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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE: DOCKET NO. 000533-PU - Proposed repeal of rule
25-22.036(3), F.A.C., Initiation of Formal
Proceedings.

BEFORE: CHAIRMAN JOE GARCIA
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER E. LEON JACOBS, JR.
COMMISSIONER LILA A. JABER

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 3**

DATE: Tuesday, May 16, 2000

PLACE: 4075 Esplanade way, Room 148
Tallahassee, Florida

REPORTED BY: MARY ALLEN NEEL
Registered Professional Reporter

ACCURATE STENOGRAPHY REPORTERS
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(850)878-2221

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PARTICIPANTS:

MATTHEW CHILDS, Steel, Hector & Davis, on behalf of Florida Power and Light Company.

MARY ANNE HELTON, Commission Staff.

STAFF RECOMMENDATION

Issue 1: Should the Commission propose the repeal of Subsection (3) of rule 25-22.036, F.A.C., Initiation of Formal Proceedings?

Recommendation: Yes. The Commission should repeal Subsection (3) of Rule 25-22.036, F.A.C., Initiation of Formal Proceedings.

Issue 2: Should this docket be closed?

Recommendation: Yes. If no comments are filed, the rule amendment as proposed should be filed for adoption with the Secretary of State and the docket closed.

1 COMMISSIONER DEASON: I believe we revert
2 back to our normal schedule, and I believe that
3 would be Item 3.

4 CHAIRMAN GARCIA: Staff?

5 MS. HELTON: Commissioners, Staff
6 recommends that you repeal subsection (3) of
7 Rule 25-22.036. This rule provides that upon
8 its own motion, the Commission may issue an
9 order or notice to initiate a proceeding. Staff
10 believes that this rule is unnecessary. We have
11 the requisite statutory authority in our organic
12 statutes, and that's all that we need.

13 I believe that Mr. Childs is here on speak
14 on this.

15 CHAIRMAN GARCIA: Mr. Childs is here to
16 impart wisdom, as he usually does. Mr. Childs.

17 MR. CHILDS: Good morning, Commissioners.
18 We have appealed the Commission's rule
19 that's the subject of this recommendation. There
20 is currently an appeal pending before the First
21 District Court of Appeal. Briefs have been
22 filed, and argument is scheduled for the 25th of
23 July, I believe.

24 This case arose, or the challenge to the
25 rule arose out of the initiation of a proceeding

1 by the Commission last year in what I call the
2 reserve margin docket, and we raised an issue
3 that we believe that the uniform rules of
4 procedure and the amendments to the
5 Administrative Procedure Act totally occupied
6 the field as to how proceedings were to be
7 initiated, that this Commission had sought a
8 waiver, or actually an exception for this
9 particular rule, and that had been denied.

10 Nevertheless, there continued to be a
11 dispute as to our position, staff taking the
12 position that the rule was valid, and we have
13 appealed it.

14 At this stage -- and I want to characterize
15 it this way. At this stage, we are in -- I
16 think almost to the point of having some
17 judicial review and an answer to the question of
18 whether this Commission can initiate a
19 proceeding, as has been proposed and as you did
20 in the reserve margin docket.

21 We did participate in the workshop on this
22 rule, and one of the questions we asked was -- I
23 wasn't there, but an associate from my office
24 was -- was do you have any internal memoranda
25 analyzing this issue, and the answer was no.

1 I go to the recommendation and the staff
2 analysis which is on page 2 under the quotation
3 of the rule, and the only thing I see there is
4 the sentence at the top which simply makes the
5 assertion that the rule is unnecessary, since
6 various sections of the Florida Statutes give
7 the Commission authority to initiate proceedings
8 on its own motion. And that's what I was asking
9 for in terms of any discussion or internal
10 memoranda.

11 Then if you go to the last sentence, the
12 staff has characterized the rule that's at issue
13 as simply providing information about the
14 procedure the Commission will follow when
15 initiating a proceeding.

16 with all due respect, I would suggest that
17 is not what the Commission did. The Commission
18 relied upon the rule as authority. It relied
19 upon the rule and the challenge of it initially
20 when we had a rule challenge proceeding, and has
21 relied upon the rule and continues to assert
22 that it's valid before the First DCA.

23 I'm not here to urge you to retain the very
24 rule that we're challenging, not at all. On the
25 other hand, I want you to know that we want to

1 call this to your attention. And we also
2 believe that what we've done is, we've hidden
3 the ball.

4 By characterizing this as the rule that
5 simply provides information about the procedure
6 the Commission will follow, and therefore you
7 can eliminate it, and therefore you can rely
8 upon your statute, not only does it ignore your
9 past practice, I think it ignores practicality
10 in this way: The uniform rules -- excuse me.
11 The Administrative Procedure Act, 120.545(1) and
12 (2) state what the rules of procedure are to be
13 in the future. And it states in part in
14 subsection (1), "The uniform rules shall be the
15 rules of procedure for each agency subject to
16 this chapter unless the Administration
17 Commission grants an exception." There was no
18 exception granted.

19 subsection (2) of that says in part, "The
20 Commission shall approve exceptions to the
21 extent necessary to implement other statutes."
22 well, conceivably these other statutes that have
23 been identified by staff are what you will
24 implement.

25 COMMISSIONER CLARK: Mr. Childs, are you

1 saying that we need to clarify whether or not
2 our statutes granting us the authority to do
3 things by our own motion have been invalidated
4 by the Administrative Procedures Act?

5 MR. CHILDS: I think you do. And also,
6 Commissioner, I think that -- I believe the
7 argument before you with respect to Staff begs
8 the question somewhat, because the rule that
9 they're saying is unnecessary, that rule
10 identifies as one of the statutes being
11 implemented the very statute that they now tell
12 you gives you independent authority to proceed.
13 I think we have a circle.

14 I think it's helpful, particularly when
15 we're this far along, to not leave this question
16 pending and say, "well, we'll wait until this
17 happens again, and if you don't like it, then
18 you can take an appeal."

19 COMMISSIONER CLARK: well, it has become
20 moot, Mr. Childs. I mean, I don't see any
21 reason --

22 MR. CHILDS: I beg your pardon?

23 COMMISSIONER CLARK: It has become moot if
24 we repeal the rule, and also --

25 MR. CHILDS: I think -- I anticipate that

1 if the rule is repealed that I will see a filing
2 with the Court saying to the Court that -- the
3 suggestion that the issue is moot, absolutely.

4 COMMISSIONER CLARK: And why shouldn't we
5 do that? why shouldn't we wait until we do have
6 a continuing case or controversy that the Court
7 can decide that has meaning so you have vigorous
8 debate on it rather than an academic question?

9 MR. CHILDS: No, I think you have vigorous
10 debate on it already, and the vigorous debate
11 has been ongoing for some time.

12 COMMISSIONER CLARK: But the substantive
13 case has been dealt with. The margin reserve
14 docket has been dealt with.

15 MR. CHILDS: That case was settled.

16 COMMISSIONER CLARK: Right.

17 MR. CHILDS: But the issue challenged,
18 Commissioner, the issue challenged was whether a
19 proceeding may be initiated at the sole
20 discretion of the Commission, and not that you
21 open a docket, not that you say we're interested
22 in something. We're not challenging the
23 authority of the Commission to consider matters
24 in its jurisdiction.

25 we're challenging the procedure whereby it

1 was one where there's no disclosure of what the
2 proposed action is, there's no disclosure of the
3 basis for that action, and that the
4 Administrative Procedure Act and the uniform
5 rules speak to there being petitions, or the
6 agency simply acting, the agency acting, and
7 then there's a challenge to that action in a
8 proceeding by a party who's affected by the
9 Commission's action. And we were saying to the
10 Commission, with all due respect, we don't think
11 you should pursue free form proceedings like
12 this.

13 We have gone through reconsideration with
14 the Commission. We have now had an appeal, and
15 it's ready to be argued, and we think that it's
16 very helpful to have that addressed as opposed
17 to saying, well, maybe we'll start over and
18 leave this potential challenge in the future,
19 which can only be raised at the time the
20 proceeding is over and there's an appeal taken
21 from Commission action.

22 COMMISSIONER CLARK: You want, in effect, a
23 declaratory statement from the Court.

24 MR. CHILDS: Well, I wanted -- I guess what
25 I wanted was a challenge to the Commission's

1 rule. And, yes, I'm not -- well, I'm not making
2 an argument here that it ought to artificially
3 be there. This is what the Commission Staff has
4 asserted repeatedly to the Court, that the rule
5 is valid.

6 CHAIRMAN GARCIA: Okay.

7 COMMISSIONER JABER: I would like to ask a
8 couple of questions.

9 Mr. Childs, you made the argument that the
10 petition filed by the Commission for an
11 exception was denied, of this rule; correct?

12 MR. CHILDS: Yes.

13 COMMISSIONER JABER: Do you know why the
14 petition for exception as it related to this
15 rule was denied?

16 MR. CHILDS: I will characterize it -- and
17 I'm going to paraphrase it, because there were
18 about four or five draft orders relating to that
19 exception. There were some letters from the
20 Commission staff attorney about the --
21 characterizing the rule. One of them was a
22 statement to the effect that the rule was
23 outside the scope of the uniform rules because
24 it covered matters preliminary to the action by
25 the Commission that would affect substantial

1 interests, which I take to be something in the
2 nature of to determine probable cause or to
3 determine an investigation. So there was that
4 characterization.

5 And as I read -- and I've gone through and
6 read all of them, and we've cited these to the
7 Court, that ultimately the drafter of the order
8 accepted that characterization as this section
9 being outside the scope of the uniform rules.

10 However, when they were applied in the
11 reserve margin docket, they were applied
12 precisely so as to cover the same subject. And
13 in fact, in your order in that docket, the
14 assertion was that the Commission must read that
15 rule of procedure that is the one at issue here
16 and the uniform rules in conjunction. So that
17 is the fundamental conflict that I'm concerned
18 about.

19 COMMISSIONER JABER: Commissioners, I would
20 like to --

21 COMMISSIONER CLARK: I think the conflict
22 you want resolved now is whether 120 has usurped
23 our authority, specific authority in the
24 statutes, not the rule.

25 MR. CHILDS: I'll tell you what I wanted to

1 ask you for and what I'm trying to ask you for
2 here. It seems to me that this is precipitous
3 at this time.

4 I read this recommendation -- as I told
5 you, we asked for any memoranda from the Staff
6 on the subject and were told there weren't any.
7 I read the recommendation before you, if you
8 turn the page, the next page, staff analysis,
9 and it says that since this is a rule of
10 procedure, you're not required to have a
11 hearing. And as I've said, I anticipate that if
12 you vote this that there will be a filing with
13 the Court saying -- a suggestion that the issue
14 is moot.

15 And it just seems to me, Commissioner, that
16 it's precipitous to go this way without spending
17 some more time on what I think is a very
18 important matter of procedure. It's very costly
19 to go forward with a proceeding and then have an
20 appeal at the end because there's a procedural
21 defect or a perceived procedural defect.

22 COMMISSIONER JABER: Commissioners, can I
23 provide some sort of historical perspective? As
24 you all know, I was involved to a degree, to a
25 great degree, I think, with the drafting of the

1 petition for the uniform rules and went to every
2 meeting with the Administration Commission
3 staff. And I can tell you personally that it
4 wasn't our idea to say that the rule was outside
5 the uniform rules.

6 As a matter of fact, you may recall that we
7 had trouble even applying the uniform rules to
8 this agency. And we took the approach from a
9 staff level, and you all agreed, that we would
10 keep -- we would try to keep every procedural
11 rule at the Commission, so we went about the
12 business of filing a petition for exceptions.

13 It was the Administration staff, the
14 Administration Commission staff that said to us,
15 "well, you don't need an exception for this
16 rule, because it falls outside the scope of the
17 uniform rules." saying that, they gave us the
18 heads-up that they would deny our petition in
19 that regard.

20 I'm ready to move Staff, knowing that. But
21 the other reason I'm comfortable moving Staff is
22 I don't think repealing this rule undermines the
23 appeal, because quite frankly, I was very
24 concerned about how this looked. I didn't want
25 to repeal the rule at this stage. But I'm

1 comfortable doing it, because I know that the
2 rule is unnecessary. We should always fall back
3 on statutory authority. We shouldn't cite the
4 rule if we have a statute.

5 MR. CHILDS: Absolutely.

6 COMMISSIONER JABER: So I can move Staff.

7 COMMISSIONER CLARK: Let me just ask a
8 question. When you said they saw it as being
9 outside the uniform rules, do you mean they said
10 it wasn't superseded, it was just applied to a
11 different process?

12 COMMISSIONER JABER: That's right. It
13 applies to the agency. They took the view that
14 this rule -- and correct me if I'm wrong, Mary
15 Anne, because you were there as well. But they
16 took the view that this rule was really
17 information for what the agency could do, and
18 the uniform rules were designed to address
19 substantial interests of a party, and they said,
20 "Agency, you've got this authority." As a
21 matter of fact, they even made some statement
22 about the rule being repetitive.

23 But you need to remember the mind-set. We
24 didn't -- we thought the agency, and I still
25 believe this agency is unique in its procedural

1 rules, so we wanted an exception for everything
2 we had in 25-22 that didn't look like, smell
3 like something that the uniform rules had.

4 COMMISSIONER CLARK: I have another
5 question. If we didn't repeal this rule, why
6 hasn't there been a motion to dismiss the case?

7 MS. HELTON:-- I included a motion to dismiss
8 the case in my appeal, in the answer brief.

9 COMMISSIONER CLARK: Because the case that
10 it arose out of has been settled.

11 MS. HELTON: And I raised just exactly that
12 point with that Court.

13 COMMISSIONER CLARK: So the fact that we're
14 repealing the rule to me is sort of --

15 MS. HELTON: And if I could make one thing
16 clear also, there has not actually been a rule
17 challenge at DOAH. We filed a motion to dismiss
18 the rule challenge, which the judge granted on
19 the basis that FPL was challenging the
20 application of the rule and not the validity of
21 the rule on its face. So that is the order that
22 is being appealed at the First DCA.

23 CHAIRMAN GARCIA: Okay. We have a motion.
24 Is there a second?

25 COMMISSIONER JACOBS: Second.

1 CHAIRMAN GARCIA: There being a second --

2 COMMISSIONER JACOBS: I would second based
3 on the rationale given by Commission Jaber. I
4 don't think it undermines the company's ability
5 to appeal, if that was their view. They're
6 looking to say that our application of this rule
7 has some detrimental effect on their interests
8 in a particular case, and it was the rule as it
9 existed at that time that the controversy arose;
10 isn't that correct, Staff?

11 COMMISSIONER CLARK: But I don't see why
12 we're even going forward now. I mean, the
13 controversy itself has been settled.

14 MR. CHILDS: Well, Commissioner --

15 CHAIRMAN GARCIA: We'll let the judge
16 decide that.

17 Commissioner Deason?

18 COMMISSIONER DEASON: Well, I have a
19 question for Mr. Childs.

20 CHAIRMAN GARCIA: Okay.

21 COMMISSIONER DEASON: If we repeal this
22 rule, will the appeal, which arguably is moot
23 for other reasons, would it continue or not?
24 And if it were to continue, why would it
25 continue?

1 MR. CHILDS: Well, I don't know that I -- I
2 have not fully analyzed is there any argument I
3 could make to the Court to say that the case
4 would continue. But the challenge is to the
5 rule, and if the rule cease ceases to exist,
6 it's -- you know, at least my third cut of this
7 about thinking about it is that there's no
8 subject matter for the Court to consider,
9 because the challenge goes to the existence of
10 the rule.

11 And this does relate to what Commissioner
12 Clark said, though, when she says wouldn't it be
13 moot anyway, because the substance of the matter
14 is gone. The docket has been settled. What
15 we're proceeding under is the Administrative
16 Procedure Act, which permits the challenge of an
17 agency rule.

18 COMMISSIONER JABER: But aren't you
19 appealing the DOAH hearing officer's ruling?
20 You're no longer appealing the validity of the
21 rule. You are now appealing the DOAH hearing
22 officer's ruling; is that correct?

23 MR. CHILDS: Well, we are asking -- what we
24 are asking now -- first of all, the DOAH hearing
25 officer did not rule that the rule is valid. It

1 didn't rule that at all. It ruled that we were
2 challenging the application of the rule, which
3 was what Staff argued. They were arguing that
4 we were challenging how the rule was applied,
5 and that therefore there was -- that that was
6 not a proper challenge. And the DOAH hearing
7 officer said -- he agreed with the Staff. We
8 don't think that's correct, but he did. And he
9 said, "You can appeal this when the case is
10 over. You can appeal the Commission's reliance
11 upon that rule as authority when the case is
12 over."

13 And we have gone to the First District and
14 are arguing that, first of all, that argument or
15 that conclusion was incorrect. It's not a
16 challenge to the rule on an as-applied basis,
17 and even if it is, we don't agree with the
18 rationale he advanced, meaning that we can't
19 challenge it then. But independently, under the
20 Administrative Procedure Act, people who are
21 affected are permitted to challenge agency rules
22 in instances other than when they're applied.

23 In fact, that's one of our arguments.
24 We're saying that the hearing officer said you
25 can't challenge us because it's being applied to

1 you. And our response is, wait a minute, the
2 statute says you can challenge the rule. We
3 happened to challenge it in the case it's being
4 applied to. That shouldn't be a defect. That
5 should illustrate the context in which the rule
6 was applied.

7 AS SO, you know, as I say, I'm not arguing
8 to you to retain the rule. I'm arguing to you
9 this way, that it seems premature. I mean,
10 with all due respect, I think there's an issue
11 here as to how you initiate a proceeding. I've
12 read the statutes that the Staff has identified.
13 They've been there before. They are identified,
14 at least the one in Chapter 366 that's the basis
15 for your rule.

16 COMMISSIONER CLARK: But, Mr. Childs, if we
17 are repealing the rule based on the fact that we
18 think the statute gives us the authority and we
19 don't need it, what you really want and what has
20 value for you going forward is finding out
21 whether or not the APA has superseded our
22 statute. That really doesn't have anything to
23 do with the rule, because the rule simply
24 implements the statute.

25 MR. CHILDS: Well, I don't -- Commissioner,

1 you know, I'm not quite there yet, and the
2 reason is the history of the docket. We had
3 several arguments to the Commission about how it
4 was applied. It was not -- this rule was not
5 identified as merely a reflection and
6 recognition of the statutory authority of the
7 Commission. In fact, that was expressly
8 argued. It was identified by the Commission as
9 the basis for going forward, not as a
10 recognition.

11 And in the Order on Reconsideration -- and
12 this is what we have before the Court,
13 Commissioner. In the Order on Reconsideration,
14 this Commission characterized its rule not
15 merely as some sort of a recognition of an
16 underlying statutory authority. It
17 characterized it as the source of authority and
18 said that the uniform rules must now be read in
19 conjunction with the Commission's rules of
20 procedure.

21 COMMISSIONER CLARK: Well, I would just
22 make two observations. If we repeal the rule,
23 then you don't have to worry about the
24 application of the rule in the future.

25 MR. CHILDS: That's true. But --

1 COMMISSIONER CLARK: So that accomplishes
2 what you were trying to do by the challenge to
3 the rule. And if it really has to do with the
4 statute and whether or not the APA supersedes
5 it, that can be left, and is appropriately left,
6 for another day when there continues to be a
7 case or controversy.

8 MR. CHILDS: Well, except that you've moved
9 it. I mean, you relied upon it. The subject of
10 the appeal were the orders of this Commission,
11 the orders of this Commission when it said what
12 its rules did and how they relied upon it, and
13 the arguments of the Staff to the Court. And
14 now the argument is, "well, we don't need the
15 rule. All the rule does is reflect the
16 statutory authority."

17 CHAIRMAN GARCIA: Okay.

18 COMMISSIONER DEASON: Mr. Chairman, I was
19 asking Mr. Childs a question, and we got other
20 questions, and I wasn't finished.

21 CHAIRMAN GARCIA: Okay. I'm sorry.

22 COMMISSIONER DEASON: But I think the
23 questions that were asked in the meantime were
24 getting to the point that I'm trying to
25 understand.

1 Mr. Childs, I'll just ask you directly. As
2 I understood your presentation, one of the bases
3 of that is that we need to try to get a
4 clarification from the appropriate entity, which
5 I assume is the Court, as to exactly what the
6 authority of the Commission is statutorily when
7 it comes to initiating an investigation or a
8 proceeding.

9 Now, my question to you is, is this the
10 appropriate vehicle to go forward with this
11 appeal on a rule, as opposed to a decision based
12 upon a statute, when the case itself has been
13 mooted by the fact that the case has been
14 settled and an acknowledgement by our staff that
15 this rule is not even needed?

16 MR. CHILDS: Commissioner, I don't think
17 the case has been mooted because the docket has
18 been settled. That's my point, that it can be
19 addressed by the Court. We argue that it can.
20 There are specific provisions in the APA that
21 permit a rule to be challenged independent of
22 it being applied. All we had with the settling
23 of that docket was that it was not being applied
24 because it had been settled as to us. But a
25 rule can be challenged -- that's what it's

1 called, a rule challenge proceeding. That's the
2 short name.

3 As to the underlying question, however, I
4 thought this was an appropriate procedure to
5 answer that question. And I think that there's
6 a very -- there's going to be a very significant
7 question, when I read simply a one-sentence
8 assertion that says in the recommendation these
9 statutes give us that authority. And when we
10 ask for the information, they haven't gotten
11 there yet. And I'm concerned that we remove the
12 vehicle to answer that question without really
13 providing much additional explanation of what
14 the Commission can do.

15 MS. HELTON: May I address that for just
16 one minute? I have never done any independent
17 analysis other than what's in the recommendation
18 and other than what's in my 30- or 40-page brief
19 that I filed with the First DCA. And the points
20 that are raised in my recommendation I discussed
21 with Ms. Blanton at our workshops, so I really
22 don't understand what Mr. Childs is getting at.

23 MR. CHILDS: Well, all I'm getting at --
24 I'm not suggesting that there is anything there
25 that's not produced. All I'm suggesting is that

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the only rationale I see for doing this is one sentence, and I'm looking for more legal analysis, that's all.

CHAIRMAN GARCIA: All right. That said, we have a motion and a second. All those in favor signify by saying "aye."

COMMISSIONER JACOBS: Aye.

COMMISSIONER DEASON: Aye.

COMMISSIONER CLARK: Aye.

COMMISSIONER JABER: Aye.

CHAIRMAN GARCIA: All opposed?

Very good. Show it passing 5-0.

Thank you, Mr. Childs. Thank you, Ms. Helton.

(Conclusion of consideration of Item 3.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, MARY ALLEN NEEL, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter transcribed under my supervision; and that the foregoing pages numbered 1 through 24 are a true and correct transcription of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, or relative or employee of such attorney or counsel, or financially interested in the action.

DATED THIS 25th day of May, 2000.



MARY ALLEN NEEL, RPR
100 Salem Court
Tallahassee, Florida 32301
(850) 878-2221