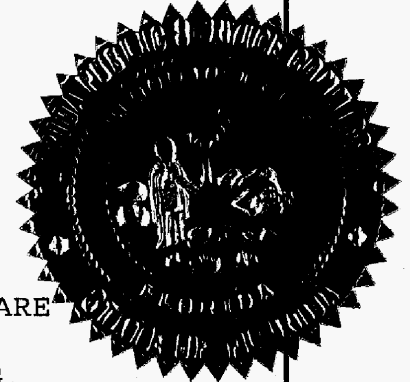


BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 050108-OT

In the Matter of:

PROPOSED REVISIONS TO RULES IN  
CHAPTER 25-22 AND 25-40, F.A.C.



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PROCEEDINGS:                   AGENDA CONFERENCE  
ITEM NO. 2

BEFORE:                         CHAIRMAN BRAULIO L. BAEZ  
                                  COMMISSIONER J. TERRY DEASON  
                                  COMMISSIONER RUDOLPH "RUDY" BRADLEY  
                                  COMMISSIONER LISA POLAK EDGAR

DATE:                            Tuesday, June 21, 2005

PLACE:                         Betty Easley Conference Center  
                                  Room 148  
                                  4075 Esplanade Way  
                                  Tallahassee, Florida

REPORTED BY:                 LINDA BOLES, RPR  
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FLORIDA PUBLIC SERVICE COMMISSION

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FPSC-COMMISSION CLERK

1 APPEARANCES :

2 RICHARD D. MELSON, ESQUIRE, and MARLENE STERN,  
3 ESQUIRE, representing the Florida Public Service Commission  
4 Staff.

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## P R O C E E D I N G S

1  
2 CHAIRMAN BAEZ: All right. Commissioners, we're now  
3 on Item 2.

4 MS. STERN: I'm Marlene Stern with General Counsel's  
5 Office.

6 Commissioners, Item 2 are revised rules for agenda  
7 conference participation and oral argument.

8 COMMISSIONER DEASON: Mr. Chairman, I have a  
9 question.

10 CHAIRMAN BAEZ: Go ahead, Commissioner. I'm sorry.

11 COMMISSIONER DEASON: Okay. Was staff finished with  
12 its introduction or are you --

13 MS. STERN: Yes.

14 CHAIRMAN BAEZ: You just read it out. Okay.

15 COMMISSIONER DEASON: Okay. My question pertains to  
16 Page 5 of the recommendation -- or maybe it would be best just  
17 to refer to the rule itself, which is Page 12 of the  
18 recommendation, Paragraph 5, which states, "Oral argument will  
19 not be entertained on a posthearing recommendation on the  
20 merits of the case. However, when the Commission votes on a  
21 recommended order, request for oral argument will be  
22 entertained."

23 And I have a question about does that language give  
24 the flexibility or discretion to the Commission that we invite  
25 oral argument ourselves and give proper notice on a matter that

1 is posthearing, or does it completely eliminate the possibility  
2 of ever having oral argument on a posthearing recommendation?

3 MS. STERN: That post -- okay. So you're concerned  
4 about the first sentence, "Oral argument will not be  
5 entertained on a posthearing recommendation on the merits of  
6 the case"?

7 COMMISSIONER DEASON: Yes.

8 MS. STERN: Okay.

9 COMMISSIONER DEASON: And here again on Page 5 of the  
10 recommendation it states -- talking about there's a prohibition  
11 on posthearing oral argument, that that is included in the  
12 newly proposed rule.

13 MS. STERN: Well, I believe there was a provision in  
14 here that said that the Commission can request oral argument at  
15 any time. I'm trying to, to find it.

16 COMMISSIONER DEASON: You can refer to Page 11 of the  
17 recommendation, Paragraph 7, which concludes by saying, "The  
18 Commission allows informal participation at its discretion."  
19 Does that then mean that even though there's a prohibition  
20 against oral argument on posthearing decisions, that we still  
21 have the discretion, and I think it would be a rare occurrence,  
22 but nevertheless in that rare occurrence would the Commission  
23 have the discretion to invite oral argument on a posthearing  
24 recommendation?

25 MS. STERN: Actually the provision you were talking

1 about pertains to agenda conference participation, and I don't  
2 think there is a provision for Commissioners to invite oral  
3 argument on their own motion on a posthearing recommendation.

4 COMMISSIONER DEASON: Okay. Then if that's not the  
5 case, why -- I mean, is your recommendation the Commission  
6 should not be allowed to do that?

7 MS. STERN: Well, I guess the, the idea of a  
8 posthearing recommendation would be that oral argument would be  
9 appropriate if there were new matters. That's the way the  
10 existing rule is and I think we intended to keep that, but we,  
11 we didn't want to get rid of that.

12 The idea about posthearing recommendations is that  
13 you've had the hearing and it's a staff recommendation. You've  
14 heard the evidence and you've had briefs, if you want briefs,  
15 from all the parties. The parties have to be allowed to file  
16 briefs, if they want to. And at that point to invite further  
17 argument would not be in keeping with the idea of a hearing, a  
18 trial of taking evidence.

19 I think that the Commission has the leeway to do it.

20 COMMISSIONER DEASON: I mean, I don't mean to put  
21 this Commission on the same level as the Florida Supreme Court,  
22 so don't take it -- but I know that briefs are filed in the  
23 Florida Supreme Court and they routinely have oral argument  
24 after the briefs are filed.

25 MS. STERN: That's because those are appeals.

1 Those -- they're, they're arguing issues on a record that have  
2 already been -- they're arguing that there has been a decision  
3 made below, an error --

4 COMMISSIONER DEASON: On a record that is already  
5 closed, just like we would be inviting oral argument on a  
6 record that is already closed before we make the decision.

7 MS. STERN: But they're arguing that there has been  
8 an error made below. And I, I --

9 COMMISSIONER DEASON: Mr. Melson, are we prohibited  
10 from in our own discretion on a rare occasion, occurrence to  
11 invite oral argument on a posthearing recommendation?

12 MR. MELSON: I think you would have the flexibility  
13 to invite it. I think -- I can't remember a situation in which  
14 you've done it. And if you'd look on Page 11 at language in  
15 the existing rule that has been deleted addresses posthearing  
16 oral or written presentation by any other person, this is other  
17 than nontestifying staff, whether by way of objection, comment  
18 or otherwise is not permitted unless the Commission is  
19 considering new matters related to but not addressed at the  
20 hearing.

21 I believe your pretty uniform practice has been if a  
22 matter has been through an evidentiary hearing and you are  
23 considering simply a recommendation on the issues that were  
24 tried in that hearing, you have not heard oral argument. And  
25 this -- I don't think the -- while there is some reorganization

1 of the rule, I didn't see that this was, the new language was  
2 intended to make a change from what's in the rule today.

3 COMMISSIONER DEASON: Okay. And my question is are  
4 we prohibited, by the rule that's being changed right now, are  
5 we prohibited from ever in a rare occurrence inviting oral  
6 argument on a posthearing recommendation?

7 MS. STERN: I don't think the rule says one way or  
8 the other. It doesn't say you're prohibited. It doesn't say  
9 you have the leeway, you know, it doesn't address that point  
10 flat out. I think though that if, I think that if there is --  
11 I think that the Commission does have the discretion to ask for  
12 it if they want it. I think it could be argued against by  
13 other parties to the hearing. But I think if you want it, it  
14 should be put in the rule expressly. And that's not a problem.  
15 You can put that in the rule. I don't --

16 CHAIRMAN BAEZ: Commissioner Bradley.

17 COMMISSIONER BRADLEY: Yes. Well, let me ask the  
18 question this way. What is the intent of the change in the  
19 rule language that's before us that Commissioner Deason is  
20 concerned about?

21 MS. STERN: Well, we didn't really intend to change  
22 that part of the rule. We wanted to make it -- our intent in  
23 revising the oral argument part of the rule was to make it  
24 clear, clearer when somebody had to request oral argument  
25 within an agenda conference and outside of an agenda conference

1 because sometimes that causes some confusion the way, given the  
2 way the rule is currently written. So our revision was to  
3 clarify an existing, the existing rule with respect to that  
4 point. Does that answer your -- we, we didn't --

5 COMMISSIONER BRADLEY: Yes. But I don't think it  
6 gets to the direct point of why this language is necessary and  
7 why it is necessary to, to clear up the problem that you just  
8 mentioned. And, you know, I'm just trying to ask simply what  
9 the intent of the language is and what does the intent address?

10 MS. STERN: Well, what we did with that particular  
11 language about posthearing, oral argument posthearing, we took  
12 it out of the section on agenda conference participation and we  
13 put it in the section, a new section we created called oral  
14 argument rule. And we did not -- although we changed the  
15 actual wording, it was not our intent to change the actual  
16 meaning of the provisions for posthearing, for oral argument on  
17 posthearing.

18 COMMISSIONER BRADLEY: Okay.

19 MR. MELSON: Commissioners, if I might, I understand  
20 Commissioner Deason's concern, and in an effort to explicitly  
21 address something which may be unclear now, I wonder if the  
22 concern could be addressed on Line 22 on Page 12 by beginning  
23 that Paragraph A with, "Except when invited by the Commission,"  
24 and continue, "oral argument agenda conference will only be  
25 entertained for recommended order and dispositive motions."



1 That would clearly give the Commission the ability to invite  
2 oral argument in any matter.

3 CHAIRMAN BAEZ: Mr. Melson, and maybe I didn't hear  
4 clearly what you said. Are you suggesting changes to that  
5 section in order, in order to preserve or in order to, to  
6 preserve some discretion along those lines?

7 MR. MELSON: Yes. And I actually marked it in the  
8 wrong place. I should have been on Line 17, excuse me, where  
9 Commissioner Deason had been.

10 "Except when invited by the Commission, oral argument  
11 will not be entertained on a posthearing recommendation on the  
12 merits of a case." That would make it absolutely clear that  
13 while a party was not entitled to request oral argument, the  
14 Commission did reserve the right to invite it on its own  
15 motion.

16 CHAIRMAN BAEZ: And I had a question on the second  
17 sentence of that while we're on (5), voting on a recommended  
18 order. That (5), Line 18 that begins -- that, that's only  
19 contemplate -- that's clearly contemplating when something  
20 comes back to us from something that may have been referred to  
21 DOAH.

22 MR. MELSON: Something comes back from DOAH and  
23 someone is, seeks either oral argument on the recommended order  
24 or on the exceptions they have filed to that recommended order.  
25 But that's a very, as you know, that's a very narrow set of

1 cases.

2 COMMISSIONER DEASON: Mr. Chairman, just let me say  
3 that I agree that it would be very, very rare, if ever, the  
4 Commission would invite oral argument on a posthearing  
5 recommendation. But I would not want to adopt rules which  
6 would take that -- if we have that discretion, if we legally  
7 have that discretion, I would not want to adopt a rule that  
8 takes that away. I would want to maintain that, and that's  
9 what my concern is.

10 CHAIRMAN BAEZ: And there's -- I have no reason to  
11 disagree with you. My, my impression from the discussion at  
12 the outset was that the rules are silent on that discretion,  
13 and I took that to mean that the rules as they're proposed and  
14 as have been written prior was merely an act of notice to  
15 parties that, that they don't have that avenue available to it,  
16 that there is a point in time in which the record closes and  
17 that the Commissioners can deliberate and ask their questions  
18 of staff certainly, but we're not going to entertain a  
19 rehashing, a rehashing of issues. But that, I saw that more  
20 directed as the parties that come before -- directed to the  
21 parties that come before us. Otherwise, we could never get any  
22 work done.

23 To the extent that it's appropriate to acknowledge  
24 that discretion formally as part of the rule, I certainly don't  
25 have any, any -- I guess I'm not seeing the downside to doing

1 that, but perhaps that's not even something we need to discuss.

2 MR. MELSON: I don't see a downside, Mr. Chairman.  
3 And I guess I do see an upside to adding it because it does  
4 make explicit something that is otherwise merely implicit, and  
5 you could have a party, you could have a situation where the  
6 party or the Commission wanted oral argument and a party came  
7 to you and argued your rule simply does not permit that. And  
8 rather than be faced with that question when you're in a  
9 contentious situation, you could deal with it up-front in the  
10 language and make it explicit.

11 CHAIRMAN BAEZ: Very well. Commissioners, any  
12 comments or questions on that matter? Commissioner Deason --  
13 well, maybe I need to understand with the changes that you've  
14 proposed, how does that change our ability to adopt the rules  
15 now? Is it something -- I mean, do we have the capabilities to  
16 make changes on the --

17 MR. MELSON: At this point you're simply proposing  
18 the rule, so the question is what is going to be in the  
19 proposed rule.

20 CHAIRMAN BAEZ: Oh, very well.

21 Commissioner Bradley, you had a question.

22 COMMISSIONER BRADLEY: More of a comment than a  
23 question.

24 CHAIRMAN BAEZ: Okay.

25 COMMISSIONER BRADLEY: I was, I was going to suggest,

1 and I heard what Mr. Melson said, that we're only proposing the  
2 rule.

3 CHAIRMAN BAEZ: Sorry, Commissioner.

4 COMMISSIONER BRADLEY: My question -- well, I guess I  
5 do have a question.

6 CHAIRMAN BAEZ: Okay.

7 COMMISSIONER BRADLEY: Since we're only proposing the  
8 rule, to what extent are we bound by the language that's before  
9 us? And my comment was going to be, was going to be that it  
10 might be a good idea for us to defer action on this particular  
11 matter this morning and to allow for concerns that have been  
12 expressed to be dealt with at a subsequent agenda after staff  
13 has maybe had an opportunity to clean up some of the ambiguous  
14 language.

15 CHAIRMAN BAEZ: That, that might be a good  
16 suggestion.

17 COMMISSIONER BRADLEY: And I had a question first.

18 CHAIRMAN BAEZ: Okay. Ask your question and then we  
19 can --

20 COMMISSIONER BRADLEY: To what extent are we bound  
21 by -- and this is a proposal, so is, does the proposal  
22 constitute the final language or is it just that this is a  
23 proposal for discussion and we are going to have to approve the  
24 final language at some subsequent agenda?

25 MR. MELSON: This would be the Commission's proposal.

1 At that point affected parties, interested persons are able to  
2 either request a hearing or to file written comments on the  
3 rule and the rule would come back to you for adoption. I'm  
4 going to have to defer to Marlene just briefly on whether if  
5 there are no comments and no request for hearing, whether we've  
6 got the ability to change the language at a later point. I  
7 frankly don't remember.

8 MS. STERN: And once it's proposed, it gets published  
9 in the FAW. And even if there are no questions or comments  
10 during the comment period where it's been noticed as such, and  
11 theoretically the public is relying on that rule the way it was  
12 published. So if we wanted to change it at that point, we'd  
13 have to do something more formal.

14 CHAIRMAN BAEZ: Commissioner Deason, I had asked you  
15 whether Mr. Melson's suggested language might adequately  
16 address your concerns. And if, and if that's the case,  
17 Commissioner Bradley, you had suggested deferring the item or  
18 deferring a vote on the item in order that the, that the  
19 concerns that have been expressed would get addressed. Now I'm  
20 trying to bring those two feelings together and see --

21 COMMISSIONER DEASON: Let me, let me just say that  
22 I'm comfortable with the language proposed by General Counsel,  
23 it addresses my concern, and I would be comfortable with  
24 issuing that as our proposed rule. And then obviously we can  
25 get feedback from parties in terms of comments or even a

1 request for hearing, if need be. And, of course, their  
2 comments and the request for hearing may be on other matters,  
3 not just our change.

4 CHAIRMAN BAEZ: Right.

5 COMMISSIONER DEASON: But I'm comfortable going  
6 forward with proposing it at this point, that we're really not  
7 adopting it at this point, it is just a proposal.

8 CHAIRMAN BAEZ: Commissioner Bradley, I mean, based  
9 on some of the comfort that you've heard here, are you all  
10 right --

11 COMMISSIONER BRADLEY: Yeah. Sure.

12 CHAIRMAN BAEZ: -- with just accepting a vote on, on  
13 this, with the added -- adding the language that Mr. Melson had  
14 suggested to (5) where it --

15 COMMISSIONER BRADLEY: Right. And I am -- and I'll  
16 tell you why. Because I think just by the mere fact that we've  
17 had this discussion and it's on the record, it probably clears  
18 up the intent of the language itself.

19 CHAIRMAN BAEZ: Right.

20 COMMISSIONER BRADLEY: And any future concerns that  
21 might arise as to what we've had a discussion about here at  
22 this point, up to this point.

23 CHAIRMAN BAEZ: Very well, Commissioners. Do you  
24 need any clarification as to the added language that we'll be  
25 tacking on to the proposed rule?

1 COMMISSIONER BRADLEY: No.

2 CHAIRMAN BAEZ: No? We're all clear? Okay. We're  
3 ready for a motion.

4 COMMISSIONER DEASON: I would move staff's  
5 recommendation as modified.

6 COMMISSIONER BRADLEY: Second.

7 CHAIRMAN BAEZ: Moved and seconded. All those in  
8 favor, say aye.

9 (Simultaneous affirmative vote.)

10 CHAIRMAN BAEZ: Thank you.

11 (Agenda item 2 concluded.)

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2 COUNTY OF LEON )

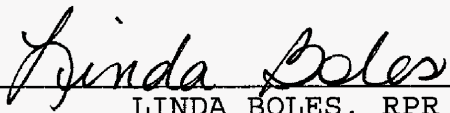
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I, LINDA BOLES, RPR, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceedings, Pages 3 through 16, were transcribed from cassette tape.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 28 DAY OF JUNE, 2005.

  
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