**FLORIDA PUBLIC SERVICE COMMISSION**

 **Fletcher Building**

 **101 East Gaines Street**

 **Tallahassee, Florida 32399-0850**

 **M E M O R A N D U M**

 **February 4, 1992**

**TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING**

**FROM: DIVISION OF APPEALS (MOORE)**

 **DIVISION OF LEGAL SERVICES (DAVIS)**

 **DIVISION OF RESEARCH & REGULATORY REVIEW (HOPPE)**

**RE: DOCKET 920840-0T - 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**

**AGENDA: 2/16/92 - CONTROVERSIAL - PARTIES MAY NOT PARTICIPATE**

**RULE STATUS: ADOPTION SHOULD NOT BE DEFERRED**

**FILE NAME: I:\PSC\APP\WP\920840.RCM**

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 **CASE BACKGROUND**

 At its agenda conference on October 6, 1992, the Commission voted to propose revisions to its rules governing post-hearing procedures. The proposed rules were published in the October 23, 1992, Florida Administrative Weekly, and comments were filed by the Office of Public Counsel (OPC), Florida Power & Light Company (FPL), Florida Waterworks Association (FWWA), GTE Florida, Incorporated (GTE), Gulf Power Company (Gulf), Tampa Electric Company (TECO), United Telephone Company of Florida (United), the Legal Environmental Assistance Foundation (LEAF), and Mr. Ben Girtman.

 The Commission first considered these rules at its September 15, 1992 agenda. A decision was deferred until October 6, 1992 so that staff could revise the rules to address comments and concerns raised by Commissioners and interested persons. The primary objection by interested persons was to the 50-page limit placed on post-hearing documents. As a result, Rule 25-22.056(1)(d) was revised to authorize the presiding officer to modify the page limit for good cause shown, and to increase the total page limit to 60.

 Staff's recommended changes to the proposed rules are shown in Attachment 1 to this memorandum as either shaded and underlined (additions) or shaded and stricken through (deletions). Comments that were filed are shown in Attachment 2.

 **DISCUSSION OF ISSUES**

**ISSUE 1**: Should the Commission adopt changes to proposed Rule 25-22.056, F.A.C., based on the comments received?

**RECOMMENDATION**: Yes. The Commission should adopt some, but not all, of the changes suggested by the comments filed on Rule 25-22.056.

**STAFF ANALYSIS**: This rule governs post-hearing documents. Several of the comments concern the imposition of the page limit on documents and the word limit on summaries of positions. Other comments are discussed below under the applicable section or subsection of the rule.

Sixty-page Limit: FPL, Gulf, and TECO oppose the imposition in Rule 25-22.056(1)(d) of a 60-page total limit on a party's post-hearing documents, asserting that the limit is arbitrary and should be imposed instead on a case-by-case basis, depending upon the number and complexity of the issues raised at hearing. GTE stated that the limit will prove to be reasonable in most cases, however, it asks the Commission to liberally exercise the option to modify the limit when necessary. FPL believes that the provision authorizing the prehearing officer or hearing officer to modify the page limit for good cause does not adequately address its concerns because it places the burden on parties to overcome the presumption that 60 pages is adequate.

 Staff believes a 60-page limit is a reasonable standard and that it is appropriate for exceptions to that standard to be granted on a case-by-case basis. The Commission has imposed page limits in several cases and staff does not believe that showing that the page limit is insufficient will be a great burden. The Division of Administrative Hearings has, by rule, imposed a 40-page limit on proposed recommended orders since 1985. Moreover, the Commission increased the limit to 60-pages (from the 50 pages initially considered) because a party asserted that the Division of Administrative Hearings (DOAH) allows legal briefs or memorandums in addition to 40-page proposed recommended orders. The limit does not deny any party their statutory right to submit proposed findings of facts and orders, it merely requires them to be more concise in presenting them.

 GTE asks the Commission to exclude the 50-word position summaries from the page limit and allow parties to submit them in a separate, appended document, in order to reduce the frequency of requests for waiver. The proposed rule does not preclude filing a separate document, however, it would be included in the total limit of 60-pages and staff does not recommend changing this.

Fifty-word Summary of Party's Position: FPL and TECO oppose the 50-word limit contained in subsection (3)(a), asserting that it is inadequate for many complex issues. TECO and FPL suggest that the rule require a "concise" summary instead. Based on its experience in drafting its rate case brief, GTE suggests either a limit of a half-page or including a provision for modifying the limit. Staff recommends that the rule authorize the prehearing officer or hearing officer to modify the word limit if good cause is shown.

 TECO also states that the rule is unfair in that the word limit only applies when a party's position has changed from its prehearing position. This is because subsection (3)(a) provides that in the absence of a summary statement, the prehearing position on that issue will be used in the staff recommendation. To correct this disparity, and to clarify the confusion it has caused some parties, staff recommends deleting that provision (lines 13-15, page 3), rearranging the other provisions of the subsection, and adding a provision requiring a summary of the party's position whether or not it has changed from the prehearing statement.

Proposed vs. Recommended Order: LEAF disagrees with the use throughout the rule of the term "recommended order", pointing out that it is defined in section 120.52(15), F.S., as the official recommendation of the hearing officer assigned by the division (DOAH) or of any other duly authorized presiding officer, other than the agency head or member thereof. LEAF states that the term "proposed order", defined in 120.57(14), should be used.

"Proposed order" means the advance text, under s. 120.58(1)(e), of the order which a collegial agency head plans to enter as its final order. When a hearing officer assigned by the division conducts a hearing, the recommended order is the proposed order.

 The order entered by a Commissioner sitting as a hearing officer does not accurately fit either definition, however, the term proposed order is probably the more accurate of the two. The effect of using one or the other of the terms appears of little consequence other than to insure compliance with section 120.58(1)(e), requiring a proposed order in certain hearing officer situations. Staff therefore recommends the simple solution of adding the word "proposed or" wherever the term "recommended order" is used with reference to a Commissioner hearing officer.

Subsection (1)(d) Style Requirements: In response to Mr. Girtman's question about subsection (1)(d)'s restriction on the size of the printing type used in documents, staff recommends replacing "11-point type" with "type of no more than 10 characters per inch." This standard is taken from the recent amendments to the Florida Rules of Appellate Procedure and should not confuse anyone.

Section (2) Proposed Findings of Fact: FPL asks the Commission to allow parties to file exceptions to an opposing party's proposed findings of fact. Staff believes this is an unnecessary and time consuming additional step. A party should address contradictory evidence in its post-hearing document and rely on the presiding officer to weigh the evidence.

Subsection (4)(b) Time for Filing Exceptions: Mr. Girtman asks the Commission to allow more than 14 days from service of a recommended order to file exceptions. The 14-day time period complies with section 120.57(1)(b)9 requiring "at least 10 days." Because of time constraints, staff does not recommend increasing it. In its comments, LEAF asks for a provision authorizing the prehearing officer to extend the time for filing exceptions, however, it is staff's opinion that the authority already exists and a specific provision is not advisable.

Subsection (4)(b) Staff as a Party: This subsection provides that parties and staff may file exceptions to recommended orders. LEAF argues that if staff files exceptions, staff is a party. The role of staff has been raised before and the Supreme Court has resolved it in favor of the Commission. LEAF attempts to limit the application of that decision (South Florida Natural Gas Co. v. Public Service Commission, 534 So. 2d 695 (Fla. 1988), to ratemaking cases and contends that in other Commission proceedings that staff is a party. Staff disagrees with LEAF's argument and does not recommend changing the proposed rule.

Other: Mr. Girtman submitted numerous other comments and questions about the meaning of the proposed rule. Staff's recommended changes to subsection (3)(a) discussed above, along with the addition of several clarifying words in other sections of the rules, should address some of Mr. Girtman's concerns. As to several other of his comments or questions, however, staff believes that a careful reading of the rule and recognition of its structure would resolve the confusion.

 Similarly, LEAF's complaint that the proposed rule does not provide for a party to file exceptions when DOAH conducts a hearing is mistaken. LEAF has either overlooked or misread section (4) of the rule which states that subsection (4)(b), "Exceptions", applies when a hearing has been conducted by DOAH.

 LEAF recommends a number of minor changes that staff believes would add unnecessary detail to the rule. Such excessive detail may well preclude flexibility in areas where both the Commission and parties find it desirable.

**ISSUE 2**: Should the Commission adopt Rule 25-22.058, F.A.C., as proposed?

**RECOMMENDATION**: Yes.

**STAFF ANALYSIS**: The proposed rule allows ten days after exceptions are filed to request oral argument on recommended orders and exceptions. Mr. Girtman comments that this is not enough time to request oral argument. Because of the time constraints imposed by statute on issuing final orders, staff does not recommend increasing the time.

 Section (3) of the rule requires requests for oral argument to accompany the pleading upon which argument is requested. Mr. Girtman states that it is not clear that the request must be submitted by the same party filing the pleadings it accompanies. Since it is unlikely that a party would file a request for oral argument with another party's pleading, staff sees no need to change the rule.

**ISSUE 3**: Should the Commission adopt changes to proposed Rule 25-22.0021, F.A.C., based on the comments received?

**RECOMMENDATION**: The Commission should adopt some, but not all, of the changes suggested by the comments filed on Rule 25-22.0021.

**STAFF ANALYSIS**: Proposed new Rule 25-22.0021 codifies the Commission's current practice on participation at agenda conferences. Staff recommends two changes to clarify the meaning of the rule and one substantive change based on the FWWA's comments.

Participation by Parties: The FWWA notes that, on occasion, new matters that have not been an issue in a proceeding arise and are subsequently considered by the Commission in the same docket, although parties have not had the opportunity to address those matters. The FWWA provides several examples in its comments and contends that parties should be able to participate in agenda discussions of these matters.

 Staff agrees and recommends that the proposed rule be changed to accommodate these occurrences by adding language to section (2) to allow participation by parties at an agenda conference when the Commission is considering new matters that are related to but were not addressed at the hearing.

 FPL commented that the Commission should leave itself some discretion in determining whether parties may participate by creating an exception to allow participation by parties when it will aid the Commission in making its decision. Alternatively, FPL suggests treating the staff recommendation as a recommended order, and allowing parties to file exceptions to it. United Telephone also supports allowing parties to participate at agenda conferences in proceedings where a hearing has been held. United contends that otherwise, there are no means for parties to correct staff errors or to ensure that their positions are adequately and objectively represented in the staff recommendation and at agenda conferences.

 Staff does not recommend changing the rule based on FPL's or United's comments. Staff's recommendation is simply advice that the Commission is free to accept or reject. Parties have no due process right to participate in the decision-making process of the Commission once the hearing is over and post-hearing argument is completed. Additionally, the Commission could not allow parties to participate at such an agenda conference without reopening the proceeding and affording all parties notice and the right to submit rebuttal evidence and counter argument.

 United suggests that the Commission could impose strict time limitations to restrict parties to correcting errors to prevent numerous and spurious attempts to reargue issues. It is highly unlikely that such restrictions would succeed without conflict and argument over permissible subjects. Moreover, allowing participation in the decision at agenda would necessarily extend the process, delay its conclusion, and further add to the Commission's busy agenda schedule.

Staff Participation at Agenda: OPC and LEAF both advocate prohibiting staff who participate in a proceeding from participating in making the recommendation on final disposition of the action or from participating at the agenda conference. The proposed rule codifies current practice, which is to prohibit staff from participating only if they have testified in the proceeding, and is consistent with section 120.66(1), Florida Statutes. Staff believes the change proposed by OPC would be duplicative, expensive and unnecessary, and does not recommend changing the rule.

Other Comments: Mr. Girtman raises several questions about this rule. Section (2) of the rule states that "oral presentation" is not permitted at agenda conferences where a hearing has been held. Mr. Girtman asks if written presentations are meant to be permitted. To make this clear, staff recommends changing the rule to additionally preclude "written" presentations.

 Mr. Girtman also questions the meaning of section (3), providing that the Commission is not precluded from "taking action" during the course of a hearing or other duly noticed proceeding. The purpose of including this section in the agenda participation rule is to give notice that not all decisions in a proceeding are made at agenda conference and that some are "bench decisions" made during a hearing. Staff recommends revising the rule in an attempt to clarify its meaning.

**ISSUE 4**: Should the Commission repeal Rule 25-22.057, F.A.C., as proposed?

**RECOMMENDATION**: Yes. If Rules 25-22.056, 25-22.058, and 25-22.0021 are adopted, the Commission should repeal Rule 25-22.057.

**STAFF ANALYSIS**: Many of the provisions of Rule 25-22.058 will be superseded by the adoption of revised Rules 25-22.056 and 25-22.058, and new Rule 25-22.0021.

 LEAF asks the Commission not to repeal the sections of Rule 25-22.057 relating to staff recommendations, but to allow parties to a proceeding to file exceptions to staff recommendations. The substance of this comment is discussed in Issue 3.

**ISSUE 5**: Should the Commission file the rules for adoption with the changes and close the docket?

**RECOMMENDATION**: The Commission should file Rules 25-22.0021, 25-22.056, 25-22.057 (repealed), and 25-22.058 for adoption with staff's recommended changes and close the docket.

**STAFF ANALYSIS**: The docket may be closed after the rule is filed for adoption.

CTM/

Attachments