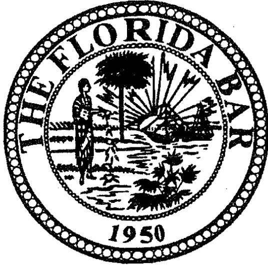

Administrative Law Section Newsletter

Volume XVII, No. 4 **Seann M. Frazier & Dan R. Stengle, Co-editors** **May 1996**

Protecting the Administrative Process from Encroachment by Federal Antitrust Laws

by Jim Rossi

Administrative law, like many other practice areas, has a tendency to be provincial in its outlook. Sometimes, however, we have an opportunity to reflect beyond the issues that normally occupy the administrative lawyer's plate, such as DOAH proceedings, agency rulemaking, declaratory statements, JAPC oversight, and judicial review of agency action. Such reflection is important because it forces us to ponder the role of the administrative state in our system of democratic governance.

TEC Cogeneration, Inc., RED v. Florida Power & Light Co.,[1] a decision handed down by a panel of the U.S. Court of Appeals for the Eleventh Circuit in March, provides an opportunity for administrative lawyers to reflect beyond the typical doctrines, mechanisms, and institutions of administrative practice and to ponder the role of the administrative state vis-a-vis other institutions in our democracy, particularly courts. Now most administrative lawyers are well aware of the conflict between agencies and courts through doctrines like primary jurisdiction, exhaustion, finality, and standards of review. However, *TEC Cogeneration* provides an opportunity to focus our reflection on the interplay between the administrative process and federal antitrust laws, such as the Sherman Act,[2] designed to protect competition and discourage predatory and anticompetitive conduct. This interplay will become increasingly important as agencies move to more privatization, more deregulation, and more reliance on markets. It is especially important in areas such as natural gas and electricity regulation, where traditional cost-of-service regulatory schemes are undergoing massive transformations.[3]

See "Antitrust Laws", page 8

From the Chair ...

by Linda M. Rigot

As I write this, my last column as Chair of the Section, the Legislature is still in session. However, the proposed legislation of most interest to Section members was passed by the Legislature on April 25. A substantially-revised Administrative Procedure Act (the APA) has been signed by the Governor. A Reviser's Bill to conform other Florida Statutes with the revisions to Chapter 120 has been prepared with the assistance of Section members and was also passed by the Legislature.

The revised APA combines the reorganized version of the APA completed by the Governor's Technical Working Group on Chapter 120, substantive changes recommended by the Governor's APA Review Commission, and the non-controversial provisions of last year's attempted revision. The 1996 revision makes changes in the requirements for agency rulemaking, provides for mediation, and allows a summary hearing process at the Division of Administrative Hearings (DOAH) whereby

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istrative Hearings (DOAH) whereby the parties agree to proceed to a Section 120.57(1) hearing without benefit of discovery and the Administrative Law Judge (currently, DOAH Hearing Officer) issues a final order. The revised APA also requires agencies to advise substantially affected persons of the right to request a variance from, or waiver of, agency rules where application of the rule would create an undue hardship or where application of the rule would affect that person differently from others similarly situated. The 1996 APA, effective October 1, also provides that exceptions must be filed within 15 days from entry of a recommended order, changes the time frames for a bid protest proceeding, and changes the standard for successfully challenging an agency's intended bid award. The "new and improved" APA is easier to understand, better organized, and likely to improve citizen participation in agency action.

Bills incorporating the recommendations of the Citizens Commission on Cabinet Reform have been voted favorably by committees in both the House and the Senate. The Section opposed certain changes affecting DOAH and the Model Rules of Procedure based on the Section's adopted official legislative positions. Both the House and the Senate deleted from the pending bills those provisions opposed by the Section.

The Section also opposed provisions in other bills which would impact the APA, were inconsistent with Section positions, and were not considered by the Governor's APA Review Commission. For example, opposition was mounted against portions of bills which would exempt the state university system and the Board of Regents from some of the regular requirements of the APA. The opposed provisions have been deleted from the pending Senate version of the bill. Two of the three opposed provisions have been deleted from the House version, and an amendment has been drafted to delete the third.

Overall, it has been a very successful legislative session for the Section. Although involved to some degree in past legislative sessions, the Section has been unusually proactive this year in adopting legislative positions, appearing before legislative committees and the Governor's APA Review Commission to promote those positions, working with legislative staff, and in drafting specific portions of the 1996 APA. The Section's participation in the legislative process has been quite visible.

The changes to Chapter 120 resulting from this legislative session will require practitioners to become familiar with new processes and with changes to old processes. The Section's "Administrative Law Overview" CLE held on April 25 presented the first opportunity for Bar members to gain an overview of the revised APA, within two hours of its passage by the Legislature.

Those who attended the CLE were invited to attend the Pat Dore Day reception held at the F.S.U. College of Law, which began upon the conclusion of the "Administrative Law Overview' program. An oil portrait of Pat was unveiled to be hung with a commemorative plaque listing all contributors to the Patricia A. Dore Endowed Professorship in Florida Administrative Law. Professor Jim Rossi, an expert in federal utility regulation who joined the faculty last year, has been named the first recipient of the Endowed Professorship. Present to honor Pat's memory and to celebrate the completion of the Section's Endowed Professorship project were judges from all levels of Florida's court system, leaders of The Florida Bar, APA practitioners, Section members and officers, students, faculty, and members of Pat's family.

The following morning, the Executive Council met. Seann Frazier was elected to the Executive Council to fill a vacant seat. He and Johnny Burris are organizing a student writing contest as part of the Section's outreach to Florida law schools and future APA practitioners. The Executive Council also formed a committee to begin revisions to the Model Rules of Procedure (the Uniform Rules of Procedure under the 1996 APA) to conform them with the revised APA and to work with the Administration Commission (Governor and Cabinet) to promulgate the revised Uniform Rules.

The Section's "Administrative Law in a Nutshell" program for its affiliate members and other non-lawyers interested in the APA, scheduled for May 20, presents another opportunity for the Section to assist in educating persons working with the APA in the revisions made by the 1996 Legislature. The videotape from the program will be available as a training tool for agency personnel and regulatory boards. In a similar vein, on June 28 the Section will co-sponsor with the Government Lawyer Section a seminar entitled "1996 Legislative Review," a portion of which will consider the 1996 revisions to the APA. To be held in the Chamber of the House of Representatives in Tallahassee, the seminar will include a simultaneous, interactive broadcast which will be available in ten locations throughout Florida via satellite.

An in-depth analysis of the revised APA will be included in the Section's upcoming Pat Dore Administrative Law Conference to be held in Tallahassee in late September. The Conference will provide insight into the revisions, the new processes included in the APA, and the legislative intent as seen through the eyes of some of the drafters of the legislation.

It has been an honor and a pleasure for me to serve as Chair during this year of change and uncertainty regarding the future of the APA. It has been an exciting time and a rewarding time for me personally. I have been proud to work with the Section's Executive Council and have enjoyed their enthusiasm in completing the Pat Dore Endowed Professorship project and in initiating the provision of services to the Section's affiliate membership. I thank the Section's officers, Executive Council members, and committee chairs for their support and hard work during this year of extraordinary activity. They gave the benefit of their diverse experiences and assisted in shaping the APA so as to ensure citizen access to executive branch decision-making. I thank Jackie Werndli, our Section administrator, who kept us all on task. Finally, I especially thank Chair-elect Bill Williams who gave his time, energy, and expertise so willingly.

Administrative Rule Making on the Internet:

Nuclear Regulatory Commission among the First to Incorporate New Means of Public Comment

by Seann M. Frazier

It's difficult to pick up any newspaper or periodical these days without some reference to the Internet and its possibilities. Internet enthusiasts claim the Internet provides a valuable, unifying tool which will provide an open forum facilitating all manner of business and interpersonal communication. Of principal benefit is a purported opening of access to government. The federal Nuclear Regulatory Commission ("NRC") has recently taken steps to make these claims a reality through its new "RuleNet" computer-based communications technology used to participate in NRC rule making.

The NRC has established RuleNet as a test of the usefulness of computer-based communications in the rule making process. The RuleNet encourages early public comment and interaction on rule making issues before a proposed rule is developed. Electronic bulletin boards are provided in order to promote interactive public comment and participatory rule making. The goal is to further interests originally conceived in the federal Administrative Procedure Act: to encourage participation of all interested parties, including governmental units, industry and members of the public, and achieve effective and agreeable regulation.

The computer-based participation of the public does not replace traditional written comments or public meetings, but rather acts as a supplement. It also encourages the public to become involved in the rule making process prior to an agency's statement of a proposed rule. This may eliminate an agency's attachment to an initial rule it may propose.

RuleNet encourages exchanges of views and presents a method of organizing rule development. First, agency employees monitor the most often asked questions and create a directory of "frequently asked questions" which may serve to alleviate the most common concerns. Next, "caucuses" are developed to encourage discussion among subgroups of participants who share similar viewpoints or concerns on specific issues. These caucuses allow detailed consideration of particular topics and, it is hoped, will more effectively resolve disputes during the rule making process.

In addition to providing a more timely and cost effective means of developing rules, RuleNet provides a method for public participation which is fun to use. Persons participating electronically click screen icons to indicate whether they agree, disagree, or agree with qualifications, etc., to the proposition on which they are commenting. Icons are presented in a pleasing manner with a Siskel & Ebert-esque thumbs-up or down icon. Additionally, search engines are provided so that specific words or phrases can be quickly identified and made easy to find.

Progenitors of RuleNet hope that it will provide greater democratization of the rule making process. Individual persons, corporations, and even law firms, may influence federal rule making via computer, rather than in a meeting room in the Washington, D.C. area. Reportedly, other agencies are considering similar projects and may have already begun them. Interested parties may view the NRC's activities for themselves by visiting http://nssc.llnl.gov/RuleNet.

On The Move...

Gary Stephens has recently been appointed as deputy director of the Broward County Department of Natural Resource Protection (DNPR). Stephens has over 15 years experience as an environmental attorney, including five years with the Florida Department of Environmental Regulation. Stephens has represented both public and private sector clients in environmental disputes and has occupied several leadership roles on the Board of the Florida Audubon Society. He is also a certified mediator and from 1991-1992 served as Chair of the Florida Bar's Administrative Law Section.

This newsletter is prepared and published by the Administrative Law Section of The Florida Bar.

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Case Notes, Cases Noted and Notable Cases
—or—
Procedural Pasquinades

by David Dagon

Supreme Court Cases

Another threat to tolerance came from the Supreme Court in ***Legal Environmental Assistance Foundation, Inc. v. Clark*, 21 Fla. L. Wkly S99 (Fla. Jan 29, 1996)**, where LEAF found its appellate standing under Section 120.68(1) trimmed back. LEAF, an environmental organization, intervened in PSC proceedings reviewing plans developed by Florida's big-four utilities to reduce consumer demand. The PSC capped the hearings with an Order Setting Conservation Goals; post-hearing motions by LEAF were largely unsuccessful.

On appeal, LEAF's challenge branched into three points: the role played by PSC staff, the wisdom of a pass/fail goal policy adopted by the Commission, and the competency of evidence supporting various cost effectiveness tests. On the first issue, LEAF argued the PSC staff attorney improperly participated in agenda conferences. LEAF's arguments had more bark than bite, however, since the Court easily reconciled opinions in *Cherry Communications, Inc. v. Deason*, 652 So. 2d 803 (Fla. 1995), and *South Florida Natural Gas Co. v. Florida Pub. Serv. Comm'n*, 534 So. 2d 695 (Fla. 1988). Readers of this column will recall that in *Cherry*, the Court found that staff participation in a license revocation proceeding violated due process. (The Court issued a constitutional holding because previous opinions had gutted Section 120.66(1)(a)'s ex parte prohibitions.) In *South Florida Natural Gas*, however, the Court approved nearly identical staff participation in a rate-making proceeding. Since the PSC's hearings resembled rate-making (more legislative, less adjudicatory), the Court approved of the staff's participation, and made mulch of LEAF's first issue.

The second issue proved more troubling. Pointing to the authorizing statute's reference to "goals," LEAF disputed the Commission's decision to review conservation plans on a pass/fail basis. The Court, however, found that LEAF lacked standing to raise this issue. Unable to find that LEAF's interests were adversely affected by the policy selection, the Court determined the organization lacked standing under Section 120.68(1). *See Daniels v. Florida Parole & Probation Comm'n*, 401 So. 2d 1351 (1st DCA 1981), *aff'd* 444 So. 2d 917 (Fla. 1983). The Court did not remove LEAF's standing root and branch; the organization was still a party under Section 120.52(12)(c) and could intervene, even though it could not obtain an appeal.

The third issue presented less difficulty. Competent, substantial evidence supported the Commission's approval of cost effectiveness tests. This and a presumption, *see Citizens of State v. Public Service Comm'n*, 448 So. 2d 1024 (Fla. 1984), decided the issue. Hedged, trimmed and bagged, LEAF's appeal was added to the compost of state-wide utility opinions.

COMMENT: Brows will furrow at the Court's standing analysis. The Court's reasoning boiled down to a single phrase: "[W]e simply find no basis upon which to conclude that LEAF's interests are adversely affected by this agency action." 21 Fla. L. Wkly at S100. How the Court arrived at this conclusion merits a few observations.

First, the Court's analysis of Section 120.68(1) proved thankfully devoid of references to federal APA standing principles. The similarity between Section 120.68(1)'s "adversely affected" standard and FAPA Section 702's "adversely affected or aggrieved" standard must have proved a temptation to this Court. *See Florida HomeBuilders Ass'n v. Dep't of Labor and Emp. Sec.*, 412 So.2d 351, 354 (Fla. 1982) (failing to completely reject dicta in *Fla. Dept. of Offender Rehab. v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1978)* equating the two). *Cf. Agrico* (2d DCA, later cited with approval by Supreme Court). While access theorists (read: optimists) like Professor Davis might have viewed such an analogy as harmless, *see* Ken Davis, "Standing to Challenge Governmental Action," 39 *Minn. L. Rev.* 353, 355-56 (1955) (Section 702 afforded review to any injury); Ken Davis, "Judicial Control of Administrative Action: A Review," 66 *Colum. L. Rev.* 635, 668-69 (1966) (same); Ken Davis, "The Liberalized Law of Standing," 37 *U. Chi. L. Rev.* 450, 465-68 (1970) (same), reliance on federal principles most certainly would have restricted the scope of appellate review. *See* Pat Dore, "Access to Florida Administrative Proceedings," 13 Fla. St. L. Rev. 965 (1986). Since the Court's analysis rooted in *Daniels*, it avoided confusion.

Second, the Court seems to have adopted a conservative interpretation of the phrase "adversely affected," or more precisely, the scope of an "agency action." Clearly there exists a spectrum of opinions discussing what makes an agency action adverse to a party, with *Rabren* representing the more liberal standard. *Rabren v. Board of Pilot Comm'nrs*, 568 So. 2d 1283 (Fla. 1st DCA 1990) (challenge to conclusion of law presented close call as to whether party "adversely affected"); *see also Bodenstab v. Department of Prof. Reg.*, 648 So. 2d 742 (Fla. 1st 1995), *won't touch with 10-foot pole*, 659 So. 2d 1085 (1995); *Fox v. Smith*, 508 So. 2d 1280 (Fla. 3d DCA 1987). *Cf. Ramadanovic v. Department of Cor-*

rections, 575 So. 2d 1333 (Fla. 1st DCA 1991) (adversity of action not clear from vague order; remanded). The *LEAF* opinion does not take sides on this issue, other than to approve of *Daniels*. Instead, the Court's reasoning relies on a narrow definition of "agency action."

Since the phrase "adversely affected" purposefully has no definition and appears in no other provision in Chapter 120, its meaning hinges in part on how precise one carves up the term "agency action" under Section 120.52(2). A narrow construction of the "agency action," by definition, is less likely to offend and prove adverse to a party. By contrast, a Brobdingnagian-sized construction of the term makes the agency's action large enough to affect all but the most successful parties. For example, the order proved adverse to LEAF on issues 1 and 3, but not 2; if the challenged "agency action" is understood to mean the "*whole* . . . of a[n] . . . order," § 120.52(2), Fla. Stat. (1995) (emphasis added), and not just a part, then the organization would have good standing for all issues. *Cf. Humana of Florida, Inc. v. McKaughan*, 652 So. 2d 852 (2d DCA 1995) (organization adversely affected by planning document and had standing to appeal), *approved*, 668 So. 2d 974 (Fla. 1996).

Thus, the Court's opinion turns over a new leaf not only through its approval of *Daniels*, but also in its narrow use of the term "agency action."

* * *

District Court Cases

Nothing refreshes quite like a starchy abuse registry opinion. And what an opinion! Reading ***F.G. v. Department of Health & Rehab. Svcs*, 21 Fla. L. Wkly D358 (Fla 5th DCA Feb. 9, 1996)**, hits with the force of a 12-hour Sudafed.

F.G. served as a youth resident coordinator when he crossed paths, and stars, with J.C., a minor resident at the HRS facility. J.C., completely lacking in Dickensian timidity, took a metal bat to F.G., who defended—now all this is alleged, mind you—with a slap to the face. This landed F.G. on the HRS abuse registry, and on the street. F.G. sought to expunge his name from the registry, but failed to persuade a hearing officer. HRS affirmed.

The fighting Fifth DCA, however, told the agency to wake up and smell the Kafka. The Court found that the Appellant was clearly the victim in this case and that "[c]ommon sense and case law require reversal." 21 Fla. L. Wkly at D358. After reviewing the record, the Court rejected the hearing officer's findings. "It seems to us that if any name should be inscribed on an abuse registry, it should be that of J.C. himself." 21 Fla. L. Wkly at D359.

COMMENT: For an agency to overrule a hearing officer's finding, it must "determine[] from a review of the complete record, and state[] with particularity in the order, that the findings of fact were not based upon competent substantial evidence . . ." § 120.57(1)(b)10., Fla. Stat. (1995); *E.g., Cordes Health Care Management Corp. v. Department of Health and Rehabilitative Services*, 461 So. 2d 184 (Fla. 1st DCA 1984). Reviewing courts, however, have a slightly different requirement. § 120.68(10), Fla. Stat. 1995) (merely admonishing that "the court shall not substitute its judgment for that of the agency as to the weight of the evidence"). The opinion appears to satisfy the requirements of Section 120.57(1)(b)10., though this was not necessary.

* * *

A chain of custody is only as strong as its weakest link, according to ***Brown v. Criminal Justice Standards and Training Comm'n*, 21 Fla. L. Wkly D432 (Fla. 4th DCA, Feb. 16, 1996).** A positive urine test (cocaine metabolites) landed a police officer in hot water. Relief came when the hearing officer flushed out the complaint in his findings: a discrepancy in the chain of custody left a stain on a witness' testimony, making it something less than clear and convincing evidence.

The decision by the agency to reweigh the evidence, however, left the Fourth DCA rather pi-, er, piqued, shall we say. "It is black letter law than an agency may not reweigh evidence submitted to an administrative hearing officer, resolve conflicts in the evidence, judge the credibility of witnesses or otherwise interpret the evidence anew." 21 Fla. L. Wkly at D432 (citing the ol' standby *Heifetz v. Department of Biz Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)). A reversal promised to restore the hearing officer's findings, and the controversy seems to have passed.

* * *

The privileges of membership were considered, albeit indirectly, in ***Department of Revenue v. John's Island Club, Inc.*, 21 Fla. L. Wkly D750 (Fla 1st DCA March 27, 1996).** The members of a country club, where "men dined and smoked and played billiards and pretended to read," A. Trollope, *The Prime Minister* ii (1877), challenged a Department of Revenue rule taxing the periodic assessments paid by club members for capital improvements. *See* Rule 12A-1.005(5), F.A.C. The Department had amended its rules to capture so-called capitalization fees or capital facility fees after the legislature expanded taxes of club admission to include dues and fees. § 212.02(1), Fla. Stat. (1995).

The legislative history of section 212.02 suggested that the term "admissions" might include capitalization fees. After all, conference committee members used these terms to describe the type of "fees" subject to tax. A hearing officer, however, found that although "capital facility fees" and "capitalization" fees were discussed by the legislature, "it [was] far from clear that the intent of the amendment was to make taxable all capital contributions and assessments." 21 Fla. L. Wkly at D751. Instead, the hearing officer noted that the term "dues" is undefined, *Cf. Romans* 13:7 ("[r]ender therefore to all their dues; . . ."), and made findings based on the accepted principles of accounting, which exclude capital costs from fees and dues. Since the hearing officer's finding met a CSE minimum, the First DCA affirmed. *See Adam Smith Enterprises, Inc. v. Dep't of Env. Reg.*, 553 So.2d 1260 (Fla. 1st DCA 1989). Judge Allen concurred, stating that the majority relied too heavily on tidbits of legisla-

continued...

CASE NOTES, CASES NOTED...
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tive history to discern intent.

COMMENT: The opinion affects not only the country club set, but may well reach to the other side of the tracks. For example, the court noted that "the absence of clear legislative intent inure[s] to the benefit of the taxpayer, . . ." 21 Fla. L. Wkly at D751. One might argue that this principle of statutory construction, normally confined to taxation matters, should apply to other section 120.56 and .54 rule challenges as well. How many agencies have cited statements of general legislative intent as specific authority under Section 120.54(7)? If DOR cannot rely on conference committee statements as specific authority, can other agencies do the same? The court may have set free a canon of construction on deck, as suggested by Judge Allen's concurrence.

* * *

A declaratory petition flew the coup in ***Crow v. Agency for Health Care Administration*, 21 Fla. L. Wkly D781 (Fla. 5th DCA March 22, 1996),** where the agency answered questions not specifically asked in a section 120.565 petition. Crow, a licensed physician, sold his practice to an HMO in exchange for a flat salary. The parties contemplated a revision to the salary agreement, whereby Crow would receive a salary based on the prior year's revenues, and feather his nest with a year-end bonus when practice revenues exceed targeted levels.

Concerned that this proposed agreement would constitute a prohibited fee-splitting arrangement, *see* § 458.331(1)(i), Fla. Stat. (1995), Crow filed a Section 120.565 petition with the agency. 21 Fla. L. Wkly at D781. The agency concluded that the fee arrangement, if based on total revenues generated for the HMO, would constitute a fee-splitting arrangement.

The agency's opinion also laid an egg; it "further conclude[d]" that an arrangement limited to fees generated for professional services actually rendered by Crow (or those under him), and without reference to fees for ancillary services, would be acceptable. Now, Crow had not requested these "further conclu[sions]" regarding ancillary services, and appealed the order. Various medical associations, fearing the agency had gone out on a wing, filed amici briefs.

Although the amici crowed that Crow had not asked about ancillary billing services, the panel thought the agency was "justified in pointing out pitfalls that it sees." 21 Fla. L. Wkly at D781. The Fifth DCA found the agency's order and additional findings "appropriately connected with the question," and approved of its reasoning and scope. *Id.* Affirmed.

COMMENT: Asking whether a performance incentive based on annual service fees constitutes a "fee-splitting arrangement" poses a simple question of statutory construction. The opinion becomes important, however, when one considers the scope of the agency's answer. With *Crow*, it seems agencies are now free to expound upon matters "appropriately connected with the question" raised in a declaratory petition.

To that extent, *Crow* is new precedent. Section 120.565 normally limits the scope of a declaratory statement to "a *specified* statutory provision . . . as it applies to the petitioner *in his particular set of circumstances only*." § 120.565, Fla. Stat. (1995) (emphasis added, of course). The final clause was added in 1978, *see* Ch. 78-425, § 4, 1978 Laws of Florida 1408, 1413 (1978), to make clear that declaratory statements were purely adjudicatory in nature, and would not resemble a rule. *See Florida Optometric Ass'n v. Department of Professional Regulation*, 567 So. 2d 928, 937 (Fla. 1st DCA 1990) ("We do observe, however, that declaratory statements and rules serve clearly distinct functions under the scheme of Chapter 120. Although the line between the two is not always clear, it should be remembered that declaratory statements are not to be used as a vehicle for the adoption of broad agency policies.").

Under Section 120.565, petitioners supplied the presumed facts, and agencies supplied the law. Under *Crow*, however, agencies appear able to discuss facts (a/k/a "pitfalls that it sees") not introduced by the petitioner. The opinion therefore warns of the price of free—and unsolicited—advice: be careful what you put in your petition.

* * *

The agency did worse in ***Orasan v. Agency of Health Care Administration*, 21 Fla. L. Wkly D537 (Fla. 1st DCA Feb. 26, 1996),** where the hearing officer's failure to admit excerpts from treatises led to reversal. The Appellant answered charges from the old DPR (now ACHA) regarding violations of Section

Section Seeks Support for Student Essay Contest

The Administrative Law Section of The Florida Bar is seeking individuals and firms interested in supporting an Administrative Law Essay Competition. The Section's hope is that this essay competition will encourage scholarship in the area of Florida Administrative Law and enhance the education of Florida students in this area.

Winning essays may be published in The Florida Bar Journal. Proposed prizes are $1,500.00, $700.00, and $200.00 for first, second and third places, respectively. Some law firms have already committed to a portion of these funds, but additional help is needed. If you or the members of your firm possess an interest in supporting an Administrative Law Essay Competition, please feel free to contact the Chair of our section, Ms. Linda M. Rigot, or Seann Frazier.

458.331, Florida Statutes, with a request for a 120.57(1) hearing. The Appellant testified on his own behalf, and offered excerpts from medical treatises under Section 90.706 as support.

The First DCA noted that since the hearsay treatises were offered "for the purpose of supplementing or explaining other evidence," § 120.58(1)(a), Fla. Stat. (1995), they should have been admitted. The panel was not convinced that this error was harmless, *see id.* at § 120.68(8) (imposing a standard for review based on the fairness of the proceeding or correctness of the action), and reversed.

COMMENT: A previous recommended order had already instructed the agency on the proper use of Section 90.706. *See Agency for Health Care Administration v. Frager*, Case No. 94-6930 (RO, May 4, 1994), at findings #24, 35 (noting that "Section 90.706 does not allow statements in a learned treatise to be used as substantive evidence.") (quoting *Green v. Goldberg*, 630 So. 2d 606, 609 (Fla. 4th DCA 1993)).

Briefly Noted

Another case involving the wrongful discharge of school employee was seen in ***Sublett v. Sumter County School Board*, 21 Fla. L. Wkly D61 (Fla. 5th DCA Dec. 29, 1995).** As usual, the case involved allegations of sexual misconduct by the school employee. As usual, the school board made supplemental findings to avoid an unfavorable finding by the hearing officer, and terminated the employee. And as usual, a panel had to remind the school board that findings must be made on a record, preferably by a hearing officer. *Cf.* Thomas Hobbes *Leviathan* 182 (Collier 1962) (1651 orig. ed.) ("And as controversies are of two sorts, namely of *fact*, and of *law;* so are judgments, some of fact: and consequently in the same controversy, there may be two judges, one of fact another of law.").

BRIEF COMMENT: The court also noted that the failure of the board to preserve a record of the hearing was not fatal to the appellant. (Indeed, how could it be? *See Financial Marketing Group, Inc. v. Department of Banking & Finance*, 352 So. 2d 524 (Fla. 3d DCA 1977) (agency must refer to transcript when rejecting/modifying hearing officer's findings).)

* * *

With glacial speed, Florida State University has finally revised its rules. Taking full advantage of Section 120.54(8), Florida Statutes (1995) (allowing incorporation of publication by reference) the former finishing school adopted its various catalogs and brochures. An unsuccessful challenge to the rule was recently affirmed. ***Charity v. Florida State University*, 21 Fla. L. Wkly D657 (Mar. 13, 1996)** (noting *Agrico*'s "stringent" burden imposed on a rule challenger).

* * *

Precious ink was wasted in ***Ross v. Department of Corrections*, 21 Fla. L. Wkly D368 (Fla. 5th DCA, Feb. 9, 1996),** because counsel for the agency misled a hearing officer concerning the absence of a party. Counsel for Appellant had a schedule conflict, and wrote to DOC about the problem. At the hearing, however, counsel for DOC stated that Appellant had given no reason for her failure to appear. The Court found that DOC had misled the hearing officer, and reversed the dismissal. "The lack of cooperation and simple courtesies between attorneys in matters involving scheduling conflicts continues to amaze us." 21 Fla. L. Wkly at D369. Enough said.

* * *

The court in ***Russell v. Department of Ins.*, 21 Fla. L. Wkly D510 (Fla. 2d DCA Feb. 16, 1996),** clarified the clear and convincing evidence standard, applicable to license revocation proceedings. *See Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987). There, the failure of an insurance agent to return funds was not clear and convincing proof of willful action, particularly where the obligation was at issue in a parallel civil proceeding.

* * *

Are working phones necessary to the public health, safety and welfare? Not really, according to the court in ***NEC Business Communications Systems (East) Inc. v. Seminole County School Board*, 21 Fla. L. Wkly D483 (Fla. 5th DCA, Feb. 23, 1996),** where the board refused to stay a contract after bid protest. Board rules, nearly identical to Section 120.53(5)(c), allowed work to proceed on a contested contract in order to avoid immediate and serious danger to the public. The Court found that the need for working phones, though urgent, did not meet this requirement. Section 120.68(1) review allowed the Court to reimpose a stay, pending resolution of the bid challenge.

David Dagon *regularly commits a column on casenotes. He can be taken to task at* dagon@freenet.fsu.edu *or at the firm of Earl, Blank, Kavanaugh & Stotts.*

Section Annual Meeting Planned

Plan on joining us for the Administrative Law Section's Annual Meeting on Friday, June 21, 2:30 p.m.-5:30 p.m. at the Annual Meeting of The Florida Bar, Buena Vista Palace, Walt Disney World Village.

Officer Nominations for 1996-97:
William E. Williams—Chair
Robert M. Rhodes—Chair-elect
M. Catherine Lannon—Secretary
Dan R. Stengle—Treasurer

Executive Council
(term expiring 1997)
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ANTITRUST LAWS

from page 1

A. *The Facts*

Like many administrative law cases, the facts of *TEC Cogeneration* are somewhat complex, but equally colorful. Florida Power and Light (FPL), the fifth largest investor-owned utility in the U.S., owns and controls ninety percent of the total generation capacity in its service area in southern and eastern Florida, which includes most of Dade County (Dade). FPL is a vertically integrated utility: in addition to electricity generation, it also engages in the transmission and distribution and sale of electricity. Like most utilities in Florida, FPL is regulated by the Florida Public Service Commission (PSC), as well as the Federal Energy Regulatory Commission (FERC). The PSC regulates FPL's retail rates, terms and conditions of sale within its service area, and many aspects of its interrelationship with potential competitors, such as a municipal utilities and other utility and non-utility providers of electricity.

TEC Cogeneration is a non-utility company which sought to generate power,[4] transmit it over FPL's grid, and sell it to end-users within FPL's service territory. Shortly after Congress passed the Public Utility Regulatory Policies Act of 1978 (PURPA),[5] Dade began to consider a cogeneration facility as part of its planning for a Miami Downtown Government Center (Center). TEC, a nationwide developer of cogeneration projects and supplier of turbines and related services for use in cogeneration facilities, encouraged Dade to use its equipment and services.

In 1981 Dade issued a request for proposals to bid on the Center cogeneration facility and TEC submitted a bid. TEC's bid was selected in late 1983 and Dade entered into contracts with TEC providing for the construction and operation of a twenty-seven megawatt (MW) cogeneration facility at Center, the supply of equipment for the project, and the supply of electrical and thermal power to Dade. Dade and TEC were to share in the profits from operating the Center; TEC was to absorb the losses. TEC agreed to operate the facility for an initial sixteen-year period, during which the Center was projected to generate cumulative profits of approximately seventy-five million dollars.

The contract allowed for the excess power from the facility to be distributed to Dade facilities outside of the Center, such as the Jackson Memorial Hospital/Civic Center complex. Construction of the cogeneration facility commenced in mid-1984 and by the end of 1986 the facility was fully operational. In order for TEC to distribute excess power, TEC had to secure a wheeling (or transmission) arrangement with FPL; alternatively, TEC could have built its own transmission line, although to do so TEC would need to first obtain the approval of the Dade County Board of Commissioners.

The facility, it turned out, was too large to serve its initially intended purposes at the Center. Although Center had the capacity to produce 27 MW of power, it only needed 10 MW to operate. Thus, the project generated 17 surplus MW of power.[6] To reduce its losses, TEC sought to distribute this power to other local Dade end-users of electricity. Under the PSC's rules, adopted pursuant to PURPA, TEC had several options. First, it could sell the surplus power to FPL at a rate equal to FPL's avoided cost—*i.e.*, the price equal to what it would have cost the utility to generate that power. Second, it could choose to force FPL to transmit or wheel the excess power to another Florida utility, who in turn would purchase the power at its own avoided cost rate. Alternatively, consistent with PSC regulations, TEC could request FPL to directly wheel the power to Dade's end-use facilities.

TEC, unsatisfied with avoided cost rates, elected the third option: TEC asked FPL to voluntarily wheel the TEC cogeneration power directly to Dade facilities, such as Jackson Memorial Hospital. Not surprisingly, FPL, which has its own cogeneration subsidiary,[7] denied TEC's request. Dade, at TEC's request, proceeded to petition the PSC for an order compelling wheeling pursuant to the best efforts clause in its contract with FPL. Under the PSC's self-service wheeling regulations, Dade or TEC could ask FPL to transmit electricity from Center to Jackson Memorial Hospital only if: 1) there was an exact identity of ownership between the generator and the consumer of the electricity; and 2) the transmission would not increase the rates to the utility, or to FPL ratepayers.[8] The PSC refused Dade's request, finding that its rules did not allow FPL to wheel directly to Dade's facilities because Dade was not a self-service producer.[9]

Following the PSC's rejection of Dade's petition for mandatory wheeling, TEC approached Dade with a proposal to build a separate transmission line from Center to Jackson Memorial Hospital. TEC and Dade made a joint submission to the Dade County Board of Commissioners (Board) for initial transmission line approval. FPL lobbied against the approval. Ultimately, the Board rejected TEC and Dade's proposal by a five to one vote.

TEC then sued FPL for violation of section two of the Sherman Act[10] in federal district court. The district court denied a motion for summary judgment by FPL on the grounds that the utility was not entitled to immunity for antitrust actions.

B. *Where Administrative Law Meets Antitrust Doctrine*

On appeal, an Eleventh Circuit panel reversed the district court's denial of FPL's motion for summary judgement and remanded. The panel's decision considered two issues: 1) whether a public utility's refusal to wheel excess power, its setting of avoided cost rates, and its failure to interconnect on terms and conditions acceptable to a cogenerator are immune from antitrust liability under the state action doctrine; and 2) whether lobbying of a county legislative body by the utility is protected by the Noerr/Pennington doctrine.

1. The State Action Doctrine

The state action doctrine, first articulated by the U.S. Supreme Court in 1943,[11] acts as a bar to the application of federal antitrust laws, such as the Sherman Act, to state-regulated anticompetitive activities. The purpose of the Sherman Act, as the Court noted in *Parker*, is "to suppress combinations to restrain competition and attempts to monopolize by indi-

viduals and corporations."[12] But, in the history of the Sherman Act, the Court reasoned, "there is no suggestion of a purpose to restrain state action."[13] Thus, responding to a request to apply the Sherman Act to a California agricultural statutory program intended to restrict competition among private producers of raisins, the Court, applying principles of federalism, refused to conclude that the Sherman Act was "intended to restrain state action or official state action directed by a state"[14]

In a later case, the Court articulated a two prong test to guide courts in application of the state-action doctrine. Private party conduct alleged to be anticompetitive is immune from antitrust liability under the state action doctrine if: 1) the conduct is performed pursuant to a clearly articulated policy of the state to displace competition with regulation; and 2) the conduct is closely supervised by the state.[15]

The first prong, the Eleventh Circuit panel concluded in *TEC*, had been met unqualifiedly. In so holding, the panel disagreed with the district court's holding that FPL had met the first prong of the state-action test, except as to its Strategic Energy Business Study (SEBS)—a study FPL had prepared to examine alternatives for the future. Florida, both the panel and district court agreed, has two statutory policies regarding the electric utility industry: one policy favors monopoly power in Florida electric utilities; the other encourages development of Florida cogeneration facilities and competition between utilities and cogeneration facilities.[16] On appeal, however, the Eleventh Circuit panel disagreed with the district court's exclusion of SEBS from its finding, reasoning that the SEBS "has no relevance to the issue of Florida's clearly articulated policy of regulation" and that the SEBS was prepared with the expectation of state regulation.

Under the second prong, active supervision, "the mere presence of some state involvement or monitoring does not suffice."[17] Instead, this prong "requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[18] For FPL to meet the second prong, the district court reasoned, Florida's PSC must have "actively supervised, substantially reviewed, and independently exercised judgment and control over FPL's overall anticompetitive campaign."[19] Although the district court noted that the PSC had the authority to review FPL's refusal to wheel, usage of rates, and alleged interference with interconnection, the court determined that the PSC was given no opportunity to do so. Therefore, the district court concluded, FPL did not satisfy the second prong.

The Eleventh Circuit panel disagreed. The PSC had denied Dade's petition to allow TEC to wheel power to Jackson Memorial Hospital because Dade could not satisfy the PSC's self-service wheeling rules, the only terms under which the PSC allowed direct wheeling. Likewise, TEC had ample opportunity to challenge FPL's methodology for calculating avoided cost rates[20] and PSC regulations permit a cogenerator to complain to the PSC about any interconnection requirements thought by the cogenerator to be unreasonable.[21] The panel reasoned that the PSC exercises its powers only when it is called upon to do so, but rejected an estoppel-type argument, implicit in the district court's reasoning, that FPL should have complained to the PSC about its contract with Dade if it had a problem. The administrative process before the PSC provided some mechanisms to regulate the potential problems about which TEC had complained; however, it was not the PSC's duty to police every aspect of FPL's allegedly anticompetitive conduct where parties, such as TEC, had an opportunity to avail themselves of and to participate in the agency's regulatory proceedings.

B. *Noerr / Pennington Defense*

The second part of the panel's decision explores whether FPL's lobbying efforts before the Board were immune from antitrust challenge. The *Noerr / Pennington* doctrine protects the efforts of private organizations to influence government officials in the formulation of legislation or policy that, ultimately, may have anticompetitive effects.

For example, in the cases articulating the doctrine, the Supreme Court held that concerted actions by private corporations to restrain trade or monopolize through legislation were protected from antitrust liability under the Sherman Act.[22] The doctrine, which "shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose,"[23] has its origin in the First Amendment rights to assemble and to petition the government.

In a recent case on the doctrine, *Allied Tube*, the Supreme Court began to distinguish between different types of lobbying conduct. In that case, a private standard-setting organization whose meeting had been packed by Allied, the nation's largest steel producer, acted to defeat a proposal to permit electrical conduits to be made of plastic as well as steel. The Court found that Allied's efforts were not immune from liability because they their primary nature was commercial, while their political aspects were secondary: "what distinguishes this case from *Noerr* and its progeny is that the context and nature of petitioner's activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves."[24] In *TEC*, the district court, applying *Allied Tube*, found that when FPL lobbied the Board to vote against construction of the transmission line, its conduct, like Allied's, fell within the commercial exception to *Noerr*: FPL's legislative lobbying was for economic reasons, not political reasons.

The Eleventh Circuit panel, again, disagreed. The panel distinguished the Board, a governmental agency, from the private standard-setting bodies in *Allied* and previous Eleventh Circuit cases.[25] Focusing on FPL's conduct before the Board rather than its motivation, the panel also questioned the validity of a commercial exception to *Noerr* and noted the constitutional protection afforded FPL's lobbying activities.

C. *Conclusion: Protecting the Integrity of the Administrative Process*

Administrative law privileges the administrative process. For many, if not most, regulatory problems, the administrative process affords the best opportunities for expertise, deliberation, and a fair hearing. *TEC*

continued...

ANTITRUST LAWS
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Cogeneration protects the administrative process from encroachment by federal district courts seeking to protect competition under the antitrust laws.

The administrative process provided TEC many opportunities to challenge the PSC's self-service wheeling, avoided-cost rate, and interconnection proceedings outside the forum of a federal district court. TEC could have appealed the agency determinations leading to this particular litigation, such as the PSC's self-service wheeling determination. Moreover, the PSC's regulations on self-service wheeling and interconnection had ample opportunity for challenge in 120.54- or 120.56-type proceedings or on appeal. There were also sufficient opportunities for TEC itself to participate in the political process before the agency—for example, by petitioning the PSC to modify its existing rules—or to seek legislation overruling PSC policy. As the Eleventh Circuit panel's decision makes clear, TEC's lobbying efforts against FPL—even if combined with those of other cogenerators, independent power producers, and consumers—would not run afoul of the antitrust laws.

However, as the district court opinion in *TEC Cogeneration* case illustrates, changes toward privatization, deregulation, and markets will likely create incentives for litigating parties to shift many competition issues out of the administrative process and into the courts. The Eleventh Circuit has struck a balance that respects the integrity of the administrative process, but this issue is likely to become increasingly important as regulators grapple with new ways of addressing market problems—not only in the electricity regulation context, but for natural gas, telecommunications, health care, and other economic regulation settings.

Endnotes:

[1] 76 F. 3d. 1560 (11th Cir. 1996).

[2] 15 U.S.C. §1, *et seq.*

[3] *See, e.g.*, Suzanne Brownless, *Deregulation Redux: Electricity Industry Restructuring*, 17:3 ADMINISTRATIVE LAW SECTION NEWSLETTER 3 (March 1996) (discussing competition-enhancing reforms in Florida); Jim Rossi, *Can the FERC Overcome Special Interest Politics?*, PUBLIC UTILITIES FORTNIGHTLY, Oct. 15, 1996, at 31 (discussing federal efforts to competitively restructure the electric utility industry).

[4] TEC used cogeneration technology to generate its power. Cogeneration is more efficient than traditional methods of generating electricity, because it both produces electricity and finds useful, cost-saving purposes for the thermal by-product of the energy generation process.

[5] 16 U.S.C. § 824a-3. PURPA defines a cogeneration facility as a facility that produces electric energy and other forms of useful thermal energy, such as steam, for industrial, commercial, heating, or cooling purposes. 16 U.S.C. § 796(18)(a).

[6] The issue of whether the project was appropriately built was the subject of a separate fraud suite in Florida state court, which was settled in 1994.

[7] FPL Energy Services, Inc. is an unregulated, wholly-owned subsidiary of FPL Group Capital, Inc., which is a wholly-owned subsidiary of FPL Group, Inc., a public utility holding company and the parent corporation of FPL. FPL Energy Services, Inc.'s primary purpose is the development of cogeneration facilities.

[8] Fla. Admin. Code R. 25-17.0882.

[9] Because Dade did not own the generation equipment, there was not an exact identity of ownership between the generator of the electricity and the ultimate consumer. *See Petition of Metropolitan Dade County for Expedited Consideration of a Request for Provision of Self-Service Transmission*, Order No. 17510, Docket No. 860786-EI, 87 FPSC 5:32, 35-37 (May 5, 1987). Existing Florida Law does not allow a cogenerator to sell electricity at retail. *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281 (Fla. 1988).

[10] 15 U.S.C. § 2. Originally, the plaintiffs had alleged violations of section one of the Sherman Act, 15 U.S.C. § 1 and violations of the Robinson Patman Act, 15 U.S.C. § 13, in addition to the section two and state causes of action. These claims were dismissed voluntarily. In order for TEC to distribute excess power, TEC had to secure a wheeling (or transmission) arrangement with FPL; alternatively, TEC could have built its own transmission line, although to do so TEC would need to first obtain the approval of the Dade County Board of Commissioners. *TEC Cogeneration, Inc., v. Florida Power & Light*, 1994-1 (CCH) Trade Cases ¶ 70,564 at 72,063 n. 9.

[11] *Parker v. Brown*, 317 U.S. 341 (1943).

[12] *Id.* at 352.

[13] *Id.* at 351.

[14] *Id.*

[15] The test was unanimously articulated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *accord FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

[16] *E.g.*, Fla. Stat. § 366.051.

[17] *Ticor*, 504 U.S. at 634 (citation omitted).

[18] *Id.*

[19] 1994-1 (CCH) Trade Cases at 72,070.

[20] The PSC had approved the methodology for approving avoided cost rates in a previous proceeding. *In re: Proceedings to Implement Cogeneration Rules*, Order No. 13247, Docket No. 830377-EU, 84 FPSC 5:4 (May 1, 1984).

[21] Fla. Admin. Code R. 25-17.087.

[22] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The doctrine was extended to the lobbying of local legislators in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-84 (1991). In *California Motor Transport*, the Supreme Court extended Noerr to attempts to petition administrative agencies, but limited Noerr protection in actions designed to exclude plaintiff's access to court or administrative proceedings. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

[23] 381 U.S. at 670.

[24] *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 505 (1988).

[25] *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991) and *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F.2d 667 (N.D. Ga. 1982), *aff'd* 729 F.2d 1467 (11th Cir. 1984).

***Jim Rossi** is the Patricia A. Dore Assistant Professor of Florida Administrative Law, Florida State University College of Law.*

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Affiliate Dues Retained by Bar	500
Total Dues	**$9,125**
Other Revenue	
CLE Courses	$450
Videotape Sales	400
Audiotape Sales	1,500
Interest	1,574
Course Material Sales	100
Section Service Programs	5500
Total Revenue	**$18,649**
Expenses	
Staff Travel	$501
Postage	800
Printing	350
Office Expense	500
Newsletter	2,500
Photocopying	250
Officer Travel	2,500
Meeting Travel	500
CLE Speaker	100
Committees	500
Council Meetings	300
Convention Meeting	1,500
Awards	500
Council of Sections	300
Public Utilities Committee	500
Membership	1,000
Section Service Programs	5,000
Operating Reserve	1,760
Total Expenses	**$19,361**
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Patricia A. Dore Professorship Announced

On Thursday, April 25,1996, a reception was held honoring contributors to the Patricia A. Dore Professorship of Florida Administrative Law which featured the introduction of Professor Jim Rossi, the first professor to hold that chair.

A reception was held within the D'Alemberte Rotunda at the Florida State University College of Law. The event was hosted by the Dean of the College of Law who offered introductory comments. The Honorable Linda M. Rigot, Chair of the Administrative Law Section, offered her comments on the importance of Ms. Dore's contributions to Florida Administrative Law, and the importance of all those who contributed to creating the Patricia A. Dore Professorship. Their generous gifts will further the goal of continuing both Ms. Dore's memory and a fundamental understanding of the APA in Florida's future lawyers. Ms. Vivian Garfein offered comments remembering Patricia A. Dore, not only for her contributions to the Administrative Procedure Act, but also for the memory of Ms. Dore as a friend and colleague. Finally, Mr. Robert Rhodes introduced Mr. Jim Rossi, first professor to hold this esteemed chair.

As part of this newly created role, Professor Rossi will incorporate the use of Ms. Dore's name regularly in class and at professional engagements. His scholarly writings and all formal announcements will reference his title as the Patricia A. Dore Professor of Florida Administrative Law.

At the reception, an oil painting of Ms. Dore was unveiled and placed in the D'Alemberte Rotunda at the FSU College of Law. Also unveiled at the event was a plaque with the names of all donors to the Patricia A. Dore Professorship Fund. The participants thanked the sponsors for their efforts in creating a Chair that will carry Ms. Dore's name on for generations to come.

Administrative Law Section Seminar on the New Administrative Procedure Act

As this Newsletter went to press, the Florida Legislature had just approved the most comprehensive revision to Florida's Administrative Procedure Act since its enactment. These revisions affect not only the organization of Florida's APA, but also signal important shifts in lative intent and regulation of administrative practice in Florida. The Administrative Law Section has scheduled the Pat Dore 1996 **Administrative Law Conference** for **October 4, 1996.** This comprehensive seminar will review these changes and their effect on practitioners who work legiswithin Florida's APA.

Please stay tuned to this Newsletter and the Florida Bar *News* for updates on particular aspects of this upcoming seminar, including the availability of CLER credits and lists of speakers.

Join the Public Utilities Law Committee

The Public Utilities Law Committee of the Administrative Law Section is concerned with the legal, technical and economic issues related to regulated providing electric, gas, water, wastewater, and telephone services. If you are a member of the Administrative Law Section and would like to become a member of this committee, please complete and return the form below:

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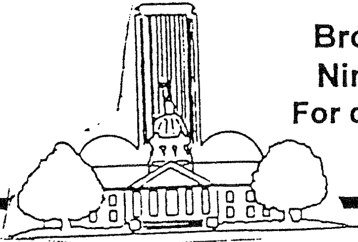


COURSE SYNOPSIS

An overview of the 1996 legislative session which will address administrative changes to the Administrative Procedures Act, criminal procedure, privatization and cabinet reorganization, natural resource law, public records and other emerging topics.

8:30 a.m. - 9:00 a.m.
Late Registration

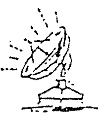
9:00 a.m.-9:15 a.m.
Opening Remarks and Welcome
Thomas D. Hall, Government Lawyer Section Chair
Observations on the 1996 Legislative Session
Lieutenant Governor Buddy MacKay

9:15 a.m.-10:45 a.m.
Administrative Procedures Act
Patrick L. "Booter" Imhof, Chief Legislative Analyst, Select Committee on Streamlining Governmental Regulations, House of Representatives, Tallahasee

10:45 a.m.-11:15 a.m.
Criminal Procedures
Nancy A. Daniels, Public Defender, 2nd Judicial Circuit, Tallahassee

11:15 a.m. - 11:45 a.m.
Natural Resource Law
John J. Fumero, Assistant General Counsel, South Florida Water Management District, West Palm Beach

11:45 a.m. - 12:00 Noon
Break



12:00 Noon - 12:30 p.m.
Privatization
Sheri W. Cape, General Counsel, Dept. of Commerce

12:30 p.m. - 1:00 p.m.
Cabinet Reorganization and Public Records
Patricia R. Gleason, General Counsel, Office of the Attorney General, Tallahassee

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