

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

FLORIDA POWER & LIGHT COMPANY,  
Petitioner/Appellant

vs.

DCA CASE NO. 1D99-4552

PUBLIC SERVICE COMMISSION,  
Respondent/Appellee

\_\_\_\_\_ /

INITIAL BRIEF OF  
FLORIDA POWER & LIGHT COMPANY

\_\_\_\_\_  
On Appeal from State of Florida  
Division of Administrative Hearings  
\_\_\_\_\_

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## STATEMENT OF THE CASE AND THE FACTS

This is an appeal from a Final Order of the Division of Administrative Hearings dismissing a petition by Florida Power & Light Company ("FPL") that challenged Public Service Commission (PSC) Rule 25-22.036(3), Florida Administrative Code (R. 327-333).

FPL challenged the rule on October 7, 1999, pursuant to sections 120.56(1) and (3), Florida Statutes, and alleged that the rule is an invalid exercise of delegated legislative authority as defined in section 120.52(8), Florida Statutes. (R. 8.) As required by section 120.56(1)(b), FPL's petition stated that FPL was substantially affected by the rule, noting that the PSC was illegally relying on it to initiate and conduct a proceeding designed to determine FPL's substantial interests. (R- 2-3).

The PSC determined in Order Nos. PSC-99-1716-PCO-EU and PSC-99-1274-PCO-EU that Rule 25-22.036(3) provides authority for the PSC, on its own motion, to initiate a proceeding designed to identify and effectuate final agency action determining FPL's substantial interests. (R. 17, 20). That determination was made in response to FPL's objection to the PSC conducting an investigation for the improper purpose of taking agency action that would affect FPL's substantial interests and to the PSC's improper reliance for that

investigation on Uniform Rule of Procedure 28-106.211. (R. 17, 20).

In its rule challenge petition, FPL argued that Rule 25-22.036(3) is invalid and cannot be relied on by the PSC to initiate a proceeding on its own motion that will determine FPL's substantial interests. (R. 4-8.) FPL pointed out that this result flows from section 120.54(5)(a)1., which provides that "the uniform rules shall be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection." (R. 4-5).

Rule 25-22.036(3) is without question a procedural rule addressing matters also addressed by the Uniform Rules of Procedure, and it was not approved by the Administration Commission as an exception to the Uniform Rules as required by sections 120.54(5)(a)1. and 2., Florida Statutes. (R. 5). Indeed, the Administration Commission specifically rejected the PSC's request to keep the rule as an exception to the Uniform Rules. (R. 131.) Thus, Rule 25-22.036(3) ceased to be a valid rule of procedure for proceedings determining FPL's substantial interests under section 120.54(5)(a) and cannot not be used as the basis for initiating and conducting a proceeding pursuant to sections 120.569 and 120.57(1) that is designed to determine FPL's substantial interests. (R. 7.)



On October 27, 1999, the PSC filed a motion to dismiss FPL's rule challenge petition, arguing that it failed to state a cause of action and that FPL lacked standing to file it. (R. 170.) FPL filed a response to this motion on October 29, 1999. (R. 194.)

Administrative Law Judge Donald R. Alexander granted the PSC's motion to dismiss in a November 3, 1999, Final Order based on his conclusion that the "gravamen of FPL's complaint is that the PSC has used the rule in an erroneous way," which he said does not invalidate the rule. (R. 329.) FPL appealed Judge Alexander's ruling to this Court on December 3, 1999. (R. 334.)

### SUMMARY OF THE ARGUMENT

Rule 25-22.036(3), Florida Administrative Code, is invalid because it expressly applies to procedural matters governed exclusively by the Uniform Rules of Procedure. Section 120.54(5)(a)1., Florida Statutes, provides that the Uniform Rules "shall be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection." The PSC's request for an exception for Rule 25-22.036(3) was specifically denied by the Administration Commission.

The Uniform Rules establish a means of providing procedural due process protections for all persons participating in proceedings governed by the Administrative Procedure Act. Uniform Rule 28-106.201 provides that initiation of formal proceedings shall be made by written petition to the agency responsible for rendering final agency action and describes allegations that must be included in any such petition. In contrast, Rule 25-22.036(3) provides that the PSC may initiate a proceeding "upon its own motion." (Emphasis supplied). The rule does not contain procedures that comply with chapter 120, Florida Statutes, as required by section 120.54(5)(a)1. Instead, this rule authorizes fishing expeditions in which the PSC may, simply by issuing an order or a notice, initiate proceedings designed both to identify

and effectuate final agency action determining substantial interests. Rule 25-22.036(3) is in conflict with Uniform Rule 28-106.201 and section 120.54(5)(a), Florida Statutes.

Rule 25-22.036(3) is an invalid exercise of delegated legislative authority as defined by section 120.52(8), Florida Statutes, because it goes beyond the powers, functions, and duties delegated by the Legislature. Any authority the PSC possessed for adopting Rule 25-22.036(3) was eliminated by the enactment of section 120.54(5), Florida Statutes; the adoption of the Uniform Rules of Procedure; and the Administration Commission's denial of the PSC's request for an exception for Rule 25-22.036(3). When the Uniform Rules went into effect on July 1, 1998, Rule 25-22.036(3) became invalid.

Rule 25-22.036(3) also is invalid pursuant to a number of specific criteria in section 120.52(8), Florida Statutes. The PSC failed to follow "the applicable rulemaking procedures or requirements set forth" in chapter 120; the rule exceeds the PSC's grant of rulemaking authority; the rule "enlarges, modifies, or contravenes the specific provisions of law implemented"; the rule "vests unbridled discretion in the agency;" and the rule is "arbitrary or capricious."

FPL's rule challenge petition should not have been dismissed by the administrative law judge. The petition was properly filed pursuant to sections 120.56(1) and (3), Florida

Statutes, was timely under those sections, and FPL was entitled to a hearing on the merits. The administrative law judge incorrectly found that FPL challenged only the application of the rule and that FPL's sole remedy was in a proceeding pursuant to section 120.57. Facts relating to the context in which the rule challenge arose were stated in the petition to establish that FPL was substantially affected by the rule, a requirement of sections 120.56(1)(b) and 120.56(3)(a), as well as Uniform Rule 28-106.201(2).

Uniform Rule 28-106.201(2) is applicable "in all proceedings in which the substantial interests of a party are determined by an agency." See r. 28-106.101 (entitled "Scope of this Chapter"). Thus, to clearly address the overlapping "scope" of Uniform Rule 28-106.201(2) and PSC Rule 25-22.036(3), it was necessary to allege in FPL's rule challenge petition that the proceeding before the PSC would affect FPL's substantial interests.

Section 120.56(3) provides that a substantially affected person may seek an administrative determination that a rule is invalid "at any time during the existence of the rule." Persons substantially affected by the application of a rule are not precluded from filing rule challenges; indeed, rule challenges may be brought at any time by any person who meets the standing test and who alleges that the rule is an invalid

exercise of delegated legislative authority. The availability of an alternative remedy in section 120.57 and through appeal from a section 120.57 proceeding does not preclude the initiation of a rule challenge. As this Court has noted, the APA contains "an impressive arsenal of varied and abundant remedies for administrative error."

## ARGUMENT

- I. **RULE 25-22.036(3) IS INVALID BECAUSE IT EXPRESSLY APPLIES TO MATTERS GOVERNED EXCLUSIVELY BY THE UNIFORM RULES OF PROCEDURE, AND NO EXCEPTION FOR THE RULE HAS BEEN GRANTED BY THE ADMINISTRATION COMMISSION.**

The Legislature in 1996 mandated that the Administration Commission adopt a set of Uniform Rules of Procedure with which all state agencies must comply by July 1, 1998. § 120.54(5)(a)1., Fla. Stat. These rules "establish procedures that comply with the requirements" of chapter 120, Florida Statutes, the Administrative Procedure Act. Id. The Administration Commission adopted the Uniform Rules of Procedure on April 15, 1997. See Fla. Admin. Code Chs. 28-101 through 28-110.

Chapter 28-106 of the Uniform Rules is entitled "Decisions Determining Substantial Interests," and part II of this chapter addresses "Hearings Involving Disputed Issues of Material Fact." Among the rules in part II is Rule 28-106.201, which governs "initiation of proceedings." It provides that "unless otherwise provided by statute" proceedings must be initiated by petition and goes on to list seven specific matters that must be addressed in such petition, including the obligation to provide "a statement of the relief sought . . . stating precisely the action petitioner wishes the agency to take with respect to the

agency's proposed action." r. 28-106.201(1)-(2), Fla. Admin. Code. Other rules in part II of chapter 28-106 address such matters as amendment of petitions, motions, intervention, discovery, prehearing conferences, the conduct of proceedings, subpoenas, evidence, post-hearing submittals, entry of a recommended order, and exceptions and responses.

In short, part II of chapter 28-106 establishes the procedures that are designed to ensure all parties participating in hearings involving disputed issues of material fact, which will determine a party's substantial interests, are provided with the due process protections required by the Florida Administrative Procedure Act. § 120.54(5)(a)1., Fla. Stat.

The PSC is an agency subject to the APA, Van Gorp Van Service, Inc. v. Mayo, 207 So. 2d 425 (1968), and is thus subject to the requirement in section 120.54(5)(a)1. to comply with the Uniform Rules "unless the Administration Commission grants an exception to the agency under this subdivision." Id. On April 15, 1998, the PSC filed a Petition for Exceptions to Uniform Rules of Procedure with the Administration Commission. (R. 64.) Included in this petition was a request for an exception to Uniform Rule 28-106.201, Florida Administrative Code, for Rules 25-22.036(1)-(7) and (9)-(10).

Specifically included was a requested exception for Rule 25-22.036(3),<sup>1</sup> which provides:

Orders and Notices. Upon its own motion, the Commission may issue an order or notice initiating a proceeding. Such order or notice shall be served upon all persons named therein. The Commission may also transmit notice of its action to other persons requesting such notice, and may publish such notice in appropriate newspapers of general circulation and the Florida Administrative Weekly.

(Emphasis supplied).

The Administration Commission denied the PSC's requested exception on June 25, 1998. (R. 131). Following entry of the Administration Commission's Final Order, the PSC revised its procedural rules in chapter 25-22, Florida Administrative Code, repealing Rules 25-22.036(1), (2), (4), (7)(a), (d)-(f), (8)-(10), and renumbering Rule 25-22.036(6) as 25-22.036(3). 25 Fla. Admin. W. 882 (March 5, 1999) (proposed); 25 Fla. Admin. W. 2135 (April 30, 1999) (adopted).

In September 1999, after FPL objected to the PSC conducting an investigation for the improper purpose of taking agency action that would affect FPL's substantial interests and to the PSC's improper reliance in that investigation on Uniform Rule 28-106.211 (R. 17, 20), the PSC identified its own rule of procedure - Rule 25-22.036(3) - as authority for

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<sup>1</sup> Rule 25-22.036(3) was numbered as 25-22.036(6) at the time the exception was requested. Although the rule was renumbered in 1999, the text was not changed. 25 Fla. Admin. W. 882 (March 5, 1999).



the proceeding. In holding that it could, on its own motion, initiate a proceeding intending to identify and then take agency action affecting FPL's substantial interests, the PSC sought to ignore the Uniform Rules and their effect, and instead ruled:

- Proceedings involving disputed issues of material fact before the PSC are not governed solely by chapter 28-106 of the Uniform Rules of Procedure, and those Uniform Rules must be read in conjunction with the remaining portions of the PSC's rules of procedure;
- Proceedings involving disputed issues of material fact before the PSC are thus also governed by the provisions of Rule 25-22.036(3), entitled "Initiation of Formal Proceedings";
- The denial of the PSC's request to the Administration Commission for an exception for Rule 25-22.036(3) was because the rule "was outside the scope of Rule Chapter 28-106, Florida Administrative Code," and therefore, "an exception was not necessary"; and
- Because Rule 25-22.036(3) has been retained, the Uniform Rules in chapter 28-106 "are supplemental to, but do not supersede," the provisions of chapter 25-22, Florida Administrative Code.

(R. 16-17).

By its express terms, chapter 28-106 of the Uniform Rules of Procedure, entitled "Decisions Determining Substantial Interests," applies "in all proceedings in which the substantial interests of a party are determined by the agency" and "to all proceedings under chapter 120" except in enumerated instances that are not relevant to this case. r. 28-106.101, Fla. Admin. Code.

By its express terms, PSC Rule 25-22.036(3) also applies to proceedings in which the substantial interests of a party are determined by the PSC. The rule is included in subpart B of part IV of chapter 25-22. Part IV relates to "Decisions Determining Substantial Interests" and subpart B relates to "Prehearing Procedures." The title to Rule 25-22.036 is "Initiation of Formal Proceedings." As previously noted, Rule 25-22.036(3) provides in relevant part that "upon its own motion, the Commission may issue an order or notice initiating a proceeding."

In stark contrast, Rule 28-106.201 of the Uniform Rules provides in relevant part as follows:

Unless otherwise provided by statute, initiation of proceedings shall be made by written petition to the agency responsible for rendering final agency action.

(Emphasis supplied). Subsection (2) of Rule 28-106.201 sets forth the necessary contents of petitions filed under the

Uniform Rules, including all of the associated allegations necessary to afford procedural due process.

Rule 25-22.036(3) without question purports to govern the same type of administrative procedures as Rule 28-106.201. Both rules are included in Florida Administrative Code chapters or parts of chapters addressing "Decisions Determining Substantial Interests." Both rules address initiation of formal proceedings. Moreover, the PSC seeks to rely on the fact that its rule and the Uniform Rule in question clearly apply to the same scope of procedure (i.e., the initiation of proceedings involving disputed issues of material fact to determine a party's substantial interests). The PSC rule conflicts with Rule 28-106.201 because it authorizes the PSC to initiate a proceeding on its own motion. Rule 28-106.201 provides that hearings involving disputed issues of material fact must be initiated by written petition to the agency. Under section 120.54(5)(a)1., Florida Statutes, the Uniform Rule displaces the PSC's rule, and the PSC's reliance on its own rule is improper.

The PSC's assertion to the Administration Commission that Rule 25-22.036(3) is outside the scope of the Uniform Rules of Procedure is not credible given the plain terms of Rules 28-016.201 and 25-22.036(3). Furthermore, the PSC itself has stated that the Uniform Rules of Procedure "are supplemental

to, but do not supersede" the PSC's own procedural rules and that proceedings involving disputed issues of material fact are thus also governed by Rule 25-22.036(3). (R. 17.) These assertions are flatly contrary to section 120.54(5)(a)1., Florida Statutes, which provides that the Uniform Rules "shall be the rules of each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection." Of course, these assertions also flatly contradict the PSC's attempt to maintain that its rule is outside the scope of the Uniform Rules.

This Court has recognized the statutory requirement that each agency adhere to the new Uniform Rules of Procedure. In Department of Corrections v. Saulter, 742 So. 2d 368, 369 (Fla. 1<sup>st</sup> DCA 1999), this Court noted that the Uniform Rules replaced an agency's prior procedural rules "by operation of law" on July 1, 1998, unless an exception was granted by the Administration Commission. The issue in Saulter was whether an appeal of a decision of the Public Employee Relations Commission (PERC) filed by the Department of Corrections was timely, even though it was filed more than 30 days after rendition of the final order. The Department argued that the motion was timely because it was filed within 30 days of PERC's entry of an order on the Department's motion for reconsideration. Id. at 368. This Court held that the notice

was untimely because the motion for reconsideration was not authorized by the Uniform Rules of Procedure, but was filed pursuant to PERC Rule 38D-15.005, which was legislatively repealed by section 120.54(5)(a), Florida Statutes. Id. at 370.

The Third District Court of Appeal recently issued an opinion contrary to Saulter and certified conflict to the Florida Supreme Court. See Crawford v. Department of Children and Families, 25 Fla. L. Weekly D158. (Fla. 3d DCA January 12, 2000). That court held that a PERC rule authorizing motions for reconsideration survived the adoption of the Uniform Rules of Procedure even though PERC was not granted an exception. The court reasoned that because the Uniform Rules do not address motions for reconsideration, such motions fall outside the subject matter or scope of the Uniform Rules.

The PSC rule is invalid even if the Crawford decision were controlling on this Court. Rule 25-22.036(3) unquestionably covers the same procedural matters as Uniform Rule 28-106.201: the initiation of proceedings involving disputed issues of material fact to determine a party's substantial interests. Thus, unlike the PERC rule authorizing a motion for reconsideration that had no counterpart in the Uniform Rules, PSC Rule 25-22.036(3) directly conflicts with Uniform Rule 28-106.201.

The Saulter opinion recognizes the straightforward mandate of section 120.54(5)(a)1. that beginning on July 1, 1998, the Uniform Rules of Procedure "shall be" the procedural rules for each agency subject to the APA unless an exception has been granted by the Administration Commission. PSC Rule 25-22.036(3) governs the same subject matters as the Uniform Rules of Procedure and is contrary to section 120.54(5)(a)1. and this Court's opinion in Saulter. Therefore, Rule 25-22.036(3) was "legislatively repealed" on July 1, 1998, and should be declared invalid by this Court.

**II. RULE 25-22.036(3) IS AN INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY AS DEFINED IN SECTION 120.52(8), FLORIDA STATUTES.**

An existing rule may be declared invalid on the ground that it is "an invalid exercise of delegated legislative authority." § 120.56(1)(a), Fla. Stat. Section 120.52(8) defines that phrase as "action which goes beyond the powers, functions, and duties delegated by the Legislature."<sup>2</sup>

The PSC, like all administrative agencies except those specifically created by the Constitution, is a creature of statute and derives only those powers enumerated by law. Grove Isle, Ltd. v. State Dep't of Environmental Regulation, 454 So. 2d 571, 573 (Fla. 1st DCA 1984). The PSC has no inherent power to promulgate rules; it possesses only that rulemaking power specifically granted by the Legislature. Id.; § 120.54(1)(e), Fla. Stat. (1999) ("No agency has inherent rulemaking authority . . .").

This Court has specifically stated that the PSC's "power, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State." Rolling Oaks Utilities v. Florida PSC, 533 So. 2d 770, 773 (Fla. 1st DCA 1988). Furthermore, the Florida Supreme Court

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<sup>2</sup> A rule is an invalid exercise of delegated legislative authority if it meets any one of several listed criteria in section 120.52(8). The specific criteria applicable to Rule 25-22.036(3) are discussed infra.

has emphasized that "[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested." City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493, 496 (Fla. 1973) (citations omitted). The PSC may not enlarge its authority by adopting rules for which no specific authority was granted by the Legislature. Department of Transportation v. James, 403 So. 2d 1066, 1067 (Fla. 4th DCA 1981); see also Great American Banks v. Division of Admin. Hearings, 412 So. 2d 373, 375 (Fla. 1st DCA 1981) ("The rulemaking process cannot be used to make legal that which there was no authority to do in the first place.").

Rule 25-22.036(3) is a procedural rule purportedly governing initiation of proceedings that determine substantial interests. It directly conflicts with Rule 28-106.201, Florida Administrative Code. Any authority the PSC possessed for adopting Rule 25-22.036(3) was eliminated following the enactment of section 120.54(5), Florida Statutes; the adoption of the Uniform Rules of Procedure; and the Administration Commission's denial of the PSC's request for an exception for Rule 25-22.036(3). Saulter, 742 So. 2d at 370 (section 120.54(5) (a) effected a "legislative repeal" of agency's prior



procedural rules). When the Uniform Rules went into effect on July 1, 1998, Rule 25-22.036(3) became invalid.

Rule 25-22.036(3) is also invalid for a number of specific reasons. First, the PSC has failed to follow "the applicable rulemaking procedures or requirements set forth" in chapter 120, Florida Statutes. § 120.52(8)(a), Fla. Stat. Section 120.54(5) specifically requires that the Uniform Rules of Procedure apply as the rules of procedure for the PSC unless the PSC has obtained an exception that would allow it to use one of its own rules to govern its procedures. When the Administration Commission denied the PSC's request for an exception for Rule 25-22.036(3), the PSC was required to repeal the invalid rule or amend it to be consistent with the Administration Commission's Final Order. Its failure to do so amounts to a failure to follow applicable rulemaking requirements set forth in chapter 120, Florida Statutes. The PSC may not simply ignore the decision of the Administration Commission and retain Rule 25-22.036(3) when the express terms of that rule establish that it is invalid.

Second, Rule 25-22.036(3) is invalid because it exceeds the PSC's "grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1." § 120.52(8)(b), Fla. Stat. The PSC's grant of rulemaking authority does not extend to adopting rules that are inconsistent with the Uniform Rules of

Procedure when no exception has been granted by the Administration Commission. § 120.54(5)(a)1., Fla. Stat.

Two statutes are cited as specific authority for Rule 25-22.036(3). One of them, section 350.127(2), Florida Statutes, is nothing more than a general grant of rulemaking authority, which is "necessary but not sufficient to allow an agency to adopt a rule . . ." § 120.52(8), Fla. Stat. The other, section 350.01(7), provides that "[t]his section does not prohibit a commissioner, designated by the chair, from conducting a hearing as provided under s. 120.569 and 120.57(1) and the rules of the commission adopted pursuant thereto." Nothing in section 350.01(7) provides authority for the Commission to initiate a proceeding designed to determine substantial interests by issuing an order or notice upon its own motion. Rather, initiation of proceedings is a matter governed by the Uniform Rules of Procedure. § 120.54(5)(a); r. 28-106.201(1). Thus, Rule 25-22.036(3) exceeds the rulemaking authority granted by its enabling statutes.

Third, Rule 25-22.036(3) is invalid because it "enlarges, modifies, or contravenes the specific provisions of law implemented." § 120.52(8)(c), Fla. Stat. (1999). The rule enlarges, modifies, or contravenes section 120.569, which is among the statutes listed as "law[s] implemented" by the rule. Section 120.569(2), which establishes procedures for formal

judicial scrutiny [and therefore, is invalid under section 120.52(8)(d), Florida Statutes].

Cortes v. State Board of Regents, 655 So. 2d 132, 138 (Fla. 1<sup>st</sup> DCA 1995). By allowing the Commission to "issue an order or notice initiating a proceeding" "upon its own motion," Rule 25-22.036(3) clearly "creates discretion not articulated in" any of the statutes it purportedly implements, and it specifies no basis upon which it will exercise that discretion. Cortes, 655 So. 2d at 138. Therefore, it confers unbridled discretion and should be invalidated under section 120.52(8)(d), Florida Statutes.

Fifth, Rule 25-22.036(3) is invalid because it is "arbitrary or capricious." § 120.52(8)(e), Fla. Stat. (1999). A capricious action is one taken without thought or reason or which is taken irrationally. An arbitrary action is one that is not supported by facts or logic or that is despotic. Agrico Chemical Co. v. Department of Env'tl. Regulation, 365 So. 2d 759 (Fla. 1<sup>st</sup> DCA 1979), cert. denied, 376 So. 2d 74 (Fla. 1979). By its plain language, Rule 25-22.036(3) allows the PSC to initiate a formal proceeding on any subject in which it may both identify and take final agency action that determines substantial interests. Such power is arbitrary because it is not supported by facts or logic and it is lacking in thought or reason, which makes it capricious. Such power also utterly ignores the decision of the Administration

Commission to deny the requested exception to the Uniform Rules of Procedure for Rule 25-22.036(3).

This rule also is arbitrary in that it allows the PSC to initiate a proceeding designed to determine substantial interests by simply issuing an order or notice upon its own motion, which is despotic. "Despotic" is defined as "characteristic of a despot." Merriam Webster's Collegiate Dictionary 314 (10<sup>th</sup> ed. 1997). "Despot" is defined as "a ruler with absolute power and authority; a person exercising power tyrannically." Id. This characterization clearly applies to an agency such as the PSC that claims the power to initiate a formal proceeding that will affect the substantial interests of regulated persons simply by issuing an order or notice upon its own motion without any basis in law and contrary to the law.

Because the rule is an invalid exercise of delegated legislative authority for the reasons stated, the administrative law judge's dismissal of FPL's petition should be reversed, and Rule 25-22.036(3), Florida Administrative Code, should be declared invalid.

**III. THE ADMINISTRATIVE LAW JUDGE IMPROPERLY DISMISSED FPL'S PETITION.**

Section 120.56(1)(a), Florida Statutes, allows "[a]ny person substantially affected by a rule [to] seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." Section 120.56(3) provides that a substantially affected person may seek an administrative determination that the rule is invalid "at any time during the existence of the rule."

FPL brought its rule challenge proceeding following the PSC's assertion that Rule 25-22.036(3) provided authority for the agency, on its own motion, to initiate a proceeding designed to identify and effectuate agency action affecting FPL's substantial interests. Facts related to this assertion and the context in which it arose were included in FPL's petition.

The administrative law judge dismissed FPL's petition based on his conclusion that the "gravamen of FPL's complaint is that the PSC has used the rule in an erroneous way," which he said does not invalidate the rule. (R. 329.) Judge Alexander stated:

Since at least 1984, the courts have held that "the remedy for an erroneous application of [a rule] is a proceeding pursuant to Section 120.57." Hasper v. Dep't of Admin., 459 So. 2d 398, 400 (Fla. 1<sup>st</sup> DCA 1984). See also Beverly Health and Rehabilitative

Servs., Inc. v. Agency for Health Care Admin., 708 So. 2d [616] (Fla. 1<sup>st</sup> DCA 1998) (where the substance of a rule challenge is to attack the application of a rule, dismissal of the petition is appropriate).

The fact that an agency may wrongfully or erroneously apply [a rule] in any given situation does not invalidate the [r]ule." Hasper at 400. Thus, accepting as true FPL's allegation that the PSC has erroneously used the rule in lieu of the Uniform Rules of Procedure, this does not invalidate the regulation.

(R. 330 (alteration in original).)

This dismissal was improper. Although the administrative law judge correctly noted that FPL's petition contained an explanation of how the PSC applied Rule 25-22.036(3), this information was included in the petition to establish that FPL was substantially affected by the rule as required by section 120.56(1)(b), Florida Statutes ("petition . . . must state . . . facts sufficient to show that the person challenging a rule is substantially affected by it . . ."). See also r. 28-106.201(2)(b) (petition must include "an explanation of how the petitioner's substantial interests will be affected").<sup>3</sup>

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<sup>3</sup> An agency's application of a rule to a particular party frequently serves as impetus for a challenge to the rule. See, e.g., Lanoue v. Florida Department of Law Enforcement, 25 Fla. L. Weekly D76 (Fla. 1<sup>st</sup> DCA December 29, 1999) (rules relating to inspection procedures and the calibration of machines that test breath-alcohol levels were challenged by individual whose breath was tested using machines and who was subsequently charged with driving under the influence as a result of that test); North American Publications v. Department of Revenue, 436 So. 2d 954, 955 (Fla. 1<sup>st</sup> DCA 1983) (rule defining newspaper for purposes of sales tax exemption was challenged by publication that was

Judge Alexander's determination that a rule challenge proceeding is inappropriate when an existing rule is being applied to a substantially affected person effectively nullifies section 120.56(3), which provides that a rule may be challenged "at any time during the existence of the rule." Moreover, the availability of an appeal after conclusion of a 120.57 proceeding does not preclude a substantially affected party from challenging a rule. In Department of General Services v. Willis, 344 So. 2d 580, 590 (Fla. 1<sup>st</sup> DCA 1977), this Court recognized that the APA contains an "impressive arsenal of varied and abundant remedies for administrative error."

Nothing in the APA suggests that rule challenges and appeals from section 120.57 adjudicatory proceedings are mutually exclusive. Rather, section 120.56(3), by providing

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denied exemption and its validity was upheld), review denied, 449 So. 2d 265 (Fla. 1984); Department of Ins. v. Insurance Servs. Office, 434 So. 2d 908, 910 (Fla. 1<sup>st</sup> DCA 1983) (rule prohibiting auto insurance rates based on sex, marital status and scholastic achievement was challenged by insurance companies to which it was applied and was invalidated), review denied, 444 So. 2d 416 (Fla. 1984); Department of Health & Rehabilitative Servs. v. McTigue, 387 So. 2d 454, 456 (Fla. 1<sup>st</sup> DCA 1980) (rule requiring applicant for licensure as a lay midwife to submit written statement from Florida physician documenting experience and to submit names of patients involved was challenged by applicant and was invalidated).

Moreover, in United Health, Inc. v. Department of Health & Rehabilitative Servs., 579 So. 2d 342, 343 (Fla. 1<sup>st</sup> DCA 1991), this Court noted that a party to whom a rule is applied may need to question the validity of the rule in a rule challenge proceeding to obtain complete relief.

that a substantially affected person may challenge an existing rule "at any time during the existence of the rule," contemplates that rule challenges may be brought in addition to other administrative proceedings.

The administrative law judge's dismissal of FPL's petition on the authority of Hasper v. Department of Administration, 459 So. 2d 398 (Fla. 1<sup>st</sup> DCA 1984) and Beverly Health & Rehabilitative Services v. Agency for Health Care Administration, 708 So. 2d 616 (Fla. 1<sup>st</sup> DCA 1998) should be reversed. Neither Hasper nor Beverly Health provide authority for dismissing this petition without ruling on the validity of Rule 25-22.036(3).

In Beverly Health, this Court upheld the dismissal of a rule challenge petition because, based on the face of the petition, it was clear that "appellant [was] not seeking to determine whether Rule 59A-4.128 constitute[d] an invalid exercise of delegated legislative authority as contemplated by section 120.56(1)." 708 So. 2d at 616. Rather, the petition challenged "an allegedly unwritten AHCA rule which modified Rule 59A-4.128, or challenge[d] Rule 59A-4.128 as it is being applied." Id. Thus, Beverly Health relates at least in part to a nonrule policy challenge, which is not at issue in this case. FPL's petition clearly challenged the facial validity



of Rule 25-22.036(3), and Beverly Health provides no authority for dismissal of FPL's rule challenge petition.

Hasper involved a public employee who had been fired pursuant to a rule that allowed the termination of a Senior Management Service appointee "by any appropriate means" and "at any time." 459 So. 2d at 399. The employee challenged the rule, alleging that it conflicted with statutory authority because it did not restrict an agency's authority to summarily terminate a senior management appointee. Id. In ruling on this petition, the hearing officer stated that although the question of whether or not the termination was proper could only be raised in a section 120.57(1) proceeding, the employee was entitled to a declaration of the validity of Rule 22SM-1.12 because she had shown that she was substantially affected by it. Id. (emphasis added).

The hearing officer then proceeded to analyze the rule's validity, ultimately concluding that the rule did not extend, modify, or conflict with the statute implemented. Id. at 400. This Court agreed with the hearing officer's conclusions and affirmed.

This case differs from Hasper. Here, the administrative law judge dismissed FPL's petition without ruling on the merits, stating that "[t]he fact that an agency may wrongfully

or erroneously apply [a rule] in any given situation does not invalidate the [r]ule." (R. 330.)

The administrative law judge's statement misses the point. The APA without question provides a procedure in section 120.56 for challenging a rule when it constitutes an "invalid exercise of delegated legislative authority." FPL petitioned for an order invalidating Rule 25-22.036(3) on proper grounds detailed in section 120.52(8). (R. 8.) FPL's petition included an explanation of the PSC's use and application of the rule to demonstrate that FPL was substantially affected by it, as required by section 120.56(1), Florida Statutes.

The administrative law judge below also relied on the following statement from Hasper to dismiss this case: "The remedy for an erroneous application of [a rule] is a proceeding pursuant to Section 120.57, Florida Statutes." Again, this statement does not provide authority for the dismissal of this case. The statement in Hasper was made to clarify that a rule challenge proceeding does not provide a petitioner with substantive relief from final agency action. This intent is clear from the Hasper hearing officer's next statement, which was that "[t]he outcome of this proceeding could not result in the automatic reinstatement of an employee." Id. at 400.

This Court confirmed that intent in Greynolds Park Manor v. Department of Health & Rehabilitative Services, 491 So. 2d 1157, 1159 (Fla. 1<sup>st</sup> DCA 1986), where it stated: "The [Hasper] court held that the rule challenge was not the forum in which to litigate her entitlement to the job and that, based on the agency's reliance on the challenged rule to fire her, she was 'substantially affected' and entitled to a determination of its validity or not."

This Court's decision in Ramadanovic v. Department of Corrections, 575 So. 2d 1333 (Fla. 1<sup>st</sup> DCA 1991), also demonstrates that the dismissal of FPL's petition was improper. In Ramadanovic, an inmate filed a section 120.56 petition challenging the validity of two rules that governed when an inmate in disciplinary confinement could prepare legal documents and legal mail. The inmate's petition explained how the rules had been applied to him. The petition was dismissed by the Division of Administrative Hearings because the petitioner was objecting to "the application of the rule to his particular situation." Id. at 1334-35. This Court reversed, stating that Ramadanovic's allegation that the challenged rules had been applied to him did not warrant dismissal because these allegations amounted to "no more than he must allege to meet the requirements of section 120.56(2)." Id. at 1335.

This Court's reasoning in Ramadanovic applies to the instant case. Allegations regarding the PSC's application of Rule 25-22.036(3) to FPL were included in FPL's petition to demonstrate standing, not to form the basis for the invalidation of the rule. As a substantially affected person, FPL is entitled to challenge an existing rule "at any time during the existence of the rule." Thus, once FPL demonstrated standing, it was entitled to a hearing on whether Rule 25-22.036(3) was an invalid exercise of delegated legislative authority pursuant to section 120.52(8), Florida Statutes.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Initial Brief was served by U.S. Mail this 11<sup>th</sup> day of February, 2000, to the following:

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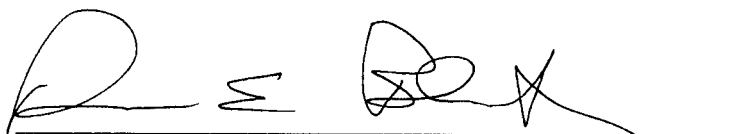
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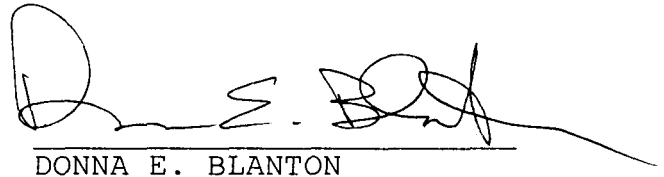
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I HEREBY CERTIFY that the text and all footnotes of Initial Brief of Florida Power & Light Company was typed using 12 point Courier New font and was fully justified. A three-and-a-half inch disk with a copy of Initial Brief of Florida Power & Light Company has been furnished to the First District Court of Appeal.



DONNA E. BLANTON