

JEFF ATWATER
President of the Senate



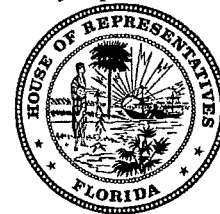
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LARRY CRETUL
*Speaker of the
House of Representatives*



March 11, 2010

Samantha Cibula
Florida Public Service Commission
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850

Re: Undocketed Rule Development Workshop regarding contacts with Commission Staff.

Dear Ms.Cibula:

Attached is a further revised version of the Public Counsel's Alternative Suggestions for amendments to Rule 25-22.033 for your consideration at the March23, 2010 workshop. We have made minor revisions where indicated in track changes and restored omitted underlining indicating new language in the last two sentences of subsections (4) and (5). Please substitute the attached rule proposal language for what was submitted on March 9, 2010 along with this explanation.

Thank you for your consideration of these revisions and corrections. Please call with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "CJ Rehwinkel".

Charles J. Rehwinkel
Associate Public Counsel

Enclosure

NOTICE OF PROPOSED RULE DEVELOPMENT
 UNDOCKETED
 March 23 Drafting Workshop Revisions

OFFICE OF PUBLIC COUNSEL ALTERNATIVE SUGGESTIONS

1 **25-22.033 Commission Employee Communications with ~~Communications Between Commission~~**
 2 **~~Employees and Parties and Interested Persons.~~**

3 (1)The Commission recognizes that Commission employees must exchange information with
 4 parties and other persons who ~~have interest in~~ are affected by Commission proceedings. However, the
 5 Commission also recognizes that all parties and interested persons ~~to~~ with an interest in docketed matters
 6 where agency action is expected, ~~adjudicatory proceedings~~ need to be notified given proper notice and
 7 given an opportunity to participate in certain communications. The intent of this rule is not to prevent or
 8 hinder in any way the exchange of information, but to provide all parties and interested persons to
 9 docketed ~~adjudicatory~~ proceedings and matters where agency action is expected notification of, and the
 10 opportunity to participate in, certain communications. This rule also defines and prohibits certain
 11 communications as impermissible.

12 (2)(1)This rule ~~shall govern~~ applies to ~~communications between~~ Commission employees'
 13 communications with ~~and~~ parties and interested persons in relation to ~~docketed proceedings matters~~
 14 where agency action is expected, ~~before the Commission.~~ This rule shall not apply to matters related to ~~in~~
 15 emergency operation center activities under declared emergency conditions, ~~proceedings under Sections~~
 16 120.54, 120.565, matters or proceedings under Section 367.0814, F.S. Florida Statutes, proposed agency
 17 action (or PAA) proceedings before the Commission has voted to issue a proposed agency action order,
 18 which are not subject to a PAA notification request or a request for a hearing, non-rate case tariffs,
 19 (except for tariffs either affecting customers' rates or affecting customer service in a material manner), ~~or~~
 20 workshops (other than rulemaking workshops), internal affairs meetings, (except for communications
 21 related to, but outside of, the actual internal affairs meetings), ~~Also exempted are~~ docketed and
 22 undocketed audits, field telephone service evaluations, informal consumer complaints,

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1 ~~and~~ electric and gas safety inspections, and cases pending on appeal from the Commission in the court
 2 system. Nothing in this rule is intended to modify or supersede the procedural requirements for formal
 3 discovery under Rules 1.280 through 1.390, the Commission's rules and applicable provisions of the
 4 Florida Rules of Civil Procedure, or affect communications regarding discovery request, procedure, or
 5 other matters not concerned with the merits of a case.

6 (3) For purposes of this rule, the following definitions shall apply:

7 (a) "Agency action proceeding" or "agency action matter" means a proceeding or matter that
 8 is, or will in the reasonably foreseeable future likely be, the subject of or subject to, agency action as
 9 defined in s.120.52(2), F.S., unless such matter or proceeding is otherwise expressly exempted in
 10 subsection (2) of this rule.

11 (b)(a) "Party" or "Parties" are those individuals or entities designated in the docket file of the
 12 proceeding or by order of the Commission as an Official Party of Record and includes employees,
 13 witnesses, consultants and persons acting in a representative capacity for individuals or entities designated
 14 as parties in the docket file of an agency action proceeding or in a file established for undocketed agency
 15 action proceedings. For purposes of providing any notice to a required person of a covered
 16 communication pursuant to this rule, only ~~the names of~~ those individuals listed as a required person in the
 17 applicable Commission files ~~shall be used~~ are required to receive notice.

18 (c) "Covered Communication" means a communication between a commission employee and
 19 either a party or an interested person, or both, directly relating to an agency action proceeding or matter,
 20 not exempted from this rule. For purposes of providing notification to required persons, this definition
 21 also includes communications described in this subsection and made in violation of the provisions barring
 22 impermissible communications. Covered communications related to undocketed agency action matters
 23 shall be filed in a publicly and readily accessible file established solely for the purpose of receiving and
 24 providing notice to the public of such communications.

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1 ~~(d)(b)~~ **"Interested persons"** are those individuals or entities listed in the applicable Commission
2 file of the corresponding agency action proceeding or matter but not designated as an Official Party of
3 Record to the proceeding, and persons, other than those persons specified in s.350.042 (2), F.S., who
4 have, or could reasonably be presumed to have, an interest in the outcome of the relevant agency action
5 proceeding in either their individual or representative capacity. For purposes of providing any notice to a
6 required person of a covered communication pursuant to this rule, only ~~the names of~~ those individuals
7 listed as a required person in the applicable Commission files ~~shall be used~~ are required to receive notice.

8 ~~(e) "Ex parte Prohibited Communication" means any communication that, if written, is not~~
9 ~~served on all parties and interested persons to a proceeding, and, if oral, is made without adequate notice~~
10 ~~to the parties and an opportunity to be present.~~

11 ~~(e)(e)~~ **"Impermissible Communication"** means any covered communication relating to an
12 agency action proceeding that, if written, is not served on, or, if oral, is made without adequate notice to,
13 required persons or persons reasonably expected to be required persons once a matter is filed with or
14 otherwise brought before the Commission, and an opportunity for them to be present.

15 ~~(f)~~ **"Required Person"** means the individual(s) who, at the time a covered communication is
16 made, have undertaken to be listed as a party or interested person in the applicable Commission file
17 relating to the matter that is the subject of the covered communication. Commission employees
18 designated in the official file for receipt of covered communications are also required persons. Persons
19 with interests before the Commission, other than those specified in s.350.042(2), F.S., are deemed to have
20 knowledge of the interests affected by matters they bring before the Commission. Accordingly, the
21 absence of a Commission file on a particular matter does not mean that communications with
22 Commission employees are permissible on a matter in the absence of notice to persons who would
23 otherwise be required persons if they were aware of the existence of the matter.

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1 ~~(4)(2)Written Communications — Notice of any Ex parte prohibited written communications are~~
2 ~~forbidden prohibited. W~~written communications between Commission employees and parties ~~or~~
3 ~~interested persons shall be transmitted to all other parties at the same time as the written communication~~
4 ~~is transmitted, whether by U.S. Mail or other means. Transmittal of the communications to all required~~
5 ~~persons and parties shall be in the same form, by the same means and simultaneous with transmittal to the~~
6 ~~recipient, whether by U.S. Mail or other means.~~

7 ~~(4) Action required in the Event Written Impermissible Communications.. Required persons shall~~
8 ~~be provided copies of a written covered communication relating to agency action proceedings. A party,~~
9 ~~person, or commission employee sending the original of a written covered communication shall provide a~~
10 ~~copy of each written covered communication to all other required persons at the same time the written~~
11 ~~covered communication is initially made. Provision of the written covered communication to all other~~
12 ~~required persons shall be made in the same form, by the same means and simultaneous with provision to~~
13 ~~the initial intended recipient. Nothing herein prohibits electronic transmittal of a facsimile copy of a~~
14 ~~communication originally made in paper form. A written covered communication received by a~~
15 ~~Commission employee with no evidence of provision to other required persons, shall be provided as~~
16 ~~promptly as is reasonable under the circumstances to all required persons as provided in this section.~~
17 ~~Provision to required persons by a Commission employee of an impermissible, but otherwise covered,~~
18 ~~communication under this circumstance does not negate a violation of this rule by a party or interested~~
19 ~~person. Nothing in this subsection is intended to countenance written impermissible communications.~~
20 ~~Instead, this section sets forth certain action required in the event such an impermissible communication~~
21 ~~should occur.~~

22 ~~(5)(3)Scheduled Meetings and Conference Calls — All parties to the proceeding shall be given~~
23 ~~reasonable notice of the time and place of any meeting or conference call Commission employees and~~
24 ~~parties or interested persons. For purposes of this subsection, a conference call is defined as a telephone~~
25 ~~call involving three or more persons. The notice of the meeting or conference call shall be posted on the~~
26 ~~Commission's website, www.floridapsc.com, prior to the meeting or conference call. (5)(3). Unwritten~~

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1 impermissible communications are forbidden. Notice of any meeting or telephone call shall be provided
2 to required persons and shall be posted on the Commission's web site, www.floridapsc.com, a reasonable
3 time prior to the meeting or telephone call. Meetings or calls that circumvent, or which are intended to
4 circumvent, the fair and open communications purposes of this rule are prohibited. Nothing in this
5 subsection is intended to countenance written impermissible communications. Instead, this section sets
6 forth certain action required in the event such an impermissible communication should occur.

7 (6) All written covered communications between Commission employees and parties or
8 interested persons in agency action proceedings, in which the Commission is determining the substantial
9 interests of a party pursuant to Sections 120.54, 120.565, 120.569 and 120.57, F.S., except discovery
10 requests and discovery responses, shall be placed in the docket file to which the communication pertains
11 by the person making the written covered communication within 3 7-days of the date of the
12 communication. If a Commission employee orally engages in an unwritten covered communication with a
13 party or interested person in such an agency action proceedings outside of a noticed meeting or
14 conference call, the Commission employee shall summarize in writing the oral communication and file
15 the summary in the docket-applicable Commission file and post notification of the communication on the
16 Commission's website within 7 3 days of the date of the communication. If the covered communication
17 occurs less than 7 3 days before a hearing or decision making point in the proceeding, the written
18 covered communication or the summary of the unwritten covered communication shall be provided to all
19 required persons as promptly as is reasonable under the circumstances, placed in the applicable
20 Commission file, and notification of the communication shall be posted on the Commission's website
21 within a reasonable time in advance of the hearing or decision making point. Nothing in this section is
22 intended to negate a violation of this rule by a party or interested person for an otherwise unlawful or
23 impermissible communication.

24 (7) No Commission employee shall contact a party or interested person and no party or interested
25 person shall contact a Commission employee on any matter at issue in an agency action a Sections 120.54
26 , 120.565, 120.569 or 120.57, F.S., proceeding during the period of time between the conclusion of the

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1 ~~hearing in the proceeding and the issuance of the final order in the proceeding unless all persons are given~~
2 ~~a reasonable opportunity to be included in or made aware of included in the communication.~~

3 (7) Persons wishing to receive notification of covered communications related to all petitions for
4 Proposed Agency Action (PAA) or matters being otherwise processed as a PAA may file a standing
5 request for notification of such in a manner specified by the Commission Clerk. Any person with a
6 standing PAA notification request must file a docket specific supplemental continuing request for
7 continued notification no later than 21 days after the docketing of each case for PAA resolution in order
8 for the requestor to receive notification of covered communications or meetings in that agency action
9 proceeding. If no docket-specific requests or docket specific supplemental continuing requests for
10 notification are received in a docket after 21 days, then the docket becomes exempt under the provisions
11 of subsection (2). This exemption applies only from the time the 21 day period expires with no docket-
12 specific notification requests filed until a protest, if any, is filed or a docket specific notification request is
13 filed. During the first 21 days of the docketing of a case for PAA resolution, the docket shall be presumed
14 a proceeding subject to the first sentence of subsection (2). Additionally, nothing in this subsection
15 exempts a matter initially docketed for a PAA resolution from the from the first sentence of subsection (2)
16 for the time prior to a docket having been opened. This subsection does not apply to an agency action
17 proceeding that is not initially designated as or subject to a request for PAA resolution at the time the
18 docket is established.

19 (8) In all agency action proceedings, not otherwise exempted from the provisions of this rule in
20 which a hearing has been held, Commission employees shall neither initiate, engage in, nor consider
21 impermissible or covered communications during the time between the end of a hearing, when the record
22 is closed, and the issuance of the final order in the proceeding. This subsection does not prohibit
23 communications with Commission employees at any time related solely to the initiation of, or response
24 to, written communications for the purpose of purely scheduling matters or completing discovery so long
25 as such written communications do not relate to the substance of the completed proceeding. All written
26 communications falling within the exemption shall be filed with the Commission Clerk, placed in the

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1 docket, and posted to the Commission website within 3 days from the time the written communication
 2 was first sent or received by a Commission employee. The prohibitions in this subsection shall not apply
 3 to those communications between Commission employees or parties and interested persons related solely
 4 to investigating and assisting in the resolution of informal individual consumer complaints unrelated to
 5 the merits of the agency action proceeding. Nothing in this section is intended to allow impermissible
 6 communications during any other part of an agency action proceeding. Nothing in this section is intended
 7 to relieve a person from the notification requirements for any communication, as otherwise provided in
 8 this rule.

9 (9)(4)Response to Communications - Any party to a proceeding may prepare a written response
 10 to any communication between a Commission employee and another party or interested person **and**
 11 submit the response to the applicable Commission file. ~~Notice of any such Filed written responses shall~~
 12 be posted on the Commissions' website and transmitted to all parties at the same time as the written
 13 response is submitted to the Commission clerk for filing, whether by U.S. Mail or other means.

14 (10)(5)Prohibited Communications - No Commission employee shall directly or indirectly relay
 15 to a Commissioner any communication from a party or an interested person which would otherwise be a
 16 prohibited ex parte communication under Section 350.042, F.S. ~~Florida Statutes.~~ Nothing in this
 17 subsection shall preclude non-testifying advisory staff members from discussing the merits of a pending
 18 case with a Commissioner, provided the communication is not otherwise prohibited by law. However, a
 19 staff member who testifies in a case or who has acted in a prosecutorial role in a license revocation or
 20 suspension proceeding or a proceeding imposing administrative fines or penalties shall not discuss the
 21 merits of that case with any Commissioner during the pendency of that case.

22 Specific Authority 350.01 (7),350.127(2) FS.

23 Law Implemented 120.569, 120.57,350.042 FS.

24 History-New 3-24-93, Amended .

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

1 **25-22.033 Commission Employee Communications with ~~Communications Between~~**
2 **Commission Employees and Parties and Interested Persons.**

3 (1) The Commission recognizes that Commission employees must exchange
4 information with parties and other persons who have an interest in Commission proceedings.
5 However, the Commission also recognizes that all parties and interested persons to certain
6 ~~docketed~~ adjudicatory proceedings need to be notified and given an opportunity to participate
7 in certain communications. The intent of this rule is not to prevent or hinder in any way the
8 exchange of information, but to provide all parties and interested persons to certain
9 ~~docketed~~ adjudicatory proceedings notification of and the opportunity to participate in certain
10 communications.

11 (2)(4) This rule shall govern ~~communications between~~ Commission employees
12 communications with ~~and~~ parties and interested persons to docketed proceedings before the
13 Commission **and notice of certain undocketed meetings as set forth in subsection (10) of**
14 **this rule.** This rule shall not apply to ~~in~~ emergency operation center activities, proceedings
15 under Sections 120.54, 120.565, 367.0814, F.S. Florida Statutes, proposed agency action
16 **(PAA) proceedings before the Commission has voted to issue a proposed agency action**
17 **order, where there has not been a request to intervene or a request for a hearing in the**
18 **docket, non-rate case tariffs, workshops, or internal affairs meetings.** ~~Also exempted are~~
19 docketed and undocketed audits, field telephone service evaluations, informal consumer
20 complaints, and electric and gas safety inspections, **communications with the Joint**
21 **Administrative Procedures Committee, the Small Business Regulatory Advisory Council,**
22 **the Office of Tourism, Trade and Economic Development, and the Department of State**
23 **in rulemaking proceedings, and cases pending in the court system a tribunal other than**
24 **the Commission.** Nothing in this rule is intended to modify or supersede the procedural
25 requirements for formal discovery under Rules 1.280 through 1.390, the Commission's rules

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1 ~~and applicable provisions of the Florida Rules of Civil Procedure, or affect communications~~
2 ~~regarding discovery requests, procedure, or other matters not concerned with the merits of a~~
3 ~~ease.~~

4 (3) For purposes of this rule, the following definitions shall apply:

5 (a) “Party” or “Parties” are those individuals or entities designated in the docket file of
6 the proceeding or by order of the Commission as an Official Party of Record and includes
7 employees, witnesses, consultants and persons acting in a representative capacity for
8 individuals and entities designated as parties in the docket file. For purposes of
9 providing any notice pursuant to this rule, only those individuals listed in the docket file
10 are required to receive notice.

11 (b) “Interested persons” are those individuals or entities listed in the docket file of the
12 proceeding but not designated as an Official Party of Record to the proceeding.

13 (c) “Impermissible Communication” means any communication with a party or
14 interested person related to the docketed matter that, if written, is not served on all
15 parties, or, if oral, is made without notice to all parties or interested persons.

16 (4) Commission employees shall not engage in impermissible communications.

17 ~~(4)(2) Written Communications — Notice of any Written communications~~
18 ~~between Commission employees and parties and interested persons shall be transmitted~~
19 ~~to all other parties at the same time as the written communication, whether by U.S. Mail~~
20 ~~or other means.~~

21 (5)(3) Scheduled Meetings and Conference Calls – All parties and interested persons
22 to the proceeding shall be given reasonable notice of the time and place of any scheduled
23 meeting or conference call between Commission employees and parties or interested persons.
24 The notice of the meeting or conference call shall be posted on the Commission’s Web site,
25 www.floridapsc.com, within a reasonable time prior to the meeting or conference call.~~For~~

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1 ~~purposes of this subsection, a conference call is defined as a telephone call involving~~
2 ~~three or more persons.~~

3 (6) All written communications between Commission employees and parties in
4 proceedings in which the Commission is determining the substantial interests of a party
5 pursuant to Sections 120.569 and 120.57, F.S., except discovery requests and discovery
6 responses, shall be placed in the docket file to which the communication pertains by the
7 person making the communication within 73 working days of the date of the communication.

8 If the written communication occurs less than 3 days before a hearing or decision
9 making point in the proceeding, the written communication shall be placed in the docket
10 file and provided to all parties as promptly as is reasonable under the circumstances. A
11 party or Commission employee sending the original written communication shall
12 provide a copy of the written communication to all parties at the same time and in the
13 same manner. If a Commission employee orally communicates with a party in such
14 proceedings outside of a noticed meeting or conference call, the Commission employee
15 shall summarize in writing the oral communication and file the summary in the docket
16 file within 7 days of the date of the communication.

17 (7) No Commission employee shall contact a party and no party shall contact a
18 Commission employee on any matter at issue in a Section 120.569 or 120.57, F.S., proceeding
19 during the period of time between the conclusion of the hearing when the record is closed in
20 the proceeding and the issuance of the final order in the proceeding unless the contact is in
21 writing and pertains to a settlement agreement and all parties to the proceeding are
22 included in the communication and the written communication is immediately placed in
23 the docket file. The prohibitions in this subsection shall not apply to those communications
24 between Commission employees and parties to investigate and assist in the resolution of
25 informal consumer complaints.

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1 (8)(4) Response to Communications – Any party to a proceeding may prepare a written
2 response to any communication between a Commission employee and another party or
3 interested person. ~~Notice of any such~~ Written responses shall be transmitted to all parties at
4 the same time as the written response, whether by U.S. Mail or other means provided to
5 all parties at the same time and in the same manner.

6 (9)(5) Prohibited Communications between Commissioners and Commission staff –
7 No Commission employee shall directly or indirectly relay to a Commissioner any
8 communication from a party or an interested person which would otherwise be a prohibited ex
9 parte communication under Section 350.042, F.S. Florida Statutes. Nothing in this subsection
10 shall preclude non-testifying advisory staff members from discussing the merits of a pending
11 case with a Commissioner, provided the communication is not otherwise prohibited by law.
12 However, a staff member who testifies in a case or who has acted in a prosecutorial role in a
13 license revocation or suspension proceeding or a proceeding imposing administrative fines or
14 penalties shall not discuss the merits of that case with any Commissioner during the pendency
15 of that case. In all Section 120.569 or 120.57, F.S., proceedings, a Commissioner or a
16 Commissioner's direct reporting staff shall not communicate with a Commission
17 employee on the merits of the proceeding during the period of time between the
18 conclusion of the hearing when the record is closed and the filing of the staff
19 recommendation. A Commission employee shall not communicate information about a
20 Commission's individual projects to any other person or entity not involved in the
21 project.

22 (10) Commission staff shall provide to the Office of Public Counsel and post on
23 the Commission's Web site all notices of undocketed meetings between Commission staff
24 and regulated entities within a reasonable time prior to the meeting. This subsection
25 shall not apply to undocketed meetings in proceedings excluded from this rule pursuant

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March 19, 2010 Staff Draft

1 **to subsection (2).**

2 Specific Authority 350.01(7), 350.127(2) FS.

3 Law Implemented 120.569, 120.57, 350.042 FS.

4 History—New 3-24-93, Amended.

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