

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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COMMISSION
CLERK

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

DATE: March 25, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Cibula) *SMC PS*
Division of Economic Regulation (Slenkewicz, Hewitt) *JS*
CBH *JDJ* *TJS*

RE: Docket No. 030970-EI – Proposed amendment of Rules 25-6.014, F.A.C., Records and Reports in General; 25-6.015, F.A.C., Location and Preservation of Records; 25-6.135, F.A.C., Annual Reports; and 25-6.1351, F.A.C., Cost Allocation and Affiliate Transactions.

AGENDA: 04/06/04 – Regular Agenda – Rule Adoption – Participation is Limited to Commissioners and Staff

RULE STATUS: Adoption May Be Deferred

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030970.RCM.DOC

Case Background

On December 2, 2003, the Commission voted to propose the amendment of Rules 25-6.014, F.A.C., Records and Reports in General; 25-6.015, F.A.C., Location and Preservation of Records; Rule 25-6.135, F.A.C., Annual Reports; and Rule 25-6.1351, F.A.C., Cost Allocation and Affiliate Transactions, all of which set forth the Commission's record retention and reporting requirements for electric utilities. The purpose of the rule amendment was to update the rules to reflect the changes in the federal requirements that are incorporated into the Commission's rules.

The Commission published its Notice of Proposed Rulemaking in the December 19, 2003, Florida Administrative Weekly. Although the Commission did not receive any requests for hearing on the proposed rule amendments, the staff of the Joint Administrative Procedures Committee (JAPC) submitted comments (Attachment B) on the proposed rules.

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FPSC-COMMISSION CLERK

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This recommendation addresses whether the Commission should make changes to proposed Rule 25-6.015 based on JAPC staff's comments. As Rules 25-6.014, 25-6.135, and 25-6.1351 required no substantive changes, these rules were filed with the Secretary of State for adoption on March 10, 2004, and will be effective on March 30, 2004. The Commission has rulemaking authority pursuant to sections 120.54, 366.05, 366.08, and 366.093, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission adopt changes to proposed Rule 25-6.015, F.A.C., Location and Preservation of Records, to address JAPC staff's comments?

Recommendation: Yes. The Commission should adopt proposed Rule 25-6.015 with changes, as set forth in Attachment A. (CIBULA, SLEMKEWICZ, HEWITT)

Staff Analysis: As stated in the case background, the Commission voted to propose amendments to Rules 25-6.014, 25-6.015, 25-6.135, and 25-6.1351 on December 2, 2003. By letters dated January 20 and February 2, 2004, JAPC staff provided comments on the proposed rule amendments.

Specifically, JAPC staff commented on proposed Rule 25-6.015. The Commission proposed amendments to Rule 25-6.015(3) to update the rule so that it refers to the most recent version of the Code of Federal Regulations, as shown on page 5, line 24. The proposed amendments also set forth six exceptions to the record retention periods required by the Code of Federal Regulations, as shown on page 6, lines 6-17, to account for the time period between rate proceedings, audits, and other matters before the Commission which require a longer retention period than set forth under federal law. JAPC staff provided no comments on this portion of the rule amendment proposal.

JAPC staff's comments pertain to the third sentence of Rule 25-6.015(3)(b), page 6, line 24, which states that the Commission may waive the requirement that documents be retained in their original form. JAPC staff indicated that this sentence of the rule fails to set forth adequate standards as to whether a waiver will be granted. Staff counsel responded to JAPC staff that the rule sets forth the criteria for granting a waiver -- a showing that the company employs a storage and retrieval system that consistently produces clear, readable copies that are substantially equivalent to the originals, and clearly reproduces handwritten notations on documents. JAPC staff, however, responded that the use of the word "may" gives the Commission too much discretion and that the rule is objectionable and should be changed.

Staff, thus, recommends that the sentence be changed to state:

The Commission will ~~may~~ waive the requirement that documents be retained in their original form upon a showing by a utility that it employs a storage and retrieval system that consistently produces clear, readable copies that are substantially equivalent to the originals, and clearly reproduces handwritten notations on documents.

JAPC staff has indicated to Commission staff counsel that this change would alleviate its concerns with the rule.

Staff notes that JAPC staff also commented on Rule 25-6.1351(5), Florida Administrative Code. Proposed Rule 25-6.1351(5) stated that Form PSC/ECR/101 is incorporated by reference into "this rule," referring to Rule 25-6.1351(5). JAPC staff commented that Form PSC/ECR/101 is actually incorporated into Rule 25-6.135 and that Rule 25-6.1351(5) should be corrected to

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reflect such. This technical correction was made, and Rule 25-6.1351 was filed for adoption with the Secretary of State on March 10, 2004, along with Rules 25-6.014 and 25-6.135.

Based on the foregoing, staff recommends that the Commission adopt proposed Rule 25-6.015 with changes, as set forth in Attachment A.

Issue 2: Should the rule be filed for adoption with the Secretary of State and the docket closed?

Recommendation: Yes. A Notice of Change should be published in the Florida Administrative Weekly. After the Notice of Change is published, the rule may be filed for adoption with the Secretary of State and the docket should be closed. (CIBULA)

Staff Analysis: If the Commission approves the change to Rule 25-6.015 as set forth in Issue 1, a Notice of Change must be published in the Florida Administrative Weekly. After the notice is published, the rule may be filed for adoption with the Secretary of State and the docket should then be closed.

1 **25-6.015 Location and Preservation of Records.**

2 (1) All records that a utility is required to keep by reason of these or other rules
3 prescribed by the Commission shall be kept at the office or offices of the utility within this
4 state, unless otherwise authorized by the Commission.

5 (2) Any utility that keeps its records outside of the state shall reimburse the
6 Commission for the reasonable travel expense incurred by each Commission representative
7 during any review of the out-of-state records of the utility or its affiliates. Reasonable travel
8 expenses are those travel expenses that are equivalent to travel expenses paid by the
9 Commission in the ordinary course of its business.

10 (a) The utility shall remit reimbursement for out-of-state travel expenses within 30
11 days from the date the Commission mails the invoice.

12 (b) The reimbursement requirement in subsection (2) shall be waived:

13 1. For any utility that makes its out-of-state records available at the utility's office
14 located in Florida or at another mutually agreed upon location in Florida within 10 working
15 days from the Commission's initial request. If 10 working days is not reasonable because of
16 the complexity and nature of the issues involved or the volume and type of material requested,
17 the Commission may establish a different time frame for the utility to bring records into the
18 state. For individual data requests made during an audit, the response time frame in Rule 25-
19 6.0151, Florida Administrative Code, shall control; or

20 2. For a utility whose records are located within 50 miles of the Florida state line.

21 (3) All records shall be preserved in accordance with the Federal Energy
22 Regulatory Commission's regulations, Title 18, Subchapter C, Part 125, Code of Federal
23 Regulations, entitled "Preservation of Records of Public Utilities and Licensees" as revised,
24 April 1, 2002 ~~1994~~, which is hereby incorporated by reference into this rule, with the
25 exception of the records listed in section (3)(a) of this rule. ~~Item 64 (Records of predecessors~~

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

1 ~~and former associates) of the Schedule of records and periods of retention contained in Title~~
2 ~~18, Subchapter C, Section 125.3, Code of Federal Regulations. Instead, utilities shall retain~~
3 ~~records listed in section (3)(a) of this rule for the periods indicated, of acquired companies~~
4 ~~until permission for disposal is petitioned for and approved by the Florida Public Service~~
5 ~~Commission~~

6 (a) The Code of Federal Regulations items listed below are exceptions to the
7 Schedule of Records and Periods of Retention contained in Title 18, Subchapter C, Section
8 125.3, Code of Federal Regulations:

- 9 1. Item 2(a), minute books of stockholders', directors', and directors' committee
10 meetings, earlier of 20 years or termination of the corporation's existence;
- 11 2. Item 6(a)(1), general ledgers, 20 years;
- 12 3. Item 6(a)(2), ledgers: subsidiary or auxiliary, 20 years;
- 13 4. Item 7, journals: general and subsidiary, 20 years;
- 14 5. Item 8(a), journal vouchers and journal entries, 20 years; and
- 15 6. Item 20(a), appraisals and valuations made by the company of its properties or
16 investments or of the properties or investments of any associated companies (includes all
17 records essential thereto), 10 years after appraisal.

18 ~~(b)(a)~~ However, all source documents retained as required by Title 18, Subchapter C,
19 Part 125, Code of Federal Regulations shall be maintained in their original form for a
20 minimum of three years, or for any lesser period of time specified for that type of record in
21 Title 18, Subchapter C, Part 125, Code of Federal Regulations, after the date the document
22 was created or received by the utility. This paragraph does not require the utility to create
23 paper copies of documents where the utility would not otherwise do so in the ordinary course
24 of its business. The Commission will ~~may~~ waive the requirement that documents be retained
25 in their original form upon a showing by a utility that it employs a storage and retrieval system

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

1 that consistently produces clear, readable copies that are substantially equivalent to the
2 originals, and clearly reproduces handwritten notations on documents.

3 (c)(b) The utility shall maintain written procedures governing the conversion of
4 source documents to a storage and retrieval system, which procedures ensure the authenticity
5 of documents and the completeness of records. Records maintained in the storage and
6 retrieval system must be easy to search and easy to read.

7 Specific Authority: 366.05(1), 350.127(2), F.S.

8 Law Implemented: 366.05(1), (9), & (11), 366.08, 366.093(1), F.S.

9 History: Amended 7/29/69, 7/19/72, 1/11/76, 9/28/81, 11/18/82, Formerly 25-6.15, Amended
10 10/1/86, 11/02/87, 6/23/93, 11/13/95, XX/XX/XX.

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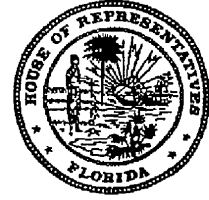
JAMES E. "JIM" KING, JR.
President



Representative Juan-Carlos "J.C." Planas, Chair
Senator Michael S. "Mike" Bennett, Vice-Chair
Senator Nancy Argenziano
Senator Gwen Margolis
Representative Bill Galvano
Representative Yolly Roberson

ATTACHMENT B

JOHNNIE BYRD
Speaker



THE FLORIDA LEGISLATURE
**JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE**

F. SCOTT BOYD
EXECUTIVE DIRECTOR
AND GENERAL COUNSEL
Room 120, Holland Building
Tallahassee, Florida 32399-1300
Telephone (850) 488-9110

January 20, 2004

Ms. Samantha M. Cibula
Office of the General Counsel
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Public Service Commission Rule Chapter 25-6

Dear Ms. Cibula:

I have completed a review of the rules being amended in chapter 25-6 and prepared the following comments for your consideration and response.

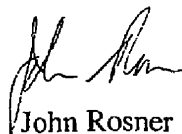
25-6.015(3)(b): The rule provides that the Commission may waive the requirement that certain documents be retained as described. However, no standards or criteria are set forth to apprise the reader of whether or not such waiver will be forthcoming under any circumstances. This renders the rule objectionable pursuant to section 120.52(8)(d), F.S., (rule is invalid exercise of delegated legislative authority where it is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency). The rule should be amended accordingly.

25-6.1351(5)

The rule provides that the form is incorporated by reference "into this rule." Actually, the form is incorporated by the previous rule.

I am available at your convenience to discuss the foregoing comments.

Sincerely,


John Rosner
Chief Attorney

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GENERAL COUNSEL
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JAMES E. "JIM" KING, JR.
President

JOHNNIE BYRD
Speaker



THE FLORIDA LEGISLATURE
JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE



Representative Juan-Carlos "J.C." Planas, Chair
Senator Michael S. "Mike" Bennett, Vice-Chair
Senator Nancy Argenziano
Senator Gwen Margolis
Representative Bill Galvano
Representative Yolly Roberson

F. SCOTT BOYD
EXECUTIVE DIRECTOR
AND GENERAL COUNSEL
Room 120, Holland Building
Tallahassee, Florida 32399-1300
Telephone (850) 488-9110

February 2, 2004

Ms. Samantha M. Cibula
Office of the General Counsel
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

04 FEB -4 PM 1:42
GENERAL COUNSEL

Re: **Public Service Commission Rule 25-6.015(3)(b)**

Dear Ms. Cibula:

Thank you for your response to my letter. You note that the criteria for the Commission's waiving the requirement that documents be retained in their original form is "upon a showing by the utility that it employs a storage and retrieval system that consistently produces clear, readable copies that are substantially equivalent to the originals, and clearly reproduces handwritten notations on documents." However, the foregoing proviso must be read together with its antecedent term. The rule provides that the Commission "may" waive the requirement that certain documents be retained as described. In my judgment, the rule is objectionable under provisions of Chapter 120, F.S., as well as judicial decisions.

Section 120.52(8) F.S., defines invalid exercise of delegated legislative authority as meaning "action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply: ... (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency" The rule under consideration does not apprise the reader of whether or not the Commission will waive the requirement under any circumstances and accords the Commission unbridled discretion in making the decision.

It is also well settled that in statutory construction the word "may" when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word "shall." I.E. Fixel v. Clevenger, 285 So.2d 687, 688 (Fla. 3 DCA 1973), cited in City of Miami v. Save Brickell Ave., Inc., 426 So.2d 1100, 1105 (Fla. 3 DCA 1983). Webster's Third New International Dictionary, unabridged, 1976 defines "permissive" as:

allowing discretion ... used often of legislation enacted by a higher body to be put into effect or not at the option of local authorities (e.s.)

In the case of Barrow v. Holland, 125 So.2d 749 (Fla. 1960), a rule of the Game and Fresh Water Fish Commission authorizing the director to issue permits to exhibit live animals was declared unconstitutional. The rule provided, in pertinent part:

The Director may issue permits giving the right to take or to be in possession of wildlife . . . Such permits shall be subject to such terms, conditions, and restrictings as may be prescribed by the Commission Barrow v. Holland, supra, p.752.

In discussing the rule, the Court said:

The appellant could have read the rules of the Commission backwards and forwards and could not have obtained any information whatsoever as to just what he would have to do to obtain the permit. . . . This is the type of arbitrary authority that due process prohibits. Barrow v. Holland, p.753.

In City of Miami v. Save Brickell Ave., supra., p.1105, the court discussed a city ordinance listing criteria to be considered by the city commission for approval of zoning deviations. The ordinance stated “[c]riteria to be considered . . . may include but are not limited to” the listed criteria. In finding the challenged ordinance to be unconstitutional, the court stated:

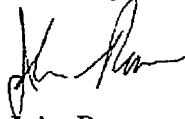
While it is true that criteria are listed in the ordinance for the City Commission consideration, further examination reveals that such criteria are solely permissive and not mandatory. The key phraseology is ‘may include but are not limited to’ In statutory construction, the word ‘may’ when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word ‘shall’. [citation omitted] Moreover, the wording of the ordinance clearly permits the Commission to totally disregard the listed criteria and instead to base a decision upon criteria that are not listed or no criteria at all. Certainly, an ordinance which permits a legislative agency to totally disregard listed criteria and to base a decision upon unlisted or no criteria does not meet the standards recited in North Bay Village v. Blackwell, supra, and the other decisions cited above. (e.s.)

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The court had earlier summarized those cases by saying "In other words, if definite standards are not included in the ordinance, it must be deemed unconstitutional as an invalid delegation of legislative power to an administrative board." Save Brickell Ave, p.1104, citing Clarke v. Morgan, 327 So.2d 769 (Fla. 1975). Although the gravamen of the case was consideration of an ordinance, the holding is applicable to the administrative rule of a state agency.

In my judgment, the rule is objectionable for the reasons discussed above. A notice of change should be published to correct its infirmity.

Sincerely,



John Rosner
Chief Attorney

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