

State of Florida



Public Service Commission

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

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

DATE: August 13, 2021

TO: Adam J. Teitzman, Commission Clerk, Office of Commission Clerk

FROM: Stefanie-Jo Osborn, Attorney, Office of the General Counsel *SJO*

RE: Docket No. 20210136-EI - Complaint by Richard L. Davis against Florida Power & Light Company.

Please file the attached letter sent to Mr. Richard Davis on July 29, 2021, via email, certified mail, and U.S. mail in the documents section of CMS for the above-referenced docket.

Thank you.

SJO/csc
Attachments

COMMISSIONERS:
GARY F. CLARK, CHAIRMAN
ART GRAHAM
ANDREW GILES FAY
MIKE LA ROSA
GABRIELLA PASSIDOMO

STATE OF FLORIDA



OFFICE OF THE GENERAL COUNSEL
KEITH C. HETRICK
GENERAL COUNSEL
(850) 413-6199

Public Service Commission

July 29, 2021

Mr. Richard Davis
1575 NW 59th Street
Apartment 10
Miami, Florida 33142
davisivad9@gmail.com

Via E-MAIL, CERTIFIED MAIL, AND U.S. MAIL

Re: Complaint No. 1354387E and Information Request No. 1373066C

Mr. Davis:

I am writing in response to recent telephone conversations you have had with me and various other Commission staff with respect to your complaint against Florida Power & Light Company (FPL), Complaint No. 1354387E, and your subsequent information request. During those conversations, you have requested an administrative hearing on your complaint with the Division of Administrative Hearings (DOAH). This letter lays out the process you have recently gone through with the Commission, and the steps you need to take if you would like to request a hearing.

On November 12, 2020, you filed a complaint with the Commission's Office of Consumer Assistance and Outreach regarding your electric account with FPL. Customer complaints that are received by the Commission by telephone or through its online complaint form are handled informally. Rule 25-22.032, Florida Administrative Code (F.A.C.) (enclosed), establishes informal customer complaint procedures.

Per this rule, the documentation you provided was forwarded to the Commission's legal department for review. We confirmed that the documentation you provided does not constitute payment of your utility bill, and Commission staff did not identify a violation of a Commission rule, statute, or order by FPL in handling your account. Accordingly, your informal complaint was closed by letter dated December 8, 2020.

You then sent additional correspondence reiterating your contention that you should not be responsible for payment on your FPL account. In response, Commission staff e-mailed you on February 19, February 22, and February 26, 2021 stating that our legal department confirmed that the documentation you provided does not constitute payment of your utility bill, and that if you do not pay your utility bill in a form of currency acceptable to the utility (such as credit,

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check, or cash), your service may be disconnected for nonpayment upon notice pursuant to Rule 25-6.105, F.A.C.

On June 30, 2021 we received new correspondence from you. Since the previous complaint had been closed longer than 30 days, we opened information request 1373066C. We responded via e-mail on June 30, 2021, again stating that our legal department confirmed that the documentation you provided does not constitute payment of your utility bill.

As you have been advised, if you do not accept the Commission staff's actions to informally resolve your complaint in accordance with Rule 25-22.032, F.A.C., you may file for a formal complaint pursuant to Rule 25-22.036, F.A.C. (enclosed).

The request for formal proceedings must follow the complaint requirements in Rule 25-22.036, F.A.C. You may file your petition by mail (address below) or electronically via the Commission's web portal. You may access the Electronic Filing Requirements and e-filing instructions at <http://www.floridapsc.com/ClerkOffice/EFilingRequirements>, and the Electronic Filing Web Portal at <https://secure.floridapsc.com/ClerkOffice/EfilingPublic>. The Commission cannot accept this request via fax.

Mailing address:
Office of Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

If a formal complaint is received, it will be given a docket number by the Commission Clerk. If your formal complaint application does not meet the requirements specified in Rule 25-22.036, F.A.C., or if the relief you are seeking is beyond the Commission's jurisdiction to grant, your formal petition may be dismissed. Otherwise, Commission staff will conduct an analysis of your complaint, and will file a written recommendation as to what action staff believes the Commission should take with respect to your complaint. This recommendation will be based on the information provided by you and FPL, and on the applicable rules, statutes, and past Commission precedent. A copy of staff's recommendation will be provided to you. The Commission will consider staff's recommendation at a noticed, public Commission Conference in Tallahassee, Florida. Under consideration will be whether your complaint meets the rule requirements, and whether your requested relief is able to be granted. If you wish, you may attend the Commission Conference and address the Commission with respect to staff's recommendation. The Commission will vote at the Commission Conference on the outcome of your formal complaint, and the Commission's decision will issue as a written order within 20 days of the Commission's vote. A copy of the order will be provided to you.

If you do not agree with the Commission's decision on the merits, you will have the option of then requesting a formal administrative hearing with respect to your complaint, pursuant to Section 120.57, Florida Statutes (F.S.) (attached). Until such time as the Commission has proposed an action with respect to your complaint, by its order, an opportunity to request a Section 120.57, F.S., hearing does not exist. As I previously discussed with you, the Commission is a collegial body of five Commissioners who serve as the administrative law judges for the

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majority of the Commission's administrative hearings. The decision of whether to refer a particular case to DOAH is entirely within the discretion of the Commission.

As referenced above, I have enclosed for your review copies of Rules 25-22.032 and 25-22.036, F.A.C., and Section 120.57, F.S. The rules can also be found online at www.flrules.org, and the statute at <http://www.leg.state.fl.us/statutes/index.cfm>.

If you have additional questions about a formal petition or formal proceedings, I can be reached at jcrawfor@psc.state.fl.us.

Sincerely,

/s/ Jennifer S. Crawford

Jennifer Crawford
Attorney Supervisor

Encl.

JSC:sfo

25-22.036 Initiation of Formal Proceedings.

(1) Application. An application is appropriate when a person seeks authority from the Commission to engage in an activity subject to Commission jurisdiction.

(2) Complaints. A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.

(3) Form and Content.

(a) Application. An application shall be governed by the statute or rules applicable to applications for authority. In the absence of a specific form and content, the application shall conform to this rule.

(b) Complaint. Each complaint, in addition to the requirements of paragraph (3)(a) above shall also contain:

1. The rule, order, or statute that has been violated;
2. The actions that constitute the violation;
3. The name and address of the person against whom the complaint is lodged;
4. The specific relief requested, including any penalty sought.

Rulemaking Authority 350.01(7), 350.127(2) FS. Law Implemented 120.569, 120.57, 350.123, 364.035, 364.05, 364.057, 364.058, 364.335, 364.337, 366.04, 366.06, 366.071, 366.076(1), 366.8255, 367.031, 367.045, 367.071, 367.081, 367.0814, 367.0817, 367.082, 367.0822, 367.091, 367.101, 367.171 FS. History—New 12-21-81, Formerly 25-22.36, Amended 5-3-99, 7-17-00.

25-22.032 Customer Complaints.

(1) **Intent; Application and Scope.** It is the Commission's intent that disputes between regulated companies and their customers be resolved as quickly, effectively, and inexpensively as possible. This rule establishes informal customer complaint procedures that are designed to address disputes, subject to the Commission's jurisdiction, that occur between regulated companies and individual customers. It provides for expedited processes for customer complaints that can be resolved quickly by the customer and the company. It also provides a process for informal Commission staff resolution of complaints that cannot be resolved by the company and the customer.

(2) Processing of Complaints.

(a) Any customer of a Commission regulated company may file a complaint with the Office of Consumer Assistance and Outreach whenever the customer has an unresolved dispute with the company regarding electric, gas, telephone, water, or wastewater service that is subject to the Commission's jurisdiction. The complaint may be communicated orally or in writing. The complaint shall include the name of the company against which the complaint is made, the name of the customer of record, and the customer's service address. Upon receipt of a complaint by telephone, Commission staff will determine if the customer has contacted the company.

(b) In the case of complaints made by telephone, if the customer agrees, Commission staff will put the customer in contact with the company for resolution of the complaint using the telephone transfer-connect system described in subsection (4), or by other appropriate means if the company does not subscribe to the telephone transfer-connect system. If the customer does not agree to be put in contact with the company, then, in the case of companies subscribing to the telephone transfer-connect system, staff will submit the complaint to the company for resolution in accordance with the provisions set forth in subsection (5).

(c) For those companies not subscribing to the telephone transfer-connect or to the E-mail transfer system described in subsection (4), staff will submit the complaint to the company for resolution in accordance with the provisions of subsection (6).

(3) **Protection from Disconnection.** During the complaint process described in subsections (5)-(9), a company shall not discontinue service to a customer because of any unpaid disputed amount until the complaint is closed by Commission staff. However, the company may require the customer to pay that part of a bill which is not in dispute. If the company and the customer cannot agree on the amount in dispute, Commission staff will make a reasonable estimate to establish an interim disputed amount until the complaint is closed by Commission staff. If the customer fails to pay the undisputed portion of the bill, the company may discontinue the customer's service pursuant to Commission rules.

(4) Telephone Transfer-connect and E-mail Transfer Systems.

(a) Each company subject to regulation by the Commission may provide a telephone transfer-connect telephone number by which the Commission may directly transfer a customer to that company's customer service personnel. When the telephone transfer is complete, any further charges for the call shall be the responsibility of the company and not the Commission or the customer. Each company that subscribes to the telephone transfer-connect system must provide customer service personnel to handle transferred calls during the company's normal business hours and at a minimum from Monday through Friday, 9:00 a.m. to 4:00 p.m., Eastern time, excluding all holidays observed by the company. Telephone transfer-connect calls shall not be initially answered by a recorded voice but shall be answered by a person ready to receive information about the complaint.

(b) A company may also provide to the Commission an E-mail address by which the customer may directly E-mail a complaint to the company's customer service personnel from the Commission's Internet Web site. The company shall acknowledge the customer's E-mail to the customer by no later than the working day after the date of receipt.

(5) **Complaints resolved within three (3) days by companies participating in the Telephone Transfer-Connect System or the E-mail Transfer System.** Companies that subscribe to the telephone transfer-connect or E-mail transfer system may resolve a customer complaint within three (3) days in the following manner:

(a) The Commission staff handling the complaint will forward a description of the complaint to the company for response and resolution. The three (3) day period will begin the working day after the day the information is sent to the company and end at 5:00 p.m. Eastern time on the third working day, excluding weekends and company holidays. If the company satisfactorily resolves the complaint, the company shall notify Commission staff of the resolution in writing by no later than 5:00 p.m. Eastern time on the third day.

(b) If the customer does not object to the company's resolution to the complaint, the complaint will not be reported in the total number of complaints shown for that company in the Commission's Consumer Activity Report. However, the Commission will retain the information for use in enforcement proceedings, or for any other purpose necessary to perform its regulatory obligations.

(c) If the customer informs Commission staff that the complaint has not been resolved, the Commission staff will notify the company and require a full report as prescribed in subsection (6).

(d) For purposes of this subsection a complaint will be considered "resolved" if the company report indicates that the problem has been corrected or the company report indicates that the company and the customer have agreed to a plan to correct the problem.

(6) General Commission Staff Complaint Investigation. If the customer is not placed in direct contact with the company by means of the telephone transfer-connect or E-mail transfer system for resolution of his complaint, Commission staff will investigate the complaint and attempt to resolve the dispute in the following manner:

(a) Commission staff will acknowledge receipt of the complaint to the customer, notify the company of the complaint and request a written response from the company. Notification to the company by Commission staff will be to the primary Commission liaison for each certificate unless the company has provided to the Office of Consumer Assistance and Outreach a name, address, telephone and facsimile numbers and E-mail address for a separate point of contact for complaint handling for each certificate. It is preferable for a company to have a single point of contact for complaint handling but a company may identify up to a maximum of three points of contact for complaint handling per certificate. However, if Commission staff directs a complaint to any one of the identified multiple complaint handling contacts, the company shall process the complaint and not return the complaint to Commission staff for redirecting the complaint to other company points of contact.

(b) If the customer specifically makes a request to the Commission that he or she not be contacted by the company, Commission staff will request that the company not contact the customer directly. Otherwise, the company shall make direct contact with the customer verbally or in writing and provide to the customer its response to the complaint within 15 working days after the Commission staff sends the complaint to the company. Responses sent by mail must be postmarked within the 15 working day time period. The company shall also provide to the Commission staff, within 15 working days after the Commission staff sends the complaint to the company, a written response to the customer's complaint. However, in the case of those complaints where the company has proposed, under the provisions of subsection (5) of this rule (complaints resolved in 3 days), a resolution with which the customer is not satisfied, the company shall respond within twelve (12) working days of the case being resent to the company.

(c) The company's response to the Commission staff shall explain the likely cause of the problem, all actions taken by the company to resolve the customer's complaint, and the company's resolution or proposed resolution of the complaint and shall answer any specific questions raised by Commission staff. The company response shall also include letters or E-mails sent to the customer that contain the company's proposed resolution of the complaint or statement of position in addressing or resolving the complaint. Upon Commission staff request, other documentation related to the complaint shall be provided to Commission staff. If the company's proposed resolution has not yet been implemented at the time of the response to the Commission staff and customer, the company shall fully set forth in its response the steps that will be taken by the company to resolve the complaint and the dates by which each step will be taken by the company. The company shall promptly notify the customer if it is subsequently unable to take its proposed action as scheduled and shall provide to the customer and, upon request, to Commission staff, a new resolution schedule for the complaint.

(d) Commission staff will not normally further respond to the customer. However, if a customer objects to the company response to the complaint, the customer may request further review of the complaint by Commission staff. Commission staff will then propose a resolution of the complaint. The proposed resolution to the customer may be either oral or written. Upon request of either the customer or the company, Commission staff shall provide the proposed resolution in writing.

(e) Commission staff may request copies of bills, billing statements, field reports, written documents, or other information in the participants' possession that may be necessary to resolve the dispute. The company shall respond in 7 working days to each subsequent request by staff after the initial company response. If a complete response cannot be provided in the 7 working days, the company shall provide an update regarding the response every 15 working days until the response is completed. Such update shall identify all actions taken since the last report, an explanation of why a complete response cannot be provided, and a time schedule for providing a complete response. Commission staff may perform, or request the company to perform, any tests, on-site inspections, and reviews of company records necessary to aid in the resolution of the dispute.

(7) Process Review Team.

(a) If the customer or the company is not in agreement with Commission staff's proposed resolution, the Office of Consumer Assistance and Outreach will refer the complaint to a Process Review Team consisting of staff from the Office of the General Counsel, the Office of Consumer Assistance and Outreach, and the appropriate technical division. This Process Review Team will review the complaint file to determine further handling of the complaint.

(b) If the Process Review Team finds that the subject matter of the complaint may be within the Commission's jurisdiction, that the relief sought can possibly be granted by the Commission, that the basis of the complaint is not an objection to current statutes, rules, company tariffs, or orders of the Commission, and that a violation of an applicable statute, rule, company tariff or order of the Commission may have occurred, the Office of Consumer Assistance and Outreach shall schedule an informal conference. The fact that an informal conference is scheduled shall not preclude any participant or Commission staff from later taking a position that the complaint does not fall into one or more of the above categories.

(c) The Process Review Team will recommend that the Office of the General Counsel send a closure letter to the participants if the team finds that:

1. The case involves issues or concerns that fall outside the jurisdiction of the Commission,
2. The relief sought cannot be provided by the Commission,
3. The basis of the complaint is an objection to current statutes, rules, company tariffs, or orders of the Commission, or
4. It does not appear that a violation of applicable statutes, rules, company tariffs, or orders of the Commission occurred.

(d) Once the closure letter has been sent, the case will be closed.

(8) Informal Conference.

(a) If the Process Review Team identifies a complaint for an informal conference, Office of Consumer Assistance and Outreach staff will notify the company and provide to the customer a Dispute Resolution Form PSC/CAO 010 (01/04), incorporated herein by reference, via certified mail. The customer shall return the completed Dispute Resolution Form PSC/CAO 010 to the Office of Consumer Assistance and Outreach postmarked within 15 working days after the date of its being sent to the customer. If the completed Dispute Resolution Form PSC/CAO 010 is not received from the customer with a postmark within the required 15 working days, the customer's complaint will be closed at that point. If the Dispute Resolution Form is completed and returned by the customer, Commission staff will provide a copy to the company.

(b) A customer's completed Dispute Resolution Form PSC/CAO 010 shall consist of:

1. A statement describing the facts that give rise to the complaint and, to the extent known, an explanation of why the basis of the complaint may be a violation of the applicable statutes, rules, company tariffs, or orders of the Commission. The statements filed by the customer should not raise any new issues not addressed in the initial complaint.

2. A statement of the issues to be resolved.

3. Any dollar amount in dispute.

4. A statement of the relief requested.

(c) Any participant may file additional information, documentation, or arguments; however, such additional information, documentation or arguments shall be limited to the issues from the customer's original complaint which are identified in the customer's Dispute Resolution Form PSC/CAO 010.

(d) When an informal conference is scheduled, the presiding staff member appointed to conduct the conference shall not have participated in the proposed resolution of the complaint. The appointed staff shall be comprised of a representative of the Office of Consumer Assistance and Outreach staff, an attorney from the Office of the General Counsel, and a staff member from appropriate technical staff. The representative from the Office of Consumer Assistance and Outreach will preside at the informal conference.

(e) After receiving the Dispute Resolution Form from the customer, Commission staff will send a written notice to the participants setting forth the unresolved issues, the procedures to be followed at the informal conference, and the dates by which written materials are to be filed. A company may at this time respond to information contained on the customer's Dispute Resolution Form. Each participant may be represented at the informal conference by an attorney or other representative or may represent himself. Each participant shall be responsible for his own expenses in the handling of the complaint. The conference may be held no sooner than ten days following a notice, unless all participants agree to an earlier date.

(f) At the conference, the participants shall have the opportunity to present information, orally or in writing, in support of their positions. During the conference, staff may encourage the parties to resolve the dispute. The Commission staff will be responsible for tape-recording, but not transcribing, the informal conference. A participant may arrange for transcription at his own expense.

(g) If a settlement is not reached within 20 working days following the informal conference and if the complaint is not withdrawn, staff shall submit a recommendation to the Commission for consideration at the next available Commission Conference. Copies of the recommendation shall be sent to the participants by the Office of the General Counsel.

(h) The Commission will address the matter by issuing a notice of proposed agency action or by setting the matter for hearing pursuant to Section 120.57, Florida Statutes. If the Commission sets the matter for hearing, the participants may be represented by

an attorney or a qualified representative as prescribed in Rule 28-106.106, F.A.C., or may represent themselves. Each participant shall be responsible for his own expenses in the handling of the complaint.

(9) Settlement. At any time the participants may agree to settle their dispute. If a settlement is reached, the participants or their representatives shall file with the Office of Consumer Assistance and Outreach a written statement to that effect. The statement shall indicate that the settlement is binding on all participants, and that the participants waive any right to further review or action by the Commission. If the complaint has been docketed, the Office of Consumer Assistance and Outreach shall submit the settlement to the Commission for approval. If the complaint has not been docketed, the Office of Consumer Assistance and Outreach will acknowledge the statement of settlement by letter to the participants.

(10) Record Retention, Reports, and Auditing.

(a) All companies shall retain documentation relating to each Commission complaint for two years after the date the complaint was closed by the Commission.

(b) All companies that participate in the telephone transfer-connect, E-mail transfer or three day complaint resolution options shall file with the Commission's Office of Consumer Assistance and Outreach, by the fifth working day of each month a report in tabular form that summarizes the following information for the preceding calendar month:

1. The number of calls handled via telephone transfer-connect, including the date received, customer's name, a brief description of the complaint, and whether the complaint was addressed;

2. The number of complaints handled via E-mail transfer, including the date received, the customer's name, the Commission assigned tracking number, a brief description of the complaint, and whether the complaint was addressed.

3. The number of complaints handled under the three day complaint resolution procedure, including the date received, the customer's name, the Commission assigned filing number, a brief description of the complaint, and whether the complaint was resolved.

(c) Companies shall provide access to the Commission to all such records for audit purposes.

(11) Extensions of Time.

(a) In the event of a storm named by the National Hurricane Center, a tornado recorded by the National Weather Service, a flood, a telephone cable cut, a severe gas or water main break, a major electrical outage, an extreme weather disturbance or fire causing activation of the county emergency operation center, acts of terrorism, or work stoppage, any of which substantially affects its operations and resources, a company may file a notice which will automatically extend by three working days the time for filing responses, forms, reports and other submissions required by this rule. Such notice shall be submitted in writing to the Director of the Office of Consumer Assistance and Outreach and shall state a reason for the three day extension. The utility will send one written request that will apply to all complaints or reports pending or received during the extension period. When the company does provide complaint responses or reports containing information on complaints affected by an extension of time, the extension must be noted on the complaint or report. For complaints, the three day extension shall apply to any complaints pending at the time such notification is given and to new complaints received during the extension period.

(b) If the company participates in the transfer connect system described in subsection (4), and the circumstances described in paragraph (11)(a) affect the operation of the transfer-connect system, the company may establish an alternative, temporary means of transmitting customer concerns from the Commission to the company for handling within the transfer-connect program.

Rulemaking Authority 350.127(2), 364.183, 366.05, 367.121 FS. Law Implemented 120.54, 120.569, 120.57, 120.573, 364.01, 364.183, 366.03, 366.04, 366.05, 367.011, 367.111, 367.121 FS. History—New 1-3-89, Amended 10-28-93, 6-22-00, 1-29-04.

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The 2020 Florida Statutes

Title X

PUBLIC OFFICERS, EMPLOYEES, AND RECORDS

Chapter 120

ADMINISTRATIVE PROCEDURE ACT

View Entire Chapter

120.57 Additional procedures for particular cases.—

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—

(a) Except as provided in ss. [120.80](#) and [120.81](#), an administrative law judge assigned by the division shall conduct all hearings under this subsection, except for hearings before agency heads or a member thereof. If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary.

(b) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative.

When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(d) Notwithstanding s. [120.569\(2\)\(g\)](#), similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. When the state in an administrative proceeding intends to offer evidence of other acts or offenses under this paragraph, the state shall furnish to the party whose substantial interests are being determined and whose other acts or offenses will be the subject of such evidence, no fewer than 10 days before commencement of the proceeding, a written statement of the acts or offenses it intends to offer, describing them and the evidence the state intends to offer with particularity. Notice is not required for evidence of acts or offenses which is used for impeachment or on rebuttal.

(e)1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. This subparagraph does not preclude application of valid adopted rules and applicable provisions of law to the facts.

2. In a matter initiated as a result of agency action proposing to determine the substantial interests of a party, the party's timely petition for hearing may challenge the proposed agency action based on a rule that is an invalid exercise of delegated legislative authority or based on an alleged unadopted rule. For challenges brought under this subparagraph:

a. The challenge may be pled as a defense using the procedures set forth in s. [120.56\(1\)\(b\)](#).

b. Section [120.56\(3\)\(a\)](#) applies to a challenge alleging that a rule is an invalid exercise of delegated legislative authority.

c. Section [120.56\(4\)\(c\)](#) applies to a challenge alleging an unadopted rule.

d. This subparagraph does not preclude the consolidation of any proceeding under s. [120.56](#) with any proceeding under this paragraph.

3. Notwithstanding subparagraph 1., if an agency demonstrates that the statute being implemented directs it to adopt rules, that the agency has not had time to adopt those rules because the requirement was so recently enacted, and that the agency has initiated rulemaking and is proceeding expeditiously and in good faith to adopt the required rules, then the agency's action may be based upon those unadopted rules if the administrative law judge determines that rulemaking is neither feasible nor practicable and the unadopted rules would not constitute an invalid exercise of delegated legislative authority if adopted as rules. An unadopted rule shall not be presumed valid. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority vested in the agency by the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;

e. Is not being applied to the substantially affected party without due notice; and

f. Does not impose excessive regulatory costs on the regulated person, county, or city.

4. The recommended and final orders in any proceeding shall be governed by paragraphs (k) and (l), except that the administrative law judge's determination regarding an unadopted rule under subparagraph 1. or subparagraph 2. shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney fee for the initial proceeding and the proceeding for review.

5. A petitioner may pursue a separate, collateral challenge under s. 120.56 even if an adequate remedy exists through a proceeding under this section. The administrative law judge may consolidate the proceedings.

(f) The record in a case governed by this subsection shall consist only of:

1. All notices, pleadings, motions, and intermediate rulings.

2. Evidence admitted.

3. Those matters officially recognized.

4. Proffers of proof and objections and rulings thereon.

5. Proposed findings and exceptions.

6. Any decision, opinion, order, or report by the presiding officer.

7. All staff memoranda or data submitted to the presiding 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.

8. All matters placed on the record after an ex parte communication.

9. The official transcript.

(g) The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost.

(h) Any party to a proceeding in which an administrative law judge has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

(i) When, in any proceeding conducted pursuant to this subsection, a dispute of material fact no longer exists, any party may move the administrative law judge to relinquish jurisdiction to the agency. An order relinquishing jurisdiction shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to

interrogatories, and admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists. If the administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge. An order entered by an administrative law judge relinquishing jurisdiction to the agency based upon a determination that no genuine dispute of material fact exists, need not contain findings of fact, conclusions of law, or a recommended disposition or penalty.

(j) Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.

(k) The presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order. All proceedings conducted under this subsection shall be de novo. The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

(l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

(m) If a recommended order is submitted to an agency, the agency shall provide a copy of its final order and any exceptions to the division within 15 days after the order is filed with the agency clerk.

(n) Notwithstanding any law to the contrary, when statutes or rules impose conflicting time requirements for the scheduling of expedited hearings or issuance of recommended or final orders, the director of the division shall have the authority to set the proceedings for the orderly operation of this chapter.

(2) **ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT.**—In any case to which subsection (1) does not apply:

(a) The agency shall:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.
2. Give parties or their counsel the option, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.
3. If the objections of the parties are overruled, provide a written explanation within 7 days.

(b) An agency may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority.

(c) The record shall only consist of:

1. The notice and summary of grounds.

2. Evidence received.
 3. All written statements submitted.
 4. Any decision overruling objections.
 5. All matters placed on the record after an ex parte communication.
 6. The official transcript.
 7. Any decision, opinion, order, or report by the presiding officer.
- (3) **ADDITIONAL PROCEDURES APPLICABLE TO PROTESTS TO CONTRACT SOLICITATION OR AWARD.**—Agencies subject to this chapter shall use the uniform rules of procedure, which provide procedures for the resolution of protests arising from the contract solicitation or award process. Such rules shall at least provide that:
- (a) The agency shall provide notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase by electronic posting. This notice shall contain the following statement: "Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes."
 - (b) Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision. With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based. Saturdays, Sundays, and state holidays shall be excluded in the computation of the 72-hour time periods provided by this paragraph.
 - (c) Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.
 - (d)1. The agency shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of a formal written protest.
 2. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of the formal written protest, and if there is no disputed issue of material fact, an informal proceeding shall be conducted pursuant to subsection (2) and applicable agency rules before a person whose qualifications have been prescribed by rules of the agency.
 3. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of the formal written protest, and if there is a disputed issue of material fact, the agency shall refer the protest to the division by electronic means through the division's website for proceedings under subsection (1).
 - (e) Upon receipt of a formal written protest referred pursuant to this subsection, the director of the division shall expedite the hearing and assign an administrative law judge who shall commence a hearing within 30 days after the receipt of the formal written protest by the division and enter a recommended order within 30 days after the hearing or within 30 days after receipt of the hearing transcript by the administrative law judge, whichever is later. Each party shall be allowed 10 days in which to submit written exceptions to the recommended order. A final order shall be entered by the agency within 30 days of the entry of a recommended order. The provisions of this paragraph may be waived upon stipulation by all parties.
 - (f) In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be

considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

(g) For purposes of this subsection, the definitions in s. 287.012 apply.

(4) **INFORMAL DISPOSITION.**—Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

(5) **APPLICABILITY.**—This section does not apply to agency investigations preliminary to agency action.

History.—s. 1, ch. 74-310; s. 7, ch. 75-191; s. 8, ch. 76-131; s. 1, ch. 77-174; s. 5, ch. 77-453; ss. 6, 11, ch. 78-95; s. 6, ch. 78-425; s. 8, ch. 79-7; s. 7, ch. 80-95; s. 4, ch. 80-289; s. 57, ch. 81-259; s. 2, ch. 83-78; s. 9, ch. 83-216; s. 2, ch. 84-173; s. 4, ch. 84-203; ss. 1, 2, ch. 86-108; s. 44, ch. 87-6; ss. 1, 2, ch. 87-54; s. 5, ch. 87-385; s. 1, ch. 90-283; s. 4, ch. 91-30; s. 1, ch. 91-191; s. 22, ch. 92-315; s. 7, ch. 94-218; s. 1420, ch. 95-147; s. 1, ch. 95-328; s. 19, ch. 96-159; s. 1, ch. 96-423; s. 8, ch. 97-176; s. 5, ch. 98-200; s. 3, ch. 98-279; s. 47, ch. 99-2; s. 6, ch. 99-379; s. 2, ch. 2002-207; s. 5, ch. 2003-94; s. 7, ch. 2006-82; s. 12, ch. 2008-104; s. 12, ch. 2011-208; s. 4, ch. 2016-116.

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