State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: APRIL 11, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BELLAK) RCB DES CRB
DIVISION OF COMPETITIVE MARKETS AND ENFORCEMENT (MAKIN) JDJ
DIVISION OF ECONOMIC REGULATION (HEWITT) CBH

RE: DOCKET NO. 011368-GU - PROPOSED ADOPTION OF NEW RULE 25-7.072, F.A.C., CODES OF CONDUCT

AGENDA: APRIL 23, 2002 - REGULAR AGENDA - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

RULE STATUS: ADOPTION MAY BE DEFERRED

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\011368.RCM

CASE BACKGROUND

On February 19, 2002, the Commission voted to propose the adoption of Rule 25-7.072, F.A.C., Codes of Conduct. As noted in staff's recommendation dated February 4, 2002,

> "Section 366.05(1), Florida Statutes, provides, in pertinent part, that
>
> the Commission shall have power to prescribe fair and reasonable rates...
>
> The fairness and reasonableness of rates could be negatively affected if providers of regulated services could use regulated revenues to subsidize activities of their affiliates in competitive markets. Section 366.05(1) and 350.127(2), Florida Statutes, authorize the Commission to adopt rules, including new Rule 25-7.072,

> to implement and enforce such requirements as fair and reasonable rates.
>
> . . .
>
> The ratepayers of the gas utilities would benefit if the proposed rule prevented the subsidization of unregulated affiliates with resources derived from regulated activities."

Staff recommendation, p. 2.

Subsequent to notice of the proposed rule adoption, no requests for hearing were received, only comments recommending that a similar rule be promulgated to include electric utilities. That, in turn, reflected the participation of the few affected companies at the agenda conference and their sense that the final form of the proposed rule was appropriate. Accordingly, staff went forward with the rule adoption process.

On March 13, 2002, a letter from the Joint Administrative Procedures Committee was received asserting that the language "city gate" was unnecessarily technical or specialized language and that the Commission lacked authority under the "map-tack" provisions of Section 120.536 "to mandate how a regulated entity must staff its operations." Attachment I.

On March 22, 2002, staff responded, noting that the legislature used the words "city gates" itself in Section 368.105(3) without defining those words in Section 368.103, thus establishing "city gate" as readable and understandable for the purposes of Section 120.54(2)(b) in the context of gas company regulation.

Staff further pointed out that rates would be neither fair nor reasonable if they reflected costs expended by a utility's unregulated marketing affiliate to sell the company's energy product in competitive markets. Therefore, Rule 25-7.072, which separated employees in the regulated business from those in the unregulated sales affiliate, was necessary to implement and enforce the "fair and reasonable rates" provision of Section 366.05(1), as well as other provisions, including Section 366.07. Attachment II.

Discussions with JAPC indicated that staff's defense of the "city gates" terminology was accepted, but as indicated in JAPC's letter dated April 3, 2002, JAPC believed that

> [t]here is nothing in Section 366, F.S., that confers the power of segregation [of employees] specifically to the Commission.

On that basis, JAPC concluded that the rule was invalid. Attachment III.

On April 4, 2002, staff e-mailed a list of statutes in further support of the rule. Attachment IV.

On April 5, staff sent JAPC a response to its April 3, 2002 letter, which was, procedurally the final response required for JAPC to certify the rule for adoption. Therein, the Commission pointed out that it could "map-tack" directly from its grant of general rulemaking authority in Section 366.05.(1) to specific enabling statutes, such as the fair and reasonable rates provisions of 366.05(1) itself and 366.07 (the Commission should promulgate reasonable rules to eliminate utility practices related to excessive rates whenever found). Attachment V.

On April 8, 2002, JAPC acknowledged that all statutory criteria had been met for adoption of the rule on April 10, 2002, but that JAPC's objection remained as to its invalidity. Attachment VI.

Staff was advised to seek Commission input before proceeding to rule adoption.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission file Rule 25-7.072 for adoption despite JAPC's objections?

RECOMMENDATION: Yes, the rule should be filed for adoption.

STAFF ANALYSIS: As JAPC acknowledged, the rule has met the statutory requirements for adoption and, as noted previously, is considered uncontroversial by the regulated companies. No hearing was requested, only comments entered noting that the electric utilities should be subject to the same restrictions as well.

It appears that the application of the "map-tack" provision of Section 120.536, as well as the recent cases cited by JAPC, Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000) and State Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001), very much depends on the short-hand characterization of the rule. Here, JAPC's shorthand for Rule 25-7.072 is that "a power of segregation" is lacking in Chapter 366.

Staff's point is that the "map-tack" provision of Section 120.536, as well as the Save the Manatee Club and Day Cruise cases, all support the rule. The question is not whether JAPC's shorthand mischaracterization of Rule 25-7.072 requires a "power of segregation" to be found in Chapter 366. The question is whether the general rulemaking power can be map-tacked to specific enabling statutes. In this case, the Commission's power to implement and enforce fair and reasonable rates, as well as to issue reasonable rules governing utility practices which would otherwise cause excessive rates, both support Rule 25-7.072, which forbids co-mingling of a company's regulated operations with those of its unregulated sales and marketing affiliates. Only if a court would find that such co-mingling is not a utility practice which would lead to unfair, unreasonable and excessive rates would the rule fail the "map-tack" test. Moreover, Section 366.07 states that the Commission is to order reasonable rules governing such "excessive" utility practices "whenever" found. Therefore, the statute requires Commission action under those circumstances.

In its April 5, 2002 letter to JAPC, staff noted that economic regulatory statutes are necessarily stated in the abstract because a laundry-list of prohibitions, no matter how detailed, would invite simply more ingenious strategies of evasion. Though somewhat abstract, they are not void for vagueness, and it would seem that the Commission can enforce them through rulemaking.

Instead of a questionable analogy to the conclusions in Day Cruise and Save the Manatee, a court would be likely to apply the analysis in those cases, as well as the text of Section 120.52(8), to determine that Rule 25-7.072 is not invalid. The rule appropriately implements and enforces the power in Sections 366.05(1) and 366.07 to prescribe fair and reasonable rates and to avoid a utility practice which would cause excessive rates.

If the Commission decides to file Rule 25-7.072 for adoption, the next steps in the process would be governed by Section 120.545. At that point, JAPC would have to decide whether to object to the rule and, if so, state its reasons for objecting. Numerous opportunities are then provided for resolving the objections, at which points both JAPC and/or the Commission could revisit the issues as appropriate.

ISSUE 2: If the rule is filed for adoption, should this docket be closed?

RECOMMENDATION: Yes, the docket should be closed.

STAFF ANALYSIS: If the rule is filed for adoption, the docket may be closed.

RCB

ATTACHMENT I

JOHN M. McKAY
President

THOMAS FEENEY
Speaker

THE FLORIDA LEGISLATURE
JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

CARROLL WEBB, EXECUTIVE DIRECTOR
AND GENERAL COUNSEL
Room 120, Holland Building
Tallahassee, Florida 32399-1300
Telephone (850) 488-9110

March 13, 2002

Mr. Richard Bellak
Appeals, Rules and Mediation Bureau
Public Service Commission
2540 Shurmard Oak Boulevard
Tallahassee, Fl 32399-0850

Re: Public Service Commission Rule No.: 25-7.072

Dear Mr. Bellak:

Please allow this to acknowledge receipt of the above-referenced rule, which was published in the March 8, 2002, edition of the Florida Administrative Weekly. I have completed my initial review and have the following comments:

25-7.072(2)(c). This sub-section states:

In addition a gas utility will not share with its Marketing Affiliate any of its employees having direct responsibility for the day-to-day operations of a gas utility's transportation operations, including employees involved in:

1. Receiving transportation service requests or tariff sales requests from customers (customer service inquiry employees);

2. Scheduling gas deliveries on the gas utility's system;

3. Making gas scheduling or allocation decisions;

4. Purchasing gas or capacity; or

5. Selling gas to end users behind the city gate, and

such employees will be physically separated from the gas utility's Marketing Affiliate.

Please provide the statutory authority for this proposed amendment. The rule cites to Section 366.05(1), F.S., as specific authority, which states in part, "In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility." It does not appear that the statutory authority cited confers regulatory authority with the Commission to mandate how a regulated entity must staff its operations. Under the "map-tack" provisions of Section 120.536, F.S., it states that an agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy.

It would appear that the Commission is attempting to use the statutory language to require a gas utility to segregate its employees from its marketing affiliate. Please explain how the Commission has the authority to require this separation of employees. Section 366.05(1), F.S., does not address employment practices of regulated entities. Additionally, assuming the requisite authority exists, how would the Commission enforce this rule? What actions would the Commission take if it found a gas utility in violation of this rule?

What does the phrase, "Selling gas to end users behind the city gate," mean? Under Section 120.54 (2)(b), F.S., it requires that all rules should be drafted in readable language. The language is readable if it avoids the use of unnecessary technical or specialized language that is understood only by members of particular trades or professions. It appears that this language is some kind of short-hand for a particular selling practice and needs to be clarified.

Please do not hesitate to contact me if you have questions or comments.

Sincerely,

Matthew A. Sirmans
Chief Attorney

127348
MS/CB S:\ATTY\25-7.LTR

STATE OF FLORIDA

OFFICE OF THE GENERAL COUNSEL
HAROLD A. MCLEAN
GENERAL COUNSEL
(850) 413-6199

Public Service Commission

March 22, 2002

Mr. Matthew A. Sirmans, Esquire
Chief Attorney
Joint Administrative Procedures Committee
Room 120, Holland Building
Tallahassee, FL 32399-1300

Dear Mr. Sirmans:

This letter responds to your letter dated March 13, 2002 containing comments regarding rule subsection 25-7.072(2)(c). You ask how the Commission has the authority to require separation of a regulated local distribution gas company's employees from those of its affiliated non-regulated, competitive marketing company. You further ask how the Commission would enforce the rule and what actions would be taken against violators. Finally, you note your concern that the phrase "selling gas to end users behind the city gate" might violate the requirements in Section 120.54(2)(b), F.S. as to being readable and would apparently need to be clarified.

Taking the last point first, our conversations concerning the phrase at issue indicated that the words "city gate" were the focus of your comment. As I indicated, other words could be substituted, though requiring more time for processing the change. However, subsequent to our conversation, I discovered that the legislature also uses the words "city gates" in a related statute, Section 368.105(3), F.S. It would seem that the use by the legislature itself of the same words, where those words were not deemed to need any special definition in Section 368.103, F.S., would establish "city gate" as readable and understandable for the purposes of Section 120.54(2)(b), F.S in the context of gas company regulation.

As to the questions related to separation of employees, the explanation is inherent in the situation presented by regulated companies having non-regulated affiliates active in competitive markets adjacent to the regulated market. In this instance, the regulated companies are local gas distribution companies which distribute energy (gas molecules) which the regulated companies manufacture, as well as energy manufactured by other competitors. Thus, a given regulated company may be active in two adjacent markets. It would be a regulated monopoly in the local gas distribution market, since it would be inefficient for competitors to install duplicate distribution pipes. However, it would only be one provider among others in the competitive market for producing energy. As such, it may operate a non-regulated affiliate which markets its energy product in competition with others.

Section 366.05(1), F.S. authorizes the PSC to prescribe, inter alia, "fair and reasonable rates and charges..." Those rates are fair and reasonable in this case to the extent the monopoly provider of gas distribution service is reimbursed the cost of providing that service plus a reasonable return on the investment required to provide that service. Those rates would be neither fair nor reasonable if they also reflected costs expended by the company's unregulated marketing affiliate to sell the company's energy product in competitive markets.

Section 366.05(1), F.S. authorizes the Commission to "prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter." Requiring separation of employees in the regulated business from those in the unregulated sales affiliate is a necessary and appropriate rule to implement and enforce the "fair and reasonable rates" provision of Section 366.05(1), F.S. as well as other provisions. See, Sections 366.06(1) and (2); 366.07. Any expense from selling and marketing the company's energy products in competitive markets would be beyond the kinds of regulated charges for gas distribution service that the Commission can legally impose on ratepayers. If the location and activities of employees in the regulated and unregulated sides of the business were not separated, even heroic auditing efforts might be insufficient to assure that ratepayers were being charged only for the company's regulated service, rather than for cross-subsidizing the company's competitive sales of energy.[1] The companies subject to the rule understand that.

Violations would be addressed , as with other Commission rules, at Section 366.095. They would be discovered through auditing the company's books and operations and remedied through orders notifying the company of steps required to avoid further penalties or an order to show cause.

Please notify me if there are further questions or concerns.

Sincerely,

Richard C. Bellak
Senior Attorney

RCB

SIRMANS.RCB

[1] As we discussed, the incentive to cross-subsidize competitive activities with regulated resources are great. Therefore, experience may demonstrate that further amendments may be required.

JOHN M. McKAY
President

THOMAS FEENEY
Speaker

THE FLORIDA LEGISLATURE
JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

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Senator Ken Pruitt
Representative Nancy Argenziano
Representative Wilbert "Tee" Holloway

CARROLL WEBB, EXECUTIVE DIRECTOR
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Tallahassee, Florida 32399-1300
Telephone (850) 488-9110

April 3, 2002

Mr. Richard Bellak
Appeals, Rules and Mediation Bureau
Public Service Commission
2540 Shumand Oak Boulevard
Tallahassee, Fl 32399-0850

Re: Public Service Commission Rule No.: 25-7.072

Dear Mr. Bellak:

Thank you for your correspondence of March 22, 2002. I appreciate your response as to why the Commission is attempting to regulate the activities of the gas utilities by separating them from their non-regulated "marketing affiliates." In your correspondence, you stated,

> "Section 366.05(1), F.S., authorizes the Commission to 'prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter.' Requiring separation of employees in the regulated business from those in the unregulated sales affiliate is necessary and appropriate rule to implement and enforce the 'fair and reasonable rates' provision of Section 366.051(1), F.S. as well as other provisions."

In other words, under Section 366.05(1), F.S., the Commission may adopt a rule, which would require the restructuring of a regulated business's workplace.

In this quote above, you stated that under Section 366.05(1), F.S., the Commission has the general rule making authority, "to prescribe all rules reasonably necessary and appropriate for the administration and enforcement of this chapter." This is an incorrect citation of this statute. In response to the 1996 amendments to the APA, all broad rulemaking authority was deleted and replaced with the "map-tack" requirement of having both a law to be implemented and specific authority. The language found in Section 366.051(1), F.S., which you cite as authority, was deleted in Section 72, Ch. 98-200, Laws of Florida. It now states, that the Commission has the power, "to adopt rules pursuant to Section 120.536(1) and 120.54 to implement and enforce the provisions of this chapter."

How does this change affect the Commission's ability to adopt rules? It is this committee's position, that in light of the recent decisions rendered by the First District Court of Appeal, in Manatee Club, and Day Cruise, see infra., that the Commission must have more than a general rulemaking authority to adopt a rule; it must have delegated to it by the Legislature a specific power or specific duty to be implemented or interpreted.

The Legislature expressed a clear intent to curb agency rulemaking authority under the "map-tack," provisions of Section 120.52(8), F.S. It states:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute Section 120.52(8), F. S.

The Legislature enacted the same restrictions on rulemaking authority in Section 120.536(1), F.S. This "map-tack" paragraph has been reviewed in several opinions, since the statute was adopted in 1999.

The First District Court of Appeal first examined this paragraph in Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla.1st DCA 2000). In Manatee Club, the court recognized that the Legislature had passed the 1999 enactment in direct response to the court's interpretation of an earlier version of the "map-tack" paragraph. That previous interpretation, rendered in St Johns Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998), had held that a rule was valid "if it regulate[d] a matter directly within the class of powers and duties identified in the statute to be implemented." Id. at 80. With the 1999 revisions to the "map-tack" paragraph, the Legislature expressly had repudiated the "class of powers" test, the court explained in Manatee Club., 773 So. 2d at 599.

In applying the new standard, the court found, as an initial matter, that the language prohibiting agencies from adopting any rules except those that implement or interpret the specific powers and duties granted by the enabling statute was clear and unambiguous. Id. The court observed that, [i]n the context of the entire sentence, it is clear that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute. Otherwise, the rule is not a valid exercise of delegated legislative authority. Id. The court held:

> It follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not. [T]his question is one that must be determined on a case-by-case basis. Id. (emphasis added).

The court is clearly stating, in other words, that the enabling statute must contain (or confer) a specific power or specific duty, and the proposed rule must implement or interpret such power or duty to be valid.

The first district revisited the map-tack paragraph of Section 120.52(8), F.S., in State Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001). In reviewing the legislative history behind the 1999 amendment to the APA, the majority held:

> [I]t is now clear [that] agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.

Id. at 700 (footnote omitted; emphasis added). And further:

> The statutory provisions governing rulemaking must be interpreted in light of the Legislature's stated intent to clarify significant restrictions on agencies' exercise of rulemaking authority, and to reject the "class of powers and duties" analysis employed in Consolidated-Tomoka. If reasonable doubt exists as to the "lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." Radio Tel. Communications, Inc. v. Southeastern Tel Co., 170 So. 2d 577, 582 (Fla. 1964). Id. at 700-01 (footnote omitted; emphasis added).

Under the majority's decision in Day Cruise, a "specific statute" means that the agency must be able to identify a particular or distinctive enabling statute. An agency cannot rely upon a general grant of rulemaking authority as the only statutory authority to implement a rule.

It appears that **25-7.072(2)(c)** is based on the general rulemaking authority to prescribe "fair and reasonable rates." The Commission's position is that this is sufficient authority to adopt a rule which mandates the segregation of employees between a regulated gas utility and its unregulated marketing affiliate. However, this committees' analysis must delve further to see what specifically the Commission has been empowered to create and to see what if any, restrictions exist. There is nothing in Section 366, F.S., that confers the power of segregation specifically to

the Commission. Without a statute delegating to the Commission the specific authority to implement this type of rule, the Commission is attempting to adopt a rule which exceeds its grant of rulemaking authority and is an invalid exercise of delegated legislative authority. See Section 120.52(8)(b), F.S.

We recently received a Notice of No Change from you indicating that the Commission intends to adopt this rule on April 10, 2002. As a reminder, the Commission may not adopt a rule until it responds in writing to all written inquires made on behalf of this committee. I look forward to discussing this matter with you.

Sincerely yours,

Matthew Sirmans
Chief Attorney

Copy faxed to Mr. Richard Bellak on April 3, 2002

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Richard Bellak

From: Richard Bellak
Sent: Thursday, April 04, 2002 10:48 AM
To: 'sirmans.matthew@leg.st.fl.us'
Subject: rule 25-7.072

Here are the statutes I mentioned: 366.05(1) "prescribe fair and reasonable rates" and "adopt rules...to implement and enforce.." them.
366.05(2) no "profit or loss" from non-regulated sales to be part of "any rate to be charged for service..."
366.05(9) Commission may "require...data necessary" to preclude cross-subsidies. 366.06(1) Commission shall "determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service...which value...shall be used for ratemaking purposes..."
366.06(2) Whenever "rates yield excessive compensation for services rendered; the commission shall...promulgate rules...affecting [inter alia] facilities...used." 366.07 "Whenever...rates...for any service...or...practices...relating thereto, are...excessive...,the commission shall determine...reasonable rules...to be imposed, observed, furnished or followed in the future."
366.093(1)Commission has access to records necessary "to ensure that a utility's ratepayers do not subsidize nonutility activities."

STATE OF FLORIDA

Public Service Commission

April 5, 2002

Via Facsimile

Mr. Matthew Sirmans
Chief Attorney
Joint Administrative Procedures
Committee
Room 120, Holland Building
Tallahassee, FL 32399-1300

Dear Mr. Sirmans:

I am responding to your letter of April 3, 2002, which concludes that Commission Rule No. 25-7.072 is an invalid exercise of delegated legislative authority because it exceeds the Commission's grant of rulemaking authority. Your conclusion is based on the fact that "[t]here is nothing in Section 366, F.S., that confers the power of segregation [of employees] specifically to the Commission." You cite, in support, the Day Cruise and Save the Manatee cases.

Where I respectfully differ with your analysis is not with the cases you cite, nor with the legislative attempt to curb agency rulemaking authority under the "map-tack" provisions of Section 120.52(8), F.S. The problem is in your application of the cases and of that provision. Correctly applied, I believe they support this rule.

As I noted, economic regulatory statutes are necessarily stated in the abstract because a laundry-list of prohibitions, no matter how detailed, would invite simply more ingenious strategies of evasion. It is the abstract nature of the statutes relied on for this rule that, I believe, has led to your incorrect conclusion, whereas the statutes themselves when correctly understood, meet the test of section 120.52(8), F.S., in support of Rule 25-7.072.

First, the Commission has "a grant of rulemaking authority" as stated in Section 366.05(1):

> ...the Commission shall have power... to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement and enforce the provisions of this chapter. [e.s.]

Second, the Commission's enabling statute grants specific powers and duties that the Commission must implement and interpret. One such statute is section 366.05(1) itself, which

grants the Commission the "power to prescribe fair and reasonable rates and charges..." As I have noted previously, where a regulated utility, in this case a local gas distribution company, has an unregulated affiliate which markets the company's energy products in competitive markets, any cross-subsidization of those unregulated sales activities with regulated assets and revenues would cause the ratepayers to be paying unfair and unreasonable rates and charges. Rule 25-7.072 is designed to "implement and enforce the [fair and reasonable rates and charges] provisions of [chapter 366]" by requiring the utility to keep its unregulated operations separate from its regulated operations to preclude any cross-subsidization of the former by the latter. In effect, the general grant of rulemaking authority at the end of section 366.05(1) implements and interprets the specific power and duty granted to the Commission at the beginning of section 366.05(1) to "prescribe fair and reasonable rates and charges..." No more is required by the "map-tack" provisions of section 120.52(8), F.S. No more is required by Day Cruise or Save the Manatee, either. Your characterization of the rule as reflecting a "power of segregation not found in Chapter 366" mischaracterizes this rule. The rule derives from a power to prescribe fair and reasonable rates and charges which is found in Chapter 366 and which the Commission has the duty to implement and enforce through Rule 25-7.072.

Moreover, the legislature has made this duty clear in other provisions which I have listed previously, including section 366.07, F.S. There, the legislature requires the Commission to act "whenever" a "practice" of a public utility would result in "unjust" or "excessive" rates or charges. The co-mingling by a company of its regulated and unregulated activities would result in exactly such unjust and excessive rates and charges. Therefore, by Rule 25-7.072, the Commission has prescribed precisely the reasonable rules and regulations to be imposed, observed and followed that section 366.07 requires. The "whenever" language of section 366.07 mandates such action by this Commission and nothing in section 120.52(8), Day Cruise or Save the Manatee forbids it.

I well understand that you are on the front lines of a seismic shift in which overly expansive and permissive rulemaking by agencies is to be rolled back. However, the Commission does not regulate boats or the environment in the way the agencies in Day Cruise or Save the Manatee regulate those substantive areas. Instead, the Commission regulates monopoly providers of utility services by means of economic regulatory provisions which, though somewhat abstract, are intended to be global and evasion-proof. Instead of an analogy to the conclusions in Day Cruise and Save the Manatee, a court would, I believe, apply the analysis in those cases, as well as the text of section 120.52(8) to determine that Rule 25-7.072 is not invalid. The Commission has applied its general grant of rulemaking authority to implement and enforce a specific power and duty to prescribe fair and reasonable rates.

Moreover, it has required that a utility practice which would cause excessive and unjust rates

be avoided. In doing so, it has appropriately relied on, inter alia, sections 366.05(1) and 366.07, F.S. Though they are economic regulatory statutes and, therefore, somewhat abstract, they are not void for vagueness, and it would seem that the Commission can enforce them through rulemaking. Would a court find that co-mingling regulated and unregulated operations is not a practice by utilities which would cause rates to be excessive? That seems unlikely.

Sincerely,

Richard C. Bellak
Senior Attorney

RCB

JOHN M. McKAY
President

THOMAS FEENEY
Speaker

THE FLORIDA LEGISLATURE
JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE

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Telephone (850) 488-9110

April 8, 2002

Mr. Richard Bellak
Appeals, Rules and Mediation Bureau
Public Service Commission
2540 Shurmand Oak Boulevard
Tallahassee, Fl 32399-0850

Re: Public Service Commission Rule No.: 25-7.072

Dear Mr. Bellak:

Please allow this to acknowledge receipt of your facsimile dated April 5, 2002, in response to my April 3, 2002, correspondence. Based on your previous request for certification and your April 5, 2002, letter, you have met the statutory criteria set forth in Section 120.54(3)(e)4, F.S., and may adopt this rule on April 10, 2002, the date specified in your Notice of No Change. This certification is valid until April 17, 2002. If you would prefer to adopt this proposed rule on another date, please advise us at your earliest opportunity, so that we may process the necessary certification documents in a timely manner.

Please know that the certification only indicates that the statutory requirement for certification has been met and that you have responded to our initial inquiry. Based on all information received to date, proposed rule **25-7.072**, is an invalid exercise of delegated legislative authority and is objectionable.

Sincerely yours,

Matthew A. Sirmans
Chief Attorney

#127348
MS: C:\WATTY\25-7.LTR.