

State of Florida



Public Service Commission

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

DATE: March 24, 2005

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

FROM: Office of the General Counsel (Stern/Smith/Melson)
Division of Economic Regulation (Hewitt)

RE: Docket No. 050108-OT – Proposed revisions to rules in Chapter 25-22 and Chapter 25-40, Florida Administrative Code

AGENDA: 04/05/05 – Regular Agenda – Rule Proposal – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\050108.RCM.DOC

Case Background

This recommendation proposes amendments to two chapters of the Florida Administrative Code, Chapter 25-22, Rules Governing Practice and Procedure, and Chapter 25-40, Exceptions to the Uniform Rules of Procedure. The primary purposes of the amendments are to make the rules on agenda conference participation and oral argument more closely reflect current Commission practice, and to clarify provisions that have caused confusion in the past. In addition, staff proposes to allow the filing of a cross-petition when proposed agency action is protested.

Because the rules proposed for amendment are procedural, the Commission will have to file a petition with the Administration Commission for approval, and explain why the Uniform Rules of Procedure in Chapter 28-108, Florida Administrative Code, are not appropriate for the Commission. Chapter 25-40 contains the exceptions to the Uniform Rules that have previously been granted to the Commission. All of the existing rules proposed to be amended herein have previously been granted exceptions. The Administration Commission must approve the

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modifications. The new rule on oral argument has obviously never been granted an exception. Chapter 25-40 must be amended to reflect changes proposed to Chapter 25-22.

Discussion of Issues

Issue 1: Should the Commission propose the amendments to Chapters 25-22 and 25-40, Florida Administrative Code, shown on Attachments 1 and 2 to this recommendation?

Recommendation: Yes. The Commission should propose the amendments to the Chapters as shown on Attachments 1 and 2 to this recommendation.

Staff Analysis: This analysis is organized into four parts. Part I explains the proposed changes to the text of Chapters 25-22 and 25-40. Part II addresses the petition to the Administration Commission. Part III identifies the statutory authority for the proposed rule amendments. Part IV summarizes the Statement of Estimated Regulatory Costs.

I. Proposed Rule Amendments

The primary purposes of the proposed rule amendments are to make the provisions on agenda conference participation (Rule 25-22.0021) and oral argument conform with current Commission practice, and to clarify provisions that seem to have caused confusion in the past. Provisions on oral argument, which are scattered throughout the existing Chapter 25-22, are now proposed to be consolidated into two rules, 25-22.0021 and 25-22.0022, the latter of which would be a brand new rule. In the process of rule development, an additional change was made. A provision allowing a cross-petition on proposed agency action is proposed to be added to Rule 25-22.029.

The changes made to each section are described below.

Rule 25-22.0021 – Agenda Conference Participation - This rule is being amended to more clearly delineate when a motion for oral argument is required in order to participate at an agenda conference, and when participation is informal, requiring no motion. The proposed amendments allow informal participation in the majority of circumstances. Informal participation is not allowed: 1) on dispositive motions; 2) when a post-hearing recommendation on the merits of a case is taken up by the panel (or full Commission); 3) when a petitioner is entitled to relief on a prima facie showing of facts (e.g., request for interim rate increase, declaratory statement); and 4) when the Commission votes on a recommended order.¹

Rule 25-22.0022 – Oral Argument Rule – This is an entirely new rule that incorporates provisions on oral argument that are scattered throughout the existing Chapter 25-22. Rule 25-22.0022(7) expressly addresses oral argument at agenda conferences. The lack of a rule on oral argument at agenda conferences has created much confusion in the past, which this new rule aims to eliminate. Subsection (7) provides that oral argument at an agenda conference will only be entertained for recommended orders, and dispositive motions. For oral argument on recommended orders, the request for oral argument must be filed no later than 10 days after

¹ This section would apply when the Commission considers a recommended order issued by an administrative law judge at the Division of Administrative Hearings, or in the rare instance when a single Commissioner sits as a hearing officer as provided for in Section 350.01(7), Florida Statutes.

exceptions are filed. This requirement is transferred from the existing rule on oral argument, 25-22.058, which is proposed to be deleted. Requests for oral argument on dispositive motions must be filed with the motion. Subsection (7) also advises the parties to come prepared to argue all issues associated with a proposed order or dispositive motion, even if the request for oral argument does not request that all issues be argued. Finally subsection (7) provides that when the published agenda shows that a request for oral argument will be an item taken up at an agenda conference, the published agenda serves as notice to the parties that they should come prepared for oral argument on all issues associated with the underlying motion. The remaining parts of the rule largely incorporate existing provisions on procedural matters.

Rule 25-22.029 – Point of Entry Into Proposed Agency Action Proceedings – The proposed revisions to this rule allow a substantially affected person or Commission staff to file a cross-petition within 10 days of service of the initial petition on proposed agency action (PAA). For most agencies, when a PAA order is protested parties are free to litigate any issue they want, whether it is raised in the protest or not. There is no need to file a cross-petition to raise an issue. Thus, the Uniform rules do not address filing of cross-petitions

The Commission is different. Under Section 120.80(13)(b), Florida Statutes, issues which are not expressly called into dispute by a petition are deemed stipulated. If a protest is filed on the last day of the protest period, as is often the case, then the only issues that can be litigated are those identified in the protest. Under the proposed rule, substantially affected persons, who may not have protested but may not have been happy with the order, can file a cross-petition within 10 days of the filing of the initial protest if they want to raise additional issues.

Florida Power & Light (FPL) commented that the opportunity to file a cross-petition should only be available to parties to the PAA proceeding, not to all substantially affected persons. FPL suggested that staff's proposed language would give a non-party an additional 10 day protest window that is not available to a party. Staff disagrees. The reasons for filing a protest and cross-petition differ, and are not related to the status of a person in the PAA proceeding. The best way to illustrate this is by example. A gas company petitions the Commission for a \$100 million rate increase. The Commission's PAA order grants a \$50 million increase and allocates a relatively high percentage to industrial customers. An industrial customer may decide that, overall, the PAA decision does not impose an unacceptable detriment on it. However, if the gas company protests the PAA order on the last the last day allowed, and only disputes the revenue requirement, then the industrial customer is subject to the risk of increased detriment. The industrial customer can intervene but cannot raise the issue of cost allocation because it was not raised in the protest. Allowing this industrial customer 10 days to file a cross-petition gives it the chance to raise the issue of cost allocation. There is no reason why this customer, who would have accepted the PAA order as issued, should be required to have become a party before the protest in order to file a cross-petition. For this reason staff recommends that any substantially affected person be allowed to file a cross-petition.

Rule 25-22.0367 – Reconsideration of Non-Final Orders – Subsection (5) of this rule, pertaining to oral argument on motions for reconsideration of non-final orders, is proposed for deletion but is incorporated into the newly proposed Oral Argument Rule, 25-22.0022. Under the proposed

amendments, a motion for reconsideration of a non-final order is considered a dispositive motion and, if a request for oral argument on the motion is filed in accordance with Rule 25-22.0022, the oral argument may occur at an agenda conference. Informal participation on a motion for reconsideration of a non-final order is not permitted under the proposed revisions.

Another proposed change to this rule is deletion of the following sentence: “A party who fails to file a written response to a point on reconsideration shall be precluded from responding to that point during oral argument.” BellSouth asked that this provision be eliminated because it is possible for a party to raise a few key issues and many less significant issues in its motion, the latter having little or no support. In such situations, explains BellSouth, a responding party might concentrate on what it believes are the most important issues, and not address every single issue raised by the motion. If the moving party then based its oral argument on some of the minor issues, the responding party would be precluded from arguing before the Commission. Thus, the purpose of an oral argument, to better inform the Commission, would be circumvented. Staff agrees with BellSouth on this point. Furthermore, in practice the Commission does not appear to follow this part of the existing rule. For these reasons the sentence was eliminated.

25-22.058 – Oral Argument – Staff proposes to repeal this rule in its entirety and replace it with proposed Rule 25-22.0022. The first and second subsections of the existing rule, dealing with procedures for filing a request for oral argument and notice, are addressed in subsections (1), (2) and (7) of proposed Rule 25-22.0022. Subsection (2) of the existing rule limits oral argument to 15 minutes unless otherwise specified. Subsection (1) of proposed Rule 25-22.0022 requires the movant to state the time needed for oral argument. The Commission can decide whether to grant that part of the request or set a different time limit when ruling on the request. Subsection (3) of the existing rule, that deals with recommended orders, is incorporated into proposed rules 25-22.0022 (2), (3), (5) and (7).

Deletion of this rule and replacement with the proposed Rule 25-22.0022 should eliminate much of the confusion associated with oral argument at agenda conferences. The existing rule creates confusion because it is the most detailed rule we have on oral argument but it is located in Part IV.D of Chapter 25-22, which pertains to post-hearing procedures. Thus, the rule’s application is intended to be limited to post-hearing procedures. However, attempts are made to apply the rule in many more situations than post-hearing because the need for oral argument arises in other situations as well. Compounding the problem is the provision in Rule 25-22.0021(2), proposed for deletion, that prohibits oral presentation on a post-hearing recommendation at an agenda conference by anyone other than non-testifying staff. Thus, under the existing rules, we have a rule seeming to allow post-hearing oral argument and another rule which prohibits post-hearing oral argument by the parties. Under the proposed rules, the oral argument rule is in Part 1 of Chapter 25-22, General Provisions, so it is clear that oral argument is not limited to one phase of a proceeding. The prohibition on post-hearing oral argument is included in the newly proposed rule.

Rule 25-22.060 – Motion for Reconsideration – The title of this rule is proposed to be changed to “Motion for Reconsideration of Final Orders” because it is located in the post-hearing section of Chapter 25-22. In addition, there is already a rule titled “Reconsideration of Non-Final Orders”

and this proposed change makes clear that Rule 25-22.060 is not intended to apply to reconsideration of both types of orders.

Three provisions of this rule pertaining to PAA orders and oral argument are being amended as follows: 1) in paragraph 25-22.060(1)(a), the language prohibiting reconsideration of PAA orders is being moved to Rule 25-22.029, which deals with proposed agency action; 2) the first sentence of provision 25-22.060(1)(f), stating that granting or denying a request for oral argument is at the sole discretion of the Commission, is moved to 25-22.0022(3); and 3) the last sentence of provision 25-22.060(1)(f), stating that a party who fails to file a written response to a point on reconsideration is precluded from responding to that point during oral argument, is proposed to be deleted. The proposed amendments to Rule 25-22.0021, Agenda Conference Participation, make clear that informal participation on motions for reconsideration is not allowed, and that a request for oral argument must be filed if a party wants to discuss such a motion before the Commission.

Rule 25-40.001 – Exceptions to the Uniform Rules of Procedure – This existing rule consists entirely of a table listing the procedural rules approved by the Administration Commission, and the corresponding provisions of the Uniform Rules that they replace. The table has to be amended to include the newly proposed oral argument rule, Rule 25-22.0022, and to delete the existing oral argument rule, Rule 25-22.058. All the other amendments proposed herein are to rules already included in the table.

II. Petition for Exceptions From the Uniform Rules of Procedure

The Uniform Rules of Procedure are found in Chapter 28, Florida Administrative Code, and are procedural rules that all agencies must follow. The rules became effective in 1997 and all agencies were required to comply with them by 1998. Section 120.54(5)(b), Florida Statutes, allows agencies to seek exceptions from one or more of the Uniform Rules in three situations: 1) to the extent necessary to implement statutes other than Chapter 120; 2) to the extent necessary to obtain federal funds or certain federal tax benefits; and 3) as required for the most efficient operation of the agency as determined by the Administration Commission.

The Commission petitioned the Administration Commission for exceptions when the Uniform Rules first became effective. All of the existing rules proposed for amendment herein were granted exceptions in 1998. The table below summarizes why each rule was granted an exception in 1998. The underlined text in the table shows the additions that are applicable to the rules proposed in this recommendation. Text that is struck through shows existing rules that are proposed to be repealed in this recommendation. This table summarizes the changes that the Administration Commission would have to approve in order for the proposed amendments in this docket to become effective.

Rule	Reason for Granting Exception	Uniform Rule from Which Exception was Granted
25-22.0021 - Agenda Conference Participation	Most efficient operation of the agency	Chapter 28-102, Agenda and Scheduling of Meetings

		and Workshops
<u>25-22.0022 – Oral Argument Rule</u>	<u>Most efficient operation of the agency</u>	<u>Chapter 28-102, Agenda and Scheduling of Meetings and Workshops and Chapter 28-106, Decisions Determining Substantial Interests</u>
25-22.029(1), (3) <u>and (4)</u>	Necessary to implement Section 367.081(4)(a), Florida Statutes, and for most efficient operation of the agency; <u>necessary to implement Section 120.80(13)(b) and for most efficient operation of the agency</u>	Chapter 28-106, Decisions Determining Substantial Interests
25-22.029(2)	Most efficient operation of the agency	Chapter 28-106, Decisions Determining Substantial Interests
25-22.0376	Necessary to implement Sections 350.01(5), 364.183, 366.093, 367.156 and 368.108, Florida Statutes, and for the most efficient operation of the agency.	Chapter 28-106, Decisions Determining Substantial Interests
25-22.058	Most efficient operation of the agency.	Chapter 28-106, Decisions Determining Substantial Interests
25-22.060	Necessary to implement Sections 350.01(5), 364.183, 366.093, 367.156 and 368.108, Florida Statutes, and for the most efficient operation of the agency.	Chapter 28-106, Decisions Determining Substantial Interests

III. Statutory Authority

The specific authority for all the proposed rule amendments comes from Sections 350.01(7) and 350.127(2), Florida Statutes. Section 350.01(7) allows the Chair to appoint a Commissioner to serve as a hearing officer. Section 350.127(2) authorizes the Commission to adopt rules implementing the duties conferred upon it by law.

The laws implemented are shown below.

<u>Rule</u>	<u>Laws Implemented</u>
25-22.0021	120.525
25-22.0022	120.569, 120.57

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25-22.029	120.569, 120.57, 120.80(13)(b), 364.05, 366.06, 367.081, 367.081(4)(a), 267.0817
25-22.0376	120.569, 120.57
25.22.060	120.569, 120.57

IV. Statement of Estimated Regulatory Costs

The Statement of Estimated Regulatory Costs is in Attachment 3. The proposed rule should make the agenda conference process more efficient and less time consuming and thus less costly for utilities. The Commission would benefit by the more timely and efficient manner of participation. The total cost savings are unknown.

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Issue 2: Should this docket be closed?

Recommendation: Yes, if no comments or requests for hearing are filed, the rule as proposed should be filed for adoption with the Secretary of State and the docket should be closed.

Staff Analysis: Unless comments or requests for hearing are filed, the rule as proposed may be filed for adoption with the Secretary of State. The docket may then be closed.