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November 22, 1996

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32301

Re: Docket No. 960235-WS, Application for Transfer of Certificate Nos. 404-W and 341-S in Orange County from Econ Utilities Corporation to Wedgefield Utilities, Inc.
Re: Docket No. 960283-WS, Application for Amendment of Certificate Nos. 404-W and 341-S in Orange County by Wedgefield Utilities, Inc.

Dear Ms. Bayo:

Enclosed for filing are the original and fifteen copies of Wedgefield's Response to OPC Motion to Strike Wedgefield's Contingent Request for Hearing and Motion to Dismiss or Strike OPC Petition for Hearing.

Thank you for your assistance.

Sincerely yours,

Ben E. Girtman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In Re: Application for Transfer of Certificate Nos. 404-W and 341-S in Orange County from Econ Utilities Corporation to Wedgefield Utilities, Inc. | DOCKET NO. 960235-WS |
| In Re: Application for Amendment of Certificate Nos. 404-W and 341-S in Orange County by Wedgefield Utilities, Inc. | DOCKET NO. 960283-WS |

Submitted for Filing:
November 22, 1996

WEDGEFIELD'S RESPONSE
TO OPC MOTION TO STRIKE
WEDGEFIELD'S CONTINGENT REQUEST FOR HEARING
AND
MOTION TO DISMISS OR STRIKE OPC PETITION FOR HEARING

COMES NOW Utilities, Inc. and its wholly owned subsidiary, Wedgefield Utilities, Inc., (hereinafter collectively referred to as "Wedgefield") and in support of its response to the Office of Public Counsel's Motion to Strike Wedgefield's Contingent Request for Hearing and its Motion to Dismiss or Strike OPC Petition for Hearing states that:

1. Wedgefield filed its initial applications with the Public Service Commission seeking approval for the transfer of the utility from Econ Utilities to Wedgefield Utilities and for extension of territory. The Commission issued a bifurcated Order No. PSC-96-1241-FOF-WS which appeared to give "final" approval to the transfer and to the extension of territory, but included a "Notice of Proposed Agency Action Order Establishing Rate Base for Purposes of the Transfer".

2. The Office of Public Counsel ("OPC") then filed a notice of intervention and conducted discovery. In response to subsequent inquiries made on behalf of Wedgefield to OPC, Wedgefield was informed shortly before the filing deadline that OPC had not decided whether to file a protest and request for hearing. In response to Wedgefield's specific request for advance notice of that decision so as to be able to protect its rights, OPC agreed to notify Wedgefield in a timely manner. However, no notification was received until after 5:00 p.m. on the last day for requesting a hearing when the undersigned counsel returned to the office from an afternoon hearing and found a facsimile of the OPC request for hearing. Only minutes before 5:00 p.m. on the afternoon of the last day for filing a request for hearing, the Clerk's Office at the Florida Public Service Commission had no record of any petition being filed by OPC. However, to preserve its rights, Wedgefield filed its request anyway. Had the OPC Motion been filed earlier, or if the OPC notice of its intentions had been provided to Wedgefield in a timely manner, there would have been no "contingency". OPC cannot now object to the wording of Wedgefield's request for hearing.

3. The Office of Public Counsel (OPC) has filed its petition and protest based on Section 120.57, F.S. However, the petition does not specifically state whether it is alleging that "exceptional circumstances" exist under the current Commission policy on acquisition adjustments, or whether it seeks to change the current policy. In either case, preservation of the

jurisdiction of the Commission requires that the OPC Motion to Strike be denied and that the Petition for hearing be dismissed or stricken.

4. There was no request for a rate increase in the transfer application, so utility rates would remain the same as they were before the requested transfer. Furthermore, in earlier rate proceedings for the seller there have been substantial downward adjustments for "used and useful", and the customers have never "paid" for the system the first time, much less a second time as asserted by OPC. Even on page 4 of the Commission Order approving the transfer it states that:

> The rate base calculations are used purely to establish the net book value of the property being transferred. These calculations do not include the normal ratemaking adjustment of working capital calculations and used and useful adjustments.

Therefore, the utility customers would not be harmed if the current Commission Order were final.

5. The threshold issue is whether the Commission can bifurcate the matters in the transfer application and issue a final order on some of those matters, without hearing, and issue only a proposed agency action on other matters relevant to the same application. Wedgefield contends that it cannot. The next issue is whether the OPC petition alleges "exceptional circumstances" under the existing Commission policy on acquisition adjustments or whether OPC seeks to change current Commission policy. Wedgefield contends that the petition does not meet the Commission's

jurisdictional requirements. It has not alleged facts amounting to "exceptional circumstances" or even that "exceptional circumstances" exist, nor can it lawfully seek to change current Commission policy on a case-by-case basis.

6. Paragraphs 1 and 2 of the OPC Motion to Dismiss allege that "Wedgefield fails to identify any disputed issue of fact or other dispute with the Commission's Order." To the contrary, Wedgefield's Contingent Request for Hearing alleged that:

> 10. It appears that the OPC may use this case as a vehicle for challenging the Commission's long-standing policy of not granting positive or negative acquisition adjustments absent exceptional circumstances. If the OPC were to prevail, the "rules of the game" under which water and sewer utilities have been acquired will be significantly altered. Such a decision in this case would be a retroactive change of the rules. As such, Utilities, Inc. would be required to re-evaluate the prudency of acquiring the Wedgefield utility systems. Consequently, Petitioners request that the transfer and service territory issues not be bifurcated from the rate base issue, if a timely protest or request for hearing is filed by October 28, 1996.

Therefore, the requirements of Rule 25-22.036(7), F.A.C., if applicable to this situation, have been met.

7. Paragraph 3 of the OPC Motion to Dismiss alleges that "Since Wedgefield has shown no dispute with the conclusions made by the Commission, it is not adversely affected and is not entitled to a hearing. The order granted the relief sought by Wedgefield." To the contrary, the order did not grant the relief sought by Wedgefield. Paragraph II. H) of the application for transfer requests that no acquisition adjustment be made. Furthermore,

Wedgefield has filed the request for transfer based upon the previously established policy of the Commission in regard to acquisition adjustments, and Wedgefield entered into the contract to acquire Econ Utilities relying upon that policy. The "dispute" is the improper bifurcation of this proceeding. If no protest had been filed, the ultimate outcome would have been the same if the Commission had entered an order either:

1) making the entire matter subject to the "proposed agency action" proceedings, or

2) making the entire order a final order on the entire application.

The order must be one or the other - a final order or, if subject to protest, a proposed agency action order. It cannot be both. The OPC Motion to Dismiss ignores the fact that the acquisition of a utility is a "yes or no" proposition on the entire proceeding and cannot be bifurcated.

8. Paragraph 4 of the OPC Motion to Dismiss alleges that "The sale of the assets is not contingent on the value of the rate base." OPC's Motion selectively quotes from a letter attached thereto as Exhibit "A". The letter was sent from the purchaser to the seller and must be read in its entirety and in context. OPC's Motion misinterprets the letter. The letter expresses the purchaser's concern about a possible used and useful adjustment to the net plant determination in the 1995 earnings review and audit by the PSC Staff. If some plant is currently not used and useful, it is normally removed from consideration in rate proceedings, but

it is not totally eliminated from net book value. Some plant may never become used and useful, in which case it never becomes part of the rate base calculation and the customers never pay rates based thereon. The letter does not even consider the possibility that the Commission would abandon its previous policy on acquisition adjustments. It would be punitive for the PSC to "retroactively" approve a negative adjustment in the instant case, without also revising the used and useful formula. Such a far-reaching change in policy should not be litigated in the narrow context of a single transfer application and can only be considered in the context of a generic rulemaking proceeding.

9. Paragraph 5 of the OPC Motion to Dismiss alleges that "Wedgefield's contingent request for hearing violates its contract with Econ." However, its obligation to use its "best efforts" does not require Wedgefield to ignore its own rights, separate and apart from the interests of the seller, or to ignore the expectations of the parties. "Best efforts" does not require an entity to give up its own due process rights and other rights in this or any other proceeding.

10. Paragraph 6 of the OPC Motion to Dismiss alleges that "Wedgefield's contingent request for hearing is an untimely [sic] attempt to move for reconsideration." In making such an argument, OPC seeks to manipulate the rules of the Commission, wait until the last minute to file a request for formal hearing on part of the order, and prevent Wedgefield from preserving its rights. Due process and fairness were never intended to be so construed. Nor

is it appropriate to require a request for reconsideration in this instance. A Proposed Agency Action order (PAA) is not subject to a motion for reconsideration. Wedgefield's position is that the portion of the Commission Order approving the transfer and extension of territory also was a PAA, and therefore, requesting reconsideration would have been contrary to that position.

11. As for the OPC petition for hearing, it does not allege "exceptional circumstances" which, under current Commission policy might warrant a negative acquisition adjustment, and the OPC petition itself should be dismissed or stricken on those grounds alone. The petition does not even allege that any "exceptional circumstances" exist.

12. Furthermore, if the Public Service Commission is going to change its longstanding policy relating to acquisition adjustments, it must do so in a generic rulemaking proceeding, not on a case by case basis. The new Administrative Procedures Act, Chapter 120, F.S., became effective October 1, 1996, and curtailed the "free form" or "incipient" rulemaking which had been prevalent in the past. Therefore, McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977) is no longer controlling law in that it was rendered null and void by the Legislative enactment of Sections 120.54(1)(a), 120.56(4), and 120.57(1)(e), F.S., (1996), copies of which are attached as composite Exhibit "A".

13. Wedgefield reserves all its rights, claims and defenses in this matter, including but not limited to the right to withdraw its applications in their entirety.

WHEREFORE, the OPC Motion to Strike Wedgefield's "Contingent Request for Hearing" should be denied and the OPC Petition for Section 120.57(1) Hearing and Protest of Proposed Agency Action should be dismissed or stricken, in which event, the entire Order No. PSC-96-1241-FOF-WS would be final.

RESPECTFULLY SUBMITTED, this 22nd day of November 1996.

Ben E. Girtman
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Suite 207
Tallahassee, FL 32301
(904) 656-3232

Attorney for Utilities Inc.
and Wedgefield Utilities, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to the Charles Beck, Esq., Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison St., Tallahassee, FL 32399-1400; Mr. John Forrer, Econ Utilities, 1714 Hoban Rd. NW Washington, D.C. 20007; and to Rob Vandiver, Esq., General Counsel, and Donna Cyrus-Williams, Esq., Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850, by U.S. Mail (or by hand delivery * or facsimile #) this 22nd day of November 1996.

Ben E. Girtman

(4) Nothing in this section shall be construed to change the legal status of a rule that has otherwise been judicially or administratively determined to be invalid.

History.—s. 9, ch. 96-159.

**[1]120.54 Rulemaking.—**

(1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.—

(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

1. Rulemaking shall be presumed feasible unless the agency proves that:

a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking;

b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or

c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:

a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

(b) Whenever an act of the Legislature is enacted which requires implementation of the act by rules of an agency within the executive branch of state government, such rules shall be drafted and formally proposed as provided in this section within 180 days after the effective date of the act, unless the act provides otherwise.

(c) No statutory provision shall be delayed in its implementation pending an agency's adoption of implementing rules unless there is an express statutory provision prohibiting its application until the adoption of implementing rules.

(d) In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and to the extent allowed by law, choose the alternative that does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

(e) No agency has inherent rulemaking authority, nor has any agency authority to establish penalties for violation of a rule unless the Legislature, when establishing a penalty, specifically provides that the penalty applies to rules.

(f) An agency may adopt rules authorized by law and necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be enforced until the statute upon which they are based is effective.

(g) Each rule adopted shall contain only one subject.

(h) In rulemaking proceedings, the agency may recognize any material which may be judicially noticed, and it may provide that materials so recognized be incorporated into the record of the proceeding. Before the record of any proceeding is completed, all parties shall be provided a list of these materials and given a reasonable opportunity to examine them and offer written comments or written rebuttal.

(i) A rule may incorporate material by reference but only as the material exists on the date the rule is adopted. For purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the changes. No rule may be amended by reference only. Amendments must set out the amended rule in full in the same manner as required by the State Constitution for laws.

(j) A rule published in the Florida Administrative Code must be indexed by the Department of State within 90 days after the rule is filed. The Department of State shall by rule establish procedures for indexing rules.

(2) RULE DEVELOPMENT; WORKSHOPS; NEGOTIATED RULEMAKING.—

(a) Agencies shall provide notice of the development of proposed rules by publication of a notice of rule development in the Florida Administrative Weekly before providing notice of a proposed rule as required by paragraph (3)(a). The notice of rule development shall indicate the subject area to be addressed by rule development, provide a short, plain explanation of the purpose and effect of the rule development, cite the specific legal authority for rule development, and include the preliminary text of the proposed rules, if available.

(b) All rules should be drafted in readable language. The language is readable if:

1. It avoids the use of obscure words and unnecessarily long or complicated constructions; and

2. It avoids the use of unnecessary technical or specialized language that is understood only by members of particular trades or professions.

(c) An agency may hold public workshops for purposes of rule development. An agency must hold public workshops, including workshops in various regions of the state, for purposes of rule development if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary. The explanation is not final agency action subject to review pursuant to ss. 120.569 and 120.57. The failure to provide the explanation when required may be a material error in procedure pursuant to s. 120.56(1)(c). When a workshop or public hearing is held, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the agency's proposal and to respond to questions or comments regarding the rule being developed. The workshop may be facilitated or mediated by a neutral third person, or the agency may employ other types of dispute resolution alternatives for the workshop that are appropriate for rule development. Notice of a rule development workshop shall be by publication in the Florida Administrative

4. A notice of each request for authorization to amend or repeal an existing uniform rule or for the adoption of new uniform rules.

5. Notice of petitions for declaratory statements or administrative determinations.

6. A summary of each objection to any rule filed by the Administrative Procedures Committee during the preceding week.

7. Any other material required or authorized by law or deemed useful by the department.

The department may contract with a publishing firm for publication of the Florida Administrative Weekly.

(c) Prescribe by rule the style and form required for rules submitted for filing and establish the form for their certification.

(d) Correct grammatical, typographical, and like errors not affecting the construction or meaning of the rules, after having obtained the advice and consent of the appropriate agency, and insert history notes.

(e) Make copies of the Florida Administrative Weekly available on an annual subscription basis computed to cover a pro rata share of 50 percent of the costs related to the publication of the Florida Administrative Weekly.

(f) Charge each agency using the Florida Administrative Weekly a space rate computed to cover a pro rata share of 50 percent of the costs related to the Florida Administrative Weekly.

(2) Each agency shall print or distribute copies of its rules, citing the specific rulemaking authority pursuant to which each rule was adopted.

(3) Any publication of a proposed rule promulgated by an agency, whether published in the Florida Administrative Code or elsewhere, shall include, along with the rule, the name of the person or persons originating such rule, the name of the supervisor or person who approved the rule, and the date upon which the rule was approved.

(4)(a) Each year the Department of State shall furnish the Florida Administrative Weekly, without charge and upon request, as follows:

1. One subscription to each federal and state court having jurisdiction over the residents of the state; the Legislative Library; each state university library; the State Library; each depository library designated pursuant to s. 257.05; and each standing committee of the Senate and House of Representatives and each state legislator.

2. Two subscriptions to each state department.

3. Three subscriptions to the library of the Supreme Court of Florida, the library of each state district court of appeal, the division, the library of the Attorney General, each law school library in Florida, the Secretary of the Senate, and the Clerk of the House of Representatives.

4. Ten subscriptions to the committee.

(b) The Department of State shall furnish one copy of the Florida Administrative Weekly, at no cost, to each clerk of the circuit court and each state department, for posting for public inspection.

(5)(a) There is hereby created in the State Treasury a revolving fund to be known as the "Publication Revolving Trust Fund" of the Department of State.

(b) All fees and moneys collected by the Department of State under this chapter shall be deposited in the revolving trust fund for the purpose of paying for the publication and distribution of the Florida Administrative Code and the Florida Administrative Weekly and for associated costs incurred by the department in carrying out this chapter.

(c) The unencumbered balance in the revolving trust fund at the beginning of each fiscal year shall not exceed $300,000, and any excess shall be transferred to the General Revenue Fund.

(d) It is the intent of the Legislature that the Florida Administrative Weekly be supported entirely from funds collected for subscriptions to and advertisements in the Florida Administrative Weekly. To that end, the Department of State is authorized to add a surcharge of 10 percent to any charge relating to the Florida Administrative Weekly until such time as the Publication Revolving Trust Fund has transferred to the General Revenue Fund an amount equal to all funds appropriated to the trust fund.

**History.**—s. 1, ch. 74-310; s. 1, ch. 75-107; s. 4, ch. 75-191; s. 5, ch. 76-131; s. 1, ch. 77-174; s. 4, ch. 77-453; s. 3, ch. 78-425; s. 4, ch. 79-299; s. 7, ch. 80-391; s. 4, ch. 81-309; s. 1, ch. 82-19; s. 1, ch. 82-47; s. 3, ch. 83-351; s. 3, ch. 84-203; s. 17, ch. 87-224; s. 1, ch. 87-322; s. 20, ch. 91-45; s. 15, ch. 96-159.

**120.56 Challenges to rules.**—

(1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.—

(a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

(b) The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.

(c) The petition shall be filed with the division which shall, immediately upon filing, forward copies to the agency whose rule is challenged, the Department of State, and the committee. Within 10 days after receiving the petition, the division director shall, if the petition complies with the requirements of paragraph (b), assign an administrative law judge who shall conduct a hearing within 30 days thereafter, unless the petition is withdrawn or a continuance is granted by agreement of the parties or for good cause shown. Evidence of good cause includes, but is not limited to, written notice of an agency's decision to modify or withdraw the proposed rule or a written notice from the chair of the committee stating that the committee will consider an objection to the rule at its next scheduled meeting. The failure of an agency to follow the applicable rulemaking procedures or requirements set forth in this chapter shall be presumed to be material; however, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired.

(d) Within 30 days after the hearing, the administrative law judge shall render a decision and state the reasons therefor in writing. The division shall forthwith

transmit copies of the administrative law judge's decision to the agency, the Department of State, and the committee.

(e) Hearings held under this section shall be conducted in the same manner as provided by ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action. The petitioner and the agency whose rule is challenged shall be adverse parties. Other substantially affected persons may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings. Failure to proceed under this section shall not constitute failure to exhaust administrative remedies.

(2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—

(a) Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule by filing a petition seeking such a determination with the division within 21 days after the date of publication of the notice required by s. 120.54(3)(a), within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(c), within 20 days after the preparation of a statement of estimated regulatory costs required pursuant to s. 120.541, if applicable, or within 20 days after the date of publication of the notice required by s. 120.54(3)(d). The petition shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The agency then has the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. Any person who is substantially affected by a change in the proposed rule may seek a determination of the validity of such change. Any person not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the rule and is not limited to challenging the change to the proposed rule.

(b) The administrative law judge may declare the proposed rule wholly or partly invalid. The proposed rule or provision of a proposed rule declared invalid shall be withdrawn by the adopting agency and shall not be adopted. No rule shall be filed for adoption until 28 days after the notice required by s. 120.54(3)(a), until 21 days after the notice required by s. 120.54(3)(d), until 14 days after the public hearing, until 21 days after preparation of a statement of estimated regulatory costs required pursuant to s. 120.541, or until the administrative law judge has rendered a decision, whichever applies. However, the agency may proceed with all other steps in the rulemaking process, including the holding of a factfinding hearing. In the event part of a proposed rule is declared invalid, the adopting agency may, in its sole discretion, withdraw the proposed rule in its entirety. The agency whose proposed rule has been declared invalid in whole or part shall give notice of the decision in the first available issue of the Florida Administrative Weekly.

(c) When any substantially affected person seeks determination of the invalidity of a proposed rule pursuant to this section, the proposed rule is not presumed to be valid or invalid.

(3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.—

(a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule.

(b) The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Weekly in the first available issue after the rule has become void.

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.—

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible and practicable under s. 120.54(1)(a).

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Weekly.

(d) When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

(e) Prior to entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), if an agency publishes, pursuant to s. 120.54(3)(a), proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules which address the statement, the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e). If an agency fails to adopt rules which address the statement within 180 days after publishing proposed rules, for purposes of this subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules. If the agency's proposed rules are challenged pursuant to subsection (2), the 180-day period for adoption of rules is tolled until a final order is entered in that proceeding.

(f) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be brought in conjunction with a proceeding under any

other section of this chapter or consolidated with such a proceeding. Nothing in this paragraph shall be construed to prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

(5) CHALLENGING EMERGENCY RULES; SPECIAL PROVISIONS.—Challenges to the validity of an emergency rule shall be subject to the following time schedules in lieu of those established by paragraphs (1)(c) and (d). Within 7 days after receiving the petition, the division director shall, if the petition complies with paragraph (1)(b), assign an administrative law judge, who shall conduct a hearing within 14 days, unless the petition is withdrawn. The administrative law judge shall render a decision within 14 days after the hearing.

History.—s. 1, ch. 74-310; s. 5, ch. 75-191; s. 6, ch. 76-131; s. 1, ch. 77-174; s. 4, ch. 78-425; s. 759, ch. 95-147; s. 16, ch. 96-159.

**120.565 Declaratory statement by agencies.**—

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

(3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Weekly and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Weekly. Agency disposition of petitions shall be final agency action.

History.—s. 6, ch. 75-191; s. 7, ch. 76-131; s. 5, ch. 78-425; s. 5, ch. 79-299; s. 760, ch. 95-147; s. 17, ch. 96-159.

**120.569 Decisions which affect substantial interests.**—

(1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s. 120.574. Unless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) applies in all other cases. Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney of record at the address of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

(2)(a) Except for any proceeding conducted as prescribed in s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency requests an administrative law judge from the division, it shall so notify the division within 15 days after receipt of the petition or request. A request for a hearing shall be granted or denied within 15 days after receipt. On the request of any agency, the division shall assign an administrative law judge with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to the formal proceeding, except as a party litigant, as long as the division has jurisdiction over the formal proceeding. Any party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.

(b) All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days; however, the 14-day notice requirement may be waived with the consent of all parties. The notice shall include:

1. A statement of the time, place, and nature of the hearing.

2. A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(d) The presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure, including the imposition of sanctions, except contempt. However, no presiding officer has the authority to issue any subpoena or order directing discovery to any member or employee of the Legislature when the subpoena or order commands the production of documents or materials or compels testimony relating to the legislative duties of the member or employee. Any subpoena or order directing discovery directed to a member or an employee of the Legislature shall show on its face that the testimony sought does not relate to legislative duties.

(e) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

(f) Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties shall be given an opportunity to compare the copy with the original, if available.

(g) When official recognition is requested, the parties shall be notified and given an opportunity to examine and contest the material.

(h) A party shall be permitted to conduct cross-examination when testimony is taken or documents are made a part of the record.

(i)1. Any person subject to a subpoena may, before compliance and on timely petition, request the presiding officer having jurisdiction of the dispute to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material.

2. A party may seek enforcement of a subpoena, order directing discovery, or order imposing sanctions issued under the authority of this chapter by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena or order resides. A failure to comply with an order of the court shall result in a finding of contempt of court. However, no person shall be in contempt while a subpoena is being challenged under subparagraph 1. The court may award to the prevailing party all or part of the costs and attorney's fees incurred in obtaining the court order whenever the court determines that such an award should be granted under the Florida Rules of Civil Procedure.

3. Any public employee subpoenaed to appear at an agency proceeding shall be entitled to per diem and travel expenses at the same rate as that provided for state employees under s. 112.061 if travel away from such public employee's headquarters is required. All other witnesses appearing pursuant to a subpoena shall be paid such fees and mileage for their attendance as is provided in civil actions in circuit courts of this state. In the case of a public employee, such expenses shall be processed and paid in the manner provided for agency employee travel expense reimbursement, and in the case of a witness who is not a public employee, payment of such fees and expenses shall accompany the subpoena.

(j) Unless the time period is waived or extended with the consent of all parties, the final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated, and it must be rendered within 90 days:

1. After the hearing is concluded, if conducted by the agency;

2. After a recommended order is submitted to the agency and mailed to all parties, if the hearing is conducted by an administrative law judge; or

3. After the agency has received the written and oral material it has authorized to be submitted, if there has been no hearing.

(k) Findings of fact, if set forth in a manner which is no more than mere tracking of the statutory language, must be accompanied by a concise and explicit statement of the underlying facts of record which support the findings.

(l) If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such finding in the final order, which shall be appealable or enjoinable from the date rendered.

History.—s. 18, ch. 96-159.

**[1]120.57 Additional procedures for particular cases.**

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT —

(a) Except as provided in ss. 120.80 and 120.81, an administrative law judge assigned by the division shall conduct all hearings under this subsection, except for hearings before agency heads or a member thereof. If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary.

(b) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(d) Notwithstanding s. 120.569(2)(e), similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. When the state in an administrative proceeding intends to offer evidence of other acts or offenses under this paragraph, the state shall furnish to the party whose substantial interests are being determined and whose other acts or offenses will be the subject of such evidence, no fewer than 10 days before commencement of the proceeding, a written statement of the acts or offenses it intends to offer, describing them and the evidence the state intends to offer with particularity. Notice is not required for evidence of acts or offenses which is used for impeachment or on rebuttal.

(e)1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.

2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. Is not arbitrary or capricious;

e. Is not being applied to the substantially affected party without due notice;

f. Is supported by competent and substantial evidence; and

g. Does not impose excessive regulatory costs on the regulated person, county, or city.

3. The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (i) and (j), except that the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review.

(f) The record in a case governed by this subsection shall consist only of:

1. All notices, pleadings, motions, and intermediate rulings.

2. Evidence admitted.

3. Those matters officially recognized.

4. Proffers of proof and objections and rulings thereon.

5. Proposed findings and exceptions.

6. Any decision, opinion, order, or report by the presiding officer.

7. All staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. †20.66(1), if such communications are public records.

8. All matters placed on the record after an ex parte communication.

9. The official transcript.

(g) The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost.

(h) Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.

(i) The presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order. All proceedings conducted pursuant to this subsection shall be de novo. The agency shall allow each party 15 days in which to submit written exceptions to the recommended order.

(j) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

(k) If a recommended order is submitted to an agency, the agency shall provide a copy of its final order to the division within 15 days after the order is filed with the agency clerk.

(l) Notwithstanding any law to the contrary, when statutes or rules impose conflicting time requirements for the issuance of expedited hearings or recommended orders, the director of the division shall have the authority to set the proceedings for the orderly operation of this chapter.

(2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—In any case to which subsection (1) does not apply:

(a) The agency shall:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.

2. Give parties or their counsel an opportunity, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the parties are overruled, provide a written explanation within 7 days.

(b) The record shall only consist of:

1. The notice and summary of grounds.

2. Evidence received.

3. All written statements submitted.

4. Any decision overruling objections.

5. All matters placed on the record after an ex parte communication.

6. The official transcript.

(3) ADDITIONAL PROCEDURES APPLICABLE TO PROTESTS TO CONTRACT BIDDING OR AWARD.—An agency which enters into a contract pursuant to the provisions of ss. 282.303–282.313, chapter 255, chapter 287, or chapters 334–349 shall adopt rules specifying procedures for the resolution of protests arising from the contract bidding process. Such rules shall at least provide that: