Ausley, McMullen, McGehee, Carothers & Proctor
Attorneys at Law
Washington Square Building
227 S. Calhoun Street
P. O. Box 391
Tallahassee, Florida 32302

Telephone 904 224-9115
Telecopier 904 222-7560

Charles S. Ausley (1907-1972)
John C. Ausley (1912-1980)
O. Fred McMullen (1904-1980)
DuBose Ausley
James D. Beasley
C. Graham Carothers
Robert N. Clarke, Jr.
Rebecca B. Conlan
J. Marshall Conrad
Timothy B. Elliott
Stephen C. Emmanuel
John P. Fons
Van P. Seeker
Michael J. Glazer
Carla A. Green
Gerald T. Hart

Jann Johnson Hart
Kenneth R. Hart
Margaret Ausley Hoffman
E. Martin McGehee
Carolyn D. Olive
R. Stan Peeler
Robert A. Pierce
H. Palmer Proctor
M. Julian Proctor, Jr.
Steven P. Seymoe
William M. Smith
Emily S. Waugh
C. Gary Williams
Lee L. Willis
E. Bryan Wilson, III

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December 15, 1989

Mr. Steven C. Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Re: Amendment of Rule 25-22.006, FAC,
Pertaining to Confidential Information
Docket No. 890252-PU

Dear Mr. Tribble:

Enclosed herewith for filing on behalf of Southern Bell Telephone and Telegraph Company are the original and 15 copies of the Post-Hearing Comments of Southern Bell.

Copies are being served on all parties of record in accordance with the attached Certificate of Service.

Yours truly,

John P. Fons

JPF/csu

Enclosures

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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 Submitted for Filing: December 15, 1989

POST-HEARING COMMENTS OF SOUTHERN BELL

Pursuant to Rule 25-22.016(5), Florida Administrative Code, and the post-hearing schedule prescribed by the hearing officer, Southern Bell Telephone and Telegraph Company ("Southern Bell") submits its post-hearing comments on proposed revisions to Rule 25-22.006, Florida Administrative Code ("Confidentiality Rule"). These comments consist of general comments concerning the proposed revisions to the Confidentiality Rule, and specific comments respecting those elements of the Confidentiality Rule which are the subject of Public Counsel's concerns.

I. General Comments

From Southern Bell's perspective, the proposed revisions to the Confidentiality Rules are appropriate in view of the Legislature's recent revisions to Chapters 366 and 367, Florida Statutes, which refined and reaffirmed the need for protecting confidential business information and excluding it from the Public Records Law. The proposed revisions to the Confidentiality Rules are consistent with the legislative mandate. In its proposed revised form, the Confidentiality Rule furthers the legislative goal of providing the Commission, the

parties and the public with access to documents and information furnished to the Commission, while at the same time protecting the interests of the utilities and other persons furnishing such information which may include proprietary confidential business information.

Although there is a need for expeditious determination of claims of confidentiality, that need should not overwhelm or undercut the equally important need to protect confidential information from disclosure. The proposed revisions to the Confidentiality Rule continue the cautious approach so necessary to prevent either inadvertent or unwarranted public disclosure. At the same time, the proposed revisions enhance the prompt accessibility to confidential information, to the extent accessibility is necessary by Public Counsel in the context of an ongoing proceeding.

This is not to say that the proposed, revised Confidentiality Rule is perfect. From the view point of Southern Bell, there are further refinements that ought to be considered. For example, the requirements in Subsections 4(a) and 4(c) that the company prepare an index of the lines of each page containing confidential information, no matter how lengthy or voluminous, is burdensome and unnecessary, when less burdensome, but equally workable and effective alternatives exist. In addition, from an administrative standpoint, it would be more practical to circle or underline confidential information rather than highlight it. Circling or underlining will show up if a document is copied,

while highlighting will not. As the Commission, the utilities and Public Counsel gain further experience with handling confidentiality requests, there may be need for additional revisions. But, for the time being, the proposed Confidentiality Rule revisions ought to be adopted with the language revisions suggested and, in large measure, agreed to in the November 17, 1989, hearing. The balance of these comments will discuss those changes.

II. Issues Raised by Public Counsel

Public Counsel filed a Request for Hearing on November 13, 1989, in which he raised several concerns regarding the proposed revisions to the Confidentiality Rule. At the November 17 hearing, these concerns were distilled into six (6) issues relating to various sections of the Confidentiality Rule. For the most part, these issues reflect Public Counsel's belief that the Confidentiality Rules must mandate a prompt resolution of claims of confidentiality. As was shown in the hearing, this preoccupation with prompt resolution sacrificed caution and thoroughness for the sake of some unnamed need to have confidential claims quickly disposed of. As previously noted, this is a poor exchange for those entities furnishing the information which is claimed to be confidential, and is unnecessary in view of the procedures making information available to Public Counsel and other parties prior to the disposition of confidentiality claims.

1. Issues 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.

This issue principally relates to Section 3(c) which states, in part, that:

> 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.

As previously noted, a speedy ruling on requests for confidential information should not risk inadvertent or unwarranted disclosure of confidential information. Likewise, any attempt to put a specific time limit on rulings should be rejected as unworkable. A time limit would ignore the practical aspects of ruling on confidentiality requests since each request could have its own unique set of facts and circumstances. The Commission should not be handicapped in its deliberations by the imposition of an arbitrary time limit. Moreover, it would be grossly unfair if a violation of the time limit by the Commission would result in loss of confidentiality.

In any event, it is agreed it is in the best interest of all parties that the Commission expeditiously rule on all confidentiality claims, given the circumstances surrounding each request. Thus, it may be appropriate to add the phrase "as expeditiously as possible under the circumstances" to Subsection 3(c) after the phrase "shall be ruled on." (See page 3, line 20.)

2. Issue 2. Whether the proposed rule should eliminate appeals from prehearing officer's ruling in confidentiality requests.

This issue relates to the procedures incorporated in Section (3)(c). (See Issue 1. for specific language of Section (3)(c).) Public Counsel initially took the position that there should be no appeals to the full Commission from prehearing officer rulings on confidentiality on the grounds that appeals introduce unnecessary delay. However, Public Counsel eventually conceded that under Chapter 120, Florida Statutes, such denial of appeals to the full Commission would be violative of the Administrative Procedures Act because an order of a prehearing officer cannot be a final order.

Public Counsel then took the position that the prehearing officer should have no more than one opportunity to rule on confidentiality claims. This recommended procedure should be rejected because it is too restrictive and may result in more delay rather than less delay. Much can be accomplished in narrowing claims of confidentiality through an iterative process involving the input of the prehearing officer who will have made an in camera inspection of the subject documents.

3. Issue 3. Should lapse or waiver ensue 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 of confidential information.

Subsection (3)(a) states as follows:

> 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 conference), file a request for confidential classification with the Division of Records and Reporting.

Public Counsel takes the position that any failure to comply with the 21-day provision should result in loss of confidential protection. Clearly, there are instances in which it is not possible to supply the requisite support for a request of confidentiality within 21 days after furnishing the material to Staff. In those situations, there should be an opportunity to show why 21 days is insufficient.

Waiver or lapse is a rather heavy penalty for failure to file a request within 21 days. At the very least, a "waiver" or "lapse" provision should be at the discretion of the Commission, not an automatic result. Thus, if Public Counsel's proposal to amend subsection (3)(b) is adpted, the appropriate language, then, ought to be: "Absent good cause shown, failure to file such request within 21 days may constitute a waiver of the request for confidential classification."

There are just too many situations in which the 21-day limit may be violated, none of which have to do with the quality of the claim of confidentiality, but rather may have to do with magnitude of the request. In view of the importance of confidential information and the resultant harm from disclosure, the proposed punishment does not fit the crime.

Likewise, as was pointed out at the hearing, the last sentence of Subsection (2)(b) creates an automatic waiver of confidentiality "if no timely request for confidential classification is filed." This waiver should not be automatic, but should, as noted in the foregoing discussion, be discretionary. The phrase "confidentiality is waived" should be changed to "confidentiality may be waived." (See page 2, lines 17 and 18.)

4. Issue 4. Should paragraph (3)(b) allow any person to object to a confidentiality request?

Subsection (3)(b) reads as follows:

> 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.

Public Counsel contends that every member of the public, not just parties of record, has a right to protest a claim of

confidentiality at any time before or after the Commission makes the requisite finding. In order to effect this right, Public Counsel further contends that the public, in addition to parties, must have notice of all claims of confidentiality. Although acknowledging that it would be impossible for the utility or other person requesting confidential classification to give notice to every person, Public Counsel still maintains that the Commission must maintain a list of requests for confidential treatment.

Southern Bell agrees that, from a practical standpoint, persons other than parties of record should have the opportunity to challenge claims of confidentiality and has no objection to Subsection (3)(b) being amended to include language designed to permit persons other than parties of record to file an objection to a claim of confidentiality. Yet, because Public Counsel, by Section 350.061(1), Florida Statutes, represents the general public in those proceedings where Public Counsel is a party of record, it should be sufficient for Public Counsel alone to have notice of claims of confidentiality, unless it can be shown that Public Counsel cannot adequately represent the interests of the general public. Likewise, Public Counsel should be in a better position than a member of the general public to advance objections to claims of confidentiality.

5. Issue 5. Who has the burden of proof once a petition has been filed under paragraph (6)(a)?

Subsection (6)(a) states as follows:

> 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.

Public Counsel contends that the burden always is on the utility or person furnishing the confidential information to show that the information is confidential whether the petition to inspect comes before or after the Commission has found that the material is confidential. Obviously, the furnisher of confidential information has the initial burden of showing confidentiality when claiming confidentiality. However, once the Commission has found the material to be confidential, any subsequent requests to inspect should be denied unless the person requesting inspection can affirmatively show that the grant of confidentiality was an abuse of discretion. The utility or other person should only have to show that the Commission has granted confidentiality. To do otherwise, would be to subject the utility or other person furnishing confidential information to constant uncertainty that the confidential material will be kept confidential, since there would never be finality.

Subsection (6)(a) should not be amended to impose any burden on the furnisher of confidential information once it has been exempted by the Commission upon a showing and finding of

confidentiality. At most, the first sentence of Subsection (6)(a) could be amended to insert the phrase "found to be" before "exempted." (See page 6, line 25.)

6. Issue 6. What is the meaning of phrase "to be used in a proceeding" in paragraph (5)(c)?

Subsection (5)(c) states as follows:

> 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.

Public Counsel contends that the phrase "is to be used" may be too narrowly defined so that if the material is not to be introduced into the record by Public Counsel it must be returned to the utility. Public Counsel concedes that "is to be used" is a broad concept and could encompass whatever manner Public Counsel, in his discretion, might use the materials in a proceeding. It is Southern Bell's understanding of the subject phrase that information furnished to Public Counsel under a claim of confidentiality may be used by Public Counsel for purposes related to the subject proceeding other than placing the information in the record. So long as the "use" of the

confidential information is limited to legitimate purposes within the specific proceeding, there is no need to return the confidential material until Public Counsel's need is completed, but not later than the time limits outlined in Subsection (5)(d).

Respectfully submitted,

E. Barlow Keener jpf
Harris R. Anthony
E. Barlow Keener
Suite 1910
150 W. Flagler Street
Miami, Florida 33130

John P. Fons
Ausley, McMullen, McGehee,
Carothers & Proctor
227 S. Calhoun Street
P. O. Box 391
Tallahassee, Florida 32302

Attorneys for Southern Bell
Telephone and Telegraph Company

CERTIFICATE OF SERVICE
Docket No. 890252-PU

I HEREBY CERTIFY that a correct copy of the foregoing bhas een furnished by U.S. Mail or hand delivery to the following parties on this 15th day of December, 1989.

William Bakstran
Division of Legal Services
Florida Public Service
Commission
101 East Gaines Street
Tallahassee, FL 32301

Jack Shreve
Office of Public Counsel
c/o The Florida Legislature
111 W. Madison St., Rm. 801
Tallahassee, FL 32399-1400

Floyd Self
Messer, Vickers, Caparello,
French and Madsen
P. O. Box 1876
Tallahassee, FL 32302

K. Crandal McDougall
P. O. Box 029100
Miami, FL 33102-9100

Teresa Liles
Beggs and Lane
P. O. Box 12950
Pensacola, FL 32501

John P. Fons