

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed Amendments to Rule 25-4.002, F.A.C., Application and Scope; 25-4.141, Minimum Filing Requirements for Rate of Return Regulated Local Exchange Companies; Commission Designee; 25-4.202, Construction and Waivers; 25-24.555, Scope and Waiver; 25-6.002, Application and Scope; 25-6.043, Investor-Owned Electric Utility Minimum Filing Requirements; Commission Designee; 25-6.0438, Non-Firm Electric Service - Terms and Conditions; 25-17.087, Interconnection and Standards; 25-30.010, Rules for General Application; 25-30.011, Application and Scope; 25-30.436, General Information and Instructions Required of Class A and B Water and Wastewater Utilities in an Application for Rate Increase; 25-30.450, Burden of Proof and Audit Provisions; 25-30.455, Staff Assistance in Rate Cases; 25-30.456, Staff Assistance in Alternative Rate Setting; 25-30.570, Imputation of Contributions-In-Aid-of-Construction; and 25-30.580, Guidelines for Designing Service Availability

DOCKET NO. 980569-PU

STAFF COMMENTS

Staff provides the following response to the comments of Tampa Electric Company (TECO) and Florida Power and Light (FPL):

Both TECO and FPL suggest that section 120.542, Florida Statutes, is not intended to require the repeal of the waiver provisions in the Commission's rules. The statute, however,

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does not except the Commission's or any other agency's rules. Rather, subsection 120.542(1) provides that it "is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute." It makes no mention of variance and waiver provisions of rules. Staff has not found any specific variance or waiver provisions in the laws implemented by the rules recommended for repeal in this docket, nor has FPL or TECO identified such a provision.

Other statutory provisions support a view contrary to FPL's and TECO's:

Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section.

§120.542(1), Fla. Stat. (1997) (Emphasis supplied.) The statutory definitions of "variance" and "waiver" in section 120.52, Florida Statutes, also support staff's view:

(18) "Variance" means a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Any variance shall conform to the standards for variances outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

(19) "Waiver" means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Any waiver shall conform to the standards for waivers outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

Staff's view of the statute is further supported by a law review article on the Administrative Procedure Act's variance and waiver provisions, where the authors noted:

It is not within the authority of an agency to substantively supplement or refine by rule the statutory standards for issuing a waiver or variance.

Donna E. Blanton and Robert M. Rhodes, Loosening the Chains that Bind: The New Variance and Waiver Provision in Florida's Administrative Procedure Act, 24 Fla. St. U. L. Rev. 353, 369 (1997).

FPL has not addressed the above authorities, nor has it explained why the Commission would have authority to maintain its rule waiver provisions even though it has not been granted an exception to the Uniform Rule of Procedure on waivers and variances. At the same time, FPL argues in another Commission docket that unless the Commission has an exception to the uniform rules, it has no authority to vary from them. See, Docket No. 981890-EU, In Re: Generic Investigation Into the Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida.

Staff disagrees that there are any inconsistencies in the Commission's stated rationale for the rule repeals in this docket. In addition, Staff refers FPL to its recommendation and the support therein, which FPL has apparently overlooked. That recommendation was filed in this docket on December 3, 1998, and approved by the Commission on December 15, 1998. A

copy is attached. FPL has yet to provide a meaningful response to the substance of the stated rationale.

Rule 25-6.002--Application and Scope:

TECO comments that subsections (2) and (4) of this rule do not need to be repealed because (2) does not actually effect a waiver or variance but simply states the Commission's willingness to entertain requests for a rule modification or temporary exemption, and (4) authorizes the Commission to amend its rules. To that extent, staff believes the rule is unnecessary and redundant. Petitions to initiate rulemaking are specifically addressed in statute and the uniform rules, as is an agency's authority to initiate rulemaking. § 120.54, Fla. Stat. (Supp. 1998); Rule 28-103.006, F.A.C. Temporary exemptions are simply a time limited waiver and are also authorized by statute and uniform rule. § 120.542(3), Fla. Stat. (1997); Rule 28-104.002(2)(I), F.A.C.

25-6.043, Investor-Owned Electric Utility Minimum Filing Requirements; Commission Designee:

This rule was amended in 1990 to incorporate the form entitled "Minimum Filing Requirements for Investor-Owned Electric Utilities". Docket No. 891269-EU. The purpose in adopting the form was to establish a standard set of MFRs for rate cases which would provide all the information the Commission needs for rate cases at their initiation, rather than through supplemental data requests and discovery. The information solicited was based on the Commission's practical

experience in rate cases. In addition, the form is uniform for all utilities, and allows potential parties to know what type of data will be available.

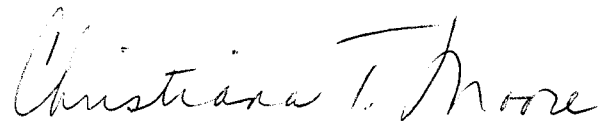
TECO's proposed language allows the utility to "furnish the Commission's Staff a list of the schedules" it intends to file and have the prehearing officer decide any disputes. This has the effect of granting the utility a blanket waiver of all filing requirements by allowing the utility to decide what information is pertinent to evaluation of its filing. The Commission has already determined a minimum filing requirement by rule to standardize the information submitted in a rate case. Staff should not be required to re-justify those requirements on a case-by-case basis.

In addition, TECO's proposal does not appear to include a formal filing of its list of selected schedules. In contrast to the requirements of a section 120.542 petition for waiver or variance, there will be no public notice of what information the utility intends not to file, and no opportunity for interested parties to object.

To the extent an MFR schedule is not applicable to a utility because, for instance, the schedule requires information about nuclear generation and the company does not have any, then all the utility has to do is to write on the form "not applicable" and state the reason. A rule waiver or variance is not required in such a case.

Rule 25-6.0438 Non-Firm Electric Service - Terms and Conditions:

TECO does not oppose repeal of subsection (9) of this rule, but only if a substantive provision is added to subsection (8) of the rule. TECO's new provision addresses a tariff policy issue which is currently the subject of Docket No. 990724-EI, In re: Petition of Tampa Electric Company for clarification of its Interruptible Rate Schedules IS-1, IST-1, SBT-1, IS-3, IST-3, and SBT-3. The Commission should decide the issue in that docket, with specific facts before it, rather than addressing it in this rulemaking proceeding.



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CERTIFICATE OF SERVICE

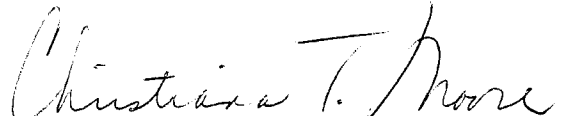
I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 15th day of July, 1999, to the following:

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-M-E-M-O-R-A-N-D-U-M-

DATE: 12/3/98

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF APPEALS (MOORE) *cm DS*
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (MAILHOT) *DM*
DIVISION OF COMMUNICATIONS (SHELPER) *AK SRP M7*
DIVISION OF ELECTRIC AND GAS (KUMMER) *AK* (FUTRELL) *JDS*
DIVISION OF RESEARCH AND REGULATORY REVIEW (HEWITT) *CBH*
DIVISION OF WATER AND WASTEWATER (LOWE) *MS*

RE: DOCKET NO. 980569-PU - PROPOSED AMENDMENTS TO RULE 25-4.002, F.A.C., APPLICATION AND SCOPE; 25-4.141, MINIMUM FILING REQUIREMENTS FOR RATE OF RETURN REGULATED LOCAL EXCHANGE COMPANIES; COMMISSION DESIGNEE; 25-4.202, CONSTRUCTION AND WAIVERS; 25-24.455, SCOPE AND WAIVER; 25-6.002, APPLICATION AND SCOPE; 25-6.043, INVESTOR-OWNED ELECTRIC UTILITY MINIMUM FILING REQUIREMENTS; COMMISSION DESIGNEE; 25-6.0438, NON-FIRM ELECTRIC SERVICE - TERMS AND CONDITIONS; 25-17.087, INTERCONNECTION AND STANDARDS; 25-30.010, RULES FOR GENERAL APPLICATION; 25-30.011, APPLICATION AND SCOPE; 25-30.436, GENERAL INFORMATION AND INSTRUCTIONS REQUIRED OF CLASS A AND B WATER AND WASTEWATER UTILITIES IN AN APPLICATION FOR RATE INCREASE; 25-30.450, BURDEN OF PROOF AND AUDIT PROVISIONS; 25-30.455, STAFF ASSISTANCE IN RATE CASES; 25-30.456, STAFF ASSISTANCE IN ALTERNATIVE RATE SETTING; 25-30.570, IMPUTATION OF CONTRIBUTIONS-IN-AID-OF-CONSTRUCTION; AND 25-30.580, GUIDELINES FOR DESIGNING SERVICE AVAILABILITY.

AGENDA: 12/15/98 - REGULAR AGENDA - RULE PROPOSAL - INTERESTED PERSONS MAY PARTICIPATE

RULE STATUS: PROPOSAL SHOULD NOT BE DEFERRED

SPECIAL INSTRUCTIONS: PURSUANT TO S. 120.536(2), F.S., THE COMMISSION MUST INITIATE THIS RULEMAKING PRIOR TO 1/1/99.

FILE NAME AND LOCATION: S:\PSC\APP\WP\980569.RCM

CASE BACKGROUND

In 1996, the Legislature substantially amended Chapter 120, Florida Statutes, the "Administrative Procedure Act" (APA). Among the changes to the APA was the adoption of section 120.542, Florida Statutes, governing rule waivers and variances, and section 120.536, requiring agencies to report to the Joint Administrative Procedures Committee (JAPC) its rules that exceed its rulemaking authority, and repeal those for which authorizing legislation does not exist. On September 9, 1997, the Commission approved the list of rules for which it lacked specific statutory authority. On September 25, 1997, by letter from Chairman Johnson, the Commission submitted its list to the JAPC. The Commission did not seek legislation to authorize the identified rules that provide generally for waivers and variances from the rules, because, as stated in the letter, specific authority is now contained in section 120.542, Florida Statutes, and specific uniform rules to implement the statute had been adopted by the Administration Commission.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission repeal Rules 25-4.141(4), 25-4.202(3), 25-24.455(4) and (5), 25-6.002(2) and (4), 25-6.043(3), 25-6.0438(9), 25-17.087(2), 25-30.011(2) and (4), 25-30.436(6), 25-30.455(11), 25-30.456(11), 25-30.570(2), 25-30.580(2), F.A.C., the individual provisions for rule variances and waivers; amend Rule 25-30.010 to delete the general provision for exceptions; amend 25-30.450, to delete the general provision for a waiver of the rule; and amend other provisions of these rules to update cross references?

RECOMMENDATION: Yes.

STAFF ANALYSIS: Section 120.536(2), Florida Statutes, requires the Commission to initiate rulemaking by January 1, 1999, to repeal the rules identified as exceeding its authority and "for which authorizing legislation does not exist." Those rules are listed below with a summary of their content. Rule 25-4.002(2) has been removed from the list because its repeal has been accomplished in Docket No. 951560-TI.

25-4.141(4), Minimum Filing Requirements for Rate-of-Return Regulated Local Exchange Companies; Commission Designees. Provides a waiver of MFR requirements for specific data or for the number of copies required by the rule upon a showing that production of the data would be impractical or impose an excessive economic burden on the company. In addition to deleting (4), the Commission should amend Rule 25-4.141(1)(d) to substitute the text of the cross-

referenced rule for the number of the rule because that rule is scheduled for repeal.

25-4.202(3), Construction and Waivers. Provides that when compliance with a commission requirement imposes an unreasonable hardship on the small LEC, would not be cost effective, or would not be in the public interest, the small LEC may apply for temporary rule waiver, repeal or amendment of the rule, or other similar relief.

Rule 25-6.002(2) and (4), Application and Scope. Provides for modification or exemption from rule requirements in cases of unusual hardship or difficulty or under exceptional conditions.

Rule 25-6.043(3), Investor-Owned Electric Utility Minimum Filing Requirements; Commission Designee. States that the Commission will waive the rule requirements upon a showing that data production would be impractical or impose an excessive economic burden on the utility.

Rule 25-6.0438(9), Non-Firm Electric Service - Terms and Conditions. Provides that the Commission may waive any provision of the rule after notice to all affected customers.

Rule 25-17.087(2), Interconnection and Standards. Allows a utility to modify the standards specified in the rule. The reference in section (3) to section (2) is deleted, rather than all of (3) as stated on the list submitted to JAPC. Section (3) does not in itself authorize a waiver of rules, but places the burden on the utility to demonstrate why interconnection with a qualifying facility (QF) should not be required or that the standards the utility seeks to impose on the QF are reasonable.

25-24.555(4) and (5), Scope and Waiver. Allows a Shared Tenant Service company to petition for waiver of any provisions of Part XII of Chapter 25-24. The waiver will be granted to the extent that the Commission determines that it is in the public interest to do so. Section (5) should also be repealed because it provides that rule waivers granted prior to the adoption of the rule are void and must be renewed. This section was adopted in 1987, and there is no basis to re-adopt such a provision now.

Rule 25-30.010, Rules for General Application. Provides that the water and wastewater utility rules are subject to such exceptions as the Commission may consider just and reasonable in individual cases.

Rule 25-30.011(2) and (4), Application and Scope. Section (2) authorizes application to the Commission for modification of or exemption from the rules for unusual hardship. Section (4) authorizes the Commission to alter and amend its rules as necessary to meet exceptional conditions.

Section (2) was not on the list submitted to the JAPC in 1997. Staff believes, however, that this was an oversight because the language of (2) is substantially the same as other provisions being repealed, and the law it implements does not provide any greater authority. In addition, section 120.542, Florida Statutes, provides the procedure and basis for obtaining a waiver or variance.

Rule 25-30.436(6), General Information Required in an Application for Rate Increase (Minimum Filing Requirements). Provides that the Commission may grant a waiver to filing specific data required by the rule upon a showing that production of the data would be impractical or impose an excessive economic burden upon the applicant.

Rule 25-30.450, Burden of Proof and Audit Provisions. The last sentence of this rule provides that utilities may request a waiver by submitting a written statement setting forth the reason, in detail, why a waiver should be granted.

Rule 25-30.455(11), Staff Assistance in Rate Cases. Provides that a petitioner may request a waiver of any of the factors listed in subsection (8), which provides the factors to be considered in recommending whether to grant or deny a petition for staff assistance in a rate application.

Rule 25-30.456(11), Staff Assistance in Alternative Rate Setting. Provides that an applicant may request a waiver of any of the factors set out in subsection (8), which provides the factors to be considered in recommending whether to grant or deny a petition for staff assistance in a rate application. In addition, section (15) is amended to add a reference to the uniform rule that has superseded the applicable part of Rule 25-22.036.

Rules 25-30.570(2), Imputation of Contributions-in-Aid-of-Construction. Provides for a waiver from the requirement in (1) that Contributions-in-Aid-of-Construction (CIAC) be imputed when the amount of CIAC has not been recorded in the utility's books and the utility does not submit competent substantial evidence as to the amount of CIAC. A waiver is authorized for unusual hardship or unreasonable difficulty and it is shown that it is not in the best interests of the customers of the utility.

Rule 25-30.580(2), Guidelines for Designing Service Availability Policy. Provides for a waiver of the requirement in (1) that a utility's CIAC should not exceed 75 percent of the total original cost, and that the minimum should not be less than a certain amount.

Rule Development Workshop:

A rule development workshop was held on June 23, 1998. Florida Power and Light (FPL) disagreed that repeal is necessarily

required by the new rulemaking standard in section 120.536, Florida Statutes. FPL also disagreed that section 120.542 requires all requests for variances and waivers to comply with the provisions of that statute.

Staff believes that although the Commission has authority to enumerate specific instances in which a rule does not apply, it does not have the authority for the identified general rules that allow rule waivers or variances and that provide a different procedure or standards than are authorized by section 120.542, Florida Statutes. Any authority for such general waiver or variance provisions has been superseded by the Legislature's enactment of section 120.542, the specific statute authorizing waivers and variances and providing the procedures for requesting a waiver, and the standards to be applied by an agency in deciding whether to grant such a request.

Staff agrees with FPL that the Legislature intended to encourage flexibility in the application of rules, however, the discretion the Commission has to do this is now constrained by the requirements of section 120.542 and the uniform rules adopted thereunder. FPL asserts that section 120.542 contains no requirement that all requests for rule variances and waivers must comply with that statute, however, Staff notes the statute specifically states that:

Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section.

(Emphasis supplied.) In addition, in a law review article on the APA's new variance and waiver provisions, the authors noted that:

It is not within the authority of an agency to substantively supplement or refine by rule the statutory standards for issuing a waiver or variance.

Donna E. Blanton and Robert M. Rhodes, Loosening the Chains that Bind: The New Variance and Waiver Provision in Florida's Administrative Procedure Act, 24 Fla. St. U. L. Rev. 353, 369 (1997).

FPL also points out that this statute provides that it "is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute." The difficulty with this contention is that there are no specific variance or waiver provisions in the laws implemented by the rules recommended for

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DATE: DECEMBER 3, 1998

repeal; thus, waivers and variances must comply with section 120.542.

Statement of Estimated Regulatory Cost:

Because there should be no significant additional costs or negative impacts on utilities, small businesses, small cities, or small counties, a Statement of Estimated Regulatory Costs (SERC) was not prepared.

ISSUE 2: If no requests for hearing or comments are filed, should the rule as proposed be filed for adoption with the Secretary of State and the docket be closed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: Unless comments or requests for hearing are filed, the rule as proposed may be filed with the Secretary of State without further Commission action. The docket may then be closed.

Attachments:

Rules
SERC Memorandum

CTM/