMENT NO. 11613-89 11/29/89
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## 1 APPEARANCES CONTINUED:

2 BARLOW KEENER, 150 West Flagler Street, Suite 1910,  
3 Miami, Florida 33130, Telephone No. (305) 263-3100, appearing on  
4 behalf of Southern Bell Telephone and Telegraph Company.

5 K. CRANDAL McDOUGALL, P. O. Box 029100, Miami, Florida  
6 33102-9100, Telephone No. (305) 552-3921, appearing on behalf of  
7 Florida Power and Light Company.

8 TERESA LILES, of the firm Beggs and Lane, P. O. Box  
9 12950, Pensacola, Florida 32501, Telephone No. (904) 432-2451,  
10 appearing on behalf of Gulf Power Company.

11 JACK SHREVE and CHARLES REHWINKEL, Office of the Public  
12 Counsel, c/o the Florida Legislature, 111 West Madison Street,  
13 Tallahassee, Florida 32399-1400, Telephone No. (904) 488-9330,  
14 appearing on behalf of the Citizens of the State of Florida.

15 WILLIAM BACKSTRAN, Associate General Counsel, FPSC's  
16 General Counsel's Office, 101 East Gaines Street, Tallahassee,  
17 Florida 32399-0863, Telephone No. (904) 488-7464, appearing on  
18 behalf of the Commission Staff.

19 STEVE TRIBBLE, FPSC Director of Records and Reporting,  
20 101 East Gaines Street, Tallahassee, Florida 32399-0850,  
21 Telephone No. (904) 488-8371.

22

23

24 REPORTED BY:

JOY KELLY, CSR, RPR  
Official Commission Reporter

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EXHIBITS

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<u>Number:</u>	<u>Identified</u>	<u>Admitted</u>
1 (Composite) Exhibits 1 through 7)	9	

CERTIFICATE OF REPORTER

P R O C E E D I N G S

(Hearing convened at 9:30 a.m.)

MR. HARROLD: Good morning. My name is William Harrold. I'm the Commission Staff member assigned to preside at this hearing. This hearing is being conducted pursuant to rulemaking provisions, Section 120.54(3), Florida Statutes.

The proposed rule amendment we're concerned with today is Rule 25-22.006, Florida Administrative Code. The amendment is a substantial rewording of the present rule and was proposed in a notice published in the Florida Administrative Weekly on September 15th, 1989, and amended notice on October 20th, 1989.

The notice of rulemaking was also issued by the Commission on October 13th, 1989, in Docket No. 890252-PU.

The function of this hearing is to allow the Commission to inform itself of matters bearing upon the proposed rule amendment by giving effected persons an opportunity to present evidence and argument on the merits of the rule amendment.

The format we will use here today is one generally employed by the Division of Appeals in conducting rulemaking hearings. Any person may present comments or make suggestions concerning the rule. Those making presentations are subject to questions from others, persons appearing as witnesses are generally sworn and subject to cross examination.

At this time, let's take appearances.

MR. SELF: Floyd R. Self, with the law firm Messer,

1 Vickers, Caparello, French and Madsen, P. O. Box 1876,  
2 Tallahassee, Florida 32302, appearing on behalf of Telus  
3 Communications, Inc., and the Florida Pay Telephone Association.

4 MR. FONS: John P. Fons of the law firm of Ausley,  
5 McMullen, McGehee, Carothers and Proctor, P. O. Box 391,  
6 Tallahassee, Florida 32302, appearing on behalf of Southern Bell  
7 Telephone and Telegraph Company and Tampa Electric Company.

8 MR. KEENER: Barlow Keener, appearing on behalf of  
9 Southern Bell Telephone and Telegraph Company, Suite 1910, 150  
10 West Flagler Street, Miami, Florida 33130.

11 MR. McDOUGALL: Crandal McDougall, Florida Power &  
12 Light Company, 9250 West Flagler Street, Miami, Florida  
13 33102-9100.

14 MS. LILES: Teresa Liles with the firm Beggs and Lane,  
15 P. O. Box 12950, Pensacola, Florida 32501, representing Gulf  
16 Power Company.

17 MR. REHWINKEL: Jack Shreve and Charles Rehwinkel,  
18 Office of the Public Counsel, 111 West Madison Street, Room 301,  
19 Tallahassee, Florida 32399-1400, appearing on behalf of the  
20 Citizens of the State of Florida.

21 MR. BAKSTRAN: William Bakstran, Associate General  
22 Counsel, appearing on behalf of the Staff. The address is 101  
23 East Gaines Street, Tallahassee, Florida.

24 MR. HARROLD: Does anybody else in the audience wish to  
25 make an appearance?

1           Have the participants had the opportunity to discuss  
2 the various issues in this case? Public Counsel filed and  
3 requested this hearing. I have reviewed -- I've seen their  
4 comments. Has there been an opportunity to come up with a list  
5 of issues?

6           MR. BAKSTRAN: Mr. Hearing Officer, I've discussed with  
7 Florida Power's representative their comments. We've reached  
8 some stipulations with them regarding the changes that could be  
9 made to the rule. I've talked to Lynette Brown of the Small  
10 Business Association, her counsel, and I think we've reached some  
11 kind of understanding on a minor change to the statute to protect  
12 small businesses from undue financial burden as a result of them  
13 complying with this rule.

14           I've talked with Public Counsel. We are still in the  
15 process of working out what the issues are in their request for  
16 hearing, and we probably need a little more time to work on that.

17           MR. HARROLD: Could you give me -- do you have an idea  
18 of how much time you'll need to discuss informally?

19           MR. REHWINKEL: Probably no more than 15 minutes, as  
20 far as -- I'd say --

21           MR. SHREVE: You're talking about doing it this  
22 morning?

23           MR. BAKSTRAN: Yes, sir. 20, 25 minutes, because we  
24 need to draft the issues.

25           MR. REHWINKEL: Sure.

1 MR. HARROLD: Okay. We will go off the record for --  
2 I'd say until 10:00. Allow the parties the opportunity to  
3 discuss among themselves; hopefully come up with a brief outline  
4 of issues. Some of you who have made an appearance have not  
5 filed anything. If you have concerns that you wish to be listed  
6 in the issues, be sure to work with Mr. Bakstran so we can get  
7 that done hopefully by 10:00 before we start. Is that procedure  
8 satisfactory to the participants? Okay, we'll adjourn until  
9 10:00.

10 (Recess.)

11 MR. HARROLD: Back on the record.

12 In the recess, the parties have been able to identify a  
13 list of issues. Mr. Bakstran, would you read the -- everybody  
14 has a copy, is that correct? Okay. Mr. Bakstran, would you just  
15 read through the issues?

16 MR. BAKSTRAN: Okay. The first issue, I don't know  
17 exactly which subsections of the rule this applies to, but it's  
18 more than one, and the issue is: Whether the proposed rule  
19 should have a time certain within which the Commission is  
20 required to rule on any request for a finding of confidentiality.  
21 If so, what should the time be?

22 The second issue I believe applies to Sections (3)(c)  
23 and (5)(d) or (5)(a): Whether the proposed rule should eliminate  
24 appeals from the prehearing officer's ruling in confidentiality  
25 requests.

1           The third issue: "Should a penalty such as lapse of  
2 waiver ensue pursuant to subsection (3)(a), if absent good cause  
3 shown a utility or other person fails to file a request within 21  
4 days after Staff takes possession."

5           Charles, is this a separate one right after that or is  
6 that part of --

7           MR. REHWINKEL: It's a separate one. It probably  
8 should say, "takes possession of confidential" -- what are we  
9 saying, "Information?"

10           MR. BAKSTRAN: At the end of 3, the last few words  
11 should read "Fails to file a request within 21 days after Staff  
12 takes possession of confidential information."

13           MR. REHWINKEL: Yes.

14           MR. BAKSTRAN: Issue 4: "Should paragraph (3)(b) allow  
15 any person to object to a confidentiality request?"

16           Issue 5: "What is the burden of proof on a utility or  
17 person once a petition has been filed under" -- let me reword  
18 that. "What is the burden of proof on a utility or other person  
19 under paragraph (6)(a) once a petition has been filed?" Is that  
20 -- Charles, can you help me out on that one, I'm not sure that's  
21 what we were talking about. (6)(a) is once a document has been  
22 determined to be confidential, you want to know what's the burden  
23 -- who has the burden of proof regarding showing --

24           MR. REHWINKEL: I guess once a petition has been filed  
25 pursuant to paragraph (6)(a), what is the burden of proof on a

1 utility or person requesting confidentiality.

2 MR. BAKSTRAN: Well, shouldn't that be properly phrased  
3 as "who has the burden of proof?"

4 MR. REHWINKEL: Yes. I think we talked -- Barlow said  
5 we just want to know what is the burden, and I guess maybe "who  
6 is" would be better, "who has."

7 MR. BAKSTRAN: Okay. Issue 6: "What is the meaning of  
8 the phrase "to be used in a proceeding" in paragraph (6)(b).

9 Issue 7: "What should Public Counsel's role and  
10 opportunity for notice be in Commission inquiries?"

11 Those are the issues that we've worked out. If you'd  
12 like, I'd like to go through some stipulations we've arrived at  
13 with the Small Business Council and with Florida Power and Light.

14 MR. HARROLD: Okay. Is that satisfactory? The first  
15 thing let's do, let's identify for the record Composite Exhibit  
16 1. It's in the green folder. Composite Exhibit, and the  
17 following materials are included: A copy of the FAW Notices  
18 published September 15th and September 20th of this year; a copy  
19 of the Commission's Notice of Rulemaking, issued October 13th,  
20 1989; a copy of the materials provided to the Joint  
21 Administrative Procedures Committee of the Florida Legislature,  
22 including the request for hearing by the Office of Public  
23 Counsel, written comments by Florida Power and Light, and the  
24 Small and Minority Business Advisory Council.

25 (Composite Exhibit No. 1 marked for identification.)

1 Now, what we've identified as Exhibit 1, you're going  
2 to start with -- what is that, tab number 4, is that correct?

3 MR. BAKSTRAN: Okay, we can refer to that. That's the  
4 letter from Lynette Brown.

5 MR. HARROLD: Yes. You said you were going to make a  
6 change to --

7 MR. BAKSTRAN: I don't have the language worked out at  
8 this time. I'd probably like, if it's okay with you, to file a  
9 posthearing draft of the rule with the changes suggested by the  
10 Small Minority Business Advisory Council. Basically, it would  
11 say something to the effect that the Commission shall have  
12 discretion to waive or modify the provisions of this rule in  
13 order to prevent undue financial burden on entities qualifying as  
14 small businesses under the section of the Florida Statutes that  
15 they are defined.

16 MR. HARROLD: Okay, that's satisfactory.

17 MR. REHWINKEL: Mr. Hearing Officer, I don't know  
18 exactly what we're doing right here as far as reaching  
19 stipulations. Is the party silence taken to be agreement with --

20 MR. HARROLD: What Mr. Bakstran just indicated is he's  
21 going to file a comment, file written comments after this  
22 proceeding, and he's going to include a modification to  
23 accommodate Lynette Brown, Advocate, Small and Minority  
24 Businesses. The letter we've identified at Tab 4, in Exhibit 1.  
25 Any other party that wishes to file comments or a suggestion

1 related to the same is welcome to do likewise.

2 MR. REHWINKEL: Okay. I just -- I'm not sure what is  
3 being proposed along that line, but I just would caution the  
4 Commission and the Hearing Officer that exemptions to the public  
5 record law or waiver of the public record law must comport with  
6 the legislative intent that a finding must be made before  
7 confidentiality is given. So I might want an opportunity to see  
8 what the proposal is and respond to that because I really don't  
9 know what they have in mind.

10 MR. HARROLD: It also appears to me you may wish to  
11 make that same comment in your written -- whatever it is you file  
12 in writing after this proceeding.

13 MR. REHWINKEL: Okay.

14 MR. HARROLD: Now, do you want to go to the comments of  
15 Florida Power and Light, which are at Tab 3?

16 MR. BAKSTRAN: Yes, sir. Would you prefer to go  
17 through this or go through the rule? Also, I intend to file with  
18 the change suggested by small minority businesses the changes  
19 that we are mutually in agreement on that should be made in  
20 response to the comments filed by Florida Power and Light. We  
21 can go through their comments or go through sections -- I'll go  
22 through the comments if that's what you prefer.

23 MR. HARROLD: That's probably easier for everybody to  
24 follow, I think.

25 MR. BAKSTRAN: Okay. In Tab 3 of Composite Exhibit 1,

1 the comments of Florida Power and Light -- the change we  
2 contemplate suggesting in our postfiling -- posthearing filing  
3 would occur in Subsection (2)(a), after reference to Section  
4 119.07(a), Florida Statutes, we would insert the words "and will  
5 be accorded stringent internal procedural safeguards against  
6 public disclosure."

7 In Subsection (3)(a) we would change the word "obtain"  
8 to "maintain" in the sentence that reads -- that would read, "To  
9 maintain continued confidential handling of the material the  
10 utility or other person must, within 21 days after the staff ..."  
11 Where we presently have "takes possession of," we would change  
12 that to "has obtained" and the rest of the sentence would read  
13 "material (or in the case the material obtained during the course  
14 of an audit, within 21 days after the field audit exit  
15 conference)," et cetera.

16 MR. HARROLD: Before you leave Section (3)(a), the  
17 sentence that Florida Power and Light would include, that's  
18 underscored in their comments.

19 MR. BAKSTRAN: We're not going to include that.

20 MR. HARROLD: Okay. Does Florida Power and Light still  
21 maintain that that should be included?

22 MR. McDOUGALL: Mr. Presiding Officer, with respect to  
23 one of the other changes that Mr. Bakstran will be discussing in  
24 a few minutes, we've agreed with Staff that that language is not  
25 absolutely necessary. It's implicit with respect to the change

1 in (3)(d).

2 MR. HARROLD: Very good, proceed.

3 MR. BAKSTRAN: All right. Subsection (3)(d) of the  
4 rule. I think through oversight, we left out the word "copy or"  
5 before the word "summary." We would insert those two words.

6 Subsection (3)(d). This is the change that satisfies  
7 Florida Power's concerns that you were just talking about, and  
8 that's beginning at Line 26, Page 3 of the rule. We would insert  
9 after the word "pending," "or is subject to a notice of intent to  
10 request confidential classification." The remainder of the  
11 sentence would remain the same.

12 With regard to Subsection (4) of the rule, we do not  
13 agree to insert the language Florida Power is suggesting. We  
14 feel that the Prehearing Officer will be able to use common sense  
15 in determining whether or not an internal audit report or  
16 security manual or some other statutory example would qualify for  
17 exemption. But Staff feels that to avoid an abuse of the  
18 possibility of every document, every memo being signed off by an  
19 internal auditor, they still need to show that it is a genuine  
20 audit report or other statutory example of confidential  
21 information. Is there anything more to add?

22 MR. McDOUGALL: With that understanding, Florida Power  
23 and Light's agreeable to not making that an issue at today's  
24 hearing. I think it's implicit also with that, and also with the  
25 following suggestion on the next page about -- I had suggested

1 adding (4)(f), and we've agreed with Staff not to make that an  
2 issue.

3           Those two sections -- the common sense that Mr.  
4 Bakstran just mentioned and also the Commission's comments at its  
5 earlier agenda in which they decided to publish the Staff's  
6 proposed rule, and that is that there will be certain instances  
7 in which documents really won't lend themselves to the  
8 highlighting and editing situation, and that common sense will be  
9 able to prevail in those instances, and filings can be taken up  
10 at the time that they're made, and the request for  
11 confidentiality.

12           MR. HARROLD: Is there a rule provision somewhere that  
13 indicates that common sense approach that you're talking about,  
14 or is there something that you're suggesting to accomplish that?

15           MR. McDOUGALL. Well, Mr. Bakstran indicated to me, and  
16 I agree with him, that there are other Commission rules in which  
17 in unusual situations a motion can be filed requesting an  
18 exception to the rules, editing requirements or the time  
19 deadlines. There may be a situation in which a large amount of  
20 documents are requested, and physically, it's impossible to  
21 comply with the deadline. Things of this nature.

22           MR. BAKSTRAN: The suggested changes Florida Power has  
23 presented regarding Subsection (5)(c) are not accepted by Staff.  
24 The purpose of this subsection was to facilitate discovery  
25 between parties without the involvement of the Commission.

1 Therefore, we don't want to involve the Staff in Subsection  
2 (5)(c).

3 On Page 8 of Florida Power's comments, item 9, there is  
4 reference to Subsection (7) of the rule to be consistent with the  
5 definitions that we have in the rule. Florida Power recommends  
6 changing the words "confidential material" to "confidential  
7 information" throughout that subsection, and we have no problem  
8 with that.

9 And the last suggestions of Florida Power on Page 9 of  
10 their comments, to add Subsections (2)(c) and (3)(e), Staff does  
11 not agree with those changes.

12 MR. McDOUGALL: I might add that we have agreed not to  
13 make this an issue, due to my discussion with Mr. Bakstran, that  
14 this concept is implicit in the rule already that stringent  
15 safeguards against public disclosure includes oral disclosures as  
16 opposed to keeping the document itself physically confidential.

17 MR. HARROLD: All right. If I go back to (5)(c), Staff  
18 objected and I do not have your position on that at this time.

19 MR. McDOUGALL: Florida Power and Light does not take  
20 issue with Staff's disagreement on this, and we do not wish to  
21 make that an issue here today. This was merely a suggestion for  
22 Staff to take or leave.

23 MR. HARROLD: Thank you.

24 Mr. Bakstran, you've now gone through Florida Power and  
25 Light's comments, indicated some suggested -- that the ones you

1 agree with and the ones that Staff still disagrees with. Any of  
2 the other parties have any comments regarding these that we ought  
3 to take up now?

4 MR. REHWINKEL: We have not analyzed them in detail.  
5 What the Staff has agreed to sounds reasonable, but we would like  
6 to reserve the opportunity to comment, if necessary, in  
7 posthearing filings.

8 MR. HARROLD: Very good.

9 MR. REHWINKEL: But it looks okay at this point.

10 MR. HARROLD: Okay, thank you.

11 MR. REHWINKEL: I think one further, and I don't know  
12 if when we gathered around we had an agreement on the --

13 MR. BAKSTRAN: I'm sorry.

14 MR. REHWINKEL: -- the language that should be in  
15 (5)(c) -- (5)(a).

16 MR. BAKSTRAN: That's an oversight also.

17 MR. REHWINKEL: It's related to one of the issues we  
18 raised. We may be able to eliminate it.

19 MR. BAKSTRAN: We're talking about Line 21, right,  
20 Charles?

21 MR. REHWINKEL: Yes.

22 MR. BAKSTRAN: "Upon a showing that the material is  
23 entitled to protection," we believe we should add the words "upon  
24 a showing and a finding by the Commission."

25 MR. REHWINKEL: I would say "a showing by the Utility

1 or person requesting confidentiality in a finding by the  
2 Commission," that would be the language --

3 MR. BAKSTRAN: Well, that's understood, isn't it? The  
4 statute doesn't even say that, does it?

5 MR. REHWINKEL: I think -- at least the telephone says  
6 "upon a showing by the company and a finding by the Commission."

7 MR. BAKSTRAN: All right. Would you read that again?

8 MR. REHWINKEL: I would say, "Upon a showing by the  
9 Utility or a person requesting confidentiality, and a finding by  
10 the Commission, that the material ..."

11 MR. BAKSTRAN: And so forth.

12 MR. REHWINKEL: Yes.

13 MR. SELF: Excuse me, I guess it should technically be  
14 "upon a showing by the Utility or other person."

15 MR. REHWINKEL: Oh, okay, I'm sorry, "or other person."  
16 I was just trying to use the same language. So it should be  
17 after the word "showing," "by a utility or other person and a  
18 finding by the Commission." (Pause)

19 MR. BAKSTRAN: Charles, I hate to split hairs here.

20 MR. REHWINKEL: Sure.

21 MR. BAKSTRAN: Do you have a copy of the statute with  
22 the changes made to our confidentiality statute, Chapter 89-292?

23 MR. REHWINKEL: Yeah, somewhere. Okay.

24 MR. BAKSTRAN: I don't know, this may be just too  
25 semantic: "Upon a showing by a Utility or other person and a

1 finding by the Commission that discovery will require the  
2 disclosure of proprietary confidential business information, the  
3 Commission shall issue appropriate protective orders." Reading  
4 that in pari materia with Subsection (1), which just says "any  
5 records received by the Commission which are shown and found by  
6 the Commission will be proprietary confidential business  
7 information" -- I'm just wondering --

8 MR. REHWINKEL: Oh, you mean about your language about  
9 showing and finding?

10 MR. BAKSTRAN: No, the additional language you've added  
11 -- "upon a showing by a utility and -- or other person that  
12 material is entitled to protection" -- I'm just wondering in the  
13 context of, say, a small business that may not be able to hire  
14 the attorneys and accountants to show that something is  
15 confidential, that Staff might help them find that it is, does  
16 the showing have to be by the Utility or other person that we're  
17 talking about?

18 MR. REHWINKEL: Well, that's something I hadn't  
19 considered.

20 MR. BAKSTRAN: What we had here was "upon a showing and  
21 a finding by the Commission that the material"; the showing would  
22 include showing by the Utility or person that owns the records.  
23 But I'm wondering if that showing could also be made by some  
24 other person?

25 MR. REHWINKEL: That's a legal determination I haven't

1 really thought through.

2 MR. BAKSTRAN: I don't know either. I'll let that pass  
3 for now. Why don't you file your suggested change on that.

4 MR. REHWINKEL: Okay. All right.

5 MR. BAKSTRAN: I'm sorry for that interruption.

6 MR. HARROLD: Okay. You've now been through all of the  
7 modifications to your original rule proposal.

8 MR. BAKSTRAN: In response to the comments that have  
9 been filed by Small Minority Business and Florida Power.

10 MR. HARROLD: Okay.

11 MR. BAKSTRAN: And the one we just discussed.

12 MR. HARROLD: Yes. As to Office of Public Counsel's  
13 comments, from the comments, we've narrowed it down to the seven  
14 enumerated issues, is that correct?

15 MR. BAKSTRAN: Yes, sir, I believe so.

16 MR. HARROLD: And they did not submit proposed  
17 revisions to go through, so at this time it might be appropriate  
18 just to start taking witnesses. Does that sound appropriate?

19 MR. BAKSTRAN: I don't think we're going to have  
20 witnesses. I think we're basically going to be arguing this.  
21 We're prepared if a factual issue comes up to put on witnesses  
22 regarding internal procedures of the Commission, the economic  
23 impact statement and so forth if you desire.

24 MR. HARROLD: Okay. Are you suggesting that at this  
25 time it's appropriate for Public Counsel to proceed with its

1 witnesses.

2 MR. BAKSTRAN: I don't they have witnesses.

3 MR. REHWINKEL: We have no witnesses. We just intended  
4 to give argument today on our position.

5 MR. HARROLD: Okay. Are we now at the appropriate time  
6 in the proceeding where we're ready to start with that part of  
7 this proceeding?

8 MR. REHWINKEL: I believe so.

9 MR. HARROLD: Okay. And since Public Counsel has the  
10 bulk of the issues, do you wish to go first?

11 MR. REHWINKEL: Okay.

12 MR. BAKSTRAN: Before you do, may I ask a question? Do  
13 you want us to interact on a give and take, or let you discuss  
14 everything, or how do you want to proceed, issue by issue?

15 MR. REHWINKEL: I would prefer -- yeah, probably issue  
16 by issue would be the best way to do it.

17 MR. HARROLD: Yeah, issue by issue. After you finish  
18 your comments in one issue, we'll go through and each of the  
19 parties who wish can comment or not comment, and that will be  
20 easier to track, I believe. So you may proceed with Issue No. 1.

21 MR. REHWINKEL: First of all, I would like to make a  
22 preliminary statement about our participation in this proceeding  
23 and what prompted us to intervene in the manner we have.

24 The Public Counsel, as representatives of the customers  
25 of the utilities regulated by this Commission, has several

1 interests with respect to the Commission's rule on  
2 confidentiality and how they go about finding confidentiality.

3           Probably paramount in Public Counsel's participation on  
4 this with regard to confidentiality is that we have a natural  
5 aversion to conducting our business before the Commission in any  
6 closed manner. We feel that there is a presumption in this state  
7 that the business of government be conducted as openly as  
8 possible. We feel that is the legislative intent. Public  
9 Counsel is a governmental agency, it is an arm of the  
10 Legislature, and we feel that we have an obligation to the people  
11 of Florida to operate publicly.

12           Additionally, as legal representatives of customers in  
13 proceedings before the Commission, we, at times, have the need to  
14 communicate with our clients. And in communication with our  
15 clients sometimes involves what the facts of the case are,  
16 sometimes it involves letting the clients know how we are seeking  
17 to represent their best interest, and we feel that certain  
18 information is necessary to communicate with the clients.  
19 Additionally, it is necessary that they be allowed to see the  
20 information to evaluate how government is doing its business and  
21 spending the taxpayer's money.

22           Additionally, and I believe this rule is in some  
23 instances a positive step in this direction, Public Counsel has  
24 been needlessly hindered in receiving information, both for use  
25 here in Tallahassee by the Public Counsel's own employees, as

1 well as those agents of the Public Counsel that are outside  
2 witnesses or expert witnesses that live in Michigan or  
3 Connecticut, or Washington, D.C., or elsewhere in the state of  
4 Florida even.

5           So we do have a problem with getting rulings on  
6 confidential information in a timely enough manner to effectively  
7 pursue our interest in the case and represent our clients, and  
8 that has been a problem that we have had. At times, we feel that  
9 confidentiality requests and the protracted proceedings  
10 associated with them have been used as delay or diversionary  
11 tactics from the real issue of the case.

12           And finally, we have at times been asked to directly  
13 participate in that portion of the confidentiality determination,  
14 which is the showing by the company and the finding by the  
15 Commission. And at times we have been very unwilling  
16 participants in this, and let me elaborate.

17           We are not the people that the Commission must ask  
18 whether an item is confidential or not. The confidentiality  
19 rises or falls on whether the company has met its burden and  
20 whether the Commission has the facts to make a finding. And the  
21 burden of proof is on the company to make its showing. We have  
22 absolutely nothing to do with that. So we do not like to be put  
23 in the position of being the ones that are asked whether an item  
24 is confidential or not.

25           I think we must proceed from the presumption here, that

1 all documents received by governmental agencies are public  
2 records. I think sometimes there is confusion about that. The  
3 only question is whether these public records can be inspected or  
4 not. And whether they can be inspected or not falls within a  
5 narrowly defined exemptions from the Public Records Law. We  
6 believe it is the intent of the legislature that the Public  
7 Records Law be as broadly interpreted as possible and that  
8 exemptions be as narrowly interpreted as possible.

9 To achieve this proper result of legislative intent, it  
10 is necessary for the Commission to take affirmative action and  
11 make findings as to whether confidentiality exists.  
12 Confidentiality should not be a de facto or default process  
13 whereby it occurs through inaction. And we strongly believe that  
14 that should be the guiding light of this Commission in  
15 determining how its rules are to be implemented and effectively  
16 to operate.

17 I turn now to our first position, which is Issue 1, has  
18 been identified and read into the record by Mr. Bakstran.

19 MR. HARROLD: Before you start Issue 1, does anybody  
20 else have a preliminary or opening statement that they wish to  
21 make?

22 MR. FONS: I do, but I'd like to reserve it until we  
23 address Issue 1, I don't know, unless you would prefer that we go  
24 ahead.

25 MR. BAKSTRAN: I might just point out that the

1 Commission is also opposed to conducting business other than in  
2 the sunshine. I would say they have an visceral aversion to  
3 doing anything other than conducting its business in public. We  
4 stringently try to avoid closing doors, and we -- I believe this  
5 rule change is for placing a greater burden on utilities to show  
6 that they are entitled to confidential treatment.

7           And I just have one question, rhetorical question. I  
8 was just wondering, with regard to Public Counsel's suggestion  
9 that they need to be able to disclose evidence and information to  
10 their clients so that they can understand what they are doing.  
11 I'm just wondering how they could do that, disclose trade secrets  
12 to their clients, and not disclose them to competitors of  
13 utilities. So that was just basically a rhetorical question in  
14 response to the opening statement.

15           MR. HARROLD: Are you ready to go to Issue 1?

16           MR. REHWINKEL: Yes.

17           I can just quickly answer that. I know it was -- I  
18 understand it was rhetorical, but we have no intention of ever  
19 disclosing confidential information determined by Commission  
20 Order or even identified in a Commission Order as being  
21 confidential to our clients. We only were making these points  
22 and not intended as any slight to the Commission about openness,  
23 and our need to communicate with our clients is that that need  
24 and that desire, on our part, drives our position in this docket,  
25 that the exemptions from the public record law be as narrowly

1 given as possible. So we certainly do not believe that if a  
2 trade secret, which is identified in the statute, is involved,  
3 that that should be disclosed. Because it's been the  
4 Legislature's determination that trade secrets must be kept  
5 confidential, so I would agree with you there.

6           The first issue is, "Whether the proposed rule should  
7 have a time certain within which the Commission is required  
8 to rule on any request for a finding of confidentiality."

9           It is our position that coupled with the numerous types  
10 of temporary exemptions and exemptions pending confidentiality  
11 requests or exemptions that are given, while a Notice of Intent  
12 to Request a Confidentiality have been given by the companies,  
13 that any inordinate delay in ruling on such request may well  
14 violate the spirit of the Public Records Law and the  
15 Legislature's intention that only these areas of the public  
16 records, which are being kept from public inspection, be given  
17 based on a finding by the Commission. We think that the  
18 Commission, as the body which has been entrusted with the  
19 granting of exemptions from inspection of public records, has the  
20 obligation to expediently rule upon requests for confidentiality.  
21 We understand the administrative burden argument that is implicit  
22 in the Commission's rule; we understand the utility's desire not  
23 to have bona fide confidential information be disseminated in a  
24 way that would harm both the company and its ratepayers.  
25 However, we feel that the Commission must have an affirmative

1 obligation to quickly rule upon requests, and not let requests  
2 for confidential determination languish for months upon end.  
3 Because, while those requests are indeed languishing, the  
4 temporary exemptions, which are given without any finding or any  
5 determination that they should, in fact, be given, are keeping  
6 public records from inspection by the public.

7 I think our opinion is adequately stated in our written  
8 comments, and I would be glad to entertain any questions or  
9 comments by the parties.

10 MR. HARROLD: Do any of the parties wish to comment?

11 MR. SELF: I have a question. I'm just trying to see  
12 exactly what type of clarification or procedure you're talking  
13 about.

14 With respect, for instance, to Section (3), paragraph  
15 -- I guess it would be (c), and, I guess also as well, the last  
16 sentence of Paragraph (b). I believe in your comments you said  
17 that you would like seven days after the response to the request  
18 is received, is that right?

19 MR. REHWINKEL: Yes.

20 MR. SELF: Okay. So, I guess theoretically, with  
21 respect to Section (3), you're talking about Paragraph (c) and  
22 you'd want seven days put in there.

23 MR. REHWINKEL: I would say the language -- my  
24 suggestion would be that that language should read "Request for  
25 confidential classification and any objections filed in response

1 thereto shall be ruled upon by the Prehearing Officer assigned to  
2 the docket within seven days after receipt of the request or  
3 objection," whichever is later. That would be how --  
4 conceptually what we're talking about there.

5 MR. SELF: Okay. I have no further comments or  
6 questions at this time.

7 MR. BAKSTRAN: Are you suggesting that if the  
8 Commission fails to issue a ruling, that the document would  
9 become public record?

10 MR. REHWINKEL: I probably couldn't suggest that by  
11 virtue of the fact that it would not be the fault of the utility  
12 that the Commission had not acted. I think that the Commission  
13 should be guided by some definite time frame upon which to rule,  
14 especially because you have these temporary exemptions out there.  
15 And that's what really -- I think those two coupled create at  
16 least a question as to whether the Commission is complying with  
17 the Legislature's intent that confidentiality be narrowly  
18 stingily given out or accorded.

19 MR. BAKSTRAN: Let me just explain the reasoning I had  
20 in asking that was that under the spirit of the Administrative  
21 Procedure Act, if someone files for a license from an agency and  
22 that agency does not act on that within, I think, 180 days, the  
23 petitioner can then get what he wanted, and that is to start  
24 operating even without the license. So by analogy, to be  
25 consistent with what the purpose of the APA is, if someone asked

1 for confidential treatment of a document and the Commission fails  
2 to act on it, then it would seem that they should be granted  
3 confidential status. Yet the statute regarding confidentiality  
4 does not address that and it requires the Commission make a  
5 finding, although it's silent as to a time frame.

6 Do you think that that's something that could better be  
7 addressed in our Administrative Procedure Manual, with language  
8 such as, "the Commission should rule on this within so many days"  
9 and not put that into our rule?

10 The reason I say that is that a time period for issuing  
11 a ruling, from a practical standpoint, could not be adhered to  
12 consistently. If it were to be adhered to, the time frame would  
13 have to be so great as to basically be meaningless.

14 MR. REHWINKEL: That may be what would be useful --  
15 because I think if whoever would have a problem with a lack of a  
16 ruling, their ultimate remedy probably would be mandamus. Maybe  
17 the language should say, "shall rule expeditiously", just to make  
18 it clear that there should be an effort. Looking at (3)(c),  
19 "Requests and any objections thereto shall be ruled upon by the  
20 Prehearing Officer and assigned to the docket in an expeditious  
21 manner." I think that right now there is very little desire to  
22 rule expeditiously on confidentiality requests.

23 MR. BAKSTRAN: Let's add a sentence to (3)(c) or  
24 propose a sentence to (3)(c) to plug in there what you want,  
25 rather than try to insert it into --

1 MR. REHWINKEL: Okay. I'd just say after that where it  
2 says "Prehearing -- Prehearing Officer's ruling."

3 MR. BAKSTRAN: I'm concerned that it gets to be  
4 confusing trying to read it. I think it would be more  
5 understandable if we had a separate sentence.

6 MR. REHWINKEL: At the end of that sentence, between  
7 lines 22 and 23

8 MR. BAKSTRAN: Yes.

9 MR. REHWINKEL: "All rulings should be made in the most  
10 expeditious manner possible."

11 MR. BAKSTRAN: Or words to that effect.

12 MR. REHWINKEL: Yes. I'm still working with this like  
13 you are. I just want to -- the concept that we have is that  
14 there is -- should be more expedition in the process, and that's  
15 what we want to bring to the Commission's attention at this point  
16 in the rulemaking, that we think it is a serious problem. And I  
17 don't think there is any hard and fast way to deal with it, but  
18 that would be one suggestion there. It may even be better than  
19 putting in a time certain.

20 MR. HARROLD: Mr. Rehwinkel, would you explain for me  
21 the problem caused by the Commission not issuing a ruling on a  
22 request for confidentiality within seven days? The Commission  
23 gets a request, and it doesn't rule within seven days, what  
24 problem does that cause your office?

25 MR. REHWINKEL: Well, to the extent that we have a

1 problem with operating under confidentiality restraints,  
2 confidentiality is granted de facto because the presumption is  
3 that as long as the utility deems it confidential, it continues  
4 on -- continues to be confidential until some action occurs,  
5 which upsets that notion.

6 MR. HARROLD: And isn't that true because to do  
7 otherwise there, in effect, would be no confidentiality.

8 MR. REHWINKEL: I agree. That's exactly right.

9 So I think the Legislature does not intend that these  
10 exemptions from inspection of public records occur without  
11 affirmative -- without fiat by the Commission. And I think that  
12 there is, without a doubt, it is impossible to avoid some amount  
13 of de facto confidentiality. I think that the Commission should  
14 endeavor to reduce that de facto confidentiality.

15 MR. HARROLD: Okay. In looking at the statutory  
16 changes, I note a reference to Rule 1.280 of the Florida Rules of  
17 Civil Procedure. To the extent there is anything in the Rules of  
18 Civil Procedure that assists in terms of this time frame, any of  
19 the parties that wish to comment, please do so. If it doesn't  
20 exist, then that's fine.

21 The other part of my thought is that to the extent  
22 there are problems caused, as you just indicated, where the  
23 Commission does not quickly issue a ruling is burdensome for you  
24 to handle these documents that are at least temporarily  
25 confidential. The same burden of proof exists on the Commission

1 and its Staff, and so to that extent there should be the same  
2 desire to get this -- to get a final order of the Commission or  
3 get something final from the Commission to say it is or it isn't,  
4 so that only those documents that are, in fact, confidential,  
5 entitled to confidential status, get this special treatment.

6           The other thing that occurs to me is that to the extent  
7 it causes some other kind of problem, perhaps some sort of delay  
8 in whatever proceeding is going on. In other words, instead of  
9 running into hearing dates or whatever other problems may be  
10 occasioned by not getting information, not having information,  
11 not being able to use it in other fashions. That's the only  
12 other thing I can think of that might relate to a more  
13 expeditious or quicker handling of these requests.

14           MR. REHWINKEL: Let me give an example.

15           We've talked some about paragraph (5)(c), and what that  
16 does, from my understanding, is that the way it's worked in the  
17 past, is that -- the language in there is that "when a utility  
18 agrees to allow Public Counsel to inspect or take possession of  
19 utility information for the purposes of determining what  
20 information is to be used in a proceeding before the Commission."  
21 What we've done in the past, is my understanding, is that we've  
22 really been allowed to go over and look at the information and  
23 call out what we think we ultimately will use, whatever that  
24 means. But in the temporary Protective Order will issue -- I'm  
25 not sure that this has been a process that we have strictly used

1 in the past or that this rule would cure the problem of getting  
2 the information to an expert witness in Bethesda, Maryland, for  
3 instance. So if there is a delay in getting the Protective Order  
4 that the company feels they need to feel comfortable about  
5 letting that stuff go out the door, if there is a delay in  
6 reaching a determination about when we're going to finally get a  
7 confidentiality ruling, that hurts us. And so I'm not sure we're  
8 in the same boat as the Staff, because the Staff can -- for  
9 instance, if they are doing an audit, they can go and look at the  
10 information. And they don't really have the problem we have as  
11 far as getting information to outside consultants, for example,  
12 so --

13 MR. HARROLD: Okay. And I would encourage you to come  
14 up with with a proposed solution, to the extent you get a time  
15 delay of the nature you just discussed. It seems it might be  
16 appropriate to me to ask for some continuation of the proceeding  
17 to give you the additional days until the ruling is made, or  
18 whatever, and there may be something you can think of to add to  
19 the rule to specifically relate to that. I don't know. But I  
20 would encourage you to consider that.

21 MR. REHWINKEL: Okay.

22 MR. BAKSTRAN: Mr. Hearing Officer, I find a correction  
23 needs to be made to Issue 6 that we're going to discuss later.

24 I think we read into the record, "What is the meaning  
25 of the phrase 'to be used in a proceeding.'" in Paragraph (6)(b),

1 that should read "in Paragraph (5)(c)."

2 MR. REHWINKEL: Yes.

3 MR. HARROLD: Okay. That correction is noted.

4 MR. HARROLD: Does anybody else want to comment on  
5 Issue No. 1?

6 MR. FONS: If I may, John Fons representing Southern  
7 Bell and Tampa Electric.

8 Before commenting on this particular rule, because I  
9 think it goes to the heart of the discussion that Public Counsel  
10 has raised here, let me just say that Tampa Electric and Southern  
11 Bell both believe that the rules as proposed are -- on the whole,  
12 are a next logical step in the progression of rules on  
13 confidentiality.

14 The current rules were rules that came about after a  
15 great deal of work among the parties to try to address what was  
16 becoming a new problem in the area, and that is competition and  
17 the documentation that results when you are in a competitive  
18 environment and the need to protect business records that relate  
19 to competition.

20 I think that the new rules attempt to balance the needs  
21 of the public to have access to documents as well as the needs of  
22 companies to protect records that would have a disastrous effect  
23 on them, if they were made public, because competition would have  
24 the access to materials that the companies that worked hard to  
25 prepare in order to meet the competitive environment.

1           We think the rules do that. We think that the changes  
2 that are being suggested by Public Counsel are what might thus be  
3 characterized as time-frame problem with respect to the  
4 procedures, and, unfortunately, some of the anxiety of Public  
5 Counsel and the changes that they are seeking to make here result  
6 in an imbalancing of the rights of the parties. The greatest  
7 fear that has to be continued to be recognized by this Commission  
8 is that if a document is released to the public through  
9 inadvertence or through whatever might happen, and the document  
10 is truly confidential, that once it has been made public, it is  
11 no longer confidential. You can't put the toothpaste back in the  
12 tube. And so to the extent that the Commission must look at  
13 these documents carefully and cautiously, that takes time.

14           We certainly agree that the Commission ought to act  
15 expeditiously, but the Commission ought to have whatever time it  
16 needs to look at these documents to make sure that a mistake is  
17 not made. The damage can be enormous.

18           So to the extent that Public Counsel is concerned about  
19 the Commission acting in a particular time frame, I think the  
20 step that was just taken with regard to the first issue,  
21 addressing it in terms of expedition rather than in a particular  
22 time, is the right way to go. The Commission must maintain the  
23 flexibility for the Commission to carry out the mandate of the  
24 Legislature, and the mandate of the Legislature is that  
25 confidential records must be exempted from the Public Records

1 Law. And the Commission has the discretion to do it, and it must  
2 be afforded timely fashion; the time necessary to make its  
3 decisions.

4 And I think I've responded now to Issue No. 1, and that  
5 is we would certainly agree that the insertion of some language  
6 to show that the Commission must act expeditiously would be of  
7 benefit to not only the Public Counsel but to the utilities as  
8 well as to the ratepaying public.

9 I would like to make one correction to something that  
10 Mr. Rehwinkel said, and that is that the public needs to make  
11 sure that the taxpayers' money is being spent wisely. I believe  
12 the taxpayers do not support the Public Service Commission, but  
13 the utilities do in the regulatory assessment fees.

14 MR. REHWINKEL: Our office is supported by taxpayer  
15 money.

16 MR. McDOUGALL: I'd like to respond to Mr. Fons.

17 On behalf of Florida Power and Light, I'd like to echo  
18 Mr. Fons' comments and also point out that this is a general rule  
19 of application. And when you're trying to draft and apply a  
20 rule, it does need to be of general application to take into  
21 account each individual instance. The Commission does need the  
22 flexibility to look at particular individual requests for  
23 confidentiality, on a case-by-case basis, to be able to have that  
24 flexibility that Mr. Fons indicated to give a careful look at  
25 what the information is. It could be one piece of paper versus

1 500 or more.

2 A specific time period in a rule, I don't think, would  
3 be the best way to do it. The suggestion of putting in the  
4 expeditious language would be more appropriate. You can't design  
5 a rule to apply in every instance if you put specific  
6 requirements in. So I think the addition of expeditious is  
7 better from that perspective; not to mention if a seven-day time  
8 requirement were put in, I question whether the Commission could  
9 hold the hearing and get all the testimony in and conclude the  
10 hearing and get a transcript within seven days. So these are  
11 practical things that need to be taken into account when you're  
12 looking at a rule like this.

13 MS. LILES: Teresa Liles for Gulf Power.

14 I would certainly concur in all the comments that have  
15 just been made. We think even though there is some delay built  
16 in with a temporary exemption from the Public Records Law, when a  
17 request is filed, that that temporary exemption is absolutely  
18 necessary to protect the material. And we do feel that a  
19 comprehensive review by the Commission needs to be undertaken.  
20 And we would object to any specific time limit that would not  
21 allow the Commission to use its full discretion and to  
22 comprehensively review these requests before issuing a ruling.  
23 We would prefer that any language be as flexible as possible to  
24 allow the Commission to make that determination.

25 MR. HARROLD: Any further comments on Issue No. 1?

1 MR. REHWINKEL: I would like to just say that maybe  
2 instead of an up-front that you may want to put, or we may even  
3 suggest that the cap, 90 days, would be put on this. In other  
4 words, put a time period beyond which it would just be deemed  
5 unreasonable to have -- let a confidentiality request result in a  
6 de facto finding. I don't know if that's appropriate or not. I  
7 throw 90 days out just as a theoretical position. I don't know  
8 what we would suggest or if we would suggest that, but hearing  
9 the comments before, that they don't want the Commission to be  
10 rushed, I can understand that, but you also don't want it to  
11 languish. So that's the point we would make.

12 MR. FONS: May I ask a question of Mr. Rehwinkel?

13 In putting any cap on it, if the cap is not met, what  
14 is the next step? It sounds as if the Commission doesn't rule on  
15 the request for confidentiality within 90 days, what happens  
16 then? Does the material then not receive confidential status,  
17 which would be the worst possible thing that could happen?

18 MR. SHREVE: May I answer that?

19 MR. HARROLD: Sure.

20 MR. SHREVE: I think you have a legitimate concern  
21 there, and after Mr. Bakstran pointed out the possibilities of  
22 that becoming the case, I'm not sure that that should be the  
23 situation, because it would, in fact, probably be the utility  
24 that was penalized and may very well not be at fault in the  
25 situation. I'm not sure that I think the cap should be there

1 either. I think it's something that -- may be some indication;  
2 but, here again, I don't think we should be in a position of a  
3 cap being put in there that would tend to extend the time. And  
4 the Commission might tend to take more time or feel that would be  
5 the maximum that should be taken -- I mean, should be the maximum  
6 but not necessarily the minimum. So I would say, here again, it  
7 would benefit all parties to have the rulings as quickly as  
8 possible because there are situations where the utilities  
9 actually would have no problem with furnishing the material; yet  
10 the utilities appear at times to be concealing the material when  
11 they haven't furnished it. Yet, they are willing to furnish it,  
12 at least to our office, once a ruling is made on confidentiality,  
13 so I think it would be of benefit to all to go ahead and have the  
14 rulings as quickly as possible and expeditiously as possible.

15 MR. BAKSTRAN: May I ask one question?

16 Out of the 150 or so confidentiality requests filed so  
17 far this year, how many of those do you feel are critically  
18 important that you get as soon as possible, get a ruling on as  
19 soon as possible? Just in terms of practical terms, have there  
20 been any of the 150 requests that are outstanding -- or have been  
21 filed this year that you feel needed prompt attention?

22 MR. SHREVE: Yes, I think they all need prompt  
23 attention. I think all need prompt attention. I see no reason  
24 not to have prompt attention. And the reason it all becomes  
25 critical, depending on the time, if you're beginning to push a

1 hearing as the Hearing Officer pointed out, perhaps there should  
2 be some built-in time frame extension, because the Office of the  
3 Public Counsel and possibly the Staff of the Commission are the  
4 ones that are burdened by not being able to use the information,  
5 particularly if they don't get it. If they have it, they may be  
6 able to go ahead and use it, but it may be more cumbersome. The  
7 longer the delay, the more critical it becomes because you lose  
8 time in preparing your case.

9 I don't think you can say 75 out of 150. How many out  
10 of the 150 have we not had rulings on? I'm really not sure.

11 MR. BAKSTRAN: Well, I don't know either. But the  
12 question I think I was trying to get at was, of all the requests  
13 for confidential classification that were filed this year, how  
14 many of them do you feel have delayed you in pursuing or  
15 preparing for your case?

16 MR. REHWINKEL: I don't know. I don't have an idea of  
17 how many but I can give you a good example.

18 In the Southern Bell depreciation docket, which was  
19 originally scheduled for the end of this month, we were delayed  
20 until -- from probably January through September in receiving the  
21 information in a manner that would allow us to send it to our  
22 outside consultant. So we would have been put -- instead of  
23 having the full 10 or 11 months preparation time, we were, at  
24 that time, put in the position of having less than three months.  
25 Fortunately the docket was -- and not really related to the

1 confidentiality matter, the docket was moved back into 1990, the  
2 hearing time. So we got more time, but we were almost in the  
3 position of being seriously hampered in our case, and that's just  
4 an example that I have.

5 MR. BAKSTRAN: Can I ask you, is that under the old  
6 rule that problem arose? Because if you look at (5)(c) under the  
7 rule we're proposing now, that has been put into the rule to  
8 facilitate your discovery in preparation for hearing. If you can  
9 agree with the utility and they agree to let you take the stuff,  
10 to send it to your consultants providing they agree not to  
11 disclose it, won't that eliminate a lot of the problems you had  
12 as far as getting access to a lot of these dockets?

13 MR. REHWINKEL: If there is clarification that that is  
14 what is meant by that rule.

15 MR. BAKSTRAN: "Takes possession of," I think that  
16 means you can send them to your agents and let them look at it  
17 provided they agree not to disclose it. Wouldn't that eliminate  
18 the problems you've just been discussing?

19 MR. REHWINKEL: And if the utility would agree.

20 MR. BAKSTRAN: That they would have to, to begin with.  
21 Yes, that's --

22 MR. REHWINKEL: Yes. That's one of the problems.

23 MR. BAKSTRAN: I think if you analyze (5)(c), I think  
24 you are going to see that that's going to really eliminate a lot  
25 of the problems you've had with discovery.

1 MR. REHWINKEL: Of course, you understand that the  
2 discovery delay is only one of the problems we have with the  
3 delay in the ruling, so, yeah. But I that doesn't even entirely  
4 satisfy our discovery problems.

5 MR. SHREVE: Mr. Bakstran, I think you have to also  
6 understand that we probably don't have as much of an argument  
7 with the utilities as sometimes would appear over confidential  
8 treatment. Generally speaking, there has been a pretty good bit  
9 of cooperation in allowing us to get the information if we can  
10 take care of making sure that everyone's rights are protected.  
11 But I think one of the problems that you must face is not just  
12 whether we have the information or not, the confidentiality may  
13 not interfere with us processing the case. When you're talking  
14 about exceptions from the Public Records Law, you're talking  
15 about exceptions from the public being able to view material in  
16 the public records.

17 I think there should be exceptions to it, and I think  
18 when the company makes the showing and the Commission issues a  
19 finding on that, there is protection there for the company and  
20 sometimes that protection is really for the public. But it's not  
21 just us processing the case. Here, I think, basically, you'd  
22 have to also look to protecting the public's rights in that and  
23 not allow something to be held confidential over an extremely  
24 long period of time just because a request is made. And I think  
25 that's probably the primary issue here. And I think that's

1 something the Commission will want to face because you don't want  
2 to take something out of the Public Records Law without a  
3 showing. And a finding.

4 MR. BAKSTRAN: I thought I was responding to the  
5 example that a hearing had been postponed and you're having  
6 trouble with discovery.

7 MR. REHWINKEL: Let me make one more point along the  
8 line of your point, and this is what gives me a problem with  
9 (5)(c), is that there's qualifying language there that we've been  
10 given inspection rights or possession rights for the purpose of  
11 determining what information is to be used in a proceeding.

12 Now, what we've done -- and this has been mostly with  
13 Southern Bell -- they have offices here; they send the stuff  
14 down; we go and look at it in their offices. There may be 15,000  
15 pages. We'll identify 5,000 pages that we want to use and take  
16 possession and send off to whomever. So it's -- actually, when  
17 we're able to use it to process our case and put it together and  
18 not necessarily -- our experts wouldn't be involved necessarily  
19 in determining whether we're going to use it in the document,  
20 although they may be. But it's not clear that this would allow  
21 us to actually substantively use the information to prepare our  
22 case.

23 MR. BAKSTRAN: Okay. I think we're getting into Issue  
24 6. Why don't we wait.

25 MR. REHWINKEL: That's one of the problems. See, if

1 there is a delay, though, and this language isn't clear, then we  
2 are actually substantively hampered in putting our case on.

3 MR. HARROLD: Okay, Issue No. 2.

4 MR. REHWINKEL: Okay. This issue is whether -- and it  
5 also goes with the delay process. The delay problem was whether  
6 there is some way that the Prehearing Officer's ruling -- whether  
7 we could cut out some of the steps that we feel contributes to  
8 delay in actually getting a ruling on confidentiality. And I  
9 think probably, after talking with Mr. Sexton about this, that I  
10 have come to believe that it would be almost impossible under  
11 this rule and Rule 25 -- whatever the procedural rules on  
12 Prehearing Procedure are -- that this would be a very difficult  
13 one to cut out that step. But what I might want to suggest, and  
14 this is related to a decision that was issued in the Docket  
15 890256, Order No. 21930, wherein, the Prehearing Officer issued  
16 what in effect was a PAA, that went out for the parties to  
17 protest. And it was protested, and it came back to the  
18 Prehearing Officer.

19 Maybe what would be best would be to limit the  
20 Prehearing Officer's decision to one ruling. In other words, you  
21 don't have to worry about him making two rulings. After his  
22 ruling, what happens is it then goes to the panel. You don't  
23 have any other intervening steps or revisiting by the Prehearing  
24 Officer. That may be one way to cut some of the time, some of  
25 the delay out of this.

1           Maybe what would be appropriate would be to add a  
2 sentence at the end of (3)(c) "that the Prehearing Officer shall  
3 make only one ruling with respect to confidentiality -- with  
4 respect to each particular confidentiality request."

5           MR. FONS: May I comment on that, please?

6           MR. REHWINKEL: Sure.

7           MR. FONS: Certainly we don't want this to go on  
8 interminably, but there needs to be a point at which the matter  
9 gets resolved. I think, though, what we have found in these  
10 situations is that when you go to the Prehearing Officer, that  
11 things come out of the prehearing argument, or the appearance  
12 before the Prehearing Officer on the confidentiality, which is  
13 more than just the Prehearing Officer's ruling. Things are oft  
14 times negotiated at that point in time, and that -- and even  
15 after the Prehearing Officer issues his order, that it then  
16 becomes clear which direction this is going and further  
17 accommodation is made, which is what has happened most recently  
18 in the docket that Mr. Rehwinkel mentioned earlier; that is, the  
19 Southern Bell Capital Recovery proceeding. Whereafter, the  
20 Prehearing Officer ruled, the parties got together to see if they  
21 could not agree with what he had ruled on, and I think worked out  
22 further details.

23           So again, putting a limit on the Prehearing Officer at  
24 this point in time may actually cause greater delay. Because if  
25 you can't go back to the Prehearing Officer and work with him,

1 then it has to go to the full panel, and it's awfully difficult  
2 to find time, in some cases, to go to the full panel. So I think  
3 that may be creating more delay rather than less by giving the  
4 Prehearing Officer just one bite at the apple.

5 MR. SHREVE: I don't really take issue too much with  
6 what Mr. Fons said, but I want to make sure that one thing is  
7 clear in his remarks where he said that there wouldn't be any  
8 negotiations between the parties.

9 I think it's very clear that no one can stipulate or  
10 negotiate the confidentiality of a document. The only way that  
11 that that document can become confidential and be excluded from  
12 view in the Public Records Law is on a showing by the company,  
13 and a finding by the Commission. So that cannot be stipulated  
14 to, and I don't think that's what you meant, but when you say  
15 "negotiated," I don't want anybody to think we would be able to  
16 stipulate, or any governmental agency would be able to stipulate  
17 to that extent, and that is not the case.

18 MR. FONS: Jack, I guess what I was really trying to  
19 say is that the public utility in those situations tends to yield  
20 more because they've made the claim, and to my knowledge, I think  
21 there has only been once where Public Counsel has agreed that the  
22 document was confidential. So it's usually the utility giving  
23 up. And all I'm saying is that that is the give and the take on  
24 it. And by having the input of the Prehearing Officer, in some  
25 cases it makes it more understandable for the public utility to

1 give up some documents.

2 MR. SHREVE: I don't disagree with that. The only  
3 point I'm making is that even -- whether we would oppose it or  
4 agree with it or whatever, it still would not become confidential  
5 until there was a showing by the company and ruling by the  
6 Commission.

7 MR. FONS: No question about it. I didn't mean to  
8 suggest anything like that.

9 MR. HARROLD: Excuse me. Mr. Rehwinkel, the Issue No.  
10 2 is whether the proposed rule should eliminate appeals from the  
11 Prehearing Officer's ruling and confidentiality request.

12 MR. REHWINKEL: Yes.

13 MR. HARROLD: Now, you're talking about whether it goes  
14 back to the Prehearing Officer at some point, and I'm confused.

15 MR. REHWINKEL: Yes. What I'm saying is that it just  
16 occurred to me, after we framed this issue, which is based on our  
17 position that's contained in our comments, that maybe a better  
18 way to do this would be to endeavor to just cut down in the  
19 delay, and maybe the issue should be whether the proposed rule  
20 should eliminate multiple hearings by the -- multiple rulings by  
21 the Prehearing Officer on any particular confidentiality request.

22 MR. HARROLD: When you say -- the rule -- I'm looking  
23 at (3)(c) and it says, "Request for confidential classification  
24 and any objections filed in response shall be ruled upon by the  
25 Prehearing Officer assigned the docket."

1 I would tend to put a period there and take out the  
2 "and" and then say, "The Commission panel assigned to the case  
3 will hear any protest to the Prehearing Officer's ruling."

4 So at that juncture it seems like you would have the  
5 Prehearing Officer ruling on a request for confidentiality; if  
6 any party objects to that, they would then file an objection and  
7 it goes to a panel, which could be the full Commission. It could  
8 be a panel of Commissioners or full Commission.

9 Now, you're objecting to that procedure?

10 MR. REHWINKEL: No, not that. What I'm objecting to  
11 is, in fact, this order -- I tried to find it. There were two  
12 orders that took about two months to issue that was really --  
13 ended up being one ruling by the Prehearing Officer.

14 I think that there should only have been one  
15 opportunity for the Prehearing Officer to rule, and that's,  
16 having been done, any order he issues goes to the full  
17 Commission. I don't want him to be revisiting the issue again  
18 and again.

19 MR. HARROLD: As I read this language, as I just read  
20 from the rule, it seems to contemplate just what you said. And I  
21 don't know if -- again, if you want some additional language, and  
22 I guess I'm also thinking that there are some other procedures or  
23 some other things done by a Commissioner, sitting as a Prehearing  
24 Officer, that then goes to the full Commission. I think that  
25 procedure is perhaps in place already in other areas also.

1 MR. REHWINKEL: I think what you suggested with the  
2 "period" in the new sentence would be good if you said, "Any  
3 objections filed in response thereto shall be ruled on only once  
4 by the Prehearing Officer assigned to the docket, period." And  
5 then go on. That's where my problem is.

6 MR. HARROLD: That's noted. If you want to comment,  
7 please do.

8 MR. BAKSTRAN: Yes, sir, I think the subsection is fine  
9 the way it is. I think it says what we intended, that the  
10 Prehearing Officer will make a ruling, and if there is a protest  
11 to it, the Commission panel assigned to the case will hear that  
12 protest.

13 I would also like to mention that I would like to  
14 respond later to Mr. Shreve's comments regarding stipulations on  
15 confidentiality and the fact the Commission has to make a  
16 finding, when we get into Subsection (5)(c), which I think is  
17 Issue 6. So just hold that for now.

18 MR. HARROLD: Any other comments on Issue No. 2 by any  
19 other parties?

20 In the absence of any, let's move to Issue No. 3.

21 MR. REHWINKEL: Having talked to some of the parties  
22 when we were informally meeting, it occurs to me also that some  
23 of our comments regarding failure to provide notice may not be  
24 well-taken with respect to this rule. But we also do stick to  
25 our comments that this rule fails to include a waiver or lapse

1 provision if the utility or other person fails to, within 21 days  
2 after the Staff takes possession of information, file its  
3 request. And there's no discussion in the Staff recommendation  
4 or anywhere else as to why that change is made from the current  
5 rule to the proposed rule.

6 I would agree with Mr. McDougall, from Florida Power  
7 and Light, that there should be an opportunity for the company to  
8 show good cause prior to the 21 days that they need more time to  
9 get their request together. I think that's reasonable. But I do  
10 think that should come before a 21-day period runs, and I don't  
11 see any good reason why the rule should be changed from the way  
12 it is. Because I think that the utility is on notice when the  
13 Staff takes the information that they have 21 days, and there is  
14 really no reason for them to fail to meet that 21 days and still  
15 maintain de facto confidentiality under the Commission's rules.

16 MR. BAKSTRAN: Charles, may I ask a question?

17 MR. REHWINKEL: Sure.

18 MR. BAKSTRAN: If we add the following sentence at the  
19 end of Subsection (3)(a), will it satisfy your concerns, and the  
20 sentence is: "Absent good cause shown, failure to file such  
21 request within the 21 days may constitute a waiver of the request  
22 for confidential classification."

23 Does that sentence satisfy your concerns?

24 MR. REHWINKEL: Whether it should be "absent good cause  
25 shown within 21 days," I would like there to be language that

1 that must be done within the 21-day period.

2 And also, I would say that we would rather that the  
3 language read "shall" constitute waiver. I'm trying to see if  
4 that's the way it reads now. Do you know how it reads right now?

5 MR. SELF: One suggestion would be if you look on Page  
6 2, Line 16 to 19, that's the waiver language that I guess carries  
7 over from the existing inquiry statute or rule.

8 MR. REHWINKEL: That is waived, there is no "may"  
9 there. There is a lapse provision, I guess, is what I may be  
10 thinking of from the --

11 MR. FONS: I think the language you're looking for,  
12 Charles, is in current (3)(b), and it says, "Material may be  
13 temporarily exempted from Section 119 upon the filing of a Notice  
14 of Intent to request specified confidential classification.  
15 Notice shall be filed with the clerk, a copy of the request shall  
16 be provided to the department requesting or inspecting the  
17 material. The temporary exemption shall lapse if the timely  
18 request for a specified confidential classification is not  
19 thereafter filed."

20 MR. REHWINKEL: Yes.

21 MR. BAKSTRAN: Mr. Fons, where are you reading that  
22 from?

23 MR. FONS: Current rule (3)(b). Yes, that's where it  
24 is.

25 MR. SELF: Section (2)(f).

1 MR. BAKSTRAN: (2)(f) is at the close, termination of  
2 an inquiry; similar language, different context.

3 MR. McDOUGALL: Well, (2)(f) is referred to later in  
4 the other section, I believe.

5 But regardless, waiver is a rather heavy penalty with  
6 respect to a rule. The Commission has penalties within the  
7 statute. Any violation of a rule is subject to a penalty under  
8 the statute for whoever violates it. Trying to write a penalty  
9 in every rule to identify and compel compliance seems rather  
10 inappropriate, and I think the language that was not taken from  
11 the earlier rule and put in the present rule, I think that was an  
12 appropriate deletion by the Staff.

13 MR. BAKSTRAN: Mr. Hearing Officer, let me just remind  
14 everyone.

15 This is -- the proposed rule is what the Commission has  
16 already looked at and proposed. We're not taking a strong  
17 position either way on changing that from "may" or "shall." I  
18 would suggest if the parties wish to file a posthearing filing  
19 regarding how they would like those sections to be worded, that  
20 would probably help us move on. To reiterate, we're going to  
21 have to think that over and probably file something with our  
22 postfiling.

23 MR. HARROLD: Staff can cover it in comments also.

24 MR. KEENER: Where in the rule were you talking about  
25 placing this proposed sentence?

1 MR. BAKSTRAN: Charles, where was it?

2 MR. REHWINKEL: Was it (3)(a), (3)(a). At the end of  
3 (3)(a)?

4 MR. HARROLD: (3)(a) is what was covered.

5 MR. BAKSTRAN: The sentence I read, "Absent good cause  
6 shown failure to file such request within the 21 days may  
7 constitute a waiver of the request for confidential  
8 classification." I think Public Counsel wants it to say "shall  
9 constitute."

10 MR. KEENER: On the part of Southern Bell, just to make  
11 a comment on that, we are opposed to the waiver provision,  
12 similarly for the reasons that FP&L stated. And in particular  
13 we're concern that, for instance, if there was a mistake in not  
14 getting something filed on time, or if confidential information  
15 came into the hands of the Commission, that what would happen is  
16 that that information, which should be confidential, which will  
17 harm the company, or which may harm the customers, the  
18 ratepayers, would be shown to the public. And because of the  
19 waiver provision. And, therefore, we strongly oppose any  
20 language in there which states that there will be, shall be or  
21 even may be a waiver. And in accord with the existing procedural  
22 rules that the Commission follows, I think it's called the  
23 manual, Procedure Manual that you have. It states in there that  
24 once the Commission obtains confidential information, that the  
25 parties may come in at a later time and file requests for

1 confidential information for that material if it's determined  
2 that that material came into the possession of the Commission.  
3 So putting in that waiver language in there would encourage truly  
4 confidential information to be given to the public. And, for  
5 instance, it could involve national security measures, or it  
6 could involve customers' names, addresses, private information  
7 which shouldn't be shown to the public.

8 MR. BAKSTRAN: So what you're saying is that you don't  
9 want the waiver for failure to file the request at time-one to  
10 prevent you from filing at time-two a request for confidential  
11 classification.

12 MR. KEENER: That's right.

13 MR. BAKSTRAN: Under the presumption that even though  
14 it wasn't protected, nobody came in to look at it and then you  
15 want to keep it --

16 MR. KEENER: That's right. Confidential information is  
17 no discovery type of game, or it doesn't have anything to do with  
18 relevance and irrelevance; it has to do with real harm to the  
19 companies or to some other person. And so like Mr. Fons pointed  
20 out, once the toothpaste is out of the tube, you know, it's hard  
21 to get it back in, and that's our concern with the waiver  
22 provision. Or the waiver wording.

23 MR. BAKSTRAN: Mr. Hearing Officer, I'd like to point  
24 out an inconsistency in the rule we have.

25 Mr. McDougall pointed out Subsection (2)(b), Page 2 of

1 the rule, the last sentence, "If no timely request for  
2 confidential classification is filed, confidentiality is waived  
3 and the material becomes subject to inspection and examination  
4 pursuant to Section 119.01(7), Florida Statutes."

5 That language is waived. And what we were suggesting  
6 is may constitute a waiver. I don't know, maybe you want the  
7 Commissioners, to reconsider both subsections.

8 MR. HARROLD: Basically, that will have to be addressed  
9 in written comments subsequent to this proceeding.

10 MR. McDOUGALL: I have to agree. The point Mr.  
11 Bakstran is making is if the Staff is going to propose "may  
12 constitute" in Subsection (3)(a), then Subsection (2)(b) should  
13 be modified to be consistent therewith. And I would fully  
14 support the use of the word "may." As Mr. Keener pointed out,  
15 the purpose of the confidentiality statute is twofold: It's to  
16 protect the companies that have information that would harm them  
17 if expressed. But more importantly, I think the Public Counsel  
18 and Staff and Public Counsel indicated this today, and I wouldn't  
19 think we disagree, we're talking about harm to the ratepayers.  
20 And there is information which if disclosed would cause the  
21 companies to incur more money in providing the services they  
22 provide, and that would harm the ratepayers. This concept of  
23 everything being in the sunshine isn't necessarily the best thing  
24 in terms of the ratepayers. That balance needs to be remembered,  
25 and I think "may constitute waiver" would be a much better

1 wording than "shall" given that we're trying to protect both the  
2 ratepayers and the public right to know.

3 MS. LILES: Gulf Power concurs with the comments made  
4 by Mr. Keener and Mr. McDougall. We feel the rule should remain  
5 flexible as it's currently written in its revised form. We feel  
6 the Commission already has substantial discretion to impose  
7 penalties where simply bad faith exists in not following through  
8 and in trying to keep information under wraps, and there is  
9 simply no reason for making the rule more specific. Waiver is  
10 certainly a very, very harsh penalty and may inadvertently occur  
11 to the detriment of the company and/or the ratepayers.

12 MR. REHWINKEL: I do agree with Mr. McDougall that it  
13 ought to be consistent, whatever the word is used. I think we  
14 also should change the issue a little bit to say -- probably  
15 should just say "should lapse or waiver pursuant to Subsections  
16 (2)(b) and (3)(a). If absent good cause shown, a utility," et  
17 cetera. I just think, since we had overlooked that.

18 MR. SELF: I think clearly the two sections need to be  
19 the same, and I think there is a very legitimate concern that  
20 something not automatically happen that, you know, once the  
21 toothpaste is out, you can't stop it.

22 Perhaps as an alternative, if there is a felt need for  
23 some type of affirmative action to resolve the failure to file,  
24 maybe instead of saying that there would be a lapse or a waiver,  
25 perhaps something to the effect that the Prehearing Officer would

1 issue an order. And if you had that procedure built in, there  
2 would be some time, obviously, between the expiration of the 20  
3 days and when the Prehearing Officer would get around to issuing  
4 the order that might afford the utility some additional time to  
5 make a request or seek further protection.

6           Additionally, if the Prehearing Officer was issuing an  
7 order, you'd have the opportunity to protest that; the cat would  
8 not let be let out of the bag.

9           MR. HARROLD: It seems to me that you are almost  
10 talking about considering -- there may be some material that  
11 everybody knows is entitled to confidentiality treatment. And,  
12 therefore, you may want some mechanism, some language, something  
13 in the rule that says where the Commission or whoever  
14 acknowledges that this information should be given  
15 confidentiality status, even in the absence of a timely request  
16 as contemplated by the rule, the Commission may issue an order  
17 finding this to be confidential. I don't know. It's like the  
18 Commission on its own motion doing something because it knows  
19 it's the right thing to do.

20           MR. BAKSTRAN: May I point out that a request entails  
21 significant work on the part of the utility to edit the material,  
22 to highlight it, to provide a line-by-line justification; and, if  
23 they don't do that, I would be willing to bet that the  
24 Commissioners are not going to do the work for them. And they  
25 will probably, if they issue any order, it would be an order to

1 say that the request for confidentiality has been waived. So you  
2 can recommend that to them. I'm not.

3 MR. SELF: My comment was, I thought I had said, "to  
4 deny confidentiality."

5 MR. BAKSTRAN: Well, okay.

6 MR. HARROLD: Would now be an appropriate time to break  
7 for lunch? We've covered three issues and we've got four to go.

8 MR. McDOUGALL: Could we maybe go off the record to  
9 discuss that to spare the court reporter our lunchtime plans?

10 MR. HARROLD: Sure.

11 (Thereupon, lunch recess was taken.)

12 MR. HARROLD: Hearing come back to order.

13 Now on Issue No. 4. Mr. Rehwinkel.

14 MR. REHWINKEL: Yes. This issue, we believe, is one of  
15 fundamental importance in this docket.

16 The rules currently in Paragraph (3)(b) allow,  
17 apparently, only any party to the proceeding to lodge an  
18 objection to a confidentiality request. Since these rules deal  
19 with the public records, and the Public Records Law is a law of  
20 applicability to any person who wants to come in and look at  
21 public records as to whether they can or cannot look at them, it  
22 seems most appropriate that the general public, they have an  
23 opportunity both to have notice as to any pending confidentiality  
24 request, as well as to object to any confidentiality request at  
25 the time when the burden of proof is on the person or utility

1 requesting confidentiality. We have proposed one thing that a --  
2 when we said, "a docket," some sort of a listing of pending  
3 confidentiality requests be specifically -- that it specifically  
4 isolate confidentiality requests and any responses or any  
5 proceedings relating to any.

6 And second, we have proposed also that the rules  
7 provide that any person be allowed to intervene -- not intervene  
8 but to object to a confidentiality request up-front. We feel  
9 that that is consistent with the spirit of the Public Records Law  
10 and that would solve that problem.

11 MR. BAKSTRAN: Charles, regarding that last point,  
12 would you agree to changing the last sentence of Subsection  
13 (3)(b), that's Page 3, line -- starting at Line 16.

14 MR. REHWINKEL: To read.

15 MR. BAKSTRAN: To read follows: "Any party to a formal  
16 proceeding or other person may file an objection to the request  
17 for confidential classification within 14 days after service of  
18 the summary."

19 Now, that just introduces a problem there. Are you  
20 suggesting also on your first point that the Commission have some  
21 kind of list of confidentiality requests in addition to its  
22 present list, I believe, of --

23 MR. REHWINKEL: Yeah, one thing the Commission --

24 MR. BAKSTRAN: All petitions that have been filed.

25 MR. REHWINKEL: Let me address both of those, but first

1 the listing.

2           The Commission, right now, issues daily filings. They  
3 are broken down by water and sewer, telephones and electricians and  
4 then generic, and they list everything that's been filed with Mr.  
5 Tribble that day.

6           It's not always possible to look at that and determine  
7 whether it's confidentiality that is at issue. Because some of  
8 them will say, "Request for confidentiality." Some of them just  
9 say, "Request for a temporary Protective Order," or they may just  
10 mention a Protective Order, or some may say, "Specified  
11 confidential." There is a whole range of the way these things  
12 are identified.

13           I don't know if it would be administratively difficult  
14 just to isolate all of those, anything that related to  
15 confidentiality request, and just do a separate printout of  
16 anything that was filed that day. So someone could go in if they  
17 wanted to, and look and see whether a confidentiality request was  
18 made.

19           Sometimes they only come in in the form of an objection  
20 to a discovery request. And there is nothing mentioned at all in  
21 the heading that you would see that confidentiality was at issue.

22           I think the better thing to do would be to have  
23 something like that; leave the sentence like you've got it and  
24 just add another one. Any person may object after -- within a  
25 certain time, 14 days or maybe 21 days after the filing of the

1 request with the Commission. So maybe they would have to go and  
2 look at the docket and once they could see that something was  
3 filed, they would then have their opportunity within a time  
4 certain. Maybe 14 days would be appropriate. I don't know.

5 MR. FONS: Charles, can you give an example of when  
6 this has happened, or are we talking theoretically at this point?  
7 where somebody has not been able to get the confidential  
8 information or to protest it prior to the time that the  
9 Commission has declared it to be confidential.

10 MR. REHWINKEL: I don't have any example, but I know  
11 that that last newspaper suit, that the order had already been  
12 issued by the time it --

13 MR. BAKSTRAN: If all the people in the state don't get  
14 noticed or copied with the Request for Confidential  
15 Classification then they have not gotten notice.

16 MR. FONS: I don't know how to break into the circle.  
17 If everybody has got to get notice so that they can do this, then  
18 we've created another problem. But if we put in procedures to  
19 take care of people who are not going to know about it anyway,  
20 then we've got a procedure that nobody is going to use.

21 What I'm saying is that I think if the problem were to  
22 arise, if somebody were to show up at the Commission hearing  
23 saying, "I understand that there is confidential information that  
24 there has been a request for confidentiality. I want to protest  
25 that." I don't think that the Commission is going to say, "You

1 cannot come in and protest this." I think the Commission will  
2 use good sense and be very practical about it, and I don't think  
3 anybody will oppose them coming in and raising their claims as  
4 though it should not be treated as confidential.

5 MR. REHWINKEL: Basically, what we're talking about  
6 here is if a newspaper reporter wants to come over to the  
7 Commission, look at the thing I'm proposing and see if there is  
8 anything that they might have a problem with, and that would be  
9 the notice. That's all I'm talking about as far as notice.  
10 We're talking about --

11 MR. FONS: But the Commission gives notice in the  
12 Florida Administrative Weekly of every hearing that's going to  
13 take place.

14 MR. REHWINKEL: Not of things like this though. There  
15 is no notice about Request for Confidentiality.

16 MR. FONS: Then, I guess the next question is, do you  
17 -- how would notice be given in that situation?

18 MR. REHWINKEL: Just like I said. It would be in a  
19 specific -- you'd pull out those requests from Mr. Tribble's list  
20 of filings. You'd just have another page; another section would  
21 say "Confidentiality request." And it would just list them out,  
22 and somebody could look at it and say, "I want to go and I want  
23 to look at that filing," whatever docket it's in. That would be  
24 the notice. I think that would be a simple probably --

25 MR. BAKSTRAN: I think we already have what you're

1 suggesting as far as a list of requests that are filed with the  
2 Commission. Would an additional sentence added at the end of  
3 (3)(b) to read, "Any other person may file an objection to the  
4 request within 14 days after the request is filed with the  
5 Commission"?

6 MR. REHWINKEL: Yes, I think that would be -- but I'm  
7 not sure that you have a specific listing of confidentiality  
8 requests. But I could be wrong.

9 MR. BAKSTRAN: May Mr. Tribble address that point. He  
10 hasn't filed an appearance. He's here assisting me.

11 MR. HARROLD: Certainly.

12 MR. TRIBBLE: We do, Charles, maintain a separate  
13 record of all of our confidential information, including the  
14 requests that are filed.

15 MR. REHWINKEL: Okay.

16 MR. TRIBBLE: And we also do have plans in our  
17 automating system to flag confidential documents as well, and to  
18 eventually be able to put out a report very similar to the daily  
19 filing report just on those types of documents. But in the  
20 confidential file procedure, there is a separate record of just  
21 those documents and those -- and if someone from the press came  
22 to us and said, "I would like to see, or were there any  
23 confidential documents filed recently," we could go right to that  
24 record.

25 MR. REHWINKEL: Okay. That probably would fix that

1 kind of notice thing that I'm talking about.

2 My question, then, would be if we send a discovery  
3 request out and Southern Bell files what they style as an  
4 objection to it, and it has general objections, it has relevancy  
5 objections, and then it has confidentiality objections in it,  
6 which somewhere attached to it is a request for specified  
7 confidential treatment. Would that be picked up and what do you  
8 do?

9 MR. TRIBBLE: Well, you know, there is a possibility  
10 that these things could get buried and we could miss it and it  
11 would be outside our ability to catch them.

12 MR. REHWINKEL: Maybe the Commission could require that  
13 the utility identify that part of their pleading is a request for  
14 confidentiality, and that may be a problem that would allow it to  
15 be picked up in your listing.

16 MR. TRIBBLE: Certainly the way they are styled could  
17 be very helpful to us.

18 MR. FONS: At the risk of sounding cynical, don't the  
19 newspapers call you and ask you whether or not there is  
20 confidential stuff that's being requested?

21 MR. SHREVE: No, they don't call us and ask us that.  
22 (Laughter) They might if they thought there was something that  
23 had been filed that was confidential, they might give us a call.  
24 However, this goes beyond the case that we might even not be  
25 intervened in. There may be cases that would come up, and have

1 been cases where confidentiality has been requested where we're  
2 not a party in the case. So I think there are some protections  
3 that have to be there beyond that. And I think what Steve is  
4 talking about probably will take care of that problem. And I  
5 don't think the companies -- particularly if there is going to be  
6 some information filed with the Commission, you do want it  
7 red-flagged anyway. So that might be the answer. Just go ahead  
8 and put a red star on there if there is something in there that's  
9 going to be confidential.

10 MR. FONS: I just wanted to highlight the point again  
11 that I did not want the burden shifted to the utilities or the  
12 company asking for confidentiality to somehow give notice to the  
13 world that they were making a claim of confidentiality.

14 MR. SHREVE: And the other point that you were making a  
15 little while ago is if these people didn't have notice, then they  
16 probably wouldn't be coming in here. I think whatever notice or  
17 however they find out, or whatever happens, if the Commission, as  
18 you said, would allow them to speak anyway, then there is  
19 certainly no reason to prohibit them from speaking or from  
20 objecting to it in the rule.

21 MR. FONS: Right.

22 MR. REHWINKEL: I think that Mr. Bakstran's language  
23 would satisfy our concern. And I don't know, we may propose  
24 something that could be added to the rule that we would just  
25 recap what Mr. Tribble stated about what was there for someone to

1 get notice, or to be on notice. And maybe even a requirement  
2 that the utility, in any filing that we actually had a request  
3 for confidentiality, that they somehow indicate that so Mr.  
4 Tribble's system could pick it up. But that's something we will  
5 propose in a posthearing.

6 MR. SHREVE: Can I ask a question, Steve? I'm not  
7 familiar with this so if someone comes in and says they would  
8 like to have a list of all confidential or material that has been  
9 requested to have confidential, you can furnish that list, from  
10 --- what do you that on?

11 MR. TRIBBLE: We maintain a master inventory of  
12 everything that we've ever received in that fashion.

13 MR. SHREVE: You would be able to pull that out.

14 MR. TRIBBLE: We can pull that out anytime.

15 MR. SHREVE: All right. So you would do it on a  
16 monthly basis, yearly basis, or whatever.

17 MR. TRIBBLE: There is a quarterly report that we can  
18 update it and pull it out at any time.

19 MR. SHREVE: But you do produce a quarterly report on  
20 confidential material or requested confidentiality?

21 MR. TRIBBLE: We do a number of things. We have a  
22 quarterly master inventory that we reproduce and it's distributed  
23 here to Staff people who have the information. And it's a  
24 procedure where we attempt to clean it up. We also produce, I  
25 think, a monthly report that we provide to David Swafford, which

1 gives all the information that has been received, added to the  
2 system and deleted from the system during that period. So there  
3 are a number of ways that we could --

4 MR. SHREVE: Okay.

5 MR. HARROLD: Are you ready for Issue No. 5?

6 MR. BAKSTRAN: One question real quick on (3)(b).

7 Public Counsel would like us to change the first  
8 sentence of Subsection (3)(b) to read as follows: "When the  
9 material is obtained incident to a formal proceeding, the utility  
10 or other person requesting confidential classification shall also  
11 serve a copy or summary of its request on all parties of record  
12 and on Public Counsel." Whether or not you're a party?

13 MR. REHWINKEL: Yeah, that probably would be  
14 reasonable. (Laughter)

15 I just don't want to be in a position where that --

16 MR. SHREVE: I don't have any problem with us receiving  
17 the notice on it. But I don't want anything to come around so it  
18 appears that we have the burden of raising any objections.  
19 There's too many times we have been put in the position of --  
20 even coming out in your orders, "Well, Public Counsel didn't  
21 object to this. So, therefor."

22 MR. BAKSTRAN: I was thinking in terms of newspaper  
23 reporters doublechecking with what Kay Flynn has on her list,  
24 we'll withdraw the receipt to see if there is any discrepancy.

25 MR. SHREVE: It should go to John. That's fine.

1 MR. REHWINKEL: Issue 5. It's kind of related to this  
2 because we were concerned about -- what we just finished talking  
3 about was what happens, or who has the responsibilities and  
4 obligations on the front end when the request is filed. What  
5 about after a finding has been made or a confidentiality  
6 protective order is operative, and someone wants to look at the  
7 information in it and files a request to inspect it. Who has the  
8 burden to -- who has the burden of proof there? In other words,  
9 the person inspecting it, does that person have the burden of  
10 overcoming or showing how the Commission's order or action, maybe  
11 even inaction, is improper, or does the company have a burden to  
12 show why confidentiality should be maintained? Right now the  
13 language reads, "That the utilities have ten days to file a  
14 response as to why the material should remain exempt."

15 That's not clear to me that they have a burden of proof  
16 there. Perhaps it should read, "Shall have ten days to show why  
17 the material should remain exempt." I don't know. I don't even  
18 know what the Commission's intention is with respect to burden of  
19 proof there.

20 MR. FONS: May I?

21 It seems to me that if the Commission has made the  
22 requisite finding that the information is confidential, we, or  
23 the utility, or the person providing that, has met the statutory  
24 test; therefore, that material ought to remain that way unless  
25 someone else can show that somehow the Commission has made a

1 mistake; something was not told to them that should have been  
2 told to them. It should not be incumbent upon the person  
3 furnishing the information to once again have to wheel out all  
4 the guns and come back through and show to the Commission why  
5 it's confidential, having already met that standard.

6           What concerns me is that it says, "Any person may file  
7 a petition to inspect." And what might happen in this situation  
8 is that every day of the week a different person may come in and  
9 ask to see this information. And does that mean that each time  
10 that the person who has furnished the confidential information,  
11 must go to the test of showing once again why it's confidential?

12           It seems to me if we're going to have any finality, and  
13 if we're going to place any credibility in what the Commission's  
14 done, this is the time to do it. And that is it's been found to  
15 be confidential, I think the person is on the person asking for  
16 it to show that it's not confidential.

17           MS. LILES: I agree. I think that the rule provides  
18 for the utility to make a show, the utility or the person to make  
19 a showing; and once that showing has been made and the Commission  
20 has made the findings, then the utility has made the necessary  
21 showing. Now, if a person comes in and says, "You didn't  
22 consider this," or "I've got an issue that wasn't before the  
23 Commission at that time," then that should be that person's  
24 burden to prove that that issue should change the Commission's  
25 decision.

1           MR. FONS: I think this rule was originally in the  
2 current rules. And I think one of the reasons it was in there  
3 was because at that particular point in time there was no  
4 determination as to how long documents would remain confidential.  
5 And I think in that situation it made sense for the utility to  
6 come in and show why it should still be kept confidential. But  
7 the revisions in 366, and we anticipate the same revisions will  
8 be made in 364, says that the document will remain confidential  
9 for only 18 months, unless the utility or the person furnishing  
10 it can demonstrate why it should have a longer time period.

11           So I don't think that this particular rule has the same  
12 importance as it once did. On the other hand, I think everybody  
13 should have the opportunity under the Public Records Law to come  
14 in and ask for a document, and then be told why they are not  
15 entitled to have that document.

16           MR. McDOUGALL: I think one additional thing I'd like  
17 to add to the comments made by Mr. Fons and Ms. Liles, is that  
18 the rule introduces new, and I don't think anybody would argue  
19 with me about this next comment -- significant burdens on the  
20 utility or other person that is requesting confidentiality. The  
21 rule now requires the highlighting and editing, and line-by-line  
22 justification. This is a significant burden for every piece of  
23 information that's provided to the Commission. Given that and  
24 the 18-month burden that's been indicated by Mr. Fons, this  
25 particular section, I would have to agree, it should place the

1 burden on the person requesting it. Because you will have had a  
2 significant filing by the utility; you will have had a hearing by  
3 the Commission and an order with a finding. And to have to go  
4 back all the way through that process with the burden once again  
5 on the utility, I think, would be inappropriate.

6 MR. BACKSTFAN: May I also respond?

7 I'm not sure that the ultimate burden is not always on  
8 the utility. I think that -- my personal opinion -- I think that  
9 the petitioner has something akin to an obligation to go forward  
10 with the evidence; show why something is not confidential or was  
11 improperly ruled as confidential. The utility would need to  
12 respond to that, and I think if the Petitioner shifts that burden  
13 to come forward again with the justification for keeping  
14 something confidential, then I think it would be incumbent upon  
15 the utility to show why it should be continued as confidential.

16 There again, I really don't know how to address this  
17 issue. It's a tough one. It seems to me that if the utility has  
18 already pulled out all their guns and went through all the  
19 burdensome requirements of showing that something is  
20 confidential, then it doesn't seem right that every time a  
21 competitor or anybody off the street comes in and asks to see  
22 something out of curiosity, that they should have to incur that  
23 same expense again. Maybe they can just refer to what they've  
24 shown or refile copies of it again with the same explanation. I  
25 don't know. It's something probably the Commissioners will have

1 to rule on.

2 MR. SHREVE: I think I would tend to agree more with  
3 Mr. Bakstran and what he said than what the utility said.  
4 Because for one thing, I think what you all are ignoring is that  
5 the people, or persons, or whoever came in here would not have  
6 the information, so it would be an almost impossible burden for  
7 them to come in and try and show what effect the release of  
8 material, which they don't have, would have on the company in the  
9 first place.

10 And I do disagree with you that this is a burden that  
11 has not been placed on the companies in the past. I think the  
12 Commission has tried to get the companies to underline and  
13 highlight, and so on and so forth, so they wouldn't come in and  
14 request a thousand pages of confidential material as has been  
15 done, and I think the Commission has tried to have that done so  
16 it would be clearer what the companies really in reality needed  
17 to have held confidential. So I don't think there is that much  
18 more of a burden placed in here on the companies, and at least  
19 not one that shouldn't have been there in the first place so they  
20 would be more specific about what was really needed as  
21 confidential, rather than just a shotgun approach that has been  
22 used in the past, and I know the Commission has tried to  
23 accomplish that.

24 I think in this rule, it would appear to me that if the  
25 Commission sets it up to go to a hearing, then the burden is

1 obviously going to have to be on the company to carry that  
2 because they are the only ones with the information. The  
3 Commission in this rule does have the ability to rule on the  
4 pleadings, so I guess at some point if they say that whoever is  
5 bringing the action or the request didn't carry enough of their  
6 -- was not able to show the Commission they were at least  
7 entitled to another hearing on it, then it wouldn't be granted  
8 because that would be on the pleadings. I just don't see that  
9 there is any way you can possibly shift the burden on the  
10 confidentiality showing to anyone other than the company, and  
11 that is as Mr. Bakstran says. It may also be a situation where  
12 there has not been any finding at all in here according to the  
13 rule. It may be coming in before there was any finding.

14 MR. FONS: No. It says that, "any person may file a  
15 petition to inspect and examine any material the Commission has  
16 exempted in 119."

17 MR. SHREVE: Yes, and I think you'll find that  
18 materials are exempted from the Public Records Law before there  
19 has been a showing and a finding.

20 MR. REHWINKEL: That's our point. The rule operates to  
21 exempt by --

22 MR. FONS: Then (6)(a) takes on a different meaning now  
23 than it did when it was in the old set of rules, which is the  
24 point I was trying to make.

25 MR. SHREVE: You're saying after a finding in a case?

1 MR. FONS: After a finding.

2 MR. SHREVE: This doesn't -- see there are necessarily  
3 things you're going to have exempted that haven't been ruled on.

4 MR. FONS: And that's the way I have been reading  
5 (6)(a). It's after the Commission has made a finding and has  
6 exempted. Maybe if we put that language in, that's important.

7 MR. REHWINKEL: That's correct. Because it is -- the  
8 rule itself by its other language with the "temporaries" and the  
9 -- it operates to exempt, and that's the way I have been reading  
10 it, and it's unclear, so I think that would be a good  
11 clarification there if that's what indeed --

12 MR. FONS: And would you agree that in that situation  
13 where the Commission has found and has exempted that the burden  
14 of why the records should now be delivered to this "any person"  
15 that burden is upon that "any person" rather than the utility?

16 MR. SHREVE: No, I wouldn't. Because the records would  
17 not have been delivered to that person, and that person would not  
18 have the information to show the harm that might come to the  
19 company. The company is the only --

20 MR. FONS: But the company has already proven that to  
21 the Commission.

22 MR. SHREVE: But if that company files a pleading and  
23 asks the Commission for another hearing and the Commission grants  
24 it, then they can't very well say, "Okay, now John Jones, come in  
25 and show us why these documents, which you have never seen, don't

1 have any affect on the company." The Commission has the ability  
2 to rule on the pleadings.

3 MR. FONS: This other person could come in and say,  
4 "The reason that I'm entitled to this information in Florida is  
5 because that company revealed it somewhere else." If they made  
6 that kind of a showing, and then the utility would have to come  
7 in and show that that was an incorrect statement. But that's all  
8 they would have to show.

9 MR. SHREVE: In that particular instance that might be  
10 the case then, and you are familiar with situations that have  
11 happened like that where it has been revealed in other areas.

12 MR. FONS: I'm sure there have been instances. I know  
13 of no particular one, but I'm sure that there are instances.

14 MR. SHREVE: You weren't there then. Okay. I see what  
15 you're saying on something like that, but I think there could be  
16 a tax that would -- where the company could convince the  
17 Commission or made a showing to the Commission, the Commission  
18 made a finding that it was horrible to them and in that case I  
19 don't think anyone else could assume the burden.

20 MR. McDOUGALL: Mr. Shreve, if you will look at the  
21 Public Records Law itself, Chapter 119, it envisions that the  
22 person who has the custody of the record is the one to explain in  
23 writing that the record is exempt. Once the custodian of the  
24 record has explained that the record is exempt, the Section 119  
25 doesn't provide any additional procedures for that person to say,

1 "Okay, I want a copy of it so that I can now reargue the issue  
2 before you that you've already reached your conclusion on."

3 MR. SHREVE: That's right. And if they couldn't get a  
4 copy of it, how could they carry any type of burden?

5 MR. McDOUGALL: The statute doesn't anticipate that.  
6 The statute leaves it to the agency to determine whether or not  
7 it should be exempt. Not to the person requesting it.

8 MR. SHREVE: Are you saying this rule doesn't apply?  
9 Are you arguing against the rule?

10 MR. McDOUGALL: The rule here in (6)(a) provides a  
11 person to come in and petition and present an issue that might  
12 not have been presented otherwise to the Commission. That's the  
13 opportunity here, for them to get their day before the  
14 Commission.

15 MR. SHREVE: So this rule provides an opportunity for  
16 them to come in. If the Commission agrees they should have the  
17 opportunity, then as Mr. Bakstran says, and I agree, you can't  
18 shift the burden from the company to whoever came in there. That  
19 the burden is always going to lie with the company.

20 MR. McDOUGALL: Well, as soon they make a prima facie  
21 case that there was something wrong with what was previously done  
22 in the previous docket, that may be true, that the burden would  
23 show.

24 MR. SHREVE: There is an ability here to rule on the  
25 pleadings, and I would assume that that is where that particular

1 part of it would come in. If they do rule on the pleadings -- I  
2 don't think they could rule on the pleadings that something would  
3 be taken out of -- away from confidential treatment. But if they  
4 went ahead and granted a hearing on that, I think the burden  
5 surely could not be shifted to the parties coming in.

6 MR. FONTS: Jack, would you agree that reference to a  
7 final decision of the Commission that the information is  
8 confidential meets that burden of proof?

9 MR. REHWINKEL: I think if that was the case, and you  
10 accepted that as a premise, then the Commission would rule on the  
11 pleading. Otherwise, there is an ability to set a hearing.

12 MR. FONTS: What I think I'm hearing you all saying is,  
13 "No, that isn't sufficient, you've got to go behind that previous  
14 ruling of the Commission and retry this whole thing before that  
15 very same Commission again."

16 MR. REHWINKEL: John, I think we might need to look at  
17 this a little closer. As I recall sitting in Judge Hall's  
18 courtroom over there, and the arguments the newspapers were  
19 making about an Order that then Chairman, and Prehearing Officer,  
20 Nichols made, there was some questions as to whether there was  
21 going to be a de novo proceeding over there, or whether they were  
22 going to review the actions of the Commission in finding  
23 confidentiality. And I don't want to be in a position of saying  
24 that there would be a presumption of correctness to the  
25 Commission's order. Because I don't really understand the state

1 of the newspaper's appeal of those decisions. I think I'd want  
2 to look at it. You may have -- I think this just needs to be  
3 looked at. One thing I think we could agree, regardless of  
4 whether it's correct or not, if the Commission decides that the  
5 burden is on the person coming in and asking to look at the  
6 information, that at least that language that you suggested that  
7 the Commission must have made a finding or any such burden, if it  
8 was correct, was imposed. I think we could agree with that  
9 today.

10 MR. FONNS: On line 25, before "exempted", insert three  
11 words, "found to be exempted." "And as found to be exempted."

12 MR. McDOUGALL: I would support that modification.

13 MR. BAKSTRAN: Can I go back and clarify something  
14 regarding the reference to the Section 119 Florida Statutes?

15 A member of the public can come into the Commission and  
16 ask to see a confidential document. The custodian of the  
17 document can tell that person, "You can't have it because there  
18 is an order prohibiting its public disclosure." The person can  
19 ask for that in writing. The custodian would give that person in  
20 writing why he can't have access to the document. That does not  
21 prevent the person from filing under Section (6)(a) a petition to  
22 inspect and examine that material.

23 I agree there is some ambiguity in (6)(a) regarding the  
24 language "has exempted" from 119 because when there is a petition  
25 pending, it's exempted from 119. I'm not sure by inserting the

1 words, "has found to be exempted" will satisfy that problem. And  
2 it takes us back also to the change we considered, I think, in  
3 (3)(b), if you'll refer back to that, we were talking about  
4 inserting another sentence saying, "or other person may file an  
5 objection to the request for confidential classification within  
6 14 days after it is filed." There is a problem here. If the  
7 request is pending, and the person doesn't come in within the 14  
8 days after the request was filed, then under (3)(b) he may be  
9 precluded from doing so. But under (6)(a) he may have to wait  
10 until it's found to be confidential, and then you get into the  
11 problem of who has the burden.

12           So you might want to consider that when we file our  
13 posthearing version of the rule, how you want to address that. I  
14 just want you to refer back to (3)(d) where we want to include  
15 people other than parties to a formal proceeding objecting to a  
16 request, and read that alongside of (6)(a) and see how that might  
17 be resolved. I can't think of something off the top of my head  
18 right now, I may have to consider that.

19           MR. FONS: I agree with you. There is an ambiguity  
20 here and the language I suggested "found to be exempted" was  
21 designed to be -- to address those situations where there has  
22 already been finality.

23           MR. BAKSTRAN: You see, the problem though is if it's  
24 pending and the person hasn't come in within 14 days after the  
25 request is filed, then where is his opportunity to --

1 MR. REHWINKEL: There is a black hole there, possibly.

2 MR. FONS: And I would agree with you in that  
3 situation, he'd have to wait until it was all over. And then he  
4 could tell the Commission in his petition that, "For some reason  
5 I was not aware of it, and I have information that may change  
6 your mind on the issue, which creates --"

7 MR. McDOUGALL: The existence of a black hole as you  
8 described it, I wouldn't call it a black hole. It's just like  
9 any other procedural issue, if you are properly watching and meet  
10 the filing deadlines, you can be part of the docket. Just like  
11 any other procedural deadline, so I don't see that being a  
12 particular problem.

13 MR. BAKSTRAN: I wasn't suggesting that we could  
14 resolve that today. I just wanted you to be aware of that  
15 problem.

16 MR. REHWINKEL: I appreciate that. I think it's a  
17 well-taken point.

18 Oh, one other thing I would just like to, I should have  
19 mentioned on my direct presentation, would be on that (6)(a), the  
20 sentence, "The Commission may set the matter for hearing or may  
21 issue a ruling on the pleadings." My only concern there was that  
22 I just want to make sure they have to do one or the other. There  
23 is two "mays" in there.

24 MR. FONS: How about putting two "shalls?" "Shall  
25 issue a rule for hearing" or "shall issue a ruling."

1 MR. REHWINKEL: "Shall either set the matter for  
2 hearing," or "shall issue a ruling."

3 MR. BAKSTRAN: I prefer "may". The Commissioners can  
4 come up with a novel approach of how to handle it. If you want  
5 to have that opportunity to do that.

6 MR. SHREVE: A novel approach without any of the  
7 parties having any --

8 MR. REHWINKEL: I think there ought to be -- I think  
9 the intention is that they do one or the other, and I just --

10 MR. BAKSTRAN: I think that's understood.

11 MR. HARROLD: If you take out the second "may," it  
12 takes out your problem, correct?

13 MR. REHWINKEL: I don't know. I've stated my concern.  
14 If there is some language I think that would be appropriate or  
15 better, I'll propose it.

16 Anyway, that's all I have on that one.

17 MR. HARROLD: Ready to move to Issue No. 6?

18 MR. REHWINKEL: Issue 6, we've touched on it several  
19 times. I am just concerned what the definition of "is to be used  
20 in a proceeding" means. It's our understanding "to be used in a  
21 proceeding" means any use that Public Counsel feels is  
22 appropriate in conjunction with his statutory obligations and  
23 powers in representing the customer. It is not necessarily that  
24 these documents would be ultimately offered into evidence.

25 MR. HARROLD: Do you wish to submit that as a

1 definition in the first part of the rule? Would that take care  
2 of your problem? The statement you just made?

3 MR. REHWINKEL: I think so. That, and really the  
4 language -- that and the point I -- yeah, I would propose  
5 something along that line as a definition.

6 MR. FONS: Charlie, before you go too far on that, I  
7 think you need to pay -- look at the 366.093. It says in  
8 366.093(2), towards the end of that paragraph, "any record which  
9 has been determined to be proprietary, confidential business  
10 information and is not entered into the official record of the  
11 proceeding, must be return to the person providing the record  
12 within 60 days."

13 MR. REHWINKEL: I understand. The point, and I would  
14 say in the definition, to the extent not inconsistent with this  
15 language here, because I'm concerned that this could mean that  
16 before the proceeding is over the documentation could be required  
17 to be returned to the utility. And I'm not for --

18 MR. FONS: That's exactly what the statute says.

19 MR. REHWINKEL: Is after the proceeding.

20 MR. FONS: No, the statute says "Any record which has  
21 been determined to be proprietary confidential business  
22 information and is not enter into the official record of the  
23 proceeding, must be returned to the person providing the record  
24 within 60 days after," okay. You're saying after it's over?

25 MR. REHWINKEL: Yeah, I'm talking about -- after it's

1 over, the Legislature spoke and we're not quarreling with that,  
2 yeah.

3 MR. BAKSTRAN: I think, if I may, get some background  
4 on a problem that we've had with this.

5 It seems that some Commissioners, Public Counsel says,  
6 has told me earlier, have not wanted to rule on a particular  
7 document until it's been offered into evidence. So suppose  
8 Public Counsel has ten documents it wants to take to the hearing,  
9 only intending to enter three of them into the record, and using  
10 the other seven to -- either for rebuttal or refresh witness'  
11 memories, or what have you.

12 The burden still is on the company to show by  
13 underlining or highlighting and line-by-line justification why  
14 those documents should be granted confidential classification.  
15 If you wait until the day of the hearing when you want to move it  
16 into evidence, the company is not going to have that opportunity.  
17 Maybe as a practical matter maybe you should go ahead and say  
18 that you intend to use these documents, then require the company  
19 to request confidential classification.

20 MR. SHREVE: I'm misunderstanding something here. I  
21 don't understand what you're saying. You're saying the  
22 Commissioners are not going to rule on the documents?

23 MR. BAKSTRAN: No, I said it was my understanding from  
24 talking to Charles is that we have had a problem with some  
25 Commissioners not wanting to rule on the confidentiality of a

1 document unless it's being offered into evidence.

2 MR. REHWINKEL: Yes, there has been some confusion  
3 about that point.

4 MR. SHREVE: That has nothing to do with it.

5 MR. REHWINKEL: Well, I think what Mr. Bakstran is  
6 saying is that -- see what happens, Bill, is when we've gone over  
7 to, say, Southern Bell and looked at 1,000 pages of documents and  
8 we tab 500, by doing that we're saying, "We are going to use  
9 these in the proceeding," Regardless of whether we're going to  
10 actually try to put them in the record.

11 MR. BAKSTRAN: Then the Utility will have the  
12 responsibility of filing their confidentiality request,  
13 highlighting the confidential information, giving a line-by-line  
14 justification. What's wrong with the Commissioners waiting to  
15 rule on that request until you all have decided whether or not to  
16 enter it into the record? It will stay confidential until the  
17 hearing is over, right?

18 MR. REHWINKEL: I think that's wrong, because I think  
19 that the -- I think that goes back to Issue No. 1 about ruling on  
20 an expedited basis, because we will have possession of those. We  
21 are subject to the Public Records Law. There must be a finding  
22 that these should be exempt, so I think once we've asked that  
23 these documents be provided, and are to be used, however we see  
24 fit, in a proceeding, then the company must come in and make  
25 their showing, and then the ruling should speedily ensue after

1 that. That's our point.

2 And I think if we do the definitional section that the  
3 hearing officer suggested, that would clear up just about any  
4 problem along these lines, because that would really show the  
5 company that those are the documents that they have to ask for  
6 the Protective Order on and to meet their burden on.

7 MR. BAKSTRAN: How about looking at (5)(c)? Line 10.  
8 The sentence beginning, after the cite to the statute there.  
9 What do you think about changing the sentence to read, "if the  
10 information is to be used or made a part of the record in a  
11 proceeding before the Commission, then the Utility must file a  
12 specific request for Protective Order."

13 MR. REHWINKEL: No.

14 MR. BAKSTRAN: Will that solve the problem?

15 MR. REHWINKEL: No, that's not the problem. I think  
16 "is to be used" is broad, it's the broadest situation I could  
17 envision. And I think as long as there is an understanding that  
18 "is to be used" means however the Public Counsel in his  
19 discretion sees fit to use them in the proceeding, then that's  
20 what -- that's what that should mean, and those are the documents  
21 that the Commission has to rule upon. That's all my concern is.  
22 I may have confused you about the --

23 MR. FONS: Our understanding of "to be used" is just as  
24 Charles has explained it, and as we have acted with Public  
25 Counsel in the past.

1 MR. REHWINKEL: That's correct. I just don't want  
2 somebody to later come in and say, you know, "Well, what that  
3 means is actually entered into the record." I want to clarify  
4 the definition on that.

5 MR. BAKSTRAN: Won't that change I just suggested,  
6 putting in "If the information is to be used or made a part of  
7 the record in the proceeding, the utility must file a specific  
8 request. And if it's not to be used or not to be made a part of  
9 the record."

10 MR. REHWINKEL: It might make someone think those are  
11 equivalent and they're not equivalent.

12 MR. FONS: No, no.

13 MR. SHREVE: I think you're mixing apples and oranges.  
14 I think the utility has a right to request confidential treatment  
15 on whatever we have in our possession or are going to take  
16 possession of that they feel should be confidential and they get  
17 a ruling on it. That has nothing to do with what is eventually  
18 used in the hearing. Commissioners can't wait and rule on two or  
19 three out of ten documents.

20 MR. BAKSTRAN: I thought that's what you all were  
21 saying was the problem.

22 MR. REHWINKEL: I'm sorry, I confused you on that.  
23 That's not --

24 MR. BAKSTRAN: Getting back to that, are you saying  
25 that if you take a thousand pages with you, and you tab 500, are

1 you going to return the 500?

2 MR. SHREVE: First of all, 500 won't be confidential.

3 MR. FONS: They don't a 1,000; they look at 1,000 but  
4 only take 500.

5 MR. SHREVE: And they don't want confidential treatment  
6 of all 500, they want confidential treatment of ten pages.

7 MR. BAKSTRAN: We're talking about the confidential  
8 information.

9 MR. SHREVE: The pages then come in.

10 MR. BAKSTRAN: Then they file a request. Where's the  
11 problem?

12 MR. FONS: There is no problem.

13 MR. REHWINKEL: I'll just provide my definitional  
14 section.

15 MR. FONS: I think what you're trying to address, Bill,  
16 is then taken care of in (5)(d).

17 MR. SHREVE: Unless you want the Commissioners to wait  
18 and rule after they find out what goes into evidence, then you've  
19 got a problem, because if they only rule on three of them, then  
20 the other seven never become confidential and they're open to  
21 public record.

22 MR. FONS: And Public Counsel doesn't know when they  
23 take it whether they are going to try and enter it into the  
24 record.

25 MR. REHWINKEL: I'll put my proposed language in.

1 We'll be all right.

2 With that being said, the last issue, I think after  
3 having discussed it a little further that this issue may just  
4 have another day, and really, probably better not be brought into  
5 this proposing at this time. We can work on that later.

6 MR. HARROLD: At this juncture you're withdrawing Issue  
7 ??

8 MR. REHWINKEL: Yeah. I think that would be the best  
9 thing to do.

10 MR. HARROLD: Does anybody else feel a need to comment  
11 on or want Issue No. 7 left in?

12 MR. KEENER: That's a nonissue?

13 MR. HARROLD: Good. Okay. Mr. Rehwinkel, will that  
14 conclude your presentation?

15 MR. REHWINKEL: Yes.

16 MR. HARROLD: Any other parties wish to make a specific  
17 presentation at this time?

18 MS. LILES: We'll be filing posthearing comments.

19 MR. HARROLD: Okay. In the absence of further comments  
20 at this time, basically we'll go through the CASR dates.

21 The CASR calls for the transcript to be filed on Friday  
22 December 1. Is that satisfactory with the court reporter?

23 THE REPORTER: It will be okay.

24 MR. HARROLD: Posthearing filings and comments filed by  
25 Monday, December 4.

1 MR. FONS: We get it late Friday and have to file our  
2 comments on Monday.

3 MR. McDOUGALL: I would have to disagree with that.

4 MR. BAKSTRAN: Mr. Hearing Officer, my understanding is  
5 that sometimes transcripts are available sooner.

6 THE REPORTER: Not this time.

7 MR. BAKSTRAN: Then let me suggest that the Chapter 120  
8 Florida Statutes requires that the Commission take action within  
9 21 days of its final hearing on this. The definition of final  
10 hearing on a rule, it includes an agenda conference. So that if  
11 you wish to revise the CASR or give us new dates, because of the  
12 holidays involved here, you're fully able to do that without  
13 violating the provisions of Chapter 120.

14 MR. HARROLD: Let's back up a little bit. The CASR  
15 calls for this matter getting back to the agenda on February 6th.  
16 Does that comply with the appropriate time limitations?

17 MR. BAKSTRAN: Let me reiterate, the statute says,  
18 "Within 21 days after the final hearing on a rule." that  
19 definition of final hearing means agenda conference, so if you  
20 want to push the agenda conference back, that gives you another  
21 21 days.

22 MR. HAROLD: You've got 21 days after the agenda  
23 conference.

24 MR. BAKSTRAN: Right, so if you want to bump the agenda  
25 conference, we could do that because of the holidays. Do you

1 need a calendar?

2 MR. HARROLD: Yeah, I will. When do the parties think  
3 they will have available posthearing comments?

4 MR. FONS: Seven days after the transcript.

5 MR. McDOUGALL: Is that the 8th or the 12th?

6 MR. BAKSTRAN: Friday the 8th.

7 MR. HARROLD: Friday, December 8th.

8 MR. BAKSTRAN: Is what? Comments?

9 MR. HARROLD: Posthearing filings and comments due.  
10 Then we'll add the two weeks to that that was there before, so we  
11 get December 28th for my final recommended version.

12 MR. BAKSTRAN: What would that be, two weeks?

13 MR. HARROLD: December 28th, which is a Thursday.

14 MR. BAKSTRAN: You're in the month of December, right?

15 MR. HARROLD: Okay. I added to the four. Make it the

16 22nd.

17 MR. BAKSTRAN: Proposed final version on the 22nd?

18 MR. HARROLD: Just adding two weeks is all we're doing.

19 MR. BAKSTRAN: Would you like a Commission calendar  
20 showing agenda conferences?

21 MR. HARROLD: You can tell me the appropriate date.

22 (Pause) You've got two weeks for -- or 14 days for exceptions.

23 MR. BAKSTRAN: That would be January 5?

24 MR. HARROLD: Yes. Okay. Now, then, we have a Staff  
25 recommendation date which would be --

1 MR. BAKSTRAN: Well, if you're going to make the  
2 February 6th agenda --

3 MR. McDOUGALL: Excuse me, could we do this off the  
4 record?

5 MR. HARROLD: That's fine. Can we go off the record,  
6 please?

7 (Discussion off the record.)

8 MR. HARROLD: Revised dates as follows: Transcript  
9 delivery due December 5th, 1989. Posthearing filings due  
10 December 15th, 1989. Proposed final version issued, January 5th,  
11 1990. Comments to the proposed final version due January 19th,  
12 1990. Staff recommendation to be filed on February 8th, 1990,  
13 and agenda for final action, February 20th, 1990.

14 MR. BAKSTRAN: Mr. Hearing Officer, if I might, Mr.  
15 Self had to leave early. He asked me to ask you to remind  
16 everyone that files any draft language or comments to serve those  
17 on all those who have entered an appearance here.

18 MR. HARROLD: Is that agreeable with the parties?

19 MR. REHWINKEL: Yes.

20 MR. McDOUGALL: Yes.

21 MR. HARROLD: Okay.

22 MR. BAKSTRAN: Is there anything else?

23 MR. HARROLD: Anybody have anything further? Time to  
24 go catch airplanes. Thank you.

25 (Hearing adjourned 1:15 p.m.)

1 F L O R I D A )  
:  
2 COUNTY OF LEON)

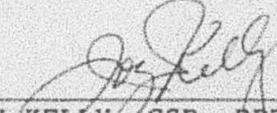
CERTIFICATE OF REPORTER

3 I, JOY KELLY, CSR, RPR, Official Commission Reporter  
4 DO HEREBY CERTIFY that the Rule Hearing, in the  
5 captioned matter, Docket No. 890252-PU, was heard by the Florida  
6 Public Service Commission Staff at the time and place herein  
7 stated; it is further

8 CERTIFIED that I reported in shorthand the proceedings  
9 held at such time and place; that the same has been transcribed  
10 under my direct supervision, and that this transcript, consisting  
11 of 90 pages, constitutes a true and accurate transcription of my  
12 notes of said proceedings; it is further

13 CERTIFIED that I am neither of counsel nor related to  
14 the parties in said cause and have no interest, financial or  
15 otherwise, in the outcome of this docket.

16 IN WITNESS WHEREOF, I have hereunto set my hand at  
17 Tallahassee, Leon County, Florida, this 29th day of November,  
18 A.D., 1989.

  
\_\_\_\_\_  
JOY KELLY, CSR, RPR  
OFFICIAL COMMISSION REPORTER  
FPSC Bureau of Reporting  
Fletcher Building, Room B-45  
101 East Gaines Street  
Tallahassee, Florida 32301-0871  
Telephone No. (904) 488-5980

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Docket No 890252 Pu  
Composite Exhibit no 1

INDEX TO COMPOSITE EXHIBIT 1

1. JAPC Materials
  - a. Letter to Carroll Webb
  - b. Rule 25-22.006
  - c. FAW Notice
  - d. Statement of Facts and Circumstances Justifying Rule; Statement on Federal Standards; Statement of Impact on Small Business
  - e. Economic Impact Statement
2. Letter to Lynette Brown, et al.
3. Comments of Florida Power & Light Company
4. Comments of Small and Minority Business Advisory Council
5. Amended FAW Notice
6. Notice of Rulemaking
7. Citizen's Request for Hearing.

JAPC MATERIALS

Commissioners  
KATIE NICHOLS, CHAIRMAN  
THOMAS M. BEARD  
GERALD L. (JERRY) GUNTER  
JOHN T. HERNDON  
MICHAEL MCK. WILSON



Division of Appeals  
David E. Smith, Director  
(904) 468-7464

# Public Service Commission

September 7, 1989

Mr. Carroll Webb  
Joint Administrative Procedures  
Committee  
120 Holland Building  
Tallahassee, Florida 32399

Re: DOCKET NO. 890252-PU, RULE 25-22.006

Dear Mr. Webb:

Enclosed are the following materials concerning the above referenced proposed rule.

1. A copy of the rule.
2. A copy of the F.A.W. notice.
3. A statement of facts and circumstances justifying the proposed rule.
4. A federal comparison statement.
5. A statement of the impact of the rule on small business.
6. An economic impact statement.

This proposed rule change is a substantial rewording of Rule 25-22.006. Please see Florida Administrative Code for present text.

If there are any questions with respect to this rule, please don't hesitate to call on me.

Sincerely,

WILLIAM J. BAKSTRAN  
Associate General Counsel

WJB:kp (2967G)  
Enclosures  
cc: Steve Tribble, Director,  
Division of Records & Reporting

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

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

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

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1 be 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), F.S., and will be accorded stringent  
28 internal procedural safeguards against public disclosure. Any  
29 staff or consultant reports or work products containing  
30 confidential information extracted from material having been  
31 classified as confidential, or for which a ruling on

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1 confidentiality is pending, shall be handled in the same manner as  
2 the material so classified. The Commission shall have discretion  
3 to retain any confidential material in its possession. Upon the  
4 consent of the Department of State, the Commission may return or,  
5 after consulting with the source, destroy any material that is no  
6 longer needed.

7 (4) Requests for confidential classification.

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

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

28 (c) In the line-by-line or field-by-field justification for  
29 confidential classification, the utility or other person must  
30 demonstrate how the information asserted to be confidential  
31 qualifies as one of the statutory examples listed in section

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1 364.183(3), 366.093(3), or 367.156(3), F.S. If no statutory  
2 example is applicable, then the utility or other person shall  
3 include a statement explaining how the ratepayers or the person's  
4 or utility's business operations will be harmed by disclosure.

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

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

17 (5) Discovery.

18 (a) In any formal proceeding before the Commission, any  
19 utility or other person may request a protective order protecting  
20 proprietary confidential business information from discovery.  
21 Upon a showing that the material is entitled to protection the  
22 Commission shall enter a protective order limiting discovery in  
23 the manner provided for in Rule 1.280, Florida Rules of Civil  
24 Procedure. The protective order shall specify how the  
25 confidential information is to be handled during the course of the  
26 proceeding and prescribe measures for protecting the information  
27 from disclosure outside the proceeding.

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

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1 exempt from section 119.07(1), F.S. Such exemption shall apply  
2 whether the information is in the possession of an entity,  
3 individual, or state agency, including the Office of Public  
4 Counsel.

5 (c) When a utility or other person agrees to allow Public  
6 Counsel to inspect or take possession of utility information for  
7 the purpose of determining what information is to be used in a  
8 proceeding before the Commission, the utility may request a  
9 temporary protective order exempting the information from section  
10 119.07(1), F.S. If the information is to be used in a proceeding  
11 before the Commission, then the utility must file a specific  
12 request for a protective order under paragraph (a) above. If the  
13 information is not to be used in a proceeding before the  
14 Commission, then Public Counsel shall return the information to  
15 the utility in accordance with the record retention requirements  
16 of the Department of State.

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

24 (6)(a) Any person may file a petition to inspect and examine  
25 any material the Commission has exempted from s. 119.07(1), F.S.  
26 A copy of the petition must be served on the affected utility or  
27 person which shall have 10 days to file a response as to why the  
28 material should remain exempt. The petitioner shall have 7 days  
29 to file a reply to the filed response. The Commission may set the  
30 matter for hearing or may issue a ruling on the pleadings.  
31 Material obtained by the Commission in connection with an inquiry

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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), F.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 confidential classification, the material will be kept  
11 confidential until the time for filing an appeal has expired. The  
12 utility or other person may request continued confidential  
13 treatment until judicial review is complete. The request shall be  
14 in writing and filed with the Division of Records and Reporting.  
15 The material will thereafter receive confidential treatment  
16 through completion of judicial 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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FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 890252-PU

RULE TITLE:

RULE NO.:

Confidential Information

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 unspecified 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 367.156, P.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, P.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), P.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 1.260, 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.

STATEMENT OF FACTS AND CIRCUMSTANCES  
JUSTIFYING RULE

The present 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. 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 procedures 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.

STATEMENT ON FEDERAL STANDARDS

The Federal government has numerous laws and regulations protecting confidential information which could be applied to proprietary confidential business information of utilities. For example, 42 USC 5916 prohibits the Administrator of the Energy Research and Development Administration from publicly disclosing trade secrets and "other proprietary information." 18 CFR 385.410(c)(6) authorizes the presiding officer in proceedings before FERC to prevent public disclosure of confidential matters. Also, 18 CFR 385.410 (d)(1) authorizes the presiding officer to issue protective orders to deny or limit discovery of privileged information. Likewise, the FCC discovery rules, 47 CFR 1.311 - 1.325, contain provisions for exempting privileged information from discovery in proceedings before the FCC.

## STATEMENT OF IMPACT ON SMALL BUSINESS

There should be no significant impact on small utilities from adoption of the proposed rule changes. However, some utilities indicated that some of their affiliates are small businesses and could experience additional costs in complying with information requests for confidential material.

MEMORANDUM

August 17, 1989

TO: DIVISION OF APPEALS (BAKSTRAN)  
FROM: DIVISION OF RESEARCH (HEWITT) *CBH WJ* *YMB*  
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

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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

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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 FPC 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.

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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

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 Wireless 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 (KAWA) 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 IXCs, 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.

CBH:jn/3387R

Commissioners  
 KATIE NICHOLS, CHAIRMAN  
 THOMAS M. BEARD  
 GERALD L. (JERRY) GUNTER  
 JOHN T. HERNDON  
 MICHAEL MCK. WILSON



Division of Appeals  
 David E. Smith, Director  
 (904) 488-7484

## Public Service Commission

September 7, 1989

Ms. Lynette Brown  
 Small and Minority Business Advocate  
 107 West Gaines Street  
 Room G-28, Collins Building  
 Tallahassee, Florida 32399

Mr. Steve Mayberry  
 Division of Economic Development  
 Department of Commerce  
 Rm. 501-B, Collins Building  
 Tallahassee, Florida 32399

Ms. Carolyn Wilson-Newton  
 Minority Business Enterprise Assistance Office  
 Department of General Services  
 613 Larson Building  
 Tallahassee, Florida 32399

Re: DOCKET NO. 890252-PU, RULE 25-22.006

Dear Ms. Brown, Mr. Mayberry and Ms. Wilson-Newton:

The Commission has determined that the above rule might indirectly affect small business. Accordingly, pursuant to section 120.54(3)(b), Florida Statutes, enclosed is a copy of the F.A.W. notice for the proposed rule, which will be published in the September 15, 1989 edition of the Florida Administrative Weekly.

This proposed rule change is a substantial rewording of Rule 25-22.006. Please see Florida Administrative Code for present text.

If there are any questions with respect to this rule or the Commission's rulemaking procedures, please do not hesitate to call on me.

Sincerely,

*William J. Bakstran*

WILLIAM J. BAKSTRAN  
 Associate General Counsel

WJB:kp (2967G)  
 Enclosure

cc: Division of Records & Reporting

FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 890252-PU

RULE TITLE:

RULE NO.:

Confidential Information

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 367.156, 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.

(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 1.260, 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.

BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

In Re: Amendment of Rule 25-22.006, )  
Florida Administrative Code, )  
pertaining to confidential )  
information )

Docket No. 890252-PU  
Florida Public Service Commission

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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FPSC-RECORDS/REPORTING

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, 356.092, 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:

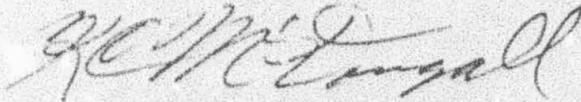
(2)(c) Material subject to subsection (2)(a) shall not be disclosed by the Commission or its staff except as provided for in a protective order in a formal proceeding.

(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.

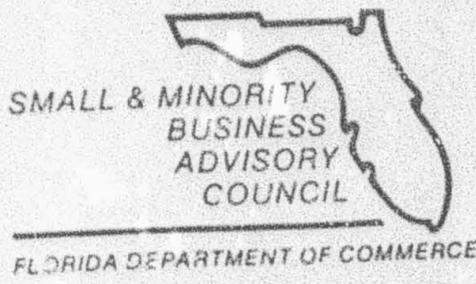
While FPL is confident that the nondisclosure requirements of the proposed amended rule adequately protects FPL from nondisclosure of proprietary confidential business information made available to the Commission or its staff in the exercise of the Commission's jurisdiction, FPL recommends clarifying 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,



K. Crandal McDougall  
Attorney  
Florida Power & Light Company  
P. O. Box 029100  
Miami, Florida 33102-9100  
(305) 552-3921



October 12, 1989

DIRECTORS

Newall Daughtrey, Chairman  
Miami

Joyce Indigore, Vice Chairman  
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Eddie Mills  
St. Petersburg

Valma Monteiro-Tribble  
Tampa

Windell Paige  
Fort Lauderdale

Mr. Steve Tribble, Director  
Division of Record and Reporting  
Public Service Commission  
101 East Gaines Street  
Tallahassee, Florida 32399-0861

890252-PU

Re: Rule 25-22.006

Dear Mr. Tribble:

We have reviewed the referenced Rule and Economic Impact Statement in accordance with the provisions of Chapter 120.54. Would it be possible to include in the rule, proviso language to allow flexibility in compliance by small firms--should it later be determined that the cost involved to comply would be substantial and create a financial hardship on small firms as defined in section 288.703, Florida Statutes.

Sincerely,

*Lynette Brown*

Lynette Brown, Advocate  
Small and Minority Business

LB/vn

cc: Newall J. Daughtrey, Chairman

DOCUMENT NUMBER-DATE  
10218 OCT 16 1989  
PSC-RECORDS/REPORTING

## M E M O R A N D U M

October 10, 1989

TO : DAVID SMITH, DIRECTOR OF APPEALS  
FROM: BILL BARSTRAN, ASSOCIATE GENERAL COUNSEL *WJB*  
RE : AMENDED FAW NOTICE IN DOCKET NO. 890252-PU (CONFIDENTIALITY  
RULE)

---

Attached is a copy of the amended notice of rulemaking, which I plan to send to the Florida Administrative Weekly on Thursday, October 12. Please let me know if there is anything you want me to change in it.

Thank you.

WJB:prl  
Attachment  
3140G

FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 890252-PU

RULE TITLE:

Confidential Information

RULE NO.:

25-22.006

AMENDED NOTICE OF RULEMAKING

Due to oversight, certain persons did not receive specific notice of the Commission's proposed rulemaking in this docket as required by s. 120.54(1)(a), Florida Statutes. Consequently, the notice of rulemaking published in the Florida Administrative Weekly (FAW) on September 15, 1989, must be amended. Therefore, the paragraph of the original notice regarding the deadline for filing written comments or requests for hearing is amended as follows:

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 THE AMENDED NOTICE FOR INCLUSION IN THE RECORD OF THE PROCEEDING. IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS AMENDED NOTICE, A HEARING WILL BE HELD AT THE DATE AND PLACE SHOWN BELOW:

TIME AND DATE: 9:30 A.M., Friday, November 17, 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 remainder of the September 15, 1989, FAW notice is not changed by this amended notice. Please refer to it for the full text of the rule change proposed in this docket.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Amendment of Rule )	DOCKET NO. 890252-PU
25-22.006, F.A.C., pertaining )	
to confidential information. )	ORDER NO. 22054
)	
)	ISSUED: 10-13-89

NOTICE OF RULEMAKING

NOTICE is hereby given that the Commission, pursuant to section 120.54, Florida Statutes, has initiated rulemaking to amend Rule 25-22.006, F.A.C., relating to confidential information.

A notice of Rulemaking appeared in the September 15, 1989, edition of the Florida Administrative Weekly.

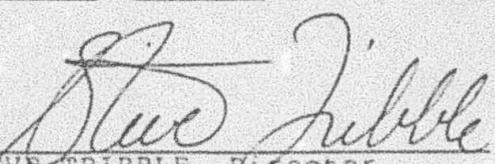
Attached is an amended notice of rulemaking which will appear in the October 20, 1989, edition of the Florida Administrative Weekly.

If requested, a hearing will be held at the following time and place:

9:30 a.m., Friday, November 17, 1989  
Room 122, Fletcher Building  
101 East Gaines Street  
Tallahassee, Florida

Written requests for hearing and written comments or suggestions on the rule must be received by the Director, Division of Records and Reporting, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, FL, 32399, no later than November 13, 1989.

By Direction of the Florida Public Service Commission,  
this 13th day of OCTOBER, 1989.

  
 STEVE TRIBBLE, Director  
 Division of Records & Reporting

( S E A L )

WJB

3141G

DOCUMENT NUMBER-DATE

10196 OCT 13 1989

FDCC-BE000000-00000000

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Amendment of Rule )  
25-22.006, F.A.C., pertaining )  
to confidential information. )  
 )  
 )  
 )

DOCKET NO. 890252-PU  
ORDER NO. 22054  
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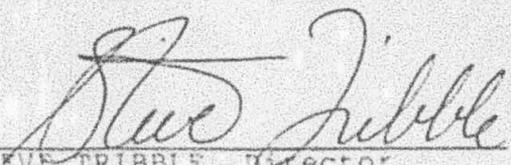
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Written requests for hearing and written comments or suggestions on the rule must be received by the Director, Division of Records and Reporting, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, FL, 32399, no later than November 13, 1989.

By Direction of the Florida Public Service Commission,  
this 13th day of OCTOBER, 1989.

  
STEVE TRIBBLE, Director  
Division of Records & Reporting

( S E A L )

WJB

3141G

DOCUMENT NUMBER-DATE

10196 OCT 13 1989

FDCC-RECORDS (278871)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amendment of Rule 25-22.006, )	Docket No. 890252-PU
FAC, pertaining to confidential )	Filed: November 13, 1989
information )	
_____ )	

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.

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FPSC-RECORDS/REPORTING

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.<sup>1</sup>

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

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<sup>1</sup>Also 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' premises<sup>2</sup> 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,

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<sup>2</sup>The 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.

strategy, and approach to the proceeding, including, but not 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,

/s/  
Jack Shreve  
Public Counsel

/s/  
Charles J. Rehwinkel  
Associate Public Counsel

Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street  
Room 801  
Tallahassee, FL 32399-1400

(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

/s/  
Charles J. Rehwinkel