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RE: DOCKET NO. 980569-PU/Proposed amendments to F.A.C. Rules 25-6.002(2) and (4); 25-6.043(3); 25-6.0438(9); and 25-17.087(2) and (3)

Dear Ms. Helton:

Please accept these written comments on behalf of Florida Power & Light Company (FPL) as supplemental to our comments at the workshop on June 23, 1998, concerning Docket 980569-PU. This docket includes the proposed repeal of rules 25-6.002(2) and (4); 25-6.043(3); 25-6.0438(9); and 25-17.087(2) and (3), Florida Administrative Code.

FPL's primary concern with the proposed repeal of these provisions is the sharp limitation on the Commission's ability to exercise discretion in the substantive areas addressed by these rules. Although the Commission staff appears convinced that the 1996 amendments to the Administrative Procedure Act (APA) require this result, we do not believe that interpretation is necessarily correct.

The stated reason for proposing the repeal of all of the above-referenced rules is as follows:

> The purpose of these rule amendments is to repeal the waiver and variance provisions for which the Commission no longer has rule authority under the more restrictive rulemaking standard in Section 120.536, Florida Statutes. Moreover, since 1996, all requests for rule variances and waivers must comply with Section 120.542, Florida Statutes.

24 Fla. Admin. Weekly 2773, May 22, 1998.

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The first stated reason appears to assume that the APA's new rulemaking standard in section 120.536, Florida Statutes,[1] requires the repeal of the rules because they now lack adequate statutory authority. We recognize that the APA's new rulemaking standard is widely viewed as requiring a closer link between administrative rules and statutes the rules purport to implement. However, the scope of the new standard is far from clear, and a major case is currently pending at the First District Court of Appeal that is expected to provide guidance concerning the new standard. This case, St. Johns River Water Management District v. Consolidated-Tomoka Land Co.. (Case No. 97-02996) ("Consolidated Tomoka") was orally argued before the court on May 27, 1998.

The importance of Consolidated Tomoka is illustrated by the parties that submitted briefs: the Governor, the Legislature, the Attorney General, and five state agencies, as well as numerous private organizations. Recognizing the significance of its interpretation of the new standard, the court granted 45 minutes per side for oral argument, three times as long as is usually permitted. No opinion has been released by the court. The court's opinion in Consolidated Tomoka may provide additional information about the new rulemaking standard and how strictly it will be interpreted. Thus, the Commission may want to consider this opinion before embarking on the repeal of rules that staff assumes do not satisfy the new standard.[2]

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[1] The language from section 120.536(1) also appears in section 120.52(8), Florida Statutes.

[2] FPL recognizes that the Commission submitted all of the rules at issue in this docket to the Legislature in September 1997 as among the rules the Commission believes do not meet the new rulemaking standard in section 120.536, Florida Statutes. FPL also recognizes that section 120.536(2) states that "[b]y January 1, 1999, each agency shall initiate proceedings pursuant to s. 120.54 to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist." Nonetheless, a more thorough analysis of the new standard's requirements, in light of the expected opinion in Consolidated Tomoka, may be prudent.

Furthermore, in considering the relevance of the APA amendments to the Commission, it may be appropriate to review case law from the Florida Supreme Court concerning the Commission's broad and comprehensive regulatory authority. E.g., Florida Power Corp. v. Seminole County, 579 So. 2d 105 (Fla. 1991); City Gas Co. v. Peoples Gas System, Inc., 182 So. 2d 429 (Fla. 1965). The court specifically recognized in General Telephone Co. of Florida v. Florida Public Service Commission, 446 So. 2d 1063 (Fla. 1984), that the PSC has authority to exercise discretion in application of its rules. The general concept of inherent agency discretion also is expressed in Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So. 2d 419 (Fla. 5th DCA 1988) (what agency in its discretion chooses to require, it may also choose not to require).

The staff appears to have assumed that the new rulemaking standard in the APA wipes out the concepts expressed in these cases. This assumption apparently has been made simply because the statutes the above-referenced rules purport to implement do not expressly authorize the Commission to adopt rules that provide for variances and waivers. Such a strict interpretation of the new rulemaking standard, if carried to its logical conclusion, could call into question the validity of numerous Commission rules, including many that were not submitted to the Legislature last year under the requirements of section 120.536(2), Florida Statutes. Given that the First District Court of Appeal is expected to soon elaborate on the parameters of the new APA rulemaking standard, FPL respectfully suggests that it may be appropriate to wait until the Consolidated Tomoka opinion is released before repealing rules as violative of that standard.

The second stated reason for the proposed repeal of the rules is that "[S]ince 1996, all requests for rule variances and waivers must comply with Section 120.542, Florida Statutes." Section 120.542 is the new provision in the APA authorizing agencies to grant variances and waivers to their own rules. We have been unable to find any requirement in section 120.542 or elsewhere stating that all requests for rule variances and waivers must comply with that statute. Indeed, section 120.542 itself provides that "[t]his section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute." § 120.542(1), Fla. Stat. If

statutes authorizing the Commission to regulate in substantive areas also authorize the Commission to exercise discretion during the course of that regulation, then those statutes could be read as providing the statutory authority for variance and waiver provisions in Commission rules. Thus, the Commission then could rely on its own procedural requirements in considering requests for variances and waivers, rather than the generic provisions in section 120.542. In short, repeal of the rules would be unnecessary.

The idea that section 120.542 requires the Commission to repeal its own rules relating to variances and waivers is inconsistent with the intent and purpose of section 120.542. The statute was enacted to increase, not reduce, agencies' ability to exercise discretion. This concept is included in the statute itself, which provides:

> Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.

§ 120.542(1), Fla. Stat.

A review of the legislative history of section 120.542 also makes clear that the statute was enacted because many agencies -- obviously not including the Commission -- did not believe they had the authority to waive or vary their own rules. Section 120.542 was drafted by the Governor's Administrative Procedure Act Review Commission, which recommended numerous changes in the APA to the Legislature in 1996. The premise behind the Commission's recommendation of the variance and waiver provision is as follows:

> More flexibility is needed in the administrative process, particularly in the ways agencies apply their rules to the public. Agencies must write their rules specific enough to be meaningful, yet general enough to fit a variety of situations. The broader the regulatory task, the greater the likelihood that unforeseen situations will arise, thus creating the need for "adjustments" to rules of general applicability. Consequently, to achieve an

> appropriate result for the public and private citizens, agencies often need flexibility to vary from literal requirements of rules. Procedural mechanisms are needed to consider individual requests for variances and exceptions to administrative rules of general applicability.

Final Report of the Governor's Administrative Procedure Act Review Commission, at 9 (February 20, 1996).

Thus, the Commission and the Legislature were seeking to give agencies the tools to flexibly apply their rules to regulated industries and persons. Nowhere does the legislative history of section 120.542 suggest that enactment of the statute would require agencies already providing such flexibility through agency rules to repeal the rules and use the new APA provision. Rather, the statute and its history make clear that section 120.542 was intended to be supplemental to other flexibility provisions already in existence. FPL respectfully suggests that the enactment of section 120.542 does not require the above-referenced rules to be repealed.

Thank you for providing FPL with the opportunity to provide these comments on the proposed amendments to rules 25-6.002; 25-6.043; 25-6.0438; and 25-17.087. As previously noted, FPL believes the proposed amendments will limit the Commission's ability to effectively regulate in the substantive areas covered by these rules.

Very truly yours,

Matthew M. Childs, P.A.

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cc: Blanca S. Bayó, Director, Division of Records & Reporting