

MEMORANDUM

June 19, 1998

TO : DIVISION OF RECORDS AND REPORTING

FROM : MARY ANNE HELTON, DIVISION OF APPEALS *MAH*

RE : DOCKET NO. 980500-PU

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Attached is a Supplement to the Commission's Petition for Exceptions to Uniform Rules of Procedure that was filed with the Administration Commission on May 29, 1998. It should also be included in the above-referenced docket file at the PSC.

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COMMUNICATIONS SECTION

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FFSC - DIVISION OF RECORDS AND REPORTING

BEFORE THE ADMINISTRATION COMMISSION  
OF THE STATE OF FLORIDA

IN THE MATTER OF: THE FLORIDA )  
PUBLIC SERVICE COMMISSION'S )  
REQUEST FOR EXCEPTIONS TO )  
UNIFORM RULES OF PROCEDURE )

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AC CASE No. APA-98-007

FILED: May 29, 1998

FLORIDA PUBLIC SERVICE COMMISSION'S  
SUPPLEMENT TO ITS  
PETITION FOR EXCEPTIONS TO UNIFORM RULES OF PROCEDURE

The Florida Public Service Commission (PSC) respectfully submits the following additional information as further support for its Petition for Exceptions to Uniform Rules of Procedure filed April 15, 1998.

I. Background.

On April 15, 1998, pursuant to Section 120.54(5)(a), Florida Statutes, the PSC filed its Petition for Exceptions to Uniform Rules of Procedure with the Administration Commission. The staff of the Administration Commission has recommended that a few of the PSC's requests for exceptions be denied. The purpose of this supplemental petition is to provide additional support for Rules 25-22.029, 25-22.039, 25-22.056(1)(c), and 25-22.037(3) and (4), F.A.C., for which the Administration Commission staff has recommended the exception request be denied.

## II. Point of Entry.

At pages 11-13 of its April 15, 1998, petition, the PSC argues for an exception to Uniform Rule 28-106.111(2)-(4) so that it can continue to follow PSC Rule 25-22.029.

The PSC is seeking an exception so that it can continue to follow its subsection (2) which requires a hearing to be requested 21 days from issuance of a proposed agency action order. This is different from Uniform Rule 28-106.111, which ties the time to request a hearing to 21 days of "receipt of written notice of the decision." Rule 28-106.111(2), F.A.C. (emphasis added).

In addition, the PSC is seeking an exception so that it can continue to shorten the protest period to 14 days for "good cause shown." Rule 25-22.029(2), F.A.C.

### A. The procedure followed by the PSC to issue orders and notices.

At the PSC, all "free form" agency action is codified only after the agency has deliberated and voted at a public meeting. These regularly scheduled public meetings, called agenda conferences, are noticed and agendas are made available to the public. In addition, interested persons are given the opportunity to address the PSC concerning its action. The trigger for the PSC's vote is a staff recommendation which is filed 12 days prior to the agenda conference.

Within 20 days of the PSC's vote, the decision is codified into a proposed agency action (PAA) order by the PSC attorney

assigned to the matter. The PAA order is then forwarded to the Division of Records and Reporting (the Division), which is the PSC's clerk's office, for issuance.

In early 1995, the Division reengineered its processes by integrating and further automating its procedures for issuing orders and notices, and, as a result, was able to eliminate one and a half positions from its staff. The procedure now followed is:

1. The Division must receive the order or notice by 2:00 p.m. for it to be issued the same business day it is received.
2. After it is received, the order or notice is assigned an order number, the date of issuance is listed, and, if it is a PAA order, the date the protest period expires is inserted in the notice language at the end of the order. All of this information is then included in the computerized Case Management System (CMS), which can be accessed through every PSC computer as well as the Internet.
3. Most orders are then faxed to parties and interested persons using information they provide to the PSC.<sup>1</sup> This process is completely automated.

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<sup>1</sup> Large orders and notices may be mailed, depending on the server usage for the day. In addition, on Fridays, most orders and notices are mailed since faxing complications may not be discovered until the start of the next work week.

Using a PSC-designed computer program, a Division staff member simply types in the docket number and order number of the order or notice to be faxed. In addition, the staff member must answer a few queries, such as whether to send the fax during or after business hours, and whether to generate an envelope or mailing label if there is a party or interested person that has not provided a fax number. A computer message notifies the staff member if a fax submission cannot be completed, and the staff member has the option of resubmitting the fax or requesting an envelope and file to be generated so that the document can be mailed. If an order or notice must be mailed, it is taken to the mail room immediately after the envelope or mailing label is generated.

4. After the staff has verified that the order or notice has been faxed or mailed to all parties and interested persons, documentation is included in each docket file that states the method and date of transmission. All orders and notices are either faxed or mailed the same day they are issued.
5. The docket automatically closes if no protest is timely filed.

A computer data base is maintained that states whether the fax submissions have been completed for each order and notice issued. In addition, there is a separate computer data base that lists the time each fax submission is completed. At the present time, the PSC does not generate written reports for each order or notice that states this information.

**B. Due process requirements.**

In Florida, "[t]he extent of procedural due process protections varies with the character of the interest and the nature of the proceeding involved." Hadley v. Department of Administration, 411 So. 2d 184, 187 (Fla. 1982) (citation omitted). With regards to free form agency action, the First District Court of Appeal has found that affected parties must be granted "a clear point of entry, within a specified time . . . , to formal or informal proceedings under Section 120.57." Capeletti Brothers, Inc. v. Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

The notice requirements in Chapter 120, Florida Statutes, are consistent with the above due process requirements. Section 120.569(1), Florida Statutes, requires parties to be notified of any agency order. In addition,

[e]ach notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

Section 120.569(1), Florida Statutes.

The PSC rule does not violate these due process or statutory requirements. The rule clearly provides that PAA orders must notify affected persons of their opportunity to request a hearing, and the time period within which a hearing must be requested. Rule 25-22.029(2), F.A.C. This rule effectively balances the interest of an affected person's right to a hearing, and the public's need for finality of agency action. Hadley, 411 So. 2d at 188 (Courts must engage in a "balancing of interest" test to determine whether due process has been met; "'a court must choose between protecting the individual's guaranteed rights on one hand and the welfare of the general public on the other.'") (citation omitted).

There is no requirement in either the Administrative Procedures Act or in Florida case law that in order to have a clear point of entry that does not violate due process, the affected person must have 21 days from receipt of codification of the agency action to request a hearing. This is, instead, a requirement that has been imposed by the Administration Commission in its adoption of the Uniform Rules of Procedure.

Moreover, not all time periods that set out legal rights are based on the time an order or notice of intended action is received. For instance, Rule 9.110(b), Florida Rules of Appellate Procedure, requires a notice of appeal to be filed "within 30 days of rendition of the order to be reviewed." Florida's courts also

require motions for rehearing to "be filed within 15 days of an order or within such other time set by the court." Rule 9.330(a), Florida Rules of Appellate Procedure. In addition, Section 120.54(3)(c)1., Florida Statutes, provides that the time period for affected persons to request a rulemaking hearing expires "within 21 days after the date of publication of the notice of intended agency action . . . ." The Administrative Procedures Act also provides that motions for summary hearing must be made within 15 days after service of the initial order required by Section 120.574(1)(a). Section 120.574(1)(b), Florida Statutes.

**C. The uniform rule's potential impact on the PSC.**

As discussed in its April 15, 1998, petition, the PSC issued 576 PAA orders in 1997. Most of these orders affected the substantial interests of more than one person; therefore, multiple copies of most of these orders would have been distributed using the procedure outlined above in part II.A.

Under current PSC procedures, not all orders are physically provided to every affected customer. However, there are certain circumstances where the PSC has found direct mailings to customers to be necessary. In such a case, the cost would be exorbitant and the procedure burdensome. See In re: Application for rate increase and for increase in service availability charges in Lake County by Lake Utility Services, Inc., PAA Order No. PSC-98-0683-AS-WU, issued May 18, 1998, page 6 (While the PSC required the utility to



mail the PAA order to the 1,612 affected customers in this case, it is probable that the PSC would have had to mail the order by certified mail if it had been operating under the uniform rule).

If the PSC's exception request is denied, the PSC will have to substantially change the manner in which it issues PAA orders. Such a change would move the PSC from a streamlined, computer automated, highly efficient system to a cumbersome, labor intensive procedure. Under the Uniform Rule, the PSC would have to implement the following procedures:

1. PAA orders would have to be physically separated from the other orders and notices received by the Division on a given day to make sure the mail room received them by its 3:00 p.m. deadline. Since so many PAA orders are issued, the Division may have to change its internal deadline to 12:00 p.m. to insure that all of the steps detailed below can be met the day the order is received in the Division.
2. Next, a hand written return receipt card would have to be manually prepared for each substantially affected party, and copies of the order would have to be made for mailing.
3. Information from each certified envelope would have to be manually recorded in a certified mail book.
4. The envelopes would then be taken to the mail room

for postage and mailing.

5. The PSC would continue to fax interested persons copies of the order, which means they would be provided with copies of the order before the substantially affected parties.
6. The expiration of the protest period could not be included in CMS because this date cannot be ascertained until all return receipt cards are received by the Division. Once the last card is received from the Post Office for each PAA order issued, the receipt date would then be entered in CMS.
7. All return receipt cards would have to be filed in the docket file.

Moreover, the PSC would have to develop procedures for cases where an affected party refused delivery of certified mail or return receipt cards were not returned for whatever reason.

The PSC would have to increase its staff to handle these additional steps. In addition, its postage budget must be increased to accommodate the \$2.77 it costs to send out each piece of minimum sized certified mail. The PSC would also have to consider whether it would be necessary to issue consummating orders to codify the date a PAA order becomes final.

To follow the uniform rules, the PSC believes the above steps,

which are more costly and less efficient than its current procedures, would be necessary to ensure finality of its actions. Even with the above steps, uncertainty and confusion could result if an affected party is delayed in signing a return receipt card. On the other hand, the process the PSC currently follows enables the agency to implement its PAA orders in a timely and orderly manner so that the date of finality is known at the time of issuance.

The other impact of the uniform rule would be that the PSC would no longer be able to shorten the protest period to 14 days for good cause shown. The PSC has done so under very limited circumstances. For example, the PSC has shortened the protest period for PAA orders that establish the price index for water and wastewater utilities. By March 31 of each year, the PSC must set price index categories based on the most recent 12-month historical data available. Section 367.081(4)(a), Florida Statutes. To do so, the PSC relies on the Gross Domestic Product Implicit Price Deflator Index, which is published by the U.S. Department of Commerce. The third quarter figures are not usually released until the end of December, and sometimes as late as January. In order to provide a clear point of entry and meet the March 31 statutory deadline, the PSC has, on occasion, shortened the protest period to 14 days. See In re: Annual reestablishment of price increase or decrease index of major categories of operating costs incurred by

water and wastewater utilities pursuant to Section 367.081(4)(a), F.S., 97 F.P.S.C. 2:162, 164 (1997). Even with this shortened protest period, the time to prepare for hearing would have been extremely abbreviated if the order had been protested.

In addition, in In re: Petition for approval of transfer of Local Exchange Telecommunications Certificate No. 33 from Central Telephone Company of Florida to United Telephone Company of Florida, for approval of merger of Certificate No. 33 into United Telephone's Certificate No. 22, and for change in name on Certificate No. 22 to Sprint-Florida, Incorporated, 96 F.P.S.C. 12:381 (1996), the PSC found good cause to reduce the protest period to 14 days. In this case, the affected companies filed a petition on November 14, 1996, requesting the PSC to approve their merger which was to become effective December 31, 1996. The protest period was shortened to 14 days so that the order would become effective by the merger date if no protest was received. Id. at 12:383. The PSC noted that the companies had provided written notice to their customers of the transfer as well as publishing two legal advertisements in November of 1996. Id.

Also, the Federal Telecommunications Act of 1996 requires the PSC to approve interconnection agreements and conduct arbitration of disputed interconnection agreements under different processes and time frames that cannot be met if a 21-day protest period is followed.

As discussed above, the exceptions sought by the PSC to keep its clear point of entry rule are for the most efficient operation of the agency.

### III. Intervention.

At pages 17-18 of its April 15, 1998, petition, the PSC argues for an exception to Uniform Rule 28-106.205 on Intervention so that it can continue to follow PSC Rule 25-22.039. The PSC rule allows intervention petitions up to five days before the hearing, whereas the uniform rule cuts off the intervention period 20 days before the hearing. Under the Uniform Rule, the specified time frame can be shortened for good cause shown.

At the PSC, utility customers often intervene and participate in proceedings. This is especially pertinent now since the Public Counsel has decided that it is a conflict of interest for him to represent customers in rate structure issues. At times, customers, homeowners associations, and other affected persons or groups, are not able to get the necessary resources and information together to intervene until close to the date of hearing.<sup>2</sup> The PSC is

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<sup>2</sup> For instance, in Docket No. 970261-EI, In re: Review of nuclear outage at Florida Power Corporation's Crystal River Unit 2, petitions to intervene were received from the Honorable Charlie Crist 13 days before the hearing and from the American Association of Retired Persons seven days before the hearing. In addition, in Docket No. 950495-WS, In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc., petitions to intervene were received from Hidden Hills Country Club Estates Homeowners' Association, Inc., seven days before the hearing and from Citrus Park Homeowners' Association five days before the hearing.

concerned that application of the Uniform Rule may prevent some customers from intervening and thus limit access to proceedings that affect substantial interests. This is true even though the rule provides that the time period will be shortened for good cause shown. Many lay persons may be chilled from intervening because they do not understand the import of this language.

In addition, the PSC is concerned that its application of this rule seems inconsistent with the notice requirements in Section 120.569(2)(b), Florida Statutes, and Uniform Rules 28-106.208 and 28-106.302 that require 14 days written notice for hearings. Thus, it is highly probable that an affected person will not be notified of a hearing date until after the intervention period has expired. The PSC does consider this inconsistency to be good cause to allow intervention past the expiration date; however, under the PSC rule, this extra showing would not have to be considered by either the intervenor or the PSC, which makes the PSC rule more efficient. To force the PSC to consider whether good cause exists for petitions filed less than <sup>20</sup> ~~five~~ days before the hearing would add to an already tight schedule and would be an inefficient use of the PSC's time and resources.

#### **IV. Waiver of Issues.**

PSC Rule 25-22.056(1)(c), F.A.C., provides that "[a] party who fails to state or reaffirm a position on an issue to the presiding officer or hearing officer at the appropriate time shall be deemed

to have waived that issue or position." On pages 22-24 of its April 15, 1998, petition, the PSC requests an exception to keep this provision.

PSC proceedings often involve multiple complex issues. PSC Rule 25-22.056(1)(b) requires parties to submit a statement of issues and positions as part of their post-hearing filings. If they do not do so, the requirement in paragraph (1)(c) makes it clear that they have waived that issue or position. This requirement keeps the PSC from having to deliberate on issues no longer viable and also ensures that the PSC is fully aware of each party's position on any remaining issues. Thus, it acts to increase agency efficiency by making the agency's workload manageable and by avoiding doubt or controversy concerning the consequence of not maintaining a position on an issue.

Moreover, "[i]t is a well settled principle of law that questions not raised and ruled upon in the lower tribunal are deemed to be waived and will not be considered on appeal." Rudloe v. Florida Department of Environmental Regulation, 517 So. 2d 731, 733 (Fla. 1st DCA 1987) (Emphasis added).

The PSC rule simply codifies its practice in a rule, which is required by Section 120.54(1)(a), Florida Statutes.

#### V. Waiver and default.

On page 33 of its April 15, 1998, petition, the PSC seeks an exception to keep the waiver and default provisions in Rule 25-

22.037.

While the PSC does not require responsive pleadings to petitions and motions, subsection (3) makes it clear that there are consequences to not doing so. PSC Rule 25-22.037(3) is consistent with Rule 1.140(h)(1), Florida Rules of Civil Procedure, which provides that a party waives all defenses and objections not made in a responsive pleading unless the defense is specifically mentioned in paragraph (h)(2) of the rule of civil procedure.

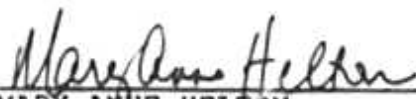
PSC Rule 25-22.037(4) provides that failure to respond to an order to show cause constitutes a default. This provision codifies the Commission practice as it is set forth in every show cause order that is issued. It allows the PSC to enforce its orders and rules in an orderly fashion, and thus, makes the PSC more efficient.



WHEREFORE, the Florida Public Service Commission respectfully requests this Commission to also consider the above in its decision on the agency's Petition for Exceptions to the Uniform Rules of Procedure.

Respectfully submitted,

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FLORIDA PUBLIC SERVICE COMMISSION  
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Tallahassee, FL 32399-0862  
850-413-6245

Dated: May 29, 1998

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following parties by U.S. Mail or hand-delivered this 29th day of May, 1998.

Honorable Lawton Chiles  
Governor  
The Capitol  
Tallahassee, FL 32399

Honorable Sandra B. Mortham  
Secretary of State  
The Capitol  
Tallahassee, FL 32399

Honorable Robert Milligan  
Comptroller  
The Capitol  
Tallahassee, FL 32399

Honorable Bill Nelson  
Insurance Commissioner  
The Capitol  
Tallahassee, FL 32399

Honorable Bob Butterworth  
Attorney General  
The Capitol  
Tallahassee, FL 32399

Honorable Frank Brogan  
Commissioner of Education  
The Capitol  
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Honorable Bob Crawford  
Commissioner of Agriculture  
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MARY ANNE HELTON