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State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: March 2, 2004

TO: Blanca S. Bayó, Commission Clerk and Administrative Services Director

FROM: Samantha M. Cibula, Senior Attorney, General Counsel *S.M.C.*

RE: Docket No. 030970-EI - Proposed Amendment of Rules 25-6.014, F.A.C., Records and Reports in General; 25-6.015, F.A.C., Location and Preservation of Records; 25-6.135, F.A.C., Annual Reports; and 25-6.1351, F.A.C., Cost Allocation and Affiliate Transactions.

Please place the attached letters from the Joint Administrative Procedures Committee into the above-referenced docket file.

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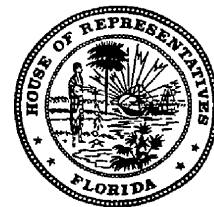
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 FPSC-COMMISSION CLERK

JAMES E. "JIM" KING, JR.
President



Representative Juan-Carlos "J.C." Planas, Chair
Senator Michael S. "Mike" Bennett, Vice-Chair
Senator Nancy Argenziano
Senator Gwen Margolis
Representative Bill Galvano
Representative Yolly Roberson

JOHNNIE BYRD
Speaker



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Room 120, Holland Building
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THE FLORIDA LEGISLATURE
JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE

January 20, 2004

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

Re: Public Service Commission Rule Chapter 25-6

Dear Ms. Cibula:

I have completed a review of the rules being amended in chapter 25-6 and prepared the following comments for your consideration and response.

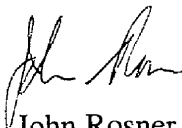
25-6.015(3)(b): The rule provides that the Commission may waive the requirement that certain documents be retained as described. However, no standards or criteria are set forth to apprise the reader of whether or not such waiver will be forthcoming under any circumstances. This renders the rule objectionable pursuant to section 120.52(8)(d), F.S., (rule is invalid exercise of delegated legislative authority where it is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency). The rule should be amended accordingly.

25-6.1351(5)

The rule provides that the form is incorporated by reference "into this rule." Actually, the form is incorporated by the previous rule.

I am available at your convenience to discuss the foregoing comments.

Sincerely,


John Rosner
Chief Attorney

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JAMES E. "JIM" KING, JR.
President



Representative Juan-Carlos "J.C." Planas, Chair
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THE FLORIDA LEGISLATURE
JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE

February 2, 2004

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

Re: Public Service Commission Rule 25-6.015(3)(b)

Dear Ms. Cibula:

Thank you for your response to my letter. You note that the criteria for the Commission's waiving the requirement that documents be retained in their original form is "upon a showing by the utility that it employs a storage and retrieval system that consistently produces clear, readable copies that are substantially equivalent to the originals, and clearly reproduces handwritten notations on documents." However, the foregoing proviso must be read together with its antecedent term. The rule provides that the Commission "may" waive the requirement that certain documents be retained as described. In my judgment, the rule is objectionable under provisions of Chapter 120, F.S., as well as judicial decisions.

Section 120.52(8) F.S., defines invalid exercise of delegated legislative authority as meaning "action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply: ... (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency" The rule under consideration does not apprise the reader of whether or not the Commission will waive the requirement under any circumstances and accords the Commission unbridled discretion in making the decision.

It is also well settled that in statutory construction the word "may" when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word "shall." I.E. Fixel v. Clevenger, 285 So.2d 687, 688 (Fla. 3 DCA 1973), cited in City of Miami v. Save Brickell Ave., Inc., 426 So.2d 1100, 1105 (Fla. 3 DCA 1983). Webster's Third New International Dictionary, unabridged, 1976 defines "permissive" as:

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GENERAL COUNSEL

allowing discretion ... used often of legislation enacted by a higher body to be put into effect or not at the option of local authorities (e.s.)

In the case of Barrow v. Holland, 125 So.2d 749 (Fla. 1960), a rule of the Game and Fresh Water Fish Commission authorizing the director to issue permits to exhibit live animals was declared unconstitutional. The rule provided, in pertinent part:

The Director may issue permits giving the right to take or to be in possession of wildlife Such permits shall be subject to such terms, conditions, and restrictings as may be prescribed by the Commission Barrow v. Holland, supra, p.752.

In discussing the rule, the Court said:

The appellant could have read the rules of the Commission backwards and forwards and could not have obtained any information whatsoever as to just what he would have to do to obtain the permit. . . . This is the type of arbitrary authority that due process prohibits. Barrow v. Holland, p.753.

In City of Miami v. Save Brickell Ave., supra., p.1105, the court discussed a city ordinance listing criteria to be considered by the city commission for approval of zoning deviations. The ordinance stated “[c]riteria to be considered . . . may include but are not limited to” the listed criteria. In finding the challenged ordinance to be unconstitutional, the court stated:

While it is true that criteria are listed in the ordinance for the City Commission consideration, further examination reveals that such criteria are solely permissive and not mandatory. The key phraseology is ‘may include but are not limited to’ In statutory construction, the word ‘may’ when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word ‘shall’. [citation omitted] Moreover, the wording of the ordinance clearly permits the Commission to totally disregard the listed criteria and instead to base a decision upon criteria that are not listed or no criteria at all. Certainly, an ordinance which permits a legislative agency to totally disregard listed criteria and to base a decision upon unlisted or no criteria does not meet the standards recited in North Bay Village v. Blackwell, supra, and the other decisions cited above. (e.s.)

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The court had earlier summarized those cases by saying "In other words, if definite standards are not included in the ordinance, it must be deemed unconstitutional as an invalid delegation of legislative power to an administrative board." Save Brickell Ave, p.1104, citing Clarke v. Morgan, 327 So.2d 769 (Fla. 1975). Although the gravamen of the case was consideration of an ordinance, the holding is applicable to the administrative rule of a state agency.

In my judgment, the rule is objectionable for the reasons discussed above. A notice of change should be published to correct its infirmity.

Sincerely,



John Rosner
Chief Attorney

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