Steel Hector & Davis
Tallahassee, Florida

Matthew M. Childs, P.A.
(904) 222-4448

November 13, 1991

By Hand Delivery

Steve Tribble, Director
Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399

RE: Docket No. 920840-OT

Dear Mr. Tribble:

Enclosed for filing are the original and 15 copies of Florida Power & Light Company's Comments On Proposed Rules in the above-referenced proceeding.

Very truly yours,

for Matthew M. Childs, P.A.

CAL/sh
Encs.
cc: All Parties of Record

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Tallahassee Office
215 South Monroe
Suite 601
Tallahassee, FL 32301-1804
(904) 222-2300
Fax: (904) 222-8410

4000 Southeast Financial Center
Miami, FL 33131-2398
(305) 577-7000
Fax: (305) 358-1418

1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, FL 33401-6198
(407) 650 7200
Fax: (407) 655-1509

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Proposed Revision of Rules 25-22.056, F.A.C., Post-Hearing Filings; 25-22.058, F.A.C., Oral Argument; and Adoption of Rule 25-22.0021, F.A.C., Agenda Conference Participation; Transfer of Parts of Rule 25-22.057, F.A.C., Recommended Order, Exceptions, Replies, Staff Recommendations, to Rule 25-22.056, F.A.C.; and Repeal of Rule 25-22.057	)	DOCKET No. 920840-OT Filed: November 13, 1992

FLORIDA POWER & LIGHT COMPANY'S
COMMENTS ON PROPOSED RULES

Pursuant to the Florida Public Service Commission's ("Commission") notice in Florida Administrative Weekly, Vol. 18, No. 43, Florida Power & Light Company ("FPL") submits the following written comments regarding the proposed amendments to certain Commission post-hearing procedural rules:

Introduction

The Commission's post-hearing procedural rules are designed to lead to reasoned and informed judgments by the Commission and to guarantee procedural due process to each party whose substantial interests will be determined or affected by the Commission's decision. These objectives are met by: (1) assuring each party a full and fair opportunity to identify for the Commission the evidence relevant to the Commission's decision on each issue; and (2) allowing each party to present to the Commission its analysis and argument on each issue of fact, policy and law relevant to the Commission's decision. The proposed rule amendments should therefore be analyzed to assure that the procedure will further these purposes; and other considerations, such as brevity of

presentation, should not be promoted at the expense of them. The Commission should continue to be primarily concerned that it is given the opportunity to fully understand each party's analysis of the facts, issues and law.

Rule 25-22.056(1)(d)--Page Limit

Subpart (1)(d) to Rule 25-22.056, if adopted, would limit a party's brief (including proposed findings of fact, conclusions of law, and the party's statement of issues and positions) to 60 pages. This limitation would not serve the proper purpose of the Commission's post-hearing procedural rules; and FPL opposes the new subpart.

It would be much more appropriate to allow the hearing officer or prehearing officer in each case to set a limit, if desired by the Commissioner(s) hearing the case, based on the number and complexity of issues in the case, and the volume of testimony and documentary evidence. An arbitrary page limit does not assist the Commission in determining, on a case-by-case basis, what page limit is appropriate given the facts and circumstances of differing cases.

At the outset, it should be noted that post-hearing briefs filed with the Commission following an evidentiary hearing differ significantly from briefs filed in Florida appellate courts and memoranda of law filed in Florida trial courts (where page limits are frequently established by rule). In hearings before the Commission, a party's brief is its only opportunity to comment to the Commission -- the trier of fact -- on what the evidence shows,

including why certain evidence should be disregarded, or who should be believed in cases where witnesses present opposing views on issues; to point out the relevance of testimony to a particular issue or issues; to make policy arguments; and to anticipate and rebut arguments from opposing parties. Each party must also present its arguments on legal issues relevant to the outcome of the preceding in the post-hearing brief.

By contrast, Florida trial courts typically give counsel an opportunity to address what the evidence shows, the credibility of witnesses, and other similar issues in closing arguments presented orally to the trier of fact immediately after evidence is taken and immediately before the fact-finders' deliberation and decision. Before this closing argument, issues of law would typically have been briefed, argued extensively, and decided -- a process often involving numerous motions and separate memoranda of law on each point at issue. Although local rules or administrative orders governing practice in some Florida trial courts contain page limits on legal memoranda, these memoranda generally address motions involving narrow issues of law. There is no limit on the number of motions and separate memoranda that a party can file; and these page limits do not involve argument on the issues of fact (or policy) to be resolved at the close of a trial.

Appellate briefs are also significantly different in scope and purpose from a post-hearing brief filed with the Commission. Appellate briefs address only the few issues raised on appeal. The appellant's brief focuses on the errors alleged to be made by the

court of original jurisdiction -- not the entire case; and the appellee then has an opportunity, after studying the arguments presented by the appellant, to respond to those points. The appellant also has an opportunity to reply to the responsive arguments of its adversary. The issues on appeal are typically narrow and fewer in number than the issues before the Commission. More importantly, an appellate brief is not the place where issues of witness credibility, conflicting evidence, policy considerations, and other similar matters bearing on the ultimate disposition of a complex evidentiary hearing are argued to a trier of fact.

In evidentiary hearings before the Commission, basic due process considerations require that parties substantially affected by the Commission's actions be allowed to present their views of the evidence and argue their case before a decision is rendered. The Florida Administrative Procedure Act also expressly provides that a party to a hearing under Section 120.57 "shall have an opportunity ... to present evidence and argument on all issues involved...." § 120.57(1)(b)4., Fla. Stat. (1991) (emphasis added). Rarely, in a case involving a large number of issues, or involving complex technical, legal, or policy issues, will FPL be able to present its analysis of the evidence and argument on all of the issues affecting its interests within a 60-page limit.

Additionally, an arbitrary page limit could particularly prejudice the party who carries the burden of proof, or other parties who must address all issues to be decided. Parties who

have narrower interests and can devote their briefs to fewer issues could be unfairly favored.

Although the proposed subsection would allow a party to attempt to convince the prehearing officer that the 60-page limit should be waived, this provision does not adequately address FPL's concerns. The rule in effect creates a presumption that each party should be able to adequately present its case within an arbitrary page limit, and places a burden on parties to overcome this artificial presumption. A party with a basic statutory and due process right to present argument on each issue affecting its interests should not have to battle an arbitrary limitation on that right in each case affecting its interests.

To the extent that the Commission's post-hearing process is considered to be unnecessarily burdensome, the Commission should consider attempting to use its prehearing procedures to narrow issues before hearing and summarily dispose of issues that are not truly in dispute. Narrowing the issues to be briefed in this manner could in many cases significantly reduce the length of post-hearing briefs without limiting parties' rights to present their case on contested issues.

Rule 25-22.056(1)(d) & (2)--Proposed Findings Of Fact

The Commission's rules regarding findings of fact, as currently proposed in this docket, would require the filing of proposed findings along with each party's brief, and include proposed findings in the 60-page limit for briefs. FPL sees two problems with the rule as proposed.

First, by including proposed findings of fact in the 60-page limit for a party's brief, the Commission's proposed rule would severely curtail a party's ability to submit proposed findings. Section 120.57(1)(b)4, Florida Statutes, mandates that parties to a formal administrative hearing be given an opportunity to submit proposed findings of fact. Therefore, FPL questions whether the Commission can place an arbitrary limit on the number of proposed facts presented to the Commission for ruling. This concern would be addressed if the Commission deletes the arbitrary page limit on post-hearing filings.

Second, FPL strongly urges the Commission to adopt a provision allowing parties to respond to proposed findings of fact submitted by an opposing party. As the rule reads now, it would be possible for a party to submit proposed findings of fact with citations to testimony that was qualified or altered in another portion of the record, or rebutted by the testimony of other witnesses. If the party proposing the finding submits record references that are incomplete, or fails to cite contradictory or impeaching evidence, there is no vehicle for opposing parties to bring this to the Commission's attention.[1]

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[1] The fact that there is contradictory evidence does not mean that a proposed finding must be rejected. The purpose of an evidentiary hearing is to resolve disputed issues of fact; and it is the Commission's obligation to weigh contradictory evidence, make judgments as to the credibility of witnesses and testimony, and resolve disputed issues of fact by making findings of fact. Nonetheless, opposing parties should clearly be given an opportunity to bring contradictory evidence to the Commission's attention before the Commission rules on a contested factual issue.

To address this problem, parties should be given an opportunity to file exceptions to an opposing party's proposed findings of fact. Exceptions should include, for each proposed finding contested, citations to other portions of the record relevant to the proposed finding and a brief statement as to why the finding should be rejected.[2] FPL believes that such a provision is necessary to allow each party to adequately protect its interests, and that this would aid the Commission in its consideration of proposed findings of fact.

Rule 25-22.0021(2)--Agenda Conference Participation and Rule 25-22.057--Staff Recommendations (Repealed)

Proposed Rule 25-22.0021(2) prohibits, under all circumstances, any party other than Staff from participating in the Commission's deliberations when a Staff Recommendation is presented and considered at an agenda conference following a formal evidentiary hearing. Although this has been the Commission's routine practice, it seems unwise for the Commission to bind itself so rigidly. There may be times when the Commission will desire parties to address an issue orally at agenda conference, after an evidentiary hearing has been held. Therefore, FPL believes that the rule should include an exception that allows the Commission to entertain comment or argument, at its discretion, in cases where it believes participation will aid the Commission in making its

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[2] Exceptions to proposed findings should not be used as a vehicle for the opposing party to submit alternative findings, but only to submit material indicating why the party believes that a finding or findings originally proposed should not be made.

decision. In the alternative, the Commission should consider treating the Staff Recommendation as a recommended order, and allow parties to file written exceptions to the Staff Recommendation (similar to the procedure currently set forth in Rule 25-22.057(3) regarding cases tried before a single Commissioner).

Rule 25-22.056(3)(a)--50-Word Limit On Positions

FPL has related concerns regarding the 50-word position summary required by Rule 25-22.056(3)(a). FPL assumes that this requirement is being added to the rule with the intent that a party's 50-word position statement on each issue will be lifted from the party's brief and placed in the Staff Recommendation. In FPL's view this would further limit parties in their attempt to summarize evidence and present their analysis to the trier of fact. Treating the Staff Recommendation as a proposed order and allowing parties to file exceptions to the Staff Recommendation would greatly relieve this concern.

As a practical matter, however, positions on a number of issues simply cannot be summarized in any meaningful way in 50 words or less. FPL therefore believes that it would be more appropriate for the post-hearing procedural rule to simply require each party to file a "concise" summary of its argument or position on each issue. The pre-hearing officer or hearing officer could strike any statement that was found to violate this standard.

WHEREFORE, FPL requests that the Commission revise its proposed rules to: (1) delete the 60-page limitation on post-hearing submissions; (2) revise Rule 25-22.056(2) to allow parties

to file responses to opposing parties' proposed findings of fact; (3) create an exception that allows parties to address the Commission at agenda conference in certain circumstances; (4) add a provision to the rules that would allow parties to file written exceptions to a Staff Recommendation; and (5) replace the 50-word limitation on position summaries with a requirement that parties file a concise summary of their position on each issue.

Respectfully Submitted,

STEEL HECTOR & DAVIS
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301-1804
Attorneys for Florida Power
& Light Company

By: 
Matthew M. Childs, P.A.
C. Alan Lawson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Comments On Proposed Rules was hand delivered (when indicated with an asterisk) or mailed this 13th day of November, 1992 to the following:

*Chris Moore, Esquire
Staff Counsel
Division of Legal Services
Florida Public Service Comm'n
101 East Gaines Street
Tallahassee, FL 32399-0863

*Noreen Davis, Esquire
Staff Counsel
Division of Legal Services
Florida Public Service Comm'n
101 East Gaines Street
Tallahassee, FL 32399-0863

James D. Beasley, Esquire
Lee L. Willis, Esquire
Ausley, McMullen, McGehee,
Carothers and Proctor
Post Office Box 391
Tallahassee, FL 32302

James A. McGee, Esquire
Corporate Counsel
Florida Power Corporation
Post Office Box 14042
St. Petersburg, FL 33733

G. Edison Holland, Jr., Esquire
Beggs & Lane
Post Office Box 12950
Pensacola, FL 32576

J. Roger Howe, Esquire
Deputy Public Counsel
Office of Public Counsel
111 West Madison St., Room 812
Tallahassee, FL 32399-1400

C. Alan Lawson