

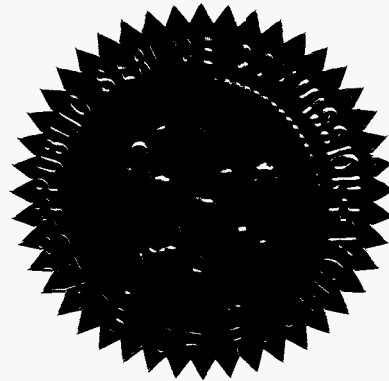
BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of:

RULE 25-22.033:
COMMUNICATIONS BETWEEN
COMMISSION EMPLOYEES
AND PARTIES.
_____ /

DOCKET NO.: UNDOCKETED



PROCEEDINGS: STAFF WORKSHOP

DATE: Thursday, October 14, 2010

TIME: Commenced at 9:30 a.m.
Concluded at 10:25 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

RECEIVED AT 4:49 PM DATE

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FPSC-COMMISSION CLERK

P R O C E E D I N G S

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2 **MS. CIBULA:** Pursuant to notice, this time and
3 place has been set for a rule development workshop on
4 Rule 25-22.033, Florida Administrative Code, entitled
5 Communications Between Commission Employees and Parties.

6 First off, let's take appearances.

7 I'm Samantha Cibula of the Commission's legal
8 staff.

9 **MS. MILLER:** I'm Cindy Miller with the
10 Commission's legal staff.

11 **MS. SALAK:** I'm Beth Salak, technical staff
12 with the Division of Regulatory Analysis.

13 **MR. WILLIS:** Marshall Willis, Director of the
14 Division of Economic Regulation.

15 **MR. REHWINKEL:** Charles Rehwinkel and J.R.
16 Kelly, Office of Public Counsel.

17 **MR. BEASLEY:** Jim Beasley and Jeff Wahlen for
18 Tampa Electric Company.

19 **MR. STONE:** Jeff Stone of Beggs and Lane on
20 behalf of Gulf Power Company.

21 **MR. HATCH:** Tracy Hatch on behalf of AT&T
22 Florida.

23 **MS. CIBULA:** There's a sign-in sheet on the
24 table to my right, so please make sure that you sign in
25 so that we have a record of who's in attendance today.

1 The first item on the agenda for the workshop is opening
2 remarks of workshop participants, so does anyone have
3 any opening remarks?

4 **MR. REHWINKEL:** Thank you, Samantha. Charles
5 Rehwinkel with Public Counsel's Office.

6 At this point, the Public Counsel's Office
7 would like to state that although we have raised issues
8 throughout this rulemaking process, we deeply appreciate
9 the Commission undertaking the rulemaking process. We
10 also appreciate the spirit of cooperation and dialogue
11 that we have had with the other interested parties in
12 the workshop and rulemaking process.

13 We hope that you go forward with the rule that
14 you have proposed as it is today. Although we have
15 asked for the Commission to take into consideration and
16 adopt certain measures that we think would be
17 improvements to the process, we realize that our
18 perspective is one of a party that participates in the
19 process, albeit frequently. It is not the end all and
20 be all of what public policy ought to be with respect to
21 these kind of rules.

22 There are other offsetting considerations that
23 the other parties, I think, have also brought to your
24 attention. We think that the proposal that is in the
25 document today is a good compromise, and it is an

1 improvement on the existing process that was undertaken
2 almost 17 years ago today, and so we think that time is
3 right to do what you are doing today.

4 The only caution that we would ask that the
5 staff and the Commission take into consideration is that
6 the Proposed Agency Action process is used more today,
7 we believe, than it was 17 years ago and further back
8 when some of the statutes and Commission rules were
9 adopted. The Proposed Agency Action process was
10 designed not to create presumptions within the Proposed
11 Agency Action order, but intended to make the
12 administrative process more efficient, and it has done
13 that, but it should never be a shortcut to due process.

14 And we would also like to state in these
15 comments that we commend the staff for the processes and
16 internal policies that they have developed in dealing
17 with parties in Proposed Agency Action and other
18 proceedings. We hope that you will adhere to those,
19 whether they are in the rule or not. One of the
20 cautions that we would offer is that because we have
21 advanced proposals and that they may not be adopted,
22 even if those proposals are things that you do today, we
23 hope that you do not recede from doing those, but are
24 continually mindful of what's important to protect not
25 only the rights of the parties, but the perception and

1 the integrity of the process.

2 We think this whole workshop process has
3 sharpened the focus on that. We think the rule proposal
4 that you have today purports with the spirit of that.
5 And so, in concluding, we would say that we will
6 accept -- or we will not contest the proposals as they
7 are here today. We certainly would like to listen to
8 what other parties have to say and respond to them, and
9 we'll always be willing to work to make the process
10 better and this rulemaking better. But we would commend
11 you and the other parties for what you have come up with
12 to this point today.

13 **MS. CIBULA:** Thank you.

14 Any additional opening comments?

15 **MR. BEASLEY:** I would just share in Charles'
16 appreciation for the work that the staff has put in, and
17 we appreciate the opportunity to appear.

18 **MR. STONE:** On behalf of Gulf Power Company,
19 we also have been willing participants in this process;
20 we think it has been helpful, and we do think that there
21 has been a heightened awareness of the concerns of all
22 parties to ensure that there is due process. We, too,
23 believe that it is important to protect the integrity of
24 the process.

25 By the same token, we think it's important

1 that the regulator be in a position to be able to gain
2 necessary information in order to make informed
3 decisions so that we don't unnecessarily increase the
4 cost of regulation by either delay or by making mistakes
5 in judgment of policy or decisions on the merits that
6 have to be retreated from at some future date. And so
7 we think it's important that there still be an efficient
8 flow of communications, not necessarily that we -- well,
9 let me rephrase that.

10 I think it's important to recognize the
11 distinction between the ultimate decision-makers, that
12 is, the Commissioners, and the professional staff that
13 is working at gathering information in order to inform
14 those decision-makers so that they can make informed
15 policy decisions and decisions on the merits. We
16 believe that the current rule strikes that balance. We
17 believe that the current statutory framework properly
18 strikes that balance.

19 And while through this whole process we have
20 gained a further insight into some areas that can be
21 problematic, perhaps, we do agree with the statement of
22 the Public Counsel that it's important that the PAA
23 process not do anything to impede due process rights,
24 but that it be protected as an efficient means of
25 regulation in terms of trying to deal with matters that

1 do not necessarily become contested matters.

2 We have other thoughts on the rules, quite
3 frankly. We believe that the current draft still has
4 some serious problems that operate as a chilling effect
5 on the efficient communication of what is necessary and
6 appropriate for the staff to understand about the
7 regulated entities. We think it's important that the
8 regulatory body be able to have contact with the
9 regulated entity. I cannot think of any regulatory body
10 in this country where the regulated entity is put in a
11 posture where there cannot be communication between the
12 staff and the entity.

13 And with that, we certainly welcome the
14 participation we have had up to now and we look forward
15 to continued participation in this process, so that
16 whatever is ultimately adopted, if anything, still
17 allows for good effective regulation in this state.

18 **MS. CIBULA:** Thank you.

19 Any additional comments?

20 **MR. HATCH:** Yes. Tracy Hatch on behalf of
21 AT&T Florida.

22 We fully support any efforts to protect the
23 integrity of the process. I think, as we have stated
24 before, that whatever the rules are, we will all strive
25 to abide by them whatever they are. But the real point

1 is that whatever those rules are, they have to be clear
2 and concise so that there can't be much ambiguity. The
3 worst place you can possibly be is guessing whether
4 something you do is right or wrong under the rules.
5 Particularly when you don't have time to go ask for a
6 dec statement to say what does it mean, what does it not
7 mean. And I think that there are some technical issues
8 with how the rule is structured and the way some of the
9 terms are used that just need to be fleshed out and
10 fixed, because what you have here is rife with a certain
11 amount of ambiguity that I think is very dangerous for
12 anybody and everybody.

13 **MS. CIBULA:** Thank you. Any additional
14 opening statements?

15 Okay. We'll move section-by-section through
16 the rule. Any comments on Subsection 1 of the draft
17 rule?

18 **MS. MILLER:** And when you do speak, I know
19 some of you remembered and some didn't, just please
20 remember to state your name and who you're with.

21 Thanks.

22 **MR. HATCH:** Just generically? Are you going
23 in any particular order?

24 **MS. CIBULA:** Whoever wants to speak up.

25 **MR. HATCH:** I moved down here so I wouldn't

1 have to be first, but everybody else moved further to
2 the left.

3 I have a couple of questions. First,
4 generically, and perhaps you can help flesh some of this
5 stuff out. When I'm talking about ambiguity, this is
6 where it starts, basically.

7 In the first section you've got things that
8 the rule doesn't apply to, and then we below you have
9 got another -- things that are excepted out of the rule.
10 I'm not sure things that that's an efficient way to
11 structure the rule, but having said all that, there's --
12 for example, one of the things that it doesn't apply to
13 is questions regarding procedure.

14 I think we all have a walking around
15 understanding of what that is, but there's a huge
16 continuum of what may be or may not be procedure. And
17 scheduling of witness and depositions isn't an adequate
18 description of what procedure is. So I'm going to get
19 hung out to dry if I'm talking about procedure
20 accidentally, and it isn't procedure, I need to know
21 what that is.

22 Again, when you get down to Line 15, you are
23 talking about persons with a legal interest. I'm not
24 sure what that term means. If you're talking about
25 somebody who has standing, we can all pretty much agree

1 or at least understand what the test is for that. If
2 you are talking about somebody whose substantial
3 interests are affected, we can all talk about that. I
4 am not sure what a legal interest is.

5 I think that's all the questions I have for
6 that one.

7 **MS. CIBULA:** Okay. Well, I think we set it up
8 so that the first section would be the general
9 exceptions, but that can be something that we would look
10 at. Maybe there should be a subsection that just at the
11 very beginning says what it applies to and what it
12 doesn't apply to all in one section so it's clear.

13 **MR. HATCH:** It kind of really lends itself to
14 a you can do -- there's two ways to approach this: You
15 can do anything you want except you can't do the
16 following, or you can't do anything, except you can do
17 the following. Either one of those would work, but each
18 of them has different advantages and disadvantages.

19 **MS. CIBULA:** And that's something that we'll
20 consider and try to maybe clarify that a little bit.
21 Or, like I said, maybe we can put it all in one section
22 so that everyone is clear about what the rule applies to
23 and what it doesn't apply to.

24 The other phrase about the legal interest, we
25 actually used that same terminology that was in the

1 Section 350.042. We were trying to come up with some
2 way of defining that, but that might be something, too,
3 that if people have suggestions of how we could hone
4 that phrase so that it's clearer, we'd appreciate, you
5 know, comments and how we could maybe go about doing
6 that.

7 **MR. REHWINKEL:** Just from Public Counsel's
8 standpoint, we would prefer -- I kind of -- I think the
9 only thing that being a criminal justice major helped me
10 with being a lawyer was a discussion we had in class one
11 time about raising the speed limit from 55 to 70. And
12 the regulators, the Department of Transportation people
13 were concerned, you know, when you set it at 55, you
14 know there is a certain number of people who are going
15 to go 60 or 65, and when you set it at 70, you know --
16 they statistically know what that is.

17 We think this rule needs to be very cognizant
18 of the fact that whatever boundaries you set, there are
19 always going to be instances where people want to test
20 them, not because they are evil, but because they are
21 advocates.

22 So we would just urge that you don't create
23 exceptions that swallow up the rule. That would be our
24 suggestion here. And so having a tighter rule with more
25 definition about what's accepted is better than having a

1 broad statement. I understand that there is a balance
2 between knowing what behavior is acceptable and not, but
3 we would prefer that you err on the side of caution with
4 respect to what's permissible.

5 I think the way you started here is a good
6 one, and I think it's up to others to come up with
7 something that is workable but doesn't create that
8 swallowing exception.

9 **MS. CIBULA:** I'll say this right now at the
10 beginning, we are going to allow post-workshop comments,
11 and we'd appreciate it that if you have comments that if
12 you could provide specific rule language of what you
13 would suggest as an alternative, we would really
14 appreciate that so that we can look at what language we
15 should consider.

16 **MR. STONE:** The comments that cause me to have
17 a question about what is meant by "or otherwise have a
18 legal interest in the proceeding," because earlier in
19 that same sentence it talks about identified as a party
20 or interested person in the proceeding. And I didn't
21 know whether or not the phrase identified was meant to
22 attach to the "otherwise have a legal interest in the
23 proceeding," or if that was left to the parties to have
24 to guess as to whether someone has a legal interest.

25 **MS. CIBULA:** I think what we were trying to

1 encompass is that a lot of times we have federal
2 agencies or other state agencies that -- or
3 municipalities that are actually parties in front of the
4 Commission, and that we're not trying to exempt them
5 from the rule. But, like I said, that's something that
6 we will look at a little closer, and maybe we can figure
7 out a way to tighten up that rule language so it's a
8 little bit clearer about what we mean by that phrase.

9 Any other comments on Section 1 of the rule?
10 Well, then let's move to Section 2. And we have moved
11 this section. It was in a different section of the
12 draft rule before, and we moved that more to the front
13 of the rule, but I think the definitions are pretty much
14 the same as what the previous drafts of the rule have
15 been.

16 **MR. STONE:** I guess Subsection C is the area
17 that causes the most confusion, because taken by itself
18 it would leave you with the impression that saying hello
19 in the hallway would be an impermissible communication.
20 It also, by the way, seems to be missing at least a
21 word. I believe there should be a word "that," I'll
22 leave it to the grammarians whether or not that or
23 which, but on Line 4 after interested person, it seems
24 to me something is missing from that phrase.

25 But setting that aside, it's of concern to us

1 that the term used is impermissible communication as a
2 definition, and it is so broad as literally to encompass
3 everything unless it's excepted. And if you are going
4 to have it that broad and have to have an exception to
5 be able to have any communications at all, including as
6 simple as saying hello, then that's clearly going to
7 operate as a chilling effect. You're going to have
8 people that are passing each other in the grocery store,
9 and they have to not be civil to each other for fear
10 that someone would contend that they are having an
11 impermissible communication.

12 **MS. CIBULA:** Well, I don't think that was the
13 intent of the rule, and that is something that we can
14 look at, too. Maybe we can put in the phrase
15 "Communications in regards to official business," that
16 might -- that's from the, I guess, more like from the
17 public records law, but maybe that's something that we
18 could put in there to clarify. But, like I said, if
19 someone else has any suggestions on how we could clarify
20 that to make sure we're not talking about, you know, if
21 you say hi to someone in the hallway that you have to
22 file something in the docket, and you're not talking
23 about Commission business at all.

24 **MR. HATCH:** My comments would echo Mr.
25 Stone's, essentially that it's drafted way too broadly,

1 and more to the point that the tag line impermissible
2 communications sets a tone that I'm not sure that you
3 intend to create, in the sense that if my mom calls me,
4 if I'm a party to a Commission proceeding, technically,
5 by definition, it's an impermissible communication. You
6 didn't mean to gather that up by definition, but that's
7 the way it's drafted.

8 I guess the second thing is that in terms of
9 limiting it, I think your suggestion limiting it to a
10 docketed matter or a Commission matter of some sort is
11 fine. And I think what you really intend here as an
12 impermissible communication is one between a party and a
13 Commission staff member. Because if I'm in a docket
14 with somebody else, and I want to call, for example,
15 counsel for the other side, by definition that's an
16 impermissible communication that doesn't involve the
17 Commission. If I'm discussing a settlement, for
18 example, this rule tells me it's an impermissible
19 communication, but it otherwise would be a permitted
20 impermissible communication. And you run into that sort
21 of strangeness when you go through this rule and how
22 this thing is structured and drafted.

23 **MR. REHWINKEL:** Samantha, I think at the last
24 proceeding we might have suggested this language to
25 address Mr. Stone's concern, which we think is a valid

1 one. After the word proceeding, the phrase -- something
2 along the lines of relative to a matter that is subject
3 to decision-making, and then we listed several statutes,
4 pursuant to 120.54, 565, 569, 57. I think that's kind
5 of where you are going. We really don't think it is
6 appropriate to tie it to an officially docketed matter,
7 because, again, if it's a matter that everyone knows is
8 going to be litigated, then it should be -- the language
9 should be that it's relative to a matter that is subject
10 to decision-making, something like that. And I don't
11 know if that addresses Mr. Stone's concerns on that
12 front, but I think that would narrow the scope of that
13 definition.

14 **MR. HATCH:** I did have one other question.
15 There is a distinction in the definition itself that
16 says if it's written and not served on all parties, and
17 the other is if oral, then all parties and interested
18 persons. If it's an oral communication, is it then to
19 be provided to all interested persons, which begs the
20 question if it's written should it be served on all
21 interested persons, as well? I just don't know. I'm
22 not sure what you're trying to get at.

23 **MS. CIBULA:** I think what we're getting at is
24 if it is written and you haven't served it on all the
25 parties. And, if oral, if you made it outside of a

1 noticed meeting where everyone was --

2 **MR. HATCH:** I understand what it says. Is
3 that what you intended to have happen, and what's the
4 distinction designed to get at? You don't have to
5 answer that. It just creates the question. And I'm not
6 trying to engage in a debate, I'm just --

7 **MS. CIBULA:** We'll look at that, and if you
8 could suggest some alternate rule language that might,
9 you know, clarify it, we will consider that.

10 **MR. BEASLEY:** We have the same concerns, and
11 we'll propose some language in our post-workshop
12 comments.

13 **MS. CIBULA:** Any additional comments on
14 Section 2 of the rule? Let's move to Section 3 of the
15 rule. And in this section, one change that we did make
16 from the previous draft of the rule is I guess at one
17 point we were considering removing the exception for
18 rulemaking, but we put the exception back in under this
19 draft so that it would be in align with 350.042, the
20 statute. So that's one change that we made to this
21 section.

22 **MR. HATCH:** I've got a couple of questions
23 about this section. For those of us that have done this
24 a fair amount, a PAA process, we all pretty much
25 understand what that is. But if you are just going to

1 read the rule and say what is a PAA proceeding, any
2 docket is subject to being a PAA proceeding. You don't
3 know going into the docket whether it will be or whether
4 it won't be. You could get halfway through a docket and
5 everybody says, well, that might be the resolution, so
6 the Commission issues the PAA and we all live with it.
7 There is no way up front of knowing if it's going to be
8 a PAA process until the staff files a PAA
9 recommendation. And I'm not quite sure, because there's
10 no identified proceeding that when you docket it, it's
11 called a PAA proceeding, and that is exactly how it is
12 and what it's going to be. We all know what it is and
13 how it works, but I don't know when it's a PAA
14 proceeding and when it's not in advance.

15 **MS. CIBULA:** And that's a good question, and
16 maybe that's something that we need to think about as
17 well to maybe give some sort of advanced notice of
18 when --

19 **MR. HATCH:** You've got the qualifier in there,
20 which is what I think you intend, which is it's a
21 docketed matter that has one party; no intervenors, no
22 interested persons. In those instances, clearly it's
23 susceptible to a PAA, because that's really just between
24 the parties and staff at that point, the one party and
25 staff. If that's what you mean a PAA proceeding to be,

1 then everybody needs to know what that is, but that's
2 not how this is drafted.

3 **MR. WILLIS:** Maybe it should be anything other
4 than a formal hearing proceeding.

5 **MR. HATCH:** I mean, but that doesn't get you
6 there, either. Like I say, I just want to know what the
7 rules are, because I'll be hanging in the wind on this
8 stuff.

9 **MR. WILLIS:** And I understand your --

10 **MR. HATCH:** It could be going to a hearing,
11 you could have a week-long hearing scheduled, and all of
12 a sudden it's an apparent result that satisfies
13 everybody, nobody is willing to or can't sign a
14 stipulation to that effect, you do a PAA and you walk
15 off.

16 **MR. WILLIS:** I understand. The dockets you
17 may be involved with in telephone are probably a lot
18 different than the ones that I'm involved with in my
19 division, so it may be a problem for Beth, but I don't
20 see a problem with the PAA stuff in what we actually do
21 in my division, because a lot of what we do is Proposed
22 Agency Action if it's not going straight to hearing. So
23 it may be something that Beth may have to work out with
24 you all.

25 **MS. SALAK:** Well, I think we could certainly

1 define certain hearings that always go straight to
2 hearing. I mean, there are those. We can delineate
3 those. But is it possible -- I mean, obviously, we
4 don't know what is going to be a PAA. And, I mean, I
5 agree with you. But as soon as we know, if a PAA is
6 protested, or if --

7 **MR. HATCH:** As soon as there is a protest
8 everybody knows what the rules are at that point.

9 **MS. SALAK:** Right. And certainly once all the
10 parties agree that we are not going to resolve it, it
11 gets to go straight to hearing, we have those.
12 Otherwise, I think that there is a possibility that we
13 will go PAA, and it would be under the PAA process.

14 **MS. CIBULA:** But it might be something that
15 maybe we can have to designate a lot earlier, like a
16 CASR or something, saying that this docket is PAA, and
17 that's something that we might need to think about doing
18 so everyone is on notice.

19 **MR. REHWINKEL:** I think Mr. Hatch has hit on
20 the issue that caused us to develop what was a
21 cumbersome notification process, but it does hit at the
22 issue. There are matters that, you know, interested
23 persons come before the Commission staff, and they know
24 that they are going to ask for PAA treatment, you know,
25 up front. Other people may not know it, but they have

1 that in their mind. There are others that they file a
2 petition or a request and may not have a preference that
3 it be handled that way, but the staff decides at some
4 point that that is how they are going to handle it, and
5 that is a decision that is made internally and it is
6 very passive to everyone else until it manifests itself
7 in the record. And there are some that are just
8 straight up asked for the PAA process. So we understand
9 that, and that's why we had proposed the process we had
10 addressing this issue and refining it and coming up with
11 those definitions we think is an acceptable solution.

12 We would request that because it's a difficult
13 issue that, you know, you don't just take it out and
14 say, well, we will just go back to the way it was.
15 Because, again, the PAA process is used more and more,
16 and our number one concern is not to have a presumption
17 attached to whatever is developed in the PAA process.
18 We have been many times before the Commission at agenda
19 and have been scolded for not participating in the
20 development of the PAA process up until the point of the
21 agenda, when it has always been understood that you can
22 ask for a hearing and then it's supposed to be a clean
23 slate and everybody goes at it and advocates with all of
24 their evidence.

25 So there's this tension between participating

1 early, and if you are supposed to participate early, you
2 should have the ability to participate from the very
3 start. And to do that, you have to have notice. And
4 then all the other procedural rules have to attach.

5 Otherwise, if it's going to be a completely
6 open process, if there's a protest opportunity, then it
7 shouldn't matter. But it doesn't always work that way.
8 So we would ask you to adhere to what you have in here.
9 If there need to be refinements about demarcation points
10 of when you know and when you don't know, that's fine,
11 and that's a very practical concern that has been raised
12 by Mr. Hatch and the others, and we recognize that.

13 **MS. CIBULA:** Any additional comments on
14 Section 3?

15 **MR. HATCH:** Yeah. You get down in where you
16 have dockets or workshops as an exception, that has
17 historically been true. But the question arises,
18 because it doesn't designate whether it's in a docket or
19 it's not in a docket. Typically you have workshops that
20 are undocketed, like this one, or in a rulemaking
21 proceeding like this one, but docketed. Sometimes on a
22 rare occasion in a proceeding that is going to hearing
23 there are workshops. And, of course, we all whine and
24 complain about is it part of the record or is it not and
25 we all work on accommodation. But, historically, there

1 have been those instances, and the question is do you
2 mean docketed or undocketed or at least make a
3 distinction as to what you're talking about. Because if
4 you have a docketed proceeding, for example, I think in
5 the 271 proceedings we had a bunch of workshops that
6 were part of the proceeding. And I think the
7 transcripts and all of that stuff ended up being part of
8 the record, but in this instance it would be an
9 exception to your communication rules, so you could go
10 in and drive a steam train through a hole like this in
11 your rules. Like I say, it works for me, I just want to
12 know what the rules are.

13 **MS. CIBULA:** That's something we'll look at,
14 as well. Any additional comments?

15 **MR. STONE:** I just want to respond briefly to
16 something Mr. Rehwinkel said. I believe we made this
17 clear in our past comments, and if we haven't, I want to
18 certainly make it clear here. It is our view that the
19 Office of Public Counsel enjoys a special status, and
20 that is that they are entitled to more notice and
21 more -- I don't want to say more due process, but they
22 are entitled to be informed on matters, which is
23 something that we feel we can accommodate.

24 It's the issue of dealing with an amorphous
25 interested person, if you will. So I would not want any

1 of our comments to be interpreted to mean that we are
2 trying to impede the ability of the Public Counsel to do
3 its job. We certainly think that their role is very
4 important to the integrity of the process. And the fact
5 that they may choose not to get involved in a proceeding
6 early on should not be an impediment to their deciding
7 that it has elevated to the point of where they're
8 interested and they need to be involved. And we
9 recognize that.

10 So I don't want anything that we have said in
11 the past or what we might say in our subsequent comments
12 to be interpreted as an impediment to the status that
13 Public Counsel plays in ensuring the integrity of the
14 process. Our concern is that the language currently is
15 written so broad that parties or potential parties other
16 than the Public Counsel that we don't know are out
17 there, that the protection that seems to be trying to be
18 put in place for those individuals who haven't declared
19 themselves is going to unnecessarily impede efficient
20 communication between the regulated and the regulator.

21 **MS. CIBULA:** Any additional comments?

22 **MR. REHWINKEL:** Yes. We fully appreciate what
23 Mr. Stone has enunciated, and we agree that their
24 comments and their initiatives have not done that. I
25 think the problem that all the people that are here are

1 dealing with with respect to these unknown interested
2 persons, we all have it in common, and I don't think
3 this really goes to that. Those are the people that you
4 are worried about having communications with the staff
5 when they don't reveal their true interests in the
6 proceeding, and that's different than this with respect
7 to giving notice and providing notice.

8 I don't think that any other party should be
9 burdened with any kind of stigma or penalty in a
10 proceeding because they don't notify these people who
11 have kept their interests secret. And that's shame on
12 those people and not shame on the responsible
13 participants like, you know, Gulf Power, and Tampa
14 Electric, and AT&T who are here today, and many others.
15 That's not the issue that we are concerned with. We
16 fully agree with Mr. Stone that the rules should be as
17 sharp as possible, but, you know, we all share that same
18 concern about the people that don't reveal their
19 interests. And anything we can do to help that in the
20 rule, we support.

21 **MR. HATCH:** One final quick comment, Samantha.
22 Line 19, where you have taken out the old historic
23 language of matters not concerned with the merits of the
24 case, that was the language that allowed you to say
25 hello or good morning in the hallway, or if you bump

1 into your neighbor in the grocery store, and they just
2 happen to work for the Commission, that you don't have
3 to turn away and shun them.

4 **MS. CIBULA:** And that might be something that
5 we could move to more at the front of the rule, the
6 general, and then we'll think about maybe putting all of
7 these exceptions together, too, so it will be in one
8 place. But that is something we will consider maybe
9 putting back into the rule.

10 Any addition comments on Subsection 3?

11 Let's move to Section 4.

12 **MR. STONE:** It's extremely short.

13 **MR. HATCH:** And it kind of lends itself to the
14 punchline of you can't have impermissible communication
15 except when it is permitted.

16 **MS. CIBULA:** Okay. Then we will move to
17 Subsection 5. Hearing none for that section, we will
18 move to Section 6.

19 **MR. STONE:** This is another one of those areas
20 where it's difficult to interpret and know -- and it's
21 the interaction of Section 6 with Section 4 and the
22 definition of impermissible communication. Section
23 6 seems to define a cure for what would otherwise be an
24 impermissible communication, but it's an after-the-fact
25 cure which makes it difficult for, I think, the staff to

1 understand whether or not a communication at the moment
2 it is taking place is permitted or not permitted. And
3 it's that type of instantaneous decision-making that we
4 are concerned about that creates the chilling effect
5 that will impede the efficient flow of necessary,
6 appropriate, and legitimate communications, and
7 therefore drive up the cost of regulation.

8 **MS. CIBULA:** I think this subsection does do
9 that, and I think -- I guess maybe why we had it in two
10 sections, and maybe this is something that we will look
11 at, is that we wanted to, you know, have an affirmative
12 statement that, staff, you're not supposed to do this.
13 But if it does happen, there is a cure, and maybe we can
14 put that in that subsection. But we did want the, you
15 know, staff to be on notice that they weren't supposed
16 to do certain things, even though there is, you know, a
17 way that you could fix it if it did happen.

18 **MR. REHWINKEL:** Yes. I think Mr. Stone raises
19 a good point; but, nevertheless, I think the way you
20 phrased it is correct is that Section 4 states the rule,
21 and Section 6 kind of deals with the pragmatic fallout
22 of what happens if something happens. And a lot of
23 times these communications that are governed by 6 are,
24 again, not evil, they happen in the context of hearings
25 where information needs to be shared and the party that

1 shares it does so in an effort to do the right thing,
2 and doing the right thing sometimes means that you make
3 sure that everyone else knows in a timely fashion so
4 that their rights are not impacted.

5 And I think lately in the hearing process, et
6 cetera, we have seen this kind of process work out very
7 well. And I think you should have something like this
8 in the rule. We had some language in a prior set of
9 comments that said that nevertheless, this should not
10 cure an impermissible communication. And our purpose in
11 doing that was to keep this type of codification of the
12 way that people practice today from becoming a loophole.

13 These communications should be the rare
14 exception and not the rule, and people should not shape
15 their conduct to fall within Subsection 6. It should be
16 something as kind of a safety valve or relief when
17 communications need to occur, and we think that's a good
18 thing. The bottom line is this rule cannot impose
19 penalties on parties, but it should be a guide for how
20 conduct occurs in the development of the process that
21 leads up to the Commission's decisions.

22 And I think any court that looked at how
23 things were done would look at how people abided by
24 these processes in evaluating whether procedural due
25 process was accorded or not. So we wouldn't -- we would

1 urge you to kind of hold the line on this, and any kind
2 of fine-tuning we would be supportive of, but I think
3 this is definitely needed.

4 **MR. HATCH:** Just an observation. At a very
5 practical level, I agree with Mr. Rehwinkel. But it
6 simply begs the question to the logic the way the rule
7 is structured. You have created an absolute, but with
8 an absolute awareness that the absolute will never be
9 absolute, and, as Mr. Rehwinkel characterizes, for very
10 good reasons. You kind of have to structure your rule
11 differently to accommodate what you know is going to
12 happen for very good reasons, but then say it's
13 impermissible, but it's okay because it was for a good
14 reason. That kind of logic ends up leading you to
15 places you don't want to be.

16 **MS. CIBULA:** I think what we were trying to
17 accomplish is that we are trying to say it's
18 impermissible, understanding that sometimes through no
19 fault of your own, you know, maybe an oral communication
20 will take place and that we didn't want to put anyone in
21 a bad situation through no fault of their own. Say they
22 picked up the telephone, and suddenly someone on the
23 other line is saying something, and there's no way that
24 you can know that before you picked up the telephone.

25 **MR. HATCH:** And I don't disagree with any of

1 that. I mean, I really do agree with Charles; I do.

2 **MR. REHWINKEL:** I think the key is here is
3 that it does require notice. And you didn't adopt our
4 language, and that's fine, about it doesn't cure, et
5 cetera. But I think that you need to keep the notice
6 thing in here, and, you know, I think the time frames
7 are appropriate. There's a certain amount of
8 subjectivity here, but I think it's the best we can
9 probably do without trying to define every possible
10 scenario.

11 **MS. CIBULA:** Any additional comments on
12 Subsection 6?

13 **MR. HATCH:** Just a quick question. When you
14 say in Line 11 "or decision-making point," is there a
15 particular reference that you had in mind for that?

16 **MS. CIBULA:** I think we used the comments that
17 we had in a prior proceeding, but we will look at that
18 and maybe we need to clarify that.

19 **MR. HATCH:** I'm not sure what that means.

20 **MR. REHWINKEL:** Well, I think that may have
21 been language that we suggested. I'm not sure. But,
22 you know, you might have a rate case that culminates in
23 a hearing, but you'll have several what I will call
24 decision-making points between then that might be, you
25 know, interim, or you might have a hearing on a matter

1 that's really before the ultimate hearing. Or you may
2 have a prehearing conference or a decision by the
3 prehearing officer on a procedural matter. I guess
4 those are all hearings, but we did not want the language
5 of hearing to be just the penultimate hearing on the
6 matter itself, because there are other -- there are
7 other points where the Commission makes decisions in a
8 docket. There are motions that are decided by the
9 prehearing officer, maybe even just based on the
10 pleadings without a hearing itself.

11 **MS. CIBULA:** Well, we'll look into maybe
12 figuring out a way to clarify that. Any additional
13 comments on Subsection 6? Let's move to Section 7.

14 **MR. REHWINKEL:** On Line 20, Samantha, that
15 phrase you have, "Any matter at issue in a proceeding,"
16 et cetera, that may be something that just occurred to
17 me that could be utilized in the interested person
18 definitional language back on Page 4. Just a
19 suggestion. I think there is some parallel benefit to
20 that.

21 **MS. CIBULA:** Okay. We'll look at that.

22 **MR. BEASLEY:** Charles, you're suggesting make
23 it apply to interested persons, as well?

24 **MR. REHWINKEL:** Yes.

25 **MR. BEASLEY:** Sure.

1 **MR. REHWINKEL:** I think that goes to Jeff's
2 concern about the open-ended nature of that definition,
3 so that's some language that you already have in your
4 proposal that may work there. It kind of gets to where
5 our language was going.

6 **MS. CIBULA:** Any additional comments on
7 Section 7? Let's move to Section 8.

8 Hearing no comments for Section 8, let's move
9 to Section 9.

10 **MR. HATCH:** I'm not quite sure how this
11 interacts with some of the things that are done in the
12 sense that, for example, our price basket filings that
13 we make every year under the price controls under 364,
14 they are typically not docketed, I believe, so
15 technically the rule wouldn't apply, but it would be a
16 staff communication. But I'm just not sure, because
17 even where it's undocketed Public Counsel gets notice,
18 but all the information in our price basket filings
19 basically is confidential cost information that we use
20 to justify it, so it would be confidential and all that
21 kind of stuff. I don't know how this all interacts with
22 that, tariff filings, all that sort of stuff.

23 **MS. CIBULA:** This section was supposed to
24 capture the undocketed matters that there were meetings
25 with staff occurring on issues that interested persons

1 might be wanting to come and participate at that
2 meeting. And right now we have it pertaining to changes
3 in rates, because we heard at the previous workshops
4 that this was one area that people were concerned that
5 if interested persons are meeting with staff about,
6 like, these types of matters, and there is no docket,
7 they would want to know about it. And we are doing that
8 right now, and it is almost codifying what we are doing
9 currently about putting the meeting notices on our
10 website and giving copies of the meeting notices to OPC,
11 and that's what we are trying to capture here.

12 **MR. HATCH:** This is one area where I generally
13 really don't condone trying to carve out industries,
14 particularly in your procedural rules, because everybody
15 ought to have the same operating rules. But
16 particularly in my price basket filing process, I mean,
17 if you want to provide notice, that's fine, but I have a
18 statutory right to raise my prices so much. And the
19 only consideration -- it would be a change in rates
20 effectively, but the only consideration is whether it
21 falls within the limits in 364. Providing notice to
22 everybody, they couldn't be there because, really, the
23 price basket meetings, if there are any, are dealing
24 with cost information that is confidential anyway. So I
25 don't know if you want to try and consider some specific

1 carve-out for that kind of stuff or not.

2 And I understand your concern about, you know,
3 negotiating rates in the absence, but in our industry
4 that's a whole different question these days.

5 **MS. SALAK:** It was my understanding -- and I
6 will have to ask OPC -- it was my understanding from
7 previous meetings that the concern on this actually had
8 to do with energy and maybe water and wastewater, but
9 did not deal with telephone.

10 **MR. REHWINKEL:** I was just talking to Mr.
11 Kelly about that. I think that's a large part of where
12 our concern lay. I don't know that it would be
13 appropriate to have a blanket carve-out for telecom, but
14 certainly I think Mr. Hatch raises some practical
15 considerations that we probably would not object to
16 working out, you working out with the staff. It's
17 definitely energy and water and wastewater where our
18 issues are.

19 **MS. SALAK:** So I think that leads to, Mr.
20 Hatch, if you have some language that you could give us.

21 **MR. HATCH:** I knew that was coming.

22 **MS. CIBULA:** Any additional comments on
23 Section 9? We'll move to Section 10.

24 Hearing no comments on Section 10, we'll move
25 to Section 11.

1 **MR. HATCH:** I have a question on 10, I'm
2 sorry.

3 **MS. CIBULA:** Okay.

4 **MR. HATCH:** Line 21, it's the prosecutorial
5 role in a license presentation. This may be quibbling,
6 but technically the Commission doesn't issue licenses,
7 but just a thought.

8 **MS. CIBULA:** We'll look at that.

9 **MR. HATCH:** 120 is geared toward licenses, and
10 it talks about licenses. Certificates by definition
11 under 120 are licenses, but we don't issue licenses
12 around here. What you really want to do is somebody
13 that doesn't work here that reads these rules has a clue
14 about what's going on.

15 **MS. CIBULA:** We'll look at that.

16 **MR. REHWINKEL:** This is probably language that
17 was from the Cherry case, right?

18 **MS. CIBULA:** Correct.

19 **MR. REHWINKEL:** They probably characterized it
20 that way.

21 **MR. HATCH:** It could very well be.

22 **MR. REHWINKEL:** Yes.

23 **MR. HATCH:** Yes, the prosecutorial stuff came
24 out of Cherry.

25 **MS. CIBULA:** Any comments on Section 11?

1 Hearing none, does anyone have any overall
2 comments they would like to make?

3 Well, I guess the next thing is then the next
4 steps. Like I said earlier, we would like post-workshop
5 comments, and even if you are not here today
6 participating, we would still welcome post-workshop
7 comments from anyone who would like to submit them. We
8 would highly appreciate it, if you do have comments, to
9 give us alternate rule language that we could actually
10 look at to review.

11 And the court reporter said it's going to take
12 two weeks to get the transcript, so I thought maybe two
13 weeks after that date -- well, that's going to wind up
14 being Veteran's Day. How about having comments due
15 November 12th? Does that work for everybody? Okay.
16 The date will be November 12th.

17 **MR. STONE:** Well, let me just say, the only
18 concern I have is that we are entering -- for our
19 industry, we are entering into the cost-recovery hearing
20 phase, and there is an awful lot of attention being
21 devoted to that for the next several weeks. We
22 recognize that two weeks from now getting the transcript
23 we will be in the midst of the hearing and hearing
24 process for the cost-recovery hearings, and so if we
25 could, perhaps, have at least an additional week, that

1 would be appreciated.

2 **MS. CIBULA:** Okay. Well, how about
3 November 18th, then? The comments will be due
4 November 18th. And you can submit those comments
5 directly to me. You can send it by e-mail to
6 scibula@psc.state.fl.us, or you can submit them to the
7 Commission and they'll go into the undocketed file. And
8 we'll try to post all of the post-workshop comments on
9 the website once we receive them, as well. So comments
10 will be due November 18th.

11 Any additional comments before we adjourn?

12 We're adjourned. Thank you.

13 (The workshop concluded at 10:25 a.m.)
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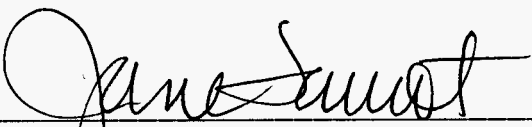
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 : CERTIFICATE OF REPORTER
COUNTY OF LEON)

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 28th day of October, 2010.



JANE FAUROT, RPR
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