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Public Service Commission

March 26, 2010

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COMMISSION  
CLERK

Mr. Scott Boyd, Executive Director  
Joint Administrative Procedures  
Committee  
Room 120 Holland Building  
Tallahassee, FL 32399-1300

RE: Docket No. 100062-OT – proposed amendment of Rule 25-22.061, F.A.C.,  
Stay Pending Judicial Review.

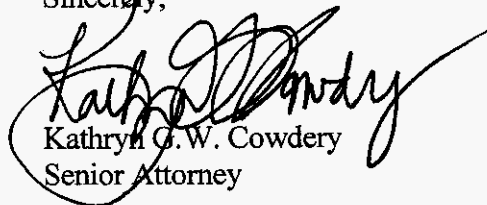
Dear Mr. Boyd:

Enclosed are the following materials concerning the above referenced proposed rule:

1. A copy of the rule.
2. A copy of the F.A.W. notice.
3. A statement of facts and circumstances justifying the proposed rules.
4. A federal standards statement.
6. A statement of estimated regulatory costs.

If there are any questions with respect to these rules, please do not hesitate to call me at 413-6216.

Sincerely,

  
Kathryn G. W. Cowdery  
Senior Attorney

Enclosures

cc: Office of Commission Clerk

3-22 JAPC Notice.doc

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FPSC-COMMISSION CLERK

1 25-22.061 Stay Pending Judicial Review.

2 (1) When the order being appealed involves the refund of moneys to customers or a  
3 decrease in rates charged to customers, the Commission shall, upon motion filed by the utility  
4 or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned  
5 upon the posting of good and sufficient bond, ~~or~~ the posting of a corporate undertaking, or and  
6 such other conditions as the Commission finds appropriate to secure the revenues collected by  
7 the utility subject to refund.

8 ~~(b) In determining the amount and conditions of the bond or corporate undertaking, the~~  
9 ~~Commission may consider such factors as:~~

- 10 ~~1. Terms that will discourage appeals when there is little possibility of success; and~~  
11 ~~2. A rate of interest that takes into consideration:~~  
12 ~~a. The use of the money that the stay permits;~~  
13 ~~b. The prime and other prevailing rates of interest at commercial banks and other~~  
14 ~~potential sources of capital in the amount involved in the appeal.~~

15 (2) Except as provided in subsection (1), a party seeking to stay a final or nonfinal  
16 order of the Commission pending judicial review ~~may~~shall file a motion with the Commission,  
17 which ~~has~~ shall have authority to grant, modify, or deny such relief. A stay pending review  
18 granted pursuant to this subsection may be conditioned upon the posting of a good and  
19 sufficient bond or corporate undertaking, other conditions relevant to the order being stayed,  
20 or both. In determining whether to grant a stay, the Commission may, among other things,  
21 consider:

22 (a) Whether the petitioner has demonstrated a likelihood of success on the merits is  
23 ~~likely to prevail~~ on appeal;

24 (b) Whether the petitioner has demonstrated a likelihood of sustaining that he is likely  
25 ~~to suffer~~ irreparable harm if the stay is not granted; and

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

1 (c) Whether the delay in implementing the order will likely cause substantial harm or  
2 be contrary to the public interest if the stay is granted.

3 ~~(3)(a) When a public body or public official appeals an order involving an increase in a~~  
4 ~~utility's or company's rates, which appeal operates as an automatic stay, the Commission shall~~  
5 ~~vacate the stay upon motion by the utility or company and the posting of good and sufficient~~  
6 ~~bond or corporate undertaking. When determining the amount and conditions of the bond or~~  
7 ~~corporate undertaking, the Commission may consider such factors as those set forth in~~  
8 ~~subparagraph (1)(b)2.~~

9 ~~(b) When a public body or public official appeals an order that does not involve an~~  
10 ~~increase in rates, the Commission may vacate the stay or impose any lawful conditions.~~

11 (34) When a stay or vacation of a stay is conditioned upon the posting of a bond, or  
12 corporate undertaking, or other appropriate form of surety, the Commission shall may at the  
13 time it grants the stay ~~or vacation of the stay~~, set the rate of interest to be paid by the utility or  
14 company pursuant to Rule 25-4.114(4), F.A.C., for telecommunication companies, Rule 25-  
15 6.109(4), F.A.C., for electric public utilities, Rule 25-7.091(4), F.A.C., for gas public utilities,  
16 and Rule 25-30.360(4), F.A.C., for water and wastewater utilities in the event that the Court's  
17 decision requires a refund to customers.

18 ~~(45) Motions filed pursuant to subsections (1) or (2) of this rule shall be heard by those~~  
19 ~~Commissioners who were on the deciding panel for participated in the proceeding which~~  
20 ~~resulted in the order being appealed. However, motions filed under subsection (3) of this rule~~  
21 ~~may be ruled upon by the Chairman or the Commissioner assigned as the prehearing officer in~~  
22 ~~the case.~~

23 Rulemaking Specific Authority 350.127(2) FS. Law Implemented 120.68(3) FS. History—New  
24 2-1-82, Formerly 25-22.61.

25  
CODING: Words underlined are additions; words in ~~struck through~~ type are deletions  
from existing law.

## Notice of Proposed Rule

### **PUBLIC SERVICE COMMISSION**

#### **RULE NO: RULE TITLE**

#### **25-22.061: Stay Pending Judicial Review**

**PURPOSE AND EFFECT:** Rule 25-22.061, Stay Pending Judicial Review, is amended for consistency with Florida Rule Appellate Procedure 9.310 , and to clarify who shall hear motions for stay and what factors are considered by the Florida Public Service Commission in granting a stay and in setting an interest rate when a stay is conditioned upon the posting of a bond or corporate undertaking. Docket No. 100062-OT.

**SUMMARY:** Rule 25-22.061, Stay Pending Judicial Review, is amended to delete provisions concerning automatic stays pending judicial review granted to public entities filing a notice of appeal in administrative actions under Chapter 120, F.S. The amendments state the factors which the Commission may consider in determining whether to grant a stay and under what conditions the Commission may condition a stay, list the factors that the Commission may consider in setting an interest rate when granting a stay conditioned upon the posting of a bond or corporate undertaking, and clarify that motions for stay shall be heard by those Commissioners who were on the deciding panel for the order being appealed.

**SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS:** The rule amendments would benefit the Commission by updating, clarifying and streamlining rule language; utilities would benefit from the rule becoming more accurate and specific concerning the granting of stays of orders pending judicial review; the changes would not result in any transactional costs to utilities, customers, small businesses, the Commission, or local governments.

Any person who wishes to provide information regarding a statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

**SPECIFIC AUTHORITY:** 350.127(2), FS

**LAW IMPLEMENTED:** 120.68(3), FS

**IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE SCHEDULED AND ANNOUNCED IN FAW.**

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting is asked to advise the agency at least 48 hours before the workshop/meeting by contacting: Office of Commission Clerk, 2540 Shumard Oak Blvd., Tallahassee, FL (850) 413-6770. If you are hearing or speech impaired, please contact the agency using the Florida Relay Service,

1(800)955-8771 (TDD) or 1(800)955-8770 (Voice).

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS:

Kathryn G.W. Cowdery, Office of General Counsel, 2540 Shumard Oak Blvd.,  
Tallahassee, FL 32399-0850, (850) 413-6216, kcowdery@psc.state.fl.us.

THE FULL TEXT OF THE PROPOSED RULE IS:

25-22.061 Stay Pending Judicial Review.

(1) When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, ~~or~~ the posting of a corporate undertaking, or and such other conditions as the Commission finds appropriate to secure the revenues collected by the utility subject to refund.

~~(b) In determining the amount and conditions of the bond or corporate undertaking, the Commission may consider such factors as:~~

~~1. Terms that will discourage appeals when there is little possibility of success;  
and~~

~~2. A rate of interest that takes into consideration:~~

~~a. The use of the money that the stay permits;~~

~~b. The prime and other prevailing rates of interest at commercial banks and other potential sources of capital in the amount involved in the appeal.~~

(2) Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review ~~may~~ shall file a motion with the Commission, which ~~has~~ shall have authority to grant, modify, or deny such relief. A stay pending review granted pursuant to this subsection may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions relevant to the order being stayed, or both. In determining whether to grant a stay, the Commission may, among other things, consider:

(a) Whether the petitioner has demonstrated a likelihood of success on the merits ~~is likely to prevail~~ on appeal;

(b) Whether the petitioner has demonstrated a likelihood of sustaining that he is likely to suffer irreparable harm if the stay is not granted; and

(c) Whether the delay in implementing the order will likely cause substantial harm or be contrary to the public interest if the stay is granted.

~~(3)(a) When a public body or public official appeals an order involving an increase in a utility's or company's rates, which appeal operates as an automatic stay, the Commission shall vacate the stay upon motion by the utility or company and the posting of good and sufficient bond or corporate undertaking. When determining the amount and conditions of the bond or corporate undertaking, the Commission may consider such factors as those set forth in subparagraph (1)(b)2.~~

~~(b) When a public body or public official appeals an order that does not involve an increase in rates, the Commission may vacate the stay or impose any lawful conditions.~~

~~(34) When a stay or vacation of a stay is conditioned upon the posting of a bond, or corporate undertaking, or other appropriate form of surety, the Commission shall may at the time it grants the stay or vacation of the stay, set the rate of interest to be paid by the utility or company pursuant to Rule 25-4.114(4), F.A.C., for telecommunication companies, Rule 25-6.109(4), F.A.C., for electric public utilities, Rule 25-7.091(4), F.A.C., for gas public utilities, and Rule 25-30.360(4), F.A.C., for water and wastewater utilities in the event that the Court's decision requires a refund to customers.~~

~~(45) Motions filed pursuant to subsections (1) or (2) of this rule shall be heard by those Commissioners who were on the deciding panel for participated in the proceeding which resulted in the order being appealed. However, motions filed under subsection (3) of this rule may be ruled upon by the Chairman or the Commissioner assigned as the prehearing officer in the case.~~

~~Rulemaking Specific Authority 350.127(2) FS. Law Implemented 120.68(3) FS. History—New 2-1-82, Formerly 25-22.61.~~

~~NAME OF PERSON ORIGINATING PROPOSED RULE: Kathryn G.W. Cowdery, Office of General Counsel, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850, (850) 413-6216, kcowdery@psc.state.fl.us~~

~~NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: Florida Public Service Commission~~

~~DATE PROPOSED RULE APPROVED BY AGENCY HEAD: March 16, 2010~~

~~DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAW: Volume 35, Number 42, October 23, 2009~~

STATEMENT OF FACTS AND CIRCUMSTANCES  
JUSTIFYING RULE

Rule 25-22.061, Stay Pending Judicial Review, is amended for consistency with Fla. R. App. P. 9.310, which was amended by the Florida Supreme Court to provide that the timely filing of a notice of appeal does not operate as a stay pending judicial review in administrative actions under Chapter 120, F.S., when the state, any public officer in an official capacity, board, commission, or other public body seeks review. The rule amendments clarify the factors which the Commission may consider in determining whether to grant a stay, under what conditions the Commission may condition a stay, and amend the factors that the Commission may consider in setting an interest rate when granting a stay conditioned upon the posting of a bond or corporate undertaking. The rule amendments clarify that motions for stay shall be heard by those Commissioners who were on the deciding panel for the order being appealed.

STATEMENT ON FEDERAL STANDARDS

The Federal Rules of Civil Procedure govern stays pending judicial review in federal court actions. Rule 25-22.061 is not in conflict with these federal rules.

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-**

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**DATE:** February 1, 2010  
**TO:** Office of General Counsel (Cowdery)  
**FROM:** Division of Economic Regulation (Hewitt) *CHK*  
**RE:** Proposed Amendments to Rule 25-22.061, Stay Pending Judicial Review, F.A.C.

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DETAILED DESCRIPTION OF THE PROPOSED RULE REPEALS

*1. Why are the rule amendments being proposed?*

Rule 25-22.061, Stay Pending Judicial Review, is proposed to be amended to be consistent with Florida Rule of Appellate Procedure 9.310(Fla. R. App. P. 9.310). Fla. R. App. P. 9.310 was amended to provide that the timely filing of a notice of appeal does not operate as a stay pending judicial review in administrative actions under Chapter 120, F.S., when the state, any public officer in an official capacity, board, commission or other public body seeks review.

The proposed rule amendment would also delete language concerning factors the Commission may consider for determining the amount and conditions of a bond or corporate undertaking. In addition, the rule amendment would have the Commissioners who were on the deciding panel rule on any motions filed pursuant to this rule.

The purpose of these amendments is to accurately reflect the factors considered by the Commission in ruling upon motions for stays pending judicial review and in getting conditions for stays.

*2. What do the rules do and how do they accomplish the goal?*

The rule specifies the provisions of law which govern stays pending judicial review, to specify the factors which the Commission may consider in determining whether to grant a stay, under what situations the Commission may condition a stay, and the factors that determine the amount and conditions of a bond posted for an appeal that involves the refund of money to customers or a decrease in rates.

IMPACT ON THE PSC

*Incremental costs*

There should be no incremental costs for the Commission.

*Incremental benefits*

There would be benefits from updating, clarifying and streamlining the rule language.



WHO BESIDES THE PSC WILL BE AFFECTED BY ADOPTION OF THE PROPOSED REPEALS

*Utilities/Regulated Companies*

Any company regulated by the Commission appealing an order involving the refund of money to customers or a decrease in rates or seeking to stay a final or nonfinal order pending judicial review would be affected. There were 1371 certificated companies regulated by the Commission as of July 1, 2009.

*Customers*

Customers would not be affected.

*Outside business and local governments*

Small businesses would not be affected.

HOW ARE THE PARTIES ABOVE AFFECTED BY THE ADOPTION OF THE PROPOSAL

*Estimated transactional costs to individuals and entities*

*Utilities*

Companies that would be affected would benefit from making the rule more accurate and specific concerning the granting of stays of Commission orders pending judicial review but would not have transactional costs.

*Customers*

Customers would not be affected.

*Outside businesses including specifically small businesses*

Outside businesses, including small business, would not be affected by the proposed rule amendments.

*Local governments*

Local governments would have no transactional costs from the rule repeals.

ANY OTHER PERTINENT COMMENTS REGARDING THE APPLICATION OF THE PROPOSED RULE

No other pertinent comments are germane to the proposed rule amendments.

CH:kb

cc: Tim Devlin  
Chuck Hill