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November 13, 1992

Mr. Steve Tribble, Director
Division of Records & Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0870

Re: Docket No. 920840-OT, in re adoption of rules proposed by
Order No. PSC-92-1175-NOR-OT issued 10/15/92

Dear Mr. Tribble:

Enclosed for filing is my response to Order No. PSC-92-1175-
NOR-OT, Notice of Rulemaking which is required to be filed by
November 13, 1992.

My comments are in the form of a letter addressed to Chris
Moore, Esq. of the Commission Staff.

Thank you for your assistance in this matter.

Sincerely yours,

ACK _____
AFA ~~*~~ _____
APP 1 _____
CAF _____
CMB _____
CTR _____
EAG _____
LEG 1 _____
LIT 6 _____
OPC 1 _____
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Enclosures

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November 13, 1992

Chris Moore, Esq.
Division of Appeals
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399

Re: Docket No. 920840-OT, in re adoption of rules proposed by
Order No. PSC-92-1175-NOR-OT issued 10/15/92

Dear Ms. Moore:

Thank you for the opportunity to meet with you and Ms. Noreen Davis for over an hour last week to discuss several concerns regarding the proposed rules.

In accordance with your request, the following is a written statement of my concerns. These comments begin on page 1 of the attached draft and generally follow sequentially, rather than taking the most important matters first.

As we discussed in our meeting, any previous notices of this proposed rule did not catch my attention. It was only when I received the Order containing the notice of rulemaking and the text of the rules did I become aware of the impact which these rules could have. I apologize for any inconvenience that may have caused, but I have felt it necessary to bring these concerns to your attention, as a private practitioner who must comply with these rules or risk waiver of my client's rights in proceedings before the Commission.

These matters are of sufficient concern for me to meet with Staff to discuss the problems with the rules, and then, as requested, to prepare this written statement of those concerns.

The organization of the rules, as amended, is confusing. In general, it is unclear whether a brief on the issues is the same as, or can substitute for, a post-hearing statement of issues and positions; it is unclear whether a copy of the prehearing statement of issues and positions must be filed in addition to the post-hearing documents; it is unclear when a summary of a statement of position must be filed in addition to the statement of position; and it is unclear exactly what will be waived, or may be

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interpreted as having been waived, if it is not filed in a certain manner. Some previously existing language becomes unclear in its application when combined with new revisions in other parts of the rule. In essence, the rules, as written, are vague and will be difficult to follow.

1. Page 1, line 5. Rule 25-22.056(1)(a) provides for the filing of a legal brief on the issues. Is this the same as, or does it replace, the post-hearing statement of issues and positions required in Rule 25-22.056(3)(a) on page 3, line 5? Are these pages counted when arriving at the 60-page limit (page 1, lines 18-20)?

2. Page 1, line 11. Rule 25-22.056(1)(b) also is unclear in that it provides for the filing of a post-hearing "statement of issues". Is this the same as a post-hearing statement of issues and positions provided in Rule 25-22.056(3)(a)?

3. Page 1, line 12. Rule 25-22.056(1)(b) provides that "exceptions" may be filed. Although it is presumed that these exceptions would be in response to a proposed order, the wording of the rule is unclear as to whether that interpretation is correct or whether any other exceptions could be filed.

4. Page 1, lines 14-17. Although it historically has been the case that failure to pursue and maintain positions on an issue may constitute waiver, the rewording of subsequent provisions of this rule may cause unintended waiver by misinterpretation of the changes in the rules. For example, see Rule 25-22.056(1)(c) and 25-22.056(3)(a).

Page 3 lines 4-8, Rule 25-22.056(3)(a) states that:

Each party to a proceeding shall file a post-hearing statement of issues and positions which shall include a summary of each position of no more than 50 words, set off with asterisks. In the absence of such summary statement, the prehearing position on that issue shall be used in the Staff Recommendation.

First, it is unclear how a summary shall be "set off with asterisks". Second, many positions on issues are shorter than 50 words which is the limitation on the summary. If a summary of every position is required, it seems that unnecessary duplication will occur. The second part of the quoted material regarding use of the prehearing position in the Staff Recommendation seems to suggest that, unless a party's position has changed, no summary is

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required. But must the prehearing position be filed as a post-hearing document if the position does not change? Furthermore, this does not address how many statements of issues and positions must be filed, and whether they may be filed by adoption, by inclusion in a brief, or by filing the redacted portions of the issues and positions from the prehearing statement.

Page 3 lines 13-15 provide that "If a party's position has not changed since the issuance of the prehearing order, the party's post-hearing statement may simply restate the prehearing position." This seems to suggest that a separate statement of issues and positions must be filed, duplicating what was done in the prehearing statement, except for identifying those positions which have been changed, which must somehow "be set off with asterisks". Page 3, lines 11-13 provide that any issue or position "not included in a post-hearing statement [of issues and positions?] shall be considered waived."

Page 1, lines 14-17 and page 2, lines 11-13 also contain existing language relating to waiver. When combined with the unclear provisions of the proposed amendments, private practitioners are placed at great risk of inadvertent waiver of a client's rights.

5. Page 1, line 19. In proposed Rule 25-22.056(1)(d) it is unclear whether the statement of issues and positions is in addition to references in the brief, or may the restatement of positions on issues be contained in the brief (page 3, line 19) and not separately filed? If they must be separately filed, the prehearing statement of issues and positions would be merely duplicative of what is in the brief and will unreasonably reduce the number of meaningful pages below the maximum 60 allowed in the rule (page 1, line 20). Furthermore, it is unclear whether a party may merely file a 1-page adoption of its prehearing statement of issues and positions, or whether the entire document must be refiled. It would seem more appropriate to have all briefs identify each specific issue as a point in the brief, restate its position on the issue, and discuss the evidence supporting its position on that issue. However, the current draft of the rules is not consistent with that concept.

6. Page 1, lines 23-24, Rule 25-22.056(1)(d), provides that "letters shall be distinct". If it is the intent to prohibit certain styles of print, perhaps it would be more appropriate to say so. If not, does "distinct" lettering require bold, capitalization, underlining, italics or something else?

Furthermore, the requirement that lettering shall be at least "11-point type" is unclear. On typewriters, 10-point (pica) sized

type is most frequently used, with 12-point (elite) being a smaller type. Thus, for typewriters, the higher the number for the type, the smaller the print size. However, on many computer word processing systems (such as WordPerfect), the opposite is true. For WordPerfect, 10 point type is the standard type, in which this letter was prepared. However, 11 point type is larger, not smaller as would be the case on a typewriter. If we are not able to use 10 point type on our computers, then we must set up special printing systems for Public Service Commission pleadings which are different than any other court or administrative tribunal, and must go to the trouble of making those revisions to all my PSC-related computer files.

7. Page 2, line 5. Rule 25-22.056(2) is unclear whether these officers include DOAH hearing officers or only a Commissioner assigned from the PSC. Compare to page 1, line 9.

8. Page 2, line 15. Rule 25-22.056(2)(b) is unclear. Does the phrase "or contain mixed questions of fact and law" intend that "each proposed finding of fact shall not contain mixed questions of fact and law."

9. Page 2, line 19. Rule 25-22.056(2)(b) requires that proposed findings of fact which relate to a particular issue shall be grouped together and shall identify the issue number to which they relate. It is very likely that some proposed findings will relate to more than one issue. On the other hand, a party may feel that if a particular proposed finding of fact relates more to one issue than the other, but someone else's interpretation may be that a particular proposed finding of fact may relate to different issues, thus resulting in a dispute as to whether or not there is a waiver.

10. Page 3, lines 1-3. Rule 25-22.056(3) is unclear how the "other documents filed pursuant to this rule" shall "conform to the form and content of the statement of the issues and positions." The proposed rule provides for the filing of proposed findings of fact, conclusions of law, legal briefs on the issues, recommended orders, and post-hearing statements of issues and positions. How shall all these documents "conform" to the form and content of the statement of the issues and positions? And shall this be the prehearing or the post-hearing statement of issues and positions? Furthermore, on page 3, lines 1-3, it is not clear, but the use of the word "statements" appears to suggest that all "post-hearing statements" (of issues and positions?) shall conform to the form and content of the (prehearing?) statement of the issues and positions. Again, it is unclear whether the prehearing statement of issues and positions can merely be adopted, whether it must be refiled in full, or whether it must be totally restated and then

duplicated in the brief.

11. Page 3, lines 8-11. Rule 25-22.056(3)(a) appears to be existing language in the rule. However, it states, "In the event that the new issue is identified by a party in a post-hearing statement, that new issue shall clearly identified as such and a statement of position thereon shall be included." This is a very dangerous provision, and can lead to denial of due process if issues can be raised unilaterally by a party after the hearing. This is especially difficult to deal with if the opposing party never has an opportunity to address the issue both in the hearing and in its post-hearing documents. If a matter is appropriately an issue it should be designated as such by the presiding officer, and the parties should be allowed an opportunity to present evidence on it in open hearing. There have been too many examples in proceedings before the Public Service Commission where last-minute matters have been allowed to be raised by the Office of Public Counsel, which should have addressed those matters in the prehearing conference and in the prehearing statement. The intervenor was slow to conduct discovery and thus was unable to comply with the intent of the prehearing process. At least a proposed issue should be ruled on by a presiding officer and the adverse party should have full opportunity to address the issue with evidence and testimony if necessary. However, last-minute issues should not be allowed to delay proceedings or draw them out. Page 3, lines 8-11 seem to be contradictory to the general intent of these rules, which, for example in Rule 25-22.056(3)(b), precludes the filing of post-hearing documents unless otherwise required by the proceeding officer.

12. Page 3 line 25 through page 4 line 22. In Rule 25-22.056(4) it is sometimes unclear which of these provisions apply when a Commissioner is the hearing officer, which provisions apply when the officer is a DOAH hearing officer, and which provisions apply in both situations.

13. Page 4 line 7-8. Rule 25-22.056(4)(a) provides that "The hearing officer shall, within 30 days after the hearing or receipt of the hearing transcript, whichever is later, file a recommended order" It appears that the receipt of the transcript, even daily transcripts, can never occur prior to the hearing to which it applies. Therefore, the inclusion of the phrase "after the hearing or" appears to be unnecessary and confusing.

14. Page 4, lines 11-12. Rule 25-22.056(4)(a) contains the phrase "separately stated" which appears to mean that findings of fact and conclusions of law must be stated separately. However, with the inclusion of the comma after the word "law", the phrase "separately stated" appears to refer to all contents of the

recommended order.

15. Page 4, line 16. Rule 25-22.056(4)(b) requires that exceptions to the recommended order be filed with the Division of Records and Recording (that is, received in the Clerk's office) within 14 days "of service" (after service?) of the recommended order. This raises the distinction between filing and serving. Service, in this context, means placing in the mail, and the document will require several days to reach the party, which will mean that there can be substantially less than 14 days in which to get the exceptions back to the Clerk's office. This places significant time constraints on all parties, and a longer period of time should be allowed.

16. The order proposing amendments to Rule 25-22.056 also proposed amendments to Rule 25-22.058 Oral Argument. In paragraphs 1 and 3 of the proposed revision, it is not clear that the request for oral argument must accompany pleadings submitted by the same party submitting the request. In subsection 3, the rule could be construed to require a party to file its request for oral argument within 10 days after exceptions or a recommended order is filed by an opposing party. If that is the proper interpretation, it leaves precious little time to receive the opposing party's documents by mail, forward them to the client, and consider whether or not to request oral arguments which must be "filed" in the clerk's office no more than 10 days after the opposing party's exceptions or recommended order is filed.

17. The Order also proposes a new Rule 25-22.0021 Agenda Conference Participation. Paragraph 3 of that proposed rule states that "Nothing in this rule shall preclude the Commission from taking action during the course of a hearing or other duly noticed proceeding." The meaning of that paragraph is unclear. Is this intended to give new powers to the Commission? If not, what action is the Commission not precluded from taking? In addition, in paragraph 2 of that proposed rule, if a hearing has been held, the rule prohibits "oral" presentation by any person other than Staff. What about letters or other written statements?

Perhaps these observations can be helpful from the perspective that I have not had the benefit of the prior discussions in development of the rules, but have seen and considered the proposed changes for the first time in their "final" proposed form.

I hope these observations and questions will assist in the consideration of these rules and in making them as workable as possible for everyone concerned. I believe that the private practitioners share the Staff's concern that we all need to work together to make the physical handling of the prehearing and post-

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hearing documents as easy and as standardized as reasonably possible. It can only benefit the private practitioner if the Staff's job and the Commissioner's job is made easier. We should be left free to focus on the merits of all of these issues and not get hung up in the paperwork. However, the wording of the proposed rules leaves many questions unanswered and I encourage careful consideration and revision to make them more clear and workable.

Because there is no hearing to be held on these rules, the practitioners' ability to have input is more limited than in other rule proceedings. However, when reading the rules for the first time and limiting one's interpretation to what the rules say rather than perhaps what was intended, it is evident that there are unintended traps for the practitioner.

If you have any other questions regarding my concerns, please feel free to call me.

Sincerely yours,



Ben E. Girtman

BEG/sw
Enclosures
cc w/encls: Mr. Steve Tribble

As Proposed

1 25-22.056 Post-Hearing Filings.

2 (1) General Provisions.

3 (a) If a hearing under section 120.57, F.S., is conducted by
 4 a panel of two or more Commissioners or the full Commission, all
 5 parties may submit proposed findings of fact, conclusions of law,
 6 and recommended orders, and or legal briefs on the issues within a
 7 time designated by the presiding officer.

8 (b) If a hearing under section 120.57, F.S., is conducted by
 9 a Commissioner sitting as a hearing officer, all parties may submit
 10 proposed findings of fact, conclusions of law, proposed recommended
 11 orders, which shall include a statement of the issues, and
 12 exceptions, within the time and in the format designated by the
 13 hearing officer.

14 (c) A party who fails to state or reaffirm a position on an
 15 issue to the presiding officer or hearing officer at the
 16 appropriate time shall be deemed to have waived that issue or
 17 position.

18 (d) A party's proposed findings of fact, conclusions of law,
 19 statement of issues and positions, and brief shall together total
 20 no more than 60 pages and shall be filed at the same time. The
 21 hearing officer or, if the hearing has been conducted by a panel or
 22 the full Commission, the prehearing officer, may modify the page
 23 limit for good cause shown. Lettering shall be distinct and in at
 24 least 11-point type. The text must be double spaced with 1-inch
 25 margins except for quoted material which may be indented and single

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1 spaced.

2 (e) Requests for oral argument shall be filed in accordance
3 with Rule 25-22.058, F.A.C.

⑦ 4 (2) Proposed Findings of Fact. A party may submit proposed
5 findings of fact, ~~and~~ the hearing presiding officer or
6 Commissioners assigned to the proceeding will rule upon each
7 finding of fact one, as required by section 5 120.59(2), F.S., when
8 filed in conformance with this rule.

9 (a) Proposed findings of fact shall be entitled as such, and
10 must be presented on a document separate from all other
11 post-hearing documents memoranda.

12 (b) Each proposed finding of fact shall be separately stated,
13 numbered consecutively, and shall be a succinct statement may not
14 to exceed 3 sentences in length ~~be contained in extensive narrative~~
⑧ 15 ~~form,~~ or contain mixed questions of fact and law. Each proposed
16 finding of fact shall cite to the record, identifying the
17 transcript page and line that supports the particular finding. All
18 proposed findings of fact which relate to a particular issue shall
⑨ 19 be grouped together and shall identify the issue number to which
20 they relate. Any written statement that is not clearly designated
21 as a proposed finding of fact shall be considered to be legal
22 argument rather than proposed finding of fact.

23 (3) Statement of issues and positions. In any proceeding
24 where a prehearing order has been issued, and such prehearing order
25 contains a statement of the issues as well as the positions of the

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1 parties thereon, all post-hearing statements and other documents
 2 filed pursuant to this rule memoranda shall conform to the form and
 3 content of the statement of the issues and positions.

4 (a) Each party to a proceeding shall file a post-hearing
 5 statement of issues and positions which shall include a summary of
 6 each position of no more than 50 words, set off with asterisks. In
 7 the absence of such a summary statement, the prehearing position on
 8 that issue will be used in the staff recommendation. In the event
 9 that a new issue is identified by a party in a post-hearing
 10 statement, that new issue shall be clearly identified as such, and
 11 a statement of position thereon shall be included. Any issue or
 12 position not included in a post-hearing statement shall be
 13 considered waived. If a party's position has not changed since the
 14 issuance of the prehearing order, the party's post-hearing
 15 statement may simply restate the prehearing position.

16 (b) A party is not required to file a post-hearing documents
 17 memorandum in addition to the post-hearing statement, unless
 18 otherwise required by the presiding officer. If a brief is filed,
 19 each argument must be identified by the issue number to which it
 20 relates. In the event that a party fails to file a post-hearing
 21 statement in conformance with (3)(a), and no other post-hearing
 22 memorandum is filed which conforms to this rule, that a party so
 23 failing shall have waived all issues and may be dismissed from the
 24 proceeding.

25 (4) Post-Hearing Filings When Hearing is Conducted by a

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1 Hearing Officer. If a hearing under section 120.57, F.S., is held
2 before a Commissioner sitting as a hearing officer, the following
3 provisions shall apply in addition to (1)(b) through (3) of this
4 rule. Subsection (b) of the following provisions also applies when
5 the hearing has been conducted by the Division of Administrative
6 Hearings.

7 (13) (a) Recommended Order. The hearing officer shall, within 30
8 days after the hearing or receipt of the hearing transcript,
9 whichever is later, file a recommended order which shall include a
10 caption, time and place of hearing, appearances entered at the
11 hearing, statement of the issues, findings of fact and conclusions
12 of law, separately stated, and recommendation for final Commission
13 action.

14 (14) (b) Exceptions. Parties and staff may file exceptions to the
15 recommended order with the Division of Records and Reporting within
16 (15) 14 days of service of the recommended order, and shall serve copies
17 of any such exceptions upon all parties of record and staff. Such
18 exceptions shall fully set forth the error claimed and the basis in
19 law and fact therefore, with exceptions to findings of fact
20 supported by citations to the record. A party's failure to serve
21 or file timely written exceptions shall constitute a waiver of any
22 objections to the recommended order.

23 Specific Authority: 120.53(1), F.S.

24 Law Implemented: 120.53, 120.57, 120.58, F.S.

25 History: New 12/21/81, formerly 25-22.57, Amended _____.

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25-22.058 Oral Argument.

(16) (1) The Commission may grant oral argument upon request of any party to a section 120.57, F.S. formal hearing. A request for oral argument shall be contained on a separate document and must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it raised by exceptions or responses. Failure to file a timely request for oral argument shall constitute waiver thereof.

(2) If granted, oral argument shall be conducted at a time and place determined by the Commission. Unless otherwise specified in the notice, oral argument shall be limited to 15 minutes to each party. The staff attorney may participate in oral argument.

(16) (3) Requests for oral argument on recommended orders and exceptions pursuant to section 120.58(1)(e), F.S., must be filed no later than 10 days after exceptions are filed.

Specific Authority: 120.53, F.S.

Law Implemented: 120.53, 120.58(1)(e), F.S.

History: New 12/21/81, formerly 25-22.58, Amended _____.

25-22.0021 Agenda Conference Participation.

(17) Persons who may be affected by Commission action on certain items on the agenda (for which a hearing has not been held) (other than actions on interim rates in file and suspend rate cases and declaratory statements) will be allowed to address the Commission concerning those items when taken up for discussion at the conference.

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(17) (2) When a recommendation is presented and considered in a proceeding where a hearing has been held, no person other than staff who did not testify at the hearing and the Commissioners may participate at the agenda conference. Oral presentation by any other person, whether by way of objection, comment, or otherwise, is not permitted.

(17) (3) Nothing in this rule shall preclude the Commission from taking action during the course of a hearing or other duly noticed proceeding.

Specific Authority: 120.53, F.S.

Law Implemented: 120.53, F.S.

History: New _____.

NAME OF PERSON ORIGINATING PROPOSED RULES: Noreen Davis

NAME OF SUPERVISOR OR PERSON(S) WHO APPROVED THE PROPOSED RULES:

Florida Public Service Commission.

DATE PROPOSED RULES APPROVED: October 6, 1992