FLORIDA PUBLIC SERVICE COMMISSION

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Tallahassee, Florida 32399-0850

M E M O R A N D U M

February 4, 1992

TO: **DIRECTOR, DIVISION OF RECORDS AND REPORTING**

FROM: **DIVISION OF APPEALS (MOORE)** CTM DES
DIVISION OF LEGAL SERVICES (DAVIS) mds
DIVISION OF RESEARCH & REGULATORY REVIEW (HOPPE) JPH

RE: **DOCKET 920840-0T - 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**

AGENDA: **2/16/92 - CONTROVERSIAL - PARTIES MAY NOT PARTICIPATE**

RULE STATUS: **ADOPTION SHOULD NOT BE DEFERRED**

FILE NAME: **I:\PSC\APP\WP\920840.RCM**

CASE BACKGROUND

At its agenda conference on October 6, 1992, the Commission voted to propose revisions to its rules governing post-hearing procedures. The proposed rules were published in the October 23, 1992, Florida Administrative Weekly, and comments were filed by the Office of Public Counsel (OPC), Florida Power & Light Company (FPL), Florida Waterworks Association (FWWA), GTE Florida, Incorporated (GTE), Gulf Power Company (Gulf), Tampa Electric Company (TECO), United Telephone Company of Florida (United), the Legal Environmental Assistance Foundation (LEAF), and Mr. Ben Girtman.

The Commission first considered these rules at its September 15, 1992 agenda. A decision was deferred until October 6, 1992 so that staff could revise the rules to address comments and concerns raised by Commissioners and interested persons. The primary objection by interested persons was to the 50-page limit placed on post-hearing documents. As a result, Rule 25-22.056(1)(d) was revised to authorize the presiding officer to modify the page limit for good cause shown, and to increase the total page limit to 60.

Staff's recommended changes to the proposed rules are shown in Attachment 1 to this memorandum as either shaded and underlined (additions) or shaded and stricken through (deletions). Comments that were filed are shown in Attachment 2.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission adopt changes to proposed Rule 25-22.056, F.A.C., based on the comments received?

RECOMMENDATION: Yes. The Commission should adopt some, but not all, of the changes suggested by the comments filed on Rule 25-22.056.

STAFF ANALYSIS: This rule governs post-hearing documents. Several of the comments concern the imposition of the page limit on documents and the word limit on summaries of positions. Other comments are discussed below under the applicable section or subsection of the rule.

Sixty-page Limit: FPL, Gulf, and TECO oppose the imposition in Rule 25-22.056(1)(d) of a 60-page total limit on a party's post-hearing documents, asserting that the limit is arbitrary and should be imposed instead on a case-by-case basis, depending upon the number and complexity of the issues raised at hearing. GTE stated that the limit will prove to be reasonable in most cases, however, it asks the Commission to liberally exercise the option to modify the limit when necessary. FPL believes that the provision authorizing the prehearing officer or hearing officer to modify the page limit for good cause does not adequately address its concerns because it places the burden on parties to overcome the presumption that 60 pages is adequate.

Staff believes a 60-page limit is a reasonable standard and that it is appropriate for exceptions to that standard to be granted on a case-by-case basis. The Commission has imposed page limits in several cases and staff does not believe that showing that the page limit is insufficient will be a great burden. The Division of Administrative Hearings has, by rule, imposed a 40-page limit on proposed recommended orders since 1985. Moreover, the Commission increased the limit to 60-pages (from the 50 pages initially considered) because a party asserted that the Division of Administrative Hearings (DOAH) allows legal briefs or memorandums in addition to 40-page proposed recommended orders. The limit does not deny any party their statutory right to submit proposed findings of facts and orders, it merely requires them to be more

concise in presenting them.

GTE asks the Commission to exclude the 50-word position summaries from the page limit and allow parties to submit them in a separate, appended document, in order to reduce the frequency of requests for waiver. The proposed rule does not preclude filing a separate document, however, it would be included in the total limit of 60-pages and staff does not recommend changing this.

Fifty-word Summary of Party's Position: FPL and TECO oppose the 50-word limit contained in subsection (3)(a), asserting that it is inadequate for many complex issues. TECO and FPL suggest that the rule require a "concise" summary instead. Based on its experience in drafting its rate case brief, GTE suggests either a limit of a half-page or including a provision for modifying the limit. Staff recommends that the rule authorize the prehearing officer or hearing officer to modify the word limit if good cause is shown.

TECO also states that the rule is unfair in that the word limit only applies when a party's position has changed from its prehearing position. This is because subsection (3)(a) provides that in the absence of a summary statement, the prehearing position on that issue will be used in the staff recommendation. To correct this disparity, and to clarify the confusion it has caused some parties, staff recommends deleting that provision (lines 13-15, page 3), rearranging the other provisions of the subsection, and adding a provision requiring a summary of the party's position whether or not it has changed from the prehearing statement.

Proposed vs. Recommended Order: LEAF disagrees with the use throughout the rule of the term "recommended order", pointing out that it is defined in section 120.52(15), F.S., as the official recommendation of the hearing officer assigned by the division (DOAH) or of any other duly authorized presiding officer, other than the agency head or member thereof. LEAF states that the term "proposed order", defined in 120.57(14), should be used.

> "Proposed order" means the advance text, under s. 120.58(1)(e), of the order which a collegial agency head plans to enter as its final order. When a hearing officer assigned by the division conducts a hearing, the recommended order is the proposed order.

The order entered by a Commissioner sitting as a hearing

officer does not accurately fit either definition, however, the term proposed order is probably the more accurate of the two. The effect of using one or the other of the terms appears of little consequence other than to insure compliance with section 120.58(1)(e), requiring a proposed order in certain hearing officer situations. Staff therefore recommends the simple solution of adding the word "proposed or" wherever the term "recommended order" is used with reference to a Commissioner hearing officer.

Subsection (1)(d) Style Requirements: In response to Mr. Girtman's question about subsection (1)(d)'s restriction on the size of the printing type used in documents, staff recommends replacing "11-point type" with "type of no more than 10 characters per inch." This standard is taken from the recent amendments to the Florida Rules of Appellate Procedure and should not confuse anyone.

Section (2) Proposed Findings of Fact: FPL asks the Commission to allow parties to file exceptions to an opposing party's proposed findings of fact. Staff believes this is an unnecessary and time consuming additional step. A party should address contradictory evidence in its post-hearing document and rely on the presiding officer to weigh the evidence.

Subsection (4)(b) Time for Filing Exceptions: Mr. Girtman asks the Commission to allow more than 14 days from service of a recommended order to file exceptions. The 14-day time period complies with section 120.57(1)(b)9 requiring "at least 10 days." Because of time constraints, staff does not recommend increasing it. In its comments, LEAF asks for a provision authorizing the prehearing officer to extend the time for filing exceptions, however, it is staff's opinion that the authority already exists and a specific provision is not advisable.

Subsection (4)(b) Staff as a Party: This subsection provides that parties and staff may file exceptions to recommended orders. LEAF argues that if staff files exceptions, staff is a party. The role of staff has been raised before and the Supreme Court has resolved it in favor of the Commission. LEAF attempts to limit the application of that decision (South Florida Natural Gas Co. v. Public Service Commission, 534 So. 2d 695 (Fla. 1988), to ratemaking cases and contends that in other Commission proceedings that staff is a party. Staff disagrees with LEAF's argument and does not recommend changing the proposed rule.

Other: Mr. Girtman submitted numerous other comments and questions about the meaning of the proposed rule. Staff's recommended changes to subsection (3)(a) discussed above, along with the

addition of several clarifying words in other sections of the rules, should address some of Mr. Girtman's concerns. As to several other of his comments or questions, however, staff believes that a careful reading of the rule and recognition of its structure would resolve the confusion.

Similarly, LEAF's complaint that the proposed rule does not provide for a party to file exceptions when DOAH conducts a hearing is mistaken. LEAF has either overlooked or misread section (4) of the rule which states that subsection (4)(b), "Exceptions", applies when a hearing has been conducted by DOAH.

LEAF recommends a number of minor changes that staff believes would add unnecessary detail to the rule. Such excessive detail may well preclude flexibility in areas where both the Commission and parties find it desirable.

ISSUE 2: Should the Commission adopt Rule 25-22.058, F.A.C., as proposed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: The proposed rule allows ten days after exceptions are filed to request oral argument on recommended orders and exceptions. Mr. Girtman comments that this is not enough time to request oral argument. Because of the time constraints imposed by statute on issuing final orders, staff does not recommend increasing the time.

Section (3) of the rule requires requests for oral argument to accompany the pleading upon which argument is requested. Mr. Girtman states that it is not clear that the request must be submitted by the same party filing the pleadings it accompanies. Since it is unlikely that a party would file a request for oral argument with another party's pleading, staff sees no need to change the rule.

ISSUE 3: Should the Commission adopt changes to proposed Rule 25-22.0021, F.A.C., based on the comments received?

RECOMMENDATION: The Commission should adopt some, but not all, of the changes suggested by the comments filed on Rule 25-22.0021.

STAFF ANALYSIS: Proposed new Rule 25-22.0021 codifies the Commission's current practice on participation at agenda

conferences. Staff recommends two changes to clarify the meaning of the rule and one substantive change based on the FWWA's comments.

Participation by Parties: The FWWA notes that, on occasion, new matters that have not been an issue in a proceeding arise and are subsequently considered by the Commission in the same docket, although parties have not had the opportunity to address those matters. The FWWA provides several examples in its comments and contends that parties should be able to participate in agenda discussions of these matters.

Staff agrees and recommends that the proposed rule be changed to accommodate these occurrences by adding language to section (2) to allow participation by parties at an agenda conference when the Commission is considering new matters that are related to but were not addressed at the hearing.

FPL commented that the Commission should leave itself some discretion in determining whether parties may participate by creating an exception to allow participation by parties when it will aid the Commission in making its decision. Alternatively, FPL suggests treating the staff recommendation as a recommended order, and allowing parties to file exceptions to it. United Telephone also supports allowing parties to participate at agenda conferences in proceedings where a hearing has been held. United contends that otherwise, there are no means for parties to correct staff errors or to ensure that their positions are adequately and objectively represented in the staff recommendation and at agenda conferences.

Staff does not recommend changing the rule based on FPL's or United's comments. Staff's recommendation is simply advice that the Commission is free to accept or reject. Parties have no due process right to participate in the decision-making process of the Commission once the hearing is over and post-hearing argument is completed. Additionally, the Commission could not allow parties to participate at such an agenda conference without reopening the proceeding and affording all parties notice and the right to submit rebuttal evidence and counter argument.

United suggests that the Commission could impose strict time limitations to restrict parties to correcting errors to prevent numerous and spurious attempts to reargue issues. It is highly unlikely that such restrictions would succeed without conflict and argument over permissible subjects. Moreover, allowing participation in the decision at agenda would necessarily extend the process, delay its conclusion, and further add to the

Commission's busy agenda schedule.

Staff Participation at Agenda: OPC and LEAF both advocate prohibiting staff who participate in a proceeding from participating in making the recommendation on final disposition of the action or from participating at the agenda conference. The proposed rule codifies current practice, which is to prohibit staff from participating only if they have testified in the proceeding, and is consistent with section 120.66(1), Florida Statutes. Staff believes the change proposed by OPC would be duplicative, expensive and unnecessary, and does not recommend changing the rule.

Other Comments: Mr. Girtman raises several questions about this rule. Section (2) of the rule states that "oral presentation" is not permitted at agenda conferences where a hearing has been held. Mr. Girtman asks if written presentations are meant to be permitted. To make this clear, staff recommends changing the rule to additionally preclude "written" presentations.

Mr. Girtman also questions the meaning of section (3), providing that the Commission is not precluded from "taking action" during the course of a hearing or other duly noticed proceeding. The purpose of including this section in the agenda participation rule is to give notice that not all decisions in a proceeding are made at agenda conference and that some are "bench decisions" made during a hearing. Staff recommends revising the rule in an attempt to clarify its meaning.

ISSUE 4: Should the Commission repeal Rule 25-22.057, F.A.C., as proposed?

RECOMMENDATION: Yes. If Rules 25-22.056, 25-22.058, and 25-22.0021 are adopted, the Commission should repeal Rule 25-22.057.

STAFF ANALYSIS: Many of the provisions of Rule 25-22.058 will be superseded by the adoption of revised Rules 25-22.056 and 25-22.058, and new Rule 25-22.0021.

LEAF asks the Commission not to repeal the sections of Rule 25-22.057 relating to staff recommendations, but to allow parties to a proceeding to file exceptions to staff recommendations. The substance of this comment is discussed in Issue 3.

ISSUE 5: Should the Commission file the rules for adoption with the changes and close the docket?

RECOMMENDATION: The Commission should file Rules 25-22.0021, 25-22.056, 25-22.057 (repealed), and 25-22.058 for adoption with staff's recommended changes and close the docket.

STAFF ANALYSIS: The docket may be closed after the rule is filed for adoption.

CTM/
Attachments

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25-22.056 Post-Hearing Filings.

(1) General Provisions.

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

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

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

(d) A party's proposed findings of fact, conclusions of law, statement of issues and positions, and brief shall together total no more than 60 pages and shall be filed at the same time. The hearing officer or, if the hearing has been conducted by a panel or the full Commission, the prehearing officer, may modify the page limit for good cause shown. Lettering shall be distinct and printed in type of no more than 10 characters per inch ~~in at least 11 point type~~. The text must be double spaced with 1-inch margins

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except for quoted material which may be indented and single spaced.

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

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

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

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

(3) Statement of issues and positions. In any proceeding where a prehearing order has been issued, and such prehearing order

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contains a statement of the issues as well as the positions of the parties thereon, all post-hearing statements and other documents filed pursuant to this rule ~~memoranda~~ shall conform to the form and content of the statement of the issues and positions.

(a) 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. 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 and shall include a summary of each position of no more than 50 words set off with asterisks. The 50-word limit may be modified for good cause shown. ~~In the absence of such a summary statement, the prehearing position on that issue will be used in the staff recommendation.~~ In the event that a new issue is identified by a party in a post-hearing statement, that new issue shall be clearly identified as such, and a statement of position thereon shall be included. Any issue or position not included in a post-hearing statement shall be considered waived.

(b) A party is not required to file a post-hearing documents ~~memorandum~~ in addition to the post-hearing statement, unless otherwise required by the presiding officer. If a brief is filed, each argument must be identified by the issue number to which it relates. In the event that a party fails to file a post-hearing statement in conformance with (3)(a), and no other post-hearing memorandum is filed which conforms to this rule, that a party ~~so~~

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~~failing~~ shall have waived all issues and may be dismissed from the proceeding.

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

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

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

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

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

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

25-22.057 Recommended Order, Exceptions, Replies, Staff Recommendations.

Specific Authority: 120.53, F.S.

Law Implemented: 120.53, F.S.

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

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25-22.058 Oral Argument.

(1) The Commission may grant oral argument upon request of any party to a section~~s~~ 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.

(3) Requests for oral argument on recommended or proposed 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 _____.

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25-22.0021 Agenda Conference Participation.

(1) 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.

(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 or written presentation by any other person, whether by way of objection, comment, or otherwise, is not permitted, unless the Commission is considering new matters related to but not addressed at the hearing.

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

Specific Authority: 120.53, F.S.

Law Implemented: 120.53, F.S.

History: New _____.

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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.

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Respectfully Submitted,

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By: 
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C. Alan Lawson

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C. Alan Lawson

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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