

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. UNDOCKETED

In the Matter of
REVIEW OF CONFIDENTIALITY
PROCEDURES.

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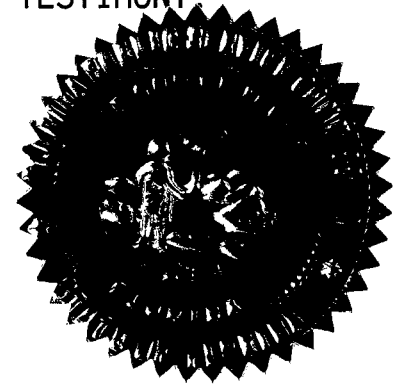
CONDUCTED BY: ROBERT V. ELIAS

DATE: Friday, March 15, 2002

TIME: Commenced at 10:00 a.m.
Concluded at 10:35 a.m.

PLACE: Betty Easley Conference Center
Room 152
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR
Official FPSC Reporter
(850) 413-6734



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FLORIDA PUBLIC SERVICE COMMISSION 03300 MAR 22 08

FPSC-COMMISSION CLERK

1 IN ATTENDANCE:

2 ROBERT ELIAS, Representing FPSC Division of Legal
3 Services.

4 VICKI GORDON KAUFMAN, Representing the Florida
5 Industrial Power Users Group.

6 JAMES D. BEASLEY, Representing Tampa Electric Company.

7 KENNETH A. HOFFMAN, Representing Florida Power & Light
8 and Florida Power Corporation.

9 RUSSELL BADDERS (by telephone), Representing Gulf
10 Power.

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P R O C E E D I N G S

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2 MR. ELIAS: All right. Good morning, everybody. This
3 time and place have been noticed for a workshop in the
4 undocketed matter concerning potential revisions to the
5 statutes, rules and procedures governing the treatment of
6 confidential information that is filed with the Public Service
7 Commission.

8 For anybody that doesn't know me, my name is Bob
9 Elias. I'm a Staff Attorney. And what we are looking for here
10 is to streamline the process. The parties and the Commission
11 spend a tremendous amount of resources handling and processing
12 confidential information. At numerous times in the past the
13 Commission has taken a look to see if there was a better way of
14 doing this. It's been quite some time since we went through
15 that exercise, and there was a general consensus that maybe it
16 was time to take a fresh look at it and that's why we're here.

17 Our purpose is not to expand the scope of the kinds
18 of information that is excluded from public view. Florida has
19 a very strong public policy that favors the records that are
20 maintained by government agencies be public, and we are not
21 looking to in any way, shape or form do anything that's
22 inconsistent with that well-established policy. However,
23 within the confines of the existing framework, we thought that
24 maybe there is some room for improvement.

25 And if you have a copy of the straw man statutory

1 proposed revision that was passed out, I'm going to step
2 through it very quickly. And basically it's got three changes
3 to the current Chapter 366 provision that governs the treatment
4 of confidential material.

5 The first is similar to what is found in Section
6 364.183, Florida Statutes, governing telecommunications
7 companies. A person claiming materials or proprietary
8 confidential business information may simply file them with the
9 Commission with such a claim and, absent some further
10 proceeding, they will be held confidential.

11 Unlike the telecommunications provision, this statute
12 explicitly recognizes the right of the Commission or any person
13 to move that the claimant demonstrate in accord with the
14 standard that's established and the procedure that's
15 established in the existing statute that the materials are, in
16 fact, confidential.

17 There have been times in the past when material that
18 was filed here as a claim was determined to be publicly filed
19 with another agency available through the Internet, a newspaper
20 article or information that on its face did not meet the
21 standard of the statute. And this is what we see as the best
22 way of assuring that, that those kinds of mistakes are not, are
23 redressed.

24 The second thing is that -- a third thing is that a
25 claim is time limited for a period of two years. I did some

1 checking and of the 136 confidentiality orders that we did in
2 2001 concerning electric and gas utilities, I believe only
3 three of them were in the nature of extensions for materials
4 that had been previously filed. The vast majority of
5 information is sensitive for a very time limited period. And
6 while the current statute provides for 18 months unless a
7 specific period is, is demonstrated in the request -- quite
8 frankly, one of the things that we were gearing this towards,
9 this revision towards is the routine fuel filings, which it
10 seemed to me in large measure have an outside window of about
11 two years. And rather than craft a statute or a revision or a
12 procedure which was defective going in in terms of affording
13 adequate protection, we thought that the two-year time frame
14 might, given what we've seen in the past, address that problem.

15 We're looking for input on the procedures that we
16 use, potential revisions to the statute, comments on this
17 particular proposal and potential rule revisions either in
18 conjunction with or apart from the statutory revisions. And,
19 and I can't stress enough that we need input from the, the
20 stakeholders, all the stakeholders.

21 Our thinking currently is -- obviously this session
22 is scheduled to end next week -- that we will have a package
23 put together sometime later on this year well in advance of the
24 next session gearing up, if there is to be a statutory
25 revision. We may walk away from this exercise deciding that

1 what, the statute as it stands currently is what's best and
2 that there may be some changes to the rule that are, that are
3 appropriate and go forward with them on a separate track.

4 It may be that we decide that both are appropriate
5 and we'd make a decision as to whether or not to wait to see
6 how the legislation faired before we went ahead with the rule
7 revisions, if there are other subjects within the existing rule
8 that, that could stand a little tweaking.

9 With that, I'd like to hear from as many presenters
10 as are willing to offer comments. And we will provide for a
11 time after this workshop to offer written input. And it is our
12 plan to at some point in the future report back to the
13 Commission at an Internal Affairs with the results of the
14 workshop and to make a recommendation as to, to what, if any,
15 action should be taken in the future.

16 One of the concerns that we had in promulgating these
17 revisions is in assuring that other nonowner, in the context of
18 confidential information, parties continue to be able to have
19 access to the materials, to do discovery in a timely matter, to
20 make sure that the Commission has the benefit of all the
21 information that's out there to enable the Commission to make
22 the best decisions on pending matters. And as I was thinking
23 about that, I think one of the things that -- two things to
24 keep in mind is, first, we're only dealing with information
25 that gets filed here. The arrangements that get made with

1 respect to the exchange of information in discovery through
2 protective orders and the like would be unfettered by this
3 action.

4 The second thing is that with this new procedure that
5 we've proposed as far as a claim and a right of any person to
6 challenge that claim, if they have, you know, if they just want
7 to be satisfied that the information does meet the standard in
8 the statute, one of the ways that the owners of the information
9 can avoid that is by sharing the information with interested
10 persons outside this agency and enable them, subject to a
11 protective order or a protective agreement where it's
12 appropriate, and enable them to satisfy themselves that, that
13 the information truly is confidential and without the need of
14 having to challenge a claim.

15 And with that, I'd like to hear from anybody and
16 everybody that wants to offer us some input on this subject.
17 And I believe there are several people participating by phone.
18 This proceeding is being transcribed, so if you're going to
19 speak, I'd ask that you identify yourself for the court
20 reporter so that we can understand exactly who's speaking.
21 Anybody?

22 MR. HOFFMAN: Well, I guess I'll start it off. My
23 name is Ken Hoffman. I'm with the law firm of Rutledge,
24 Ecenia, Purnell & Hoffman. I'm here this morning on behalf of
25 Florida Power & Light Company and Florida Power Corporation.

1 And my comments are very brief and very general at this point,
2 Bob.

3 I would say this, that I think that, at least in my
4 experience in proceedings before the Commission, the number of
5 legitimate disputes over whether certain documents are
6 confidential are relatively few and far between. And despite
7 that, at least under the current statute and rules, the
8 utilities as well as the Commission Staff are required to
9 expend significant resources demonstrating what in large part
10 everyone already understands, which is that specific documents
11 have been in the past and should in the future continue to be
12 treated as confidential. So that is my way of saying on behalf
13 of FP&L and Florida Power Corp that we welcome and applaud this
14 undertaking by the Commission Staff to streamline the process.

15 I think that this type of movement will in no way,
16 shape or form impede efforts by other parties to review
17 information through the discovery process that is claimed to be
18 confidential by a utility. The one difference, I guess, that I
19 see, and I think that you touched on this, Bob, between this
20 initial proposal for the electric and gas utilities as opposed
21 to what the statute says for the telephone companies is the
22 provision that would specifically put in the statute that any
23 person, or the Commission can require any person asserting a
24 claim that the information is proprietary to demonstrate that
25 it does meet the requirements of confidentiality under the

1 statute. And I think that that's, that's something that does
2 need to be preserved, those types of rights. I see in the rule
3 that that is there now in connection with the
4 telecommunications companies.

5 So we support your efforts. Once a deadline for
6 filing comments is set, I imagine that we may expand on what
7 I've had to say this morning just a little bit. But apart from
8 that, we support where you're going with this and we think it
9 makes all the sense in the world.

10 MR. ELIAS: Thank you, Ken. Mr. Beasley?

11 MR. BEASLEY: Yes, Bob. Jim Beasley for Tampa
12 Electric Company.

13 We, we likewise want to avoid any labors that can be
14 avoided both for the Commission, the Staff, the parties
15 involved. We do want to stress the importance that, that there
16 be no inroads on the protection of confidential information,
17 the disclosure of which would harm utilities, customers,
18 industrial customers who need protection of their confidential
19 information in proceedings before the Commission, and anyone
20 else whose, whose proprietary information, if disclosed
21 publicly, would harm their interests. And that, I think, the
22 Commission has recognized many times through many of the
23 hundreds of orders that you've referenced.

24 And so with that, with that cardinal goal in mind of
25 not harming the confidential protection that, that needs to be

1 there for the parties that are participants in proceedings
2 before the Commission, we can certainly work towards
3 streamlining the process. I don't know whether it needs to be
4 by statute or by rule or rule amendment. Preferably the lesser
5 always -- if you can avoid having to change statutes, I think
6 that's a good thing. If you can do it within the confines of
7 366.093, I think that would be good to do by rulemaking. I
8 don't know if the Staff has looked at that possibility, but I
9 think it would be a good one, if, if that's a way to do it.

10 MR. ELIAS: We did. And there are some areas of the
11 rule that apart from revision to, to the statute we think
12 could, could be streamlined, made more clear.

13 In some instances, take steps to expedite parties'
14 access to information during discovery disputes and things of
15 that nature. But rather than move on parallel tracks, I don't
16 think that -- well, let me rephrase this.

17 I think in the context of the post-1996 and post-'99
18 Administrative Procedures Act, the more explicit the authority
19 in the statute, the, the, the better foundation you have to
20 promulgate a valid rule. And, quite frankly, some of the
21 provisions that we've suggested might be appropriate here. I
22 would certainly feel more comfortable having the statutory
23 authority than trying to base those provisions on the existing
24 statute and just simply amending the rule.

25 MR. BEASLEY: Right. Well, one, one thing I want to

1 urge on behalf of my client is that we, we don't like to have
2 things treated confidentially unless necessary. And I know
3 there was some discussion at the outset about things that are
4 on the Internet and, or, or made public in other filings. And
5 we, we strive every time we file something with the Commission
6 to ensure that that's not the case with information that we
7 seek -- because it's a lot of work for us, too, it's a lot of
8 work for the Staff, it's a lot of work for the Commission. And
9 so, you know, to the extent we can avoid having to do that,
10 we'd sure like to do it.

11 MR. ELIAS: Believe me, nobody appreciates like me
12 just how much work is involved in processing confidential
13 information in the energy industry.

14 At the same time, we're also mindful that the vast
15 majority of this information is held confidential to assure
16 that the utility is able to bargain for goods and services on
17 favorable terms for commodities whose cost is directly paid for
18 by the ratepayers. And I'm speaking in terms of the fuel and
19 fuel transportation.

20 I don't think that I've seen anyone argue that the
21 public disclosure of that information wouldn't have some
22 adverse effect on the ability of the utilities to bargain for
23 that, for those commodities on favorable terms. And that is a,
24 you know, a protection that is paramount in our minds in terms
25 of securing the lowest cost service for customers.

1 MR. BEASLEY: We're -- bottom line, we're amenable to
2 doing, you know, anything it takes to, to make this thing less
3 painful for everybody.

4 MR. ELIAS: And, you know, I'd encourage everybody to
5 go back to the people in your organizations that deal with this
6 stuff on a regular basis and, and just get their input as to
7 how we can improve the process. And for the parties that are
8 typically trying to grapple with information that's posited to
9 them as confidential, we need to know what we could do to make
10 it easier to get more timely access to the information outside
11 the public eye to enable all of you to marshal the evidence to
12 make the points to the Commission that you believe need to be
13 made.

14 We do lots of, make lots of decisions in a very short
15 time frame around here, and I think that's in the public
16 interest. But at the same time, any decision that's made
17 without the best information or all the information available,
18 all parties, is, is compromised in terms of quality.

19 Ms. Kaufman?

20 MS. KAUFMAN: Thank you. Vicki Gordon Kaufman. I'm
21 here on behalf of the Florida Industrial Power Users Group.
22 I'm with the McWhirter, Reeves Law Firm.

23 It's not going to come as a surprise to anybody that
24 we think this proposal is moving in the wrong direction as
25 party, a party that's involved continually almost in these

1 confidentiality claims. And, as you mentioned earlier,
2 Mr. Elias, as an interested stakeholder that bears the, a big
3 responsibility for portions, for example, of the fuel costs and
4 other costs that are going through the cost recovery clause, we
5 think that claims of confidentiality require more scrutiny, not
6 less scrutiny. I think there are a lot of differences. I know
7 you modeled this on the telecom statute that has a similar
8 provision. There's a lot of differences between the telecom
9 industry and the electric industry, the primary one being that
10 telecom consumers have a choice. Telecom companies are not
11 rate-base regulated. Telecom companies don't have automatic
12 pass-through clauses.

13 And in my experience in the telecom sector, the kind
14 of information that's being protected has to do with company to
15 company; in other words, one company doesn't want another
16 company to see its subscriber lists, to know where its switches
17 are located, those kind of things.

18 In the electric industry the kind of information
19 that's being withheld from ratepayers is information that
20 affects their bottom line; every month they get an electric
21 bill.

22 This is a very broad proposal, as I understand it,
23 that basically lets a company claim information is confidential
24 and then it remains so. It shifts the burden, I think,
25 inappropriately under Chapter 119 to parties seeking to gain

1 access to the information.

2 So I would have to say that we are opposed to this
3 statutory revision and encourage the Commission to look more
4 carefully and to make more information available to the public
5 rather than to suggest procedures that, I guess in my mind,
6 would, would result in even more information being kept from
7 the public.

8 MR. ELIAS: Okay. Let me respond to a couple of
9 things that you said.

10 First of all, it is not our intent to in any way,
11 shape or form expand the categories or types of information
12 that would be withheld from, from public view. Anything that's
13 filed here still has to meet the standard, that is going to
14 remain confidential still has to meet the standard in (3) for
15 proprietary and confidential business information.

16 MS. KAUFMAN: Well, let me ask you. Well, how, how
17 do you do that? Because I understand the way this would work,
18 and this is the way it works on the telecom side, somebody has
19 information, they file it, they say, this is confidential,
20 proprietary business information. Thank you very much. That
21 information remains sealed, it's my understanding, unless it's
22 utilized in a proceeding or something like that I don't -- and
23 I might be wrong, but I'm not aware that there is any review of
24 that claim.

25 MR. HOFFMAN: That -- oh, I'm sorry.

1 MR. ELIAS: I can't speak to the specific procedures
2 that they use in each and every telecom case. But the
3 provision that we put in here that says, "Upon request of any
4 person or upon its own motion," was not envisioning a change in
5 the burden of proof or persuasion or moving forward or making
6 any kind of showing on the part of the movant. It's just
7 somebody that wants to know. And thereafter the person
8 claiming confidential treatment would have to meet the standard
9 in the statute, which would -- what I was envisioning is that
10 if an interested person -- well, I don't want to use the word
11 "interested person" because --

12 MS. KAUFMAN: An intervenor.

13 MR. ELIAS: No, not even that. In our view, anyone
14 --

15 MS. KAUFMAN: Any member of the public, yeah.

16 MR. ELIAS: -- any member of the public who would
17 otherwise have a right of access to the information could
18 require the movant or the claimant to demonstrate that the
19 information is, in fact, confidential would just simply ask.

20 MS. KAUFMAN: And then you would contemplate that the
21 utility would then sort of fall back on the prior process.

22 MR. ELIAS: Would fall -- yes.

23 MS. KAUFMAN: You would get a lot of requests, I
24 guess.

25 MR. ELIAS: Well, and, you know, I think when you

1 look at the history of, of how this agency has moved in my time
2 here, there's a lot more negotiation that goes on on some of
3 these issues than, than was had in the past. And it would be
4 my hope that upon, you know, that if a particular party or
5 person was concerned about the, the confidentiality of a
6 particular claim, that the first move would be to contact the
7 utility, maybe execute a protective agreement, and review the
8 information and satisfy themselves that it was, in fact,
9 confidential.

10 Failing that, it would be simply that, that the
11 Commission issue an order requiring the owner of the
12 information to make the requisite showing, and the Commission
13 would rule on it in the same manner it does now.

14 MR. HOFFMAN: Under the Commission's rules, this is
15 Ken Hoffman, there is a procedure in place when we're talking
16 about the exchange of information between a telecommunications
17 company and the Staff for a claim of confidentiality to be
18 challenged. How often that happens, I don't know.

19 In my experience, as Ms. Kaufman said, where you
20 typically tend to spend time and negotiate is with the exchange
21 of information between two companies and typically you end up
22 entering into some type of protective and nondisclosure
23 agreement and you exchange that information.

24 But I just wanted to note that there is a provision
25 in the Commission's rules which appears to set forth the same

1 type of goal that is set forth in the second piece of your
2 draft statutory language, which is to preserve that opportunity
3 to contest the claim of confidentiality.

4 MR. ELIAS: Okay. Anybody else?

5 MR. BEASLEY: Bob, I'd just like to note that we're
6 not proponents of changing the statute. We're proposing doing
7 whatever it takes to make life easier for the Staff and the
8 parties, the utilities that the Commission regulates. And if
9 that can be done, be it rulemaking or practice or whatever,
10 we're all for it.

11 MR. ELIAS: When you file your comments, if you
12 choose to file comments, if you have specific suggestions that
13 address either the provisions of the rule or the practices to
14 the extent that they're not resident in the rule, that would be
15 most helpful.

16 MR. BEASLEY: Uh-huh. Okay.

17 MR. BADDERS: Bob, this is Russell Badders on behalf
18 of Gulf Power. I just wanted to express some support for what
19 Staff is trying to accomplish here. We appreciate your
20 efforts.

21 I don't have specific comments on the rule or the
22 proposed revision to the statute, but we do intend to file
23 comments.

24 One comment with regard to what Vicki was or Ms.
25 Kaufman was talking about, no one's trying to expand the scope

1 of what is confidential. I think you made that fairly clear.
2 This is just a way to streamline the process when we're dealing
3 with trying to get the information to the parties as fast as we
4 can while still preserving what the statutes currently say
5 should be done, which is keep what is confidential
6 confidential. And all I can see this is doing is streamlining
7 the process. I don't really think it's taking anyone's
8 substantive rights away. But, again, we do support what Staff
9 is trying to accomplish here.

10 MR. ELIAS: And I think you've expressed our goal
11 fairly well. And at the same time we are mindful of the open
12 records policy of the state and we are trying to preserve the
13 integrity and access to that information that, that should be
14 public in as timely and as open a fashion as possible.

15 Is there anybody else on the phone that wishes to
16 offer comments? Any questions?

17 All right. Today is March 15th. How about -- how
18 much time would y'all like for comments?

19 MS. KAUFMAN: A lot. No.

20 MR. ELIAS: Three weeks, four weeks?

21 MS. KAUFMAN: Just when I get through the other rate
22 case first.

23 MR. ELIAS: I understand.

24 MR. HOFFMAN: 30 days?

25 MR. BADDERS: 30 days would probably be good, knowing

1 that we have, I think, the true-up and some of the causes
2 coming up around the first of April. That gives us a couple of
3 weeks after that.

4 MR. ELIAS: All right. I believe that would be
5 April -- well, let's see. It would be April 15th because I
6 think the 14th is a Monday, if I'm not mistaken. All right.

7 MS. KAUFMAN: I'm sorry. April 15th? I'm sorry.

8 MR. ELIAS: Does anybody have a calendar in front of
9 them? I took mine out. I'm pretty sure April 15th is a
10 Monday. Yes. Yeah, it is. That's right.

11 MR. HOFFMAN: It's certainly a hard day to forget.

12 MR. ELIAS: Yes. Truly, unless you don't have a
13 calendar in front of you. All right. Let's make it for
14 April 15th. And --

15 MR. BEASLEY: Short form?

16 MS. KAUFMAN: Hopefully.

17 MR. ELIAS: Yes. Since Internal Affairs items are
18 typically only filed about six days before the Internal
19 Affairs, I will send a memo to the same, to the electric
20 industry and to all interested persons that have asked to be
21 notified of pending matters in the electric industry in, well
22 in advance of when we plan to schedule it for Internal Affairs
23 so that, to the extent that people need to make travel plans or
24 put that on their calendar, they have the benefit of that
25 information ahead of time.

1 Again, we really want to hear from all interest
2 groups before we go forward with this proposal. And to the
3 extent that you can provide us detailed input on what we should
4 do, if anything -- if you think the process is too closed, I
5 can open it up. You know, if, if there's information that
6 we've been finding confidential that maybe in the new universe
7 no longer meets that test, that would be worth knowing, too.
8 It might ultimately save a whole lot of people a lot of
9 unnecessary work.

10 Okay. I'd like to thank everybody for their
11 participation and look forward to hearing from you on the 15th
12 of April. Thank you.

13 MR. BADDERS: Thank you.

14 (Concluded at 10:35.)

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1 STATE OF FLORIDA)
2 :
3 COUNTY OF LEON)
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CERTIFICATE OF REPORTER

5 I, LINDA BOLES, RPR, Official Commission
6 Reporter, do hereby certify that the foregoing proceeding was
7 heard at the time and place herein stated.

8 IT IS FURTHER CERTIFIED that I stenographically
9 reported the said proceedings; that the same has been
10 transcribed under my direct supervision; and that this
11 transcript constitutes a true transcription of my notes of said
12 proceedings.

13 I FURTHER CERTIFY that I am not a relative, employee,
14 attorney or counsel of any of the parties, nor am I a relative
15 or employee of any of the parties' attorneys or counsel
16 connected with the action, nor am I financially interested in
17 the action.

18 DATED THIS 21ST DAY OF MARCH, 2002.

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FPSC Official Commissioner Reporter
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