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ORIGINAL
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December 15, 1989

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

Re: Docket No. 890252-PU

Dear Mr. Tribble:

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

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

Sincerely,

Darlene Driscoll
Darlene Driscoll

Enclosure

_____	HLO
____/____	SVM
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 890252-PU
Filed: December 15, 1989

CITIZENS' POST HEARING COMMENTS

Pursuant to the directives of the hearing officer in this case, the Citizens of the State of Florida, through Jack Shreve, Public Counsel hereby file their post hearing comments on the Commission's proposed rule pertaining to confidentiality information.

The Citizens initial participation in this docket came on November 13, 1989. At that time the Citizens' filed a request for hearing in response to a notice of rulemaking, Order No. 22054, issued October 13, 1989. Included in the Citizens' request for hearing were Citizens' comments and objections to the proposed rule. On November 17, 1989 the Citizens and various other parties participated in a rule hearing. At that time the Citizens' comments and concerns regarding the rule were heard by the hearing officer, in conjunction with the comments and objections of other parties.

While many of the points and concerns raised in Citizens' November 13, 1989 filing continue to be a concern, other issues have been adequately resolved or dropped by Citizens. The Citizens' request for hearing did not include an explicit enunciation of issues to be addressed at the hearing. During the hearing such an issue list was fashioned. The Citizens will follow this issue list where appropriate.

Issue: 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?

The Citizens' concerns on this issue were adequately set out in Citizens' November 13, 1989 request for hearing and comments. Although Citizens initially proposed a 7 day time limit on confidentiality rulings, it appears the better course would be to emphasize in the rule that confidentiality rulings should be made expeditiously. The Citizens propose that paragraph 3(c) of the rule be modified to indicate that rulings on confidentiality requests be made expeditiously.¹ In addition this paragraph should be modified to indicate that expeditious ruling is required on any discovery related request for confidentiality or motion for protective order.

¹Citizens' proposed modifications are contained in Attachment 1.

The Citizens' proposal to add the expedition language was supported by representatives of Southern Bell, Tampa Electric and Florida Power and Light. (T. 35, 36). Southern Bell and Tampa Electric Company even indicated that the expedition language would benefit the utilities as well as the ratepaying public. (T. 35).

Issue: Whether the proposed rule should eliminate appeals from the Prehearing Officer's ruling on confidentiality requests.

The Citizens' initial position taken in the November 13 comments was modified. The Citizens expressed concern that inordinate delay could exist where the Prehearing Officer makes multiple rulings on the same confidentiality requests. The Citizens agree with the suggestion at the hearing that paragraph 3(c) should be modified to clearly express the staff's stated intent that the Prehearing Officer make just one ruling. The Citizens have also added language to clarify that the Commission panel assigned to the case will hear any and all protests to the Prehearing Officer's ruling.

The sole purpose for the proposed changes would be to eliminate as much delay as possible in confidentiality rulings. Such practice would aid the Citizens in situations where confidentiality ruling delays held up receipt of needed information. The practice would also reduce the possibility that the public would be harmed by ruling delay situations where

temporary public record inspection exemptions are given. The Citizens also believe that the proposed language is consistent with the intent of the staff and Commission in proposing the rule language. (T. 48).

Issue: Should a penalty such as lapse or waiver ensue pursuant to paragraphs (2)(b) and (3)(a) if, absent good cause shown, a utility or other person failed to file a request within 21 days after staff takes possession of confidential information?

As pointed out by the Citizens in the November 13 comments, the proposed rule retreats from the current rule which provides essentially for a waiver of confidentiality claims if timely formal requests for confidentiality are not filed once documents are in the possession of the staff. In the proposed rule the staff has, without explanation, dropped this language.

During the hearing it was suggested by other parties that an absolute and inflexible provision of waiver or lapse might do more harm to the companies and the ratepayers. The Citizens agree and would concur in a provision allowing untimely filings for confidentiality to be made upon a showing of good cause. The Citizens propose that good cause and mandatory waiver language be added to the proposed rule Sections 2(b) and 3(a) as set out in Attachment 1.

The Citizens believe that the addition of such language would protect the integrity of the process and put all utilities on notice that the Commission takes the confidentiality process seriously. The possibility that waiver of confidentiality will ensue if a company is not diligent or able to show good cause will provide a stronger incentive for companies to comply with this rule.

Issue: Should paragraph 3(b) allow any person to object to a confidentiality request?

The Citizens pointed out in comments and at hearing that the proposed rule is unduly restrictive with regard to the Public Records Law when it allows only parties to formal proceedings to object to requests for confidentiality. At the time that the burden of proof is clearly upon the person requesting confidentiality, the general public (including the press) is by rule foreclosed from participation in a process which likely affects issues of a broader public interest than those in a given formal proceeding. The Citizens believe it will be appropriate to modify proposed paragraphs 3(b) to allow any person -- in addition to any party -- to file objections to requests for confidentiality or motions for protective order. As pointed out at hearing we believe this would be consistent with the broader public policy nature of the Public Records Law.

In addition to allowing any person or member of the general public to participate in the initial confidentiality process, there must be some mechanism for providing notice to the general public. The Citizens have proposed that the Commission establish a daily listing of confidentiality requests available for inspection by any member of the public, including the press. The Director of Records and Reporting, Steve Tribble, testified that the Commission had the mechanism which would generate such reports. (T. 62). The only problem may be in the way the confidentiality requests or motions for protective order are styled that would not allow them to be picked up in the system. (T. 63). To remedy this situation the Citizens have proposed all confidentiality request filings clearly indicate that confidentiality is being requested so that the Division of Records and Reporting can make available for public inspection a listing of all pending requests. This listing would constitute effective service of confidentiality requests on nonparties for purpose of objecting within the 14 day time period.

The Citizens continue to believe that these modifications to the initial objection phase of confidentiality request proceedings will better serve the public and impose a minimum cost upon the Public Service Commission and other affected parties.

Issue: What is the burden of proof on the utility or person once a petition has been filed under paragraph 6(a)?

This issue deals with the burden of proof existing once a document has been classified -- either temporarily or permanently -- confidential. Currently the proposed rule requires a person seeking to inspect and examine exempt information to file a petition with the Commission for inspection. Thereupon the affected utility or person would have 10 days to "file a response as to why the material should remain exempt." This procedure raises at least two problems.

First, the petition requirement may be too onerous for the ordinary citizen or even the press. Petitions under the Commission procedural rules have certain legal requirements. A simple written request would be more appropriate under the Public Records Law. The Citizens have proposed language replacing the word "petition" with the word "request."

Second, this part of the rule does not clarify what burden is on the utility or other persons to respond to a request for confidentiality. The Citizens believe this language should indicate that the utility or person must show affirmatively why the materials should remain exempt. As was pointed out at hearing, shifting the burden of proof to the person requesting inspection creates an impossible burden to meet since that person would not

have the information with which to make argument before the Commission. (T. 73).

Another problem with paragraph 6(a) of the proposed rule is that it does not clearly require the Commission to either set an inspection request and/or objection for hearing or issue a ruling. The language is merely permissive rather than mandatory. The Citizens' have proposed language to change this and also have inserted language requiring expeditious resolution of the matter consistent with issue 1 above.

Issue: What is the meaning of the phrase "to be used in a proceeding" in paragraph (5)(c)?

This issue probably turned into a non-issue at the hearing. The Public Counsel expressed concerns that the phrase to be used in a proceeding might be construed in a manner to impair the Public Counsel's statutory discretion in his representation of the state's Citizens. The Citizens' biggest concern was that it might be construed to mean actually introduced at the hearing. Discussion with the parties and the staff did not indicate that this was the case. The Citizens have proposed a definition section which will clearly indicate that the Public Counsel has the sole discretion to decide how he will use information in a proceeding. This language in no way would affect any statutory requirement that information be returned pursuant to current or future amended

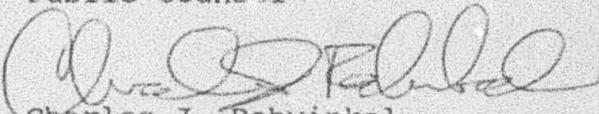
statutes.

Issue: Whether confidentiality determinations under paragraph 5(a) requires a finding by the Commission that confidentiality should be granted.

As the Citizens pointed out in our comments, both the current telephone statute and the newly enacted water and sewer and electric statutes require the Commission to make a finding after a showing by the company that confidentiality should be granted. The Citizens have proposed that paragraph 5(a) be amended to specify that the company must make the showing and the Commission must make a finding before granting a protective order. Although there was some concern expressed about small businesses not being able to make a showing because of costs, the Citizens believe the statutory language is quite clear in requiring the person or the utility requested the showing to make it.

Respectfully submitted,

Jack Shreve
Public Counsel



Charles J. Rehwinkel
Associate Public Counsel

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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 15th day of December, 1989.

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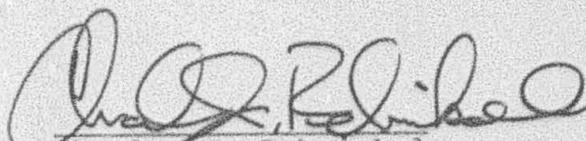
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Charles J. Rehwinkel

Attachment 1

New 1(f)

"Used in a proceeding" when referring to information in the possession of the Public Counsel means whatever use the Public Counsel in his sole discretion wishes to make of the information pursuant to the discharge of his duties under Section 350.0611, Fla. Stat.

Paragraph 2(b)

(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, absent good cause shown,

confidentiality is waived and the material becomes subject to inspection and examination pursuant to Section 119.01 (7), F.A.

A new last sentence should be added to paragraph 3(a) as follows: Absent good cause shown, failure to file such request within 21 days shall constitute a waiver of the request for confidential classification.

Paragraphs 3(b) and 3(c)

(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 or any person may file an objection to the request for confidential classification within 14 days after service of the summary.

All pleadings or requests for confidentiality, including motions for protective order, shall be styled such that it is readily apparent to the Division of Records and Reporting that

confidentiality is being requested. The Division of Records and Reporting will make available for public inspection a listing of daily filings with the Commission requesting confidentiality. Such listing shall constitute service of confidentiality requests on non-parties for purposes of this rule.

(c) Requests for confidential classification including motions for protective orders filed under paragraph 5(a) and any objections filed in response thereto shall be expeditiously 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.

Paragraph 5(a)

(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 by a utility or person and a finding by the Commission that the material is entitled to protection the Commission shall expeditiously enter a protective order limiting discovery in the manner provided for in Rule 1.280, Florida Rules of Civil Procedure. The protective order shall specify how the confidential

information is to be handled during the course of the proceeding and prescribe measures for protecting the information from disclosure outside the proceeding. The notice and objection provisions of paragraph 3(b) above, shall apply to requests for confidentiality filed pursuant to discovery.

(6)(a) Any person may file a petition request to inspect and examine any material the Commission has exempted from s. 119.07(1), F.S. A copy of the petition request must be served on the affected utility or person which shall have 10 days to ~~file a response as~~ to show why the material should remain exempt. The petitioner person requesting inspection shall have 7 days to file a reply to the filed response. The Commission ~~may~~ shall either expeditiously 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.