

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building  
101 East Gaines Street  
Tallahassee, Florida 32399-0850

MEMORANDUM

March 8, 1990

TO : DIRECTOR OF RECORDS AND REPORTING  
FROM : DIVISION OF APPEALS (SMITH, AS HEARING OFFICER) *DES*  
RE : DOCKET NO.: 890252-PU  
CASE: AMENDMENT OF RULE 25-22.006, F.A.C., PERTAINING TO  
CONFIDENTIAL INFORMATION  
AGENDA: 03/20/90 - CONTROVERSIAL AGENDA - PARTIES MAY NOT PARTICIPATE  
PANEL : FULL COMMISSION  
CRITICAL DATES: NONE  
RULE STATUS DEADLINE: RULE MUST BE FILED FOR ADOPTION WITHIN 21 DAYS  
AFTER AGENDA

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ISSUE AND RECOMMENDATION SUMMARY

ISSUE 1: Should the Commission adopt the Hearing Officer's recommended final version of Rule 25-22.006, F.A.C., pertaining to confidential information? (Attachment 1).

RECOMMENDATION: Yes.

ISSUE 2: Should this docket be closed upon adoption of the rule?

RECOMMENDATION: Yes. The docket can be closed when the rule is filed with the Secretary of State.

DOCUMENT NUMBER-DATE

02091 MAR -7 1990

FPSC-RECORDS/REPORTING

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FPSC-RECORDS/REPORTING

DISCUSSION

ISSUE 1: Should the Commission adopt the Hearing Officer's recommended final version of Rule 25-22.006, F.A.C., pertaining to confidential information?

RECOMMENDATION: Yes.

STAFF ANALYSIS:

Background

The Commission proposed a substantial revision to the confidentiality rule by notice published in the Florida Administrative Weekly on September 15, 1989. Due to a procedural oversight an amended notice was necessary, and it was published in the FAW on October 20, 1989. The Office of Public Counsel filed a request for hearing in response to the Commission's notice on November 13, 1989.

A hearing was held on November 17, 1989, before the Division of Appeals Hearing Officer, Bill Harrold. The following parties were represented: Telus Communications, Inc.; Florida Pay Telephone Association; Southern Bell Telephone and Telegraph Company; Tampa Electric Company; Florida Power and Light Company; Gulf Power Company; Public Counsel; and the Commission staff. In addition, the Small and Minority Business Advocate had filed comments in the docket which were considered for inclusion during the hearing.

Participating parties were given until December 15, 1989, to file post-hearing comments. Post-hearing comments were submitted by Gulf, Public Counsel, Southern Bell, TECO, and the Commission staff. (Attachment 2).

On January 12, 1990, the Hearing Officer issued a proposed final version of the rule for comments by the parties. Filings were received from

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Public Counsel, TECO, Gulf, FPL, and Southern Bell. Copies of those comments which essentially address remaining controversies on the proposed final version of the rule, are attached. (Attachment 3).

The Hearing Officer's Recommended Final Version of the Rule

Public Counsel raised essentially six issues which were discussed at the hearing. Those were as follows:

1. Should the proposed rule have a time certain within which the Commission must rule on any request for confidentiality?
2. Should the proposed rule eliminate appeals from the prehearing officer's ruling on confidentiality request?
3. Should there be a section in subsection (3)(a) of the rule which would provide for waiver of confidentiality if a utility or other person fails to file a request within 21 days after staff takes possession of confidential information.
4. Should there be a provision in section (3)(b) of the rule which would allow any person to object to confidentiality request filed in a formal proceeding?
5. Who has the burden of proof when a petition has been filed under subsection (6)(a), which allows any person to file a petition to examine any material the Commission has exempted from Chapter 119, Florida Statutes?
6. What is the meaning of the phrase "to be used in a proceeding" in paragraph (5)(c) relating to material Public Counsel has been allowed to inspect or take possession of?

The issues raised were discussed in order by the participants at hearing, and their final positions were summarized in post-hearing comments. Most of the issues raised have been resolved and incorporated into the rule. Rather than belabor each issue through the entire hearing and comment process, the following discusses the Hearing Officer's recommended changes to the

rule. The changes are listed in order by rule section, with a brief statement of the purpose of the change, and any controversies surrounding its implementation. Page numbers refer to the locations of the rule section in this recommendation.

1. Section (2)(a) has been modified to read "All material obtained incident to an inquiry . . . is exempt from the public access requirements of Section 119.07(1), P.S. and will be accorded stringent procedural safeguards against public disclosure." P. 11.

This change is an addition to address a perceived need to clearly state that the Commission will give material received pursuant to an inquiry the same strict protection against disclosure that it gives other specified confidential information.

2. Section (3)(a), line 5, the word maintain has been substituted for "obtained". P. 13.

This change is for logical consistency, since the process being described is how to get continued confidential treatment of material that has been temporarily classified.

3. Section (3)(a), line 7, the phrase has obtained is substituted for "takes possession of." This matches the definition in section (1)(e) of the rule and makes it consistent with the use of the term in the text. P. 13.

4. Section (3)(a), line 12, is amended to add the following sentence: Absent good cause shown, failure to file such a request within 21 days shall constitute a waiver of confidentiality. P. 13.

The purpose of this section is to clearly indicate that, once the Commission staff has obtained material from a utility or other person, a

request for confidentiality must be filed within 21 days. If not, confidentiality will be waived, absent some showing of good cause for not filing the request within the 21-day period. A more stringent version of this penalty provision was originally proposed. Staff recommended simply having an absolute waiver of confidentiality if the request was not filed within 21 days. The change recognizes that there may be some rare instances in which good cause can be shown when failure to file the request within 21 days should not result in waiver and loss of confidentiality.

5. Section (3)(b) is changed to read: ". . . the utility or other person . . . shall also serve a copy or summary of its request on all parties of record and on Public Counsel." P. 13.

This indicates that Public Counsel, in addition to all parties of record, shall be served with a copy or summary of any request for confidential treatment of the information.

6. Section (3)(b), line 22, adds copy or to make the language of section (3)(b) internally consistent. P. 13.

7. Section (3)(c), line 23, is amended to read: "Requests for confidential classification, including motions for protective orders under Paragraph 5(a), and any objections filed in response thereto shall be ruled on expeditiously by the prehearing officer assigned to the docket." P. 13.

This change simply indicates that the prehearing officer also rules on motions for protective orders involving confidentiality and that such rulings should be made "expeditiously" to the extent possible. Public Counsel originally proposed an absolute time limit, but backed off from that position at hearing. An absolute time limitation would, of course, be highly

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impractical given the Commission's schedule. The addition of "expeditiously" is consistent with the general idea that the Commission should try to act on confidentiality requests as quickly as possible and that they should not languish unnecessarily.

8. Section (3)(d), line 1, is modified to read "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), P.S. . . ." P. 14.

This change simply makes clear that the material for which a notice of intent has been filed will also be treated as confidential subject to further resolution of the matter.

9. The second sentence of section (4)(a), line 17, has been modified to add the sentence "All such requests, including motions for protective orders based on confidentiality, shall be styled to clearly indicate on their face that confidentiality is being requested." P. 14.

This provision is added to facilitate identification by the Clerk staff and any other interested party that a confidentiality request is involved in some filing.

10. Section (4)(f), line 27, is added to the rule to read "The Commission shall have the discretion to modify the requirements of this subsection in order to alleviate the financial burden of entities qualifying as small businesses under section 288.702, F.S." P. 15.

This section is added to the rule to address the concerns of the Minority and Small Business Advocate that some qualifying small businesses might incur a significant financial burden in complying with the strict filing

requirements of the rule. No party expressed any objection to this provision, and the Hearing Officer anticipates that its use would be extremely limited.

11. The second sentence of section (5)(a) is modified to read "Upon a showing by a utility or other person and a finding by the Commission that the material is entitled to protection, the Commission shall enter a protective order . . . ." P. 16.

This section is added to clarify that the statutory standard of a showing by a utility or other person and a finding by the Commission will apply to the Commission's evaluation of requests for protective orders based on confidentiality.

12. The first sentence of section (6)(a) is modified to read "Any person may file a petition to inspect and examine any material which the Commission has ruled exempt from s. 119.07(1), F.S., or which is exempted under paragraph 3(d) pending the Commission's ruling or as the result of the filing of a notice of intent to request confidentiality." P. 17.

This modification represents the Hearing Officer's attempt to resolve one of the more controversial issues in the rule. Public Counsel has insisted that, in any formal proceeding where confidentiality is requested, persons other than the parties to the proceeding should have the right to file an objection to the request for confidential classification. This would mean, essentially, that anybody, whether they had an interest in the proceeding or not, could file an objection to a confidentiality request made in a formal proceeding before the Commission. This process is addressed in section (3)(b) of the rule. Public Counsel has further insisted that section (3)(c) be modified to include the following provision: "The Division of Records and

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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." Public Counsel would thus have the Commission Clerk produce a daily listing of filings as notice on the public at large that a confidentiality request had been made with the Commission.

It is the Hearing Officer's opinion that these additions to the rule are unnecessary. In the first place, the information on confidentiality filings is available at the Clerk's office for anyone interested enough to ask for it. Furthermore, the Public Records law contemplates that any person will have the ability to inspect any public records not classified as exempt, and to petition to inspect those that are. The language proposed by the Hearing Officer recognizes this process. However, it distinguishes the procedures applicable to interested parties in a formal proceeding from those of persons who simply would like to obtain the material. Persons who are not parties could effectively seek access to material at any stage of the classification process, from the filing of a notice of intent through the final ruling by the Commission. The only difference is that this language would keep the procedure in the Public Records request domain, rather than injecting it into the process of formal proceedings before the Commission.

12. In section (7) the term confidential information is substituted for confidential "material" in several places. This change is simply for internal consistency. P. 17.

Other Controversial Changes Rejected by the Hearing Officer

At hearing and its post-hearing filings, Public Counsel has urged the inclusion of a new section (1)(f) in the definitional section of the rule. It would state: "'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."

Public Counsel's reference to "used in a proceeding" concerns the discovery section of the rule (5)(c) which states:

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 initially argued at hearing that the definition of "used in a proceeding" was necessary to assure that everyone understood that the use that Public Counsel might make of the confidential material was not limited to actually introducing it into evidence in a formal proceeding. During discussion at hearing, however, the parties generally agreed that Public Counsel's use of the material would not be limited to introducing it into evidence. The Hearing Officer believes that Public Counsel proposed definition is not needed. The general understanding is that information used in a proceeding may be broader than introducing it into evidence.

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The Hearing Officer believes that the Commission's rule should be a generally applicable statement of its policy and procedure for handling confidential material. It cannot, and should not, attempt to address every special situation which may occur. The hearing officer recommends that the Commission adopt the version of the rule which is attached.

DES:prl  
Attachments

1 25-22.006 Confidential Information.

2 (1) Definitions.

3 (a) "Confidential Information" means material that has been  
4 determined, pursuant to this rule, to be proprietary confidential  
5 business information under Section 350.121, 364.193, 366.093, or  
6 367.156, F.S.

7 (b) "Formal proceeding" means a proceeding docketed in the  
8 Commission's Division of Records and Reporting.

9 (c) "Inquiry" means an investigation pursuant to section  
10 350.121, F.S. An inquiry is set in motion by the Commission  
11 Chairman, the Executive Director, or the General Counsel to  
12 evaluate a complaint, allegation, or to develop information as a  
13 basis to initiate action on or dispose of any matter within the  
14 Commission's jurisdiction.

15 (d) "Material" means all documents, papers, letters, maps  
16 books, tapes, photographs, films, sound recordings, or other  
17 recorded information regardless of physical form or  
18 characteristics.

19 (e) "Obtaining material" means receiving material pursuant to  
20 filing or taking physical control of material by removing the  
21 original material or a copy of it from the utility's or other  
22 person's premises. Obtaining material also means the extraction  
23 of data from material for inclusion in working papers or memoranda.

24 (2) Material obtained during an inquiry.

25 (a) All material obtained incident to an inquiry by the  
26 Commission, its staff or any consultant employed by the Commission  
27 is exempt from the public access requirements of Section  
28 119.07(1), F.S., and will be accorded stringent procedural  
29 safeguards against public disclosure during the pendency of the  
30 inquiry. When the Commission or its staff is requesting  
31 information incident to an inquiry, the source shall be informed

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struck-through type are deletions from existing law.

1 in writing that the request is made incident to an inquiry.

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

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

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

MEMORANDUM

March 15, 1990

RECEIVED  
MAR 16 1990

FPSC-RECORDS/REPORTING

TO : DIVISION OF RECORDS AND REPORTING  
FROM: DAVID E. SMITH, DIRECTOR OF APPEALS  
RE : DOCKET NO. 890252-PU -- AMENDMENT OF RULE 25-22.006, F.A.C.,  
PERTAINING TO CONFIDENTIAL INFORMATION

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Attached is an amended page 13 to the recommendation submitted on March 8, 1990. "Absent good cause shown" is inserted at lines 11-12.

DES:prl  
Attachment  
3493G

*Placed with  
recommendation  
GC*

1 The notice of intent to request confidential classification shall  
2 be filed with the Division of Records and Reporting and shall have  
3 appended thereto a copy of any written request for the material to  
4 which it relates. A copy of the notice shall be provided to the  
5 division(s) requesting the material. To maintain obtain  
6 continued confidential handling of the material the utility or  
7 other person must, within 21 days after the staff has obtained  
8 ~~takes-possession-of~~ the material (or in the case of material  
9 obtained during the course of an audit, within 21 days after the  
10 field audit exit conference), file a request for confidential  
11 classification with the Division of Records and Reporting. Absent  
12 good cause shown, failure to file such a request within 21 days  
13 shall constitute a waiver of confidentiality.

14 (b) When the material is obtained incident to a formal  
15 proceeding, the utility or other person requesting confidential  
16 classification shall also serve a copy or summary of its request  
17 on all parties of record and on Public Counsel. The summary shall  
18 describe the material in sufficient detail so as to reasonably  
19 inform the reader of the nature of the material. Any party to a  
20 formal proceeding may file an objection to the request for  
21 confidential classification within 14 days after service of the  
22 copy or summary.

23 (c) Requests for confidential classification, including  
24 motions for protective orders under Paragraph 5(a), and any  
25 objections filed in response thereto shall be ruled on  
26 expeditiously by the prehearing officer assigned to the docket.  
27 The and-the Commission panel assigned to the case will hear any  
28 protest to the prehearing officer's ruling. If a request is  
29 received outside a docketed proceeding, the request itself will be  
30 docketed.

31 (d) All material that has been classified as confidential, or

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1 for which a ruling on confidentiality is pending, or is subject to  
2 a notice of intent to request confidential classification, shall  
3 be exempt from Section 119.07(1), F.S., and will be accorded  
4 stringent internal procedural safeguards against public  
5 disclosure. Any staff or consultant reports or work products  
6 containing confidential information extracted from material having  
7 been classified as confidential, or for which a ruling on  
8 confidentiality is pending, shall be handled in the same manner as  
9 the material so classified. The Commission shall have discretion  
10 to retain any confidential material in its possession. Upon the  
11 consent of the Department of State, the Commission may return or,  
12 after consulting with the source, destroy any material that is no  
13 longer needed.

14 (4) Requests for confidential classification.

15 (a) A request for confidential classification of material  
16 shall be filed in writing with the Division of Records and  
17 Reporting. All such requests, including motions for protective  
18 orders based on confidentiality, shall be styled to clearly  
19 indicate on their face that confidentiality is being requested.  
20 The utility or other person shall file with the request one copy  
21 of the material for which confidential treatment is requested. On  
22 this copy, the specific information asserted to be confidential  
23 shall be highlighted. Along with the highlighted copy, the  
24 utility or other person shall file two or more edited copies as  
25 required by the type of proceeding, which will be made available  
26 for public inspection. In the edited copies, the specific  
27 information asserted to be confidential shall be blocked out by  
28 the use of an opaque marker or other masking device. The utility  
29 or other person shall identify the page(s) and line(s) at which  
30 the confidential material is found and shall correlate the page(s)  
31 and line(s) identified with the specific justification proffered

1 in support of the classification of such material.

2 (b) In the case of electronically stored material, one  
3 unedited version shall be submitted along with a written  
4 identification of the specific data fields for which confidential  
5 classification is requested along with a field-by-field  
6 justification for the confidential classification.

7 (c) In the line-by-line or field-by-field justification for  
8 confidential classification, the utility or other person must  
9 demonstrate how the information asserted to be confidential  
10 qualifies as one of the statutory examples listed in section  
11 364.183(3), 366.093(3), or 367.156(3), F.S. If no statutory  
12 example is applicable, then the utility or other person shall  
13 include a statement explaining how the ratepayers or the person's  
14 or utility's business operations will be harmed by disclosure.

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

19 (e) The burden of proof shall be on the utility or other  
20 person to show that the material in question contains bona fide  
21 proprietary confidential business information. A request for  
22 confidential classification that fails to identify the material  
23 for which confidential classification is sought in sufficient  
24 detail to permit a reasoned analysis or which fails to provide the  
25 required justification for classification may be denied as  
26 insufficient on its face.

27 (f) The Commission shall have the discretion to modify the  
28 requirements of this subsection in order to alleviate the  
29 financial burden of entities qualifying as small businesses under  
30 section 288.702, F.S.

31 (5) Discovery.

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1 (a) In any formal proceeding before the Commission, any  
2 utility or other person may request a protective order protecting  
3 proprietary confidential business information from discovery.  
4 Upon a showing by a utility or other person and a finding by the  
5 Commission that the material is entitled to protection, the  
6 Commission shall enter a protective order limiting discovery in  
7 the manner provided for in Rule 1.260, Florida Rules of Civil  
8 Procedure. The protective order shall specify how the  
9 confidential information is to be handled during the course of the  
10 proceeding and prescribe measures for protecting the information  
11 from disclosure outside the proceeding.

12 (b) The Commission's protective orders shall exempt  
13 proprietary confidential business information from section  
14 119.07(1), F.S. While a request for a protective order is  
15 pending, the information asserted to be confidential shall also be  
16 exempt from section 119.07(1), F.S. Such exemption shall apply  
17 whether the information is in the possession of an entity,  
18 individual, or state agency, including the Office of Public  
19 Counsel.

20 (c) When a utility or other person agrees to allow Public  
21 Counsel to inspect or take possession of utility information for  
22 the purpose of determining what information is to be used in a  
23 proceeding before the Commission, the utility may request a  
24 temporary protective order exempting the information from section  
25 119.07(1), F.S. If the information is to be used in a proceeding  
26 before the Commission, then the utility must file a specific  
27 request for a protective order under paragraph (a) above. If the  
28 information is not to be used in a proceeding before the  
29 Commission, then Public Counsel shall return the information to  
30 the utility in accordance with the record retention requirements  
31 of the Department of State.

1 (d) Confidential information which has not been entered into  
2 the official record of the proceeding shall be returned to the  
3 utility or person who provided the information no later than 60  
4 days after the final order, unless the final order is appealed.  
5 If the final order is appealed, the confidential information which  
6 has not been made a part of the record shall be returned no later  
7 than 30 days after the decision on appeal.

8 (6)(a) Any person may file a petition to inspect and examine  
9 any material which the Commission has ruled exempt from s.  
10 119.07(1), F.S., or which is exempted under paragraph 3(d) pending  
11 the Commission's ruling or as the result of the filing of a notice  
12 of intent to request confidentiality. A copy of the petition must  
13 be served on the affected utility or person which shall have 10  
14 days to file a response as to why the material should remain  
15 exempt. The petitioner shall have 7 days to file a reply to the  
16 filed response. The Commission may set the matter for hearing or  
17 may issue a ruling on the pleadings. Material obtained by the  
18 Commission in connection with an inquiry shall not be subject to  
19 requests for inspection and examination until after the inquiry is  
20 terminated.

21 (b) A finding of confidentiality notwithstanding, a source  
22 may consent to inspection or examination by any person. Such  
23 consent shall not constitute a waiver of confidentiality and only  
24 the person(s) specified in the consent may inspect or examine the  
25 material. The Commission may be requested to issue a protective  
26 order to recognize the terms and conditions of the consent. All  
27 persons are urged to seek mutual agreement regarding access prior  
28 to bringing a controversy to the Commission.

29 (7) Use of confidential information material during formal  
30 proceedings. The Commission may rely upon confidential  
31 information material during a formal proceeding and such

1 information material, if otherwise admissible, will be received  
2 in evidence. In such event, reasonable precautions will be taken  
3 to segregate confidential information material in the record and  
4 otherwise protect its integrity.

5 (8) Duration of Confidential Classification.

6 (a) Orders of the Commission granting confidential  
7 classification shall limit the duration of such classification to  
8 a period not exceeding 18 months. The Commission may approve a  
9 longer period if it finds, for good cause, that such longer period  
10 is necessary to protect the ratepayers or the business operations  
11 of the utility or affected person.

12 (b) When confidential information is no longer needed for the  
13 Commission to conduct its business, the Commission shall order all  
14 persons holding such information to return it to the utility or  
15 person providing the information.

16 (c) Confidential information not returned at the conclusion  
17 of the period established under paragraph (a) of this subsection,  
18 shall no longer be exempt from s. 119.07(1), F.S., unless the  
19 utility or affected person shows, and the Commission finds, that  
20 the information continues to be confidential. Upon such finding,  
21 the duration of confidential classification may be extended for a  
22 period of up to 18 months, or for a longer period if the  
23 Commission finds, for good cause, that such longer period is  
24 necessary to protect the business operations of the utility or  
25 affected person. While the Commission is considering an extension  
26 under this paragraph, the information in question shall remain  
27 exempt from s. 119.07(1), F.S.

28 (9) Judicial Review. When the Commission denies a request  
29 for confidential classification, the material will be kept  
30 confidential until the time for filing an appeal has expired. The  
31 utility or other person may request continued confidential

1 treatment until judicial review is complete. The request shall be  
2 in writing and filed with the Division of Records and Reporting.

3 The material will thereafter receive confidential treatment  
4 through completion of judicial review.

5 Specific Authority: 350.127, P.S.

6 Law Implemented: 350.121, 364.163, 366.093, 367.156, P.S.

7 History: New 7/1/85, Amended  
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