

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PAR GAS, INC., d/b/a 1ST )  
PROPANE OF BUSHNELL, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 02-1617RX  
 )  
DEPARTMENT OF AGRICULTURE AND )  
CONSUMER SERVICES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings held a formal hearing in the above-styled cause on October 28, 2002, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Steven M. Malono, Esquire  
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For Respondent: Dana H. Plummer, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether the challenged two working day notice provision of existing Rule 5F-11.047(1), Florida Administrative

Code, constitutes an invalid exercise of delegated legislative authority as defined in Section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

By Petition for the Administrative Determination of Invalidity of an Existing Rule (Petition), Par Gas Inc., d/b/a 1st Propane of Bushnell, (Petitioner) challenged Rule 5F-11.047(1), Florida Administrative Code (the Rule).

At the final hearing, conducted pursuant to Section 120.56(3), Florida Statutes, Petitioner presented testimony of two witnesses and five exhibits. Respondent, Florida Department of Agriculture and Consumer Services (Department), presented testimony of four witnesses and 21 exhibits. Official Recognition was taken of four Department exhibits, as opposed to evidentiary admission, and official recognition was also taken of Chapter 527, Florida Statutes; Chapter 570, Florida Statutes; Chapter 120, Florida Statutes; and Rule 5F-11.047, Florida Administrative Code.

A Transcript of the final hearing was filed on November 13, 2002. The parties were granted leave to file proposed final orders within 30 days of the filing of the Transcript. The parties filed Proposed Final Orders on December 13, 2002. Proposed Final Orders submitted by the parties have been reviewed and utilized in the preparation of this Final Order.

## FINDINGS OF FACT

1. The Department is the state agency charged by law with regulation of the liquefied petroleum (LP) gas industry. Sections 570.07(16)(k), 570.07(23), 527.055, and 527.06, Florida Statutes.

2. Petitioner bears the name "1st Propane of Bushnell," a registered fictitious name of Par-Gas, Inc. Petitioner is a Category I liquefied petroleum gas distributor, licensed and regulated by the Department.

3. There are approximately 460 licensed LP gas dealers in Florida. Florida's licensed LP gas dealers include one-man operations, mom and pop family-owned businesses, regional marketers and national multi-state marketers. LP gas operations in Florida are unique compared to other states, in that Florida has many small volume users.

4. The Department issues the Category I LP gas dealer license only to entities, not to individuals. The license permits the licensee gas company to transport LP gas, fill LP gas containers, sell LP gas containers, and to service, install, or repair appliances or equipment that use LP gas. Most LP gas dealers own the LP gas tank or cylinder installed at the customer location. Accordingly, when the dealer delivers LP gas to its customer, it is filling or refilling its own container;

unless the customer owns the container, then the dealer fills the customer's container.

5. LP is a by-product of the oil refining process. The most common LP gas in Florida is propane. LP gas has a boiling point of minus 44 degrees Fahrenheit. The very cold LP gas is stored in the container under pressure of approximately 145 pounds per square inch (PSI).<sup>1</sup> LP gas expands approximately 270 times as it changes from a liquid to a vapor. LP gas vapor is one and one-half times heavier than air.

6. Because LP gas is heavier than air, when released into the air, LP gas vapor drops, pools and accumulates in low areas. It will not disperse in areas where there is no wind movement. A spark from static electricity, electric motors, automobile fan motors, exhaust pipes, catalytic converters, air conditioning compressors or lit cigarettes will ignite LP gas, causing explosion or fire. LP gas is more volatile than natural gas.

7. Unlike natural gas which is delivered to the customer by pipe, LP gas is typically stored at residential, commercial or school installations in a pressurized container. Two kinds of LP gas containers are tanks and cylinders. Other LP gas system components include the regulator, valves, interior and exterior piping, meter, and appliances. The National Fire Protection Association, Standard 58, LP Gas Code 2001 Edition,

("NFPA 58") makes the container owner responsible for ensuring his containers are suitable and qualified for service.

LP gas tanks are typically horizontal and much larger than LP gas cylinders. Tanks used in residential and commercial applications, generally range in size up to 1,000 gallons.

Tanks are deemed permanent installations. Cylinders are generally upright and have a specified lifetime, after which they must be re-qualified by the owner. Cylinders are deemed temporary or portable installations. LP gas cylinders and tanks are both "liquefied petroleum gas equipment" within the meaning of Chapter 527, Florida Statutes.

8. Rule 5F-11.047, Florida Administrative Code, governs LP gas container disconnections in Florida. The genesis of Rule 5F-11.047, Florida Administrative Code, dates back to the 1940's and 1950's and a State Regulation<sup>2</sup> that allowed only the LP gas tank owner, or those authorized by him, to disconnect a tank from a customer's system. In 1958, Florida's Attorney General, Richard Ervin, became concerned that the Regulation could be applied in an anti-competitive manner, but in 1959, the Regulation was amended to allow one gas company to disconnect another company's tank whether or not it was authorized, provided advance notice was given to the gas company owning the tank. In the 1970's this "advance notice" concept was continued and again adopted, this time in an administrative rule

promulgated under Chapter 120, Florida Statutes. In 1990, The Department of Insurance ("DOI") promulgated Rule 4B-1.008, Florida Administrative Code, under Chapter 120, Florida Statutes.<sup>3</sup>

9. In 1994, DOI's Rule 4B-1.008, Florida Administrative Code, was properly transferred to the Department without changes. The Department properly filed Rule 5F-11.047, Florida Administrative Code, for adoption without changes as required by Chapter 120, Florida Statutes, and Chapter 1S-1, Florida Administrative Code, effective March 15, 1994.

10. When the Rule was initially adopted in 1990, David Rogers wrote a letter<sup>4</sup> to DOI on behalf of The Florida Propane Gas Association ("The Association") recommending rule language which became Rule 4B-1.008, Florida Administrative Code. The same language lives on in challenged Rule 5F-11.047(1), Florida Administrative Code. The Association specifically recommended the Rule language "in the interest of safety to the propane industry and consumers" and because the Rule allowed "orderly disconnects to be made in a safe manner."

11. As stipulated by the parties at final hearing, Rogers' October 31, 1990, letter is the Association's past and present position on Rule 5F-11.047(1), Florida Administrative Code.

12. Other states have tank disconnect rules similar to Florida's Rule, and other states have modeled their disconnect

rules after Florida's Rule 5F-11.047(1), Florida Administrative Code. No company has ever challenged Rule 5F-11.047(1), Florida Administrative Code, except Petitioner.

13. Petitioner challenges only the two working day notice requirement of Rule 5F-11.047(1), Florida Administrative Code, alleging it is an invalid exercise of delegated legislative authority. Section 120.52(8), Florida Statutes. Petitioner alleges that the "Department has exceeded its grant of rulemaking authority because Section 527.06, Florida Statutes, does not specifically include nor contemplate or require notice to cylinder, tank and system owners prior to a disconnection;" that the existing rule enlarges, modifies and contravenes the specific provisions of Sections 527.06 and 527.07, Florida Statutes, in that neither statutory provision requires or authorizes a 48-hour/two working day pre-disconnection notice to an LP gas tank or system owner"; that the existing rule is arbitrary and capricious in that the pre-disconnection notice requirement has no relation or connection to any health, safety or welfare concerns; and that the Rule does not promote the health, safety or welfare of the public and, therefore, cannot be supported by competent substantial evidence. Petitioner also alleges that application of the two working day notice requirement has an anti-competitive effect on the LP gas market.

14. Rule 5F-11.047(1), Florida Administrative Code, pertains to disconnecting LP gas containers. No statute prohibits a person or gas company from disconnecting another gas company's LP gas container. However, Section 527.07, Florida Statutes, prohibits a person or gas company from filling, refilling, using, or delivering another gas company's LP gas container without authorization from the gas company that owns the container. Section 527.07, Florida Statutes, reads:

No person, other than the owner and those authorized by the owner, shall sell, fill, refill, deliver, permit to be delivered, or use in any manner any liquefied petroleum gas container or receptacle for any gas or compound, or for any other purpose.

Section 527.07, Florida Statutes, is one of the statutes implemented by Rule 5F-11.047(1), Florida Administrative Code, the other being Section 527.06, Florida Statutes. As a practical matter, when a gas customer wants to change LP gas companies, his new choice of companies cannot use his existing gas company's LP gas container unless authorized by the existing company, which owns the installed container. So, if the customer does not own his own container<sup>5</sup> and authorization to use the existing company's container is not obtained, the existing container will have to be disconnected so the new company can install its own container. Section 527.07, Florida Statutes.



15. When one gas company disconnects another gas company's container in order to install its own container, it is called a "switch-out" or "changeover." Rule 5F-11.047, Florida Administrative Code, determines when the disconnect notification must occur. When disconnected, a LP gas container is either empty (out-of-gas)<sup>6</sup> or it contains LP gas. If the tank is empty, the tank owner must be notified within 24 hours after the empty tank has been disconnected. See Rule 5F-11.047(2), Florida Administrative Code. Thus, no advance notice is required when the customer is out-of-gas.

16. However, if the existing container contains gas (hereinafter referred to as a "gas-filled container"),<sup>7</sup> Rule 5F-11.047(1), Florida Administrative Code, requires the new, incoming gas company to give two working days advance notice to the existing gas company/tank owner that it intends to disconnect the existing container after two working days. Rule 5F-11.047(1), Florida Administrative Code, reads:

(1) No person, firm or corporation, other than the owner and those authorized by the owner, shall connect or disconnect any cylinder, tank, or system containing liquefied petroleum gas, except in an out-of-gas situation, unless due and sufficient notice has been given by any person, firm or corporation to the owners of any cylinder or tank, prior to disconnecting or connecting such cylinder, tank, or system. Due and sufficient notice shall be received by the owners at least two (2) working days prior to installing the cylinder, tank, or system of

said person, firm, or corporation, and shall be evidenced by a signed receipt. Acceptable evidence of receipt of notification shall be a signed certified mail receipt, signed receipt of hand delivery or facsimile transmission receipt. If after two working days the cylinder, tank, or system has not been disconnected by the owner, the said person, firm or corporation may then disconnect downstream of the system regulator or meter. It shall be mandatory that the person, firm or corporation who so disconnects any such cylinder or tank, whether empty or full, upon the premises of a consumer, does so in a manner that renders the cylinder or tank tight with valves turned off, the cylinder or tank service valve plugged with brass or steel fittings, and all other cylinder, tank or system openings properly plugged. In addition, any cylinder, tank, or system disconnected must be done so in a manner that is in compliance with the requirements of NFPA 58. (Emphasis supplied).

The advance notice requirement only applies to gas-filled containers.

17. After receiving two working days notice, the existing company/tank owner has several options: 1) The tank owner/company can disconnect and remove its gas-filled container from the property within the two working days; 2) swap containers with the incoming company, exchanging the existing container with a similar container delivered to its storage yard by the incoming company; 3) sell the existing gas-filled container to the incoming company or the consumer; 4) coordinate a switch-out with the incoming company; or 5) if it knows and

trusts the safety training of the incoming company's personnel, it can authorize the incoming company to disconnect its tank and put it in an agreed-upon safe location at the customer property until it can be picked up in a reasonable time.

18. Disconnecting a gas-filled container is an inherently dangerous activity even though the person doing the disconnect has been properly trained. If the existing gas-filled container is sold or swapped to the incoming gas company, the inherently dangerous disconnect is not required. By contrast, after a gas-filled container is disconnected it must be temporarily stored on the customer property if it is not immediately removed.

19. As established by testimony of the Department's safety expert even trained persons sometimes store gas-filled containers on customer property in an unsafe and improper manner. Even LP gas companies' employees are known to violate the two working day notice requirement leaving another company's gas-filled container, unplugged, unprotected hazardous, unsafe condition on the consumer's property.

20. The two working day notice requirement of Rule 5F-11.047(1), Florida Administrative Code, provides sufficient time for the two gas companies to work out the switch-out or terms of transfer. Less than two working days' notice would not be sufficient to promote the safe handling of LP gas and proper installation of LP gas equipment.

21. The Department presented the testimony of a Suburban Propane ("Suburban") employee, Tom Ross. Ross is Suburban's Florida regional manager. Suburban is a multi-state marketer and is the third largest propane company in Florida. Suburban's 29 Florida locations are licensed by the Department and serve 80,000 customers. Suburban has twice as many LP gas containers in the field in Florida as any other region due largely to the fact that Florida has a lot of small volume users.

22. Ross testified that training of personnel to perform disconnect varies, some companies providing better training than others. Suburban prefers to disconnect its own gas-filled tanks primarily because it knows the training its employees have received, and has no idea what kind of training a competitor company's personnel may have received.

23. Ross testified that as it relates to Suburban, Rule 5F-11.047(1), Florida Administrative Code, promotes the safe handling of propane gas. The two working day notice requirement gives Suburban the opportunity to evaluate the safety/liability of the situation and the potential safety/liability involved in moving the tank. Safety/liability issues related to the disconnect and removal of the gas-filled tank may make it advantageous for the existing tank owner to negotiate a tank swap with the company taking over the account. In that circumstance, no disconnect is required.

24. The Department presented the testimony of Mike Ivestor. Ivestor is the operations manager of Quality Propane in Havana, Florida, a small mom-and-pop, independent LP gas company. Ivestor knows his own employees have been properly trained, but he cannot be sure how well all his competitors train their employees. Ivestor has a good relationship with most, but not all, competitors in his market. There are some LP gas companies Ivestor would not want to disconnect his company's tanks. In the past, competitor gas companies have disconnected Quality Propane tanks and left them on a customer's property in unsafe condition. Two working days allows Ivestor sufficient time to coordinate with the incoming gas company a time to disconnect his tank so as to not interfere with the new installation or disrupting service to the customer. If Ivestor knows the incoming company, he may authorize it to disconnect his gas-filled container and temporarily store it in an agreed-upon place at the customer property which Ivestor knows is safe.

25. Ivestor is concerned about his company's liability when he has no control over who, when, or how his gas-filled tank is disconnected and set aside. Petitioner and the Department stipulated that if one gas company disconnects another company's gas-filled container and relocates it on the customer's property, it creates liability for the owner of the

container. Rule 5F-11.047, Florida Administrative Code, is a safety rule, not a rule that regulates competitiveness.

Further, the two working days' notice promotes proper installation and transporting of LP gas equipment.

26. Rule 5F-11.047, Florida Administrative Code, states that it implements Section 527.06, Florida Statutes. The Florida Legislature provided in Section 527.06(1), Florida Statutes, that:

The department may adopt rules necessary to effectuate any of the statutory duties of the department in the interest of public health, safety, and welfare and to promote the safe handling of liquefied petroleum gas and proper installation, storing, selling, utilizing, transporting, servicing, testing, repairing, and maintaining of liquefied petroleum gas equipment and systems. The department shall adopt rules reasonably necessary to assure the competence of persons to safely engage in the business of liquefied petroleum gas, including, but not limited to, the licensure, testing, and qualifying of such persons for the protection of the health, welfare, and safety of the public and persons using such materials. These rules shall be in substantial conformity with generally accepted standards of safety concerning the same subject matter and shall not extend, modify, or conflict with any laws of this state or the reasonable implications of such laws."

27. The Florida Legislature also provided in Section 527.06(2), Florida Statutes that:

(2) The department shall promulgate and enforce rules setting forth minimum general

standards covering the design, construction, location, installation, and operation of equipment for storing; handling; transporting by tank truck, tank trailer, or pipeline; and utilizing liquefied petroleum gases and specifying the odorization of such gases and the degree thereof. The rules shall be such as are reasonably necessary for the protection of the health, welfare, and safety of the public and persons using such materials and shall be in substantial conformity with the generally accepted standards of safety concerning the same subject matter.

28. Petitioner and the Department each presented testimony of Vicki O'Neil in their respective case-in-chief. Ms. O'Neil has been Bureau Chief of the Bureau of LP Gas Inspection since August 1994. She oversees Bureau licensing, training, investigations, examinations, and the marketing assessment program.

29. Ms. O'Neil testified that the Department's interpretation of Section 527.06(1), Florida Statutes, is that the Department may take reasonable steps necessary to ensure the public's safety through the rule-making process, and that the safe handling of LP gas is in the interest of the public health, safety, and welfare. This has been the Department's interpretation of Section 527.06, Florida Statutes, since 1994 when responsibility for LP gas regulation was transferred from the DOI to the Department, along with Ms. O'Neil.

30. As established by Ms. O'Neil's testimony, the Department's policy is that proper installation, storing, selling, utilizing, transporting, servicing, testing, repairing, and maintaining of LP gas equipment and systems is in the interest of the public health, safety, and welfare and that Rule 5F-11.047, Florida Administrative Code, is an exercise of the Department's power and duty to promote those public interests. The Department's policy is that Rule 5F-11.047(1), Florida Administrative Code, is a safety rule necessary to promote the safe handling of LP gas.

31. Rule 5F-11.047(1), Florida Administrative Code, is a safety rule, which is in substantial conformity with the published standards of the National Fire Protection Association and is also in substantial conformity with generally accepted standards of safety.

32. As a result of the two working day notice requirement, the incoming and outgoing LP gas companies can dialogue about the proposed disconnection, repairs, safety, or hazardous conditions that might exist. The dialogue may also result in the two companies swapping tanks; thus, the inherently dangerous process of disconnecting the tank is avoided altogether.

33. In light of recent terrorist events in this country, law enforcement has taken a heightened interest in LP gas and gas-filled LP gas containers. Security bulletins from various



federal agencies, including the U.S. Department of Transportation, show the potential for terrorist groups to target commercial LP gas tanks and hazardous material storage facilities. There is a potential for theft of even small quantities of these materials for the purpose of making weapons of mass destruction.

34. Each Category I LP gas dealer must have one "master qualifier" at each business location. Each Category I LP gas dealer must also have one "qualifier" for each 10 employees performing LP gas work. A gas company employee does not have to be a qualifier or a master qualifier to connect or disconnect LP gas containers for the company.

35. Any gas company employee can disconnect gas-filled containers if he or she has been trained by the gas company to do so. These employees are not required to receive training or testing from the Department. The gas company must only document employee training in their company files. The Department generally does not know if a company employee is actually performing disconnects correctly or not, nor whether the employee has ever been disciplined by the employer for safety violations.

36. The quality of employee training varies from company to company. For this reason, some LP gas companies prefer to have their own trained employees disconnect their tanks. Even

though companies train their employees, some have been known to leave disconnected gas-filled containers in unsafe, hazardous condition on a customer's property.

37. As established by testimony of Ernest Barany, an employee of the Department within the Department's Bureau of LP Gas Inspection for seven years and current supervisor of the Department's LP gas inspectors, the Rule's two working day notice requirement applies to LP gas containers in residential and commercial locations, LP gas dispensers, and containers installed in school facilities. Further, the two working day notice requirement of the Rule promotes public safety and the safe handling of LP gas. The two working day notice requirement of the Rule promotes the proper installation, storage, selling, and transporting of LP gas equipment.

38. A customer's existing gas company usually has superior knowledge of safety conditions at the LP gas installation because it installed the container and/or the entire LP gas system; has been delivering LP gas into the container; has maintained and/or repaired the system; and knows about any "red-tag" situations that exist on the LP gas system.

39. In the LP gas industry, a red tag is a warning of an unsafe or hazardous condition in a LP gas system. The red tag is a paper tag hung by a wire from the tank cover or an

appliance or other system component to warn all persons who see it that there is a problem or unsafe condition in the system.

40. A gas company/tank owner will red-tag its LP gas container, appliance, or other system component when a temporary repair has been made or when the gas company knows of a defect in the system. A common temporary repair requiring a red tag is when the on-and-off valve leaks gas that can be detected at the threads between the handle and the body of the valve. The leak can be temporarily stopped by fully opening the valve and then with hand pressure turning the valve counterclockwise a little harder. A red tag would then be put on the tank saying "don't refill until a permanent repair is made." Next, when the tank goes empty the repair can either be made on site or by changing the container on a scheduled basis.

41. Customers sometimes remove a red tag after it is placed on the system by the current gas company. If the red tag is removed, the new, incoming LP gas company coming to disconnect the gas-filled container would not be aware that the system has a problem, defect, or temporary repair unless the existing gas company/tank owner has informed them. Accidents have occurred because customers have removed red tags without the knowledge of the gas company. The two working day notice requirement allows the existing company to address safety

matters that are unknown to the incoming company, thus promoting a safe transfer of gas service.

42. A switch-out or changeover requires more than just safely disconnecting the gas-filled container. If a gas company does not disconnect and remove its own gas-filled container, the gas-filled container must be disconnected and temporarily stored on the consumer's property by the new incoming company.

43. A disconnected gas-filled container is more dangerous than a disconnected empty container. Gas-filled containers temporarily stored on the customer's property present a variety of safety concerns. If a gas-filled cylinder is disconnected and stored on its side at the customer location, liquid propane coming into contact with the safety valve can cause the valve to fail and leak. A gas filled cylinder can fall over creating a hazardous situation if it is punctured, or falls, and begins to roll or hits a person or vehicle. Failure to comply with Rule 5F-11.047(1), has resulted in at least one fatality in Florida because the tank was stored improperly on the customer property.

44. Sometimes there is no safe place to temporarily store a gas-filled container on the customer property. In metropolitan markets there are unique safety concerns requiring that a gas-filled container be removed immediately upon disconnection. In some metropolitan areas there are limited

property lines on residential tanks, underground tanks, commercial tanks that are stacked up behind strip malls with no place to move them, and tanks that are installed around schools or parks that could be tampered with by children. Without advance notice the tank owner cannot address these safe/liability concerns and responsibility for mishaps fall squarely on him. The two working day notice requirement gives the tank owner time to review customer records, evaluate the situation, and coordinate the disconnection and removal of its gas-filled tank.

45. Sometimes the terrain makes safe temporary storage impossible or immediate removal of the tank required. In flood plain areas, local ordinances require the container to be chained or bolted down or bracketed to a wall. Vehicular traffic conditions at some locations require that a gas-filled container be protected behind a barrier. If the location requires that the new container be installed behind the existing barrier, the disconnected gas-filled container may end up stored in an un-barricaded area.

46. The gas company that owns the existing installed container, has an investment in it, has serviced the customer location, and often will know whether or not there is a safe place to temporarily store the disconnected gas-filled container on the property. Two days' advance notice allows the existing

gas company time to assess the safety situation unique to a customer location, thus promoting a safe transfer of gas service.

47. Some LP gas containers are buried underground and must be excavated so the incoming gas company can install its own container underground. A crane, back-hoe, or other special equipment may be required to unearth and move the tank. The existing tank owner may also have to locate existing utilities and obtain governmental authorization or permits to excavate the tank. Some localities require the tank owner to notify local fire or building officials or apply for permits to move the container. If the tank is buried, other buried utilities on the property must be located before excavation.

48. A gas-filled container sometimes must have the gas pumped out of it before the tank can be transported on Florida roads. This usually requires special equipment and two different kinds of trucks. The existing tank owner also has to schedule his employees to do the work. The Rule gives the tank owner the time to work out the logistics and scheduling of equipment to draw the gas out of the tank before it can be transported from the consumer's property.

49. In 1958, Florida's tank disconnect rule was called LP Gas Regulation 11, of the Fire Marshall's rules. LP Gas Regulation 11, Circa 1958 reads:

No person, firm or corporation, other than the owner and those authorized by the owner so to do, shall connect or disconnect or transport or carry any means of conveyance whatsoever, any cylinder or tank containing Liquefied Petroleum Gas, whether in the liquid or vapor state.

Thus, in 1958 all disconnects were prohibited unless authorized by the tank owner. A tank owner could monopolize a customer's LP gas system by simply withholding authorization for the disconnect. The Insurance Commissioner at the time asked for an opinion from the Attorney General because he was troubled that a natural gas supplier was disconnecting LP gas containers without authorization from the owner. Voicing public safety concerns, the Attorney General opined that:

Serious problems of public safety are involved in the disconnecting of L.P. gas cylinders and tanks and the above rule has its legitimate purpose in insuring public safety. I am of the opinion that this regulation can be legitimately enforced against the private utility in question, however, it must be applied in terms of public safety and not in such a manner as will unreasonably restrict competition.

50. Acknowledging the serious public safety concerns related to LP gas tank disconnections, Attorney General Ervin also saw the potential evil of construing Regulation 11 to prohibit tank disconnections "under any circumstances." "Advanced reasonable notice" was the cure. Attorney General Ervin opined:

Said rule should not be construed to prohibit the private utility from disconnecting the L.P. gas tanks and cylinder under any circumstances. If after reasonable notice to the LP gas dealer said dealer does not disconnect his cylinders or tanks, the private utility should be permitted to disconnect them if it does so in a manner which leaves the tanks or cylinders in a safe condition. If the private utility should persist in failing to give reasonable notice and in leaving the tanks and cylinders in an unsafe condition, the State Fire Marshal may hold a hearing . . . and issue a cease and desist order.

51. Subsequent to the Attorney General's July 3, 1958, Opinion, on February 27, 1959, Regulation 11 was amended after Public Hearing. The revised, adopted Regulation 11 provided for "due and sufficient" notice to the tank owner prior to disconnecting his tank. Thus, in similar fashion to Rule 5F-11.047(1), Florida Administrative Code, if the notified tank owner did not disconnect his tank after a reasonable time, the tank could be disconnected by the company desiring to install its own tank.

#### CONCLUSIONS OF LAW

52. The Division of Administrative Hearings has jurisdiction over the parties in this proceeding pursuant to Subsections 120.56(1) and (3), Florida Statutes.

53. LP gas cylinders and tanks are "liquefied petroleum gas containers" within the meaning of Section 527.07, Florida



Statutes. LP gas cylinders, tanks or containers are "liquefied petroleum gas equipment" within the meaning of Section 527.06, Florida Statutes.

54. Rule 5F-11.047, Florida Administrative Code, was properly renumbered, transferred, and filed for adoption by the Department effective March 15, 1994, pursuant to the requirements of Chapter 120, Florida Statutes, and Chapter 1S-1, Florida Administrative Code. Adoption of the Rule was not procedurally infirm.

55. Rule challenge proceedings are conducted pursuant to Section 120.56, Florida Statutes. Subsection 120.56(3), Florida Statutes, applies to existing rule challenge proceedings and, by contrast, Subsection 120.56(2), Florida Statutes, applies in proposed rule challenge proceedings. Rule 5F-11.047(1), Florida Administrative Code, is an adopted, existing rule, to which Subsection 120.56(3), Florida Statutes, applies.

56. Because Petitioner is asserting that existing Rule 5F-11.047(1), Florida Administrative Code, constitutes an invalid exercise of delegated authority, Petitioner has the burden of proving the invalidity of the challenged existing rule, St. Johns River Water Management District v. Consolidated-Tomoka Land Company, 717 So. 2d 72 (Fla. 1st DCA 1998), by a preponderance of the evidence. Board of Trustees of

Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359, 1363 (Fla. 1st DCA 1995).

57. Further, Rule 5F-11.047(1), Florida Administrative Code, is presumed valid because it is an existing rule, which underwent extensive rule promulgation process and review by the Joint Administrative Procedures Committee (JAPC) in the 1990's. Only proposed rules are neither presumed valid nor invalid.

58. Legislative changes to Chapter 120, Florida Statutes, in 1996 and 1999 have not removed the presumption of validity accorded existing rules under the Florida cases. "If an agency's interpretation of its governing statutes is one of several permissible interpretations, it must be upheld, despite existence of reasonable alternatives." Board of Trustees of the Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359 (Fla. 1st DCA 1995). "If we are to regard seriously the incentives for rulemaking under the APA scheme, and if we are to credit the deliberative process that the legislature has prescribed for the development of agency policy, then surely an interpretative rule emerging from this process should be accorded a most weighty presumption of validity." State Department of Rehabilitative Services v. Framat Realty, Inc., 407 So. 2d 238, 242 (Fla. 1st DCA 1981). Hence existing Rule 5F-11.047, Florida Administrative Code, is accorded a presumption of validity.

59. Subsection 570.07(23), Florida Statutes, authorizes the Department to adopt rules pursuant to Sections 120.536(1) and 120.54, Florida Statutes, to implement provisions of law-conferring duties upon the Department. Section 527.055, Florida Statutes, grants to the Department authority to administer and enforce the provisions of Chapter 527, Florida Statutes, and rules promulgated related thereto. Subsection 570.07(16)(k), Florida Statutes, grants to the Department the function, power, and duty to enforce the state laws and rules relating to the sale of liquid fuels. Section 527.07, Florida Statutes, is a state law related to the sale of liquid fuels, which the Department has a statutory duty to enforce.

60. Section 527.07, Florida Statutes, does not prohibit one company from disconnecting another company's gas-filled tank.<sup>8</sup> However, the statute does force two eventualities when one gas company plans to sell LP gas to a customer who currently has another gas company's container installed at his home or business: 1) the new incoming company will either use or fill the existing gas-filled container with permission from the tank owner; or 2) the tank must be disconnected because the new incoming company needs to install his own tank.

61. Rule 5F-11.047(1), Florida Administrative Code, requires the new incoming gas company proposing to sell gas to

the customer to initiate communication to the existing tank owner so the eventualities appurtenant to the proposed sale of gas can be addressed by the tank owner. By contrast, if no advance notice was required, the gas-filled tank would be disconnected and stored on the customer's property,<sup>9</sup> and this would occur without the tank owner's knowledge.

62. "The authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute. Otherwise, the rule is not a valid exercise of delegated legislative authority." Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243 (Fla. 1st DCA 2002), citing Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000). "Moreover, the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough." Id. This question is one that must be determined on a case-by-case basis.

63. As authority for Rule 5F-11.047(1), Florida Administrative Code, the Department relied on Section 527.06, Florida Statutes, which gives the Department rulemaking authority to "adopt rules necessary to effectuate any of the statutory duties of the Department in the interest of public

health, safety, and welfare and to promote the safe handling of liquefied petroleum gas and proper installation, storing, selling, utilizing, transporting, servicing, testing, repairing, and maintaining of liquefied petroleum gas equipment and systems."

64. Disconnecting, connecting, and storing a gas-filled container at a residential, commercial, or public site is inherently dangerous. See Noack v. B.L. Watters, Inc., 410 So. 2d 1375 (Fla. 5th DCA 1982), concur Hartford Fire Insurance Company v. Public Service Commission of Colorado, 676 P.2d 25 (Colo. App. 1983). A disconnected gas-filled container is more dangerous than a disconnected empty container.

65. Additionally, promoting the safe handling of liquefied petroleum gas and proper installation, storing, selling, utilizing, transporting, servicing, testing, repairing, and maintaining of liquefied petroleum gas equipment and systems is in the interest of the public health, safety, and welfare. The pre-disconnection notice requirement of Rule 5F-11.047(1), Florida Administrative Code, is directly related to these public health, safety, or welfare interests.

66. The two working day notice requirement of Rule 5F-11.047(1), Florida Administrative Code, falls within the class of powers and duties delegated to the Department to adopt rules under Section 527.06, Florida Statutes. The fact that a

Rule falls within the class of powers and duties delegated to an agency will not alone make the Rule a valid rule. Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

67. In addition to being within the general class of powers and duties delegated to the Department, Rule 5F-11.047(1), Florida Administrative Code, implements and interprets the specific powers and duties identified in Section 527.06, Florida Statutes, "to promote the safe handling of liquefied petroleum gas and proper installation, storing, selling, utilizing, transporting, servicing, testing, repairing, and maintaining of liquefied petroleum gas equipment and systems." Id.

68. "[A]n agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute." Section 120.52(8), Florida Statutes. "[I]t is clear that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute." Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000). "A rule that is used to implement or carry out a directive will necessarily contain language more detailed than that used in the directive itself. Likewise, the use of the term "interpret" suggests that a rule will be more detailed than the applicable

enabling statute. There would be no need for interpretation if all of the details were contained in the statute itself." Id.

69. The language in Rule 5F-11.047(1), Florida Administrative Code, is more detailed than the language in the enabling statute. Rule 5F-11.047(1), Florida Administrative Code, specifies with detail when and under what conditions notice is required, and how much time in advance notice must be given. This does not make the Rule invalid. To the contrary, the notice requirement is a Department directive which implements the powers and duties identified in Section 527.06, Florida Statutes. In General Motors Corporation v. Florida Department of Highway Safety and Motor Vehicles, 625 So. 2d 76 (Fla. 1st DCA 1993), the court affirmed the Administrative Law Judge's order finding that an existing rule, imposing a 12-month time period, did not constitute an invalid exercise of delegated authority. Petitioner did not argue that the time period chosen by the Department was unreasonable and, therefore, arbitrary and capricious. Rather Petitioner argued, unsuccessfully, that since the statute being implemented did not contain a time limit, the Department lacked authority to adopt a time limit by rule. The General Motors Corporation court looked at the Legislature's intent to protect the public health, safety, and welfare of Florida citizens in the context of motor vehicle dealer licensing. Id. at 77.

70. Further, "rulemaking authority may be implied to the extent necessary to properly implement a statute governing the agency's statutory duties and responsibilities." General Motors Corporation, citing Department of Professional Regulation, Board of Professional Engineers v. Florida Society of Professional Land Surveyors, 475 So. 2d 939, 942 (Fla. 1st DCA 1985). Fairfield Communities v. Florida Land and Water Adjudicatory Commission, 522 So. 2d 1012 (Fla. 1st DCA 1988).

71. Rule 5F-11.047(1), Florida Administrative Code, is necessary to carry out the provisions of Section 526.06, Florida Statutes.

It is well established in Florida that the Legislature, having enacted a Statute complete in itself which declares a legislative policy or standard and operates to limit the power delegated, may authorize an administrative agency to prescribe rules and regulations for its administration. . . . Where the empowering provision of a statute states simply that an agency may "make such rules and regulations as may be necessary to carry out the provisions of this Act," the validity of regulations promulgated thereunder will be sustained so long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious."

General Motors Corporation, citing Florida Beverage Corporation v. Wynne, 306 So. 2d 200, 202 (Fla. 1st DCA 1975) (citations omitted). Accord General Telephone Company v. Florida Public Service Commission, 446 So. 2d 1063 (Fla. 1984). General Motors



Corporation v. Florida Department of Highway Safety and Motor Vehicles, 625 So. 2d 76, 78 (Fla. 1st DCA 1993)

72. The Department demonstrated by competent substantial evidence how and why the two working day notice requirement of Rule 5F-11.047(1), Florida Administrative Code, is necessary to implement or interpret the specific powers and duties identified in Section 527.06, Florida Statutes.

73. "A capricious action is one which is taken without thought or reason or rationality. An arbitrary decision is one not supported by facts or logic, or despotic." Board of Trustees of the Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359 (Fla. 1st DCA 1995). It is significant that Rule 5F-11.047(1), Florida Administrative Code, requires "two working days" notice, rather than 48 hours, two days, or no advance notice at all. The designation of "working" days logically reflects the reality that planning, coordination, and execution of the excavation, disconnection, gas evacuation, and transportation of gas-filled containers obviously must be performed on work days when those persons required to perform the activities are working. In some instances application for governmental authorization must also be made. The fact that "working" days was specified suggests that these factors were considered. The two working day advance notice requirement of Rule 5F-11.047(1), Florida Administrative Code, is not an

arbitrary or capricious; rather it is a safety standard which is thoughtful, logical, and reasonably related to promoting the safe handling of LP gas and the proper installation, storing, selling, utilizing, transporting, servicing, testing, repairing, and maintaining of liquefied petroleum gas equipment and systems, and the proper storage and transport of LP gas containers.

74. Rule 5F-1.047(1), Florida Administrative Code, promotes tank swaps, thus making the inherently dangerous disconnect process unnecessary. Tank swaps also make temporary storage of disconnected gas-filled containers on the public or private property unnecessary. Promoting tank swaps promotes the safe handling of LP gas and the proper selling, storing and utilizing of LP gas equipment. Without two days' advance notice, the opportunity to swap tanks is lost, because the disconnect will have already occurred before the two gas companies even discuss it.

75. Rule 5F-11.047(1), Florida Administrative Code, reduces the likelihood of injury or damage to persons and property during the disconnect process. Financial interests motivate the owner of a gas-filled container to preserve his equipment and the gas product at a consumer site, and to protect himself against liability which results from mishaps. The tank owner is the most knowledgeable about the LP gas system because

he installed the container and perhaps the system, he has delivered the LP gas, and may have serviced or repaired system components. His interest in, his knowledge of, and experience with a particular gas system, gives him superior knowledge of any latent safety conditions, temporary latent repairs, and/or red-tag situations that exist.

76. The two working day notice requirement of Rule 5F-11.047(1), Florida Administrative Code, facilitates the tank owner warning the incoming gas company of latent safety hazards or potentially unsafe conditions. Without advance notice, there is no opportunity to warn another. Even if the incoming company's employee is properly trained, without knowledge of a hidden danger, he may disconnect the gas-filled container and find himself in an unexpected, perilous, and uncontrollable situation, endangering himself, other persons and property.

77. Another basis of authority to adopt the two working day notice provision of Rule 5F-11.047(1), Florida Administrative Code, is the specific powers and duties identified in Section 527.06(2), Florida Statutes, to promulgate and enforce rules setting forth minimum general standards covering the design, construction, location, installation, and operation of equipment for storing, handling, transporting by tank truck, tank trailer, or pipeline and utilizing liquefied

petroleum gases, as are reasonably necessary for the protection of the health, welfare, and safety of the public and persons using such materials that are in substantial conformity with the generally accepted standards of safety. Rule 5F-11.047(1), Florida Administrative Code, is a minimum general standard which covers the location, installation, and operation of equipment for storing, handling, and transporting by tank truck, LP gas.

78. Notice to the existing tank owner is a prerequisite to the location and installation of the new LP gas equipment, and as such, is a minimum general standard reasonably related to those activities. With notice, the gas-filled tank owner can work out the logistics necessary to pump LP gas from a tank that will be a disconnected tank, so the tank can be transported from the site. With notice the tank owner can apply for governmental permits, locate piping, and other buried utilities, all of which are attendant to the deinstallation and removal of existing equipment so new gas equipment can be installed. For these reasons, Rule 5F-11.047(1), Florida Administrative Code, is a minimum general standard that covers the location and installation of equipment for storing, handling, and transporting LP gas.

79. Rule 5F-11.047(1), Florida Administrative Code, is in substantial conformity with generally accepted standards of safety, and with the published standards of the National Fire

Protection Association. See Section 527.06(3), Florida Statutes.

80. Rule 5F-11.047(1), Florida Administrative Code, continues the "advance notice" concept which was amended into a Regulation 11 in 1959, after Attorney General Ervin expressed some concern that, an earlier version of the safety regulation could conceivably have had an anti-competitive effect if disconnections were forbidden under any circumstances. Rule 5F-11.047(1), Florida Administrative Code, does not prohibit disconnections under any circumstances, so the evil warned of in the earlier regulation is not present in the challenged Rule.

81. The two working day notice provision of Rule 5F-11.047(1), Florida Administrative Code, in no way economically harms the consumer, instead it provides beneficial economic opportunities for the consumer, and is not anti-competitive from the consumer standpoint. Petitioner presented no competent substantial evidence that the Rule denied him access to the market. This case is distinguishable from Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243 (Fla. 1st DCA 2002), where Section 455.544, Florida Statutes, specifically granted power to the Secretary of Health to challenge a rule if it unreasonably restricted competition. Antitrust laws are enacted for the protection of

competition, not competitors. Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 97 S. Ct. 690 (1977). The fact that application of Rule 5F-11.047(1), Florida Administrative Code, results in economic benefits to consumers indicates healthy competition, and that the rule has a pro-competitive effect.

FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions Law set forth herein, it is

ORDERED:

That the Petition is dismissed.

DONE AND ORDERED this 2nd day of January, 2003, in Tallahassee, Leon County, Florida.

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DON W. DAVIS  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of January, 2003.

ENDNOTES

1/ One hundred and forty-five pounds PSI at ambient outside temperature at 70 degrees Fahrenheit.

2/ Regulation 11 (Department's Exhibits 2 and 3)

3/ DOI's tank disconnect rule was identical to the challenged rule.

4/ Department's Exhibit 8.

5/ Rule 5F-11.047(1), Florida Administrative Code, does not prohibit people from disconnecting the gas cylinders on their barbecues because such cylinders are typically owned by the consumer.

6/ A LP gas container is out of gas when there is not sufficient gas in it to support combustion of a pilot light on an appliance.

7/ "Gas-filled container" in this Order simply means the container has gas in it, even though it may not be filled with gas.

8/ If one company was prohibited from disconnecting another company's tank without authorization, the company with its tank connected to the gas system could monopolize a customer account by simply refusing to authorize that its tank be disconnected.

9/ The disconnecting gas company is prohibited from using, filling or delivering the container to the tank owner by Section 527.07, Florida Statutes, so once disconnected it would have to be stored on the customer's property.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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