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January 25, 1990

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

Re: Docket No. 390252-PU

Dear Mr. Tribble:

Please find enclosed FPL's comments regarding the Hearing Officer's proposed final version of Rule 25-22.006, F.A.C.

Sincerely,

K. Crandal McDougall Attorney	ACK	<u>✓</u>
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00832 JAN 26 1990
FPSC-RECORDS/REPORTING

BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Amendment of Rule 25-22.006,)
Florida Administrative Code,)
pertaining to confidential) Docket No. 890252-PU
information)

COMMENTS OF FLORIDA POWER & LIGHT COMPANY
REGARDING THE HEARING OFFICER'S PROPOSED
FINAL VERSION OF RULE 25-22.006, F.A.C.

Florida Power & Light Company (hereinafter FPL) files these comments to the proposed final version of Rule 25-22.006, F.A.C., issued by the Hearing Officer on January 12, 1990.

1. At the November 17, 1989 hearing, Public Counsel indicated a concern with the lack of a waiver condition in section 3(a) of the published amendment to Rule 25-22.006, F.A.C. In framing the issue to be presented to the Hearing Officer, the parties agreed to the following language which was read into the record by Mr. Bakstran (TR.page 8 Lns. 1-4):

The third issue: "Should a penalty such as lapse of 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."

After discussion of the issue began, Mr. Bakstran, on behalf of Staff, made the following proposal (TR.page 49, Lns. 18-22):

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If we add the following sentence at the end of subsection (3)(a), will it satisfy your [Public Counsel] concerns, and the sentence is: "Absent good cause shown, failure to file such a request within the 21 days may constitute a waiver of the request for confidential classification."

A discussion then ensued about whether the word "shall" should be substituted for the word "may" in the above sentence. There appeared to be no disagreement among the parties present regarding the necessity of the "absent good cause" language. However, when Staff filed its post-hearing comments on December 13, 1989, Staff for the first time indicated misgivings about the "absent good cause" language. Since the Hearing Officer has adopted Staff's position on this matter, FPL is compelled to address this matter which was not in dispute at the hearing. FPL will not rehash the "may" versus "shall" issue which has already been adequately addressed for the Hearing Officer.

FPL wholeheartedly concurs with Public Counsel's post-hearing comments regarding the "absent good cause" language. An absolute and inflexible provision of waiver could be detrimental to

ratepayers and those seeking confidential classification. Public Counsel's proposed language contains the minimum caveat necessary to remedy a mistake that could result in significant damage to ratepayer or utility interests.

Staff's comment that allowing the "absent good cause" caveat would require an order from a prehearing officer every time the 21 day filing period expired before Staff could release a document is incorrect. The caveat only provides a utility or other person with an opportunity to correct a mistake. The utility or other person who would ultimately request confidentiality on a showing of good cause clearly runs the risk that a document request will be made by a member of the public, or that a specific disclosure by the Staff will be made, after the 21 day time limit has run. The proposed Rule already states that to maintain continued confidential handling, in the event the material is subject to a notice of intent, a request must be filed 21 days after Staff has obtained the material. That is, after 21 days the Commission is no longer obligated to handle material as confidential that was subject to a notice of intent for which no request for confidential classification or motion for extension of time has been filed.

Furthermore, at the hearing FPL agreed to withdraw its proposal, found at page 5, paragraph 7, in FPL's October 5, 1989 comments,

to specifically delineate a procedure for handling untimely requests for confidential classification on Staff's statement that the Commission's general procedural rules allow for motions to modify the filing requirements of the rule at hand. However, staff's unequivocal language added to section (3)(a) presents a possible question as to whether the specific language of the rule, i.e., waiver, can be modified by the general language of procedural rules allowing for extensions of time. It makes no sense to leave such an ambiguity in the rule when Public Counsel's proposed language solves this dilemma with no side effects. However, if staff's new position is to be adopted then FPL recommends adoption of the language proposed in paragraph 7 of its October 5, 1989 comments. For these reasons, FPL requests that the Hearing Officer adopt the language agreed to at the hearing regarding the caveat of "absent good cause" and add such language to section (2)(b).

2. FPL objects to the modifications made by the Hearing Officer to section (6)(a) in the proposed final version of Rule 25-22.006, lines 8 to 12. While no party suggested the changes the Hearing Officer has proposed, the changes appear to address a perceived lapse in the proposed rule which were identified and discussed at the hearing. (See TR, pages 78 and 79) The Staff expressed concern about how a person could oppose a pending request for confidential classification since section (6)(a) only allows petitions to

request inspection and examination of material that the Commission had already found to be exempt. This perceived dilemma was also discussed in relation to section (3)(b) regarding whether a party or a person could object to a request for confidential classification made in an ongoing docketed proceeding.

The perceived gap is really no gap at all. No additional language is necessary in either section (6)(a) or (3)(b). The rule as published requires that all requests for confidential classification be handled in a docketed proceeding and be disposed of by a Commission order. Therefore, the limitation of petitions to inspect confidential information to those instances where the Commission has issued a final order is proper because Commission Rules 25-22.029 and 25-22.039, F.A.C., address public participation in docketed proceedings. Commission Rules 25-22.029 and 25-22.039 provide adequate procedures to allow any member of the public, who was seeking access to material which was the subject of a pending request for confidential classification, to object and participate in the proceeding which would determine whether the material was exempt. Consequently, no additional "participation" procedures with respect to the proposed Confidentiality Rule are necessary.

Specifically, Rule 25-22.039 allows persons with substantial interests to intervene in pending proceedings. In an ongoing

proceeding with issues other than a request for confidential classification, such as the fuel adjustment docket, a limited intervention could be provided to allow a person to participate only with respect to the request for confidential classification they seek to challenge. With respect to dockets established by section (3)(b) of the proposed rule, Rule 25-22.039 once again provides for intervention. Rule 25-22.029, F.A.C., provides procedures prescribing the entry of persons in proposed agency action proceedings in the event the Commission rules on the pleadings. These procedural rules are applicable to all Commission docketed proceedings. As such, they will adequately serve the interests of the public with respect to those docketed proceedings in which requests for confidential classification are pending.

A deviation from Rules 25-22.039 and 25-22.029 would unduly complicate the Confidentiality Rule. The additional language added to section (6)(a) by the Hearing Officer conflicts with the procedures established in section (3) of the published rule. Where a request for confidential classification is pending, the additional language would either open a parallel proceeding or create a new round of pleadings which Rule 25-22.039 would not allow, i.e., the challenger would not take the case as they found it. For example, a request for confidential classification ripe for determination by the Commission, after a hearing and briefing

schedule, would suddenly have 17 days added on every time a petition to inspect were filed by a member of the public.

If a petition to inspect material subject to a notice of intent were allowed, the proposed final version language in section (6)(a) would alter the time periods set forth in section (3). The purpose of section (3) is to allow the person requesting confidentiality to have 21 days to file a request for confidential classification. The proposed final version language in section (6)(a) would eliminate 10 of those days if a person filed a petition to inspect material subject to a notice of intent, since section (6)(a) requires a utility to respond in 10 days to a petition to inspect.

Should the Hearing Officer find that participation in a request for confidential classification proceeding should not require that a person meet the requirements of Rule 25-22.039, F.A.C., regarding intervention, then sections (3)(b) and (3)(c) of the published rule should be modified to reflect such and specify the pleading requirements. For example, the last line of section (3)(b) could be modified as follows:

Any person [party to a proceeding] may file an objection to the request for confidential classification within 14 days after service of the copy or summary[.] on all parties of record and Public Counsel.

A sentence could be added to section (3)(c) as follows:

Any person may file an objection to the request for confidential classification within 14 days after the filing of the request.

The proposed language would eliminate the necessity of a person showing a substantial interest in the confidentiality determination and would eliminate the confusion the (6)(a) procedural requirements would create for the Commission when a person attempts to enter the confidentiality proceeding after the Commission and other parties have expended a substantial amount of time on reaching a determination.

For these reasons FPL recommends that section (6)(a) be adopted as originally published by the Commission. If the Hearing Officer

believes Rules 25-22.029 and 25-22.039, F.A.C., are inadequate to address public participation in the Commission's proceedings then FPL suggests that any specific procedures to provide participation in proceedings to resolve requests for confidential classification be delineated as parts of sections (3)(a) and (3)(b).

Respectfully submitted,

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Before

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 by Express Mail to the following parties on this 25th day of January 1990.

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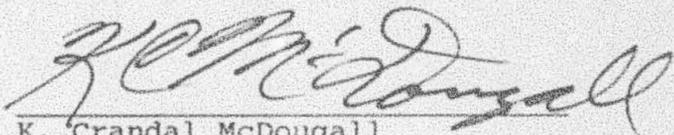
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