

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Adoption of Proposed) DOCKET NO. 950546-PU
Rule 25-22.0376, F.A.C.,) ORDER NO. PSC-95-0818-NOR-PU
Reconsideration of Prehearing) ISSUED: July 6, 1995
Officer Orders; and 25-22.038,)
F.A.C., Prehearing Officer;)
Prehearing Statement; Prehearing)
Conferences; and Prehearing)
Order.)
_____)

NOTICE OF RULEMAKING

NOTICE is hereby given that the Florida Public Service Commission, pursuant to Section 120.54, Florida Statutes, has initiated rulemaking to adopt Rule 25-22.0376 and to amend Rule 25-22.038, Florida Administrative Code, relating to orders of prehearing officers and prehearing matters.

The attached Notice of Rulemaking will appear in the July 14, 1995, edition of the Florida Administrative Weekly. No hearing will be held because the rules relate exclusively to the Commission's organization, procedure, or practice.

By ORDER of the Florida Public Service Commission, this 6th day of July, 1995.

BLANCA S. BAYÓ, Director
Division of Records & Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

DOCUMENT NUMBER-DATE

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FPSO-RECORDS-REPORTING

ORDER NO. PSC-95-0818-NOR-PU
DOCKET NO. 950546-PU
PAGE 2

FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 950546-PU

RULE TITLE:

RULE NO.:

RECONSIDERATION OF PREHEARING

OFFICER ORDERS

25-22.0376

PREHEARING OFFICER; PREHEARING

STATEMENT; PREHEARING CONFERENCES;

AND PREHEARING ORDER

25-22.038

PURPOSE AND EFFECT: The purpose of proposed Rule 25-22.0376 is to give parties only one opportunity to seek reconsideration of a prehearing officer's order and to clarify that the review standard is reconsideration and not de novo. The purpose of the proposed amendments to Rule 25-22.038 is to clarify the rule's language.

SUMMARY: Proposed Rule 25-22.0376 provides the procedure a party adversely affected by a prehearing officer's order must follow to seek reconsideration of the prehearing officer's order. The amendments to Rule 25-22.038 clarify the language of the rule that deals with prehearing officers, prehearing statements, prehearing conferences, and prehearing orders.

RULEMAKING AUTHORITY: 120.53, F.S.

LAW IMPLEMENTED: 120.53, F.S.

WRITTEN COMMENTS OR SUGGESTIONS ON THE PROPOSED RULE MAY BE SUBMITTED TO THE FPSC, DIVISION OF RECORDS AND REPORTING, WITHIN 21

DAYS OF THE DATE OF THIS NOTICE FOR INCLUSION IN THE RECORD OF THE PROCEEDING.

NO HEARING WILL BE HELD BECAUSE THIS RULE RELATES EXCLUSIVELY TO THE COMMISSION'S ORGANIZATION, PROCEDURE OR PRACTICE.

THE PERSON TO BE CONTACTED REGARDING THESE RULES AND THE ECONOMIC IMPACT STATEMENT IS: Director of Appeals, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0862.

THE FULL TEXT OF THE THESE RULES ARE:

25-22.0376 Reconsideration of Prehearing Officer Orders.

(1) Any party who is adversely affected by an order of a prehearing officer may seek reconsideration by the Commission panel assigned to the proceeding by filing a motion in support thereof within 10 days after issuance of the order. For the purposes of this rule, orders of the prehearing officer shall not be considered non-final orders subject to Rule 25-22.060(3)(b), Florida Administrative Code. The Commission shall not entertain a motion for reconsideration of an order disposing of a motion for reconsideration.

(2) A party may file a response to a motion for reconsideration within 7 days after service of the motion for reconsideration.

(3) Failure to timely file a motion for reconsideration or a response shall constitute a waiver of the right to do so.

(4) Any motion or response filed pursuant to this rule shall contain a concise statement of the grounds therefor and the signature of counsel or other person filing the motion.

(5) Oral argument on any motion filed pursuant to this rule may be granted at the discretion of the Commission. A party who fails to file a written response to a point on reconsideration shall be precluded from responding to that point during oral argument.

Specific Authority: 120.53, F.S.

Law Implemented: 120.53, F.S.

History: New _____.

25-22.038 Prehearing Officer; Prehearing Statement; Prehearing Conferences Conference; and Prehearing Order.

(1) Prehearing Officer. For the purpose of this chapter rule, the words "prehearing officer" shall refer to a ~~Commissioner designated to preside at the hearing, a hearing officer designated by the Division of Administrative Hearings to preside at the hearing, or~~ a member of a commission panel assigned to the case who ~~that~~ has been designated by the chairman ~~Chairman~~ as a prehearing officer. When ~~Where~~ the commissioner ~~commissioners~~ designated as the prehearing officer becomes unavailable, the following persons may act as prehearing officer in the following order of availability: any member of the panel assigned to the proceeding, in order of seniority, or the commission chairman. A commissioner

acting as prehearing officer may, in his or her discretion, refer any matter ~~matters~~ to the panel assigned to the case for a decision.

~~(2) Orders of Prehearing Officer. A party who is adversely affected by any such order or notice may seek reconsideration by the prehearing officer, or review by the Commission panel assigned to the proceeding, by filing a motion in support thereof within ten (10) days of service of the notice or order. Unless raised within this time, any error claimed with reference to discovery, scheduling, prehearing requirements, or the prehearing order will be waived, absent good cause shown.~~

(2)(3) Prehearing Statement. A prehearing officer may issue an order requiring each party to file a prehearing statement. The ~~Such~~ order shall provide a date by which time the ~~such~~ prehearing statement is due and shall further state that the failure of a party to file a prehearing statement shall be a waiver of any issues not raised by other parties or by the Commission, as well as the ability to present testimony in favor of his or her position. An order requiring a prehearing statement may address or rule upon any matters which may aid in the orderly disposition of the proceeding. In an order requiring a prehearing statement, the prehearing officer may require each party:

(a) to identify all known witnesses that may be called and indicate the subject matter of their testimony;

(b) to identify all known exhibits, identify their contents, and indicate whether they may be identified on a composite basis;

(c) to provide a statement of the party's ~~its~~ basic position in the proceeding;

(d) to provide a statement of each question of fact the party considers at issue;

(e) to provide a statement of each question of law the party considers at issue;

(f) to provide a statement of each policy question the party considers at issue;

(g) to provide a statement of the party's position on each issue identified pursuant to paragraphs (d), (e), and (f);

(h) to provide a statement of issues that have been stipulated to by the parties;

(i) to provide a statement of all pending motions or other matters the party seeks action upon;

(j) to provide a statement as to any requirement set forth in the prehearing order that cannot be complied with, and the reasons therefore;

(k) to include such other matters in the prehearing statement as will aid the Commission in achieving an orderly disposition of the proceeding.

~~(3)(4)~~ Prehearing Conferences, ~~etc.~~ A prehearing officer may require the parties to hold ~~such~~ conferences, exchange ~~such~~

information, and submit ~~such~~ pleadings to ~~as will~~ aid in the organization of the proceeding and the efficient disposition of the merits of the proceeding. ~~The requirement imposed by the prehearing officer with respect to the exchange of information shall be consistent with Rule 25-22.038.~~

(a) Upon ~~seven~~ ~~(7)~~ days written notice, the prehearing officer may conduct, or request the parties to hold one or more prehearing conferences for the purpose of hearing arguments on pending motions, clarifying and simplifying issues, discussing the possibility of settlement of the issues, examining exhibits and documents, exchanging names and addresses, and resolving other procedural matters.

(b) Within a reasonable time after designation to the case, the prehearing officer shall set a date for a final prehearing conference and shall issue notice of the same.

(c) All parties and the prehearing officer shall attend the final prehearing conference, at which time the participants shall advise the prehearing officer as to the issues known to be in dispute, as well as the parties' positions thereon.

~~(d) The prehearing officer may issue a prehearing order as set forth in (5) below.~~

(4)~~(5)~~ Prehearing Order. The prehearing officer may issue a prehearing order which sets forth the issues in the case, as well as the positions of the parties, and addresses ~~such~~ other matters

as may aid in the conduct of the hearing and the efficient and fair disposition of the proceeding. Issues raising primarily questions of fact shall be stated separately from issues raising solely legal questions.

(a) The prehearing order shall control the conduct of the parties in the case to the extent the matter is addressed in the order. Except for good cause, an objection to any aspect of the prehearing order shall be raised at the start of or prior to the hearing.

(b) When ~~Where~~ an order has been issued that requires prehearing statements to list issues and positions, the prehearing officer has conducted a final prehearing conference wherein issues and positions were discussed, and a prehearing order has been issued which sets forth the issues in the case and the parties' positions thereon, the following shall apply:

1. Any party who failed to attend a final prehearing conference, unless excused by the prehearing officer, will have waived all issues and positions raised in his or her prehearing statement;
2. Any issue not raised by a party prior to the issuance of a prehearing order shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the issuance of the prehearing order shall demonstrate that he or she was unable to identify the

issue because of the complexity of the matter; discovery or other prehearing procedures were not adequate to fully develop the issues; due diligence was exercised to obtain facts touching on the issue; information obtained subsequent to the issuance of the prehearing order was not previously available to enable the party to identify the issue; and introduction of the issue could not be to the prejudice or surprise of any party. Specific reference shall be made to the information received, and how it enabled the party to identify the issue;

3. Unless a matter is not at issue for that party, a party shall diligently endeavor in good faith to take a position on each issue prior to issuance of the prehearing order. When a party is unable to take a position on an issue, he or she shall bring that fact to the attention of the prehearing officer. If the prehearing officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceedings, the party may maintain "no position at this time" prior to hearing and thereafter identify his or her position in a post-hearing statement of issues. In the

ORDER NO. PSC-95-0818-NOR-PU
DOCKET NO. 950546-PU
PAGE 10

absence of such a finding by the prehearing officer, the party shall have waived the entire issue.

(c) When an issue and position have been properly identified any party may adopt that issue and position in his or her post-hearing statement.

Specific Authority: 120.53, F.S.

Law Implemented: 120.53, F.S.

History: Transferred from 25-2.68 and Amended 12/21/81, formerly 25-22.38. Amended_____.

NAME OF PERSON ORIGINATING PROPOSED RULES: Noreen Davis, Director of the Division of Legal Services.

NAME OF SUPERVISOR OR PERSON(S) WHO APPROVED THE PROPOSED RULES: Florida Public Service Commission.

DATE PROPOSED RULES APPROVED: June 27, 1995.