IN THE SUPREME COURT OF FLORIDA

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| LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.<br><br>Appellant,<br><br>vs.<br><br>SUSAN F. CLARK, J. TERRY DEASON, JOE GARCIA, JULIA L. JOHNSON, and DIANE K. KIESLING, as the FLORIDA PUBLIC SERVICE COMMISSION,<br><br>Appellees. | ) | CASE NO. 85,204 |

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**ANSWER BRIEF OF APPELLEES**
**FLORIDA PUBLIC SERVICE COMMISSION**

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## SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, the Florida Public Service Commission is referred to in this brief as "Commission". Appellant, Legal Environmental Assistance Foundation, Inc. is referred to as "LEAF".

The transcript of the prehearing conference is referenced as TRPH ____; the hearing transcript TR ____; the special agenda conference transcript TRSA ____; the transcript of the agenda conference on reconsideration TRA ____. Cites to the record on appeal are referenced R ____. References to LEAF's initial brief are listed as "Brief at ____".

The Florida Energy Efficiency and Conservation Act, Sections 366.80-366.85, Florida Statutes, is referred to as "FEECA". The consolidated proceedings in Dockets Nos. 930548-EG, 930549-EG, 930550-EG and 930551-EG are referred to collectively as the "goals dockets". The Commission's final order in the goals dockets (Order No. PSC-94-1313-FOF-EG) is referred to as the "final order"; the order on reconsideration (Order No. PSC-95-0075-FOF-EG) is referred to as the "order on reconsideration".

## STATEMENT OF THE CASE AND THE FACTS

Certain statements contained in LEAF's Statement of the Case and Facts are misleading and improper. Specifically, at p. 2 of the brief LEAF refers to the "unsolicited memorandum" filed by the Commission staff. Apparently, LEAF would have the Court believe that the staff simply chose to provide an advisory recommendation to the Commission. As LEAF is very well aware, the staff files an advisory memorandum in the form of a recommendation for disposition of the issues after every hearing and in virtually in every other case whether or not it is been to hearing. LEAF attempts to mislead the Court into thinking that some procedural impropriety occurred because the staff was not specifically ordered by the Commission to file a recommendation. The record reflects that LEAF could not possibly have been unaware that a recommendation would be filed.[1]

At p. 3 of the Brief, LEAF refers to the "oral argument from staff" at the special agenda conference where the Commission made its initial decision. Again, as LEAF is very well aware, this was not oral argument at all but a presentation by the staff of their recommendation.

At p. 10, LEAF refers to the staff's "numerous formal appearances as a party" in the proceedings. Staff attorneys entered an appearance at the prehearing and hearing, as is the

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[1]This point is discussed below at pp. 19-22. detailing the various references to the filing of a staff recommendation, in addition to the rules and scheduling document discussed in this section.

custom in such cases. However, the staff did not make "appearances" at the special agenda or the agenda on reconsideration. Staff members were present at these times to present their recommendation.

The Court should also take special note of LEAF's request at p. 5 of the Brief that the Court take "judicial notice of LEAF's April 12, 1995, Motion for Order Directing Appellees To Consider and Respond to Intervenor\Appellant's Alternative Motion To Alter or Amend Order" (Motion to Alter or Amend). Although it occurred after LEAF filed its brief, the Court will recall that the Commission filed an Objection to LEAF's pleading based on the Commission's order denying the Motion. That order found that Commission was without jurisdiction to hear the matter and further that LEAF's motion were an improper pleading and "nothing more than a second request for reconsideration". (Objection of Appellee Public Service Commission to Motions of Appellant Legal Environmental Assistance Foundation, Inc. at 2) (filed April 25, 1995). The Commission struck LEAF's pleading as a nullity and this Court denied the Motion for Order Directing Appellees to Consider and Respond to Intervenor/Appellants Alternative Motions to Alter or Amend order on May 2, 1995. Order dated May 2, 1995.

At p. 13 of its Statement of the Case and Facts, and at various other places in the brief, as pointed out by the Commission in this brief, LEAF attempts to cite its Motion to Alter or Amend and accompanying materials as a "record" basis for its positions. Although the motion and accompanying materials are contained in the

record of this appeal at R 5413-5495, the Court should recognize that the substance of this pleading is argument, the merits of which was never ruled on by the Commission. As such, any references to these materials should be considered argumentative and disregarded as a factual basis for LEAF's claims. The Motion to Alter or Amend is, as the Commission found, a nullity. (Order No. PSC-95-0463-FOF-EG; See, Appellee's April 25, 1995 Objection, p. 2).

The Commission accepts the remainder of LEAF's presentation of the case and facts as generally adequate to understand the nature of the proceedings. However, since LEAF has made the role of staff in these proceedings an issue in this appeal, the Commission offers the following to put the functions of Commission staff in perspective.

The Commission is an arm of the Legislature. Section 350.001, Florida Statutes. The basic requirements for Public Service Commissioners are set forth in Section 350.031(4), Florida Statutes, which states that no person will be recommended to the governor for appointment before the Florida Public Service Commission Nominating Council determines "that the person is competent and knowledgeable in one or more fields, which shall include, but not be limited to: public affairs, law, economics, accounting, engineering, finance, natural resource conservation, energy or another field substantially related to the duties and functions of the Commission".

There is no requirement that the Commissioners be trained as judges. Standards of conduct for the Commissioners are set forth in Section 350.041, Florida Statutes.

The Legislature has seen fit to provide the Commission with authority to hire a staff to carry out its mission. Section 350.06(3), Florida Statutes, provides that "the Commissioners may employ clerical, technical, and professional personnel reasonably necessary for the performance of their duties". The Commission currently employs slightly less than 400 persons organized into various departments set forth in Rules 25-21.020 through 25-21.033, Florida Administrative Code.

The Legislature has also seen fit to assure that the Commission has effective access to its staff's advice in proceeding before it by providing that communications with advisory staff are not subject to a prohibition against ex parte communications. Section 350.042, Florida Statutes.

The Commission staff involved in this proceeding were primarily those of the Division of Electric and Gas and the Division of Legal Services. As stated in Rule 25-21.028, Florida Administrative Code, staff of that Division "participates in formal rate proceedings through reviewing and analyzing testimony and exhibits, assisting in the cross-examination of witnesses, and preparing recommendations covering areas such as plant investments, reserve margins, quality of service, conservation, cogeneration, power plant and transmission line siting, and related items".

Attorneys' from the Division of Legal Services are charged with supervising "the procedural and legal aspects of rate cases and other formal proceedings before the Commission, the Division of Administrative Hearings and, on behalf of the Commission in civil court proceedings. This Division also represents staff before the Commission and issues reports and recommendations to the Commission as requested". Rule 25-21.021(2), Florida Administrative Code.

Staff of the Commission's Division of Appeals also assisted the Commission during the goals hearings. As stated in Rule 25-21.021(1), Florida Administrative Code, among the duties of Division of Appeals' staff is its duty to attend "Commission and staff conferences as well as the Commission's hearings to provide legal advice to the Commission . . . ."

Rule 25-22.026, Florida Administrative Code, "Parties" provides in subsection (3) that "[t]he Commission staff may participate as a party in any proceeding. Their primary duty is to represent the public interest and see that all relevant facts and issues are clearly brought before the Commission for its consideration". Subsection (4)(a) further elaborates that

> [s]taff is not a party in interest and has no substantial interests that may be affected by the proceeding. Commission staff's role shall be to assist in developing evidence to ensure a complete record so that all relevant facts and issues are represented to the fact finder. Any position that staff has prior to the hearing is preliminary; final positions are based upon review of the complete record.

Subsection (4)(b) recognizes that "[w]hen advocating a position, Commission staff may testify and offer exhibits and such

evidence shall be subject to cross-examination to the same extent as evidence offered by any other party".

Staff did not present any witnesses in this case, nor did it advocate a position. As reflected in the Prehearing Order, the staff stated a preliminary basic position in the conservation goals dockets consistent with Rule 25-22.026(4)(a) and only took preliminary positions on two of the sixty-odd issues identified in the proceedings. R at 2558; 2585; 2601.

The Commission makes its decisions and votes at its public agenda conferences. Agenda conferences are generally held on the first, third and fifth Tuesdays of each month, but may be scheduled for other times depending on the nature of the case. Such individually scheduled agendas are referred to as "special" agenda conferences, such as was held in the goals dockets. Specifically, Rule 25-21.042 provides that

> [g]enerally, the Commission conducts its public business at agenda conferences with the advice, assistance and recommendations of staff. With regard to proposed Commission action, the Commission may call upon others to answer questions or elicit information where such solicitation does not violate the prohibition against ex parte communications at a adjudicatory proceedings.

Agenda conference participation is defined in Rule 25-22.0021, Florida Administrative Code, which states in subsection (1):

> Persons who may be affected by Commission action on certain items on the agenda for which a hearing has not been held . . . . will be allowed to address the Commission concerning those items when taken up for discussion at the conference.

Subsection (2) provides for a limitation on the role of staff who testified at hearing:

> When a recommendation is presented and considered in a proceeding where a hearing has been held, no person other than staff who did not testify at the hearing and the Commissioners may participate at the agenda conference. Oral or written presentation by any other person, whether by way of objection, comment or otherwise, is not permitted, unless the Commission is considering new matters related to, but not addressed at the hearing.

The Commission's rule governing the types of post-hearing filings that may be made by parties is Rule 25-22.056, Florida Administrative Code. That rule does not address staff recommendations nor post-hearing filings submitted by staff except when a hearing is conducted by a single Commissioner acting as hearing officer. In such cases

> all parties and staff may submit proposed findings of fact, conclusion of law, proposed recommended orders which shall include a statement of the issues, and exceptions to the proposed or recommended order within the time and in the format designed by the hearing officer. 25-22.056(1)(b).

These specific provisions of the rule were not applicable to staff in the goals docket, since the case was heard by four Commissioners.

Consistent with the role of staff contemplated in its various procedural rules, staff prepared a detailed recommendation summarizing the evidence and positions of the parties in the goals dockets. Staff also provided its advice to the Commissioners on how it believed the case should be decided. R 5015-5222. The

matter was decided at a special agenda conference on October 3, 1994, which lasted from 9:35 a.m. until 5:22 p.m.

The Commission staff also prepared a recommendation for disposition of LEAF's Motion for Reconsideration and Request for Oral Argument. R 5380-5394. Consistent with Commission's rules, only staff participated at the special agenda conference and that portion of the regular agenda conference which dealt with LEAF's motion for reconsideration. TRSA 4-255; TRA 1-14.

In every docketed matter which comes before the Commission the staff prepares, subject to the Chairman's approval, a Case Assignment and Scheduling Record (CASR). The CASR lists the various procedural steps and events connected with the case. A copy of the extensive CASR in the goals dockets is appended as Appendix 1. The CASR was available to all parties, including LEAF, and reflects the various dates for staff recommendations in this case.

## SUMMARY OF THE ARGUMENT

The Commission did not violate LEAF's due process rights in the goals setting proceedings. LEAF should not be allowed to raise these issues on appeal since it did not object and present the matter to the Commission for decision. The Commission's setting of numeric conservation goals was fundamentally a policy-making proceeding. LEAF cannot equate it's due process rights in such a proceeding with those of an individual threatened with deprivation of life, liberty or property. The Court's decision in Cherry Communication, Inc. v. Deason, 83,274 (Fla. April 20, 1995) does not apply; South Florida Natural Gas Co. v. Florida Public Service Commission, 534 So. 2d 695 (Fla. 1988) does apply.

The staff's role in the goals setting proceedings was consistent with the Commission's rules and was specifically explained to LEAF's attorney at the pre-hearing conference. Staff's recommendation was the embodiment of its collective expertise and responsibility to assist the Commission in making complex decisions. LEAF was given every opportunity to influence the Commission's decision that was afforded other parties. LEAF has not shown that the staff was impermissibly biased against its position or that the Commission's decision was in error as a result. The Commission has done nothing which would justify re-doing the massive hearing in this case. To re-hear the case would be extremely time consuming, costly and contrary to the interests of the other parties affected and the agency.

The Commission's decision is neither inconsistent with FEECA nor the Commission's rules. LEAF improperly suggests that this Court apply Section 120.535, Florida Statutes, to invalidate the Commission's action. If anything, that statute should provide a basis for a rule challenge, not an appeal. In any case, it has been repealed effective July 1, 1995.

The Commission's decision to set pass/fail goals for utilities cannot be reasonably construed as contrary to LEAF's interest. Although LEAF may disagree with the policy basis of the goals, the Commission's adoption of a fail/pass standard will encourage utilities to implement and promote effective conservation. This is consistent with LEAF's proclaimed interests. LEAF has not been adversely effected by this decision and should not be allowed to challenge it on appeal.

The Commission has indicated that it will consider some form of penalty at such time that it finds that the utility has failed to meet its goals. The Commission at this point has taken no action which directly affects the substantial interests of anyone, and it may never do so. The issue of penalties and their validity is not ripe for decision at this time.

Section 366.01 and 366.81, Florida Statutes, give the Commission broad authority to regulate public utilities and to establish conservation goals in the public interest. The establishment of a pass/fail goals policy is in furtherance of that interest. This Court has specifically recognized that the

Commission must have the authority to effectively carry out its policies, even if it must impose a penalty to do so.

The Commission's rules do not specifically address enforcement mechanisms for seeing that the required numeric goals are carried out. The Commission's decision is not inconsistent with its rules contained in Chapter 25-17, Florida Administrative Code.

The Commission's setting of conservation goals based on the RIM test was within its discretion and based on the entire record of the proceedings. The Commission weighed the relative benefits of adopting TRC-based goals and concluded that as a policy matter that RIM-based goals were preferable. The Commission concluded that, based on the record, the goals based on measures that passed the TRC test but not the RIM test would tend to increase rates and produce subsidies between non-participating and participating customers. On this basis, the Commission concluded that it would not adopt a TRC cost-effectiveness test. It found no substantial basis which would justify adopting measures which would raise rates even slightly.

The Commission's order correctly characterized the difference in savings associated with the RIM and TRC test. The Commission's use of the word "negligible" in the various contexts of its orders is clear. LEAF's attempts to make the Commission's choice of words into the linchpin of its decision are largely semantic and force an argument where none exists.

The Commission's orders should be affirmed.

## ARGUMENT

### I. THE COMMISSION'S POST-HEARING PROCEDURES DID NOT VIOLATE LEAF'S RIGHT TO DUE PROCESS.

As it has done in various other contexts, LEAF is before this Court again challenging the way the Commission makes its decisions after the hearing has concluded.[2] The Commission has done nothing in this case which exceeds its delegated legislative authority nor has it violated any constitutional right of due process.

#### A. LEAF did not properly raise any claim of due process for Commission decision and cannot raise it on appeal.

An appellant cannot raise an issue for the first time on appeal. Castor v. State, 365 So. 2d 701 (Fla. 1978); C.F. Industries v. Nichols, 536 So. 2d 234 (Fla. 1988). Nowhere in its assault on the role of Commission staff in the goals proceedings, does LEAF state that it made any formal objection to procedure which could have been ruled on by the Commission. While LEAF filed various documents, ranging from its Motion for Reconsideration, to letters to staff, to its improper Motions to Alter or Amend, it did not express its belief to the Commission that its due process rights were being violated, nor did it ask for a ruling.

Having failed to properly object and raise its due process claims before the Commission, LEAF now attempts to have this Court declare the proceedings invalid without proper record foundation. The Court should reject LEAF's attempt and refuse to hear the issue. The Court should follow the holding of Ford v. Bay County

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[2] These include a rule challenge before the Division of Administrative Hearings and subsequent appeal. See discussion pp. 43 below.

School Board, 246 So. 2d 119 (Fla. 1st DCA 1970). In that case, the court refused to find a due process violation where a school board attorney acted both as prosecutor and advisor. The Court's opinion was based in part on the failure of petitioner to object to the procedure at hearing. Id at 122. This case is in contrast to Forehand v. School Board of Gulf County, 600 So. 2d 1187, 1190 (Fla. 1st DCA 1992), where the court found that the issue of the attorney's role had been properly preserved "through appropriate objections made throughout the proceedings . . . ."

If the Court concludes that LEAF has properly attempted to raise some due process argument, the Court should find that the nature of policy-oriented goals proceedings and the Commission's conduct of the case do not support LEAF's claims.

**B. LEAF has mischaracterized the nature of the proceedings and the role of staff.**

This Court specifically recognized the critical role of Commission staff in South Florida Natural Gas Co. v. Florida Public Service Commission, 534 So. 2d 695 (Fla. 1988). There, the Court recognized that "the Commission is clearly authorized to utilize its staff to test the validity, credibility, and competence of the evidence presented . . . ." Id. at 698. Again, in its recent decision in Cherry Communications, Inc. v. Deason, 83,274 (Fla. April 20, 1995), the Court acknowledged the validity of its South Florida rationale in recognizing that, generally, "an agency should have great flexibility in carrying out its diverse functions and in the utilization of staff in a wide range of capacities". Id., slip op. at 3.

In Cherry the Court went on to note that "[t]he question we now face is whether the same individual who prosecuted a case on behalf of the agency may also serve to advise the agency in its deliberations as an impartial adjudicator". Id., slip op. at 4. However, any similarities between the issues in raised in Cherry and the Commission's goals decision urged by LEAF are superficial at best. The Cherry analysis cannot apply.

In order to invoke the Cherry model in support of its due process arguments, LEAF has fundamentally mischaracterized the nature of the proceedings before the Commission. LEAF notes at page 15 of its Brief, that, in Cherry, this Court distinguished South Florida Natural Gas "because of the nature of the proceedings". LEAF then goes on to pay lip service to the Court's holding in South Florida Natural Gas, but then proceeds to develop a faulty syllogism to tie its arguments to the Cherry rationale. LEAF concludes that ratemaking is quasi-legislative, as distinguished from the quasi-judicial functions performed by the Commission. LEAF reasons that the license revocation proceeding in Cherry was clearly a quasi-judicial function; the proceedings in the numerical goals dockets were quasi-judicial (because the Commission determined "disputed issues of material fact"), therefore, the Cherry rationale applies. Brief at 17-18. LEAF is mistaken.

In Cherry, this Court recognized that the company was invoking that concept of due process which involves governmental deprivation of some interest in life, liberty or property. The

Cherry case involved the revocation of the company's right to do business in Florida as a reseller of long distance telephone service. The resolution of the issues turned on "contested factual issues concerning that individual". Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, 3rd Ed., II, 7. The Commission's determination in the Cherry proceedings were quasi-judicial because they involved individual rights and turned on the resolution of "adjudicative facts", which are "facts, which usually answer the questions of who did what, where, when, how, why, with what motive or intent; . . . roughly the kind of facts that go to a jury in a jury case". Id.

In the goals docket proceedings, the Commission was not conducting a proceeding which threatened to deprive any individual of life, liberty or property in any recognizable sense. Certainly, the proceeding did not involve the determination of such interests based on facts associated with an individual or individual rights. Rather, the Commission's proceedings were fundamentally quasi-legislative, directed toward implementation of the policy contained in FEECA and the Commission's rules. No decision could ultimately be a clearer policy choice than the central issue contested by LEAF, i.e., what cost-effectiveness test should be applied to set numeric conservation goals.

The Commission's proceedings were not a backward-looking attempt to determine who did what, when, where and how. Rather the goals proceed were concerned with what policy should be implemented in the future to carry out effective conservation programs for

Florida utilities and their ratepayers. As such, the Commission's determination hinged not on adjudicative facts, but other facts developed as the basis of setting broad policies. Such facts have been characterized as "legislative facts", and are defined as facts which "do not describe the individual who is uniquely affected by the government action or that individual's past conduct. Rather, legislative facts are the general facts that help a government institution decide questions of law, policy and discretion". Id.

That the numeric goals proceedings were conducted pursuant to Section 120.57(1), Florida Statutes, does nothing to change the basic nature of the proceedings. The Commission conducts virtually all of its hearings under the formal procedures of 120.57(1), except rulemaking proceedings. This includes the rate case proceedings recognized by the Court in South Florida Natural Gas. The concept of quasi-judicial versus quasi-legislative does not hinge, as LEAF mistakenly assumes, on resolution of "disputed issues of material fact" through the taking of sworn testimony and evidence. It is the underlying purpose of the proceeding, not the formal structure, that is determinative.

It would be stretching the concept of adjudication of individual rights, or "prosecution", to the limits to agree with LEAF's conclusion that the Commission's staff attorney "prosecuted the case" on behalf on the Commission staff. Whatever due process rights LEAF may have had in a conservation goal setting proceedings are founded in its right to participate in a policy-making decision. LEAF's rights do not rise to the level of those of

Cherry Communications in seeking to defend its license. LEAF was admittedly a "full party" recognized by the Commission to have some substantial interest in the proceedings under the Florida Administrative Procedure Act (APA). But that in itself does not invoke the entire panoply of due process rights that an individual might have in an adjudication of personal interests. Even if LEAF asserts that its interests are those of Florida ratepayers, ratepayers' rights are limited to rates that are fair, just and reasonable and not unduly discriminatory. Section 366.05, Florida Statutes.

The Commission agrees with LEAF that there is a right of due process in Florida which applies to administrative agencies. However, the Commission also agrees with this Court in Hadley v. Department of Administration, 411 So. 2d 184, 187 (Fla. 1982), that "[t]he extent of procedural due process protection varies with the character of the interest and the nature of the proceeding involved". LEAF's interest in this case was that of an intervenor who could be affected to one degree or another through the impact of the Commission's conservation decisions on rates and service. As such LEAF was entitled to participate to the extent guaranteed by section 120.57(1)(b), Florida Statutes. There is no dispute that LEAF was afforded those opportunities. LEAF participated as a full party, presented evidence, conducted discovery and extensive cross-examination, responded and made argument as provided by the Commission's procedural orders and applicable rules. In short, LEAF was afforded all rights conferred by the APA and enjoyed every

privilege and opportunity afforded to the other 18 parties to the proceeding.

Notwithstanding that LEAF indisputably was given a full opportunity to present its position, and notwithstanding that LEAF was in no sense the subject of a "prosecution" brought by the staff of the Commission, LEAF nevertheless cries foul. LEAF blusters about the participation of the staff as a "party"; the filing of the staff's "unsolicited" recommendation for disposition of the case and the exclusion of LEAF and other parties from the decision-making process at agenda conference. All this LEAF labels "unconstitutional procedures" and concludes that one party, the Commission staff, was afforded "special advantage" in influencing the decision. Despite LEAF's best efforts to make staff into an adversarial and biased party, neither the facts nor the law supports such a notion.

**C. The staff's role in the goals docket setting proceeding does not give rise to a claim of deprivation of due process under Florida law.**

To force its argument, LEAF deliberately mischaracterizes the nature of the staff's participation in this case and LEAF's knowledge of applicable procedures. Thus, LEAF refers to the staff as a "full party" and makes much of the entry of an appearance by Mr. Palecki and other legal staff members on behalf on the Commission staff. Brief at 19-20.

The staff was authorized by rule to make an appearance as a "party" at the proceedings. Rule 25-22.026(3), Florida Administrative Code. It is difficult to imagine how else they

could be recognized and have the opportunity to carry out their job of helping to develop the record for the Commission.

LEAF's counsel was also specifically aware of what the staff's role would be in the proceedings. In fact, it was in response to a discussion initiated by him at the pre-hearing conference that the Chairman explained in detail what the staff's role in the proceeding would be, and why he sometimes wanted the staff to take preliminary positions on some issues. TRPH 63-66. Specifically, the Chairman noted that the staff "is in a slightly different category than the other parties and that staff has an obligation to make sure that the record is complete and to give a recommendation to the Commissioners at the conclusion of this". TRPH 64. The Chairman also noted that although he liked sometimes to have the staff state a position, it sometimes had been "counter productive" because "in some parties' minds that has been perceived as a statement by the staff that they are going to pursue that position as an advocate of that position regardless of what the record shows and that they are going to recommend that at the end of the hearing." TRPH 64-65. Chairman Deason went on to state that was a mistaken perception and that

> "[t]hat is not the staff's role; that even if they initially take a position, that if the evidence in the case shows contrary, not only should, but they are under obligation to make a recommendation to the Commissioners which is consistent with the best evidence which is in the record. So often times, having staff state a position this early in the process is misunderstood by the parties as that being an advocacy role being played by the staff for that particular issue; and staff does not have an advocacy role in this type of proceeding." TRPH 64-65.

Contrary to LEAF's assertions at page 19 of its Brief, there is nothing "significant" about the staff's stating a preliminary position on issues which had been before the Commission in one form or another for months, and even over the last several years in dockets involving conservation programs. It is rather "significant" that LEAF quotes only one line of the staff's position on Issue 15, which addresses what cost-effectiveness test should be used for setting DSM goals. Staff's position also indicated that it specifically recognized that other measures favored by LEAF, namely TRC measures, should be included if they "have a large benefit-to-cost ratio and a minimum rate impact . . . ." R 2601. In fact, staff did not have a position stated on that issue until LEAF's attorney inquired why the staff had not taken a position. TRPH 97-99. Staff then indicated its willingness to accommodate LEAF by stating a position. Id.

The Court should note that the staff took no other positions on any of the other sixty-odd issues identified in the preliminary order. The reason for that was clearly stated in the Prehearing Order itself. In the section containing statements of "Basic Positions", the staff's statement concluded:

> Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. R 2559.

The staff of the Commission did participate extensively in the proceedings; did provide advice to the Commissioners during the course of those proceedings; did provide an extensive

recommendation to the Commission for disposition of the case; and did provide recommendations and counsel for disposition of LEAF's post-hearing motions. These, however, are precisely the functions contemplated by the Commission's rules and recognized by this Court in South Florida Natural Gas. It is no violation of due process that the Commission makes efficient use of its staff, even if they do participate in the investigation and decision-making phases of the proceedings. Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); State v. Johnson, 345 So. 2d 1069 (Fla 1977).

In this case, as in any case involving the Commission's general exercise of the police powers afforded to it under Chapter 366, the Commission was charged with making a decision in the public interest. Here that interest was the promotion of conservation among Florida electric utilities consistent with FEECA. As even a cursory glance at the record in this case would suggest, this was an enormous undertaking. In such a proceeding where there are widely divergent interests, the Commission simply cannot rely on the good offices of the parties. Parties are primarily before the Commission seeking to achieve a result favorable to their position, as LEAF was. They are not before the Commission to even-handedly balance the competing concerns which must be weighed in the public interest. The Commission has to be able to utilize its staff to develop the record, test the credibility of evidence presented, and to the extent possible, make sure the Commission hears the information it needs to render a fair decision. Particularly, in a massive undertaking such as the goals

dockets, staff must also be able to provide input and advice to the Commission on how to procedurally achieve it's objectives in an orderly manner.

Even though LEAF attempts to make hypertechnical distinctions to suggest confusion and surprise at the staff's filing of recommendations in the case (Brief at 20), the Court should disregard these allegations. LEAF was well aware that the staff would file a detailed written recommendation to the Commission, as it always does after hearing, and that a time had been set for that filing. TRPH 66; TR 5696-5697; CASR, Appendix 1.

LEAF was also well aware that no other party at the proceeding would be allowed to participate in the Commission's decision-making process at agenda, or to continue arguing the case after the staff had made a recommendation, except through a valid motion for reconsideration after a final order had been issued. Rule 25-22.060, F.A.C.

The Court should note, however, that LEAF in fact did re-argue it's case on reconsideration, taking special issue with the Commission's final decision based on particular parts of the staff's recommendation. In it's 44-page Motion for Reconsideration, LEAF cites specific passages both from the staff's recommendation and the special agenda transcript to attempt to convince the Commission that the staff's recommendation and the resulting order were wrong. See, for example, pp. 16-20; R 5293-5296.

LEAF's Motion for Reconsideration went far beyond an attempt to demonstrate points of fact or law which the Commission might have overlooked in its order, as would be proper in such a motion. LEAF's Motion was basically a re-argument of the case and an attempt to discredit the staff's recommendation and resulting order. Notwithstanding this fact, the Commission did consider LEAF's arguments in its Motion for Reconsideration and in fact made some changes suggested by it. R 5401-5402.

If the Commission's rules and procedures did not specifically provide for comment on the staff's recommendation prior to the Commission's decision, LEAF took that opportunity de facto on reconsideration.[3] LEAF's claim that it's "plea for fundamental fairness to respond to staff's advocacy" fell on deaf ears when the Commission rejected its Motion for Oral Argument on reconsideration is without merit. Brief at 21. LEAF did, in fact, respond to what it characterizes as the staff's advocacy in its Motion for Reconsideration. Oral argument was denied because LEAF's Motion stated no reason why oral argument was necessary or would be of value to the Commission as required by Rule 25-22.058, Florida Administrative Code. R 5399.

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[3] On December 19, 1994, LEAF also wrote an unsolicited letter to the Commission staff arguing with staff's recommendation and the motion for reconsideration. R 5449. As the court is aware, LEAF also filed an unauthorized pleading styled "Exceptions or Motion to Alter or Amend" which was struck by the Commission because a notice of appeal had been filed and the Exceptions and Motion were otherwise improper. The Court refused to contradict the Commission's decision and denied LEAF's motion to this Court for an order to compel the Commission to hear the Exceptions and Motion to Alter or Amend. Order of the Court dated May 2, 1995.

**D. LEAF was afforded due process by any reasonable standard.**

Administrative due process does not require that a party be given the opportunity to go on quarreling with the Commission's staff ad infinitum. At some point the Commission is entitled to rely on the analyses and recommendations of its staff and make a decision. As the Florida Attorney General found in Opinion 075-190, July 7, 1975, the procedural due process guaranteed by the APA [Section 120.57(1)(b)(5), Florida Statutes, (1974 Supp.)] does not require that a party be allowed to pursue further argument on staff's recommendation after the conclusion of evidentiary hearings.

The foregoing illustrates that LEAF has shown no flaw in the Commission's procedure which would give rise to a due process claim. Nor has it shown any biased treatment at the hands of the staff or the Commissioners. What LEAF has shown is its desire to go on arguing with the Commission and its staff because the Commission did not adopt the expansive conservation goals advocated by LEAF.

On the facts in this case, the Court could not reasonably conclude that the decision-making process was biased in the manner found by this Court in Cherry and Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So. 2d 322 (Fla. 1990). The Court should take note of the U.S. Supreme Court's observation in Hortonville Joint School Dist. No. 1 v. Hortonville Education Association, 426 U.S. 482, 496-497, 96 S. Ct. 2155, 49 L. Ed. 2d

775 (1976) that there is a "presumption of honesty and integrity in policy makers with decision-making power".

The Court should also note the Hortonville case's finding that, even if a personal liberty such as dismissal of a school teacher is involved in a decision, the decision-maker should not be disqualified as to important government and public policy considerations involved in the case "simply because he has taken a position, even in public, on a policy issue related to the dispute . . . ." Id. at 493. Even if LEAF had been asserting a personal interest involving deprivation of life, liberty or property in this case, it would not have been a matter sufficient to reverse the Commission's policy decision, even had the Commission gone into the case with a predisposition to adopt the RIM cost-effectiveness test.

The facts involved in this case were legislative facts upon which a policy decision affecting a wide range of persons was to be made. In such a case, even if a decision-maker does have some disposition to a particular policy going into the case, that is not enough to support a claim of violation of due process. To show a violation of due process, the claimant would have to demonstrate that the decision-makers' minds were "irrevocably closed" on the matter before them. FTC v. Cement Institute, 333 U.S. 683, 701, 68 S. Ct. 793, 92 L. Ed. 1010 (1948). Even if LEAF's unsubstantiated allegations of predisposition of the Commission's staff and the Commissioners had any basis in fact, it has made no showing even

approaching a violation under the standard of review recognized by the U.S. Supreme Court for this type of decision.

Finally, the Court should take up LEAF's proposed balancing of equities under Hadley v. Department of Administration, 411 So. 2d 184 (Fla. 1982), and consider the interests of LEAF balanced against those of other parties and the Commission. First, the Court should note that LEAF's stated interest at p. 16 of its Brief is somewhat tenuous. While it is uncertain how many members LEAF has in its organization, or how many are Florida ratepayers, LEAF certainly does not represent the body of Florida ratepayers. It is likewise uncertain that the goals adopted by the Commission will result in increased implementation of supply-side rather than demand-side conservation. Moreover, while LEAF advocates TRC measures which might benefit some customers by lower bills, if they participated, TRC measures could cause others to subsidize these reductions and tend to drive overall rates for all customers up. R 5244; 5072-5073.

In contrast to the interests asserted by LEAF, the interests of the other parties primarily affected by this proceeding, namely the utilities and their ratepayers, are definite and substantial. Utilities are being required to adopt the programs which will substantially affect the way they deliver service, their growth and economic condition. Ratepayers will feel the effects of conservation and may pay a higher or lower price for service depending on the policy choices of the Commission and their implementation by the utilities.

The Commission's interest, and the State of Florida's interest, in this proceeding is to carry out the mandate of FEECA to develop cost-effective conservation measures in the public interest. The Commission also has an interest in being able to carry out those policy choices in a manner which it believes best balances the competing interests of the parties in this case. LEAF's claim that the Commission has an interest "in ease of decision making" has hardly been borne out by this case. (Brief at 17). If the Commission has such an interest, it is more in the nature of wishful thinking.

This Court should conclude, as it did in Hadley, that the Commission's decision in this case "strikes a fair compromise" between the interests of the parties. 411 So. 2d 188.

The Court's analysis should not stop here, however. It should go one step further and consider LEAF's demand for relief in light of the further criteria enunciated by the U.S. Supreme Court in Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In finding that a hearing was not required before provisionally terminating social security benefits, the Eldridge court weighed the private interests of the individual and the need for additional procedural safeguards against the interests of the government. These included the fiscal and administrative burdens that additional procedures would entail. Id. at 335.

LEAF has asked this Court to provide a new hearing that would "afford due process by recognizing the proper separation of the advocacy and advisory roles of staff and agency lawyers." Brief at

21. The cost to the parties and the agency to re-do the entire twenty-day goals hearing would be enormous in expenditures of time and money. It would further delay the implementation of conservation goals which LEAF has claimed was a primary objective of its members. TR 5699. This uncertainty and delay would be a detriment both to the utilities and Florida ratepayers, and contrary to the Commission's delegated responsibilities under FEECA. Moreover, if the Court took LEAF's suggestion and effectively ordered the Commission to reorganize its staff's functions, the administrative burden on the agency in conducting its business would be considerably increased. The Commission does not have an infinite number of staff members to carry out its objectives, and there is little likelihood that additional help could be acquired in the current fiscal atmosphere in Florida.

In view of such considerations, LEAF's interest in re-doing the hearing are vastly outweighed. Presumably, LEAF would put on the same case in the same manner that it did before without any certainty that the result would be changed one iota. All that would be accomplished would be the vindication of LEAF's procedural wrangling with the Commission.

## II. THE COMMISSION'S ADOPTION OF MINIMUM, PASS/FAIL CONSERVATION GOALS FOR FLORIDA UTILITIES IS NEITHER INCONSISTENT WITH FEECA NOR THE COMMISSION'S RULES.

LEAF'S arguments on this point are purely formalistic and contrary to its own positions.

**A. Section 120.535, Florida Statutes, does not apply.**

LEAF attempts to invoke the mandatory rulemaking requirements of Section 120.535 to have the Court overturn the Commission's decision to consider penalizing or prescribing programs for utilities who do not meet their minimum RIM-based conservation goals. Subject to the Governor's signature, Section 120.535 was repealed by the Florida Legislature effective July 1, 1995 and will no longer exist on that date.

Even if Section 120.535 is still viable for a short while, its prohibitions could not be invoked in this appeal. The very case that LEAF cites, Christo v. Florida Department of Banking and Finance, 20 Fla. L. Weekly D262 (Fla. 1st DCA, January 26, 1995), contradicts its position. There, the Court held that Section 120.535 was the exclusive remedy for bringing a challenge to an agency's policy statement on the ground that it was an unadopted rule. Any such challenge to the Commission's decision to consider penalties to enforce minimum conservation goals would have to be brought under the rule challenge procedures of that statute, not an appeal.

**B. The Commission's pass/fail goals policy is not contrary to LEAF's interest and LEAF has no standing to challenge it.**

It is difficult to understand how LEAF can logically be opposed to the Commission's decision to consider penalties or mandatory programs for utilities that fail to meet their minimum goals. LEAF claims in its Brief that it intervened in these proceedings to protect the environmental and economic interests of

its members. Brief at 16. Presumably, these interests will be served by effective conservation programs and attainable goals.

LEAF's interests in these proceedings cannot be negatively affected by the Commission's pledge to require utilities to meet their conservation goals. Although LEAF would have the Commission make greater use of the TRC test in its goal setting, the Commission's pledged enforcement of minimum conservation goals is consistent with LEAF's aim to encourage demand-side investments.

It is axiomatic that a party raising an issue on appeal must be adversely affected by the decision being appealed. North Shore Bank v. Town of Surfside, 72 So. 2d 659 (Fla. 1954); General Development Utilities v. Florida Public Service Commission (Fla. 1st DCA 1980). Notwithstanding any tortured arguments about the effect of the Commission's choice of RIM goals versus TRC goals, there is no way that LEAF's members can be negatively affected by the Commission's decision to enforce minimum goals. If penalties ever are imposed, they won't be imposed on LEAF's members, nor will their bills be adversely affected by RIM measures which both decrease consumption and lower rates. TRSA 71; R 5407-5408. LEAF has no standing to contest this issue.

**C. The issue of penalties or mandatory programs is not ripe for decision.**

The Commission's final order states that

> [a]ny utility that does not achieve its goal shall be either penalized or have programs prescribed to it in a matter to be determined by this Commission on a case-by-case basis. R 2544.

Under the terms of the Commission's order, it would be impossible to say at this time if any penalty will ever be imposed on a Florida electric utility for failing to meet its conservation goals, or what form such a penalty might take. Any harm to an affected party, namely the utilities, or for the sake of argument, LEAF, is purely speculative at this point. No substantial interest has been determined by the mere existence of a possibility that something could occur in the future. Such an interest is too remote and cannot be the subject of judicial review in the abstract. Agrico Chemical Company v. Dept. of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981).

**D. The Commission's proposed enforcement policy for conservation goals is within its delegated discretion under Chapter 366, Florida Statutes.**

Section 366.01, Florida Statutes, declares that the regulation of public utilities in Florida "shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose". Section 366.81, the legislative statement of findings and intent for FEECA, likewise finds that "it is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens". These statutes make clear that the Commission has been given broad authority to exercise discretion in determining what measures are necessary to protect the public interest in the

regulation of electric utilities of public utilities generally, and in the development of conservation programs specifically.

Section 366.81 further gives the Commission specific authority to "require each utility to develop plans and implement programs for increasing energy efficiency and conservation within its service area, subject to the approval of the Commission". Section 366.82(2), in turn, requires the Commission to

> "adopt appropriate goals for increasing the efficiency of energy consumption and increasing the development of cogeneration, specifically including goals designed to increase the conservation of expensive resources, . . ., to reduce and control the growth rates of electric consumption, and to reduce the growth rates of weather sensitive peak demand".

Subsection (3) of 366.82 then prescribes that the Commission "shall require each utility to develop plans and programs to meet the overall goals within its service area" and authorizes the Commission to impose mandatory programs for a utility where "any utility has not implemented its programs and is not substantially in compliance with the provisions of its approved plan at any time . . . ."

Section 366.82 on its face gives the Commission authority to impose one sanction listed in its final order, that is, the imposition of mandatory programs to meet the utilities' goals. Contrary to LEAF's assertions, there is nothing in any part of the FEECA statutes that would preclude the Commission from imposing some kind of enforcement measure to encourage utilities to meet their approved conservation goals. The fact that subsection (4) of

366.82 directs the Commission to "require periodic reports from each utility" and to "consider the performance of each utility . . . when establishing rates . . ." does not exclude other enforcement measures.[4]

This Court has recognized that the Commission must have sufficient authority to ensure that the provisions of its orders are carried out. Aloha Utilities, Inc. v. Florida Public Service Commission, 376 So. 2d 850 (Fla. 1979). Moreover, the Court has also recognized that it is within the Commission's discretion to grant rewards or impose penalties for a variety of reasons in the context of rate cases. In Gulf Power Company v. Cresse, 410 So. 2d 492 (Fla. 1982) this Court specifically upheld the Commission's grant of a ten-basis points reward to Gulf Power Company for its good conservation efforts. Conversely, the Court recognized that the Commission was within its discretion to impose a fifty-basis points reduction on Gulf's return on equity for poor management practices. Gulf Power Company v. Wilson, 570 So. 2d 270 (Fla. 1992). Even within the context of the specific provisions of 366.82(4) directing the Commission to consider conservation performance in the context of rate cases, such a penalty would be permissible.

The Commission did not speculate on what particular form a conservation-based penalty might take, but it did indicate that such decisions would be made on a case-by-case basis. R 2544. At

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[4]The doctrine of expressio unius est exclusio alterius cannot logically apply where the statutes terms do not address the same category of things.

such time as it seeks to impose a penalty, the Commission will be required to afford the affected utility and any other persons having standing the opportunity to contest the proposed action.

The fact that the Commission contemplates a penalty to enforce the achievement of minimum conservation goals is in no way inconsistent with its statutory authority.

**E. The Commission's order is consistent with its conservation goals rules.**

The Commission's decision to review prescribed conservation goals on a pass/fail basis subject to possible penalties is consistent with its existing rules in Chapter 25-17, Florida Administrative Code. The phrase seized by LEAF, Brief at 26, that the "best efforts of electric utilities" will be required to achieve goals is consonant with the Commission's decision. By putting the utilities on notice that they must meet at least minimum goals or be subject to some penalty, the Commission is seeking to promote the ends of effective DSM programs. The fact that the Commission recognizes in subsection (6) of Rule 25-17.001, Florida Administrative Code, that goals may not be achieved as projected, and may need to be revised, does not mean that the Commission cannot provide incentives to see that the goals are met. Indeed, Rule 25-17.0021(4)(j) specifically recognizes that if the utility does not meet its goals, the Commission "may require the utility to modify its proposed programs or adopt additional programs and submit its plan for approval". Although the Commission did not specify what type of penalty it might impose for failure to meet conservation goals, it is possible that the

imposition of a program might require the utility to absorb costs associated with it.[5]

The Commission has done nothing inconsistent with its conservation rules. The Commission's proposed enforcement mechanism does not conflict with its conservation goals rule. As the Commission noted in its order on reconsideration

> [t]he setting of pass/fail conservation goals furthers the rule's purpose of promoting reliability in the planning process. By subjecting utilities to the possibility of a penalty or Commission prescribed programs should they fail to achieve their goals, the Commission is increasing the likelihood that goals will be achieved. In turn, the likelihood that DSM efforts will truly avoid and defer generating capacity is increased. R 5406-5407.

The witness relied on extensively by LEAF, Mr. McDonald, supported the position ultimately taken by the Commission in this docket. Mr. McDonald testified that if definite goals were going to be set for conservation then they should be realistic and enforceable. TR 2722-2724, R 5403-5407.

The Commission was concerned about setting goals which could not be attained and which might result in capacity shortfalls. The intent of FEECA is to provide for and encourage conservation but to do so realistically. It would be irresponsible of the Commission to set goals that could not be achieved. While encouraging cost-effective conservation under FEECA, it must also assure that utilities' capacity planning is realistic and that the state's

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[5] A discussion of this type of mechanism occurred at pp. 75-76 of the special agenda transcript.

supply of electricity is not put in jeopardy by complacent reliance on conservation effects which cannot be achieved.

## III. THE COMMISSION DID NOT ERR IN SETTING RIM-BASED RATHER THAN TRC-BASED CONSERVATION GOALS.

LEAF would have this Court believe that the Commission's characterization of the difference in the energy savings between the RIM and TRC portfolios as "negligible" is the linchpin of its entire decision. LEAF's arguments on this point are largely semantic and are founded in LEAF's refusal to accept the Commission's policy choice to set RIM-based goals.

As a preliminary matter, it should be noted that LEAF's characterization of what the Commission did in setting RIM-based goals is misleading. The Court might get the impression from LEAF's characterization that the Commission totally rejected all forms of TRC conservation programs. At the same page of the Commission's final order that LEAF seizes on to attack the Commission's characterization of the differences between TRC and RIM programs as negligible, the order states:

> [A]lthough we are setting goals based solely on RIM measures, we encourage utilities to evaluate implementation of TRC measures when it is found that the savings are large and the rate impacts are small. Some measures that may fall in this category are solar water heating, photovoltaics, high efficiency on-site cogeneration, renewable resources, end-use natural gas and commercial lighting.
>
> Upon petition from a utility, lost revenue recovery and stockholder incentives shall be considered on a case-by-case basis for such TRC measures that result in large savings and small rate impacts. We are not implying that lost revenue recovery or incentives will be approved across the board for all such

> programs. Rather, each program or program portfolio will be considered on a case-by-case basis for incentives and lost revenue recovery.
>
> Utilities are free to file whatever portfolio of programs they wish, including TRC programs, in order to meet their goals. Demand and energy savings achieved through Commission approved TRC programs (including programs approved for incentives and lost revenue recovery) shall be counted toward each utility's RIM based goal. R 5244.

The Commission's decision is not an out-of-hand rejection of all TRC based conservation measures. The Commission recognized that there may be instances where TRC measures are desirable, even though they tend to drive rates up as opposed to RIM measures which reduce rates. It was in this light that the Commission stated that "since the record reflects that the benefits of adopting a TRC goal are minimal, we do not believe that increasing rates, even slightly is justified". Id. That statement is the essential policy choice made by the Commission, and its underlying premises are undisputed.

By focusing on the Commission's characterization of the difference between RIM and TRC portfolios as "negligible", LEAF attempts to force an argument against the Commission's policy choice. LEAF would elevate the use of the term to a finding of mathematical certainty. However, it is obvious that the word negligible is susceptible to various applications, depending on the perspective of the person using it. What is negligible for one may be significant to another.

It is clear that LEAF believes that the number differences between TRC and RIM based conservation savings are not susceptible

to being characterized as negligible. However, it is equally clear that the Commission's view was that the differences were not significant and would not support a policy based on TRC goals which drive rates up. The best explanation of what the Commission meant by its use of the word negligible is stated in its order on reconsideration where it said:

> In this docket when we compared the MW and MWH savings in each RIM and TRC portfolio and the differences between the two, to each utility's system peak demand and energy sales, the savings are negligible. The use of the word "negligible" is the result of an overall cost-effectiveness evaluation, and not just consideration of one piece, such as MW or MWH savings. A complete and balanced view was provided in the staff recommendation and at the special agenda. We made an informed decision after comparing the higher rate impacts of the TRC portfolio to the RIM portfolio. Apart from the corrections previously addressed, LEAF has shown no appropriate ground for reconsideration. R 5403.

The Commission has attempted in its order on reconsideration to make clear that it viewed the differences between TRC and RIM based goals in a broader perspective encompassing both demand and energy savings and the effect the differences would have on "rates, generation expansion and revenue requirements". The matter was indeed exhaustively discussed in the staff's recommendation and at the special agenda where the matter was decided.[6]

The Commission's decision to set RIM based goals is hardly as shallow as LEAF's characterization would make it. It was the

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[6] See the discussion between Commissioners and staff at 61-85 of the special agenda transcript.

substance of the differences between the TRC and RIM cost-effectiveness test, namely TRC's tendency to increase rates and produce subsidies, which lead the Commission to adopt the RIM test as the primary cost-effectiveness test for conservation programs. It is not the Commission's use of the relative term negligible to describe the difference between TRC and RIM programs, but rather the underlying substance of the decision that is important.

LEAF attempts to undermine the credibility of the Commission's policy choice by producing a deluge of record cites and argumentative claims about the meaning of evidence. LEAF's arguments were largely considered and rejected in the Commission's order on reconsideration. It simply attempts to persuade the Court to agree with LEAF's interpretation of the evidence, not the Commission's. In other words LEAF would have the Court improperly substitute its judgment for that of the Commission. Citizens v. Florida Public Service Commission, 425 So. 2d. 534 (Fla. 1983).

To put this matter in perspective, the Court should consider the nature of the decision-making process in this docket as characterized by Chairman Deason at the special agenda:

> **CHAIRMAN DEASON:** That's another thing is, I think we probably need to establish this right up front, is that one may get the feeling that these goals are being set with a minute degree of precision and that is not the case. While we have analyzed this docket as thoroughly as any docket that can be analyzed and we had more hearing days and hearing hours and more witnesses and more pages of transcripts and more exhibits than probably any docket that I have been associated with, it is just the magnitude of this docket and the type of information that we are looking -- it is on a

> forward-looking basis as well, we are talking ten years into the future.
>
> You do not have the degree of exactness that you may have with the analysis of some type of historical test year that sometimes we utilize in ratemaking purposes where all effects are known and you're making accounting adjustments to the very penny, we are not doing that here. It is the nature of the analysis and it is the nature of the issues in front of us. TRSA 28-29.

The Commission would not imply that any lesser standard of review should apply to the Commission's decision in this case. However, the Chairman's remarks, while not evidence and not a finding in an order, do correctly characterize the nature of the task before the Commission. As it noted in its order on reconsideration the Commission was working with data that had to be evaluated in the light of the testimony presented at hearing and appropriate adjustments made supported by the record. R 5401-5402.

As it did on rehearing, LEAF assails in Subpoint II B of its Brief the Commission's calculation of percent of system used for purposes of comparing TRC and RIM results. LEAF criticizes the Commission's reliance on adjustments of utility data made based on their Ten-Year Site plans and concludes the Commission's findings are "based upon inconsistent data, and that the data was improperly adjusted to estimate system size". Brief at 34. While LEAF cites a litany of sources from the record, which it claims the Commission and its staff used in their calculations, there is no demonstration that the Commission was incorrect in the method it applied in calculating percent of system. Indeed, the record cites presented by LEAF in support of its arguments in the text on pages 33 - 35 of

its Brief are none other than its own arguments presented in its Exception/Motion to Alter or Amend which was struck by the Commission as beyond its jurisdiction in light of LEAF's appeal and otherwise inappropriate as a post-hearing filing.[7] The Court denied LEAF's motion to compel the Commission to consider the matters raised in the Exceptions/Motion to Alter or Amend. The Court should not entertain LEAF's attempt to interject arguments which were never properly before the Commission, and the validity of which have never been tested.

LEAF continues its battle of semantics over the meaning of negligible by detailing the Commission's findings on RIM and TRC savings as a percentage of total system sales. LEAF then manipulates these figures to calculate percentages of percentages and concludes that the differences in energy savings between TRC and RIM cannot be characterized as negligible. Brief at 37-38. Again, LEAF simply attempts to have the Court look at the evidence and agree with its evaluation favoring TRC programs. LEAF has done nothing on this issue to show that the Commission's finding that conservation goals should be based on a RIM test rather than on the TRC test was unreasonable or unsupported by the record in this proceeding.

LEAF's final argument on the negligible versus substantial issue is the ultimate attempt to mousetrap the Commission into

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[7] LEAF's Exceptions/Motion to Alter or Amend is contained in the record on appeal at R 5413-5495.

error. The Commission's final order contained a statement which said:

> The record in this docket reflects that the difference in demand and energy savings between RIM and TRC portfolios are negligible. (Emphasis supplied). R 5244.

The order on reconsideration contained the statement:

> Differences in MW and MWH savings may be substantial in isolation but negligible when viewed from a rates, generation expansion, and revenue requirements perspective. (Emphasis supplied). R 5403.

Despite the Commission's best efforts to explain what it meant by the term negligible in response to LEAF's Motion for Reconsideration, LEAF cries foul and attempts to elevate the use of the word may "into an observation not tied to the record". Brief at 39. LEAF's argument misapprehends Commission procedure and is utterly trivial.

LEAF points to the staff recommendation on reconsideration and notes that it, like the final order, contains the statement: "Differences in MW and MWH savings are substantial in isolation, but negligible when viewed from a rates, generation expansion, and revenue requirements perspective". R 5387, Brief at 39. LEAF proceeds to argue in essence that, since this was in the staff recommendation and since the Commission didn't specifically discuss it at agenda on reconsideration, the order could not possibly contain a statement that the differences "may be substantial".

LEAF overlooks the fact that, fundamentally, the staff recommendation is just that, a recommendation. The Commission is free to accept or reject it and there is no presumption that the

Commission's final order must say exactly what was in the staff recommendation. Having heard the case, the Commission is presumed to have knowledge of relevant evidence and the ability to weigh the advice of staff in that context. Although LEAF might wish to argue that staff's recommendation is the equivalent of a hearing officer's recommended order, it does not enjoy that status and the Commission is not bound to accept findings of fact or conclusions of law as presented by the staff.[8]

LEAF finds great significance in the use of the word "may", since it believes that the Commission's use of this conditional term would undermine its entire theory that the Commission based its choice of RIM goals solely on a finding that the differences between TRC and RIM are negligible. While it is uncertain, as LEAF notes, how or why the particular phrase was changed in the order,

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[8]LEAF's previous attempts to advance the theory that it has some right to go on arguing with the Commission and file exceptions to staff recommendations and final orders issued by a panel of Commissioners was rejected by a Division of Administrative Hearings Hearing Officer in Legal Environmental Assistance Foundation vs. Florida Public Service Commission, Case No. 93-2956RX, August 27, 1993. Although LEAF did not directly raise the right to file exceptions to staff recommendations, that was, as the Hearing Officer recognized, the clear implication, and the subject of staff recommendations was extensively discussed in the Hearing Officers Order. See especially findings of fact 15-18, (Appendix 2, pp. 9-10). In fact the Hearing Officer went on to conclude that

> The advisory memoranda prepared by Commission staff who do not testify at hearing are not documents which constitute proposed orders or recommended orders. They are contemplated by and consistent with Section 120.66(1)(b), Florida Statutes. The advisory memoranda are not matters about which exception may be taken.

The Hearing Officer's order was affirmed per curiam in Legal Environmental Assistance Foundation, Inc. v. Florida Public Service Commission, 641 So. 2d 1349 (Fla. 1st DCA 1994).

it is extremely doubtful that the Commission or anyone else would attach great significance to it. It appears to be simply a more casual rephrasing of the Commission's original order and is in no way inconsistent with the basic reasoning which led the Commission to adopt RIM-based goals instead of TRC goals. As stated above, the Commission ultimately chose RIM over TRC because, based on its comparison, it saw no reason to adopt a methodology which would tend to drive up rates. In any case, since the Commission denied reconsideration on the issue, the substance of its decision presumably was not changed.

## CONCLUSION

LEAF has not made any showing that the procedures followed by the Commission in this case violated any due process right. Nor has it shown that the Commission's policy choices were substantively incorrect or beyond its discretion. LEAF has not met its burden to overcome the presumption of validity which attaches to Commission orders. City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981). The Commission's orders should be affirmed.

Respectfully submitted,

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DAVID E. SMITH
Director of Appeals
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Dated: May 16, 1995

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 16th day of May, 1994 to the following:

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## APPENDIX

APPENDIX 1 CASE ASSIGNMENTAND SCHEDULING RECORD

APPENDIX 2 FINAL ORDER

# Case Assignment and Scheduling Record

Section 1 - Division of Records and Reporting (RAR) Completes

Docket No. 930548-EG  Date Docketed: 06/07/93  Title: Adoption of Numeric Conservation Goals and Consideration of National Energy Policy Act Standards (Section 111) by FLORIDA POWER & LIGHT COMPANY.

Company: Florida Power & Light Company

Official Filing Date: _____
Last Day to Suspend: _____  Expiration: _____

| Referred to: ("()" indicates OPR) | ADM | AFA | (APP) | CAF | CMU | EAG | GCL | LEG | RAR | RRR | WAW |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | ___ | ___ | X | ___ | ___ | X | ___ | X | ___ | ___ | ___ |

Section 2 - OPR Completes and returns to RAR in 10 workdays.

Program/Module C5

Staff Assignments

OPR Staff: D Smith

Staff Counsel: _____

OCRs (EAG): R Floyd, E Mills, R Shine

(LEG): M Palecki

( ): _____

( ): _____

( ): _____

Recommended assignments for hearing and/or deciding this case:

Full Commission X  Commission Panel ___
Hearing Examiner ___  Staff ___

Date filed with RAR: 02/23/95

Initials: OPR _____
Staff Counsel _____

Time Schedule

Warning: This schedule is tentative and subject to revision

Current CASR revision level: 7

| | Due Dates Previous | Current |
|---|---|---|
| 1.*Notice of Settlement Workshop | SAME | 01/28/93 |
| 2.*Order on Procedure | SAME | 06/28/93 |
| 3.*Technical Market Potential Results Filed | SAME | 09/15/93 |
| 4.*Notice of Workshop | SAME | 09/20/93 |
| 5.*FAW Notice for Workshop | SAME | 09/22/93 |
| 6.*Progress Report Due | SAME | 10/15/93 |
| 7.*Settlement Workshop I | SAME | 10/20/93 |
| 8.*Order on Procedure | SAME | 11/01/93 |
| 9.*Order on Procedure | SAME | 11/05/93 |
| 10.*Order on Procedure | SAME | 11/19/93 |
| 11.*FAW Notice for 2nd Settlement Public Workshop | SAME | 02/02/94 |
| 12.*Order on Procedure | SAME | 02/03/94 |
| 13.*Cost-Effectiveness Goals Results Filed | SAME | 02/18/94 |
| 14.*Preliminary list of issues | SAME | 02/21/94 |
| 15.*Integrated Resource Planning Report | SAME | 02/24/94 |
| 16.*Issue Identification | SAME | 02/25/94 |
| 17.*Cost-Effectiveness Goals Report Due | SAME | 02/28/94 |
| 18.*Settlement Workshop II | SAME | 03/03/94 |
| 19.*Notice of Public Meeting | SAME | 03/14/94 |
| 20.*FAW Notice for Preliminary Prehearing | SAME | 03/16/94 |
| 21.*Utility's Petition Filed | SAME | 03/18/94 |
| 22.*Utility's Direct Testimony Due | SAME | 03/18/94 |
| 23.*Preliminary Issue Statements Due | SAME | 03/28/94 |
| 24.*Notice of Workshop | SAME | 03/29/94 |
| 25.*FAW Notice for Workshop | SAME | 03/30/94 |
| 26.*Pre-prehearing | SAME | 04/11/94 |
| 27.*FAW Notice for Service Hearing - Tampa | SAME | 04/13/94 |
| 28.*Notice of Prehearing and Hearing | SAME | 04/13/94 |
| 29.*Order on Procedure | SAME | 04/14/94 |
| 30.*Order PSC-94-0483-PCO-EG Scheduling Hearings | SAME | 04/22/94 |
| 31.*Commission Workshop | 04/25/94 | 04/22/94 |
| 32.*Staff and Intervenor Testimony Due | 04/05/94 | 04/29/94 |
| 33.*Transcripts Due for Workshop | SAME | 04/29/94 |
| 34.*Prehearing Statements Due | 04/27/94 | 05/04/94 |
| 35.*FAW Notice | SAME | 05/05/94 |
| 36.*Last Day to Send Out Written Discovery Requests | 04/20/94 | 05/10/94 |
| 37.*Notice of Motion Hearing | SAME | 05/17/94 |
| 38.*Motion Hearing | SAME | 05/18/94 |
| 39.*Utility's Rebuttal Testimony Due | 04/18/94 | 05/19/94 |
| 40.*Prehearing | 05/09/94 | 05/20/94 |

Section 3 - Chairman Completes

Assignments are as follows:

- Hearing Officer(s)

| Commissioners | | | | | | Hrg. Exam. | Staff |
|---|---|---|---|---|---|---|---|
| ALL | CL | DS | JN | KS | GR | | |
| X | | | | | | | |

- Prehearing Officer

| Commissioners | | | | | ADM |
|---|---|---|---|---|---|
| CL | DS | JN | KS | GR | |
| | X | | | | |

Where panels are assigned the senior Commissioner is Panel Chairman; the identical panel decides the case.
Where one Commissioner, a Hearing Examiner or a Staff Member is assigned the full Commission decides the case.

Approved: _____

Date: 03/01/95



* COMPLETED EVENTS

# Case Assignment and Scheduling Record

## Section 1 - Division of Records and Reporting (RAR) Completes

Docket No. 930548-EG  Date Docketed: 06/07/93  Title: Adoption of Numeric Conservation Goals and Consideration of National Energy Policy Act Standards (Section 111) by FLORIDA POWER & LIGHT COMPANY.

Company: Florida Power & Light Company

Official Filing Date: _____
Last Day to Suspend: _____  Expiration: _____

| Referred to: ("()" indicates OPR) | ADM | AFA | (APP) | CAF | CMU | EAG | GCL | LEG | RAR | RRR | WAW |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | ___ | ___ | X | ___ | ___ | X | ___ | X | ___ | ___ | ___ |

## Section 2 - OPR Completes and returns to RAR in 10 workdays.

Program/Module C5

### Staff Assignments

OPR Staff: D Smith

Staff Counsel: _____

OCRs (EAG): R Floyd, E Mills, R Shine

(LEG): M Palecki

( ): _____

( ): _____

( ): _____

Recommended assignments for hearing and/or deciding this case:

Full Commission X  Commission Panel ___
Hearing Examiner ___  Staff ___

Date filed with RAR: 02/23/95

Initials: OPR _____
Staff Counsel _____

### Time Schedule

Warning: This schedule is tentative and subject to revision

Current CASR revision level: 7

| | Due Dates Previous | Current |
|---|---|---|
| 1.*Notice of Hearing | SAME | 05/20/94 |
| 2.*Prehearing Transcripts Due | SAME | 05/24/94 |
| 3.*Last Day to Conduct Discovery | SAME | 05/25/94 |
| 4.*Transcripts Due for Motion Hearing | SAME | 05/25/94 |
| 5.*Prehearing Order | SAME | 05/26/94 |
| 6.*Technical Hearing 6/1-3, 6/6, 6/8-10 | SAME | 06/01/94 |
| 7.*FAW Notice for Service Hearing - Miami | SAME | 06/01/94 |
| 8.*Service Hearing, Tallahassee @ 5:30 p.m. | SAME | 06/01/94 |
| 9.*FAW Notice for Service Hearing - Tampa | SAME | 06/15/94 |
| 10.*Hearing Transcripts Due | 06/15/94 | 06/24/94 |
| 11.*Service Hearing - Miami @ 6:30 p.m. | SAME | 06/30/94 |
| 12.*Service Hearing - Tampa @ 6:30 p.m. | 05/13/94 | 07/12/94 |
| 13.*Transcripts Due for Miami Service Hearing | SAME | 07/18/94 |
| 14.*Transcripts Due for Tampa Service Hearing | SAME | 07/25/94 |
| 15.*Briefs Due | 07/22/94 | 08/22/94 |
| 16.*Staff Recommendation | 08/08/94 | 09/23/94 |
| 17.*Special Agenda | 08/18/94 | 10/03/94 |
| 18.*Standard Order | 09/08/94 | 10/24/94 |
| 19.*Response to Motion for Reconsideration | SAME | 11/21/94 |
| 20.*Staff Recommendation | SAME | 12/13/94 |
| 21.*Agenda - Regular | SAME | 12/20/94 |
| 22.*Standard Order | SAME | 01/09/95 |
| 23.*DSM Plan Filed | SAME | 01/23/95 |
| 24. Case Appealed to Supreme Court | NONE | 02/13/95 |
| 25.*Staff Recommendation | NONE | 03/23/95 |
| 26.*Agenda - Regular | NONE | 04/03/95 |
| 27.*Standard Order | NONE | 04/24/95 |
| 28. | | |
| 29. | | |
| 30. | | |
| 31. | | |
| 32. | | |
| 33. | | |
| 34. | | |
| 35. | | |
| 36. | | |
| 37. | | |
| 38. | | |
| 39. | | |
| 40. | | |

## Section 3 - Chairman Completes

Assignments are as follows:

- Hearing Officer(s)

| Commissioners | | | | | | Hrg. Exam. | Staff |
|---|---|---|---|---|---|---|---|
| ALL | CL | DS | JN | KS | GR | | |
| X | | | | | | | |

- Prehearing Officer

| Commissioners | | | | | ADM |
|---|---|---|---|---|---|
| CL | DS | JN | KS | GR | |
| | X | | | | |

Where panels are assigned the senior Commissioner is Panel Chairman; the identical panel decides the case.
Where one Commissioner, a Hearing Examiner or a Staff Member is assigned the full Commission decides the case.

Approved: _____

Date: 03/01/95

PSC/RAR-15 (Rev. 1/95)

* COMPLETED EVENTS

# APPENDIX

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS



| | | |
|---|---|---|
| LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC., | ) | |
| Petitioner, | ) | |
| vs. | ) | CASE NO. 93-2956RX |
| FLORIDA PUBLIC SERVICE COMMISSION, | ) | |
| Respondent. | ) | |

FINAL ORDER

This case was scheduled and heard on July 6, 1993. The hearing considered challenges to Rule 25-22.056(1)(a) and (b), 25-22.056(4) and 25-22.058, Florida Administrative Code, brought pursuant to authority set forth in Sections 120.54, 120.56 and 120.535, Florida Statutes. The hearing was held at the Offices of the Division of Administrative Hearings in Tallahassee, Florida, and the Hearing Officer was Charles C. Adams.

APPEARANCES

For Petitioner: Ross Stafford Burnaman, Esquire
Legal Environmental Assistance Foundation
1115 North Gadsden Street
Tallahassee, Florida 32303

For Respondent: Marsha E. Rule
Associate General Counsel
Florida Public Service Commission
106 East Gaines Street
Tallahassee, Florida 32399

STATEMENT OF ISSUES

The issues to be considered were framed through challenges to the aforementioned rules as alleged invalid exercises of delegated legislative authority, and if held to be invalid that the rules constitute agency statements that violate Section 120.535, Florida Statutes.

In particular Petitioner alleges that the rules are invalid exercises of delegated legislative authority for reason that:

1. The Respondent failed to publish notice of its decision to modify the challenged rules after they had been proposed.

2. Rules 25-22.056(1)(a) and (4)(b), Florida Administrative Code, deny parties the opportunity to file exceptions to any order or Hearing Officer's recommended order as allowed by Section 120.57(1)(b)4, Florida Statutes.

3. Rules 22-25.056(1)(a) and (4)(b), Florida Administrative Code, are invalid exercises of delegated legislative authority in that they modify and contravene Sections 120.53(1)(c), 120.57(1)(b)4 and 6 and 120.58(1)(e), Florida Statutes, and are arbitrary and capricious.

(a) Concerning Section 120.53(1)(c), Florida Statutes, the challenged rules are alleged to be other than "rules of procedure appropriate for the presentation of argument." It is asserted that the possibility exists that the failure to accept a finding of fact could be considered as a waiver of objection on appeal in the setting where the rules are not procedures appropriate for presentation of argument. Therefore, the rules are alleged to be inappropriate.

(b) It is alleged that the rules violate Section 120.57(1)(b)4, Florida Statutes, specifically in that the rules do not allow parties the opportunity to file exceptions in the instance where two or more Public Service Commissioners conduct the formal proceeding, contrary to the referenced statutory

provision which does not contain that limitation. Similarly, it is alleged that the rules violate Section 120.57(1)(b)6(e), Florida Statutes, by failing to provide the parties the opportunity to develop a record which includes exceptions, in that no opportunity to file exceptions is provided other than the instances where a hearing officer conducts the formal proceedings.

(c) It is alleged that Section 120.58(1)(e), Florida Statutes, is violated in that the challenged rules do not provide the parties the opportunity to file exceptions to the proposed order in those circumstances where a majority of those who are to render the final order have not heard the case or read the record, and where a decision adverse to a non-agency party is to be made, thus contravening the legal requirements set out in that statute.

4. It is alleged that there is no logical rationale for limiting the statutory opportunity to file exceptions according to the number of Public Service Commissioners conducting the formal hearing, when considering the aforementioned statutes.

5. It is alleged that Rule 25-22.056(1)(b), Florida Administrative Code, is vague in that it fails to establish adequate standards for agency decisions by not specifying what is meant by the right to file exceptions to a proposed order "within the time . . . designated by the hearing officer." Moreover, Rule 25-22.056(1)(b), Florida Administrative Code, when contrasted with Rule 25-22.056(4)(b), Florida Administrative

Code, is said to be inconsistent when describing the right to file exceptions to recommended orders.

6. Rule 25-22.058, Florida Administrative Code, is alleged to limit oral argument in formal proceedings to only those instances when the Respondent exercises discretion to grant oral argument in contravention of Section 120.58(1)(e), Florida Statutes, which is alleged to grant a mandatory right of oral argument in instances where a majority of those who are to render the decision have not heard the case or read the record and a decision adverse to a party other than the agency is contemplated by a proposed order.

## PRELIMINARY STATEMENT

On May 28, 1993, the rules case was filed with the Division of Administrative Hearings. The case was assigned to a hearing officer on June 4, 1993. The hearing was conducted on July 6, 1993.

Prior to hearing two separate requests for official recognition were made by Petitioner and granted through orders entered on June 9 and 21, 1993.

Petitioner made a motion for summary final order. Respondent responded to that motion and filed a cross-motion for summary final order which was opposed by the Petitioner in a response. Those motions for summary final order are addressed by the final order.

Respondent's motion to quash subpoena was made moot by arrangements made at hearing which spoke to the issues set forth in the motion.

Petitioner's Exhibits 2, 5, 6, 9, 10, and 11 through 20 were admitted at hearing. Petitioner's Exhibit 4 was admitted for the limited purpose of serving as an example of an agenda conference transcript before the Florida Public Service Commission. Petitioner's Exhibit 7 was identified as an exhibit, should drafts of the final order in Commission Docket No. 920520-EQ be found. No exhibit under that number was admitted based upon the representation by Respondent that those drafts no longer existed. Petitioner's Exhibit 8 was withdrawn. Petitioner's Exhibit 3 was offered and ruling reserved on its admission. Upon consideration of the argument in favor of and in opposition to that exhibit, Petitioner's Exhibit 3 is admitted. Petitioner's Exhibit 1 was denied admission.

Respondent's Exhibits 1 and 2 were admitted. Subsequent to the hearing Respondent moved to withdraw its Exhibits 9 and 10. That motion was opposed. Upon consideration the motion to withdraw is granted.

Petitioner did not present witnesses. Respondent presented Michael A. Palecki as a witness.

The parties entered into certain factual stipulations as set forth in the transcript of proceedings.

The parties submitted proposed final orders which have been reviewed. The fact finding set forth in those proposed final orders is addressed in an appendix to the final order.

## FINDINGS OF FACT

### Rules Adoption

1. On October 18, 1992, Respondent published notice of intent to adopt Rule 25-22.021, Florida Administrative Code, entitled Agenda Conference Participation. The publication was made in the Florida Administrative Weekly. On that same date, in the Florida Administrative Weekly, Respondent published notice of its intent to amend Rule 25-22.056, Florida Administrative Code, entitled Post Hearing Filings; to repeal Rule 25-22.057, Florida Administrative Code, entitled Recommended Order, Exceptions, Replies, Staff Recommendations; and to amend Rule 25-22.058, Florida Administrative Code, entitled Oral Argument.

2. On November 12, 1992, Petitioner submitted timely written comments to the Respondent regarding the rule proposals. In these comments Petitioner expressed an interest in the right to file exceptions to opposing parties' proposed findings of fact and to file exceptions to Respondent's staff advisory memoranda provided to Commissioners.

3. On February 16, 1993, Respondent considered the published rules and public comments and voted to adopt the rules with changes.

4. On March 3, 1993, Respondent filed with the Secretary of State a certification of the adopted rule, rule amendments and rule repeal previously described.

5. On March 4, 1993, Respondent issued an order memorializing the adoption process. That order was No. PSC-93-

0337-FOF-OT, Notice of Adoption of Rule. This document set forth that the Respondent had adopted Rules 25-22.021 and 25-22.056, Florida Administrative Code, with changes; that Rule 25-22.058, Florida Administrative Code, was adopted without change and that Rule 25-22.057, Florida Administrative Code, was repealed.

6. Respondent did not publish additional notice in the Florida Administrative Weekly of the decision to change Rule 25-22.056, Florida Administrative Code.

The Parties

7. Petitioner is a public interest environmental law firm with an office in Tallahassee, Florida. It is a corporation authorized to do business in the state of Florida. Petitioner has been a party to Respondent's formal administrative proceedings and is presently a party to such proceedings. In the past, Petitioner has filed post-hearing pleadings following formal administrative proceedings conducted by Respondent.

8. Respondent holds hearings pursuant to Section 120.57, Florida Statutes, and prepares orders in accordance with that provision. The Florida Public Service Commission has five members.

9. The Chairman of the Florida Public Service Commission has the responsibility to assign cases for hearing. See Sections 350.01 and 350.125, Florida Statutes. The assignment of formal proceedings is to an individual Public Service Commissione; a hearing officer with the Division of Administrative Hearings upon referral to the Division of Administrative Hearings; and panels

constituted of two or more Commissioners. See also Rule 25-22.0355, Florida Administrative Code.

10. Upon Petition in accordance with Section 350.01(6), Florida Statutes, and by decision made by a majority of the commissioners some proceedings may be assigned to the full Florida Public Service Commission for consideration.

11. Commissioners who have been assigned to a proceeding act in a quasi-judicial capacity and are called upon to find facts as well as determine applicable law and are charged with making the ultimate decision in that proceeding.

12. Commissioners vote on the issues considered in the cases presented. The voting occurs at a public agenda conference. A vote sheet is maintained.

13. Legal staff assist the Commission in preparing the final order than memorializes that vote. There are no preliminary drafts or recommended orders (proposed orders) circulated to the parties unless the hearing was conducted by a single Commissioner serving as a hearing officer. Dissents from the majority vote in proceedings conducted by panels of Commissioners may or may not be reflected through a written dissenting opinion shown at the end of the final order.

14. The final order discusses issues, makes fact finding and draws legal conclusions, and also makes ruling on proposed findings of fact submitted by the parties. There is no requirement for review or signature on the final order by persons assigned to the proceedings. The final order is issued by the

Director of the Division of Records and Reporting or a person supervised by that individual.

15. Opportunity is not presented to file exceptions to the staff advisory recommendations or to final orders of the Commission. Exceptions may be filed to proposed or recommended orders drawn by a single Commissioner sitting as a hearing officer or directed to recommended orders issued by a hearing officer from the Division of Administrative Hearings.

16. Commissioners assigned to a proceeding receive copies of post-hearing submissions.

17. In cases which are heard by two or more Commissioners, a recommended order (proposed order) is not prepared. Instead, in each case the Commissioners have available a staff memorandum concerning the issues in the proceeding for use at the agenda conference where a decision is reached in the case. That decision is rendered as a written final order.

18. Advisory memoranda presented to assigned Commissioners in the various proceedings include discussions of issues found in prehearing orders, statements by each party concerning their position on those issues, staff recommendations as to resolution of issues, and an analysis of evidence and argument presented in the hearings and in the post-hearing filings, with citations to hearing testimony and reference to hearing exhibits. At times the advisory memoranda may include more than one recommended disposition on issues if the staff members do not concur as to the appropriate recommendation. Staff members may not prepare an advisory memorandum if they have testified in the proceeding.

19. The advisory staff memoranda are not controlling when the assigned Commissioners deliberate cases.

20. Commissioners who have been assigned to a case have heard the testimony and had the opportunity to review prefiled testimony, the hearing transcripts, transcripts of any argument that was permitted, the briefs of the parties and any proposed findings of fact and conclusions of law, as well as any statement of position of the parties and the staff advisory memorandum before deciding a case.

21. The format for final orders is described in Rule 25-22.059, Florida Administrative Code.

22. After a final order has been entered an adversely affected party may request reconsideration of the final order or take appeal to the appropriate court. See Rule 25-22.060, Florida Administrative Code. A motion for reconsideration addresses the substance in the final order, whereas, corrections which deal with scrivener's errors are made by informal contact through correspondence directed to the Florida Public Service Commission. A motion for reconsideration need not be correctly styled to be considered. Motions for reconsideration are voted upon by the Commissioners assigned to the proceeding.

23. Separate written advisory memoranda are prepared directed to the disposition of motions for reconsideration. The motion is voted upon by the Commissioners assigned to the proceeding. The order directed to the motion for reconsideration is drafted by the legal staff for the Commission. The vote by

the individual Commissioners assigned to the proceeding in deciding whether to reconsider is memorialized in a manner similar to the vote on the final order decision previously reached.

The Subject Rules

24. Rule 25-22.056(1)(a), Florida Administrative Code, describes the post-hearing opportunities for parties to a proceeding where two or more Commissioners or the full Commission conducts a hearing pursuant to Section 120.57, Florida Statutes. By contrast Rule 25-22.056(1)(b), Florida Administrative Code, describes the opportunities for post hearing submissions following a hearing conducted pursuant to Section 120.57, Florida Statutes, in which a single Commissioner sits as a hearing officer.

25. Rule 25-22.056(4)(b), Florida Administrative Code, describes the opportunity for excepting to the proposed order of a single Commissioner sitting as a hearing officer or the recommended order in cases heard before a Hearing Officer employed by and assigned by the Division of Administrative Hearings.

26. Rule 25-22.058, Florida Administrative Code, describes opportunities for oral argument before the Florida Public Service Commission associated with Section 120.57, Florida Statutes, formal hearings.

## CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over this case pursuant to Sections 120.54, 120.56 and 120.57, Florida Statutes.

28. Petitioner is substantially affected by the challenged rules and has standing to bring the rule challenge. See Section 120.56(1), Florida Statutes.

29. In accordance with Section 120.52(8), Florida Statutes, the burden of proving its claims resides with Petitioner when attempting to demonstrate that the challenged rules constitute an invalid exercise of delegated legislative authority and if invalid that the policy statement envisioned by the subject rules violates Section 120.535, Florida Statutes. See also Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1979) and Adam Smith Enterprises v. Department of Environmental Regulation, 555 So.2d 1260 (Fla. 1st DCA 1990).

30. Wide discretion is afforded an agency in exercising lawful rule making which is clearly conferred or fairly implied and coincides with an agency's general duties set forth in statutes. Department of Professional Regulation v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984).

31. Petitioner has failed to prove that the rules under consideration are an invalid exercise of delegated legislative authority.

32. The term "invalid exercise of delegated legislative authority" is defined at Section 120.52(8), Florida Statutes, where it states:

"Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:

(a) The agency has materially failed to follow the applicable rule making procedure set forth in s. 120.54; and

(b) The agency has exceeded its grant of rule making authority, citation to which is required by s. 120.54(7); and

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or

(e) The rule is arbitrary or capricious.

33. None of the deficiencies described exist when considering the rules in question. Therefore, the rules are not invalid exercises of delegated legislative authority.

34. In particular, Petitioner has argued that Section 120.54(13)(b), Florida Statutes, requires an agency to publish additional notice of any changes that are made to rules after they have been proposed. Section 120.54(13)(b), Florida Statutes, states:

After the notice required in subsection (1) and prior to adoption, the agency may withdraw the rule in whole or in part or may make such changes in the rule as are supported by the record of public hearings held on the rule, technical changes which do not affect the substance of the rule, changes in response to written material relating to the rule received

> by the agency within 21 days after the notice and made a part of the record of the proceeding, or changes in response to a proposed objection by the committee. 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. 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 and shall notify the Department of State if the rule is required to be filed with the Department of State. After a rule has become effective, it may be repealed or amended only through regular rulemaking procedures.

35. That section identifies activities in rule making that transpire after notice has been given that an agency intends to adopt a rule. Before the adoption occurs the agency may withdraw the rule, in whole or in part. It may make changes to the rule supported by the record of public hearings held on the rule. It may make technical changes which do not affect the substance of the rule. It may make changes in response to written material relating to the rule that have been received by the agency within 21 days after the notice of intended agency action to adopt a rule, which written material has been made part of the record of the proceeding in the rule adoption process. It may make changes in response to the proposed objection of the Joint Administrative Procedures Committee. However, after the adoption has taken place and before the effective date of the rule, there is a limited opportunity to modify or withdraw the rule. That opportunity is associated with response by the agency to an

objection by the Joint Administrative Procedures Committee or on the occasion of modifying the rule to extend the date upon which the rule becomes effective by not more than 60 days where the Joint Administrative Procedures Committee has notified the agency that an objection to the rule is under consideration. No other opportunities are presented to modify or withdraw the rule after adoption and before the effective date. Should the agency withdraw or modify a rule at the instigation of the Joint Administrative Procedures Committee after adoption and before the effective date, the agency must give notice of the decision to withdraw or modify the rule in the first available issue of the Florida Administrative Weekly where the agency had published the initial notice of rule making and the agency shall also notify the Department of State if the rule is required to be filed with the Department of State.

36. A second notice of decision is not required concerning changes to a rule that have been brought about after the notice set forth in Section 120.54(1), Florida Statutes, and prior to adoption, that have been described in the initial language within Section 120.54(13)(b), Florida Statutes. It is that category of change, after the notice and prior to adoption, which Petitioner contends must be noticed in the first available issue of the Florida Administrative Weekly following the agency decision to make such a change. That requirement is not incumbent upon Respondent in that the changes here were within the categories of changes contemplated to be made after the notice required in

Section 120.54(1), Florida Statutes, and prior to rule adoption, as contrasted with modifications brought about in the category discussed in Section 120.54(13)(b), Florida Statutes, dealing with activities after adoption but before the effective date of the rule.

37. The decision in Department of Health and Rehabilitative Services v. Florida Medical Center, 578 So.2d 531 (Fla. 1st DCA 1991) does not promote a different conclusion of law. There the court criticized the agency for not allowing a meaningful point of entry to challenge a proposed rule prior to its adoption. The challenger there had been denied a reasonable point of entry because the agency had exceeded the authority granted to it by Section 120.54(13)(b), Florida Statutes, to change the proposed rule prior to adoption. Consequently the court concluded that the agency had to reinstitute the process of notice of proposed rule adoption to afford a meaningful point of entry for the challenger to contest changes which were not made in accordance with opportunities set forth in Section 120.54(13)(b), Florida Statutes.

38. This Petitioner has not claimed that the Respondent exceeded the opportunities described in Section 120.54(13)(b), Florida Statutes, for changing the proposed rule prior to adoption. Rather, Petitioner urges that the court case creates the requirement for further notice when any change is brought about prior to adoption. That argument unreasonably expands the court holding and is rejected. In summary, Petitioner has failed

to show that the Respondent has exceeded the opportunity for changing the subject rules prior to adoption as described in Section 120.54(13)(b), Florida Statutes. Absent such showing the cited case has no application.

39. Section 350.01, Florida Statutes, in its relevant parts describes the membership of the Florida Public Service Commission and its duties, to include conduct of proceedings held before the Commission where it states:

> (1) The Florida Public Service Commission shall consist of five commissioners appointed pursuant to s. 350.031.
>
> * * *
>
> (4) One member of the commission shall be elected by majority vote to serve as chairman for a term of 2 years. . . .
>
> (5) The primary duty of the chairman is to serve as chief administrative officer of the commission; however, the chairman may participate in any proceedings pending before the commission when administrative duties and time permit. In order to distribute the workload and expedite the commission's calendar, the chairman, in addition to other administrative duties, has authority to assign the various proceedings pending before the commission requiring hearings to two or more commissioners or to the commission's office of hearing examiners under the supervision of the office of general counsel. Only those commissioners assigned to a proceeding requiring hearings are entitled to participate in the final decision of the commission as to that proceeding; provided, if only two commissioners are assigned to a proceeding requiring hearings and cannot agree on a final decision, the chairman shall cast the deciding vote for the final disposition of the proceeding. If more than two commissioners are assigned to any proceeding, a majority of the members assigned shall constitute a quorum and a majority vote of the members assigned shall be essential to final

commission disposition of those proceedings requiring actual participation by the commissioners. If a commissioner becomes unavailable after assignment to a particular proceeding, the chairman shall assign a substitute commissioner. In those proceedings assigned to a hearing examiner, following the conclusion of the hearings, the designated hearing examiner is responsible for preparing recommendations for final disposition by a majority vote of the commission. A petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding.

(6) A majority of the commissioners may determine that the full commission shall sit in any proceeding. The public counsel or a person regulated by the Public Service Commission and substantially affected by the proceeding may file a petition that the proceeding be assigned to the full commission. Within 15 days of receipt by the commission of any petition or application, the full commission shall dispose of such petition by majority vote and render a written decision thereon prior to assignment of less than the full commission to a proceeding. . . .

(7) This section does not prohibit a commissioner, designated by the chairman, from conducting a hearing as provided under s. 120.57(1) or s. 350.631, and the rules of the commission adopted pursuant thereto.

40. A companion reference is made to hearings conducted by hearing officers with the Division of Administrative Hearings. That reference is Section 350.125 Florida Statutes, which states:

> Any provision of law to the contrary notwithstanding, the commission shall utilize hearing officers of the Division of Administrative Hearings of the Department of Administration to conduct hearings of the commission not assigned to members of the commission.

41. Section 350.01, Florida Statutes, creates the opportunity for the Commission to conduct proceedings as the full

Commission or through two or more Commissioners acting in lieu of the full Commission. When two or more Commissioners, but not the full Commission, serve as the Commission in a proceeding requiring hearings, only those Commissioners assigned participate in the final decision to resolve the matter. In that setting the outcome constitutes the Commission's choice concerning that proceeding, not a recommendation for disposition. In a case assigned to two Commissioners who cannot agree on the disposition the Chairman casts the deciding vote for disposition in the proceeding. There the two members assigned to the proceeding have heard the case and are expected to render the final order together with the third voting member, the Chairman. In instances where more than two commissioners are assigned to the proceeding, there must be a majority of the members assigned to form a quorum before action may be taken in the case and a majority of all members assigned to a panel consisting of three or more persons is essential before final disposition is made in the proceeding.

42. Rule 25-21.005, Florida Administrative Code, further defines a quorum where it states:

> A majority of any Commission panel constitutes a quorum and the Commission cannot take formal action in the absence of a quorum. A majority vote of the quorum is essential to Commission action, and where only two commissioners are assigned to a proceeding and they do not agree on a final decision, the chairman of the Commission shall cast the deciding vote. Where the chairman is one of a two-member panel and the panel does not agree on a final decision, the matter shall be referred to the full Commission for disposition. In such an event the full Commission shall review the record as provided in Section 120.57(1)(b)9.

43. Rule 25-22.0355, Florida Administrative Code, specifically describes the assignment of formal hearings where it states:

> (1) Formal Proceedings may be assigned by the Chairman to panels of two, three or five Commissioners or to a DOAH Hearing Officer or individual Commissioner for hearings as provided in Section 350.01, Florida Statutes.
>
> (a) The assignment of proceedings shall be accomplished at the earliest practicable time but no later than 45 days after a case is docketed in any event.
>
> (b) Assignment of cases to panels of two or three Commissioners shall be done randomly, unless the Chairman determines otherwise for good cause shown in a particular case.
>
> (c) If a Commissioner becomes unavailable after assignment, he shall notify the Chairman, who shall make another assignment as soon as practicable.
>
> (2) When a case is assigned for hearing to a panel of Commissioners, the hearing and deciding panels shall be identical. If a case is assigned to a DOAH Hearing Officer or individual Commissioner for a hearing, the case shall be assigned to the full Commission for decision.
>
> (3) If a proceeding is assigned for hearing to a panel of two or three Commissioners or to a DOAH Hearing Officer or individual Commissioner, upon motion of a Commissioner or upon petition of those persons described in 350.01(7), a majority of the Commission shall decide that the full Commission shall hear such a case.
>
> (4) Petitions seeking to have the full Commission sit in a particular case may be filed as authorized by Section 350.01(7).
>
> (a) Applicants, petitioners or eligible parties filing a pleading who desire a hearing before the full Commission shall so specify in their initial pleading.
>
> (b) Other persons eligible to make such a request shall do so within 15 days of notice of filing of the application or petition, or

rendition of an order suspending proposed rates or of an order initiating a proceeding, whichever occurs first. In each case, these petitions/requests shall be disposed of by a majority of the Commission. Failure to file pleadings timely, and in the manner specified herein, may be considered just cause for denial of such pleadings.

(5) In cases filed pursuant to the provisions of Subsections 365.05(4), 366.06(3), or 367.081(6), the initial decision whether to suspend all or part of the rates as filed shall be made by the full Commission, since whether a hearing will be required cannot be determined until that decision is made.

(6) Assignment of a proceeding to a panel does not preclude delegation of prehearing conferences or similar procedural matters to a single member of the panel.

44. Final orders by the Commission are described in Rule 25-22.059, Florida Administrative Code, where it states:

(1) If a hearing is conducted by the Commission, a final order shall be entered within ninety (90) days after the hearing or receipt of the hearing transcript, whichever is later. The final order shall include a caption, time and place of the hearing, appearances entered at the hearing, statement of the issues, findings of fact, conclusions of law, and statement of final Commission action.

(2) If the final hearing has been conducted by other than the Commission, the Commission shall issue its final order within ninety (90) days of receipt of the recommended order. The recommended order shall be considered at a public meeting. This proceeding shall not be a de novo review, but shall be confined to the record submitted to the Commission together with the recommended order.

(3) If a party files exceptions to a recommended order or submits proposed findings of fact to the Commission, the final order shall include an explicit ruling on each exception and

each proposed finding of fact; provided however, the Commission will not rule upon proposed findings of fact unless submitted in conformance with Rule 25-22.056(2). The Commission is not required to make explicit rulings on subordinate, cumulative, immaterial or unnecessary proposed facts, and such proposed facts may be rejected in the final order by a statement that they are irrelevant or immaterial, or that competent substantial evidence supports the presiding officer's findings of facts which were contrary to those filed in the exceptions.

45. The process of moving for reconsideration is set out in Rule 25-22.060, Florida Administrative Code, where it states:

(1) Scope and General Provisions.

(a) Any party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order. The Commission will not entertain any motion for reconsideration of any order which disposes of a motion for reconsideration. The Commission will not entertain a motion for reconsideration of a Notice of Proposed Agency Action issued pursuant to Rule 25-22.029, regardless of the form of the Notice and regardless of whether or not the proposed action has become effective under Rule 25-22.029(6).

(b) A party may file a response to a motion for reconsideration and may file a cross motion for reconsideration. A party may file a response to a cross motion for reconsideration.

(c) A final order shall not be deemed rendered for the purpose of judicial review until the Commission disposes of any motion and cross motion for reconsideration of that order, but this provision does not serve automatically to stay the effectiveness of any such final order. The time period for filing a motion for reconsideration is not tolled by the filing of any other motion for reconsideration.

(d) Failure to file a timely motion for reconsideration, cross motion for reconsideration, or response, shall constitute waiver of the right to do so.

(e) A motion for reconsideration of an order adopting, repealing, or amending a rule shall be treated by the Commission as a petition to adopt, repeal, or amend a rule under S. 120.54(5), F.S., and Rule 25-22.012.

(f) Oral argument on any pleading filed under this rule shall be granted solely at the discretion of the Commission. A party who fails to file a written response to a point on reconsideration is precluded from responding to that point during the oral argument.

(2) Contents. Any motion or response filed pursuant to this rule shall contain a concise statement of the grounds for reconsideration, and the signature of counsel, if any.

(3) Time.

(a) A motion for reconsideration of a final order shall be filed within fifteen (15) days after issuance of the order.

(b) A motion for reconsideration of a nonfinal order may be filed at any time prior to the issuance of a final order. However, except for good cause shown, unless the motion is filed within fifteen (15) days after the issuance of the non-final order, the Commission may rule upon that motion in its final order.

(c) A response to a motion for reconsideration or a cross motion for reconsideration shall be served within seven (7) days of service of the motion for reconsideration to which the response or cross motion is directed. A response to a cross motion for reconsideration shall be served within seven (7) days of service of the cross motion.

46. In the context of Sections 350.01 and 350.125, Florida Statutes, and the other rules previously described, Respondent has promulgated the rules at issue here.

47. Rule 25-22.056(1)(a) and (b), Florida Administrative Code, states:

(1) General Provisions.

(a) If a hearing under section 120.57, F.S., is conducted by a panel of two or more Commissioners or the full Commission, all parties may submit proposed findings of fact, conclusions of law, and recommended orders, or legal briefs on the issues within a time designated by the presiding officer.

(b) If a hearing under section 120.57, F.S., is conducted by a Commissioner sitting as a hearing officer, all parties may submit proposed findings of fact, conclusions of law, proposed recommended orders, which shall include a statement of the issues, and exceptions, within the time and in the format designated by the hearing officer.

48. Rule 25-22.056(4)(b), Florida Administrative Code, states:

(4) Post-Hearing Filings When Hearing is Conducted by a Hearing Officer. If a hearing under section 120.57, F.S., is held before a Commissioner sitting as a hearing officer, the following provisions shall apply in addition to (1)(b) through (3) of this rule. Subsection (b) of the following provisions also applies when the hearing has been conducted by the Division of Administrative Hearings.

* * *

(b) Exceptions. Parties and staff may file exceptions to the recommended or proposed order with the Division of Records and Reporting within 14 days of service of the recommended order, and shall serve copies of any such exceptions upon all parties of record and staff. Such exceptions shall fully set forth the error claimed and the basis in law and fact therefore, with exceptions to findings of fact supported by citations to the record. A party's failure to serve or file timely written exceptions shall constitute a waiver of any objections to the recommended order.

49. Rule 25-22.058, Florida Administrative Code, states:

25-22.058 Oral Argument.

(1) The Commission may grant oral argument upon request of any party to a section 120.57, F.S. formal hearing. A request for oral argument shall be contained on a separate document and must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. Failure to file a timely request for oral argument shall constitute waiver thereof.

(2) If granted, oral argument shall be conducted at a time and place determined by the Commission. Unless otherwise specified in the notice, oral argument shall be limited to 15 minutes to each party. The staff attorney may participate in oral argument.

(3) Requests for oral argument on recommended orders and exceptions pursuant to section 120.58(1)(e), F.S., must be filed no later than 10 days after exceptions are filed.

50. By the enactment of the questioned rules Respondent has acted in accordance with Section 120.53(1)(c), Florida Statutes, which commands the Respondent to: "adopt rules of procedure appropriate for the presentation of arguments concerning issues of law or policy, and for the presentation of evidence on any pertinent fact that may be in dispute."

Section 28-5.201(1)(b)4. and 6., Florida Administrative Code, states:

(1) FORMAL PROCEEDINGS. --

(b) In any case to which this subsection is applicable, the following procedures apply:

* * *

4. All parties shall have the opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, submit proposed

findings of fact and orders, to file exceptions to any order or hearing officer's recommended order and to be represented by council. When appropriate, the general public may be given an opportunity to present oral and written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebutted.

* * *

6. The record in a case governed by this subsection shall consist only of:

a. All notices, pleadings, motions, and intermediate ruling;

b. Evidence received or considered;

c. A statement of matters officially recognized;

d. Questions and proffers of proof in objections and rulings thereon;

e. Proposed findings and exceptions;

f. Any decision, opinion, proposed or recommended order, or report by the officer presiding at the hearing;

g. All staff memoranda or data submitted to the hearing officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records;

h. All matters placed on the record after an ex parte communication pursuant to s. 120.66(2); and

i. The official transcript.

52. The rules under consideration here do not contravene Section 120.57(1)(b)4 and 6, Florida Statutes, especially as it pertains to the right to file exceptions. This conclusion is reached in recognition that the Commission may act through two or

more Commissioners in performing its duties and when doing so issues a final order in the person of the Commissioners responsible for conducting the proceeding and those Commissioners assigned are synonymous with the Commission as a governmental entity authorized to exercise final order authority. When two or more Commissioners serve there are no orders or recommended orders from which the parties may file exception to a reviewing agency which has final order authority. The rules that discuss proceedings conducted by individual Commissioners and hearing officers from the Division of Administrative Hearings allow exceptions to be filed.

53. Section 120.58(1)(e), Florida Statutes, states:

> If a majority of those who are to render final order have not heard the case or read the record, a decision adverse to a party other than the agency itself shall not be made until a proposed order is served upon the parties and they are given an opportunity to file exceptions and present briefs and oral arguments to those who are to render the decision. The proposed orders shall contain necessary findings of fact and conclusions of law and a reference to the source of each. The proposed orders shall be prepared by the individual who conducted the hearing, if available, or by one who has read the record. The parties by written stipulation may waive compliance with this paragraph. The provisions of this paragraph do not apply in the granting of parole or preliminary hearings for the revocation of parole.

54. Under the circumstances contemplated by Section 350.01, Florida Statutes, and as carried forward in the subject rules, in instances where two or more Commissioners conduct proceedings and are responsible for entering the final order, a majority of those

Commissioners assigned have either heard the case or read the record before rendering the final order. Therefore, there is no requirement for serving a proposed order upon the parties and the parties are not afforded an opportunity to file exceptions to a proposed order. Again, the rules that discuss proceedings conducted by individual Commissioners and hearing officers from the Division of Administrative Hearings allow exceptions to be filed. The subject rules do not contravene Section 120.58(1)(e), Florida Statutes.

55. The rules in questions are rational, thus they are not arbitrary and capricious.

56. An agency is not obligated to follow Rule 28-5.404, Florida Administrative Code, in setting a deadline for filing exceptions to a recommended order. The time limit in that rule is twenty days from date of service of the recommended order. In this case Rule 25-22.056(1)(b), Florida Administrative Code, grants to the hearing officer, who is a member of the Commission, in a case not considered by the Commission, the opportunity to establish the deadline for submitting exceptions. That speaks to proposed recommended orders prepared by a single Commissioner serving as a hearing officer. The term proposed recommended order in Rule 25-22.056(1)(b), Florida Administrative Code, is synonymous with the term proposed order as set forth in Section 120.58(1)(e), Florida Statutes.

57. Rule 25-22.056(4)(b), Florida Administrative Code, related to the right to file exceptions in the instances where a

single Commissioner serves as Hearing Officer uses the term proposed order and that terminology is consistent with Section 120.58(1)(e), Florida Statutes.

58. The description within Rule 25-22.056(4)(b), Florida Administrative Code, that describes a recommended order refers to cases in which a hearing officer from the Division of Administrative Hearings has conducted a formal hearing.

59. There are no inconsistencies within Rule 25-22.056 (1)(b), Florida Administrative Code, and Rule 25-22.056(4)(b), Florida Administrative Code, pertaining to time for filing exceptions to recommended orders, as alleged. There is a difference between those rules as it pertains to proposed orders entered by a single Commissioner. The first rule describes the exceptions being filed at a time designated by the Commission hearing officer and the latter rule describes filing of exceptions within 14 days of service of the proposed order. Contrary to the contention by Respondent in arguing this case, Rule 25-22.056(4)(b), Florida Administrative Code, does pertain to proposed orders by a single Commissioner. Subsection (b) to the overall Rule 25-22.056(4), Florida Administrative Code, applies to a single Commissioner and also to a hearing officer from the Division of Administrative Hearings. Nonetheless, the two provisions discussing the filing deadline for offering exceptions to a proposed order prepared by a single Commissioner may be reconciled because the latter provision is read to apply on the occasion where the Commissioner serving as a hearing

officer did not designate a deadline for filing exceptions prior to entering his or her proposed order.

60. Rule 25-22.058(1) and (2), Florida Administrative Code, relates to oral argument before two or more Commissioners serving as the Commission. As stated before in that setting a majority of the Commissioners have heard the case or read the record, and the opportunity for oral argument contemplated by Section 120.58(1)(e), Florida Statutes, in not mandated. Therefore, Rule 25-22.058(1) and (2), Florida Administrative Code, does not contravene Section 120.58(1)(e), Florida Statutes.

61. Rule 25-22.058(3), Florida Administrative Code, addresses opportunities where a single Commissioner or a hearing officer from the Division of Administrative Hearings conducted a hearing. Respondent must comply with Section 120.58(1)(e), Florida Statutes, in that instance to include providing an opportunity for oral argument prior to the entry of a final order by the Commission, assuming the request for oral argument was timely made. Rule 25-22.058(3), Florida Administrative Code, guarantees that right to request oral argument. It does not reserve discretion to the Commission in responding to the request, and it must be presumed the Commission will act consistent with existing law. Rule 25-22.058(3), Florida Administrative Code, does not contravene Section 120.58(1)(e), Florida Statutes.

62. The advisory memoranda prepared by Commission staff who do not testify at hearing are not documents which constitute

proposed orders or recommended orders. They are contemplated by and consistent with Section 120.66(1)(b), Florida Statutes. The advisory memoranda are not matters about which exception may be taken.

63. It is not necessary to consider the alleged violation of Section 120.535, Florida Statutes, in that the subject rules under challenge have been upheld.

ORDER

Based upon the facts found and the conclusions of law reached, it is,

ORDERED:

That the petition to determine the invalidity of Rules 25-22.056(1)(a) and (b), Florida Administrative Code, Rule 25-22.056(4)(b), Florida Administrative Code, and Rule 25-22.058, Florida Administrative Code, is denied and the case dismissed both as to challenges pursuant to Section 120.54 and Section 120.56, Florida Statutes, and the request for Section 120.535, Florida Statutes, hearing.

DONE and ORDERED this 27TH day of August, 1993, in Tallahassee, Florida.

CHARLES C. ADAMS, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings

this 27th day of August, 1993.

APPENDIX CASE NO. 93-2956RX

The following discussion is given concerning the proposed facts submitted by the parties:

Petitioner's Facts:

Paragraphs 1 through 11 are subordinate to facts found.

Paragraphs 12 through 14 constitute legal argument.

Paragraph 15 is subordinate to facts found.

Paragraphs 16 through 18 are not necessary to the resolution of the dispute.

Paragraph 19 is subordinate to facts found.

Paragraph 20 is not necessary to the resolution of the dispute.

Paragraphs 21 and 22 are subordinate to facts found.

Paragraph 23 is in keeping with Section 350.01(5), Florida Statutes, but is not necessary to the resolution of the dispute.

Paragraphs 24 and 25 are subordinate to facts found.

Paragraphs 26 through 28 are not necessary to the resolution of the dispute.

Respondent's Facts:

Paragraphs 1 through 13 are subordinate to facts found.

Paragraphs 14 through 20 are not necessary to the resolution of the dispute.

Paragraphs 22 through 24 are not necessary to the resolution of the dispute with the exception of the reference to receipt of copies of post-hearing submissions by Commissioners assigned to the proceeding. That reference is subordinate to facts found.

Paragraphs 25 through 28 are subordinate to facts found.

Paragraph 29 is not necessary to the resolution of the dispute.

Paragraphs 30 and 31 are subordinate to facts found.

Paragraph 32 is not necessary to the resolution of the dispute.

Paragraphs 33 through 46 are subordinate to facts found.

Copies furnished:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.