

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Proposed amendments to Rule 25-4.002, F.A.C., Application and Scope; 25-4.141, Minimum Filing Requirements for Rate of Return Regulated Local Exchange Companies; Commission Designee; 25-4.202, Construction and Waivers; 25-24.555, Scope and Waiver; 25-6.002, Application and Scope; 25-6.043, Investor-Owned Electric Utility Minimum Filing Requirements; Commission Designee; 25-6.043.8, Non-Firm Electric Service - Terms and Conditions; 25-17.087, Interconnection and Standards; 25-30.010, Rules for General Application; 25-30.011, Application and Scope 25-30.436, General Information and Instructions Required of Class A and B Water and Wastewater Utilities in an Application for Rate Increase; 25-30.450, Burden of Proof and Audit Provisions; 25-30.455, Staff Assistance in Rate Cases; 25-30.456, Staff Assistance in Alternative Rate Setting; 25-30.570, Imputation of Contributions-in-Aid-of-Construction; and 25-30.580, Guidelines for Designing Service Availability.

DOCKET NO. 980569-PU

BEFORE: CHAIRMAN JULIA A. JOHNSON
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER JOE GARCIA
COMMISSIONER E. LEON JACOBS, JR.

PROCEEDING: AGENDA CONFERENCE

ITEM NUMBER: 5**

DATE: Tuesday, December 15, 1998

PLACE: Betty Easley Conference Center
4075 Esplanade Way
Room 148
Tallahassee, Florida

ENCLOSURE 1-7-98

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DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

APPEARANCES:

MATTHEW M. CHILDS, representing Florida Power & Light Company.

STAFF RECOMMENDATIONS

Issue 1: Should the Commission repeal Rules 25-4.141(4), 25-4.202(3), 25-24.555(4) and (5), 25-6.002(2) and (4), 25-6.043(3), 25-6.0438(9), 25-17.087(2), 25-30.011(2) and (4), 25-30.436(6), 25-30.455(11), 25-30.456(11), 25-30.570(2), 25-30.580(2), F.A.C., the individual provisions for rule variances and waivers; amend Rule 25-30.010 to delete the general provision for exceptions; amend 25-30.450, to delete the general provision for a waiver of the rule; and amend other provisions of these rules to update cross references?

Recommendation: Yes.

Issue 2: If no requests for hearing or comments are filed, should the rule as proposed be filed for adoption with the Secretary of State and the docket closed?

Recommendation: Yes.

P R O C E E D I N G S

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CHAIRMAN JOHNSON: Item 5.

MS. MOORE: Commissioners, Item 5 is a proposal to repeal numerous rule provisions for waivers of our rules pursuant to Section 120.536 of the Statutes.

The Commission, last year, sent a list to the Joint Administrative Procedures Committee, submitting the rules that we have reviewed and the Commission approved at Internal Affairs as rules that we no longer had authority for and should be repealed.

The ones in this docket are ones that we didn't ask for or get separate statutory authority for. The other rules on the list are water and wastewater rules and our purchasing rules, we did get statutory authority for.

Rule waivers and variances are now covered by Section 120.542 of the Statutes and uniform rules adopted thereunder. We are required to -- by statute to begin proceedings to repeal these rules by January 1, 1999.

CHAIRMAN JOHNSON: Is that it?

MS. MOORE: Thank you.

CHAIRMAN JOHNSON: Okay. Any questions, Commissioners?

Are you here to speak to this item?

MR. CHILDS: Commissioners, my name is Matthew Childs. I'm appearing on behalf of Florida Power and

1 Light Company. I have a few comments on this proposal.
2 I understand that the Commission will very likely go
3 forward with the proceeding to consider the repeal of
4 these rules, but I want to urge that there be some
5 serious attention and caution as you go forward.

6 I respectfully disagree with the rationale that the
7 staff has presented in their recommendations. I realize
8 and accept that it's a complicated area; it's a new area,
9 because of the comprehensive revisions to the
10 Administrative Procedure Act in 1996. I don't intend to
11 argue that at length.

12 However, I would point out that the Commission, this
13 Commission, has broad authority. Unlike many agencies in
14 the state, it regulates a few comprehensively, rather
15 than a lot of individuals a little bit. It has
16 historically been recognized as having broad,
17 comprehensive powers to regulate in the public interest.

18 There was a theory that the revisions to 120,
19 Chapter 120 restricted the agency power to those
20 particular actions that have been expressly granted by
21 the Legislature. That's not how this Commission has
22 regulated ever. It has regulated broadly. Since the
23 amendment to the APA and since this Commission sent its
24 list to the Legislature of rules that may be beyond its
25 expressed authorized power, the First District Court of

1 Appeal has ruled in the Consolidated Tomoka (phonetic)
2 case. I'd like the Commission to consider the
3 implications of that, because that has a very different
4 view as to the authority of agencies. We are concerned
5 that this Commission has the broad power to regulate and
6 would be giving up its discretion to determine when it
7 might want to waive those rules. I think it would then
8 put the Commission also in the position that when it
9 adopts a rule that it's going to have this view, that it
10 can't waive the rule in the future except pursuant to the
11 provisions of Section 120.542. It will, I think, be much
12 more limited in the rules that it wants to adopt.

13 It's a serious matter. I think there is a
14 respectful disagreement. I don't read as the staff does,
15 for instance, that Section 120.542 is the exclusive
16 avenue for waiver. They have presented that as an
17 argument. I think the statute clearly says that it is an
18 avenue for waiver, but it also says it's intended to be
19 remedial. It is remedial to address the problems of
20 inflexibility. I think with the Consolidated Tomoka
21 decision, which says that agencies have the power to
22 adopt rules that are within the areas that it directly
23 regulates, that it certainly has the authority. This is
24 my argument, to waive its rules for cause shown.

25 Please pay attention to that as you go forward. And

1 I ask that you do that because I think it has a serious
2 impact on the authority of this Commission in the future.

3 Thank you.

4 CHAIRMAN JOHNSON: Thank you.

5 COMMISSIONER JACOBS: Do you think the Tomoka
6 decision pronounced a different standard of review than
7 set out -- than the original interpretation of the
8 statute that JAPC (phonetic) gave us?

9 MR. CHILDS: Yes.

10 COMMISSIONER JACOBS: And it will be as stated in
11 the case?

12 MR. CHILDS: It is stated in the case. And the --
13 you know, they stated expressly that the statute
14 delegates whether the -- the extent to which Section
15 120.58 -- 52, Subsection 8, restricts an agency's
16 rulemaking authority in general. I would point out that
17 that subsection has the same language as .536 that we're
18 referring to here. And they go through an extensive
19 discussion of that, where some had argued that agencies
20 could only adopt rules if there was an expressed
21 authorization for that rule adoption.

22 And, you know, I would point out, Commissioner, in
23 that area that one of the rules that would be repealed
24 here is in Chapter 25-6. This is the rules -- general
25 rules for customer relations, et cetera. Well, you know,

1 I don't find any of those rules in the Florida Statutes.
2 They are not there, because you regulate generally.

3 And I think Consolidated Tomoka says, "No, we don't
4 have to look to the specific expressed authorizations;
5 instead, we look more broadly." And I think the
6 administrative bar in Tallahassee was maybe somewhat
7 surprised by the decision in Consolidated Tomoka.

8 COMMISSIONER CLARK: Mr. Childs, what is the date of
9 that case?

10 MR. CHILDS: That case is -- the opinion was filed
11 July 29th, 1998.

12 COMMISSIONER CLARK: And it was interpreting the new
13 section?

14 MR. CHILDS: It was interpreting the revisions in
15 1996, and it was interpreting expressly Section 120.52,
16 Subsection 8, which had to do with the language about
17 whether a general grant of authority is sufficient or
18 whether it had to be a specific grant of authority to
19 adopt a rule.

20 MS. MOORE: Commissioner, from my -- it had to do
21 with the law implemented.

22 MR. CHILDS: Excuse me one moment. The citation,
23 just for information, the citation of that opinion is at
24 717 So.2d, Page 72.

25 COMMISSIONER CLARK: And it's your view that that --

1 well, give me your rationale again for cautioning the
2 Commission with respect to repealing these rules.

3 MR. CHILDS: Well, there are two grounds, as I
4 understand it that are presented by the staff. One is
5 that there is the more restrictive -- there are more
6 restrictions on your authority under Section 120.536 to
7 adopt rules. Now you have to have specific authorization
8 to adopt rules, and the argument is you don't have any
9 specific authorization to adopt a rule granting a waiver.
10 So, therefore, you lack authority. That's one argument.

11 The other argument is that a separate section,
12 Section 120.542 is now the exclusive avenue for rule
13 waivers and variances to be addressed. I don't see that
14 in the statute.

15 This is our argument. The argument is that the
16 statute itself expressly notes that it's supposed to be
17 remedial to address the problem when there was the blind
18 application of rule without regard to its impact.

19 I also think that the Consolidated Tomoka decision
20 affects that separate argument as well, because that
21 Consolidated Tomoka decision, in effect, says an agency
22 can have power. Well, if it can have the power without
23 there being an expressed authorization, I can't
24 understand how Section 120.542 can preempt or repeal that
25 power without doing so expressly. And there is no

1 express repeal or statement of preemption.

2 So the concern is, Commissioner, that the Commission
3 operates broadly and regulates broadly in the public
4 interest, and that it ought not to be restricted when it
5 adopts its rules to some separate method and avenue for
6 waiver. And I happen to think that there are lots of
7 problems with the model rules and how they apply and the
8 restrictions they place on agencies.

9 But what I'm asking and suggesting is that I think
10 there are some problems as to how this agency, the Public
11 Service Commission, operates and how other agencies do,
12 and that that should be reviewed. And if further action
13 needs to be taken, to urge that you do that.

14 COMMISSIONER DEASON: Mr. Childs, what would you
15 have us to do today? Are you asking for a change, or are
16 you just putting us basically on notice that you're going
17 to request a hearing on this particular matter?

18 MR. CHILDS: We will be requesting a hearing. I had
19 thought to say -- to urge you to not go forward with
20 rulemaking, you know. And I don't think that would be
21 the proper course, you know. Because I think that the
22 Commission has already taken the step of identifying
23 rules that it thinks it lacks the authority to do -- to
24 continue. And I believe it's important that you consider
25 -- you continue that process to evaluate them. But my

1 purpose here is to simply urge that as you go forward, to
2 please don't treat some comments that you may have about
3 the scope of your authority as being just a bother.
4 Because they are intended, really, to urge you to think
5 about the implication that they have on the authority of
6 this Commission.

7 CHAIRMAN JOHNSON: Any other questions? Staff?

8 COMMISSIONER GARCIA: We are going to go back and
9 discuss this anyway, right? And that's what we're doing
10 is going --

11 MS. MOORE: Apparently, if they are going to ask for
12 a hearing.

13 COMMISSIONER GARCIA: Right.

14 MS. MOORE: Or file comments.

15 COMMISSIONER GARCIA: With that said, I don't think
16 there's much we can do here today, so I'll just move
17 staff.

18 CHAIRMAN JOHNSON: Is there a second?

19 COMMISSIONER CLARK: I guess I was interested in
20 hearing the response.

21 I guess, Mr. Childs, my concern is that it does seem
22 that 120.542 is specific as to waivers. And as I read
23 the staff recommendation, that it's exclusive.

24 And while you may have general authority, as you
25 describe it, and Consolidated Tomoka affirms that, where

1 there is a specific legislative -- sort of an enactment
2 on the subject of waivers, that that takes it out of the
3 Consolidated Tomoka case.

4 MR. CHILDS: I don't think so, and there are several
5 reasons. One is that when this section was being
6 discussed, various agencies were -- were commenting that
7 they thought they lacked the power to grant a waiver.
8 And I would suggest to this Commission that by the very
9 rules that are identified here, that this Commission
10 never thought it lacked the power to grant a waiver or
11 variance from its rules. And that, therefore, a
12 principal purpose of the statute was, as it says in the
13 first sentence, "Strict application of uniformly
14 applicable rule requirements can redound reasonable,
15 unfair and unintended results in particular instances."
16 And I would take it that that's what this statute was
17 intended to address.

18 Also, Commissioner, in the last sentence of
19 Subsection 1, it states that, "This section is
20 supplemental to and does not abrogate the variance and
21 waiver provisions in any other statute." Now, I realize
22 it doesn't say "or rule," but my argument about the
23 Consolidated Tomoka is that if under that case it is
24 permissible for an agency to act on the basis of a more
25 general grant of authority, then certainly that action

1 can include a waiver. I mean, if you don't have the
2 authority to adopt the substantive rule without an
3 expressed grant, then you don't have the authority to
4 grant a waiver. I agree with that.

5 But what we're doing here is addressing repealing
6 the waiver provision of a rule without addressing the
7 expressed substantive grant. And I think they go
8 together. That this agency is -- for one, it's
9 different. It has always regulated broadly. It has not
10 regulated specifically where the Commission -- excuse me,
11 the Legislature would say, "You will grant a license
12 under these conditions." It regulates broadly in the
13 public interest.

14 COMMISSIONER DEASON: Mr. Childs, am I understanding
15 the basis of your argument simply to be that if we have
16 the authority to adopt a rule, we have the authority to
17 grant a waiver of that rule?

18 MR. CHILDS: I think you do. And as to -- and as to
19 the argument or the point that Commissioner Clark brought
20 up, you know, I look to the standards of Section 120.542,
21 and asked somewhat the rhetorical question. And say,
22 "Well, if I have a rule that is not expressly authorized
23 by statute, and I want a waiver of that rule, then I have
24 to go under the standard of the statute, under her
25 postulated approach." And I say, "How do I make a

1 statement, how do I make a showing that the underlying
2 purpose of the statute is fulfilled when there is no
3 expressed underlying purpose of the statute?" It's the
4 Commission that determined that under its general, broad
5 powers. Because there is no expressed statement in the
6 statute.

7 COMMISSIONER DEASON: Well, let me ask you this: If
8 an agency has the authority to adopt a rule; and,
9 therefore, you believe we should have the authority to
10 waive it, why did the Legislature -- what is the need for
11 120.542?

12 MR. CHILDS: Because most and many agencies thought
13 that they did not have the power to waive the rule, any
14 rule. And, secondly, there was a concern about the
15 separation of powers. Many of these agencies, or most of
16 these agencies, are part of the executive branch.
17 Therefore, there was a concern that if the Legislature
18 enacts a statute saying, "You will regulate in a
19 particular way," could that agency, then, waive the rule?
20 And the answer was, "Well, we don't think we can." I
21 don't think that's ever been the case. This Commission
22 functions as part of -- as a legislative branch, and acts
23 in a legislative way. But independent of that, you now
24 have a case, I think, that says that you don't have to
25 have a specific grant of authority for a substantive

1 rule. And I have -- I don't have -- I have difficulty
2 separating those two. If you don't have to have the
3 specific, particular grant for a substantive rule, why do
4 you now have to have a particular grant to waive that
5 substantive rule? The logic doesn't seem to be there.
6 It may be that you disagree, but I think it has serious
7 implications as to this Commission's authority; and that
8 we ought not to treat it as simply, well, we have a list
9 of rules, and we have to send them up, and so let's get
10 on with it.

11 MR. SMITH: Could I interject something here
12 as a note of historical precedent? In about 1984, the
13 Legislature amended Chapter 120 to make it a grounds for
14 automatic remand if an agency departed from the
15 substantive rule. So that's sort of the precursor
16 restriction on an agency's action that occurred before
17 this waiver section was adopted.

18 And, in fact, I think the Commission basically
19 took the position after that was pointed out, that is the
20 change in 1984, which, essentially, made it more
21 difficult, or at least a subject of judicial remand if
22 you departed from your substantive rule. I think the
23 Commission at that point said, basically, we can waive
24 our procedural rules, but we won't waive our substantive
25 rules, even though we did, in fact, do it over several

1 years. But that was fundamentally the position that was
2 taken, and we submit advice provided to you.

3 MR. CHILDS: But at that time, after that 1984
4 amendment to the APA, is when the agency was urged and,
5 in fact, did in particular instances, put the waiver
6 provision in the rule, so that -- you know, no one is
7 suggesting, I don't think, that the waiver would be
8 arbitrary or capricious or without standards. I'm not.
9 I think that is in violation of the APA. And I don't
10 think you can have an absolute rule and then just come
11 along and say, "Well, we're not going to apply it here."
12 But if the rule itself has a provision in it for waiver,
13 then our position is that's permissible, and was under
14 the '84 amendment.

15 COMMISSION CLARK: Let me ask a question. Does it
16 make any sense on some of those things to say the waiver
17 section is authority for putting in there specific
18 language on waivers?

19 MS. MOORE: I don't believe so, because there are
20 uniform rules already adopted to implement that. And
21 120.542 and the uniform rules that we're suppose to
22 follow have particular procedures. Our rules don't do
23 that, and I don't -- and as -- the statute, I don't
24 think, authorizes or allows us to create different
25 standards.

1 COMMISSIONER CLARK: Well, what does the -- what is
2 the -- I guess it's 120.542, say with respect to what you
3 have to show to get a waiver?

4 MR. CHILDS: Well --

5 MS. MOORE: You have to demonstrate that the purpose
6 of the underlying statute will be, or has been achieved
7 by other means. And I think Mr. Childs spoke to that,
8 and I think the Commission does have discretion there in
9 determining it knows best whether the statute is being
10 met for the purpose. The person, petitioner, also has to
11 show that it would create a hardship, or that it would
12 violate principles of fairness for the rule to apply to
13 the person in the way it's written. And those terms are
14 defined in the statute.

15 I note that -- well, the Commission may be different
16 and have more discretion than some agencies and be a part
17 of the legislative rather than the executive branch. 120
18 applies to us just like it does any other agency, Chapter
19 120 does. And there aren't any exemptions or exceptions
20 to it for the PSC. Now, the statute recognizes that
21 there may be other statutes that -- substantive statutes
22 that allow waiver, and we do have the telephone statutes
23 that specifically say the requirements of the statute,
24 and in some cases rules may be waived. That's what it's
25 referring to. I don't think it's referring to broad,

1 general rule.

2 COMMISSIONER CLARK: Let me ask -- let me be more
3 specific. If we look at, say, the minimum filing
4 requirements for electric utilities, would there be
5 anything wrong with putting in Subsection 3 that for
6 purposes of Section 120.542, if it is shown that the data
7 production would be impractical or impose an excessive
8 economic burden on the utility, we find it has met the
9 requirements -- it will meet the requirements of the
10 waiver rule? What I'm suggesting is that we could put --

11 MS. MOORE: Sort of define hardship, or give
12 examples of what we've already found to be hardship? I
13 think the -- under -- you know, each year we have to
14 report and keep track of the waivers and variances that
15 we grant. And part of the -- I think the purpose of that
16 is to see whether the exceptions ought to be codified.
17 And, yes, we can do that. I believe we can.

18 COMMISSIONER CLARK: But it's your view that this --
19 by repealing these sections, we don't necessarily narrow
20 what authority we have. If we have the authority, we can
21 exercise it as a waiver?

22 MS. MOORE: Yes. We have to follow the procedures
23 of the statute, unless we have something separate. In
24 reviewing -- the technical staff went over some of the
25 waivers that we have been granting and asked whether in

1 their opinion we were losing something by repealing these
2 rules. Were there petitions for waivers that would have
3 qualified under ours and now are not, and so, thus, maybe
4 we ought to adopt other rules to provide for that. And
5 the answer was, no, for the most part, the procedure
6 under the statute, under the new statute, has worked
7 fine.

8 COMMISSIONER CLARK: Well, I can think of one
9 instance it caused us a little difficulty being able to
10 find that it met -- it met the statute, having to do with
11 changing the time for the cost recovery clauses. It
12 didn't exactly fit into what was in the statute.

13 MR. CHILDS: Well, I would ask that the Commission
14 look, as well, to the uniform rule, because that's one of
15 the -- one of the things that, I think, is of concern.
16 And, you know, I think to say that the rule -- the
17 rule -- the uniform rule itself makes it clear that this
18 is preemption, I disagree. But look at what you have to
19 do under that procedurally. It's 28-104.002. You know,
20 you have to file a copy of the petition with the Joint
21 Administrative Procedures Committee, and go through
22 specific allegations and petitions as to how the
23 underlying statute's purpose is met.

24 COMMISSIONER CLARK: And you're saying you think we
25 have a choice?

1 MR. CHILDS: I think you -- I think this is a rule
2 of procedure under -- under implementing this statute. I
3 think now that we have seen that there's -- the
4 Consolidated Tomoka decision, that the Commission,
5 particularly that the Commission should step back and
6 say, "Well, what do we have to do now? Does this have an
7 impact, and procedurally, is there a way around it if
8 there is a problem that we perceive under the Uniform
9 Rules of Procedure?" Because I think -- I think it's
10 important that the agency have that discretion. And I
11 would urge you under any instance not to say that the
12 reason that you would repeal the waiver rule is because
13 you have to have specific authorization for it. I think
14 once you do that, then the next question I would say is,
15 "Well, where is your specific authorization for the
16 substantive rule?" And it's not there.

17 MS. MOORE: Commissioners, Consolidated Tomoka had
18 to do with the law implementing a statute for an agency's
19 authority, but particularly the law, whether the agency
20 had a law to implement, which is something different than
21 its general authority to adopt rules. You also have to
22 have a law to implement. And what Consolidated Tomoka
23 said was that the rule and what you're governing has to
24 be within the class of powers. It has to do more with
25 our substantive rules and whether we can impose certain

1 requirements on utilities.

2 My point is that 120.542 does provide the authority
3 and the -- it is not to preclude other authority where it
4 is specific in our statutes. But this statute and the
5 uniform rules govern the procedure and provide for
6 notice, and apparently is what the Legislature thought
7 ought to be the requirements when a variance and waiver
8 is granted. I suggest if there is a problem with the
9 uniform rules, that Mr. Childs can join with us, and
10 we'll petition for an exception.

11 MR. CHILDS: We could do that.

12 MR. VANDIVER: Commissioners, there's also some
13 significant history here. I don't know if Mr. Childs is
14 aware of it or not. Florida Power & Light didn't
15 participate before the Cabinet. And we made many of
16 these same arguments that the Commission is a little bit
17 different kind of creature, and we need specific rules.
18 For the most part, those arguments fell on deaf ears.
19 And we were told to follow the Uniform Rules of
20 Procedure, and the like.

21 And Consolidated Tomoka came after that decision,
22 but I just wanted it to be clear that there were
23 extensive negotiations with the Administration
24 Commission, the Governor and Cabinet in getting these
25 rules adopted. And that's just in a historical context

1 for how we came to have the uniform rules and how many of
2 these rules got repealed.

3 MR. CHILDS: Well --

4 MR. VANDIVER: Because we asked, and they said
5 no. And Mr. Childs was not there standing with us to say
6 this agency is different. And it's a shame. And here we
7 are today. And I just thought you'd like that historical
8 context, because I think it's important.

9 CHAIRMAN JOHNSON: Thank you, Rob.

10 Mr. Childs?

11 MR. CHILDS: Well, I'm not going to get into all
12 that history, but I think that I understand some of that
13 frustration about going to the Joint Administrative
14 Procedures Committee and the Legislature and speaking to
15 them about the distinction of this agency.

16 Part of what I'm urging this Commission to do,
17 however, is to say, "Well, maybe there are some
18 differences, and maybe there are some valid reasons for
19 those differences; and, therefore, let's take a second
20 look and not just say, "Well, early last year we thought
21 there was this theory about the restriction on our
22 authority." And as addressed in Consolidated Tomoka, the
23 argument was that you had to have a rule that was in the,
24 quote, "particular powers and duties," end quote, granted
25 by the enabling statute. Particular powers and duties,

1 that was meant to -- it was argued to be specific. And
2 the court said, "No." And what you just heard is the
3 interpretation. And it said, "No, that's not so. It
4 doesn't have to be within the particular powers. It's a
5 valid exercise that delegated legislative authority if
6 the rule regulates a matter directly within the class of
7 powers and duties identified in the statute to be
8 implemented." And I'm saying now, think about it when
9 you do that. When you have -- when you implement that
10 broad power, which this decision says you can, that you
11 should not conclude that you have to be bound by the
12 other argument and restrict your authority to waive those
13 rules under appropriate circumstances. I think in the
14 long run it's going to have a real serious impact on the
15 ability to adopt rules that are applicable in the utility
16 sphere because of the way you regulate.

17 COMMISSIONER CLARK: Well, Mr. Childs, you know,
18 I've -- I've been frustrated with what the amendments to
19 the APA have done, and you certainly made our pitch over
20 to the Governor and Cabinet, I guess, where people are
21 reviewing it, how we thought it would affect us. And I
22 seem to recall that whenever we make an argument in a
23 court that we are different; and, therefore, certain
24 provisions of the APA are not applicable to us, we
25 haven't been very successful.

1 And, you know -- and the staff says that they think
2 they can live within the -- that what we need to get done
3 in terms of waivers can be accomplished by using the
4 uniform waiver rule. And I'm not so sure that the
5 requirement of requiring a petition and explanation of
6 how you -- how it's appropriate to give the waiver is
7 unreasonable.

8 MR. CHILDS: I'm not arguing that this Commission
9 doesn't have the discretion to eliminate the waiver
10 provision in any of its rules. What I'm arguing is that
11 the Commission should not do so on the basis of the
12 belief that the law compels it. If the Commission
13 decides that it wants to eliminate all the waiver
14 provisions that it has, then that's certainly within its
15 discretion to address.

16 I'm arguing as to the conclusion that 120.536 and
17 120.542 compel that results. And I'm saying to you that
18 I don't think it does. I understand the staff's
19 arguments, and I've read them and spent a lot of time
20 trying to understand how they should be applied here.
21 And I think there's a lot of pressure on agencies to go
22 forward and simply list and repeal everything, because we
23 now have uniform procedures, and so repeal it and just go
24 do it that way.

25 And I'm concerned, for instance, that when you adopt

1 a rule in the future, for instance: You adopted a rule
2 and you addressed it recently as to the reporting on
3 bills or bill inserts of the type of fuel that's burned
4 and used by utilities. Well, one of the things that I
5 would think that a utility might be concerned about is
6 whether in the future it could have a waiver from that
7 rule. If the idea was, no, you couldn't have a waiver,
8 unless you complied with the statute, then I think you
9 might see a different response to that rule provision,
10 including where's your underlying authority for the rule?
11 Because we don't want to be in the position down the road
12 where the only way out of the rule is to go through a
13 more stylized proceeding for you and argue about
14 underlying legislative intent. That's the difficulty.

15 CHAIRMAN JOHNSON: Any other questions,
16 Commissioners?

17 MS. MOORE: I have one correction to make in the
18 issue statement. It should be Rule 25-24.555, that's the
19 rule having to do with STS, shared tenant service, and
20 that rule is correct in the discussion. It's the issue
21 statement that misidentifies it.

22 CHAIRMAN JOHNSON: Any further discussion?

23 Is there a motion?

24 COMMISSIONER DEASON: I think there has been a
25 motion and a second.

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CHAIRMAN JOHNSON: Was there a motion?

COMMISSIONER JACOBS: Yeah, I think you did.

CHAIRMAN JOHNSON: All those in favor, signify by saying "aye."

COMMISSIONER CLARK: Aye.

CHAIRMAN JOHNSON: Aye.

Show it approved unanimously.

Thank you for your comments, Mr. Childs.

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CERTIFICATE OF REPORTER

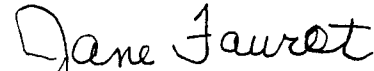
STATE OF FLORIDA)

COUNTY OF LEON)

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceeding was transcribed from cassette tape, and the foregoing pages numbered 1 through 25 are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 7th day of January, 1999.



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