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April 20, 2010

VIA: ELECTRONIC MAIL

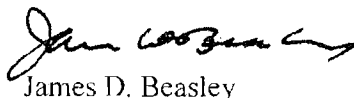
Ms. Samantha Cibula
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: UNDOCKETED – March 23, 2010 Staff Workshop Regarding Rule 25-22.033,
Florida Administrative Code, Communications between Commission Employees
and Parties

Dear Ms. Cibula:

Following up the March 23, 2010 rule development workshop in the above matter, I am pleased to enclose Comments by Tampa Electric Company.

Sincerely,



James D. Beasley

JDB/pp
Enclosure

cc: Paula Brown (w/enc.)
Billy Stiles (w/enc.)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: March 23, 2010 Staff Workshop)
Regarding Rule 25-22.033, Florida)
Administrative Code, Communications)
Between Commission Employees and)
Parties)
_____)

UNDOCKETED
Filed: April 20, 2010

COMMENTS BY TAMPA ELECTRIC COMPANY

Tampa Electric Company (Tampa Electric or the Company) submits these comments in response to the rule development workshop held March 23, 2010, regarding Rule 25-22.033, Florida Administrative Code, Communications Between Commission Employees and Parties.

Introduction

Tampa Electric submitted comments to the Commission on December 15, 2009, in response to the Commission's November 24, 2009 workshop. These comments offered certain principles the Company believes should be taken into account as the Commission considers changes to Rule 25-22.033, Florida Administrative Code, Communications Between Commission Employees and Parties. The Company suggested that:

- The benefits to be gained from extending the requirements of the rule, or applying similar requirements, to the proceedings and activities that are currently exempt should be weighed against the impact on the costs and efficiency of the regulatory process;
- New requirements regarding communications between Staff and parties should take into account similar processes employed by other agencies of the State of Florida; and
- Application of the rule should be symmetrical in all respects.

Tampa Electric continues to believe these principles are appropriate and offers the following comments in response to the March 19, 2010 Staff Draft (Staff Draft) and the comments and ideas expressed by others at the workshop.

Communications Between Staff and Individuals or Entities That Are Not Parties or Interested Persons

As the Commission considers revisions to its rule governing communications with Staff, it is most important that the Commission arrive at a rule that is clear and practicable. As stated in comments previously filed with the Commission, Tampa Electric will continue to comply with all communication protocols prescribed by the Commission; however, parties' and interested persons' ability to understand and comply with the rule will have a bearing on the effectiveness of the communications upon which the Commission's decision making process relies. As one of the workshop participants pointed out, if the rule is vague or difficult to understand, there will be a natural tendency for Staff and others representing interests before the Commission to err on the side of caution in order to avoid violating the rule. A cautionary attitude will undoubtedly serve everyone's interests; however, the regulatory process depends on the flow of accurate and timely information fostered through open dialogue. Tampa Electric supports the general approach followed in the Staff Draft to create a rule that is clear and understandable. The application of the rule to docketed matters is an example of the "bright line" approach that will simplify compliance with the rule and minimize the possibility of inadvertent rule violations. Another example of this "bright line" approach is defining "interested persons" as individuals or entities who are listed in the Commission's docket files so it is readily determinable who is supposed to receive notice of communications. Again, this approach will serve to minimize confusion on the part of regulatory representatives, practitioners and Staff when communicating.

Tampa Electric applauds the Office of Public Counsel's (OPC) involvement in this matter and is supportive of OPC's effort to draft recommended rule language that attempts to provide

additional transparency with respect to communications between the Commission Staff and persons other than parties and interested persons. Tampa Electric is concerned, however, that OPC's approach would not be workable. The OPC recommends that interested persons be defined to include persons who "could reasonably be presumed to have an interest in the outcome of the relevant agency action." OPC's intent is to create additional transparency for communications that occur between Staff and persons or entities who are not either a "party" or an "interested person" to a proceeding. Tampa Electric shares OPC's concerns in this regard, but believes a clearer and more practical approach is warranted as the Staff and the Company cannot be expected to be clairvoyant with respect to who might be interested in a given proceeding beyond those who have been granted intervenor status and those who are listed in the Commission's docket file as interested persons.

Tampa Electric believes an alternative would be to create notice requirements applicable to individuals or entities that are not parties or interested persons. Such notice requirements could be effected by creating a new category called "concerned persons," which could be defined as any individuals or entities who are not listed in a docket as parties or interested persons. Notice of communications between Staff and concerned persons could be provided for in the rule by requiring all written communications and written summaries of oral communications between Commission employees and concerned persons addressing the merits of docketed matters to be filed by the Commission employee receiving or initiating the communication in the docket file within three days of the communication. Tampa Electric would also suggest adding "concerned persons" to the list of people or entities who are prohibiting from communicating with Staff regarding the merits of any matter at issue in a Section 120.569 or 120.57, F.S., proceeding during the period of time between the conclusion of the hearing and issuance of the final order.

Applicability of the Rule to PAA Proceedings

As stated above, Tampa Electric supports the approach taken in the Staff Draft regarding the applicability of the rule to docketed proceedings only. With respect to the exemption for Proposed Agency Action (PAA) proceedings, Tampa Electric does not necessarily have a position as to whether such proceedings should or should not be covered by the rule, although in the Company's view the Staff Draft offers a workable solution that addresses concerns about the impact on the efficiency of Staff's data collection efforts. Tampa Electric would also observe that PAA decisions are preliminary in nature and any substantially affected person, including OPC, has the right to request a hearing on the matter.

Tampa Electric's primary goal with this and other sections of the rule is that the Commission arrive at a clear and workable process. To this end, Tampa Electric is concerned about OPC's recommended process for determining when a PAA proceeding is exempt from the rule. OPC recommends that all PAA proceedings be subject to the rule for the first 21 days and then become exempt until a docket-specific PAA notification is filed. From Tampa Electric's point of view, this process unnecessarily increases the complexity of the rule and, consequently, the likelihood that individuals who have a need to communicate with the Staff will inadvertently violate the rule. Like other utilities, Tampa Electric has multiple open dockets at the Commission at any given time, many of which will be processed as PAA. OPC's recommended process would result in Tampa Electric's representatives having to determine whether the matter on which they are communicating is subject to the rule or not, a process that might be difficult depending on how the Commission accommodates the PAA notifications within its case management system. If the Commission is inclined to incorporate OPC's suggested PAA

notification process, or some variation thereof, Tampa Electric would request that the Commission provide a clear indication within the docket file indicating whether or not the provisions of the rule are in effect at any given moment, and that parties to the case be entitled to rely on that indication.

Undocketed Matters

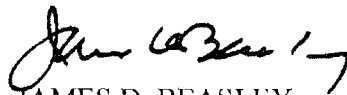
As stated previously, the “bright line” of applying the rule to docketed matters only would contribute to the rule being clear and workable as it is relatively straightforward to determine which matters are docketed. The Staff Draft deviates from this concept in Subsection (10), which provides for notice to the OPC and the public of all meetings involving undocketed matters between Commission Staff and regulated entities. Tampa Electric does not object to including a notice provision for undocketed matters, per se, realizing, however, that requiring advance notice for any such meetings could result in lengthening the time associated with the flow of information sought by the Staff.

While Tampa Electric does not object to a notice requirement for such matters, the Company objects to this subsection applying only to meetings between Staff and regulated entities. Tampa Electric believes an important guiding principle to be followed in this rulemaking is that the rule be applied symmetrically in all respects. Communications between Staff and one stakeholder group should not be covered by the rule, while communications with other groups of stakeholders are allowed to occur without notice. Tampa Electric suggests that Subsection (10) be revised to simply require Commission Staff to post on the Commission's web site notices of all meetings with Commission employees involving undocketed matters.

Conclusion

Tampa Electric thanks the Commission for the opportunity to submit these comments. We look forward to working further with the Commission to achieve a workable process that maintains the flow of information necessary for the Commission to effectively regulate the industry.

Respectfully submitted this 20th day of April, 2010,



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April 20, 2010

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Re: Undocketed Rule Development Workshop regarding Commission
Employee Communications with Parties and Interested Persons

Dear Ms. Cibula:

Thank you for the opportunity to participate in this ongoing rule development process. The dialogue fostered through the series of workshops initiated by the Commission Staff and the Commission held to date has been very helpful. We look forward to continuing to engage in this useful dialogue, and offer these comments as part of that effort.

It is important for any rule that results from this process to distinguish the Commissioners' role as the ultimate decision makers on both policy matters and the merits of contested matters from that of the information gathering function typically fulfilled by the Commission Staff. In a judicial atmosphere, a ban on "ex parte" communications is typically applied only to the ultimate decision maker (e.g. the judge or jury in a criminal case, not the prosecutor's office). Caution must be exercised to ensure that the information gathering function is not handicapped by complex and difficult to interpret rules that do not contribute to a fully informed decision making process. Likewise, it is important not to create a system that complicates communications to the point that administrative efficiency is destroyed. The resulting rules should not discourage efficient questions and answers between Staff and the possessors of

information that Staff needs in order to ensure that the Commission continues to be well informed in an efficient and timely manner prior to its decisions on important issues.

Another important concern relates to the potential settlement of otherwise contested issues. Any restructuring of the communication process should be flexible enough to encourage dialogues that may lead to mutually agreeable settlements that will allow the avoidance of unnecessary proceedings. The Commission's long standing Proposed Agency Action (PAA) process has served as an efficient means of resolving certain matters without having to resort to the more formal structure associated with contested hearings. A decision to follow the PAA process should not prejudice anyone with a recognizable legal interest in a proceeding. If anyone with a recognizable legal interest in a proceeding objects to the "proposed" agency action, that person (or entity) can request party status and a hearing on the merits. The resulting hearing process will result in an evidentiary hearing that produces a record on which the ultimate decision of the Commission must be made. The efficacy of the PAA process as a mechanism for potentially resolving matters without a hearing can be severely damaged by adding too much structure to the communication process on the presumption that all matters are contested.

Even in the context of contested hearings, the parties are typically encouraged to resolve their differences and enter into settlements whenever possible. Any rule resulting from the current discussions should provide sufficient flexibility to allow settlement opportunities to be explored without prejudicing any party's right to hearing. A mechanism that allows (but does not necessarily require) parties engaged in settlement discussions to inform the Commission Staff and/or the Commissioners that such discussions are ongoing may prove beneficial to the ultimate resolution of matters without necessarily invoking the full costs of following contested litigation to a full conclusion. Frequently, settlement agreements are reached due the relative uncertainty faced by all sides to a contested matter of the ultimate outcome of a decision on the merits. Overly structured and complex rules can discourage settlement discussions by premature disclosure of the areas of discussion before agreement is reached.

Any rule that restricts communications should be applied carefully. Such a structure is entirely appropriate in the context of a discussion of the merits for a matter that is clearly contested. Adding such structure to communications regarding potential matters at too early a stage may be counter-productive and may ultimately increase the cost to consumers through administrative inefficiency or ill-informed decision making at an early stage of the information gathering process. Once a matter becomes docketed, additional structure may be appropriate with regard to the merits of a matter. Even then, flexibility to communicate on subjects other than the merits of a contested matter is needed to maintain efficiency and control costs.


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It is also important that an affirmative burden be placed on persons having an interest in a proceeding to identify themselves and demonstrate legal standing in order to be entitled to notice regarding permitted communications. Parties to a proceeding should be assured that they are given prompt notice of all communications to or from the Commission Staff regarding the merits of the proceeding and an opportunity to respond, whether the communications involve parties or non-parties. That said, it is neither necessary nor appropriate to require parties to a proceeding to incur the burden of providing notice to non-parties who have not demonstrated a legal entitlement to such notice. This comment should not be construed to suggest an approach that might interfere with the unique statutory role of the Office of Public Counsel. To the contrary, compliance with both the spirit and the letter of the law set forth in F.S. 350.0613¹ is important to the fair administration of justice and the efficient operation of the regulatory process.

If changes in the current rules are ultimately adopted, it is important that the resulting rule be simple to understand and easily applied. The resulting rule should allow for communication to and from the Staff, with notice to parties in any contested matter of any discussions relating to the merits of the proceeding. Such notice is intended to allow for an adequate opportunity to respond to such information on the merits prior to any forwarding of such information to the decision makers, whether in the form of a recommendation or an answer to a question when a decision is being considered. There should be symmetry in the application of the rules to all parties (including members of any associations appearing as a party in a proceeding).

Once again, thank you for the opportunity to participate in this process.

Very truly yours,



Jeffrey A. Stone
For the firm

¹ "... The commission shall furnish the Public Counsel with copies of the initial pleadings in all proceedings before the commission, and if the Public Counsel intervenes as a party in any proceeding he or she shall be served with copies of all subsequent pleadings, exhibits, and prepared testimony, if used. Upon filing notice of intervention, the Public Counsel shall serve all interested parties with copies of such notice and all of his or her subsequent pleadings and exhibits."