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December 14, 1989

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VIA FEDERAL EXPRESS

Mr. Steve Tribble
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-9863

Re: Docket No.: 890252-PU
Post-Hearing Comments of Gulf Power Company

Dear Mr. Tribble:

Enclosed you will find the original and 15 copies of Gulf Power Company's Post-Hearing Comments in the above docket. Thank you very much for your assistance. Should you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

Teresa E. Liles

Teresa E. Liles
For the Firm

ACKTEL/100

AFA Enclosures

APP cc: 3 All Parties of Record (w/encl.)

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Amendment of Rule 25-22.006,) Docket No. 890252-PU
FAC, pertaining to confidential) Filed:
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POST-HEARING COMMENTS OF GULF POWER COMPANY

Gulf Power Company ("Gulf", "Gulf Power", or "the Company"), by and through its undersigned counsel, submits the following post-hearing comments concerning the issues raised by the Office of Public Counsel and other parties at the hearing in the above docket on November 17, 1989. For convenience, Gulf's comments regarding Public Counsel's proposals will be grouped under the numbered issues as described during the hearing.

PRELIMINARY STATEMENT

During the November 17, 1989 hearing in this docket, Public Counsel made an opening statement extolling the Public Records Act and government in the sunshine in general. Similar references were made throughout the hearing. Gulf Power Company believes that it is beyond dispute that this state has a very strong and sound policy favoring open government. However, Gulf also believes that the confidentiality provisions of Sections 364, 366 and 367 Florida Statutes, applicable to regulated utilities, evidence the Legislature's recognition that utilities are not converted into public agencies by virtue of state regulation and, as private businesses, have a legitimate and substantial interest in maintaining their trade secrets,

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security and audit information, customer lists, etc. exempt from public disclosure. Similarly, while state employees should be aware that their official position subjects them to some degree of public scrutiny, the employees of a regulated utility are entitled to expect that otherwise private matters will remain private, as would be the case in any other non-governmental business. Thus, Gulf urges the Commission to accept Staff's version of proposed Rule 25-22.006, which strikes the delicate balance between the public's right to know with respect to public agencies such as the Commission and Public Counsel, while maintaining the Companies' ability to preserve proprietary and confidential information in order to do business in the private marketplace.

1. Public Counsel's Issue No. 1: Whether the Proposed Rule should Have a Time Certain Within Which the Commission is Required to Rule on any Request for a Finding of Confidentiality? If so, What should the time be?

Gulf supports Staff's revision to Rule 25-22.006, Florida Administrative Code, in its present form, and opposes Public Counsel's request for imposition of any specific time limitation for ruling on confidentiality requests, especially a limit so severely inadequate as the seven-day requirement addressed in Public Counsel's Request for Hearing. In many cases, the Commission is required to review and evaluate

voluminous documents for which confidentiality is requested, and to analyze and rule upon any number of legal and factual arguments asserted by the utility in support of the request. As Public Counsel repeatedly noted during the November 17 hearing, exceptions to the Public Records Act, such as the statutory confidentiality provisions for regulated utilities codified in Chapters 364, 366 and 367, Fla. Stat., are not to be taken lightly; thus, the Commission is obligated to be thorough and comprehensive in determining whether the confidentiality statutes apply in a given case. Such a thorough and comprehensive review takes time.

Moreover, it is unclear what the result would be if any mandatory time limit were exceeded. As even Public Counsel recognizes, it would be inequitable to punish the utility and its ratepayers by releasing confidential information such as trade secrets due to the Commission's failure to make a timely ruling. In addition, the addition of paragraph (5)(c) recognizes Public Counsel's ability to review material for which confidentiality has been requested pending the request, thus ameliorating many of the adverse effects resulting from any delay in ruling. Currently, those dissatisfied with the timeliness of Commission action may seek an expedited ruling, or may resort to mandamus. Accordingly, Gulf would not support any revisions to Staff's proposed Rule which would interfere with a

thorough and comprehensive decision making process, or which would unduly burden the Commission or its staff. Gulf specifically objects to any recommendation which would deny the Commission its requisite flexibility by imposing an arbitrary time limit to be followed in all instances.

Public Counsel's Issue No. 2: Whether the Proposed Rule should Eliminate Appeals from the Prehearing Officer's Ruling in Confidentiality Requests?

In its Request for Hearing, Public Counsel suggested two alternatives in order to shorten the appeal process, but appeared to modify its position at the November 17 hearing. First, Public Counsel had recommended that the Prehearing Officer's ruling on requests for confidentiality be considered final for purposes of appeal. As was pointed out at the hearing, however, the Commission may not delegate final decision making authority to a Prehearing Officer, whose recommendation cannot be "final agency action" for purposes of appeal under current law. See e.g., North Broward Hospital District v. Humana of Florida, Inc., 444 So.2d 594, 595 (Fla. 1st DCA 1984)(hearing officer's orders are not "agency action"). Alternatively, Public Counsel had suggested in its Request for Hearing that the Prehearing Officer be bypassed entirely, and that the Commission Panel make the initial, and final, decision in confidentiality proceedings. This alternative, however,

would generate even more delay since the Commission would be required to rule on all confidentiality requests, not merely those in which the Prehearing Officer's recommended order is protested.

Gulf Power asserts that the decision making and appeal process under the current rule, as well as under Staff's proposed rule, serves the substantial interests of all parties, and actually avoids unnecessary delay. As currently written, the rule would only require that the Commission panel become involved if and when a protest is filed as to the Prehearing Officer's initial ruling. Many requests will be disposed of at the first stage, and thus it is impracticable to impose upon the full Commission panel, in addition to the Commission's other obligations, the responsibility of hearing each and every confidentiality request without a prior opportunity for the Prehearing Officer to enter what may very well become a final ruling for which no appeal is necessary and at least to make preliminary findings which may narrow the scope of subsequent consideration by the panel. Conversely, even if the Prehearing Officer's ruling could be considered final for purposes of appellate review, if the Prehearing Officer is authorized to make a final ruling which is not subject to appeal to the full Commission, the legislative policy of exhaustion of administrative remedies prior to the invocation of judicial

review as codified in the Administrative Procedure Act would be violated.

At the hearing on November 17, Public Counsel appeared to recognize that the above two alternatives were unfeasible, but propounded a third course: that the Rule prohibit parties from requesting reconsideration or modification by the Prehearing Officer, thus limiting the Prehearing Officer to one ruling, relief from which would have to be requested from the Commission panel. Gulf believes that this, too, is an unworkable solution since in many cases the option to seek reconsideration or modification from the Prehearing Officer will obviate the need to resort to the panel. For instance, if the Prehearing Officer's order contains a factual error which is not disputed, the Prehearing Officer is in the best position to modify his or her ruling than the panel.

Thus, the proposal made by Public Counsel would either result in an undue burden on the Commission, since it would be required to rule on all confidentiality results, and not merely those which are challenged; or, in the alternative, would eliminate the important function currently served by the Prehearing Officer and impose an undue burden on the judicial system, contrary to the policies codified in Chapter 120, Florida Statutes, providing for administrative exhaustion and narrowing of issues prior to resort to judicial action. Gulf

supports Staff's proposed rule in its current form.

3. Public Counsel's Issue No. 3: Should a Penalty Such as Lapse or Waiver Ensnare Pursuant to Subsection (3)(a); if Absent Good Cause Shown, a Utility or Other Person Fails to File a Request Within 21 Days After Staff Takes Possession?

Gulf opposes any lapse or waiver penalty in the context of material obtained by Staff in the course of an audit under (3)(b), as requested by Public Counsel. In general, contrary to Public Counsel's comments in its Request for Hearing, the Commission retains substantial authority to determine appropriate penalties for non-compliance with the proposed Rule. Gulf believes that the Commission should be permitted to continue to utilize its discretion, and should not be bound to impose specific penalties in all cases.

As was noted at the November 17 hearing, a Commission audit is fundamentally different from a formal proceeding where issues of relevancy are involved, and once a utility gives notice that it intends to request confidentiality for certain information, a sanction as harsh a waiver should not result from the utility's mere, perhaps inadvertent, failure to follow up with a subsequent request within 21 days. Certainly if the information were sought out by the public, the utility would have the burden to make a formal showing justifying a finding of confidentiality, but unless and until such a Public Records

request is made the information should be kept confidential for the internal use of the Commission Staff auditors.

While Gulf objects to the insertion of any waiver of lapse provision in Staff's current proposed Rule, if the Commission deems such a provision necessary then Gulf would support language in Subsection (3)(a) to the effect that "Absent good cause shown, failure to file such request within the 21 days may constitute a waiver of the request for confidential classification." Gulf feels that it is essential that the Commission be allowed to make a case-by-case determination where a harsh sanction such as waiver is involved, and a mandatory waiver provision would deprive the Commission of its discretion and perhaps irreparably harm the utility or its ratepayers by release of bona fide proprietary confidential business information. In most cases, the utility will act within the 21-day period, or will demonstrate within that time why it has good cause for failing to act, but in those rare instances where it cannot comply it should not be forced to suffer the consequence of having its confidential trade secrets, security measures, internal audits, customer lists and the like disclosed to the public at large. Gulf supports Staff's proposed Rule in its current form.

4. Public Counsel's Issue No. 4: Should Paragraph (3)(b) Allow Any Person to Object to a Confidentiality Request?

Public Counsel is charged by law with the responsibility of representing the general public of Florida before the Public Service Commission under Sections 350.061 and 350.0611, Florida Statutes (1987). Thus, contrary to the comments in Public Counsel's Request for Hearing, the public is already represented in all confidentiality proceedings to which Public Counsel is a party. To require additional notice to and participation from members of the general public would only further complicate and delay confidentiality determinations, exacerbating Public Counsel's repeated complaints that the process is already overly encumbered by delay. In addition, all confidentiality requests and associated documentation (other than the confidential information itself)¹ are available to the public for review and inspection under the Public Records Law, which provides a more than adequate mechanism for the public to be made aware of pending confidentiality proceedings. It is unclear exactly what affirmative changes Public Counsel recommends to Staff's current proposed Rule in order to further public involvement in confidentiality proceedings. Clearly,

¹Gulf strenuously would oppose any provision requiring or permitting disclosure of the confidential information to the public or press during confidentiality proceedings, since such disclosure would totally defeat the purpose of the confidentiality statutes.

members of the public as well as the news media already have the ability to discover the existence of pending confidentiality matters, and to intervene as parties before a ruling is made or to protest the ruling afterward under (6)(a) of Staff's proposed Rule. If the press and/or the public do not have sufficient interest to avail themselves of existing mechanisms for public involvement concerning such matters, Gulf believes that it is inappropriate to require that the Commission Staff take the initiative to draw the public into confidentiality proceedings. Gulf would certainly object to placing any further burden on the utility requesting confidentiality to provide notice to the public at large.

The Company is aware that the Division of Records and Reporting currently maintains a list of all confidentiality requests for easy public access, and Gulf opposes placing any further, unnecessary burdens on the Commission or its Staff to make the information available.

5. Public Counsel's Issue No. 5: Once a Petition Has Been Filed Under Paragraph (6)(a), who Has the Burden of Proof?

The situation with which Gulf is concerned arises where a utility has submitted the requisite number of highlighted and edited copies of the material for which confidentiality is requested, has offered a line-by-line justification for the request, and has supported its request by a legal showing of

entitlement to confidentiality, after which the Commission makes a finding based upon the utility's showing and enters an order granting confidential treatment. Under Public Counsel's recommendation that the utility continue to bear the burden of proving entitlement to confidentiality when a request for the material is subsequently made after a finding under (6)(a), it would appear that this effort would have to be repeated, resulting in needless duplication of effort and expense. Additionally, the opportunities for harassment are enormous.

Due to the utilities' much more stringent burden of making a showing of confidentiality under the new Rule, Gulf strongly opposes any requirement that the same effort be undertaken each time a person contests a finding of confidentiality. Clearly there may be some instances where persons not parties to the confidentiality proceedings will raise an issue which was not considered during those proceedings, and the utility could be required to make an additional showing as to that issue; however, it is only logical to place the burden upon the person contesting confidential treatment to demonstrate to the Commission's satisfaction that the issue is substantive and warrants a shifting of the burden back to the utility. Public Counsel's proposal would require substantial effort, expense and duplication if the utility is required to make an additional showing upon each and every

request under (6)(a), no matter how frivolous or duplicative of prior proceedings. The only viable solution to this issue would respect the already stringent requirements of the revised confidentiality rule as well as the integrity of Commission orders by placing the initial burden on the person contesting a finding of confidentiality under (6)(a) to demonstrate why the matter should be reconsidered.

At the November 17 hearing, it was pointed out that (6)(a) could also be invoked prior to a Commission finding, while material is temporarily exempted from the Public Records Law. Gulf's primary concern as to Public Counsel's proposed changes to (6)(c) pertains to the effect on the utility once a finding has been made. However, Gulf is aware that situations may arise where a petition under (6)(e) is brought pending a ruling, and that the issue(s) raised in any such petition could affect the utility's burden of showing entitlement to confidential treatment in that proceeding. Gulf recognizes that it retains the burden of proof prior to a finding of confidentiality by the Commission, but would point out that the time of entry into pending confidentiality proceedings under (6)(a) should nevertheless be a factor. For instance, should the mere filing of a (6)(a) request late in the proceedings, after parties have made arguments and have provided edited and highlighted copies and a line-by-line justification, but prior

to a Commission ruling, cause the utility to carry an additional burden where no new or significant issues are raised?

Gulf suggests that, in general, it is reasonable to require that a person making a (6)(a) request after a finding of confidentiality by the Commission should carry the initial burden of proof. Prior to the entry of an order, however, the Commission should retain the discretion to evaluate the timeliness or significance of a (6)(a) request and to apportion the burden of proof appropriately. Accordingly, Gulf objects to any specific language in the Rule which would result in inefficient duplication of effort after a finding, or deny the Commission the flexibility to exercise its judgment before a finding is made.

6. Public Counsel's Issue No. 6. What is the Meaning of the Phrase "To Be Used In a Proceeding" in Paragraph (5)(c)?

Gulf supports Staff's proposed addition of paragraph (5)(c) to the revised rule which provides for a temporary protective order exempting confidential information inspected by Public Counsel in order to determine what information Public Counsel may wish to utilize in a proceeding before the Commission. Gulf also believes that paragraph (6)(b) provides an informal mechanism for the same purpose, wherein the Company may allow any person, including Public Counsel, to inspect or examine confidential information by mutual agreement. Gulf

understands that whatever information Public Counsel takes into its possession after such inspection and review is the information it intends to use and for which a request for confidentiality would be required.

However, Public Counsel has also asserted a general objection in its Request for Hearing to "any efforts 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." This statement fails to recognize that the Legislature has specifically restricted Public Counsel's access to confidential information, as well as the access of any party other than the Commission or its staff to confidential information, under Section 366.093(1), Fla. Stat. as amended by Chapter 89-292, Laws of Florida. Thus, Gulf points out that the Commission is authorized to implement this restriction by prescribing the circumstances under which Public Counsel, or any other party, may acquire access to confidential information.

7. Issues Raised by Small Business Council and Florida Power and Light.

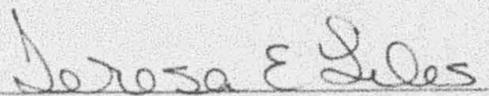
Gulf has no objection to the request by Lynette Brown, counsel for the Small Minority Business Advisory Council, that the Commission be entitled to waive or modify the Rule's requirements for qualifying small businesses. Gulf also

s.ports the changes to the Rule proposed by Florida Power and Light which were agreed to by Staff.

CONCLUSION

Gulf Power Company believes that Staff's current recommendation is a well-drafted and appropriate mechanism to simplify confidentiality proceedings, while protecting the substantial interests of the various parties involved. The proposals Public Counsel raises are unnecessary, and in many instances inappropriate if not expressly contrary to existing Florida law, as described above. Gulf Power Company would urge the Commission to adopt the revisions to Rule 25-22.006 as currently recommended by the Commission's Staff, except as stipulated during the November 17 hearing in this docket.

Respectfully submitted,



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CERTIFICATE OF SERVICE
Docket No. 890252-PU

I HEREBY CERTIFY that a copy of the foregoing has been
furnished by United States Mail this 14th day of December
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