

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: March 17, 2020
TO: Adam J. Teitzman, Commission Clerk, Office of Commission Clerk
FROM: Kathryn G.W. Cowdery, Senior Attorney, Office of the General Counsel
RE: Docket No. 20200094-EU

Please file the attached materials in the docket file listed above.

Thank you.

Attachment

RECEIVED-FPSC
2020 MAR 17 PM 3:47
COMMISSION
CLERK



FECA

Florida Electric Cooperatives Association, Inc.

2916 Apalachee Parkway
Tallahassee, Florida 32301
(850) 877-6166
FAX: (850) 656-5485

December 3, 2019

Andrew King, Esquire
Office of the General Counsel
Florida Public Service Commission
Shumard Oak Blvd.
Tallahassee, FL 32399-0850
aking@psc.state.fl.us

VIA Electronic Delivery

RE: COMMENTS FOR Undocketed: IN RE: PROPOSED AMENDMENT OF RULES 25-6.0440, TERRITORIAL AGREEMENTS FOR ELECTRIC UTILITIES; 25-6.0441, TERRITORIAL DISPUTES FOR ELECTRIC UTILITIES

Dear Mr. King:

The Florida Electric Cooperatives Association, Inc. ("FECA"), on behalf of its 17 member-cooperatives,¹ provides the following comments on the above-referenced proposed rule amendments, which were noticed in the November 18, 2019 edition of the Florida Administrative Register, Vol. 45, No. 224. FECA has also been authorized to represent that FPL, Duke and the Florida Municipal Electric Association supports the positions addressed in this communication.

FECA believes that the proposed changes to the rules are an invalid exercise of delegated legislative authority (i.e., the proposed rule is more restrictive than the implementing statute) at least in regards to Rule 25-6.0441, F.A.C., Territorial Disputes for Electric Utilities, and arguably in regards to Rule 25-6.0440, F.A.C.,

¹ FECA's electric distribution cooperative members include: Central Florida Electric Cooperative, Inc., Choctawhatchee Electric Cooperative, Inc., Clay Electric Cooperative, Inc., Escambia River Electric Cooperative, Inc., Florida Keys Electric Cooperative Association, Inc., Glades Electric Cooperative, Inc., Gulf Coast Electric Cooperative, Inc., Okefenokee Rural Electric Membership Corporation, Peace River Electric Cooperative, Inc., Sumter Electric Cooperative, Inc., Suwannee Valley Electric Cooperative, Inc., Talquin Electric Cooperative, Inc., Tri-County Electric Cooperative, Inc., West Florida Electric Cooperative Association, Inc., and Withlacoochee River Electric Cooperative, Inc. FECA's generation and transmission cooperative members include PowerSouth Energy Cooperative and Seminole Electric Cooperative, Inc.

Territorial Agreement for Electric Utilities. The proposed amendment to Rule 25-6.0441, F.A.C., restricts the Commission to the factors delineated in the rule when resolving territorial disputes and prohibits the Commission from considering other factors on a case-by-case basis as they deem appropriate, notwithstanding the statutory authority provided by Section 366.04(2)(e), Florida Statutes.

Section 366.04(2)(e), Florida Statutes states: "In resolving territorial disputes, the commission **may consider, but not be limited to** consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services" (Emphasis added). The plain language of the statute reflects the legislature's intent to give the Commission, as the expert regulatory body, discretion when resolving territorial disputes. The proposed revision of the territorial dispute rule eliminates the very language within the enabling statute that provides the Commission that discretion.

Historically, the Commission has considered other factors outside the factors defined in the rule in resolving territorial disputes. For example, which utility has historically served in the disputed area has consistently been included as a factor in resolving past territorial disputes. Moreover, the Commission in past proceedings has used its discretion to consider whether or not the customers in the disputed area require more than "usual and customary service". The Commission has similarly considered the overall public interest in considering territorial issues.

While the proposed modification to Rule 25-6.0441, F.A.C., retains the language in subsection (3) which allows the Commission to "require additional relevant information from the parties of the agreement, if so warranted", under the revision the Commission would arguably be precluded from considering the impact of such information, unless it was related to the specifically identified provisions in the proposed revised subsection (2)².

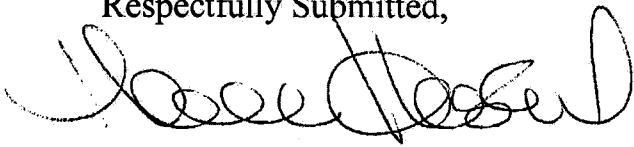
² The only factors the Commission would be permitted to consider when resolving a territorial dispute, as delineated in subsection (2) of the rule, would be "(a) The capability of each utility to provide reliable electric service within the disputed area with its existing facilities and the extent to which additional facilities are needed; (b) The nature of the disputed area including population and the type of utilities seeking to serve it, the degree of urbanization of the area and its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services; (c) The cost of each utility to provide distribution and subtransmission facilities to the disputed area presently and in the future; and (d) Customer preference if all other factors are substantially equal."

The proposed limitation of factors to be considered in addressing territorial agreements similarly and unnecessarily impedes the Commission's role, discretion and expertise in approving such agreements. Although Rule 25-6.0440(3) remains (allowing the Commission to require additional information from the parties), the proposed removal of the words that currently provide the Commission discretion in considering other factors would now limit the Commission from considering the impact of such information, unless it was related to the specifically identified provisions in the proposed revised subsection (2) (i.e., purchase price, reliability, and uneconomic duplication of facilities).

It is our understanding that these edits to the territorial rules are designed to meet "plain language" requirements. However, narrowing the scope of the Commission's review is a significant, substantive change that removes the discretion specifically derived from the plain language of the enabling statute, at least with respect to the resolution of territorial disputes. As amended, the two rules under consideration would arguably be interpreted as providing an exclusive list of factors that the Commission could consider, thereby removing the discretion to consider other factors that would support the Commission's determination of whether approval of a proposed territorial agreement, or the resolution of a territorial dispute, is in the public interest.

FECA respectfully requests you to consider these comments as you evaluate whether or not to pursue the above-referenced amendments. Thank you for your consideration in this matter. Please call me if you have any questions.

Respectfully Submitted,



Michelle Hershel, Esq.
Director of Regulatory Affairs
Florida Electric Cooperatives Association
2916 Apalachee Parkway
Tallahassee, FL 32301
mhershel@feca.com
(850) 877-6166, ext. 3
Cell: (850) 510-1693

Andrew King

From: Michelle Hershel <mhershel@feca.com>
Sent: Monday, February 03, 2020 10:27 AM
To: Andrew King; 'MMeans@ausley.com'
Cc: JR Kelly
Subject: RE: Amendments to Rules 25-6.0440 & 25-6.0441

Yes- correct- no workshop necessary

From: Andrew King <AKing@psc.state.fl.us>
Sent: Monday, February 3, 2020 10:25 AM
To: Michelle Hershel <mhershel@feca.com>; 'MMeans@ausley.com' <MMeans@ausley.com>
Cc: JR Kelly <kelly.jr@leg.state.fl.us>
Subject: RE: Amendments to Rules 25-6.0440 & 25-6.0441

Thank you! By your responses, I'm assuming everyone is ok with us moving forward without a workshop. I just requested a SERC from technical staff. Once I get the SERC back, I'll open a docket, draft a rec, and set the matter for consideration at a future Agenda.

Thanks again,

Andrew B. King

Senior Attorney
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399
(850) 413-6195

From: Michelle Hershel [<mailto:mhershel@feca.com>]
Sent: Monday, February 03, 2020 9:27 AM
To: Andrew King; 'MMeans@ausley.com'
Cc: Mike Bjorklund; Adams, Lynne; Robert Pickels; Dan O'Hagan; Amy Zubaly
Subject: RE: Amendments to Rules 25-6.0440 & 25-6.0441

Good Morning Andrew- thank you for making the adjustments to the territorial rules- FECA, as well as the other utilities who supported our comments (FPL, Duke, FMEA), are fine with the new language.

Michelle Hershel
Director of Regulatory Affairs
Florida Electric Cooperatives Assoc.
2916 Apalachee Parkway
Tallahassee, FL 32301
Cell: (850) 510-1693
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From: Andrew King <AKing@psc.state.fl.us>
Sent: Tuesday, January 28, 2020 10:18 AM
To: 'MMeans@ausley.com' <MMeans@ausley.com>; Michelle Hershel <mhershel@feca.com>
Subject: Amendments to Rules 25-6.0440 & 25-6.0441

Malcolm & Michelle,

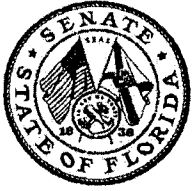
Good morning to both of you. After reading and considering your comments on these rules, I had a discussion with Jamie over at JAPC, and we came up with language that I'm hoping will satisfy all parties involved. Specifically, my hope is that this language can satisfy your desire that the Commission retain the flexibility granted by section 366.04(2) while at the same time satisfying JAPC's concern that the current rule fails to sufficiently circumscribe the Commission's discretion.

Let me know your thoughts. I am happy to go forward with scheduling the workshop if you think further discussions would be helpful.

Andrew B. King
Senior Attorney
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399
(850) 413-6195

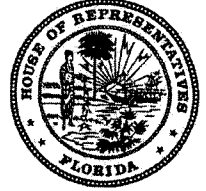
PS: I'm going to forward this email along with JAPC's letter and your comments to OPC to keep them in the loop.

JOE NEGRON
President



Senator Kevin Rader, Chair
Representative George R. Moraitis, Jr., Vice Chair
Senator Daphne Campbell
Senator George B. Gainer
Senator Rene Garcia
Senator Keith Perry
Representative Jason Fischer
Representative Michael Grant
Representative Sam H. Killebrew
Representative Amy Mercado
Representative Barrington A. "Barry" Russell

RICHARD CORCORAN
Speaker

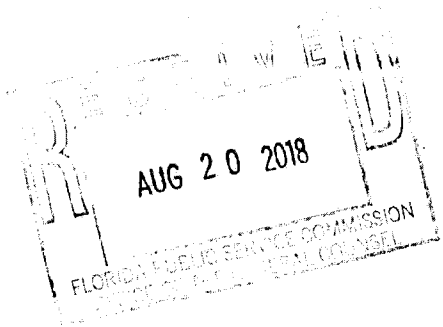


KENNETH J. PLANTE
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www.japc.state.fl.us
joint.admin.procedures@leg.state.fl.us

THE FLORIDA LEGISLATURE
JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE

August 17, 2018

Ms. Samantha Cibula
Attorney Supervisor
Public Service Commission
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850



RE: Existing Rule Review, Public Service Commission
Rules 25-6.0141, .0151, .020, .021, .033, .036, .037, .038, .039, .040, .0440, and .0441

Dear Ms. Cibula:

Pursuant to this Committee's authority in Joint Rule 4.6 of the Florida Legislature to review administrative rules and to advise the agency of its findings, I have reviewed the above-referenced rules and offer the following comments for your consideration and response:

- 25-6.0141(9):** It appears that this subsection is no longer necessary as the date triggers have passed.
- 25-6.0151(7):** This subsection incorporates a form dated 2/95. Please advise whether this version is the version that is currently utilized by the Commission. If subsequent revisions have been made, please amend this rule to update the version incorporated by reference.
- 25-6.020:** Please review and advise whether updates are needed to this rule, which has not been amended since adoption in 1969.
- 25-6.021:** Please see the comment above for rule 25-6.020.
- 25-6.033(3):** This subsection requires filings to be made in conformance with a quoted order of the Commission. As this rule has not been amended since adoption in 1969, please advise whether revisions are necessary. Material that meets

Ms. Samantha Cibula
August 17, 2018
Page 2

the definition of a rule in section 120.52(16), Florida Statutes, should be specifically incorporated by reference in rule. *See* § 120.54(1)(i), Fla. Stat. (2018), rule 1-1.013, F.A.C.

25-6.036:

Law Implemented

Please review whether sections 366.055 and .08, Florida Statutes, are properly cited as laws implemented by the content of this rule.

This rule requires a utility to set its own inspection frequency based on experience and “accepted good practice.” How does the Commission define the quoted language? *See* § 120.52(8)(d), Fla. Stat. (2018). Additionally, as this rule has not been amended since adoption in 1969, please advise whether further revisions are necessary.

25-6.037:

It is unclear how this rule’s language specifically implements the cited statutes as it appears to contain undefined goals (e.g. safety, proper condition) without setting forth definitions, standards, or how compliance is to be determined. *See* § 120.52(8)(d), Fla. Stat. (2018). Additionally, as this rule has not been amended since adoption in 1969, please advise whether further revisions are necessary.

25-6.038:

Please see the comment above for rule 25-6.020.

25-6.039:

Please see the comment above for rule 25-6.020.

25-6.040:

Please see the comment above for rule 25-6.020.

25-6.0440(2):

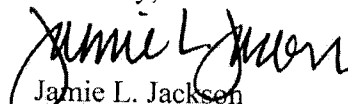
Regarding approval for territorial agreements, this subsection sets forth that the Commission “may consider, but not be limited to” certain enumerated factors. The use of the quoted phrase implies that there are additional [expectations or standards that could be enforced] that are not enumerated. *See* § 120.52(8)(d), Fla. Stat. (2018). Please review and advise.

25-6.0441(2):

Please see the comment above for rule 25-6.0440(2).

Should you have any questions, please do not hesitate to contact me. Otherwise, I look forward to your response.

Sincerely,


Jamie L. Jackson
Senior Attorney



FECA

Florida Electric Cooperatives Association, Inc.

2916 Apalachee Parkway
Tallahassee, Florida 32301
(850) 877-6166
FAX: (850) 656-5485

December 4, 2019

Andrew King, Esquire
Office of the General Counsel
Florida Public Service Commission
Shumard Oak Blvd.
Tallahassee, FL 32399-0850
aking@psc.state.fl.us

VIA Electronic Delivery

RE: REQUEST FOR A RULE DEVELOPMENT WORKSHOP FOR
Undocketed: IN RE: PROPOSED AMENDMENT OF RULES 25-6.0440,
TERRITORIAL AGREEMENTS FOR ELECTRIC UTILITIES; 25-0441,
TERRITORIAL DISPUTES FOR ELECTRIC UTILITIES

Dear Mr. King:

Pursuant to the Notice of Development of Rulemaking in the November 18, 2019 edition of the Florida Administrative Register, Vol. 45, No. 224, the Florida Electric Cooperatives Association, Inc. ("FECA"), on behalf of its 17 member-cooperatives,¹ requests that a rule development workshop be scheduled on the above-referenced proposed rule amendments.

FECA believes that the proposed changes to the rules are an invalid exercise of delegated legislative authority (i.e. the proposed rule is more restrictive than the implementing statute) at least in regards to Rule 25-0441, Territorial Disputes for Electric Utilities. The proposed amendment to Rule 25-0441, F.A.C., restricts the

¹ FECA's electric distribution cooperative members include: Central Florida Electric Cooperative, Inc., Choctawhatchee Electric Cooperative, Inc., Clay Electric Cooperative, Inc., Escambia River Electric Cooperative, Inc., Florida Keys Electric Cooperative Association, Inc., Glades Electric Cooperative, Inc., Gulf Coast Electric Cooperative, Inc., Okefenokee Rural Electric Membership Corporation, Peace River Electric Cooperative, Inc., Sumter Electric Cooperative, Inc., Suwannee Valley Electric Cooperative, Inc., Talquin Electric Cooperative, Inc., Tri-County Electric Cooperative, Inc., West Florida Electric Cooperative Association, Inc., and Withlacoochee River Electric Cooperative, Inc. FECA's generation and transmission cooperative members include PowerSouth Energy Cooperative and Seminole Electric Cooperative, Inc.

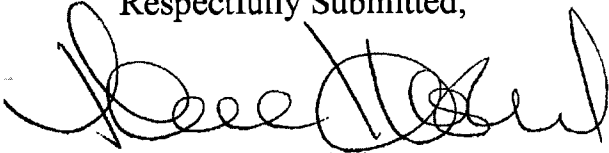
Commission to the factors delineated in the rule when resolving territorial disputes and prohibits the Commission from considering other factors on a case-by-case basis as they deem appropriate.

Section 366.04(2)(e), Florida Statutes states: "In resolving territorial disputes, the commission **may consider, but not be limited to** consideration of..." (Emphasis added). It appears that the legislature's intent was to give the Commission, as the expert regulatory body, some discretion when resolving territorial disputes.

Since, historically, the Commission has considered other factors outside the factors defined in the rule in resolving territorial disputes, FECA respectfully requests that a rule development workshop be scheduled to determine the need for the proposed rule amendment.

Thank you for your consideration in this matter. Please call me if you have any questions.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michelle Hershel", written in a cursive style.

Michelle Hershel, Esq.
Director of Regulatory Affairs
Florida Electric Cooperatives Association
2916 Apalachee Parkway
Tallahassee, FL 32301
mhershel@feca.com
(850) 877-6166, ext. 3
Cell: (850) 510-1693

AUSLEY McMULLEN

ATTORNEYS AND COUNSELORS AT LAW

123 SOUTH CALHOUN STREET
P.O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(850) 224-9115 FAX (850) 222-7560

December 3, 2019

VIA: ELECTRONIC DELIVERY

Andrew King, Esquire
Office of the General Counsel
Florida Public Service Commission
Shumard Oak Blvd.
Tallahassee, FL 32399-0850
aking@psc.state.fl.us

Re: Comments for *In Re: Proposed Amendment of Rules 25-6.0440, Territorial Agreements for Electric Utilities; 25-6.0441, Territorial Disputes for Electric Utilities*

Dear Mr. King:

On November 19, 2019, the Florida Public Service Commission issued a Notice of Development of Rulemaking declaring the Commission's intent to revise Rules 25-6.0440 and 25-6.0441 of the Florida Administrative Code. *See* Doc. No. 10992-2019. Pursuant to Section 120.54 of the Florida Statutes, Tampa Electric Company ("Tampa Electric" or "the company") hereby offers the following comments on the Commission's proposed rulemaking.

Tampa Electric shares the concerns raised in the comments submitted by the Florida Electric Cooperatives' Association, Inc. More specifically, Tampa Electric agrees that the revisions to Rule 25-6.0441, Territorial Disputes for Electric Utilities, included in the Notice of Development of Rulemaking, if adopted, would constitute an invalid exercise of delegated legislative authority.

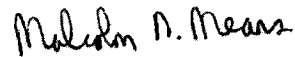
A proposed rule is an invalid exercise of delegated legislative authority if the rule "contravenes the specific provisions of law implemented." § 120.52(8)(c), Fla. Stat. Proposed Rule 25-6.0441 cites Section 366.04(2) as the law to be implemented by the rule. *See* Doc. No. 10992-2019, at page 7, line 3. That statute provides: "In resolving territorial disputes, the commission may consider, but not be limited to consideration of," a series of factors related to the utilities and geographic area involved in the dispute. 366.04(2)(e), Fla. Stat. (emphasis added). Proposed Rule 25-6.0441 directly contravenes this language. It provides that the Commission "will consider" four enumerated factors and nothing more. *See* Doc. No. 10992-2019, at page 6, lines

2019, at page 6, lines 11-21. The proposed Rule thus improperly narrows the Commission's statutory authority to evaluate and resolve territorial disputes.

Tampa Electric believes the Commission should refrain from restricting its authority by rule amendment in contravention of the clear legislative intent that the Commission should possess considerable discretion in resolving territorial disputes. Tampa Electric also believes that having a workshop would provide an opportunity to further discuss the concerns expressed above, and, therefore, Tampa Electric hereby requests a workshop.

Thank you for your assistance in connection with this matter. Please feel free to contact me at 850-224-9115 with any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "Malcolm N. Means". The signature is written in a cursive style with a clear, legible font.

Malcolm N. Means

Andrew King

From: Malcolm N. Means <MMeans@ausley.com>
Sent: Monday, February 03, 2020 10:56 AM
To: Michelle Hershel; Andrew King
Cc: JR Kelly
Subject: RE: Amendments to Rules 25-6.0440 & 25-6.0441

Agreed.

Thank you,

Malcolm Means
Ausley McMullen
123 S. Calhoun Street
Tallahassee, FL 32301
Direct: (850) 425-5301
Fax: (850) 222-7560

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Sent: Monday, February 3, 2020 10:27 AM
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Cc: JR Kelly <kelly.jr@leg.state.fl.us>
Subject: RE: Amendments to Rules 25-6.0440 & 25-6.0441

Yes- correct- no workshop necessary

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Good Morning Andrew- thank you for making the adjustments to the territorial rules- FECA, as well as the other utilities who supported our comments (FPL, Duke, FMEA), are fine with the new language.

Michelle Hershel
Director of Regulatory Affairs
Florida Electric Cooperatives Assoc.
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Andrew B. King
Senior Attorney
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PS: I'm going to forward this email along with JAPC's letter and your comments to OPC to keep them in the loop.