**FLORIDA PUBLIC SERVICE COMMISSION**

Fletcher Building

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R E V I S E D M E M O R A N D U M

September 3, 1992

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF APPEALS (SMITH)

DIVISION OF LEGAL SERVICES (DAVIS)

DIVISION OF WATER AND WASTEWATER (HILL)

DIVISION OF ELECTRIC AND GAS (JENKINS)

DIVISION OF COMMUNICATIONS (D'HAESELEER)

DIVISION OF AUDITING AND FINANCIAL ANALYSIS (DEVLIN)

DIVISION OF RESEARCH AND REGULATORY REVIEW (HEWITT)

RE: DOCKET NO. 920617-OT - PROPOSED ADOPTION OF RULE 25-22.033 COMMUNICATIONS BETWEEN COMMISSION EMPLOYEES AND INTERESTED PERSONS

AGENDA: 09/15/92 AGENDA - CONTROVERSIAL - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE - PROPOSAL MAY BE DEFERRED

**CASE BACKGROUND**

The Commission currently has no procedural rules dealing with informal interaction between Commission employees and regulated utilities, intervenors and other persons having an interest in Commission proceedings. Chapter 25-22, F.A.C., makes the Florida Rules of Civil Procedure applicable where formal discovery is conducted, but there are no similar provisions for notice and opportunity to participate where information is gathered through informal contacts.

The absence of specific rules governing contacts between Commission employees and interested persons, particularly regulated utilities, has resulted in criticism of the Commission in the last year. In January, 1992, the Tenth Statewide Grand Jury issued an interim report entitled "Regulating Utilities - Recommendations to Enhance the Integrity of the Process" which found, in essence, that informal and unnoticed contacts between regulators and the regulated had a negative impact on the integrity of the regulatory process. The report offered several suggestions for improving the process, such as requiring advance notice of meetings between representatives of the Commission and regulated utilities, and the immediate dissemination of copies of written correspondence between the staff and the utilities.

In addition to the Grand Jury report, a bill was introduced into the Florida Legislature in the 1992 session which would have required the Commission to adopt rules establishing "standards of conduct for the employees of the Commission in order to carry out the legislative intent of promoting fairness among all parties to proceedings before the Commission." (CS/HB 1017) Although the legislation offered no specific proposals, the focus was once again on informal communications between Commission employees, the utilities and other interested persons.

Staff believes that the negative perceptions embodied in the Grand Jury report and the proposed legislation could and should be remedied by adoption of rules governing informal contacts between Commission employees and persons whose interests are affected by Commission proceedings. Staff believes that the Commission's interest will be served by clearly defining notice requirements and opportunities to participate when contacts are initiated outside the formal discovery process.

DISCUSSION

ISSUE 1: Should the Commission propose new Rule 25-22.033, F.A.C. - Communications Between Commission Employees and Interested Persons? (Appendix 1)

RECOMMENDATION: Yes, the rule should be proposed.

STAFF ANALYSIS: **25-22.033 - Scope of the Rule** - The rule applies to all Commission employees, excluding Commissioners, and governs written and oral communications between employees and "interested persons", i.e., those persons who will or may be affected by Commission action. The term interested person encompasses more than just the actual parties, but does not include individual residential ratepayers acting in their own behalf. Rulemaking, declaratory statements, workshops and internal affairs are exempted from the rule.

The rule does not apply to communications initiated in the context of formal discovery pursuant to Commission rules and the Florida Rules of Civil Procedure.

(1) - **Docketed matters** - The notice requirements of this subsection apply in docketed matters.

(1)(a) - **Written communications** - Commission employees will send a copy of written communications with interested persons to all parties when the written communication is transmitted. All communications, including responses, will be put in the docket file.

(1)(b) - **Scheduled meetings and conference calls** - When a Commission employee schedules a meeting or conference call with interested persons, all parties will be given two working days' written notice. "Conference call" is defined as a call between 3 or more persons.

(1)(c) - **Follow-up communications** - No notice is required if there is a brief follow-up to the scheduled meeting or conference call or an emergency situation necessitates communication between Commission employees and interested persons. However, all parties will be sent a summary of the Communication within five working days.

A documented emergency for purposes of the rule is "an unforeseen or unpredictable event which necessitates the communication to Commission employees of some information essential to the performance of regulatory duties."

(1)(d) - **Response to Communications** - Any party to the proceeding may file a response to any communication between Commission employees and interested persons. The response must be filed with the Director of Records and Reporting within ten working days of the communication triggering the response.

(2) - **Communications in undocketed matters** - The rule does not apply to communications concerning undocketed matters unless the Commission employee knows that a docket directly relating to the matter will be opened within 90 days. Then, a copy of the correspondence or summary of the conversation will be filed with the Director of Records and Reporting.

(3) - **Audits** - No notice of communications made in the course of an audit will be given. However, if a written report is developed and the report is to be used in a docketed matter, notice will be given when the final audit report is published.

(4) - **Telephone service evaluations and electric and gas safety inspections** - The notice provision does not apply to communications in the course of these activities except where written reports are generated and will be used in a docketed matter. Then, notice will be given upon publication of the final report.

(5) -  **Other communications** - This subsection deals with communications relating to surveys, questionnaires or information gathering activities of persons or organizations such as NARUC. No notice of such communications between Commission employees and interested persons would be required in these situations.

(6) - **Prohibited communications** - This subsection prohibits Commission employees from being conduits for prohibited ex parte communications under section 350.042, F.S. It does not apply to communications between Commissioners and staff in staff's advisory role.

**Economic Impact Statement**

The Economic Impact Statement (EIS) for the rule found that there were no quantifiable costs to the agency or those affected by the rule. A certain amount of staff time will be involved in complying with the rule, but it is unclear exactly how much time that will be. The EIS found no significant impact on small businesses, competition or employment. A copy of the EIS is attached as Appendix 2.

Staff recommends the Commission adopt Rule 25-22.033. It will provide a framework for notice to persons having an interest in Commission proceedings and help assure that all parties have a fair and equal opportunity to participate in informal contacts.

ISSUE 2: Should the Commission file these rules with the Secretary of State if no comments are received?

RECOMMENDATION: Yes, if there are no comments, then the rules may be filed with the Secretary of State and the docket closed.

STAFF ANALYSIS: This rule relates solely to Commission practice and procedure. Pursuant to section 120.54(3)(a) it is not necessary to hold a hearing on the rule; affected persons have the opportunity to submit comments for the Commission's consideration, if they wish. The Commission may, of course, hold a hearing if it so desires, but the standard Notice in the Florida Administrative Weekly will not invite requests for hearing. Any person wishing to make a request that a hearing be held should be prepared to so when the rule is discussed at agenda conference.

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Attachments