

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Amendment of Rule)	DOCKET NO. 890252-PU
25-22.006, F.A.C., pertaining to)	ORDER NO. 22795
confidential information.)	ISSUED: 4-11-90
_____)	

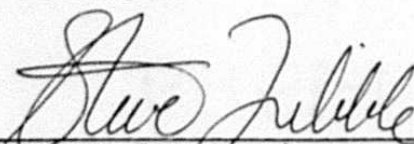
NOTICE OF ADOPTION OF RULE AMENDMENT

NOTICE is hereby given that the Commission, pursuant to section 120.54, Florida Statutes, has adopted the amendments to Rule 25-22.006, F.A.C., relating to confidential information, with changes.

The rule amendment was filed with the Secretary of State on April 6, 1990, and will be effective on April 26, 1990. A copy of the relevant portions of the certification filed with the Secretary of State is attached to this Notice.

This docket is closed upon issuance of this notice.

By Direction of the Florida Public Service Commission,
this ~~11th~~ day of APRIL, 1990.



STEVE TRIBBLE, Director
Division of Records & Reporting

(S E A L)

DES

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DOCUMENT NUMBER-DATE

03148 APR 11 1990

FPSC-RECORDS/REPORTING

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CERTIFICATION OF
PUBLIC SERVICE COMMISSION ADMINISTRATIVE RULES
FILED WITH THE
DEPARTMENT OF STATE

I do hereby certify:

(1) The time limitations prescribed by paragraph 120.54(11)(a), F.S., have been complied with; and

(2) There is no administrative determination under section 120.54(4), F.S., pending on any rule covered by this certification; and

(3) All rules covered by this certification are filed within the prescribed time limitations of paragraph 120.54(11)(b), F.S. They are filed not less than 28 days after the notice required by subsection 120.54(1), F.S., and;

(a) And are filed not more than 90 days after the notice; or

(b) Are filed not more than 90 days after the notice not including days an administrative determination was pending; or

(c) Are filed within 21 days after the adjournment of the final public hearing on the rule; or

(d) Are filed within 21 days after the date of receipt of all material authorized to be submitted at the hearing; or

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 (e) Are filed within 21 days after the date the transcript was received by this agency.

Attached are the original and two copies of each rule covered by this certification. The rules are hereby adopted by the undersigned agency by and upon their filing with the Department of State.

<u>Rule No.</u>	<u>Specific Rulemaking Authority</u>	<u>Law Being Implemented, Interpreted or Made Specific</u>
25-22.006	350.127, F.S.	350.121, 364.183, 366.093, 367.156, F.S.

Under the provision of paragraph 120.54(12)(a), F.S., the rules take effect 20 days from the date filed with the Department of State or a later date as set out below:

Effective: _____
(month) (day) (year)

Steve Tribble

Director, Division of Records & Reporting
Title

Number of Pages Certified

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Substantial rewording of Rule 25-22.006. See Florida Administrative Code for present text.

25-22.006 Confidential Information.

(1) Definitions.

(a) "Confidential Information" means material that has been determined, pursuant to this rule, to be proprietary confidential business information under Section 350.121, 364.183, 366.093, or 367.156, F.S.

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

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

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

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

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(2) Material obtained during an inquiry.

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

(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

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request for confidential classification is filed, confidentiality is waived and the material becomes subject to inspection and examination pursuant to Section 119.01 (7), F.S.

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

(a) 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 maintain continued confidential handling of the material the utility or other person must, within 21 days after the staff has obtained the material (or in the case of material obtained during the course of an audit, within 21 days after the field audit exit conference), file a request for confidential classification with the Division of Records and Reporting. Absent good cause shown, failure to file

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such a request within 21 days shall constitute a waiver of confidentiality.

(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 and on Public Counsel. 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 copy or summary.

(c) 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. 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.

(d) 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), F.S., and will be accorded stringent internal procedural safeguards against public disclosure. Any staff or consultant reports or work products containing confidential information extracted from material having

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been classified as confidential, or for which a ruling on confidentiality is pending, shall be handled in the same manner as the material so classified. The Commission shall have discretion to retain any confidential material in its possession. Upon the consent of the Department of State, the Commission may return or, after consulting with the source, destroy any material that is no longer needed.

(4) Requests for confidential classification.

(a) A request for confidential classification of material shall be filed in writing with the Division of Records and Reporting. 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. The utility or other person shall file with the request one copy of the material for which confidential treatment is requested. On this copy, the specific information asserted to be confidential shall be highlighted. Along with the highlighted copy, the utility or other person shall file two or more edited copies as required by the type of proceeding, which will be made available for public inspection. In the edited copies, the specific information asserted to be confidential shall be blocked out by the use of an opaque marker or other masking device. The utility or other person shall identify the page(s) and line(s) at which the confidential material is found and shall correlate the page(s) and line(s) identified with the specific justification proffered

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in support of the classification of such material.

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

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

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

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

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insufficient on its face.

(f) The Division of Records and Reporting shall make available for public inspection a listing of daily filings with the Commission requesting confidentiality.

(g) 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.

(5) Discovery.

(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 other person and a finding by the Commission that the material is entitled to protection, the Commission shall 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.

(b) The Commission's protective orders shall exempt proprietary confidential business information from section 119.07(1), F.S. While a request for a protective order is pending, the information asserted to be confidential shall also be exempt from section 119.07(1), F.S. Such exemption shall apply

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whether the information is in the possession of an entity, individual, or state agency, including the Office of Public Counsel.

(c) 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.

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

(6) (a) 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

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the Commission's ruling or as the result of the filing of a notice of intent to request confidentiality. 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 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.

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

(7) Use of confidential information during formal proceedings. The Commission may rely upon confidential information during a formal proceeding and such information, if otherwise admissible, will be received in evidence. In such event, reasonable precautions will be taken to segregate confidential information in the record and otherwise protect its integrity.

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(8) Duration of Confidential Classification.

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

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

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

(9) Judicial Review. When the Commission denies a request for confidential classification, the material will be kept

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confidential until the time for filing an appeal has expired. The utility or other person may request continued confidential treatment until judicial review is complete. The request shall be in writing and filed with the Division of Records and Reporting. The material will thereafter receive confidential treatment through completion of judicial review.

Specific Authority: 350.127, F.S.

Law Implemented: 350.121, 364.183, 366.093, 367.156, F.S.

History: New 7/1/85, Amended

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Rule 25-22.006
Docket No. 890252-PU

SUMMARY OF RULE

The proposed rule, which is a substantial rewording of Rule 25-22.006 (see Florida Administrative Code for present text), eliminates the unnecessary distinction between general and specified confidential classifications.

Under the proposed rule, all confidentiality requests will be ruled on expeditiously by the prehearing officer and any protest to the ruling will be heard by the panel of commissioners assigned to the case. The Commission's Office of General Counsel will no longer make tentative rulings on undocketed confidentiality requests. Such requests will themselves be docketed.

The utility or person requesting confidential classification will have to submit to one unedited and at least two edited versions of the material. On the unedited version, the specific information for which confidential classification is sought will have to be highlighted. The request must be accompanied by a line-by-line justification for classification. Thus, only actual confidential information will be granted exemption from public disclosure and an edited version of the material will be available for immediate public inspection. Absent good cause shown, a utility will waive confidentiality if a request for confidential treatment is not filed within 21 days after the staff takes possession of the material.

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The Division of Records and Reporting will maintain a daily listing of confidentiality requests and make it available to the public.

Any person may file a petition to inspect confidential material and shall serve a copy of the petition on the affected utility or person. The utility or person will have ten days to file a response stating why the information should be kept confidential, and the petitioner will have seven days to file a reply to the response. The Commission will then have the option of ruling on the pleadings or setting the matter for hearing.

Every confidentiality request must contain an affirmative statement that the information has not been publicly disclosed.

Utilities and other persons will be able to get temporary exemption from the Public Records Law for all the documents being inspected by Commission auditors until the exit conference. Then they will have 21 days to file confidential request.

When utilities or other persons agree to allow Public Counsel to inspect or take possession of documents for the purpose of determining what information Public Counsel would like to use in a proceeding before the Commission, they will be able to get a temporary protective order exempting the information from public disclosure. When Public Counsel decides what information it wants to use, then the utility or other person can file a specific request for a protective order.

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Confidential material, which is not made part of the record, can be kept by the Commission not longer than 60 days after the final order, unless it is appealed; if appealed, not longer than 30 days after the decision on appeal.

Orders granting confidential classification will limit such classification to period not exceeding 18 months unless, for good cause, the Commission determines that a longer period is necessary to protect the ratepayers or the business operations of the utility or affected person. At the conclusion of the period of classification, the information will no longer be exempt from the Public Records Law unless the utility or affected person shows, and the Commission finds, that the information continues to be confidential. The Commission may then extend the period of classification another 18 months or for a longer period, if the Commission finds that such longer period is necessary.

SUMMARY OF HEARINGS ON THE RULE

November 17, 1989

In response to the Commission's Notice of Proposed Rulemaking, the Office of Public Counsel filed a request for hearing. The hearing was held on November 17, 1989, before an attorney from the Commission's Division of Appeals acting as Hearing Officer. The following parties were represented: Telus Communications, Inc.; Florida Pay Telephone Association; Southern Bell Telephone and Telegraph Company; Tampa Electric Company;

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Florida Power and Light Company; Gulf Power Company; Public Counsel; and the Commissions staff. In addition, the small and minority business advocate had filed comments in response to the Notice of Rulemaking which were considered for inclusion during the hearing. The issues that were considered at the hearing were those raised by Public Counsel. As formulated at the hearing, those issues 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 rulings on confidentiality requests? 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 a confidentiality request filed in a formal proceeding? 5. Who has the burden of proof when a petition has been filed under section (6)(a), which allows any person to file a petition to examine any material the Commission has exempted from Chapter 119, Florida Statutes? and 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?

These issues were discussed at length by the participants at the November 17, 1989, hearing. In addition, the parties were

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allowed to file post-hearing comments and to respond to a proposed final version of the rule issued by the Hearing Officer. The discussions at hearing and post-hearing comments resulted in an agreement on several modifications to the rule which were included in the Hearing Officer's proposed final version submitted for the Commission's consideration. For example, a section was added to provide for a waiver of confidentiality under certain circumstances and parties filing confidentiality requests were directed to clearly state their requests to indicate that confidentiality was being requested. The Hearing Officer also recommended a provision in the rule which would require the Commission to act "expeditiously" on all confidentiality requests and would make clear that any person could petition the Commission to inspect and examine any material classified as confidential by the Commission, whether the clarification was pursuant to a specific ruling or the material was being held as confidential pending final disposition of the confidentiality request.

March 20, 1990

The proposed final version of Rule 25-22.006 was considered by the Commission at its public agenda conference held on March 20, 1990. At that time, the Commission modified one section of the rule. That modification was to specifically adopt Public Counsel's proposal to require the Director of Records and Reporting to maintain a daily listing of confidentiality requests

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which would be available for public inspection. With that modification, the Commission voted to adopt the rule.

FACTS AND CIRCUMSTANCES JUSTIFYING THE RULE

The present rule worked fairly well until approximately a year and a half ago when the Commission was flooded with confidentiality requests, which were the result of increased competition among utilities, particularly in the telecommunications industry. In several dockets, the prehearing officers and the full Commission itself, were having to devote an inordinate amount of time to hearing motions on confidentiality. With the overload of confidentiality requests, problems with the confidentiality rule began to emerge.

To resolve these problems and the ever increasing backlog of confidentiality requests, the General Counsel and the Executive Director convened a task force to review the Commission's procedures relating to confidential information. After thoroughly examining the confidentiality rule in light of the problems resulting from the increasing number of confidentiality requests, the task force issued its final report which recommended revising the rule to simplify and clarify the Commission's procedures. Legislative changes to Chapters 366 and 367, Florida Statutes, in 1989 also required modification of portions of the rule.