

State of Florida



Public Service Commission

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COMMUNICATIONS AND RECORDS

DATE: 11/18/99

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

FROM: DIVISION OF APPEALS (MOORE) *CTM DS*
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (MAILHOT, DM) *DM TA*
HEWITT) *CBH RS*
DIVISION OF COMMUNICATIONS (SIMMONS) *SAS PD*
DIVISION OF ELECTRIC AND GAS (KUMMER, FUTRELL) *MT*
DIVISION OF WATER AND WASTEWATER (LOWE) *LF DM* *JDJ*

RE: DOCKET NO. 980569-PU - PROPOSED AMENDMENTS TO RULE 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.

AGENDA: 11/30/99 - REGULAR AGENDA - RULE ADOPTION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

RULE STATUS: ADOPTION SHOULD NOT BE DEFERRED

FILE NAME AND LOCATION: S:\PSC\APP\WP\980569-2.RCM

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

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CASE BACKGROUND

In 1996, the Legislature substantially amended the Administrative Procedures Act (APA) and adopted section 120.542, F.S., authorizing agencies to grant waivers and variances to their rules:

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.) Sections 120.52(18) and (19), F.S., define "waiver" & "variance" as follows:

(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).

(Emphasis supplied.)

Under section 120.542(2), in addition to showing that the purpose of the underlying statute will be met, the person seeking a variance or waiver of a rule must demonstrate that its application would create a substantial hardship or would violate principles of fairness. "Substantial hardship" is defined as

a demonstrated economic, technological, legal, or other type of hardship to the person requesting a variance or waiver.

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Id. "Principles of fairness" are violated when

the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Id. The statute also provides that notice of the petition for a waiver or variance must be published in the Florida Administrative Weekly (FAW), specifies time frames for disposing of the petition, and provides an opportunity for interested persons to comment on the petition. Section 120.542(6), F.S.

The 1996 APA further provides for uniform rules of procedure that each agency which is subject to the APA must follow. Section 120.54(5)(a)1., F.S. Section 120.54(5)(b)7., F.S., specifically directs that the uniform rules establish "procedures for granting or denying petitions for variances and waivers pursuant to s. 120.542."

These statutes took effect October 1, 1996, and the uniform rules of procedure took effect April 1, 1997. For the past three years, the Commission has followed the substantive and procedural requirements of the new statute instead of the general provisions in its own rules that contain waiver provisions.

Another new provision of the 1996 APA was section 120.536 requiring agencies to report to the Joint Administrative Procedures Committee (JAPC) the rules that exceed its rulemaking authority, and repeal those for which authorizing legislation is not passed. Because a specific statute, section 120.542, had been enacted providing the authorization and procedures for granting waivers and variances, the Commission included its waiver and variance rules on the list of rules for which it lacked specific statutory authority. The Commission did not seek legislation to authorize the identified rules, because, as stated in the letter to the JAPC on September 25, 1997, specific authority had been provided in section 120.542, F.S., and specific uniform rules of procedure to implement the statute had been adopted by the Administration Commission composed of the Governor and Cabinet.

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The Commission proposed to repeal the rules in this docket in December, 1998. (Attachment 1) Florida Power and Light (FPL) and Tampa Electric Company (TECO) requested a hearing. FPL, TECO, and Staff prefiled comments. The Commission conducted a rulemaking hearing on August 12, 1999, in which FPL and TECO participated. FPL and TECO also filed posthearing comments. (Attachment 2; cited as FPL PH ____, TECO PH ____.)

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. The rules should be repealed and amended as published in the December 28, 1998, edition of the Florida Administrative Weekly.

STAFF ANALYSIS: Staff believes the general waiver provisions in the rules in this docket are inconsistent with the substantive and procedural requirements of the APA for granting waivers and variances of rules. Although the Commission has the authority to enumerate specific instances in which a rule does not apply and broad discretion to determine what constitutes a substantial hardship justifying a waiver, it does not have the authority for rules that provide for waivers in general terms, without adequate standards, nor does it have the authority to follow different procedures than provided by the APA and uniform rules.

FPL and TECO urge the Commission not to repeal the various waiver provisions of the rules in this docket. They assert that the Commission has the authority to maintain its own waiver rules and to follow them as an alternative to the APA's provisions. (TR 120; FPL PH at 7, TECO PH at 2) In addition, FPL asserts that the uniform rules of procedure only apply to waivers filed under the authority of section 120.542, F.S., and not to requests for waivers

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that are filed pursuant to the Commission's rules providing for waivers. (TR 26)

FPL and TECO also take issue with staff's conclusion that the Commission does not have authority for the waiver provisions of its rules, but has authority for the remaining provisions of its rules in this docket. FPL claims that there is a similar lack of express authority for either. Staff disagrees that there is no express authority for the remaining provisions of the Commission's rules. Staff also disagrees with FPL's claim that the underlying statutory authority for the remaining portions of the rules has not been identified. Each rule clearly identifies the statute that authorizes rulemaking and the law that is being implemented by the rule.

Staff concluded that the Commission does not have authority for the general waiver provisions because of the language of section 120.542 and the language in the definitions of "waiver" and "variance." Those statutes, cited above, confer authority for all agencies to grant waivers and variances in accordance with the APA. The only reference to an agency's authority to grant waivers outside the method provided in the APA is found in section 120.542(1), which provides that it "is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute." In staff's opinion, those statutory provisions must be express. FPL has identified no such express authority in Chapter 366 for the Commission to waive its rules. Any implied authority the Commission may have had to include general waiver provisions in its rules has been superseded by the enactment of section 120.542, F.S.

The conclusion that the Commission does not have the authority for the general waiver rules in this docket does not mean the Commission cannot adopt exceptions or cannot vary a rule's application to address differences in utilities or their circumstances. In addition, the Commission has the authority to decide, and to include examples in its rules if it chooses, what constitutes an economic, technological, legal, or other type of hardship that would justify a waiver or variance from the rule. For a rule to be a valid exercise of delegated legislative authority, however, the rules must include adequate standards for agency decisions and may not be vague. See, section 120.52(8), F.S. (defining "invalid exercise of delegated legislative authority.") Otherwise, the standards of section 120.542 must be met. The procedures under that statute and the uniform rules must also be followed.

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FPL also contends that by repealing the waiver provisions, the "character" of the remaining rule is changed. FPL, however, has merely raised this point as an obstacle to deleting the waiver provisions; it has not identified a specific provision that may result in a problem absent the existing waiver provision, nor has it suggested any changes to the remaining provisions. Moreover, waivers and variances are still available, but substantial hardship must now be shown, or application of the rule must be shown to violate principles of fairness.

In the case of Rule 25-6.002(2) and (4), Application and Scope, the statutory standards do not appear to be significantly different than the "unusual hardship or difficulty" or "exceptional conditions" that is now required. In the case of Rule 25-6.043(3), governing Minimum Filing Requirements, a showing that data production would be impractical or impose an excessive economic burden on the utility will justify a waiver. An excessive economic burden is a substantial hardship under section 120.542, F.S. Thus, repeal of these provisions should have little effect. Rule 25-6.0438(9), Non-Firm Electric Service, on the other hand, simply states that the Commission may waive any provision of the rule if it is consistent with the purpose and intent of the rule. In staff's opinion, this is the sort of general waiver provision that is vague and lacks adequate standards, and which is inconsistent with section 120.542. Nevertheless, FPL and TECO have not provided any examples of waivers that have been approved under these rule that would not qualify for a waiver under the APA's provisions.

FPL next asserts that the purpose of section 120.542 is remedial; that is, it was enacted to encourage flexibility and to remedy the problem of state agencies' inflexible application of their rules. FPL suggests that this remedial purpose conflicts with staff's opinion that the statute is exclusive, and supersedes the Commission's rules.

First, it is unnecessary to resort to the rules of statutory interpretation and identify the purpose of the statute unless the statute is ambiguous. City of Miami Beach v. Galbut, 626 So.2d 192 (Fla. 1993); Holly v. Auld, 450 So.2d 217 (Fla. 1984). Staff does not believe that it is. Nevertheless, even if the Commission finds the statute is ambiguous, the consequence of determining that the intent of the legislation is remedial does not exempt agencies that were already flexible in applying their rules from its application, and FPL cites no case law or other authority to support such a

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view. The APA does not contain an exception for the Commission or for existing rule waivers.

The view that section 120.542 is the exclusive authority for granting a rule waiver, absent another specific statute, is supported by a law review article written by the Executive Director and the Chairman of the Governor's Administrative Procedure Act Review Commission:

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 relies on the subsequent workshop comments of Ms. Blanton that the statute was supposed to increase agency authority and discretion to support its argument that the statute is not exclusive. (FPL PH 6) As stated above, however, the statute contains no such exception nor is there any language to suggest that agencies may employ lesser standards for granting waivers.

Moreover, there are other purposes of the 1996 changes to the APA. One was to correct the confusing practice of each state agency having its own procedural rules. Thus, the legislature prescribed uniform rules that all agencies are required to follow unless they obtain an exception, and specifically prescribed uniform rules for the granting of waivers and variances. FPL's assertion that the Commission's rules may be used as an alternative to section 120.542 and the uniform rules is totally at odds with this intent of the Legislature.

FPL also argues that the Commission's rules may be followed as an alternative to the statute because section 120.542 does not provide that it overrules and displaces any other "legal or valid procedure" for waiving rules that already exists. FPL's argument begs the question. Section 120.542(1) acknowledges other "legal or valid" provisions by expressly stating that it is supplemental to waiver provision of other statutes. Because there is not express authority for the Commission to waive its rules in any other statute, however, no such legal or valid procedure exists.

FPL's argument is also at odds with its position in Florida Power & Light Company vs. Public Service Commission, DOAH Case No.

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99-4264RX, a rule challenge brought by FPL challenging the validity of Rule 25-22.036(3), F.A.C. (Petition dismissed 11/3/99). In that case, FPL asserted that all agency procedural rules were repealed by operation of law on July 1, 1998, and thereafter, the uniform rules of procedure govern unless the agency has been granted an exception. The Commission was not granted an exception for the rule at issue because it was outside the scope of the uniform rules and therefore did not require an exception. FPL nevertheless complained that the Commission was attempting to exempt itself from the uniform rules of procedure and the procedural protections of the Administrative Procedure Act, a position that is contrary to the position it takes in this docket.

Finally, TECO contends that the procedures under section 120.542 are cumbersome and time consuming. For the most part, however, the additional burden is on the Commission and not the utilities. The requirement to file and publish notices in the FAW is placed on the Commission. The various time requirements are for the purpose of ensuring the petitioner that its request is timely acted upon. The purpose of the FAW notice is to protect the public. The opportunity for a hearing after the agency acts on the petition is no different. Prior to the adoption of section 120.542, F.S., the Commission issued orders on rule waiver requests as proposed agency action, just as it does now. In practice, many more waivers are being sought and approved under the new statute, yet there have been no hearings held as a result of a protested waiver. In any event, TECO should address its argument to the Legislature.

The Department of Environmental Protection (DEP) and several water management districts provide examples of agencies that have adopted rules on variances and waivers. See, e.g., Rules 62-110.104 and 40A-1.1002, F.A.C. These rules are specifically authorized by statutes that also authorize the agencies to grant variances from requirements of the statute. Sections 373.326 and 403.201, F.S. In addition, these agencies have obtained exceptions to the uniform rules to vary their requirements for waivers, and they have included the rules in chapters titled "Exceptions to the Uniform Rules of Procedure." See, e.g., Rules 40E-0.101, 40E-0.111, and 62-110.104, F.A.C.

Whether or not the Commission repeals its rules, unless it obtains an exception to the uniform rules on waivers and variances, it must follow the uniform rules and does not have the option to follow other procedures. Gaston v. Department of Revenue, 24 Fla. L. Weekly D2410c (Fla. 1st DCA October 20, 1999); Department of

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Corrections v. Saulter, 24 Fla. L. Weekly D1951a (Fla. 1st DCA, August 20, 1999). In Saulter, the court concluded that the uniform rules of procedure replaced the Public Employees Relations Commission's (PERC) prior procedural rules by operation of law, so that PERC's rules were no longer in effect. Thus, even though PERC had not repealed its procedural rules, a motion for reconsideration was not authorized by the uniform rules. As a result, the Department of Corrections' appeal, which was filed more than 30 days after the final order, was untimely and the appeal was dismissed. The significance of these cases is that the Commission's waiver rules, because they are procedural, would most likely be considered repealed by operation of law, even if the Commission does not act to repeal them. In addition, many of the required procedures are in the statute, and must be followed whether or not an exception to the uniform rules is obtained.

As stated above, the Commission has the authority to enumerate specific instances in which a rule does not apply. The Commission also has the discretion to decide, and to define or include examples in its rules if it chooses, what constitutes economic, technological, legal, or other type of hardship that would justify a waiver or variance from the rule. Staff does not, however, believe the Commission has the authority for the identified rules that allow general waivers or variances, and it does not have the authority to follow a different procedure than is prescribed by section 120.542, Florida Statutes, and the uniform rules.

ISSUE 2: Should the rules as proposed be filed for adoption with the Secretary of State and the docket be closed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: If the Commission approves the Staff Recommendation on Issue 1, then the rules may be filed for adoption with the Secretary of State without further Commission action. The docket may then be closed.

Attachments:
Rules
Posthearing Comments

CTM/

1 25-4.141 Minimum Filing Requirements for Rate-of-Return Regulated
2 Local Exchange Companies; Commission Designee.

3 (1) General Filing Instructions.

4 (a) - (c) No change.

5 (d) Each page of the filing shall be numbered and on 8 ½ x
6 11 inch paper. Each witness' prefiled testimony shall be double-
7 spaced with 25 numbered lines on numbered pages. ~~and Exhibits~~
8 shall be on numbered pages and all exhibits shall be attached to
9 the proponent's testimony ~~and shall also comply with Rule 25-~~
10 ~~22.048, Evidence.~~ Each set of the filing, consisting of the
11 petition and its supporting attachments, testimony, and exhibits,
12 shall be bound in order of appearance in this rule in standard
13 three ring binders, with each schedule indexed and tabbed.

14 (e) - (I) No change.

15 (2) - (3) No change.

16 ~~(4) Waiver of MFR Requirements. The Commission may grant a~~
17 ~~waiver with respect to specific data or the number of copies~~
18 ~~required by this rule upon a showing that production of the data~~
19 ~~would be impractical or impose an excessive economic burden upon~~
20 ~~the company.~~

21 Specific Authority 350.127(2), FS.

22 Law Implemented 364.05(4), FS.

23 History--New 5-4-81, Amended 7-29-85, 6-11-86, 2-3-88, 3-10-96,
24 _____.

25 ~~25-4.202 Construction and Waivers~~

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1 (1) - (2) No change.

2 ~~(3) When compliance with a Commission imposed requirement~~
3 ~~would result in unreasonable hardship on a small local exchange~~
4 ~~company, would not be cost effective, or would not be in the~~
5 ~~public interest, the small local exchange company may apply for a~~
6 ~~temporary rule waiver pursuant to Rule 25 4.002(2), petition the~~
7 ~~Commission to amend or repeal its rule pursuant to Rule 25-~~
8 ~~22.012, or seek similar relief as appropriate.~~

9 Specific Authority 350.127(2), FS.

10 Law Implemented 364.052, FS.

11 History--New 3-10-96, Amended _____.

12 25-6.002 Application and Scope.

13 (1) No change.

14 ~~(2) In any case where compliance with any of these rules~~
15 ~~introduces unusual hardship, or if unreasonable difficulty is~~
16 ~~involved in immediate compliance with any particular rule,~~
17 ~~application may be made to the Commission for modification of the~~
18 ~~rule or for temporary exemption from its requirements, provided~~
19 ~~that the utility shall submit with such application a full and~~
20 ~~complete statement of reason thereafter.~~

21 (2)~~(3)~~ No change.

22 ~~(4) The adoption of these rules shall in no way preclude the~~
23 ~~Commission, upon complaint, upon its own motion, or upon the~~
24 ~~application of any utility from altering or amending them, in~~
25 ~~whole or in part, or from requiring any other or additional~~

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1 ~~service, equipment, facility or standard, or from making such~~
2 ~~modification with respect to their application as may be found~~
3 ~~necessary to meet exceptional conditions.~~

4 ~~(3)-(5)~~ No change.

5 Specific Authority 366.05(1), FS.

6 Law Implemented 366.05(1), FS.

7 History--New 7-29-69, formerly 25-6.02, Amended .

8 25-6.043 Investor-Owned Electric Utility Minimum Filing
9 Requirements; Commission Designee.

10 (1) - (2) No change.

11 ~~(3) Waiver of Minimum Filing Requirements. The Commission may~~
12 ~~grant a waiver with respect to specific data required by this~~
13 ~~rule upon a showing that production of the data would be~~
14 ~~impractical or impose an excessive economic burden upon the~~
15 ~~company.~~

16 Specific Authority 366.05(1), (2), 366.06(3), FS.

17 Law Implemented 366.06(1), (2), (3), (4), 366.04(2)(f), 366.071, FS.

18 History--New 5-27-81, formerly 25-6.43, Amended 7-5-90

19 .

20 25-6.0438 Non-Firm Electric Service - Terms and Conditions.

21 (1) - (8) No change.

22 ~~(9) The Commission may waive any provision of this rule if it~~
23 ~~determines that such waiver is consistent with the purpose and~~
24 ~~intent of this rule after notice to all affected customers.~~

25 Specific Authority 350.127(2), 366.05(1), FS.

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1 Law Implemented 366.03, 366.04, 366.041, 366.05, FS.

2 History--New 8-21-86, Amended 9-4-91, _____.

3 25-17.087 Interconnection and Standards.

4 (1) No change.

5 ~~(2) Nothing in this rule shall be construed to preclude a~~
6 ~~utility from evaluating each request for interconnection on its~~
7 ~~own merits and modifying the general standards specified in this~~
8 ~~rule to reflect the result of such an evaluation.~~

9 (2)~~(3)~~ Where a utility refuses to interconnect with a
10 qualifying facility or attempts to impose unreasonable standards
11 ~~pursuant to subsection (2) of this rule~~, the qualifying facility
12 may petition the Commission for relief. The utility shall have
13 the burden of demonstrating to the Commission why interconnection
14 with the qualifying facility should not be required or that the
15 standards the utility seeks to impose on the qualifying facility
16 ~~pursuant to subsection (2)~~ are reasonable.

17 (4) through (11) renumbered (3) through (10). No change.

18 Specific Authority 366.051, 350.127(2), FS.

19 Law Implemented 366.04(2)(c)&(5), 366.051, FS.

20 History--New 9-4-83, formerly 25-17.87, Amended 10-25-90, 5-6-93,

21 _____.

22 25-24.555 Scope and Waiver.

23 (1) through (3) No change.

24 ~~(4) A shared tenant service company may petition for a waiver~~
25 ~~of any provision of this part. The Commission may grant a waiver~~

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1 ~~to the extent that it determines that it is in the public~~
2 ~~interest to do so. The Commission may grant the petition in whole~~
3 ~~or part and may impose reasonable alternative regulatory~~
4 ~~requirements on the petitioning company. In disposing of a~~
5 ~~petition, the Commission shall consider:~~

6 ~~—(a) The factors enumerated in section 364.339(4), Florida~~
7 ~~Statutes;~~

8 ~~—(b) The extent to which competitive forces may serve the same~~
9 ~~function as, or prevent the necessity for, the provision sought~~
10 ~~to be waived; and~~

11 ~~—(c) Alternative regulatory requirements for the company which~~
12 ~~may serve the purposes of this part.~~

13 ~~—(5) Any statutory exemptions granted or rule waivers granted~~
14 ~~prior to the adoption of this rule are void, and to the extent~~
15 ~~not covered in this rule, must be renewed.~~

16 Specific Authority 350.127(2) FS.

17 Law Implemented 364.01, 364.339 FS.

18 History--New 1-28-91, Amended 7-29-97, _____.

19 25-30.010 Rules for General Application. The rules hereinafter
20 set forth are for general application and are subject to such
21 changes and modifications, permitted by law, as the Commission
22 from time to time may determine advisable. ~~The rules are subject~~
23 ~~to such exceptions as the Commission may consider just and~~
24 ~~reasonable in individual cases.~~ The rules are supplementary to
25 the Water and Wastewater System Regulatory Law, Chapter 367,

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1 Florida Statutes.
2 Specific Authority 367.121, FS.
3 Law Implemented 367.121, FS.
4 History--Amended 2-3-70, 9-12-74, formerly 25-10.01, Transferred
5 from 25-10.001 11-9-86, Amended _____ .
6 25-30.011 Application and Scope.

7 (1) No change.

8 ~~(2) In any case where compliance with any of these rules~~
9 ~~introduces unusual hardship, or if unreasonable difficulty is~~
10 ~~involved in immediate compliance with any particular rule,~~
11 ~~application may be made to the Commission for modification of the~~
12 ~~rule or for temporary exemption from its requirements, provided~~
13 ~~that the utility shall submit with such application a full and~~
14 ~~complete statement of reason therefor.~~

15 (2) ~~(3)~~ No change.

16 ~~(4) The adoption of these rules shall in no way preclude the~~
17 ~~Commission, upon complaint, upon its own motion or upon the~~
18 ~~application of any utility, from altering or amending them, in~~
19 ~~whole or in part, or from requiring any other or additional~~
20 ~~service, equipment, facility or standard, or from making such~~
21 ~~modification with respect to their application as may be found~~
22 ~~necessary to meet exceptional conditions.~~

23 (3) ~~(5)~~ It is not intended that any rule or regulation
24 contained herein shall supersede or conflict with an applicable
25 regulation of the Department of Health and Rehabilitative

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1 Services (DHRS) or the Department of Environmental Protection
2 ~~Regulation~~ (DEPR). Compliance by a utility with the regulations
3 of the DHRS or DEPR on a particular subject matter shall
4 constitute compliance with such of these rules as relate to the
5 same subject matter except as otherwise ordered by the
6 Commission.

7 ~~(4)(6)~~ No change.

8 Specific Authority 367.121, FS.

9 Law Implemented 367.121(1), FS.

10 History--Amended 9-12-74, formerly 25-10.14, Transferred from
11 25-10.014 and Amended 11-9-86, _____.

12 25-30.436 General Information and Instructions Required of Class
13 A and B Water and Wastewater Utilities in an Application for Rate
14 Increase.

15 (1) through (5) No change.

16 ~~(6) Waiver of MFR Requirements. The Commission may grant a~~
17 ~~waiver with respect to specific data required by this rule upon a~~
18 ~~showing that the production of the data would be impractical or~~
19 ~~impose an excessive economic burden upon the applicant. All~~
20 ~~requests for waiver of specific portions of the minimum filing~~
21 ~~requirements shall be made as early as practicable.~~

22 ~~(6)(7)~~ No change.

23 Specific Authority 350.127(2), 367.121, FS.

24 Law Implemented 367.081, 367.083, 367.121, FS.

25 History--New 11-9-86, Amended 6-25-90, 11-30-93, _____.

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1 25-30.450 Burden of Proof and Audit Provisions. In each
2 instance, the utility must be able to support any schedule
3 submitted, as well as any adjustments or allocations relied on by
4 the utility. The work sheets, etc. supporting the schedules and
5 data submitted must be organized in a systematic and rational
6 manner so as to enable Commission personnel to verify the
7 schedules in an expedient manner and minimum amount of time. The
8 supporting work sheets, etc., shall list all reference sources
9 necessary to enable Commission personnel to track to original
10 source of entry into the financial and accounting system and, in
11 addition, verify amounts to the appropriate schedules. ~~Utilities~~
12 ~~may request a waiver of specific parts of the above rule from the~~
13 ~~Commission by submitting a written statement setting forth the~~
14 ~~reason, in detail, why the waiver should be granted.~~

15 Specific Authority 367.121, FS.

16 Law Implemented 367.081, FS.

17 History--New 6-10-75, Transferred from 25-10.177 11-9-86, Amended

18 .

19 25-30.455 Staff Assistance in Rate Cases.

20 (1) through (4) No change.

21 (5) Within 30 days of receipt of the completed application,
22 the committee shall evaluate the application and determine the
23 petitioner's eligibility for staff assistance.

24 (a) through (b) No change.

25 (c) All recommendations of ineligibility shall be in writing

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~~struck through~~ type are deletions from existing law.

1 and shall state the deficiencies in the application with
2 reference to guidelines set out in subsection (8) of this rule ~~or~~
3 ~~with reference to subsection (11) of this rule.~~

4 (6) through (10) No change.

5 ~~(11) A petitioner may request a waiver of any of the~~
6 ~~guidelines set out in subsection (8) of this rule.~~

7 (12) through (15) renumbered (11) through (14) No Change.

8 Specific Authority 367.0814, 367.121, FS.

9 Law Implemented 367.0814, FS.

10 History--New 12-8-80, Transferred from 25-10.180 and Amended 11-
11 9-86, 8-26-91, 11-30-93, .

12 25-30.456 Staff Assistance in Alternative Rate Setting.

13 (1) through (4) No change.

14 (5) Within 30 days of receipt of the completed application,
15 the Division of Water and Wastewater shall evaluate the
16 application and determine the petitioner's eligibility for staff
17 assistance.

18 (a) through (b) No change.

19 (c) All recommendations of ineligibility shall be in writing
20 and shall state the deficiencies in the application with
21 reference to guidelines set out in subsection (8) of this rule ~~or~~
22 ~~with reference to subsection (11) of this rule.~~

23 (6) through (10) No change.

24 ~~(11) An applicant may request a waiver of any of the~~
25 ~~guidelines set out in subsection (8) of this rule.~~

CODING: Words underlined are additions; words in
~~struck through~~ type are deletions from existing law.

1 (12) through (14) renumbered (11) through (13) No change.
2 ~~(14)~~~~(15)~~ A substantially affected person may file a petition
3 to protest the Commission's PAA Order regarding a staff assisted
4 alternative rate setting application within 21 days of issuance
5 of the Notice of Proposed Agency Action as set forth in Rule 28-
6 106.201 ~~25-22.036~~, F.A.C.

7 (16) through (20) renumbered (15) through (19) No change.
8 Specific Authority 367.0814, 367.121, FS.

9 Law Implemented 367.0814, FS.

10 History--New 11-30-93, Amended _____.

11 25-30.570 Imputation of Contributions-in-Aid-of-Construction.

12 ~~(1)~~ No change.

13 ~~(2) In any case where the provisions of subsection (1)~~
14 ~~introduces unusual hardship or unreasonable difficulty, and the~~
15 ~~Commission, utility or interested party shows that it is not in~~
16 ~~the best interests of the customers of the utility, the~~
17 ~~Commission may waive the applicability of the rule to the~~
18 ~~utility.~~

19 Specific Authority 367.121(1), 367.101, FS.

20 Law Implemented 367.101, FS.

21 History--New 6-14-83, formerly 25-30.57, Amended _____.

22 25-30.580 Guidelines for Designing Service Availability Policy.

23 ~~(1)~~ A utility's service availability policy shall be designed
24 in accordance with the following guidelines:

25 (1)~~(a)~~ No change.

CODING: Words underlined are additions; words in
~~struck through~~ type are deletions from existing law.

1 ~~(2)(b)~~ No change.

2 ~~(2) In any case where compliance with the guidelines of~~
3 ~~subsection (1) introduces unusual hardship or unreasonable~~
4 ~~difficulty, and the Commission, utility, or interested party~~
5 ~~shows that it is not in the best interests of the customers of~~
6 ~~the utility to require compliance, the Commission may exempt the~~
7 ~~utility from the guidelines.~~

8 Specific Authority 367.121(1), 367.101, FS.

9 Law Implemented 367.101, FS.

10 History--New 6-14-83, formerly 25-30.58, Amended _____.

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CODING: Words underlined are additions; words in struck through type are deletions from existing law.

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; 25-24.455, 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.)
_____)

DOCKET NO. 980569-PU
FILED: September 2, 1999

**TAMPA ELECTRIC COMPANY'S
POST-HEARING COMMENTS**

Tampa Electric Company (“Tampa Electric” or “the company”) submits the following Post-Hearing Comments relative to the rule amendments Staff has proposed in this docket. Tampa Electric incorporates by reference the concerns expressed in its earlier written comments and during the course of the August 12, 1999 hearing in this matter and offers the following additional observations:

1. The rule amendments proposed by Staff are not required by the 1996 amendments to the Administrative Procedures Act and neither the Staff nor the Commission should presume they are. Instead, the Commission should staunchly defend the continuing availability of the substantive waiver provisions the Commission saw fit to include in its rules.

2. Staff's proposed amendments would remove key substantive provisions that were included as integral parts of the rules in which they appear. This would render the rules inflexible and accomplish little more than causing unnecessary and costly additional work for everyone involved in Commission proceedings. If there is no statutory authority for the waiver provisions of the rules in question, how can there be statutory authority for other substantive parts of the rules at issue?

3. Adoption of the proposed amendments would destroy flexibility in the Commission's administration of its very broad regulatory authority. Without the waiver provisions currently included in the Commission's rules, the Commission and the parties appearing before it would be left to rely solely on the cumbersome time-consuming waiver requirements of Section 120.542, Florida Statutes. The latter appears to be intended to allow for variances and waivers in instances where agencies have not adopted waiver provisions as substantive components of their own rules. That is not the case here and Section 120.542 does not control.

4. As the hearing in this proceeding neared its conclusion, there appeared to be a growing awareness among the Commissioners that Staff's proposed amendments could only have a negative impact on the regulatory process and the parties who appear before the Commission. Tampa Electric concurs and urges that those considerations be revisited when the Commission takes up final consideration of this matter and relied upon as the basis for rejecting the proposed rule amendments.

WHEREFORE, Tampa Electric Company submits the foregoing Post-Hearing Comments and urges rejection of the rule amendments proposed in this proceeding.

DATED this 2nd day of September 1999.

Respectfully submitted,



LEE L. WILLIS
JAMES D. BEASLEY
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302
(850) 224-9115

ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Post-Hearing Comments, filed on behalf of Tampa Electric Company, has been forwarded by U. S. Mail or hand delivery(*) on this 2nd day of September 1999 to the following:

Ms. Christiana Moore*
Staff Counsel
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Mr. James A. McGee
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Florida Power Corporation
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ATTORNEY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Proposed amendments to Rules) DOCKET NO. 980569-PU
25-4.002, F.A.C., Application and Scope;) DATE: SEPTEMBER 2, 1999
25-4.141, F.A.C., Minimum Filing)
Requirements for Rate of Return)
Regulated Local Exchange Companies;)
Commission Designee; 25-4.202, F.A.C.,)
Construction and Waivers; 25-24.455,)
F.A.C., Scope and Waiver; 25-6.002,)
F.A.C., Application and Scope; 25-6.043,)
F.A.C., Investor-Owned Electric Utility)
Minimum Filing Requirements; Commission)
Designee; 25-6.0438, F.A.C., Non-Firm)
Electric Service - Terms and Conditions;)
25-17.087, F.A.C., Interconnection and)
Standards; 25-30.010, F.A.C., Rules for)
General Application; 25-30.011, F.A.C.,)
Application and Scope; 25-30.436, F.A.C.,)
General Information and Instructions)
Required of Class A and B Water and)
Wastewater Utilities in an Application)
for Rate Increase; 25-30.450, F.A.C.,)
Burden of Proof and Audit Provisions;)
25-30.455, F.A.C., Staff Assistance in)
Rate Cases; 25-30.456, F.A.C., Staff)
Assistance in Alternative Rate Setting;)
25-30.570, F.A.C., Imputation of)
Contributions-in-Aid-of-Construction;)
and 25-30.580, F.A.C., Guidelines)
for Designing Service Availability Policy))
)

POST-HEARING COMMENTS

Florida Power & Light Company ("FPL"), pursuant to applicable rules and the May 13, 1999 Order establishing procedure in this Docket, hereby submits its Post-Hearing Comments concerning those rules identified herein which are applicable to electric utilities.

I. Introduction

The rules at issue herein, are at issue because of the adoption by the Legislature in 1996 of Section 120.536, F.S. After stating in subsection 1 of Section 120.536 that agencies may only adopt rules that "implement, interpret, or make specific the particular powers and duties granted by the enabling statute.", subsection 2 directs each agency to:

"...provide to the Administrative Procedures Committee a listing of each rule, or portion thereof, adopted by that agency before October 1, 1996, which exceeds the rulemaking authority permitted by this Section. For those rules of which only a portion exceeds the rulemaking authority permitted by this Section, the agency shall also identify the language of the rule which exceeds this authority."

(Emphasis added). This subsection 2 then directs "each agency" to repeal each rule or portion thereof identified as exceeding the rulemaking authority permitted by this Section. That is what this Commission has done. By letter dated September 25, 1997 addressed to Senator Charles Williams, Chairman of the Joint Administrative Procedure Committee, (a copy of which is attached hereto), the Commission identified portions of various rules which it said was the result of its applying the criteria set out in Section 120.536(1). It was then stated in this transmittal:

"Many of the identified rules contain waiver provisions for which there is no specific authority in the Commission's enabling statutes."

Also a part of the 1996 amendment to Chapter 120, Florida Statutes, was the adoption of Section 120.542. Staff, in this docket, has also taken the position that there can be no variance and waiver provisions in rules of the Florida Public Service Commission because Section 120.542 displaces any independent Commission authority. (See Hearing Transcript at pp. 7,8,40,42, etc.).

II. FPL's Comments On The Justification For The Rule Repeals

FPL understands and appreciates that the rules being addressed in this docket were previously identified to the Legislature because of this Commission's understanding as to the scope of its authority with respect to portions of various rules. However, FPL believes that the repeal of a rule on the basis of a legal conclusion must provide adequate support for the legal conclusion. Stated differently, it is not appropriate in FPL's view to rely upon the ministerial act of placing various rule provisions on a list as justification for the Commission's action in a rulemaking proceeding.

III. Section 120.536 - Lack of Sufficient Authority

FPL incorporates its prior comments in this Docket on this point but wishes to note that the Commission clearly maintained at one time and over time that it had the necessary legal authority to adopt the rule provisions at issue in this docket. That is, it clearly believed that its actions were lawful and it had sufficient

legal authority to act. Section 120.536 raises the question as to whether the Commission's authority was sufficient in general with respect to rules it has adopted. FPL takes issue with the staff's offered conclusion that the Commission lacks authority to grant waivers (because there is no separate statute saying expressly that the Commission can grant such waivers) but retains authority for other substantive rules where there is a similar lack of express authority. Moreover, there has been absolutely no identification of the underlying statutory authority for the remaining portions of the rules and absolutely no explanation of how that statutory authority is sufficient for the retained portions of the rule but deficient for the waiver provisions.

Of necessity, the Commission action on the basis of a lack of statutory authority has to raise the question of the sufficiency of the authority for the remaining portions of the rules.

At the Hearing in this Docket, the question was raised as to whether the more recent revisions to the Administrative Procedure Act in response to the decision of the First District Court of Appeal in the so-called Consolidated Tomoka case had implications for the sufficiency of the statutory authority for the Commission to act. FPL pointed out that the 1999 amendments to the APA were not operative to the action in this Docket however it did observe that it might be appropriate for the Commission to consider re-reviewing all of its rule provisions with an eye to the sufficiency of the statutory authorization and noted that this might be an appropriate way to deal with the questions in this Docket.

FPL also points out that the action proposed in this Docket would in effect constitute rulemaking by re-adopting the other substantive provisions of the rule without the waiver provision. When the rules were initially adopted, they had waiver provisions. To remove those waiver provisions is not merely the act of removing a technical provision of the rule. Instead, the entire character of the rule has changed.

IV. Section 120.542

The totality of the legal argument presented in support of reliance on Section 120.542 is that one sentence in Section 120.542(1) reads:

"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."

At the Hearing, the Staff took the position that although Section 120.542 does not say that an agency cannot have a separate waiver provision in their rules it does say that agencies are authorized to grant waivers consistent with the statute and the Uniform Rules of Procedure (TR 48) thus displacing such separate waiver provisions. In presenting this view, no explanation was provided as to how this interpretation could be reconciled with this legislative intent that the Section 120.542 procedures be remedial. Moreover, the Staff maintained that its interpretation of Section 120.542 does not require application of any rule of statutory

construction. (TR 51). Therefore, the staff's contention becomes inscrutable. In addition, the Staff sought to rely upon a Law Review article when questioned as to its conclusion that 120.542 represented the "exclusive way" for there to be a waiver or variance "unless there's separate statutory authority" for the proposition:

"that variances and waivers can be sought, either under the general authority in the APA which is 120.542, and there they call it general, or under the authority of specific substantive statutes."

(TR 41 and 42). Staff however did not respond in a meaningful way when it was pointed out that one of the authors of the very Law Review article relied upon and who was executive director of the Governor's Administrative Procedure Review Commission (TR. 51) testified at the Commission's Workshop addressing these particular rule amendments as follows:

"The whole purpose of coming up with Section 120.542 was to give agencies more discretion, not less, and to increase the opportunity for the exercise of the discretion. Many agencies, not the Public Service Commission because you did have these rules, but many agencies felt for whatever reason they had no authority, that is, to grant a waiver. Their rules were their rules and no matter how absurd their result we are going to apply those rules."

(TR 50 and 51). Thus, it appears that there is absolutely no support provided for the severe construction presented by the Commission staff and, they have not recognized various factors that reflect that their interpretation is not correct. One final area

that was not addressed by the Staff in its reliance on Section 120.542 is how, assuming that the Commission's waiver provisions were valid prior to the amendment of the Administrative Procedure Act, now become invalid. It is clear that Section 120.542 addresses and provides a procedure for variance and waivers. The statute however does not say that it overrules and displaces any other legal or valid procedure that may be in existence.

Finally, the construction offered by FPL does not, as was suggested at the Hearing in this Docket propose a conflict with either Section 120.542 or the implementing provisions of the Uniform Rules. To the contrary, FPL's construction is that the procedures contemplated by Section 120.542 and the Uniform Rules do apply to the Public Service Commission if and to the extent a variance or waiver is sought by someone pursuant to their provisions. On the other hand, if a variance or waiver is sought pursuant to the provision Commission rule then those rules would apply to the action requested.

V. Conclusion

FPL submits that the rationale advanced for the repeal of the rules in this Docket (those as to which FPL is participating) raise question as to the authority of the Commission to adopt the remaining portions of the rules as to which those variance and waiver provisions apply. In addition, FPL submits that the approach proposed to be taken which is to eliminate long standing

waiver and variance provisions from Commission rules is a harsh action which serves to re-establish and re-institute rules quite different from those that were adopted by the Commission initially. Finally, FPL submits that reliance upon Section 120.542 has not been adequately justified. Instead, the explanation for that reliance appears to conflict with the clear remedial intent of the legislature in adopting that Section in the first place.

Respectfully submitted,

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Tallahassee, FL 32301
Attorneys for Florida Power
& Light Company

By: 

Matthew M. Childs, P.A.

JULIA L. JOHNSON
CHAIRMAN



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Public Service Commission

September 25, 1997

Senator Charles Williams, Chairman
Joint Administrative Procedures Committee
Room 250, Senate Office Building
Tallahassee, Florida 32399

Dear Senator Williams:

Enclosed for the Committee's consideration is the Public Service Commission's list of rules exceeding statutory authority identified pursuant to Section 120.536(2), Florida Statutes. The list is the result of the Commission's review of its rules adopted prior to October 1, 1996, applying the criteria set out in section 120.536(1).

Many of the identified rules contain waiver provisions for which there is no specific authority in the Commission's enabling statutes. No additional legislation is necessary to provide authority for these rules, however, since that authority is now contained in section 120.542, Florida Statutes. Moreover, specific rules implementing 120.542 are now contained in the new Uniform Rules of Procedure.

There are several other rules on the Commission's list for which it does intend to seek legislative authority. These are water and wastewater rules 25-30.034(1)(e); 25-30.035(6); 25-30.36(3)(d); 25-30.039; 25-30.433(10); 25.30.436(4)(I), Florida Administrative Code, and the Commission's purchasing rules, Chapter 25-25, Florida Administrative Code. These rules are identified on the attached list as numbers 11, 12, 13, 14, 15, 16 and 23 respectively. A brief explanation of the specific deficiency is contained in the comments to the rule. The Commission believes that these rules contain important regulatory requirements, and we are in the process of formulating legislative proposals to provide the necessary authority. We will transmit our proposals to the Committee as soon as they are available.

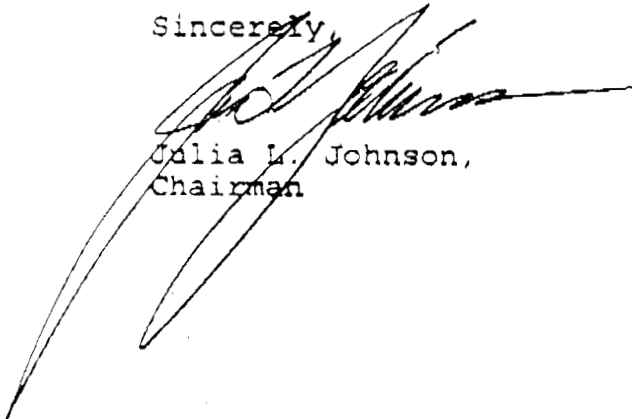
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Attachment 1
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Internet E-mail: CONTACT@PSC.STATE.FL.US

Senator Charles Williams, Chairman
September 25, 1997
Page -2-

Please contact me if I can be of further assistance to the
Committee in this matter.

Sincerely,



Julia L. Johnson,
Chairman

DES
Enclosure

cc: Commissioners
Talbot
Vandiver
Bane
Directors
Miller

Florida Power & Light Company
Docket No. 980569-PU
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Attachment 1
Page 2 of 10

034

RULES OF THE FLORIDA PUBLIC SERVICE COMMISSION IDENTIFIED AS
LACKING STATUTORY AUTHORITY PURSUANT TO SECTION 120.536(2),
FLORIDA STATUTES

CHAPTER 25-4, F.A.C.

1. **Rule 25-4.002(2), Application and Scope.**

Summary: Provides that in any case where compliance with any of these rules introduces unusual hardship, or if unreasonable difficulty is involved in immediate compliance with any particular rule, written application may be made to the commission for modification of the rule or for temporary exemption from its requirements.

Law Implemented: Sections 364.01 and 364.337, F.S. Section 364.01, F.S., does not contain a provision for exception to Commission rules. Section 364.337, F.S., provides for waiver of rules regulating alternative local exchange telecommunications companies and interexchange telecommunications companies only. Effective October 1, 1996, Section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

2. **25-4.141(4), Minimum Filing Requirements for Rate-of-Return Regulated Local Exchange Companies; Commission Designees.**

Summary: Provides a waiver of MFR requirements with respect to specific data or the number of copies required by this rule upon a showing that production of the data would be impractical or impose an excessive economic burden of the company.

Law Implemented: Section 364.05(4), F.S. This section does not contain a provision for exception to Commission rules. Effective October 1, 1996, Section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

3. **25-4.202(3), Construction and Waivers.**

Summary: Provides that when compliance of 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.

Law Implemented: Section 364.052, F.S. This section does not contain a provision for exception to Commission rules. Effective October 1, 1996, Section 120.542, F.S., and the uniform

rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

4. 25-24.555, Scope and Waiver.

Summary: Subsection (4) allows a STS company to petition for waiver of any provisions of Par XII relating to STS providers. The waiver will be granted to the extent that the Commission determines that it is in the public interest to do so.

Law Implemented: Sections 364.01 and 364.339, F.S. These sections do not contain a provision for exception to Commission rules. Effective October 1, 1996, Section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

CHAPTER 25-6, F.A.C.

5. Rule 25-6.002(2) and (4), Application and Scope.

Summary: Subsections (2) and (4) provide that the Commission will modify or exempt rule requirements in cases of unusual hardship or difficulty or under exceptional conditions.

Law Implemented: Section 366.05(1), F.S. This statute does not contain a provision for exceptions to Commission rules. Effective October 1, 1996, Section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

6. Rule 25-6.043(3), Investor-Owned Electric Utility Minimum Filing Requirements; Commission Designee. Subsection (3) states 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.

Laws Implemented: Sections 366.04(2)(f), 366.06, and 366.071, F.S. These statutes do not contain a provision for exceptions to Commission rules. Effective October 1, 1996, Section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

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

Laws Implemented: Sections 366.03, 366.04, 366.041, and 366.05, F.S. None of these statutes contain a provision for exceptions to Commission rules. Effective October 1, 1996, Section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

CHAPTER 25-17, F.A.C.

8. Rule 25-17.087(2)&(3), Interconnection and Standards.
Subsections (2) and (3) allow a utility to seek waiver of the rule's requirements.

Law Implemented: Sections 366.051, 266.04(2)(c) and (5), F.S. These statutes do not contain a provision for exceptions to Commission rules. Effective October 1, 1996, Section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

CHAPTER 25-30, F.A.C.

9. Rule 25-30.010, Rules for General Application.

Summary: Provides that the water and wastewater utility rules are subject to such exceptions as the Commission may consider reasonable in individual cases.

Law Implemented: Section 367.121, F.S. This statute does not contain a provision for exceptions to Commission rules. Effective October 1, 1996, section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

10. Rule 25-30.011(4), Application and Scope.

Summary: Subsection (4) authorizes the Commission to modify the application of its rules as necessary to meet exceptional conditions.

Law Implemented: Section 367.121, F.S. This statute does not contain a provision for exceptions to Commission rules. Effective October 1, 1996, section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

11. Rule 25-30.034(1)(e), Application for Certificate of Authorization for Existing Utility Currently Charging for Service.

Summary: Requires an existing utility that is applying for an initial certificate to provide evidence that the utility owns the land upon which the utility treatment facilities are located, or a copy of an agreement that provides for the continued use of the land such as a 99-year lease. It also provides that the Commission may consider a written easement or other cost-effective alternative.

Law Implemented: The rule cites section 367.045 as the law implemented. Subsection 367.045(1)(b) requires a utility to provide all information required by rule or order of the Commission which information may include a detailed inquiry into the ability of the applicant to provide service. Although it is logical to require a utility to own or have the legal right to long-term use of the land upon which its facilities are located to ensure its ability to continue to provide service, the statute does not authorize the Commission to require this.

12. Rule 25-30.035(6), Application for Grandfather Certificate.

Summary: Rule 25-30.035(6) requires an applicant for a "grandfather" certificate under section 367.171, F.S., to provide evidence that the utility owns the land upon which the utility treatment facilities are located, or a copy of an agreement that provides for the continued use of the land such as a 99-year lease. It also provides that the Commission may consider a written easement or other cost-effective alternative.

Law Implemented: Subsection 367.171(2) provides that a utility shall make application for a certificate by filing with the Commission a map of its system; a description of the area served, and a tariff listing all rates and charges and such other financial information as may be required by the Commission. It does not itself require proof of ownership or a right to long-term use of the land or authorize the Commission to require it.

13. Rule 25-30.036(3)(d) Application for Amendment to Certificate of Authorization to Extend or Delete Service.

Summary: Rule 25-30.036(3)(d) requires a certificated water or wastewater utility that proposes to extend its service area to provide evidence that the utility owns the land upon which the utility treatment facilities are located, or a copy of an agreement that provides for the continued use of the land such as a 99-year lease. It also provides that the Commission may consider a written easement or other cost-effective alternative.

Law Implemented: Section 367.045, F.S., requires the utility to provide all information required by rule or order of the

Commission, which information may include a detailed inquiry into the ability or inability of the applicant to provide service. Although it is logical to require a utility to own or have the legal right to long-term use of the land upon which its facilities are located to insure its ability to continue to provide service, the statute does not require proof of ownership or a right to long-term use of the land.

14. Rule 25-30.039, Application for Name Change.

Summary: This rule requires a certificated utility that changes its name, with no change in the ownership or control of the utility or its assets, to apply for approval of a change in name, and to provide notice to its customers.

Law Implemented: Section 367.121. Although the Commission has broad authority under section 367.121 to require utilities to file information and reports, this statute does not appear to authorize the Commission to require a utility to seek approval of a name change. Section 367.071, F.S., requires Commission approval of a sale, assignment, or transfer of a certificate, but not of a name change only.

15. Rule 25-30.433(10), Rate Case Proceedings.

Summary: Rule 25-30.433(10) provides that a utility is required to own the land upon which the treatment facilities are located, or possess the right to continued use of the land, such as a 99-year lease. The Commission may consider a written easement or other cost-effective alternative.

Law Implemented: Section 367.081 provides the procedure for fixing and changing rates. While it is logical to require a utility to own or have the legal right to long-term use of the land upon which it is recovering a return on an investment, section 367.081 does not appear to authorize imposing such a requirement.

16. Rule 25-30.436(4)(I), General Information and Instructions Required of Class A and B Water and Wastewater Utilities in an Application for Rate Increase.

Summary: Rule 25-30.436(4)(I) requires that for any land recorded on the utility's books since rate base was last established, the utility shall file copies of the documents that demonstrate that the utility owns the land upon which the treatment facilities are located, or that provides for the right to continued use of the land, such as a 99-year lease. The Commission may consider a written easement or other cost-

effective alternative.

Law Implemented: Section 367.081, F.S., provides the procedure for fixing and changing rates. While it is logical to require a utility to own or have the legal right to long-term use of the land upon which it is recovering a return on an investment, section 367.081 does not appear to authorize imposing such a requirement. The rule also cites to section 367.121, F.S. Although the Commission has broad authority under section 367.121 to require utilities to file information and reports, which would include documents showing who owns the land, the statute does not appear to authorize the Commission to require documents that show that the utility owns it.

17. Rule 25-30.436(6), General Information Required in an Application for Rate Increase (Minimum Filing Requirements).

Summary: Subsection (6) 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.

Law Implemented: Section 367.081, Rates, Procedures for Fixing and Changing, and section 367.121, Powers of the Commission. Neither of these statutes contain a provision for a waiver. Effective October 1, 1996, section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

18. Rule 25-30.450, Burden of Proof and Audit Provisions.

Summary: 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.

Law Implemented: Effective October 1, 1996, section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

19. Rule 25-30.455(1), Staff Assistance in Rate Cases.

Summary: Provides that a petitioner may request a waiver of any of the guidelines 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.

Law Implemented: Section 367.0814, which authorizes the Commission to establish rules for certain utilities to request

staff assistance in changing rates, does not authorize a waiver of the rules. Effective October 1, 1996, section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

20. Rule 25-30.456(11), Staff Assistance in Alternative Rate Setting.

Summary: Provides that an applicant may request a waiver of any of the guidelines 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.

Law Implemented: Section 367.0814 which authorizes the Commission to establish rules for certain utilities to request staff assistance in changing rates, does not authorize a waiver of its rules. Effective October 1, 1996, section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

21. Rules 25-30.570(2), Imputation of Contributions-in-Aid-of-Construction.

Summary: 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.

Law Implemented: Section 367.101 authorizes the Commission by rule to set standards for and levels of service availability charges and conditions. It does not authorize a waiver of the rules. Effective October 1, 1996, section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

22. Rule 25-30.580(2), Guidelines for Designing Service Availability Policy.

Summary: 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.

Law Implemented: Section 367.101 authorizes the Commission by rule to set standards for and levels of service availability

charges and conditions. It does not authorize a waiver of the rules. Effective October 1, 1996, section 120.542, F.S., and the uniform rules adopted thereunder govern an agency's grant of a variance or waiver of its rules.

CHAPTER 25-25, F.A.C.

23. Rule Chapter 25-25, General Purchasing Procedures

Summary: This chapter is comprised of 27 rules governing the Commission's procedures for purchases of commodities and services.

Law Implemented: The rules, first adopted in 1983, cite subsection 120.53(1), Florida Statutes, as the law implemented and specific authority. Prior to October 1, 1996, subsection 120.53(1) provided that each agency shall adopt rules of practice setting forth the nature and requirements of all formal and informal procedures. Because Chapter 287, Florida Statutes, governing procurement of commodities and contractual services and authorizing the Division of Purchasing of the Department of Management Services to adopt such rules, does not apply to agencies of the legislative branch such as the Commission, the Commission adopted its own rules.

Effective October 1, 1996, agencies no longer have the authority to adopt rules of practice or procedure. Rather, they are required to comply with uniform rules of procedure. §120.54(5), Fla. Stat. (Supp. 1996). Although the uniform rules include rules on bid protests, they do not include rules on purchasing, as those rules are provided for by Chapter 287, Florida Statutes.

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CERTIFICATE OF SERVICE
DOCKET NO. 980569-PU

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Post-Hearing Comments has been furnished by Hand Delivery (*), or U.S. Mail this 2nd day of September, 1999, to the following:

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