

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

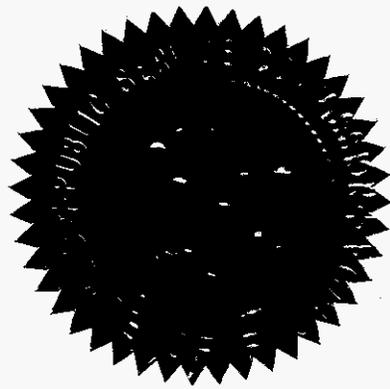
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In the Matter of:

DOCKET NO. UNDOCKETED

INITIATION OF RULEMAKING TO  
AMEND RULE 25-22.061, F.A.C.,  
STAY PENDING JUDICIAL REVIEW.

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PROCEEDINGS:                   RULE DEVELOPMENT WORKSHOP

DATE:                            Thursday, December 10, 2009

TIME:                            Commenced at 9:00 a.m.  
                                  Concluded at 9:15 a.m.

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

REPORTED BY:                    JANE FAUROT, RPR  
                                  Official FPSC Reporter  
                                  (850) 413-6732

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IN APPEARANCES:

FOR THE FPSC:

KATHRYN COWDERY, ESQUIRE, MICHAEL SPRINGER,  
and NATALIA SALNOVA representing the Commission Staff.

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

1  
2           **MS. COWDERY:** This is the Florida Public  
3 Service Commission Staff Workshop on the Initiation of  
4 Rulemaking to Amend Rule 25-22.061, Stay Pending  
5 Judicial Review, as noticed in the October 23rd, 2009,  
6 addition of the Florida Administrative Weekly.

7           My name is Kathryn Cowdery. I'm a senior  
8 attorney with the Commission's Office of General  
9 Counsel, and with me are Michael Springer and Natalia  
10 Salnova with the Division of Economic Regulation.

11           I think you have seen at the back of the room  
12 on a cart are copies of the preliminary draft rule and  
13 the agendas for the workshop, and also a sign-in sheet.  
14 If you have not already done so, at some point please  
15 fill in your contact information on the sign-in sheet  
16 and that way we have a record of your attendance and we  
17 have your contact information for this matter.

18           Are there any other preliminary matters?  
19 There being no preliminary matters, we will start with  
20 Item 1 on the agenda. And I'll explain the reasons for  
21 amending the rule and the amendments being considered at  
22 this time.

23           This docket concerns Commission Rule  
24 25-22.061, Florida Administrative Code, Stay Pending  
25 Judicial Review. This rule implements the Florida

1 Administrative Procedures Act Section 120.68(3) that  
2 states in part that an agency may grant a stay of its  
3 decision upon appropriate terms. Rule 25-22.061 applies  
4 when a party files an appeal of a Commission order and  
5 requests that the Commission stay the effect of that  
6 order pending judicial review. The rule currently  
7 includes provisions addressing automatic stays to  
8 certain public entities which appeal Commission orders.  
9 Section 120.68(3) is also implemented by the Florida  
10 Rules of Appellate Procedure, Rules 9.310, Stay Pending  
11 Review, and 9.190, Judicial Review of Administrative  
12 Action.

13           The Florida Rules of Appellate Procedure  
14 govern all appellate proceedings in the state courts and  
15 supersede all conflicting statutes and conflicting  
16 Commission rules of procedure. Effective January 1st,  
17 2009, the Florida Supreme Court amended the Rules of  
18 Appellate Procedure with the result that with certain  
19 exceptions there is no longer an automatic stay if a  
20 public entity seeks review of a Commission order. For  
21 this reason, the Commission's rule needs to be amended.

22           Staff is considering amendments that are on  
23 the draft that we have provided for you to look at.  
24 Just going through what is being proposed, the draft  
25 rule deletes Subsection 3 of the rule in its entirety.

1 This section provides that when a public entity appeals  
2 an order involving an increase in a company's rates,  
3 which appeal operates as an automatic stay, the  
4 Commission shall vacate the stay upon motion by the  
5 company and the posting of good and sufficient bond or  
6 corporate undertaking.

7 The controlling Rules of Appellate Procedure,  
8 as we stated, no longer allow automatic stays in  
9 administrative actions under the Administrative  
10 Procedure Act when the state, any public officer, board,  
11 commission, or public body seeks review except for an  
12 appeal concerning public records or public meeting.  
13 Because there is no longer an automatic stay of rate  
14 orders appealed by public bodies, the provision  
15 concerning vacation of a stay and the appeal of a rate  
16 case by a public entity is obsolete, contrary to the  
17 Rules of Appellate Procedure, and should be deleted.

18 Subsection 3 of the rule also provides that  
19 when a public body or public entity appeals an order  
20 that does not involve an increase in rates, the  
21 Commission may vacate the stay or impose any lawful  
22 conditions. This provision could apply to appeals by  
23 public bodies of public records or public meeting  
24 orders. This is because the Florida Rule of Appellate  
25 Procedure 9.310(b)(2) specifically states that an

1 automatic stay shall exist for 48 hours after the filing  
2 of a notice of appeal for public records and public  
3 meeting cases. It also provides that on motion the  
4 lower tribunal or the court may extend the stay, impose  
5 any lawful conditions, or vacate the stay, but there  
6 appears to be no reason to duplicate this appellate rule  
7 language in Rule 25-22.061.

8 The draft rule adds a new Subsection 1 to the  
9 rule for clarity, which states that the issuance of a  
10 stay of a Commission order pending judicial review in  
11 the state courts shall be governed by the applicable  
12 Rules of Appellate Procedure in this rule. In the draft  
13 rule we also refer to Section 120.68, but I don't know  
14 that that will remain in there. I don't think that's  
15 really necessary.

16 The draft rule then renumbers the subsections  
17 and amends the second sentence of what will then be  
18 Subsection 2 so that it states, "The stay shall be  
19 conditioned upon the posting of good and sufficient  
20 bond, the posting of a corporate undertaking, or such  
21 other conditions as the Commission finds appropriate to  
22 secure the revenues collected by the utility subject to  
23 refund." This change makes the provisions consistent  
24 with current agency practice. That was our intent.

25 The draft rule deletes Subparagraph (1)(b),

1 which lists the factors which the Commission may  
2 consider in determining the amount and conditions of the  
3 bond or corporate undertaking. Subparagraph (1)(b)1.  
4 list mas factors for consideration by the Commission  
5 terms that will discourage appeals when there is little  
6 possibility of success. This provision appears to be  
7 unnecessary and inappropriate in that the Commission may  
8 consider whether the petitioner has demonstrated a  
9 likelihood of success on the merits in determining  
10 whether to grant the stay in the first place. Once the  
11 Commission grants the stay, the conditions of the bond  
12 or corporate undertaking are meant to secure the  
13 revenues collected subject to refund, not to discourage  
14 the appeal.

15 The draft rule deletes Subparagraph (b) (2)  
16 relating to the rate of interest just because then it's  
17 put into Subsection 4. Subsection 2 is renumbered to 3.  
18 The draft rule states that a party seeking to stay a  
19 final or non-final order of the Commission pending  
20 judicial review may file a motion with the Commission  
21 rather than stating that a party shall file a motion  
22 with the Commission. This change recognizes that under  
23 the Rules of Appellate Procedure there are circumstances  
24 under which a party is not required to file a motion for  
25 stay with this Commission, but may file directly with

1 the court.

2 Rule 25-22.061(4) provides that when a stay or  
3 vacation of a stay is conditioned upon the posting of a  
4 bond or corporate undertaking, the Commission may at the  
5 time it grants the stay or vacation of the stay set the  
6 rate of interest to be paid by the company in the event  
7 the court's decision requires a refund to customers.

8 The draft rule amends Subsection 4 to delete  
9 references to vacation of stays which relate to the  
10 deleted automatic stay provisions. The draft rule is  
11 also amended to be consistent with Commission practice  
12 by adding language recognizing that stays may be  
13 conditioned on forms of surety other than bonds or  
14 corporate undertakings.

15 And, finally, the draft rule amends Subsection  
16 4 to require that the Commission set the rates of  
17 interest pursuant to Rule 25-6.109(4), which is the  
18 Commission rule that addresses refund interest. Again,  
19 this change was made to be consistent with current  
20 Commission practice.

21 Subsection 5 states that the motions filed  
22 pursuant to Subsections 1 and 2 of the rule shall be  
23 heard by those Commissioners who participated in the  
24 proceeding which resulted in the order being appealed,  
25 but that motions filed under Subsection 3 may be ruled

1 upon by the Chairman or the Commissioner assigned as the  
2 prehearing officer in the case. The draft rule would  
3 amend Subsection 5, of course, to delete reference to  
4 Subsection 3 concerning automatic stays, since it is  
5 deleted in the draft rule.

6 The draft rule amends the language of  
7 Subsection 5 also to clarify that motions filed pursuant  
8 to 25-22.061 shall be heard by those Commissioners who  
9 were on the deciding panel for the order being appealed,  
10 again, consistent with agency practice.

11 Do any of the participants have any comments  
12 or wish to speak? Okay. Do we have any other matters  
13 for discussion?

14 The next step in the rulemaking would be for  
15 participants to submit written comments. If you would  
16 like to submit written comments, please e-mail them to  
17 me by January 8th, 2010. My e-mail address is initial K  
18 Cowdery, C-O-W-D-E-R-Y @ PSC.STATE.FL.US. Following  
19 receipt of any comments, staff will prepare a statement  
20 of estimated regulatory costs. A docket will then be  
21 opened. A staff recommendation will be prepared which  
22 will go before the Commission for consideration. It is  
23 too early at this point in the proceeding to be able to  
24 give you a date as to when it would go to the  
25 Commission.

1                   Do we have any questions? Thank you for your  
2 -- oh, yes.

3                   **MS. SCOLES:** Would you repeat the date when  
4 the comments are due to you?

5                   **MS. COWDERY:** That would be January 8th.

6                   **MS. SCOLES:** Okay. Thank you.

7                   **MS. COWDERY:** And thank you for your  
8 participation, and this workshop is adjourned.

9                   (The workshop concluded at 9:15 a.m.)

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STATE OF FLORIDA        )  
                                  :  
                                  :        CERTIFICATE OF REPORTER  
COUNTY OF LEON        )

I, JANE FAUROT, RPR, Chief, Hearing Reporter Services Section, FPSC Division of Commission Clerk, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

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' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 17th day of December, 2009.

  
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JANE FAUROT, RPR  
Official FPSC Hearings Reporter  
(850) 413-6732