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April 15, 2002

**VIA HAND DELIVERY**

Blanca S. Bayo, Director  
Division of Records and Reporting  
Betty Easley Conference Center  
4075 Esplanade Way  
Tallahassee, Florida 32399-0870

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02 APR 15 PM 4:33  
COMMISSION  
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Re: Docket No.: Undocketed

Dear Ms. Bayo:

On behalf of the Florida Industrial Power Users Group (FIPUG), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ Comments of the Florida Industrial Power Users Group on Proposed Revisions to Confidentiality Statute.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,



Vicki Gordon Kaufman

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04178 APR 15 02  
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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Re: Review of Confidentiality  
Procedures

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Docket No.: Undocketed  
Filed: April 15, 2002

**COMMENTS OF THE FLORIDA INDUSTRIAL POWER USERS GROUP  
ON PROPOSED REVISIONS TO CONFIDENTIALITY STATUTE**

Pursuant to Staff's request at the workshop held on March 15, 2002, the Florida Industrial Power Users Group (FIPUG) files these comments in regard to the suggestion that §366.093(1), Florida Statutes, be amended so as to create a presumption of confidentiality for certain documents which electric utilities claim are confidential.

1. In a revision of § 366.093(1), Florida Statutes, distributed at the workshop, Staff suggested that an amendment to that section might be appropriate so as to provide that upon the request of the utility, any documents, which it *claims*<sup>1</sup> are confidential, shall be kept confidential. As explained in the Staff memo of February 21, 2002, the proposed revision "provides that material claimed to be confidential may be filed with the agency, and a Commission ruling on that claim is only required in limited circumstances." The burden would then be upon the person who disputes such a claim to request that the utility prove up its confidentiality claim.

2. The rationale set out in support of this proposed change is to "streamline" the confidentiality process. While FIPUG appreciates the Commission's desire to make its procedures more efficient, it believes that the proposed suggestion is a step in the wrong

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<sup>1</sup> Had the suggested revision been in place in the past, a document which a utility *claimed* was confidential, but which had been publicly filed in another jurisdiction, would have been kept secret in Florida.

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direction. Rather than making its confidentiality procedures less rigorous, FIPUG suggests that they should be more stringent.

3. As this Commission is aware, it is the policy of this state, as articulated in Chapter 119, Florida Statutes, to make every document which a public agency receives, a public record, with limited exceptions delineated in the statute. Section 119.011(1), Florida Statutes, defines "public records" to include:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

This definition includes all materials made or received by an agency in connection with official business that are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980). All these types of materials must be open for public inspection, unless the Legislature has created a specific exemption. *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

4. Further, Article I, §24, Florida Constitution, establishes a constitutional right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by or specifically made confidential by the Constitution. *See, State ex rel. Clayton v. Board of Regents*, 635 So. 2d 937 (Fla. 1994) ("[O]ur Constitution requires that public officials must conduct public business in the open and that public records must be made available to all members of the public."). The suggestion of a statutory amendment, which makes it as simple as just claiming a document is confidential to shield it from public view, is contrary to the public policy of this state and should be rejected.

5. The suggested statutory amendment seems principally aimed at documents used in the fuel adjustment and other cost recovery clause proceedings. As the Commission knows, the amounts at issue for recovery in these proceedings are quite large and often exceed by several magnitudes amounts at issue in base rate proceedings. Further, the amounts sought for recovery in the clause proceedings, are passed directly through to ratepayers without any adjustment for or attention to a utility's earnings. It is FIPUG's view that it is critical that such information be provided and examined in the sunshine.<sup>2</sup>

6. FIPUG often participates before the Commission in cases involving alleged confidential information. FIPUG has often experienced extreme difficulty in obtaining information pertinent to its interests that underlies the utilities' requests to collect significant sums of money from ratepayers. Frequently, the utilities present only gross totals that they seek to collect. Efforts to inquire as to specifics are often met with confidentiality claims that impede efforts to gain access to relevant information.

7. At the workshop, Staff stated that the proposed revision was modeled after the telecommunications statute, §364.183(1), Florida Statutes. However, there are significant differences between the telecommunications industry and the electric industry that make such a comparison inappropriate.

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<sup>2</sup> FIPUG anticipates that proponents of the amendment will suggest that parties to a particular proceeding may gain access to confidential information through the execution of a confidential agreement with the utility that claims the information is confidential. This approach is problematic for several reasons. First, FIPUG strongly believes that *ALL* ratepayers should have access to this information. After all, it often forms the basis for the collection of *MILLIONS* of dollars from them. Second, in numerous instances, the confidentiality agreements presented to FIPUG for signature often seek to prohibit certain FIPUG members from viewing the information, even though they participate in paying for the charges at issue. Third, execution and negotiation of such agreements is often a time-consuming and contentious process that greatly limits the actual review and discovery time once such documents are actually received.

8. First, the electric industry is rate-base regulated. That is, the electric industry's investment in its assets is included in rate base and a return is earned on it, which is funded solely by ratepayers. Telecommunications companies (even the ones that remain de facto monopolies) are not rate base regulated. The Commission and ratepayers do not guarantee their earnings level.

9. Further, in some instances, especially those of the long distance telecommunications market, consumers have a choice of providers. If a consumer is dissatisfied with a particular provider, the consumer may readily and easily change companies. In the electric industry, consumers are captive customers with no ability to select an alternative provider. Customers have every right to see and review the information upon which the monopoly utility seeks to base its rates.

10. Third, in the instance of the telecommunications industry, the information most often kept confidential is information between competing telecommunications companies, such as, for example, customer lists. In the electric industry, confidentiality procedures keep information secret from the consumers who are nonetheless asked to pay the freight on transactions, often between affiliated companies.

11. FIPUG believes it is time for the Commission to revisit its confidentiality procedures -- not to make it easier to keep documents out of the public domain, but to make it more difficult. Ratepayers are entitled to view those documents that form the basis for rate increases. The Commission's procedures should ensure that this happens.

*Vicki Gordon Kaufman*

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Comments of The Florida Industrial Power Users Group on Proposed Revisions To Confidentiality Statute has been furnished by (\*) hand delivery or U.S. Mail this 15<sup>th</sup> day of April, 2002 to the following:

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