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**Matthew M. Childs, P.A.**

June 24, 1999

Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, FL 32399

**RE: DOCKET NO. 980569-PU**

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen (15) copies of Florida Power & Light Company's Pre-filed Comments in the above referenced docket.

Also enclosed is a formatted double sided high density 3.5 inch diskette containing the Pre-filed Comments of Florida Power & Light Company.

Very truly yours,

Matthew M. Childs, P.A.

MMC:ml

cc: All Parties of Record

AFA 1
APP Moose
CAF
CMU 1
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EAG
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MAS 5
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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|---|---|
| IN RE: Proposed amendments to Rules 25-4.002, F.A.C.,Application and Scope; 25-4.141, F.A.C., Minimum Filing Requirements for Rate of Return Regulated Local Exchange Companies; Commission Designee; 25-4.202, F.A.C., Construction and Waivers; 25-24.455, F.A.C., Scope and Waiver; 25-6.002, F.A.C., Application and Scope; 25-6.043, F.A.C., Investor-Owned Electric Utility Minimum Filing Requirements; Commission Designee; 25-6.0438, F.A.C., Non-Firm Electric Service - Terms and Conditions; 25-17.087, F.A.C., Interconnection and Standards; 25-30.010, F.A.C., Rules for General Application; 25-30.011,F.A.C., Application and Scope; 25-30.436, F.A.C., General Information and Instructions Required of Class A and B Water and Wastewater Utilities in an Application for Rate Increase; 25-30.450, F.A.C., Burden of Proof and Audit Provisions; 25-30.455,F.A.C., Staff Assistance in Rate Cases; 25-30.456, F.A.C., Staff Assistance in Alternative Rate Setting; 25-30.570, F.A.C.,Imputation of Contributions-in-Aid-of-Construction; and 25-30.580, F.A.C., Guidelines for Designing Service Availability Policy) | DOCKET NO. 980569-PU<br>DATE: JUNE 24, 1999 |

PRE-FILED COMMENTS OF
FLORIDA POWER & LIGHT COMPANY

Florida Power & Light Company ("FPL") a public utility subject to the jurisdiction of this Commission under Chapter 366, Florida Statutes, hereby files this its pre-filed comments as directed by

Commission Order No. PSC-99-0968-PCO-PU issued by the Commission on May 13, 1999. FPL understands that it will have the ability to participate at the hearing and offer comments and arguments if appropriate at that time. In addition, once FPL has received a list of materials, if any, recognized by the Commission in this rulemaking proceeding, then, FPL may need the opportunity to examine and offer comments or rebuttal as authorized by in section 120.54(1)(h), Florida Statutes.

The Rules Proposed At Issue For Florida Power & Light Company

This docket addresses many rules. FPL, however, only wishes to participate as to those rules which apply to it as a public utility under Section 366 of the Florida Statutes. These rules, a copy of which are attached to these comments, are:

1. Rule 25-6.002, Application and Scope (Proposed repeal of subsections (2) and (4)).

2. Rule 25-6.043, Investor-Owned Electric Utility Minimum Filing Requirements; Commission Designee (Proposed repeal of subsection (3)).

3. Rule 25-6.0438, Non-Firm Electric Service - Terms and Conditions (Proposed repeal of subsection (9)).

4. Rule 25-17.087, Interconnection and Standards (Proposed repeal of subsection (2) and conforming changing thereafter to reflect eliminate subsection (2)).

Absence of Rationale Supporting Commission Rule Proposal

The following is a listing of the only explanations of which FPL is aware that have been provided by the Commission in connection with this proposed repeal of rules in this docket. They are:

1. The Notice of Proposed Rule Development dated May 1, 1998 and the Amended Notice of Proposed Rule Development dated May 8, 1998 wherein, in the amended notice, the following was stated:

> PURPOSE AND EFFECT: The purpose of these rule amendments is to repeal the waiver and variance provisions for which the Commission no longer has rule authority under the more restrictive rulemaking standard in section 120.536, Florida Statutes. Moreover, since 1996, all requests for rule variances and waivers must comply with section 120.542, Florida Statutes.
> SUBJECT AREA TO BE ADDRESSED: The repeal of waiver and variance rule provisions no longer authorized by Statute.

2. The Notice of Proposed Rulemaking published in the Florida Administrative Weekly, 24 Fla. Admin. Weekly 2773, May 22, 1998, was consistent with the above explanations.

3. In its December 18, 1998 Notice of Rulemaking in this docket, the following was stated as an explanation of the proposed repeal of rules:

> PURPOSE AND EFFECT: To repeal provisions authorizing rule waivers that have been superseded by section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, which provides specific standards and procedures to be followed in granting rule waivers and variances.

4. The Statement of Facts and Circumstances justifying rule submitted to Mr. Carroll Webb of the Joint Administrative Procedures Committee on December 24, 1998:

> In 1996, the Legislature substantially amended Chapter 120, Florida Statutes, the "Administrative Procedure Act" (APA). Among the changes to the APA was the adoption of section 120.542, Florida Statutes, governing rule waivers and variances, and section 120.536, requiring agencies to report to the Joint Administrative Procedures Committee (JAPC) its rules that exceed its rulemaking authority, and repeal those for which authorizing legislation does not exist. On September 9, 1997, the Commission approved the list of rules for which it lacked specific statutory authority. On September 25, 1997, by letter from Chairman Johnson, the Commission submitted its list to the JAPC. The Commission did not seek legislation to authorize the identified rules that provide generally for waivers and variances from the rules, because, as stated in the letter, specific authority is now contained in section 120.542, Florida Statutes, and specific uniform rules to implement the statute had been adopted by the Administration Commission.

Lack of Rationale

As can be seen from a review of the above statements by the Commission, the limited explanation presented is not consistent. It is not clear because of changes to the explanation from time to time whether reliance is based on section 120.542 and 120.536, Florida Statutes, or whether reliance is based on only one of these subsections. Moreover, the "explanations" are really just bare assertions because no support for the conclusion chosen has been given.

For instance without reference to any particular words of sections 120.542 and 120.536 relied upon, if any, to simply assert that rule waiver provisions "have been superseded" cannot be helpful. Attached to these comments, as an Appendix, is a copy of section 120.542 and 120.536, Florida Statutes. Neither of those Statutes say, directly or indirectly, that the Commission's rules at issue here are not valid or need to be repealed. No basis for reliance upon section 120.542 is supported by identification of any rules of statutory construction or interpretation that may or may not have been applied by the Commission in this instance.

In addition, there is no attempt to explain why the statutes (120.542 and 120.536) that the Commission identifies as applying to "variances" or "waivers" are not likewise applicable to the substantive rules to which the waivers and variances apply.

As it now stands, the lack of explanation puts FPL in the position of attempting to guess at the rationale and then "prove a negative". FPL cannot address whether the Commission's rationale is correct because no rationale has been presented. There is some apparent basis for the Commission's action. That basis has not been identified or provided. Therefore, FPL submits, any action the Commission takes in this docket must of necessity be arbitrary and capricious and not supported by competent substantial evidence.

In addition to the lack of support for the repeal of the rules proposed by the Commission, FPL submits that the Commission's

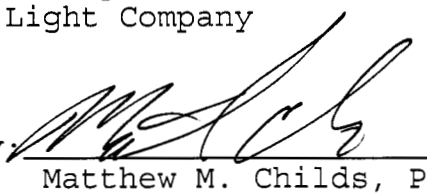
action involves more than a rule repeal. The effect of the Commission's action is quite clearly a rule adoption which has been neither noticed nor supported. For instance, the action in this docket would eliminate subsection (2) of Rule 25-6.002 so that no "electric public utility" could maintain that compliance with any portion of Chapter 25-6 of the Commission's rules would "[introduce] unusual hardship" or be "unreasonably difficult" so as to support Commission action permitting temporary exemption from the rule's requirements. FPL is attaching to its comments the index of the various rules contained in Chapter 25-6 for which subsection (2) of Rule 25-6.002 is applicable.

If, the rationale for elimination of Rule 25-6.002 (2) is that there has been no grant of authority to permit a waiver or variance as required by section 120.536 then FPL would maintain that there are very few of the substantive rules in Chapter 25-6 that have sufficient authority. Most importantly, however, when the various rules in Chapter 25-6 were adopted, they were all subject to the "unusual hardship" or "unreasonable difficulty" basis for Commission ruling that compliance was temporarily exempted. The effect of the elimination of this basis for this temporary exemption, and the change of the standard and the procedures associated therewith, changes the substantive rules to which 25-6.002 (2) would otherwise apply.

WHEREFORE, FPL respectfully submits these pre-filed comments in association with the Commission's consideration of whether to repeal the various rules to which FPL is subject and which have been identified in this docket and that, the Commission consider and provide some rationale so that FPL may have an opportunity to be informed and provide meaningful evidence, comment and argument to the Commission.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP
Suite 601
215 South Monroe Street
Tallahassee, FL 32301
Attorneys for Florida Power
& Light Company

By: 
Matthew M. Childs, P.A.

# APPENDIX 1

***Library References:*** *Significant recent decisions in public utility law, Lee L. Willis, Ben E. Girtman, James A. McGee, 54 Fla. Bar J. 389, 393 (May 1980).*

## PART I GENERAL PROVISIONS

### 25-6.001 Authorization of Rules.

*Specific Authority 366.05(1) FS. Law Implemented 366.05(1) FS. History—New 7-29-69, Formerly 25-6.01, Repealed 5-4-97.*

*ANNOTATIONS*

***Cost of service***

*Public Service Commission in setting new electricity rate structure did not err merely because it considered factors other than actual cost of service differences, since regulatory statute does not specify that particular consideration. International Minerals and Chemical Corporation v. Mayo, 336 So. 2d 548 (1976).*

***Territorial disputes***

*Court affirmed Public Service Commission's order entitling one power company to provide electric power to project and prohibiting another power company from doing so, where no factual or equitable distinction existed in favor of either company, and territorial dispute was thus properly resolved in favor of privately owned utility; court disagreed, however, with Commission's alternative finding that its more extensive jurisdiction over privately owned utilities was additional consideration supportive of policy decision in favor or private utility. Escambia River Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So. 2d 1384 (1982).*

### 25-6.002 Application and Scope.

(1) These rules and regulations shall apply to all electric public utilities operating under the jurisdiction of the Florida Public Service Commission. They are intended to define and promote good utility practices and procedures, adequate and efficient service to the public at reasonable costs, and to establish the rights and responsibilities of both the utility and the customer.

(2) In any case where compliance with any of these rules introduces unusual hardship, or if unreasonable difficulty is involved in immediate

compliance with any particular rule, application may be made to the Commission for modification of the rule or for temporary exemption from its requirements, provided that the utility shall submit with such application a full and complete statement of reason therefor.

(3) No deviation from these rules shall be permitted unless authorized in writing by the Commission.

(4) The adoption of these rules shall in no way preclude the Commission, upon complaint, upon its own motion, or upon the application of any utility from altering or amending them, in whole or in part, or from requiring any other or additional service, equipment, facility or standard, or from making such modification with respect to their application as may be found necessary to meet exceptional conditions.

(5) The adoption of these rules shall not in any way relieve any utility from any of its duties under the laws of the State.

*Specific Authority 366.05(1) FS. Law Implemented 366.05(1) FS. History—New 7-29-69, Formerly 25-6.02.*

*ANNOTATIONS*

***Foreign cooperatives***

*Where Florida rural electric cooperatives enjoyed power of eminent domain, foreign cooperative meeting F. S. A. § 425.27 requirements was also entitled to exercise this power in order to construct electrical transmission line over appellants' land, and no abuse of discretion was found in that choice of locations; further, since F. S. A. § 425.04(4) authorized rural electric cooperatives to serve up to ten percent non-rural areas, and cooperative had not violated "central station" provisions, foreign corporation's service to four municipalities did not deprive it of its "rural" character. Alabama Electric Cooperative, Inc. v. First National Bank of Akron, Ohio, 684 F. 2d 789 (11th Cir. 1982).*

***Municipal utilities***

*While Commission had no jurisdiction to set rates for municipal utility, it had authority over "rate structure" of all electric utilities in state; city's differential charges to customers within and without its corporate limits constituted classification system and therefore were matter of "rate structure" subject to jurisdiction of Public Service Commission. City of Tallahassee v. Mann, 411 So. 2d 162 (1982).*

***State policy***

*Florida cities' claim involving electricity transmission services arose under state "Little FTC Act," Section 501.204, F.S., so was dismissed without prejudice for reassertion in state proceedings. Federal court refused to determine state policy by interpreting scope of regulated business exemption to that statute. City of Gainesville v. Florida Power & Light Company, 488 F. Supp. 1258 (S. D. Fla. 1980).*

**25-6.003 Definitions.** Unless otherwise defined in Rule 25-6.003 below, Rule 25-6.075 or in adopted national codes, pursuant to Rule 25-6.034, the definition of the terms used in Chapter 25-6 shall be as stated in the IEEE Dictionary of Electrical and Electronic terms.

(1) "Commission." Unless a different intent clearly appears from the context, the word "Commission" shall be construed to mean the Florida Public Service Commission.

(2) "Customer." Any person, firm, partnership, company, corporation, association, governmental agency or similar organization, who makes application for and is supplied with electric service by the utility for its ultimate use and not for use by, to, or through any other person or entity unless specifically authorized by the Commission.

(3) "Customer's Installation." Wires, enclosures, switches, appliances, and other apparatus, including the service entrance and service equipment, forming the customer's facilities utilizing service for any purpose on the customer's side of the point of delivery.

(4) "Meter." The word "meter," when used in these rules without other qualification, shall be construed to mean any device used for the purpose of measuring the service rendered to a customer by a utility.

(5) "Point of Delivery." The first point of attachment where the utility's service drop or service lateral is connected to the customer's service entrance conductors either at a riser, in a terminal box, or meter or other enclosure inside or outside the building wall.

(6) "Service." The supply by the utility of electricity to the customer, including the readiness to serve and availability of electrical energy at the customer's point of delivery at the standard available voltage and frequency whether or not utilized by the customer.

(7) "Service Conductors." The overhead conductors from the last pole or other aerial support to the point of delivery including the splices, if any, connecting the service drop to the service entrance conductors.

(8) "Service Drop." The overhead service conductors from the last pole or other aerial support to and including the splices, if any, connecting to the service entrance conductors at the building or other structure.

(9) "Service-Entrance Conductors, Underground System." The service conductors between the terminals of the service equipment and the point of connection of the service lateral.

(10) "Service Equipment." The customer's equipment, usually consisting of circuit-breaker or switch and fuses, and their accessories, connected to the supply conductors of a building.

(11) "Service Lateral." The underground conductors between the transformer(s) or transformer secondary, including any risers at a pole or other structure, and the point of delivery.

(12) "Utility." Unless a different intent clearly appears from the context, the word or words "utility" or "electric utility" as used in these rules shall have the same meaning as set out for "public utility" in § 366.02, F.S., and shall include all such utilities subject to Commission jurisdiction.

*Specific Authority 366.05(1) FS. Law Implemented 366.05(1) FS. History—New 7-29-69, Amended 4-13-80, Formerly 25-6.03.*

**25-6.004 Reference to Commission.** In the event of any dispute involving the interpretation of any of these rules and regulations, any party in interest may refer the matter to the Commission for adjudication.

# APPENDIX 2

subsection (5) the Commission will determine the level of sharing of prudent economic development costs and the future treatment of these expenses for surveillance purposes.

(4) Each utility shall report its total economic development expenses as a separate line item on its income statement schedules filed with the earnings surveillance report required by Rule 25-6.1352, Florida Administrative Code. Each utility shall make a line item adjustment on its income statement schedule to remove the appropriate percentage of economic development expenses incurred for the reported period consistent with subsections (2) and (3).

(5) Requests for changes relating to recovery of economic development expenses shall be considered only in the context of a full revenue requirements rate case or in a limited scope proceeding for the individual utility.

*Specific Authority 288.035(3), 350.127(2) FS. Law Implemented 288.035 FS. History—New 7-17-95, Amended 6-2-98.*

**25-6.043 Investor-Owned Electric Utility Minimum Filing Requirements; Commission Designee.**

(1) General Filing Instructions

(a) The petition under Section 366.06 and Section 366.071, Florida Statutes, for adjustment of rates must include or be accompanied by:

1. The information required by Commission Form PSC/EAG/11 (7/90), entitled "Minimum Filing Requirements for Investor-Owned Electric Utilities" which is incorporated into this rule by reference. The form may be obtained from the Commission's Division of Electric and Gas.

2. The exact name of the applicant and the address of the applicant's principal place of business.

3. Copies of prepared direct testimony and exhibits for each witness testifying on behalf of the company.

(b) In compiling the required schedules, a company shall follow the policies, procedures and guidelines prescribed by the Commission in relevant rules and in the company's last rate case or in a more recent rate case involving a comparable utility. These schedules shall be identified appropriately (e.g., Schedule B-1 would be designated Company Schedule B-1 — Company basis).

(c) Each schedule shall be cross-referenced to identify related schedules as either supporting schedules and/or recap schedules.

(d) Each page of the filing shall be numbered on 8½ × 11 inch paper. Each witness' prefiled testimony and exhibits shall be on numbered pages, and all exhibits shall be attached to the proponent's testimony.

(e) Except for handwritten official company records, all data in the petition, testimony, exhibits and minimum filing requirements shall be typed.

(f) Each schedule shall indicate the name of the witness responsible for its presentation.

(g) All schedules involving investment data shall be completed on an average investment basis. Unless a specific schedule requests otherwise, average is defined as the average of thirteen (13) monthly balances.

(h) Twenty-one (21) copies of the filing, consisting of the petition and its supporting attachments, testimony, and exhibits, shall be filed with the Division of Records and Reporting.

(i) Whenever the company proposes any corrections, updates or other changes to the originally filed data, twenty-one (21) copies shall be filed with the Division of Records and Reporting with copies also served on all parties at the same time.

(2) Commission Designee: The Director of the Division of Electric and Gas shall be the designee of the Commission for purposes of determining whether the utility has met the minimum filing requirements imposed by this rule.

(3) Waiver of Minimum Filing Requirements. The Commission may grant a waiver with respect to specific data required by this rule upon a showing that production of the data would be impractical or impose an excessive economic burden upon the company.

*Specific Authority 366.05(1), (2), 366.06(3) FS. Law Implemented 366.04(2)(f), 366.06, 366.071 FS. History—New 5-27-81, Formerly 25-6.43, Amended 7-5-90.*

*ANNOTATIONS*

*Rate base*

*Court said Commission neither violated essential requirements of law nor abused its discretion by allowing power company to include in its rate base unamortized cancellation charges as base rate or by adding ten basis points to company's return on equity in recognition of its energy conservation efforts. Gulf Power Company v. Cresse, 410 So. 2d 492 (1982).*

*Transition adjustment*

*Where public counsel petitioned Florida Supreme Court to review Public Service Commission order, which changed fuel adjustment clause procedure for electric utilities, and questioned legality of two-month transition adjustment which counsel argued would result in double recovery, or recovery of costs not previously recouped, Court found that order was supported by competent, substantial evidence. Citizens of State of Florida v. Florida Public Service Commission, 403 So. 2d 1332 (1981).*

**25-6.0435 Interim Rate Relief.**

(1) Each electric utility petitioning for interim rate relief pursuant to Section 366.071, F.S., shall file the data required in Schedules 2 through 14, 17, and 23 in Rule 25-6.043(1)(a). In addition, a schedule shall be submitted calculating the interim relief in accordance with § 366.07, F.S., and allocation factors by functional group approved in the company's last rate case.

(2)(a) Interim rates shall apply across the board based on base rate revenues for the test period less embedded fuel revenue by rate schedule. The resulting dollar amount shall be divided by base rate revenues per rate schedule to determine the percent increase applied to each rate schedule.

(b) In determining the interim increase, the following data shall be provided: KWH sales; base rate revenue less base fuel revenue; base fuel revenues; total base rate revenue; fuel adjustment revenue; total revenue. The interim increase shall

# APPENDIX 3

**25-6.0437 Cost of Service Load Research.**

(1) Applicability. This rule shall apply to all investor owned electric utilities over which the Commission has jurisdiction and which had gross annual retail sales of 500 GWH or more in 1983.

(2) Purpose. The primary purpose of this rule is to require that load research that supports cost of service studies used in ratemaking proceedings is of sufficient precision to reasonably assure that tariffs are equitable and reflect the true costs of serving each class of customer. Load research data gathered and submitted in accordance with this rule will also be used by the Commission in evaluating proposed and operating conservation programs, for research, and for other purposes consistent with the Commission's responsibilities.

(3) Sampling Plan. All utilities subject to this rule shall, within 90 days of the effective date of this rule, submit to the Commission a proposed load research sampling plan. The plan shall provide for sampling all rate classes that account for more than 1 percent of a utility's annual retail sales. The plan shall provide that all covered rate classes shall be sampled within two years of the effective date of this rule. The sampling plan shall be designed to provide estimates of the summer and winter peak demand by class and the averages of the 12 monthly coincident peaks for each class within plus or minus 10 percent at the 90 percent confidence level. Any utility subject to this rule may apply to the Commission to waive the requirements hereof for any specific covered rate class.

(4) Review of Proposed Plan. Except where a utility has requested a formal ruling by the Commission, within 90 days after submission, the Commission's Electric and Gas Department shall review each utility's plan to determine whether it satisfies the criteria set forth in subsection (3) above and shall notify the utility in writing of its decision accepting or rejecting the proposed sampling plan. If a proposed plan is rejected, the written notice of rejection shall state clearly the reasons for rejecting the proposed plan. If a utility's proposed plan is rejected, the utility shall submit a revised sampling plan to the Commission within 60 days after receiving the notice of rejection. Where a utility has requested staff review of its sampling plan and the plan has been rejected, the utility may petition the Commission for approval of the plan. If a utility has not submitted a satisfactory sampling plan within 6 months following the submission of the initially proposed plan, the Commission may prescribe by order a sampling plan for the utility.

(5) Use of Approved Sampling Plan. The approved sampling plan shall be used for all load research performed for cost of service studies and other studies submitted to the Commission until a new sampling plan is approved by the Commission.

(6) Revised Sampling Plans. Each utility subject to this rule shall submit a current, revised sampling plan to the Commission no less than every two years after the initial sampling plan is approved. Any new or revised plan shall be developed using data from the utility's most current load research to determine the required sampling plan to achieve the precision required in subsection (3) of this rule. New or revised plans shall be reviewed by the Commission pursuant to subsection (4) of this rule.

(7) Load Research Data to be Reported. Each utility subject to this rule shall perform a complete load research study in accordance with the specifications of this rule by December 31, 1985, and no less often than every two years thereafter. Each utility shall, within 120 days following completion of the study, submit to the Commission the results of each load research study completed after the effective date of this rule. This submission shall include the hourly load data described in subsection (8) for the residential class. The load research results of each study shall be submitted on a form prescribed by the Commission.

(8) Hourly Data to be Available Upon Request. Each utility subject to this rule shall make available within 90 days of a request by the Commission the estimated hourly demands by class for all 8760 hours in the year derived from this load research.

*Specific Authority 366.05(1), 350.127(2) FS. Law Implemented 350.117, 366.03, 366.04(2)(f), 366.05(1), 366.06(1), 366.82(3), (4) FS. History—New 3-11-84, Formerly 25-6.437.*

**25-6.0438 Non-Firm Electric Service — Terms and Conditions.**

(1) Applicability. This rule shall apply to all investor-owned electric utilities.

(2) Purpose. The purposes of this rule are: to define the character of non-firm electric service and various types thereof; to require a procedure for determining a utility's maximum level of non-firm load; and to establish other minimum terms and conditions for the provision of non-firm electric service.

(3) Definitions.

(a) "Non-firm electric service" means electric service that, in accordance with terms and conditions specified in the applicable tariff, can be limited or interrupted. Non-firm service includes interruptible, curtailable, load management, and other types of non-firm electric service offered by the utilities pursuant to tariffs approved by the Florida Public Service Commission.

(b) "Interruptible electric service" means electric service that can be limited or interrupted, either automatically or manually, solely at the option of the utility.

(c) "Cost effective" in the context of non-firm service shall be based on avoided costs. It shall be defined as the net economic deferral or avoidance of additional production plant construction by the utility or in other measurable economic benefits in excess of all relevant costs accruing to the utility's general body of ratepayers.

(d) "Curtailable electric service" means electric service that can be reduced or interrupted upon request of a utility but solely at the discretion of the customer.

(e) "Load management service" means electric service provided under an applicable firm rate

schedule whereby electric service to specified components of the customer's electric load may be interrupted at the discretion of the utility in accordance with conditions specified in the utility's tariffs.

(4) Availability of Service.

(a) A utility may offer non-firm electric service to any customer or class of customers pursuant to tariffs or contracts approved by the Commission. Each utility that currently offers or proposes to offer non-firm electric service shall demonstrate, no later than its next rate case, that providing such service is cost effective.

(b) Each utility shall state in its tariff the terms and conditions under which non-firm electric service will be offered. If a utility believes that providing interruptible service or another type of non-firm service to a specific customer who otherwise qualifies for such service under the utility's tariff will not result in benefits accruing to its general body of ratepayers, that utility shall apply to the Commission for authorization to refuse non-firm service to that customer. The provision of non-firm service for standby and supplemental purposes shall be consistent with the Federal Energy Regulatory Commission rule, 18 C.F.R. Sec. 292.305.

(c) When a utility proposes to make a change in anv of its non-firm electric service offerings, it must provide written notice to each customer who may be affected by the proposal.

(5) Methods of Determining Maximum Levels of Non-Firm Load. Each utility offering non-firm electric service shall have on file with the Commission a methodology approved by the Commission for determining the cost effectiveness of non-firm load over its generation planning horizon, pursuant to the definition of "cost effective" in Paragraph (3)(c). Specific consideration must be given to each type of non-firm electric service offered. A utility may petition the Commission to revise their methodology at any time.

(6) Maximum Levels of Non-Firm Load. Each utility shall attempt to maintain its subscribed non-firm loads at or below their maximum cost-effective levels, as determined by the utility's approved methodology utilizing its most current system expansion plans and approved rates. If, during a revenue or rate review, the Commission finds that a utility's efforts to maintain its subscribed non-firm loads at or below the maximum cost-effective level have not been prudent, the Commission may impute revenues at otherwise applicable rates for the amount of non-firm load in excess of cost effective levels.

(7) Reporting Requirements. Each utility offering non-firm electric service shall submit to the Commission on January 1 and July 1 of each year a report detailing the type of non-firm service offered and showing the amount of non-firm load on the utility's system as of the month ending one month prior to the reporting date. In addition, the report shall state the cost-effective levels of non-firm load determined by the utility's approved methodology.

(8) Minimum Notice to Transfer from Non-Firm to Firm Service. Each utility that offers non-firm service shall include a specific provision in its tariff that requires a customer to provide the utility with at least five years advance written notice in order for the customer to be eligible to transfer from interruptible to firm service. A utility may apply to the Commission for approval of a different minimum notice requirement if it can demonstrate that a different notice requirement is necessary or appropriate, either for all or any individual non-firm service offerings.

(9) The Commission may waive any provision of this rule if it determines that such waiver is consistent with the purpose and intent of this rule after notice to all affected customers.

*Specific Authority 350.127(2), 366.05(1) FS. Law Implemented 366.03, 366.04, 366.041, 366.05 FS. History—New 8-21-86, Amended 9-3-91.*

*ANNOTATIONS*

***Methodology***

*Rule 25-6.0438(5)(a), F. A. C., does not apply only to nonfirm service which avoids or defers capacity. Language referring to "generation planning horizon" is time period for developing utility's maximum level of cost-effective nonfirm load of which curtailable load is part. In order to develop meaningful number, all types of nonfirm load must be measured over same time period. Rule 25-6.0438(5)(a), F. A. C., requires company to develop methodology for determining maximum amount of cost-effective curtailable service, and to apply that methodology to come up with annual target amounts over company's generation expansion planning horizon. Rule 25-6.0438(4)(a), F. A. C., prohibits Commission from closing curtailable tariff to existing customers should methodology provided for in Rule 25-6.0438(5)(a), F. A. C., indicate that curtailable rate does not offer any economic benefits to company's general body of ratepayers. Curtailable tariff could only be closed to existing customers in company's next rate case. Should methodology indicate no current benefit to ratepayers, Commission would be allowed to close curtailable rate schedules to new customers. Subsection (4)(a) is consistent with Subsection (5)(a) of Rule 25-6.0438, F. A. C. In re: Petition of Florida Power and Light Co., 87 FPSC 10:115 (1987).*

***Notice***

*Commission's primary concern in promulgating minimum transfer notice provision of Rule 25-6.0438, F. A. C., was to prevent any adverse impact on utility's generation expansion planning that might result from sudden transfers of large amounts of non-firm load to firm service. There was no adverse impact as result of utility's residential load management rate schedule because (1) transfer rate was very low and (2) individual customer's load under control is small relative to entire system. Thus, Rule 25-6.0438(7), F. A. C., was waived for residential schedule. There was adverse impact as result of utility's commercial load management program because few customers have fairly large load and transfer rate was high. Thus, waiver of Rule 25-6.0438(7), F. A. C., was denied. In re: Petition by Florida Power Corp., 87 FPSC 7:233 (1987).*

**25-6.0439 Territorial Agreements and Disputes for Electric Utilities — Definitions.**

(1) For the purpose of Rules 25-6.0440, 25-6.0441, and 25-6.0442, the following terms

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**25-17.086 Periods During Which Purchases Are Not Required.** Where purchases from a qualifying facility will impair the utility's ability to give adequate service to the rest of its customers or, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, or otherwise place an undue burden on the utility, the utility shall be relieved of its obligation under Rule 25-17.082 to purchase electricity from a qualifying facility. The utility shall notify the qualifying facility(ies) prior to the instance giving rise to those conditions, if practicable. If prior notice is not practicable, the utility shall notify the qualifying facility(ies) as soon as practicable after the fact. In either event the utility shall notify the Commission, and the Commission staff shall, upon request of the affected qualifying facility(ies), investigate the utility's claim. Nothing in this section shall operate to relieve the utility of its general obligation to purchase pursuant to Rule 25-17.082.

*Specific Authority 350.127(2) FS. Law Implemented 366.04(5), 366.051 FS. History—New 5-13-81, Amended 9-4-83, Formerly 25-17.86.*

**25-17.087 Interconnection and Standards.**

(1) Each utility shall interconnect with any qualifying facility which:

(a) is in its service area;

(b) requests interconnection;

(c) agrees to meet system standards specified in this rule;

(d) agrees to pay the cost of interconnection; and

(e) signs an interconnection agreement.

(2) Nothing in this rule shall be construed to preclude a utility from evaluating each request for interconnection on its own merits and modifying the general standards specified in this rule to reflect the result of such an evaluation.

(3) Where a utility refuses to interconnect with a qualifying facility or attempts to impose unreasonable standards pursuant to subsection (2) of this rule, the qualifying facility may petition the Commission for relief. The utility shall have the burden of demonstrating to the Commission why interconnection with the qualifying facility should not be required or that the standards the utility seeks to impose on the qualifying facility pursuant to subsection (2) are reasonable.

(4) Upon a showing of credit worthiness, the qualifying facility shall have the option of making monthly installment payments over a period no longer than 36 months toward the full cost of interconnection. However, where the qualifying facility exercises that option the utility shall charge interest on the amount owing. The utility shall charge such interest at the 30-day commercial paper rate. In any event, no utility may bear the cost of interconnection.

(5) Application for Interconnection. A qualifying facility shall not operate electric generating equipment in parallel with the utility's electric system without the prior written consent of the utility. Formal application for interconnection shall be made by the qualifying facility prior to the installation of any generation related equipment. This application shall be accompanied by the following:

(a) Physical layout drawings, including dimensions;

(b) All associated equipment specifications and characteristics including technical parameters, ratings, basic impulse levels, electrical main one-line diagrams, schematic diagrams, system protections, frequency, voltage, current and interconnection distance;

(c) Functional and logic diagrams, control and meter diagrams, conductor sizes and length, and any other relevant data which might be necessary to understand the proposed system and to be able to make a coordinated system;

(d) Power requirements in watts and vars;

(e) Expected radio-noise, harmonic generation and telephone interference factor;

(f) Synchronizing methods; and

(g) Operating/instruction manuals.

Any subsequent change in the system must also be submitted for review and written approval prior to actual modification. The above mentioned review, recommendations and approval by the utility do not relieve the qualifying facility from complete responsibility for the adequate engineering design, construction and operation of the qualifying facility equipment and for any liability for injuries to property or persons associated with any failure to perform in a proper and safe manner for any reason.

(6) Personnel Safety. Adequate protection and safe operational procedures must be developed and followed by the joint system. These operating procedures must be approved by both the utility and the qualifying facility. The qualifying facility shall be required to furnish, install, operate and maintain in good order and repair, and be solely responsible for, without cost to the utility, all facilities required for the safe operation of the generation system in parallel with the utility's system.

The qualifying facility shall permit the utility's employees to enter upon its property at any reasonable time for the purpose of inspection and/or testing the qualifying facility's equipment, facilities, or apparatus. Such inspections shall not relieve the qualifying facility from its obligation to maintain its equipment in safe and satisfactory operating condition.

The utility's approval of isolating devices used by the qualifying facility will be required to ensure that these will comply with the utility's switching and tagging procedure for safe working clearances.

(a) Disconnect Switch. A manual disconnect switch, of the visible load break type, to provide a separation point between the qualifying facility's generation system and the utility's system, shall be required. The utility will specify the location of the disconnect switch. The switch shall be mounted separate from the meter socket and shall be readily accessible to the utility and be capable of being locked in the open position with a utility padlock.

The utility may reserve the right to open the switch (i.e., isolating the qualifying facility's generation system) without prior notice to the qualifying facility. To the extent practicable, however, prior notice shall be given.

Any of the following conditions shall be cause for disconnection:

1. Utility system emergencies and/or maintenance requirements;

2. Hazardous conditions existing on the qualifying facility's generating or protective equipment as determined by the utility;

3. Adverse effects of the qualifying facility's generation to the utility's other electric consumers and/or system as determined by the utility;

4. Failure of the qualifying facility to maintain any required insurance; or

5. Failure of the qualifying facility to comply with any existing or future regulations, rules, orders or decisions of any governmental or regulatory authority having jurisdiction over the qualifying facility's electric generating equipment or the operation of such equipment.

(b) Responsibility and Liability. The utility and the qualifying facility shall each be responsible for its own facilities. The utility and the qualifying facility shall each be responsible for ensuring adequate safeguards for other utility customers, utility and qualifying facility personnel and equipment, and for the protection of its own generating system. The utility and the qualifying facility shall each indemnify and save the other harmless from any and all claims, demands, costs, or expense for loss, damage, or injury to persons or property of the other caused by, arising out of, or resulting from:

1. Any act or omission by a party or that party's contractors, agents, servants and employees in connection with the installation or operation of that party's generation system or the operation thereof in connection with the other party's system;

2. Any defect in, failure of, or fault related to a party's generation system;

3. The negligence of a party or negligence of that party's contractors, agents, servants or employees; or

4. Any other event or act that is the result of, or proximately caused by, a party.

For the purposes of this paragraph, the term party shall mean either utility or qualifying facility, as the case may be.

(c) Insurance. The qualifying facility shall deliver to the utility, at least fifteen days prior to the start of any interconnection work, a certificate of insurance certifying the qualifying facility's coverage under a liability insurance policy issued by a reputable insurance company authorized to do business in the State of Florida naming the qualifying facility as named insured, and the utility as an additional named insured, which policy shall contain a broad form contractual endorsement specifically covering the liabilities accepted under this agreement arising out of the interconnection to the qualifying facility, or caused by operation of any of the qualifying facility's equipment or by the qualifying facility's failure to maintain the qualifying facility's equipment in satisfactory and safe operating condition.

1. The policy providing such coverage for a standard offer contract shall provide public liability insurance, including property damage, in the amount of $1,000,000 for each occurrence.

2. The policy providing such coverage for a negotiated contract shall provide public liability insurance, including property damage, in an amount not less than $1,000,000 for each occurrence. The parties may negotiate the amount of insurance over $1,000,000.

3. The above required policy shall be endorsed with a provision requiring the insurance company to notify the utility thirty days prior to the effective date of cancellation or material change in the policy.

4. The qualifying facility shall pay all premiums and other charges due on said policy and keep said policy in force during the entire period of interconnection with the utility.

(7) Protection and Operation. It will be the responsibility of the qualifying facility to provide all devices necessary to protect the qualifying facility's equipment from damage by the abnormal conditions and operations which occur on the utility system that result in interruptions and restorations of service by the utility's equipment and personnel. The qualifying facility shall protect its generator and associated equipment from overvoltage, undervoltage, overload, short circuits (including ground fault condition), open circuits, phase unbalance and reversal, over or under frequency condition, and other injurious electrical conditions that may arise on the utility's system and any reclose attempt by the utility.

The utility may reserve the right to perform such tests as it deems necessary to ensure safe and efficient protection and operation of the qualifying facility's equipment.

(a) Loss of Source: The qualifying facility shall provide, or the utility will provide at the qualifying facility's expense, approved protective equipment necessary to immediately, completely, and automatically disconnect the qualifying facility's generation from the utility's system in the event of a fault on the qualifying facility's system, a fault of the utility's system, or loss of source on the utility's system. Disconnection must be completed within the time specified by the utility in its standard operating procedure for its electric system for loss of a source on the utility's system.

This automatic disconnecting device may be of the manual or automatic reclose type and shall not be capable of reclosing until after service is restored by the utility. The type and size of the device shall be approved by the utility depending upon the installation. Adequate test data or technical proof that the device meets the above criteria must be supplied by the qualifying facility to the utility. The utility shall approve a device that will perform the above functions at minimal capital and operating costs to the qualifying facility.

(b) Coordination and Synchronization. The

qualifying facility shall be responsible for coordination and synchronization of the qualifying facility's equipment with the utility's electrical system, and assumes all responsibility for damage that may occur from improper coordination or synchronization of the generator with the utility's system.

(c) Electrical Characteristics. Single phase generator interconnections with the utility are permitted at power levels up to 20 KW. For power levels exceeding 20 KW, a three phase balanced interconnection will normally be required. For the purpose of calculating connected generation, 1 horsepower equals 1 kilowatt. The qualifying facility shall interconnect with the utility at the voltage of the available distribution or the transmission line of the utility for the locality of the interconnection, and shall utilize one of the standard connections (single phase, three phase, wye, delta) as approved by the utility.

The utility may reserve the right to require a separate transformation and/or service for a qualifying facility's generation system, at the qualifying facility's expense. The qualifying facility shall bond all neutrals of the qualifying facility's system to the utility's neutral, and shall install a separate driven ground with a resistance value which shall be determined by the utility and bond this ground to the qualifying facility's system neutral.

(d) Exceptions. A qualifying facility's generator having a capacity rating that can:

1. produce power in excess of 1/2 of the minimum utility customer requirements of the interconnected distribution or transmission circuit; or

2. produce power flows approaching or exceeding the thermal capacity of the connected utility distribution or transmission lines or transformers; or

3. adversely affect the operation of the utility or other utility customer's voltage, frequency or overcurrent control and protection devices; or

4. adversely affect the quality of service to other utility customers; or

5. interconnect at voltage levels greater than distribution voltages, will require more complex interconnection facilities as deemed necessary by the utility.

(8) Quality of Service. The qualifying facility's generated electricity shall meet the following minimum guidelines:

(a) Frequency. The governor control on the prime mover shall be capable of maintaining the generator output frequency within limits for loads from no-load up to rated output. The limits for frequency shall be 60 hertz (cycles per second), plus or minus an instantaneous variation of less than 1%.

(b) Voltage. The regulator control shall be capable of maintaining the generator output voltage within limits for loads from no-load up to rated output. The limits for voltage shall be the nominal operating voltage level, plus or minus 5%.

(c) Harmonics. The output sine wave distortion shall be deemed acceptable when it does not have a higher content (root mean square) of harmonics than the utility's normal harmonic content at the interconnection point.

(d) Power Factor. The qualifying facility's generation system shall be designed, operated and controlled to provide reactive power requirements from 0.85 lagging to 0.85 leading power factor. Induction generators shall have static capacitors that provide at least 85% of the magnetizing current requirements of the induction generator field. (Capacitors shall not be so large as to permit self-excitation of the qualifying facility's generator field.)

(e) DC Generators. Direct current generators may be operated in parallel with the utility's system through a synchronous inverter. The inverter must meet all criteria in these rules.

(9) Metering. The actual metering equipment required, its voltage rating, number of phases, size, current transformers, potential transformers, number of inputs and associated memory is dependent on the type, size and location of the electric service provided. In situations where power may flow both in and out of the qualifying facility's system, power flowing into the qualifying facility's system will be measured separately from power flowing out of the qualifying facility's system.

The utility will provide, at no additional cost to the qualifying facility, the metering equipment necessary to measure capacity and energy deliveries to the qualifying facility. The utility will provide, at the qualifying facility's expense, the necessary additional metering equipment to measure energy deliveries by the qualifying facility to the utility.

(10) Cost Responsibility. The qualifying facility is required to bear all costs associated with the change-out, upgrading or addition of protective devices, transformers, lines, services, meters, switches, and associated equipment and devices beyond that which would be required to provide normal service to the qualifying facility if the qualifying facility were a non-generating customer. These costs shall be paid by the qualifying facility to the utility for all material and labor that is required. Prior to any work being done by the utility, the utility shall supply the qualifying facility with a written cost estimate of all its required materials and labor and an estimate of the date by which construction of the interconnection will be completed. This estimate shall be provided to the qualifying facility within 60 days after the qualifying facility supplies the utility with its final electrical plans. The utility shall also provide project timing and feasibility information to the qualifying facility.

(11) Each utility shall submit to the Commission, a standard agreement for interconnection by qualifying facilities as part of their standard offer contract or contracts required by Rule 25-17.0832(3).

*Specific Authority 366.051, 350.127(2) FS. Law Implemented 366.04(2)(c), (5) 366.051 FS. History—New*

*5-13-81, Amended 9-4-83, Formerly 25-17.87, Amended 10-25-90, 5-10-93.*

*ANNOTATIONS*

***Indemnification***

*Public Service Commission concluded that the insurance requirements of Florida Power and Light's (FPL) standard interconnection agreement, which required the Qualifying Facility (QF) to procure insurance to cover FPL's liabilities, did not conform to Rule 25-17.087(6)(b), (c), F.A.C. FPL can require only that it be named as an additional insured on the QF's interconnection insurance policy. FPL's own applicable insurance policies must indemnify and hold QF harmless from FPL's actions. In re: Planning Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities, 91 FPSC 8:560 (1991).*

***Insurance***

*Rule 25-17.087(6)(c), F.A.C., does not set a maximum insurance amount that may be required. Nor does the rule prohibit the Commission from setting a maximum for a particular contract. PSC, being cognizant of the terms and conditions of a particular standard offer contract, as well as the size (in terms of energy and capacity) of the proposed project, is well able to determine a reasonable amount which the utility may require of the Qualifying Facility. Order No. 24989, which sets a maximum of $1 million for this particular standard offer contract, does not conflict with the rule, but rather addresses an area which was not addressed by the rule. In Re: Planning Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities, 92 FPSC 1:63 (1992).*

***Minimum standards for insurance provisions***

*PSC concluded that it did not need to prescribe further guidelines or standards for the insurance provisions to be included in negotiated QF power sales contracts. In Re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., Regarding Cogeneration and Small Power Production, 92 FPSC 2:24 (Docket No. 910603-EQ, Order No. 25668) (1992).*

*PSC declined to impose a cap on the amount of insurance that a utility may require of a QF, concluding that insurance amounts should be negotiated by the parties based on the unique characteristics of the QF's facility. Id.*

***Negotiation relating to ownership of interconnection***

*PSC concluded that a Qualifying Facility may negotiate to own whatever portion of the interconnection it is required to pay for. In Re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., Regarding Cogeneration and Small Power Production, 92 FPSC 2:24 (Docket No. 910603-EQ, Order No. 25668) (1992).*

***Sureties***

*Proposed requirement that qualifying facilities desiring to pay interconnect costs over 36 month period must put up some type of surety is logical implementation of rule. Proposal is not rule modification requiring administrative hearing. In re: Annual hearings on load forecasts, generation expansion plans and cogeneration prices for Peninsular Florida's electric utilities, 88 FPSC 1:435 (1988).*

**25-17.088 Transmission Service for Qualifying Facilities.**

*Specific Authority 350.127(2), 366.051 FS. Law Implemented 366.051, 366.04(3), 366.055(3) FS. History—New 10-14-85, Formerly 25-17.88, Amended 2-3-87, Repealed 10-25-90.*

**25-17.0882 Transmission Service Not Required for Self-Service.**

*Specific Authority 350.127(2), 366.05(1) FS. Law Implemented 366.051, 366.04(3), 366.055(3) FS. History—New 10-14-85, Formerly 25-17.882, Repealed 10-25-90.*

**25-17.0883 Conditions Requiring Transmission Service for Self-service.** Public utilities are required to provide transmission and distribution services to enable a retail customer to transmit electrical power generated at one location to the customer's facilities at another location when the provision of such service and its associated charges, terms, and other conditions are not reasonably projected to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers. The determination of whether transmission service for self service is likely to result in higher cost electric service may be made by using cost effectiveness methodology employed by the Commission in evaluating conservation programs of the utility, adjusted as appropriate to reflect the qualifying facility's contribution to the utility for standby service and wheeling charges, other utility program costs, the fact that qualifying facility self-service performance can be precisely metered and monitored, and taking into consideration the unique load characteristics of the qualifying facility compared to other conservation programs.

*Specific Authority 366.051, 350.127(2) FS. Law Implemented 366.051 FS. History—New 10-25-90.*

*ANNOTATIONS*

***Cost-effective cogeneration***

*Requirement of Rule 25-17.0882, F. A. C., that utility should not be required to provide Self-Service Wheelings (SSWs) unless result would not increase rates for general ratepayers means that ratepayers should either incur benefits or should have cost exactly as before. This is cost-effective cogeneration. In re: Petition of W. R. Grace & Co., 87 FPSC 4:147 (1987).*

***Negotiations***

*Before bringing petition concerning Self-Service Wheelings (SSWs) to commission, evidence must be produced showing that reasonable efforts to find negotiated settlement have been made. The spirit if not letter of Rule demands this. In re: Petition of W. R. Grace & Co., 87 FPSC 4:147 (1987).*

**25-17.0889 Transmission Service for Qualifying Facilities.**

(1) Upon request by a qualifying facility, each electric utility in Florida shall provide, subject to the provisions of subsection (3) of this rule, transmission service to wheel as-available energy or firm energy and capacity produced by a Qualifying Facility from the Qualifying Facility to another electric utility.

(2) The rates, terms, and conditions for transmission services as described in subsection (1) and in Rule 25-17.0883 which are provided by an investor-owned utility shall be those approved by the Federal Energy Regulatory Commission.

(3) An electric utility may deny, curtail, or discontinue transmission service to a Qualifying

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commission is shared with, in whole or in part, or appointed by a member government of a regional water supply authority in proceedings under s. 120.569, s. 120.57, or s. 120.68, to the extent that an interlocal agreement under ss. 163.01 and 373.1962 exists in which the member government has agreed that its substantial interests are not affected by the proceedings or that it is to be bound by alternative dispute resolution in lieu of participating in the proceedings. This exclusion applies only to those particular types of disputes or controversies, if any, identified in an interlocal agreement.

(13) "Person" means any person described in s. 1.01, any unit of government in or outside the state, and any agency described in subsection (1).

(14) "Recommended order" means the official recommendation of an administrative law judge assigned by the division or of any other duly authorized presiding officer, other than an agency head or member of an agency head, for the final disposition of a proceeding under ss. 120.569 and 120.57.

(15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.

2. Statements, memoranda, or instructions to state agencies issued by the Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Comptroller.

3. Contractual provisions reached as a result of collective bargaining.

4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

(16) "Small city" means any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census.

(17) "Small county" means any county that has an unincarcerated population of 75,000 or less according to the most recent decennial census.

(18) "Variance" means a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Any variance shall conform to the standards for variances outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

(19) "Waiver" means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Any waiver shall conform to the standards for waivers outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

History.—s. 1, ch. 74-310; s. 1, ch. 75-191; s. 1, ch. 76-131; s. 1, ch. 77-174; s. 12, ch. 77-290; s. 2, ch. 77-453; s. 1, ch. 78-28; s. 1, ch. 78-425; s. 1, ch. 79-20; s. 55, ch. 79-40; s. 1, ch. 79-299; s. 2, ch. 81-119; s. 1, ch. 81-180; s. 7, ch. 82-180; s. 1, ch. 83-78; s. 2, ch. 83-273; s. 10, ch. 84-170; s. 15, ch. 85-80; s. 1, ch. 85-168; s. 2, ch. 87-385; s. 1, ch. 88-367; s. 1, ch. 89-147; s. 1, ch. 91-46; s. 9, ch. 92-166; s. 50, ch. 92-279; s. 55, ch. 92-326; s. 3, ch. 96-159, s. 1, ch. 97-176; s. 2, ch. 97-286; s. 1, ch. 98-402.

**120.54 Rulemaking.—**

(1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.—

(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

1. Rulemaking shall be presumed feasible unless the agency proves that:

a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking;

b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or

c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:

a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

(b) Whenever an act of the Legislature is enacted which requires implementation of the act by rules of an agency within the executive branch of state government, such rules shall be drafted and formally proposed as provided in this section within 180 days after the effective date of the act, unless the act provides otherwise.

(c) No statutory provision shall be delayed in its implementation pending an agency's adoption of implementing rules unless there is an express statutory provision prohibiting its application until the adoption of implementing rules.

(d) In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and to the extent allowed by law, choose the alternative that does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

(e) No agency has inherent rulemaking authority, nor has any agency authority to establish penalties for violation of a rule unless the Legislature, when estab-

lishing a penalty, specifically provides that the penalty applies to rules.

(f) An agency may adopt rules authorized by law and necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be enforced until the statute upon which they are based is effective.

(g) Each rule adopted shall contain only one subject.

(h) In rulemaking proceedings, the agency may recognize any material which may be judicially noticed, and it may provide that materials so recognized be incorporated into the record of the proceeding. Before the record of any proceeding is completed, all parties shall be provided a list of these materials and given a reasonable opportunity to examine them and offer written comments or written rebuttal.

(i) A rule may incorporate material by reference but only as the material exists on the date the rule is adopted. For purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the changes. No rule may be amended by reference only. Amendments must set out the amended rule in full in the same manner as required by the State Constitution for laws.

(j) A rule published in the Florida Administrative Code must be indexed by the Department of State within 90 days after the rule is filed. The Department of State shall by rule establish procedures for indexing rules.

(2) RULE DEVELOPMENT; WORKSHOPS; NEGOTIATED RULEMAKING.—

(a) Except when the intended action is the repeal of a rule, agencies shall provide notice of the development of proposed rules by publication of a notice of rule development in the Florida Administrative Weekly before providing notice of a proposed rule as required by paragraph (3)(a). The notice of rule development shall indicate the subject area to be addressed by rule development, provide a short, plain explanation of the purpose and effect of the proposed rule, cite the specific legal authority for the proposed rule, and include the preliminary text of the proposed rules, if available, or a statement of how a person may promptly obtain, without cost, a copy of any preliminary draft, if available.

(b) All rules should be drafted in readable language. The language is readable if:

1. It avoids the use of obscure words and unnecessarily long or complicated constructions; and

2. It avoids the use of unnecessary technical or specialized language that is understood only by members of particular trades or professions.

(c) An agency may hold public workshops for purposes of rule development. An agency must hold public workshops, including workshops in various regions of the state or the agency's service area, for purposes of rule development if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary. The explanation is not final agency action subject to review pursuant to ss. 120.569 and 120.57. The failure to provide the explanation when required may be a material error in procedure pursuant to s. 120.56(1)(c). When a workshop or public hearing is held, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the agency's proposal and to respond to questions or comments regarding the rule being developed. The workshop may be facilitated or mediated by a neutral third person, or the agency may employ other types of dispute resolution alternatives for the workshop that are appropriate for rule development. Notice of a rule development workshop shall be by publication in the Florida Administrative Weekly not less than 14 days prior to the date on which the workshop is scheduled to be held and shall indicate the subject area which will be addressed; the agency contact person; and the place, date, and time of the workshop.

(d)1. An agency may use negotiated rulemaking in developing and adopting rules. The agency should consider the use of negotiated rulemaking when complex rules are being drafted or strong opposition to the rules is anticipated. The agency should consider, but is not limited to considering, whether a balanced committee of interested persons who will negotiate in good faith can be assembled, whether the agency is willing to support the work of the negotiating committee, and whether the agency can use the group consensus as the basis for its proposed rule. Negotiated rulemaking uses a committee of designated representatives to draft a mutually acceptable proposed rule.

2. An agency that chooses to use the negotiated rulemaking process described in this paragraph shall publish in the Florida Administrative Weekly a notice of negotiated rulemaking that includes a listing of the representative groups that will be invited to participate in the negotiated rulemaking process. Any person who believes that his or her interest is not adequately represented may apply to participate within 30 days after publication of the notice. All meetings of the negotiating committee shall be noticed and open to the public pursuant to the provisions of this chapter. The negotiating committee shall be chaired by a neutral facilitator or mediator.

3. The agency's decision to use negotiated rulemaking, its selection of the representative groups, and approval or denial of an application to participate in the negotiated rulemaking process are not agency action. Nothing in this subparagraph is intended to affect the rights of an affected person to challenge a proposed rule developed under this paragraph in accordance with s. 120.56(2).

(3) ADOPTION PROCEDURES.—

(a) *Notices.*—

1. Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the specific rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific. The notice shall include a summary of the agency's statement of

the estimated regulatory costs, if one has been prepared, based on the factors set forth in s. 120.541(2), and a statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative as provided by s. 120.541(1), must do so in writing within 21 days after publication of the notice. The notice must state the procedure for requesting a public hearing on the proposed rule. Except when the intended action is the repeal of a rule, the notice shall include a reference both to the date on which and to the place where the notice of rule development that is required by subsection (2) appeared.

2. The notice shall be published in the Florida Administrative Weekly not less than 28 days prior to the intended action. The proposed rule shall be available for inspection and copying by the public at the time of the publication of notice.

3. The notice shall be mailed to all persons named in the proposed rule and to all persons who, at least 14 days prior to such mailing, have made requests of the agency for advance notice of its proceedings. The agency shall also give such notice as is prescribed by rule to those particular classes of persons to whom the intended action is directed.

4. The adopting agency shall file with the committee, at least 21 days prior to the proposed adoption date, a copy of each rule it proposes to adopt; a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of any statement of estimated regulatory costs that has been prepared pursuant to s. 120.541; a statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and the notice required by subparagraph 1.

(b) *Special matters to be considered in rule adoption.*—

1. Statement of estimated regulatory costs.—Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency is encouraged to prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541.

2. Small businesses, small counties, and small cities.—

a. Each agency, before the adoption, amendment, or repeal of a rule, shall consider the impact of the rule on small businesses as defined by s. 288.703 and the impact of the rule on small counties or small cities as defined by s. 120.52. Whenever practicable, an agency shall tier its rules to reduce disproportionate impacts on small businesses, small counties, or small cities to avoid regulating small businesses, small counties, or small cities that do not contribute significantly to the problem the rule is designed to address. An agency may define "small business" to include businesses employing more than 100 persons, may define "small county" to include those with populations of more than 75,000, and may define "small city" to include those with populations of more than 10,000, if it finds that such a definition is necessary to adapt a rule to the needs and problems of small businesses, small counties, or small cities. The agency shall consider each of the following methods for reducing the impact of the proposed rule on small businesses, small counties, and small cities, or any combination of these entities:

(I) Establishing less stringent compliance or reporting requirements in the rule.

(II) Establishing less stringent schedules or deadlines in the rule for compliance or reporting requirements.

(III) Consolidating or simplifying the rule's compliance or reporting requirements.

(IV) Establishing performance standards or best-management practices to replace design or operational standards in the rule.

(V) Exempting small businesses, small counties, or small cities from any or all requirements of the rule.

b.(I) If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to the small business ombudsman of the Office of Tourism, Trade, and Economic Development not less than 28 days prior to the intended action.

(II) Each agency shall adopt those regulatory alternatives offered by the small business ombudsman and provided to the agency no later than 21 days after the ombudsman's receipt of the written notice of the rule which it finds are feasible and consistent with the stated objectives of the proposed rule and which would reduce the impact on small businesses. When regulatory alternatives are offered by the small business ombudsman, the 90-day period for filing the rule in subparagraph (e)2. is extended for a period of 21 days.

(III) If an agency does not adopt all alternatives offered pursuant to this sub-subparagraph, it shall, prior to rule adoption or amendment and pursuant to subparagraph (d)1., file a detailed written statement with the committee explaining the reasons for failure to adopt such alternatives. Within 3 working days of the filing of such notice, the agency shall send a copy of such notice to the small business ombudsman.

(c) *Hearings.*—

1. If the intended action concerns any rule other than one relating exclusively to procedure or practice, the agency shall, on the request of any affected person received within 21 days after the date of publication of the notice of intended agency action, give affected persons an opportunity to present evidence and argument on all issues under consideration. The agency may schedule a public hearing on the rule and, if requested by any affected person, shall schedule a public hearing on the rule. Any material pertinent to the issues under consideration submitted to the agency within 21 days after the date of publication of the notice or submitted at a public hearing shall be considered by the agency and made a part of the record of the rulemaking proceeding.

2. Rulemaking proceedings shall be governed solely by the provisions of this section unless a person timely asserts that the person's substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests. If the agency determines that the rulemaking pro-

ceeding is not adequate to protect the person's interests, it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of ss. 120.569 and 120.57. Similarly situated persons may be requested to join and participate in the separate proceeding. Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.

(d) *Modification or withdrawal of proposed rules.*—

1. After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, if the rule has not been changed from the rule as previously filed with the committee, or contains only technical changes, the adopting agency shall file a notice to that effect with the committee at least 7 days prior to filing the rule for adoption. Any change, other than a technical change that does not affect the substance of the rule, must be supported by the record of public hearings held on the rule, must be in response to written material received on or before the date of the final public hearing, or must be in response to a proposed objection by the committee. In addition, when any change is made in a proposed rule, other than a technical change, the adopting agency shall provide a copy of a notice of change by certified mail or actual delivery to any person who requests it in writing no later than 21 days after the notice required in paragraph (a). The agency shall file the notice with the committee, along with the reasons for such change, and provide the notice to persons requesting it, at least 21 days prior to filing the rule for adoption. The notice shall be published in the Florida Administrative Weekly at least 21 days prior to filing the rule for adoption. This subparagraph does not apply to emergency rules adopted pursuant to subsection (4).

2. After the notice required by paragraph (a) and prior to adoption, the agency may withdraw the rule in whole or in part.

3. After adoption and before the effective date, a rule may be modified or withdrawn only in response to an objection by the committee or may be modified to extend the effective date by not more than 60 days when the committee has notified the agency that an objection to the rule is being considered.

4. The agency shall give notice of its decision to withdraw or modify a rule in the first available issue of the publication in which the original notice of rulemaking was published, shall notify those persons described in subparagraph (a)3. in accordance with the requirements of that subparagraph, and shall notify the Department of State if the rule is required to be filed with the Department of State.

5. After a rule has become effective, it may be repealed or amended only through the rulemaking procedures specified in this chapter.

(e) *Filing for final adoption; effective date.*—

1. If the adopting agency is required to publish its rules in the Florida Administrative Code, it shall file with the Department of State three certified copies of the rule it proposes to adopt, a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances justifying the rule. Agencies not required to publish their rules in the Florida Administrative Code shall file one certified copy of the proposed rule, and the other material required by this subparagraph, in the office of the agency head, and such rules shall be open to the public.

2. Filings shall be made no less than 28 days nor more than 90 days after the notice required by paragraph (a). When a required notice of change is published prior to the expiration of the time to file the rule for adoption, the period during which a rule must be filed for adoption is extended to 45 days after the date of publication. If notice of a public hearing is published prior to the expiration of the time to file the rule for adoption, the period during which a rule must be filed for adoption is extended to 45 days after adjournment of the final hearing on the rule, 21 days after receipt of all material authorized to be submitted at the hearing, or 21 days after receipt of the transcript, if one is made, whichever is latest. The term "public hearing" includes any public meeting held by any agency at which the rule is considered. The filing of a petition for an administrative determination under the provisions of s. 120.56(2) shall toll the 90-day period during which a rule must be filed for adoption until the administrative law judge has filed the final order with the clerk.

3. At the time a rule is filed, the agency shall certify that the time limitations prescribed by this paragraph have been complied with, that all statutory rulemaking requirements have been met, and that there is no administrative determination pending on the rule.

4. At the time a rule is filed, the committee shall certify whether the agency has responded in writing to all material and timely written comments or written inquiries made on behalf of the committee. The department shall reject any rule not filed within the prescribed time limits; that does not satisfy all statutory rulemaking requirements; upon which an agency has not responded in writing to all material and timely written inquiries or written comments; upon which an administrative determination is pending; or which does not include a statement of estimated regulatory costs, if required.

5. If a rule has not been adopted within the time limits imposed by this paragraph or has not been adopted in compliance with all statutory rulemaking requirements, the agency proposing the rule shall withdraw the rule and give notice of its action in the next available issue of the Florida Administrative Weekly.

6. The proposed rule shall be adopted on being filed with the Department of State and become effective 20 days after being filed, on a later date specified in the rule, or on a date required by statute. Rules not required to be filed with the Department of State shall become effective when adopted by the agency head or on a later date specified by rule or statute. If the committee notifies an agency that an objection to a rule is being considered, the agency may postpone the adoption of the rule to accommodate review of the rule by the committee. When an agency postpones adoption of a rule to accommodate review by the committee, the 90-day period for filing the rule is tolled until the committee notifies the agency that it has completed its review of the rule.

(4) EMERGENCY RULES.—

(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency may adopt a rule by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.

2. The agency takes only that action necessary to protect the public interest under the emergency procedure.

3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one or a part of one county, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Weekly and provided to the committee. The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

(b) Rules pertaining to the public health, safety, or welfare shall include rules pertaining to perishable agricultural commodities.

(c) An emergency rule adopted under this subsection shall not be effective for a period longer than 90 days and shall not be renewable, except during the pendency of a challenge to proposed rules addressing the subject of the emergency rule. However, the agency may take identical action by the rulemaking procedures specified in this chapter.

(d) Subject to applicable constitutional and statutory provisions, an emergency rule becomes effective immediately on filing, or on a date less than 20 days thereafter if specified in the rule, if the adopting agency finds that such effective date is necessary because of immediate danger to the public health, safety, or welfare.

(5) UNIFORM RULES.—

(a)1. By July 1, 1997, the Administration Commission shall adopt one or more sets of uniform rules of procedure which shall be reviewed by the committee and filed with the Department of State. Agencies must comply with the uniform rules by July 1, 1998. The uniform rules shall establish procedures that comply with the requirements of this chapter. On filing with the department, the uniform rules shall be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection.

2. An agency may seek exceptions to the uniform rules of procedure by filing a petition with the Administration Commission. The Administration Commission shall approve exceptions to the extent necessary to implement other statutes, to the extent necessary to conform to any requirement imposed as a condition precedent to receipt of federal funds or to permit persons in this state to receive tax benefits under federal law, or as required for the most efficient operation of the agency as determined by the Administration Commission. The reasons for the exceptions shall be published in the Florida Administrative Weekly.

3. Agency rules that provide exceptions to the uniform rules shall not be filed with the department unless the Administration Commission has approved the exceptions. Each agency that adopts rules that provide exceptions to the uniform rules shall publish a separate chapter in the Florida Administrative Code that delineates clearly the provisions of the agency's rules that provide exceptions to the uniform rules and specifies each alternative chosen from among those authorized by the uniform rules. Each chapter shall be organized in the same manner as the uniform rules.

(b) The uniform rules of procedure adopted by the commission pursuant to this subsection shall include, but not be limited to:

1. Uniform rules for the scheduling of public meetings, hearings, and workshops.

2. Uniform rules for use by each state agency that provide procedures for conducting public meetings, hearings, and workshops, and for taking evidence, testimony, and argument at such public meetings, hearings, and workshops, in person and by means of communications media technology. The rules shall provide that all evidence, testimony, and argument presented shall be afforded equal consideration, regardless of the method of communication. If a public meeting, hearing, or workshop is to be conducted by means of communications media technology, or if attendance may be provided by such means, the notice shall so state. The notice for public meetings, hearings, and workshops utilizing communications media technology shall state how persons interested in attending may do so and shall name locations, if any, where communications media technology facilities will be available. Nothing in this paragraph shall be construed to diminish the right to inspect public records under chapter 119. Limiting points of access to public meetings, hearings, and workshops subject to the provisions of s. 286.011 to places not normally open to the public shall be presumed to violate the right of access of the public, and any official action taken under such circumstances is void and of no effect. Other laws relating to public meetings, hearings, and workshops, including penal and remedial provisions, shall apply to public meetings, hearings, and workshops conducted by means of communications media technology, and shall be liberally construed in their application to such public meetings, hearings, and workshops. As used in this subparagraph, "communications media technology" means the electronic transmission of printed matter, audio, full-motion video, freeze-frame video, compressed video, and digital video by any method available.

3. Uniform rules of procedure for the filing of notice of protests and formal written protests.

4. Uniform rules of procedure for the filing of petitions for administrative hearings pursuant to s. 120.569 or s. 120.57. Such rules shall include:

a. The identification of the petitioner.

b. A statement of when and how the petitioner received notice of the agency's action or proposed action.

c. An explanation of how the petitioner's substantial interests are or will be affected by the action or proposed action.

d. A statement of all material facts disputed by the petitioner or a statement that there are no disputed facts.

e. A statement of the ultimate facts alleged, including a statement of the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action.

f. A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action.

g. A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the proposed action.

5. Uniform rules of procedure for the filing and prompt disposition of petitions for declaratory statements.

6. Provision of a method by which each agency head shall provide a description of the agency's organization and general course of its operations.

7. Uniform rules establishing procedures for granting or denying petitions for variances and waivers pursuant to s. 120.542.

(6) ADOPTION OF FEDERAL STANDARDS.—Notwithstanding any contrary provision of this section, in the pursuance of state implementation, operation, or enforcement of federal programs, an agency is empowered to adopt rules substantively identical to regulations adopted pursuant to federal law, in accordance with the following procedures:

(a) The agency shall publish notice of intent to adopt a rule pursuant to this subsection in the Florida Administrative Weekly at least 21 days prior to filing the rule with the Department of State. The agency shall provide a copy of the notice of intent to adopt a rule to the committee at least 21 days prior to the date of filing with the Department of State. Prior to filing the rule with the Department of State, the agency shall consider any written comments received within 14 days after the date of publication of the notice of intent to adopt a rule. The rule shall be adopted upon filing with the Department of State. Substantive changes from the rules as noticed shall require republishing of notice as required in this subsection.

(b) Any rule adopted pursuant to this subsection shall become effective upon the date designated in the rule by the agency; however, no such rule shall become effective earlier than the effective date of the substantively identical federal regulation.

(c) Any substantially affected person may, within 14 days after the date of publication of the notice of intent to adopt a rule, file an objection to rulemaking with the agency. The objection shall specify the portions of the proposed rule to which the person objects and the specific reasons for the objection. The agency shall not proceed pursuant to this subsection to adopt those portions of the proposed rule specified in an objection, unless the agency deems the objection to be frivolous, but may proceed pursuant to subsection (3). An objection to a proposed rule, which rule in no material respect differs from the requirements of the federal regulation upon which it is based, is deemed to be frivolous.

(d) Whenever any federal regulation adopted as an agency rule pursuant to this subsection is declared invalid or is withdrawn, revoked, repealed, remanded, or suspended, the agency shall, within 60 days thereafter, publish a notice of repeal of the substantively identical agency rule in the Florida Administrative Weekly. Such repeal is effective upon publication of the notice. Whenever any federal regulation adopted as an agency rule pursuant to this subsection is substantially amended, the agency may adopt the amended regulation as a rule. If the amended regulation is not adopted as a rule within 180 days after the effective date of the amended regulation, the original rule is deemed repealed and the agency shall publish a notice of repeal of the original agency rule in the next available Florida Administrative Weekly.

(e) Whenever all or part of any rule proposed for adoption by the agency is substantively identical to a regulation adopted pursuant to federal law, such rule shall be written in a manner so that the rule specifically references the regulation whenever possible.

(7) PETITION TO INITIATE RULEMAKING.—

(a) Any person regulated by an agency or having substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule or to provide the minimum public information required by this chapter. The petition shall specify the proposed rule and action requested. Not later than 30 calendar days following the date of filing a petition, the agency shall initiate rulemaking proceedings under this chapter, otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial.

(b) If the petition filed under this subsection is directed to an existing rule which the agency has not adopted by the rulemaking procedures or requirements set forth in this chapter, the agency shall, not later than 30 days following the date of filing a petition, initiate rulemaking, or provide notice in the Florida Administrative Weekly that the agency will hold a public hearing on the petition within 30 days after publication of the notice. The purpose of the public hearing is to consider the comments of the public directed to the agency rule which has not been adopted by the rulemaking procedures or requirements of this chapter, its scope and application, and to consider whether the public interest is served adequately by the application of the rule on a case-by-case basis, as contrasted with its adoption by the rulemaking procedures or requirements set forth in this chapter.

(c) Within 30 days following the public hearing provided for by paragraph (b), if the agency does not initiate rulemaking or otherwise comply with the requested action, the agency shall publish in the Florida Administrative Weekly a statement of its reasons for not initiating rulemaking or otherwise complying with the requested action, and of any changes it will make in the scope or application of the unadopted rule. The

agency shall file the statement with the committee. The committee shall forward a copy of the statement to the substantive committee with primary oversight jurisdiction of the agency in each house of the Legislature. The committee or the committee with primary oversight jurisdiction may hold a hearing directed to the statement of the agency. The committee holding the hearing may recommend to the Legislature the introduction of legislation making the rule a statutory standard or limiting or otherwise modifying the authority of the agency.

(8) RULEMAKING RECORD.—In all rulemaking proceedings the agency shall compile a rulemaking record. The record shall include, if applicable, copies of:

(a) All notices given for the proposed rule.

(b) Any statement of estimated regulatory costs for the rule.

(c) A written summary of hearings on the proposed rule.

(d) The written comments and responses to written comments as required by this section and s. 120.541.

(e) All notices and findings made under subsection (4).

(f) All materials filed by the agency with the committee under subsection (3).

(g) All materials filed with the Department of State under subsection (3).

(h) All written inquiries from standing committees of the Legislature concerning the rule.

Each state agency shall retain the record of rulemaking as long as the rule is in effect. When a rule is no longer in effect, the record may be destroyed pursuant to the records-retention schedule developed under s. 257.36(6).

History.—s. 1, ch. 74-310; s. 3, ch. 75-191; s. 3, ch. 76-131; ss. 1, 2, ch. 76-276; s. 1, ch. 77-174; s. 13, ch. 77-290; s. 3, ch. 77-453; s. 2, ch. 78-28; s. 2, ch. 78-425; s. 7, ch. 79-3; s. 3, ch. 79-299; s. 69, ch. 79-400; s. 5, ch. 80-391; s. 1, ch. 81-309; s. 2, ch. 83-351; s. 1, ch. 84-173; s. 2, ch. 84-203; s. 7, ch. 85-104; s. 1, ch. 86-30; s. 3, ch. 87-385; s. 36, ch. 90-302; ss. 2, 4, 7, ch. 92-166; s. 63, ch. 93-187; s. 758, ch. 95-147; s. 6, ch. 95-295; s. 10, ch. 96-159; s. 6, ch. 96-320; s. 9, ch. 96-370; s. 3, ch. 97-176; s. 3, ch. 98-200.

**120.569 Decisions which affect substantial interests.—**

(1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s. 120.574. Unless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) applies in all other cases. Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney of record at the address of record. Each 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.

(2)(a) Except for any proceeding conducted as prescribed in s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency requests an administrative law judge from the division, it shall so notify the division within 15 days after receipt of the petition or request. A request for a hearing shall be granted or denied within 15 days after receipt. On the request of any agency, the division shall assign an administrative law judge with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to a proceeding under s. 120.57(1), except as a party litigant, as long as the division has jurisdiction over the proceeding under s. 120.57(1). Any party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.

(b) All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days; however, the 14-day notice requirement may be waived with the consent of all parties. The notice shall include:

1. A statement of the time, place, and nature of the hearing.

2. A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b)4. Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. The agency shall promptly give written notice to all parties of the action taken on the petition, shall state with particularity its reasons if the petition is not granted, and shall state the deadline for filing an amended petition if applicable.

(d) The agency may refer a petition to the division for the assignment of an administrative law judge only if the petition is in substantial compliance with the requirements of paragraph (c).

(e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

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before October 1, 1996, which exceeds the rulemaking authority permitted by this section. For those rules of which only a portion exceeds the rulemaking authority permitted by this section, the agency shall also identify the language of the rule which exceeds this authority. The Administrative Procedures Committee shall combine the lists and provide the cumulative listing to the President of the Senate and the Speaker of the House of Representatives. The Legislature shall, at the 1998 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 1999, each agency shall initiate proceedings pursuant to s. 120.54 to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist. By February 1, 1999, the Administrative Procedures Committee shall submit to the President of the Senate and the Speaker of the House of Representatives a report identifying those rules that an agency had previously identified as exceeding the rulemaking authority permitted by this section for which proceedings to repeal the rule have not been initiated. As of July 1, 1999, the Administrative Procedures Committee or any substantially affected person may petition an agency to repeal any rule, or portion thereof, because it exceeds the rulemaking authority permitted by this section. Not later than 30 days after the date of filing the petition if the agency is headed by an individual, or not later than 45 days if the agency is headed by a collegial body, the agency shall initiate rulemaking proceedings to repeal the rule, or portion thereof, or deny the petition, giving a written statement of its reasons for the denial.

(3) All proposed rules or amendments to existing rules filed with the Department of State on or after October 1, 1996, shall be based on rulemaking authority no broader than that permitted by this section. A rule adopted before October 1, 1996, and not included on a list submitted by an agency in accordance with subsection (2) may not be challenged before November 1, 1997, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section. A rule adopted before October 1, 1996, and included on a list submitted by an agency in accordance with subsection (2) may not be challenged before July 1, 1999, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section.

(4) Nothing in this section shall be construed to change the legal status of a rule that has otherwise been judicially or administratively determined to be invalid.

History.—s. 9, ch. 96-159.

120.54 Rulemaking.—

(1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.—

(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

1. Rulemaking shall be presumed feasible unless the agency proves that:

a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking;

b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or

c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:

a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

(b) Whenever an act of the Legislature is enacted which requires implementation of the act by rules of an agency within the executive branch of state government, such rules shall be drafted and formally proposed as provided in this section within 180 days after the effective date of the act, unless the act provides otherwise.

(c) No statutory provision shall be delayed in its implementation pending an agency's adoption of implementing rules unless there is an express statutory provision prohibiting its application until the adoption of implementing rules.

(d) In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and to the extent allowed by law, choose the alternative that does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

(e) No agency has inherent rulemaking authority, nor has any agency authority to establish penalties for violation of a rule unless the Legislature, when establishing a penalty, specifically provides that the penalty applies to rules.

(f) An agency may adopt rules authorized by law and necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be enforced until the statute upon which they are based is effective.

(g) Each rule adopted shall contain only one subject.

(h) In rulemaking proceedings, the agency may recognize any material which may be judicially noticed, and it may provide that materials so recognized be incorporated into the record of the proceeding. Before the record of any proceeding is completed, all parties shall be provided a list of these materials and given a reasonable opportunity to examine them and offer written comments or written rebuttal.

(i) A rule may incorporate material by reference but only as the material exists on the date the rule is

**CERTIFICATE OF SERVICE**
**DOCKET NO. 980569-PU**

**I HEREBY CERTIFY** that a true and correct copy of Florida Power & Light Company's Pre-filed Comments has been furnished by Hand Delivery (*), or U.S. Mail this 24th day of June, 1999, to the following:

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