Legal Environmental Assistance Foundation

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November 12, 1992

Mr. Steve Tribble
Florida Public Service Commission
Division of Records and Reporting
101 East Gaines Street
Tallahassee, Florida 32399

RE: Comments on Proposed Rules in Order PSC-92-1175-NOR-OT (Docket No. 920840-OT).

Dear Mr. Tribble:

Pursuant to the Commission's Notice of Rulemaking, the Legal Environmental Assistance Foundation, Inc. submits comments and suggestions on the proposed rule amendments. In order to facilitate your review, the comments are referenced by the rule number as stated in the "full text" section of the notice.

25-22.056

(1) General Provisions

The existing rule, and the proposed rule both fail to comply with Section 120.57 (1)(b)4, Florida Statutes. That statute creates a substantive right of any party to a Section 120.57 proceeding "to file exceptions to any order or hearing officer's recommended order".

The proposed rule purports to limit the opportunity to file exceptions to those proceedings where a Section 120.57 proceeding is conducted by one Commissioner. The proposed rule is silent as to the procedures which apply when a hearing officer from the Division of Administrative Proceedings conducts the proceeding.[1]

The Commission must change the existing and proposed rules to provide for the opportunity to file exceptions in all Section 120.57 proceedings.

In addition, (1)(a) deletes the right to propose "recommended orders", but the Commission should have the opportunity to hear what party-litigants recommend as the agency's proper final action.

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[1] Cf. Proposed Rule 25-22.056 (4)

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<u>(2) Proposed Findings of Fact</u>

Subsection (b) contains an editorial error. With the changes to the first sentence, the resulting construction occurs: " <u>shall be</u>...not to...or contain".

The second sentence of subsection (b) should provide for multiple page and line citations to support a finding of fact. In addition, the rule should provide for citation to exhibits and matters officially recognized.

The third sentence of subsection (b) should provide that one finding of fact can relate to more than one issue.

<u>(4) Post-Hearing Filings When Hearing is Conducted by a Hearing Officer</u>

This rule should be rewritten to more clearly differentiate the process which applies when a member of the Commission presides over the hearing as contrasted with a hearing conducted by a Division of Administrative Hearings' officer.

The existing and proposed rules incorrectly refer to a "recommended order" in those instances when a Commissioner presides over the hearing. The resultant recommendation is not a "recommended order" as defined in Section 120.52 (15), Florida Statutes (1991). Rather, the resultant pre-decisional document is properly termed as a "proposed order" pursuant to Section 120.52 (14), Florida Statutes (1991).

In addition to the correction of nomenclature, the Commission should revise its existing and proposed rules to comply with Section 120.58 (1)(e), Florida Statutes. That statute specifically requires the preparation of proposed orders in certain circumstances.

In subsection (b) of the proposed rule, which relates to "exceptions", "parties <u>and staff</u>" are authorized to file exceptions to the recommended order (or proposed order). Section 120.52 (12), Florida Statutes (1991), defines "party". Subsection (c) of that section provides that "party" includes any agency staff person who participates in the proceeding as a party. Clearly, if the PSC staff files exceptions, it is a party.

In <u>South Florida Natural Gas Co. v. Public Service Comm.</u>, 534 So.2d 695 (Fla. 1988), the utility complained that PSC staff participation at a ratemaking hearing (cross examination of company witnesses and assistance in evaluation of evidence) violated due process. The court rejected that claim based upon Section 366.06 (1), Florida Statutes (1985), which pertains to <u>ratemaking</u>.

Without question, the Commission's ratemaking functions are legislative in nature. However, the Commission performs quasi-judicial functions that do not involve ratemaking and in those proceedings, it is incumbent upon the Commission (and staff) to protect the due process rights of participants. In a quasi-judicial administrative proceeding, if the Commission staff decides to present evidence, cross-examine witnesses, file exceptions or otherwise behave as a party-litigant, it must do so as a party. See, Section 120.57 (1)(b)4, Florida Statutes.

The last sentence of subsection (b) is ambiguous. A failure to file exceptions is said to constitute a "waiver of any objections to the recommended order". Typically, a party objects to testimony or evidence, rather than to recommended facts or legal conclusions. The rule suggests that the failure to file exceptions would bar any "objection" to the recommended order. The filing of exceptions, or decision not to file exceptions, is without waiver of the right of judicial review of the final order pursuant to Section 120.68, Florida Statutes (1991).

In addition, subsection (b) should authorize the prehearing officer to extend the 14 day time period for the filing of exceptions for good cause shown.

A major flaw in the existing and proposed rule is the failure to provide for the opportunity for parties to file exceptions, as noted previously in these comments. See Section 120.57 (1)(b)4, Florida Statutes (1991). This right must be respected.

25-22.057

The proposed repeal of this section deletes discussion of the procedures governing staff recommendations from the Commission's rules. The status of the staff recommendation is very much a grey area in the quasi-judicial context. See, Occidental Chemical Co. v. Mayo, 351 So.2d 336, 338-343 (Fla. 1977), (Atkins, J., dissenting).

In essence, staff has the opportunity to present evidence and cross-examine witnesses in a proceeding, and then wait until all of the other parties to the proceeding have filed proposed findings of fact and briefed the matter to take a position. The other parties to the proceeding have no effective opportunity to respond to the staff recommendation (unless oral argument is granted), aside from a motion for reconsideration, or a judicial appeal.

Accordingly, the Commission is requested to amend, rather than repeal those portions of the proposal related to staff recommendations to conform with due process in quasi-judicial proceedings and the right of parties to file exceptions.

25-22.0021

Subsection (2) should be revised to prohibit participation by any staff-person who participated in the development of staff's position or recommendation in the proceeding. Section 120.66 (1), Florida Statutes. If staff filed exceptions, participation by any staff-person who participated in the preparation of the exceptions should be prohibited.

Thank you for the opportunity to comment. Please provide the Foundation with actual notice of the final rule, actual notice of changes, and of any hearings or other proceedings related to the proposed rules.

Sincerely,

Ross S. Burnaman
Attorney
Energy Advocacy Program

cc: Noreen Davis, Esquire

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General Counsel's Office
Florida Public Service Commission

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Adoption of Rule 25-22.0021, Amendment of Rules 25-22.056 and 25-22.058, and Repeal of Rule 25-22.057, F.A.C.

DOCKET NO. 920840-OT
FILED: November 13, 1992

PUBLIC COUNSEL'S COMMENTS

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Order No. PSC-92-1175-NOR-OT, submit the following comments:

1. In its attempt to streamline post-hearing procedures, the Commission has proposed rule revisions that would violate the Administrative Procedure Act. Section 120.66, Florida Statutes (1991), provides that staff members who litigate or testify in hearings before a Division of Administrative Hearings hearing officer cannot make a recommendation to the Commission after receipt of the recommended order:

> (1) In any proceeding under s. 120.57, no ex parte communication relative to the merits, threat, or offer of reward shall be made to the agency head, after the agency head has received a recommended order, or to the hearing officer by:
>
> (a) An agency head or member of the agency or any other public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter.
>
> (b) A party to the proceeding or any person who, directly or indirectly, would have a substantial interest in the proposed agency action, or his authorized representative or counsel.
>
> Nothing in this subsection shall apply to advisory staff members who do not testify on behalf of the agency in the proceeding or to any rulemaking proceedings under s. 120.54.

2. The Commission complies with Section 120.66 in its current Rule 25-22.057(5) by excluding from agenda conference participation all staff which "participated" in DOAH proceedings:

> The Commissioners may, at any time, request a recommendation and/or suggested order from staff members who did not participate at the hearing. . . . The staff members who prepared the recommendation or suggested order may participate at an agenda conference.

This provision is necessary to prevent staff members who prosecuted or testified in a show-cause proceeding, for example, before DOAH from making a recommendation on final disposition and discussing the recommendation at an agenda conference in contravention of Section 120.66(1).

3. In its recommendation in this docket, staff stated that "[t]he substance of the agenda conference participation provisions of Rule 25-22.057(5) is transferred to a new rule, Rule 25-22.0021, entitled 'Agenda Conference Participation.'" However, the new rule would permit agenda conference participation by any staff member who participated but did not testify in the DOAH proceeding:

> 25-22.0021 Agenda Conference Participation.
> (2) When a recommendation is presented and considered in a proceeding where a hearing has been held, no person other than staff who did not testify at the hearing and the Commissioners may participate at the agenda conference. Oral presentation by any other person, whether by way of objection, comment, or otherwise is not permitted.

Clearly, the "substance of the agenda conference participation provisions of Rule 25-22.057(5)" have been changed significantly in the new rule.

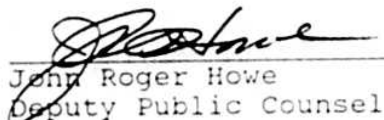
4. In an article in the October 1987 Florida Bar Journal, entitled "Beyond Ex Parte Communications" (copy attached), the limitations of Section 120.66 were described as follows:

> The [ex parte] ban applies to the agency head and to any member of the agency staff or other public employee 'engaged in prosecution or advocacy in connection with the matter under consideration.' It does not, however, apply to staff members who do not litigate or testify on behalf of the agency. Those staff members may consult with the agency head, after the agency head has received the recommended order from the hearing officer, with impunity. Obviously, the attorney who has handled the case for the agency would be precluded from communicating agency head, since that person has been involved in a prosecutorial or advocacy role for the agency. However, other staff attorneys, including the agency head's general counsel in many cases, would be exempt from the proscription on ex parte communications. Likewise, other technical staff members not participating actively in the proceeding may legally advise or communicate with the agency head.

The foregoing is an accurate representation of the limitations imposed on agency staff by Section 120.66. The Commission's proposed rule, however, is inconsistent and contrary to the APA.

Respectfully submitted,

JACK SHREVE
Public Counsel



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CERTIFICATE OF SERVICE
DOCKET NO. 920840-OT

I HEREBY CERTIFY that a true and correct copy of the foregoing PUBLIC COUNSEL'S COMMENTS, has been furnished by *hand-delivery or by U.S. Mail to the following parties on this 13th day of November, 1992

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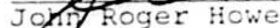

John Roger Howe

Administrative Law

Beyond *Ex Parte* Communications

by Mary F. Smallwood

In this age of regulation, administrative agencies seem to have tremendous power over the everyday lives of the state's citizens. Real or apparent, that power can be most frightening when the agency is acting in an adjudicatory capacity, determining a citizen's rights under laws administered by that same agency. It often seems that the agency holds all the cards; after all, it makes the preliminary decision and the citizen has to challenge that action; it can rely on the courts to give great weight to its interpretation of the statutes and rules it implements; often it will have greater financial and manpower resources than the citizen; and (perhaps most importantly) it issues the final order after an administrative hearing.

Background of the APA

In large part, the adoption of the Administrative Procedure Act in 1974 and subsequent judicial interpretation of the APA have curbed the excesses that admittedly existed in the past. Most agencies have learned to function well within the restrictions of the APA and have, in fact, benefitted from the establishment of procedural guidelines applicable to the decisionmaking process. Unlike most laws of such far reaching impact, the APA contains no statement of legislative intent or purpose. However, the purposes of the act become clear when its provisions are considered in toto.

In particular the APA was meant to provide an impartial forum for the resolution of disputes between citizens and administrative agencies, thus giving citizens a more clearly defined role in the decisionmaking process. That goal has been achieved through the implementation of a number of specific provisions in the act, such as the establishment of an independent Division of Administrative Hearings to provide impartial hearing officers,[1] the requirement that an agency may not reject a finding of fact in a hearing officer's recommended order unless it determines that the finding was not based on competent substantial evidence or that the proceedings did not comply with essential requirements of law,[2] the provision that after referral of a proceeding to DOAH the referring agency may take no further action except as a party litigant so long as DOAH retains jurisdiction,[3] and the prohibition on *ex parte* communications with the decision maker.[4]

In the 13 years since its adoption, the APA has generated a tremendous amount of litigation with the resultant creation of a significant body of case law. The provision restricting *ex parte* communications has resulted in practically no cases. This might lead one to believe that the requirement is of little importance. In fact, it is very important in creating a climate in which impartiality can flourish.

The Basis of the *Ex Parte* Prohibition

Black's Law Dictionary defines *ex parte* as an act done for or on behalf of only one party. In general, the law does not favor actions taken *ex parte* and puts severe restrictions on such proceedings. Under the APA, *ex parte* communications or proceedings are in direct conflict with the purpose of the act to provide for an open, accessible, factually based decisionmaking process. Such communications are particularly suspect when they occur between staff of the affected agency and the agency head who is responsible for issuing a final order. Under any circumstances, agency staff can be expected to have a tremendous influence on the agency head; when that natural influence occurs in a vacuum, without the countervailing influence of the other affected parties in the proceeding, it is perfectly reasonable to suspect that the final decision of the agency head will not meet standards of impartiality required under the APA.

In a dissenting opinion in *Hershkowitz v. Kelly*, 440 So.2d 2 (Fla. 5th DCA 1983), Judge Sharp articulated the basis of the prohibition on *ex parte* communications:

> In proceedings where a due process type of hearing is required, the finder of fact must make its determination on the basis of the record and evidence presented at the hearing. . . . The person entitled to a due process type of hearing must be given an opportunity to confront and cross-examine adverse witnesses . . . *Ex parte* contacts defeat both basic principles.
>
> This is why *ex parte* contacts with decision makers are condemned upon proof that they were made, without necessity to show prejudice. *Id.* at 8.

Ex Parte Communications Under the APA

Cognizant both of these due process requirements and of the general public policy favoring impartiality in the administrative decisionmaking process, the framers of the APA included a provision prohibiting certain *ex parte* communications:

> (1) In any proceeding under s. 120.57, no ex parte communication relative to the merits, threat, or offer of reward shall be made to the

agency head, after the agency head has received a recommended order, or to the hearing officer by:

(a) An agency head or member of the agency or any other public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter.

(b) A party to the proceeding or any person who, directly or indirectly, would have a substantial interest in the proposed agency action, or his authorized representative or counsel.

Nothing in this subsection shall apply to advisory staff members who do not testify on behalf of the agency in the proceeding or to any rulemaking proceedings under s. 120.54.[5]

The act goes on to require that any hearing officer[6] who receives an *ex parte* communication shall place such written communications or a memorandum regarding oral communications on the record and advise all parties accordingly; allow parties so requesting within 10 days the opportunity to rebut the *ex parte* communications; and, if the hearing officer deems necessary, withdraw from the proceeding.[7]

The ban on *ex parte* communications set forth in §120.66 is interesting as much for the contacts that are not covered as for those that are covered. The ban applies to the agency head and to any member of the agency staff or other public employee "engaged in prosecution or advocacy in connection with the matter under consideration."[8] It does not, however, apply to staff members who do not litigate or testify on behalf of the agency. Those staff members may consult with the agency head, after the agency head has received the recommended order from the hearing officer, with impunity. Obviously, the attorney who has handled the case for the agency would be precluded from communicating with the agency head, since that person has been involved in a prosecutorial or advocacy role for the agency. However, other staff attorneys, including the agency's general counsel in many cases, would be exempt from the proscription on *ex parte* communications. Likewise, other technical staff members not participating actively in the proceeding may legally advise or communicate with the agency head. Finally, an agency head may communicate even with agency staff involved in the proceeding prior to the time the hearing officer forwards the recommended order to the agency.

The question that must be asked then is whether §120.66 provides adequate protection in administrative proceedings against the exercise of undue influence by *ex parte* communications. Clearly, the answer is that it does not, at least as with respect to the ultimate decision of the agency head.[9] Agency staff may still have access to the agency head that is denied to others. And, in fewer situations, members of the general public (including parties to the proceeding) may be able to influence substantially the agency head before the hearing officer has entered a recommended order.

This is not meant to suggest any evil intent on the part of Florida's public officials. Instead, it is merely human nature. Agency heads hire and train their staffs. Staff members naturally share and reflect the philosophy of their agency head. Likewise, agency heads are elected or appointed to be particularly responsive to public opinion. These influences, however, may be inconsistent with the purpose of the *ex parte* rule.

At least one state agency has voluntarily gone beyond the restrictions of the APA on *ex parte* communications to reduce further the possibility of having agency decisions following administrative hearings based on anything other than the record of the proceeding. The Department of Environmental Regulation recognized many years ago that the letter of the law, as stated in §120.66, might be inadequate. As a result, that agency, over the years, implemented a number of internal procedures intended to supplement the statutory requirements of the APA. Over time, those requirements have evolved, and it is likely that they will continue to evolve. To date, these procedures remain informal and have not been reduced to formal rules. However, the experience of the Department of Environmental Regulation (DER) may provide a model for other agencies to follow or, ultimately, for statutory modifications.

Process Followed in Entering Final Orders

Before explaining the additional restrictions imposed by DER on *ex parte* communications, it is necessary to understand the process followed by DER in reviewing recommended orders and entering final or-

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ders under F.S. §120.57. DER has a fairly large legal staff. The staff attorneys are responsible for handling both permitting and enforcement cases generated by DER's duties under the various statutes it implements. The general counsel of the department generally does not participate in the direct management or handling of any cases, but is responsible for overall management of the office and, more significantly, advising and representing the agency head in entry of final orders.

Agency staff members, other than legal staff, participate in a number of ways. As with most administrative agencies, they represent the primary source of technical expertise and are frequently called upon to serve as expert witnesses. In addition, the staff is continually expected to provide technical guidance for the agency head. In many areas before the agency, the agency head can also expect to receive public comment in the form of letters or phone calls urging a particular position.

The agency head at DER is thus exposed to several avenues of communication outside the formal administrative proceeding and record that might influence the ultimate decision. The agency's general counsel has direct access to the agency head and directly participates in the formulation of final agency action. In most cases, the general counsel actually drafts the final order for the agency head's signature.[10] Other members of the agency staff who have not been involved in the administrative proceeding may be called upon to provide technical advice both before and after the submission of a recommended order to the agency.

Finally, there will always be attempts by members of the public (including those participating in or substantially affected by the outcome of the administrative proceeding) to influence the agency head's decision. For the most part, attorneys representing clients in administrative hearings are familiar with the restrictions of the *ex parte* rule and do not attempt to communicate with either the hearing officer or the agency head outside the formal process. Frequently, however, citizens either not represented by counsel or not formal parties to the administrative proceeding attempt to contact the agency head outside the process provided for by the APA.

Additional Restrictions Imposed by DER

DER has adopted a number of procedural mechanisms not specifically required by §120.66 in an attempt to assure that the agency head will be able to consider recommended orders without bringing to the case strong prejudices that one side or the other is correct. Probably the most important of these is the attempt to insulate the general counsel, as well as the agency head, from *ex parte* contacts. Thus, after a recommended order is received from DOAH, the general counsel does not consult with the staff attorney or attorneys handling the case or the other staff members involved in presenting testimony to the hearing officer. Likewise, the general counsel does not participate in drafting exceptions to a recommended order. This degree of insulation is possible, in part, because the general counsel does not usually become involved directly in any cases and because there is a level of intermediate supervisory attorneys providing guidance for the staff attorneys and participating in case management. Obviously this process would be difficult to implement in an agency with a very small legal staff.

These self-imposed restrictions on contacts are not applied to the general counsel prior to receipt of the recommended order. The general counsel can and does participate in certain aspects of case management, particularly as it relates to making policy decisions for the agency. However, in those rare instances when that participation is significant and ongoing, the general counsel generally designates another agency attorney to assist the agency head in preparing a final order.

Precautions taken to insulate the secretary of DER from contacts regarding a pending case go even further. Although the APA does not prohibit communications with the agency head until after the hearing officer has forwarded a recommended order to the agency, the DER secretary has applied those restrictions from the time a request for an administrative hearing is filed. Of course, the bar on *ex parte* contacts during the pendency of the administrative hearing cannot be complete. The agency head is responsible for setting policy and cannot shed that duty simply because a hearing is taking place. At a minimum, the agency head must be available to discuss any settlement proposals that might be made during the course of the proceeding.

Within these constraints, the DER secretary has always attempted to minimize all contacts regarding pending administrative cases. In addition to keeping contacts with agency staff to a minimum, the secretary has generally declined to discuss such

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cases with newspaper reporters. All correspondence to the secretary on a pending proceeding was screened and generally referred to other agency personnel to draft a response. Most often that response was limited to a statement that the secretary would be entering a final order in the case upon receipt of the recommended order and would fully review and consider the record of the proceeding at that time. Certain controversial cases generated a high volume of mail addressed to either the Governor or other high level public officials. When that correspondence was forwarded to DER for preparation of a response, it was treated in the same manner as correspondence addressed to the secretary.

Section 120.66 does not appear to require an agency head to withdraw from consideration of a case under any circumstances.[11] Nor does it place the agency head under any obligation to place *ex parte* communications on the record and allow opportunity for rebuttal. DER has extended those provisions to the agency head of its own accord, however. Such extreme precautions have rarely been necessary at DER since the secretary has been scrupulous in limiting the allowable communications in advance. In at least one case, however, the secretary recused herself and designated the assistant secretary as agency head for purposes of entering a final order.[12] This action was taken not because of an illegal *ex parte* contact, but because the secretary had become personally and directly involved in an ultimate permitting decision and in discussing and defending that position before various interest groups. Clearly, §120.66 would not have precluded the secretary from entering the final order in that case. Her decision to recuse herself, however, avoided even the appearance of bias or partiality.

Conclusion

In determining which communications between agency staff or other interested persons and the agency head should be avoided, a delicate balance must be struck between assuring an impartial and unbiased decision and maintaining the public's access to the agency head. To some extent, the facts of any particular case must dictate that answer. In reaching that balance, however, DER has generally come down on the side of restricting many otherwise allowable contacts to assure that the agency's final order is based solely on the record of the proceeding below and the ultimate policy decisions of the agency head. ■

[1] FLA. STAT. §120.65 (1986 Supp.).

[2] FLA. STAT. §120.57(1)(b)9 (1986 Supp.).

[3] FLA. STAT. §120.57(1)(b)3 (1986 Supp.).

[4] FLA. STAT. §120.66 (1985).

[5] FLA. STAT. §120.66(1) (1985).

[6] Interestingly, this provision appears to be limited to hearing officers. While subsection (1) of F.S. §120.66 applies to both hearing officers and agency heads, subsection (2) makes no mention of agency heads.

[7] FLA. STAT. §120.66(2) (1985).

[8] FLA. STAT. §120.66(1)(a) (1985).

[9] The opportunity for undue influence to be exerted on the hearing officer certainly exists, particularly when the hearing officer is also a member of the agency staff. However, most administrative agencies now utilize hearing officers from the Division of Administrative Hearings. The use of independent DOAH hearing officers significantly reduces the likelihood of *ex parte* communications affecting the recommended order.

[10] On occasion, this function may be performed by a staff attorney other than the attorney representing the agency before the hearing officer.

[11] FLA. STAT. §120.71(1) (1985), entitled "Disqualification of agency personnel," provides, however, that "any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice or interest. . . ."

[12] Environmental Coalition of Southwest Florida v. Department of Environmental Regulation, 8 F.A.L.R. 317 (Final Order Entered October 16, 1985).

Mary F. Smallwood is practicing in the areas of environmental, land use and administrative law in the Tallahassee office of Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A. She is the former director of the Division of Environmental Permitting of the Florida Department of Environmental Regulation and served as general counsel to the department from 1981 to 1986. She is a member of The Florida Bar Environmental and Land Use Law Section's Executive Council. She graduated from Florida State University College of Law in 1977 with high honors.

She writes this column on behalf of the Administrative Law Section, Chris H. Bentley, chairman, and Robert T. Benton II, editor.

THE LAW FIRM

OF

CARSON & LINN, P.A.

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JAMES C. ADKINS,

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HAS JOINED THE FIRM

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed Revision of Rules 25-22.056, F.A.C., Post-Hearing Filings; 25-22.058, F.A.C., Oral Argument; and Adoption of Rule 25-22.0021, F.A.C., Agenda Conference Participation; Transfer of Parts of Rule 25-22.057, F.A.C., Recommended Order, Exceptions, Replies, Staff Recommendations, to Rule 25-22.056, F.A.C.; and Repeal of Rule 25-22.057.

DOCKET NO. 920840-OT
FILED: 10/28/92

TAMPA ELECTRIC COMPANY'S
COMMENTS ON PROPOSED RULES

Tampa Electric Company ("Tampa Electric" or "the company") submits the following written comments concerning the proposed amendments to certain of the Commission's post-hearing procedural rules:

1. Tampa Electric has some genuine concerns over the proposal to amend Fla. Admin. Code Rule 25-22.056(1)(d) to limit proposed findings of fact, conclusions of law, statement of issues and positions and brief to what appears to be an aggregate total of not more than 60 pages. While there is something to be said for brevity, the company believes that such a page number restriction should not be contained in the rule.

2. Commission proceedings vary according to their complexity, the number of parties involved, the number and complexity of the issues raised, and the number of witnesses participating. One hearing could involve only 3 relatively simple issues warranting a four or five page post-hearing statement,

whereas another hearing could involve upwards of 200 issues presented in a major utility rate case or need determination proceeding, with numerous parties participating. Tampa Electric simply does not believe that an arbitrary total of 60 pages for all of the various post-hearing submissions identified in the rule would be reasonable nor would it be adequate to ensure that litigants before the Commission are afforded due process.

3. The proposed 60-page limitation would be particularly unfair for the regulated utilities who, in a rate case for example, must address each issue and prove its case to the Commission. An intervenor might participate in a utility rate case for the sole purpose of addressing a small number of issues not requiring post-hearing filings of the length which the utility must have in order to adequately address all of the issues. This is quite often the case when, for example, municipalities or electric power users groups intervene in utility rate proceedings.

4. Tampa Electric has similar concerns over the proposed revision to Fla. Admin Code Rule 25-22.056(3)(a) to require parties to include in their post-hearing statement of issues and positions a summary, not to exceed 50 words in length, of the parties' positions on each issue. Many positions on complex issues cannot be squeezed within a 50 word limitation. This is particularly true with complex accounting and engineering issues.

5. As was discussed above regarding the proposed 60-page limitation on post-hearing filings, the utility has to address <u>every issue</u> involved in a big case and more often than not has the

burden of proof on these issues. Certainly for some issues 50 words would be adequate and on occasion Tampa Electric has merely stated a yes or no answer as its entire position on an issue. However, on other complex issues Tampa Electric does not believe it would be fair to impose an arbitrary 50-word limitation on the summary of the company's position. For example, every utility rate case involves an issue of what is the appropriate weighted average cost of capital including the proper components, amounts, and cost rates associated with the utility's capital structure. Quite often the parties' positions on this issue can be most effectively summarized by use of a chart covering two-thirds of a typewritten page and containing more than 50 words. Similarly, the annual planning hearing has involved an issue as to which cost assumptions should be made in determining the statewide avoided unit. The list of assumptions in response to this issue typically covers nearly two pages and involves many more than 50 words. There would be no way to respond to this issue without violating the 50-word limitation.

6. Tampa Electric's final concern has to do with the fact that the draft rule language pertaining to the summary of parties' positions seems to require that each party file a summary of its position. However, it goes on to state that in the absence of such a summary statement, the party's prehearing position will be used in the Staff Recommendation. Thus, a party who had set forth a lengthy position in the prehearing order arguably could have their lengthy position from the prehearing statement included in the

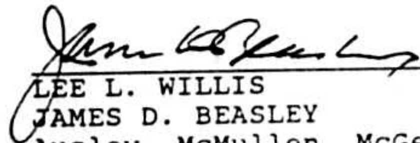
Staff Recommendation, simply by not complying with the 50-word summary requirement. This would be to the detriment of other parties who comply with the 50-word summary requirement.

7. Rather than imposing an arbitrary 50-word limitation on summaries, Tampa Electric would urge the Commission to simply require each party to submit a reasonably concise summary of its position on each issue.

WHEREFORE, Tampa Electric Company urges the Commission to refrain from imposing a 60-page limitation on all of the various post-hearing submissions and to refrain from imposing an arbitrary 50-word limitation on the summary of a party's position on each issue.

DATED this 28th day of October, 1992.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Comments on Proposed Rules, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail on this 28th day of October, 1992 to the following:

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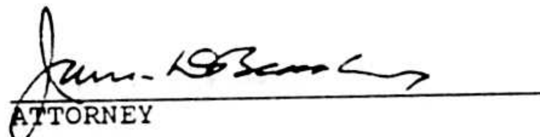

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