

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: June 26, 2014

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Cowdery) *KC S.M.C.*
Division of Accounting and Finance (Bulecza-Banks) *CB*

RE: Docket No. 140107-PU – Petition for declaratory statement regarding discovery in dockets or proceedings affecting rates or cost of service processed with the Commission's proposed agency action procedure.

AGENDA: 07/10/14 – Regular Agenda – Decision on Declaratory Statement – Participation is at the Discretion of the Commission

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: Final Order must be issued by August 18, 2014 pursuant to Section 120.565(3), Florida Statutes

SPECIAL INSTRUCTIONS: None

Case Background

On May 20, 2014, pursuant to Section 120.565, Florida Statutes (F.S.), and Rule 28-105.002, Florida Administrative Code (F.A.C.), the Office of Public Counsel (OPC) filed a Petition for Declaratory Statement (Petition) regarding the application of Sections 350.0611(1), 366.093(2), 367.156(2), F.S., and Rule 28-106.206, F.A.C., to OPC's ability to obtain discovery during any future proposed agency action (PAA) proceedings affecting rates or cost of service. OPC states in its Petition that it requests the Commission to issue an order declaring that:

Upon intervention in any proceeding affecting rates or cost of service that the Commission processes under proposed agency action (PAA) procedures, Sections 350.0611(1), 366.093(2), 367.156(2), F.S., and Rule 28-106.206,

F.A.C., authorize the Office of Public Counsel to conduct discovery prior to the issuance of the Commission's written Notice of Proposed Agency Action.

Pursuant to Rule 28-105.0024, F.A.C., a Notice of Declaratory Statement was published in the May 23, 2014, edition of the Florida Administrative Register, informing interested persons of the Petition. On June 12, 2014, Utilities, Inc. (UI), timely filed a motion to intervene pursuant to Section 120.565, F.S., and Rule 28-105.0027, F.A.C. Utilities, Inc. was granted intervention by Order No. PSC-14-0328-PCO-PU, issued June 25, 2014.

This recommendation addresses OPC's Petition for Declaratory Statement. Pursuant to Section 120.565(3), F.S., and Rule 28-105.003, F.A.C., an agency must issue a declaratory statement or deny the petition within 90 days after the petition is filed. Thus, the Commission must issue an order on the Petition by August 18, 2014. The Commission has jurisdiction pursuant to Section 120.565, and Chapters 366 and 367, F.S.

Discussion of Issues

Issue 1: Should the Commission issue a declaratory statement in response to OPC's Petition?

Recommendation: No. The Commission should deny OPC's Petition for Declaratory Statement for failure to meet the statutory requirements necessary to obtain a declaratory statement. (Cowdery, Bulecza-Banks)

Staff Analysis:

Threshold requirements for issuance of a declaratory statement

Declaratory statements are governed by Section 120.565, F.S., and the Uniform Rules of Procedure in Chapter 28-105, F.A.C. Section 120.565, F.S., states, in pertinent part, that:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides that:

[a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.002, F.A.C., requires a petition for declaratory statement to include a description of how the statutory provisions or rule on which a declaratory statement is sought may substantially affect the petitioner in the petitioner's particular set of circumstances. The agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts.¹ The appropriate action for the Commission to take on this petition for declaratory statement is to either issue a declaratory statement and answer the question or deny the petition and decline to answer the question.²

¹ Rule 28-105.003, F.A.C.

² Subsection 120.565(3), F.S., and Rule 28-105.003, F.A.C.

OPC's requested declaratory statement

OPC's Petition for Declaratory Statement asks the Commission to issue an order declaring that:

Upon intervention in any proceeding affecting rates or cost of service that the Commission processes under proposed agency action (PAA) procedures, Sections 350.0611(1), 366.093(2), 367.156(2), F.S.,³ and Rule 28-106.206, F.A.C., authorize the Office of Public Counsel to conduct discovery prior to the issuance of the Commission's written Notice of Proposed Agency Action.

Petition, p. 2.

The Petition alleges that four procedural orders issued by Prehearing Officers in Commission PAA proceedings create doubt regarding whether, going forward, the Commission will "enforce OPC's statutory discovery rights in docketed PAA proceedings in which it intervenes prior to the issuance of a Notice of Proposed Agency Action." Petition, p. 1. The Petition further describes how a declaratory statement is necessitated by what OPC characterizes as "inconsistent and conflicting decisions" and avoidance of "piecemeal, repetitive litigation" concerning OPC's alleged right to conduct discovery in PAA proceedings. Petition, p. 1 and p. 4, fn. 1.

OPC states that in three of the procedural orders, the FPUC Order,⁴ the AUF Order,⁵ and the Labrador Order,⁶ the Commission recognized, explicitly and/or implicitly, OPC's right to obtain discovery in PAA rate cases prior to the issuance of a Notice of Proposed Agency Action. Petition, p. 4. OPC disagrees with the fourth and most recent order, the WMSI Order,⁷ stating that the order "terminated OPC's pre-PAA order discovery initiatives specifically in that case." Petition, p. 4.

OPC argues that "going forward, the conclusions, determinations, and practice embodied in the FPUC and AUF Orders, not the WMSI Order, must govern OPC's ability to conduct discovery prior to the issuance of Notice of Proposed Agency Action." Petition, p. 22. To resolve the "inconsistent and conflicting decisions," OPC asks the Commission to declare "in a

³ The Petition is specific to rate cases in the electric, gas, water and wastewater industries.

⁴ Order No. PSC-09-0182-PCO-GU, issued March 27, 2009, Docket No. 080366-GU, In re: Petition for rate increase by Florida Public Utilities Company (Order Denying Florida Public Utilities Company's Objections and Motion for Protective Order).

⁵ Order No. PSC-11-0018-PCO-WS, issued January 5, 2011, Docket No. 100330-WS, In re: Application for increase in water/wastewater rates in Alachua, Brevard, DeSoto, Hardee, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc. (Order Granting Citizens Motion to Set Discovery Parameters and Motion to Compel Discovery Responses).

⁶ Order No. PSC-12-0139-PCO-WS, issued March 26, 2012, Docket No. 110264-WS, In re: Application for increase in water and wastewater rates in Pasco County by Labrador Utilities, Inc. (Order Denying Motion to Intervene. This order does not address any discovery issues.)

⁷ Order No. PSC-12-0316-PCO-WU, issued June 19, 2012, Docket No. 110200-WS, In re Application for increase in water rates in Franklin County by Water Management Services, Inc. (Order Denying OPC's Motion to Establish Discovery Procedures and Motion to Compel Discovery Responses).

single order that, going forward, it will recognize OPC's discovery rights in PAA cases." Petition, pp. 1 and 4.

In its motion to intervene, Utilities Inc., alleges that if the interpretation of the PAA procedure sought by OPC is adopted by the Commission, it will drastically increase the rate case expense incurred by the UI's subsidiaries and will otherwise exacerbate an already tight deadline within which the Commission has to rule in a PAA proceeding, and is contrary to the purpose of the PAA process.

OPC responds to UI's allegations by stating that OPC is not advancing a new interpretation of the PAA procedure, but is asking for affirmation of OPC's statutory right to discovery in a PAA proceeding as set forth in the FPUC Order. OPC states that its discovery activities and related rate case expense have been part of the PAA ratemaking in the past and that the continuation of that practice is neither new nor incremental in nature. Further, OPC states that any argument in opposition to OPC's Petition that is based on the level of rate case expense would not be relevant to the timing of discovery but to establishing appropriate discovery parameters in a given case. OPC concludes that to the extent that the purpose of the PAA process is to shorten the amount of time necessary to complete a rate case, OPC's discovery rights are consistent with, and in some cases are likely essential to, that goal.

The statutes and rules to be applied to OPC's particular circumstances

OPC asks the Commission to issue a declaratory statement recognizing OPC's right to obtain discovery under the provisions of Subsections 350.0611(1), 366.093(2), 367.156(2), F.S., and Rule 28-106.206, F.A.C., during any future PAA proceedings affecting rates or cost of service, quoting the statute and rule language as set forth below.

Subsection 350.0611(1), F.S., concerning the powers and duties of OPC:

It shall be the duty of the Public Counsel to provide legal representation for the people of the state in proceedings before the [C]ommission. . . . The Public Counsel shall have such powers as are necessary to carry out the duties of his or her office, including, but not limited to, the following specific powers:

(1) . . . to appear in the name of the state or its citizens, in any proceeding or action before the [C]ommission . . . and utilize therein all forms of discovery available to attorneys in civil actions generally, subject to protective orders of the [C]ommission. . .

Subsections 366.093(2), F.S., concerning the confidentiality of electric and gas utilities' records, and 367.156(2), F.S., concerning the confidentiality of water and wastewater utilities' records:

Discovery in any docket or proceeding before the [C]ommission shall be in the manner provided for in Rule 1.280 of the Florida Rules of Civil Procedure. Information which affects a utility's rates or cost of service shall be considered relevant for purposes of discovery in any docket or proceeding where the utility's rates or cost of service are at issue. The [C]ommission shall determine whether information requested in discovery affects a utility's rates or cost of service . . .

Rule 28-106.206, F.A.C., addressing discovery in hearings involving disputed issues of material facts:

After commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanctions in accordance with the Florida Rules of Civil Procedure, except contempt.

OPC's Statement of Fact

OPC states that whenever it has deemed formal discovery pursuant to Subsection 350.0611(1), F.S., necessary to carry out its statutory responsibilities in a given PAA case in which it has intervened, it has initiated discovery prior to the issuance of the Commission's Notice of Proposed Agency Action. Petition, pp. 2-3, para. 4. OPC alleges that because the Petition is based in part upon Section 350.0611, F.S., OPC's empowering statute, the declaratory statement sought will apply only to OPC in its individual, particular, and unique circumstances. *Id.* OPC further states that going forward, if the Commission does not allow OPC to conduct this discovery, it would impair OPC's ability to fully, efficiently and effectively represent the citizens of the State in any proceeding or action before the Commission, in derogation of OPC's rights under Section 350.0611, F.S. *Id.*

Discussion and Recommendation

For the reasons discussed in detail below, staff recommends that the Petition be denied and that the Commission decline to issue a declaratory statement because the Petition does not meet the statutory and rule requirements for a petition for declaratory statement.

1. The Petition should be denied for failure to allege a present, ascertained set of facts

The purpose of a declaratory statement is to answer questions or doubts concerning the applicability of an agency's statutes, rules, or orders to the petitioner's particular circumstances.⁸

⁸ Rule 28-105.001, F.A.C.

OPC is required by Subsection 120.565(2), F.S., to “state with particularity the petitioner’s set of circumstances” and “specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.” The authority of the Commission to issue a declaratory statement in this docket is limited by Section 120.565, F.S., to a determination of the application of the statutes and rule identified by OPC to OPC’s particular set of circumstances.⁹

A petition for declaratory statement must demonstrate a present, ascertained state of facts and may not allege merely a hypothetical situation¹⁰ or the possibility of a dispute in the future.¹¹ Declaratory statements cannot be rendered when the petitioner does not allege specific facts,¹² and instead alleges only that the petitioner would be exposed to problems in the future.¹³

The Petition’s allegation of particular circumstances is that OPC in the future may want to conduct discovery in a PAA action in a rate case, and failure to conduct discovery would impair its ability to represent Florida citizens in that action. This statement does not allege specific facts or circumstances as required by Section 120.565, F.S. OPC merely alleges the possibility that there could be a future rate case in which OPC wishes to conduct discovery but is denied discovery by the Prehearing Officer. OPC admits in its Petition that it does not request discovery in every PAA proceeding in which rates are affected, but only “whenever OPC has deemed such formal discovery necessary....” Petition, p. 2. As is well-established by the Courts, the mere possibility of a dispute or hypothetical set of facts in the future is insufficient to meet the requirements for a statement of facts setting out with particularity the petitioner’s set of circumstances.¹⁴ For this reason, staff recommends that the Petition be denied.

2. The Petition should be denied because it requests a general advisory opinion

As previously stated, a petition for declaratory statement may be used to resolve questions or doubts as to how specific statutes, rules, or orders may apply to the petitioner’s particular factual circumstances.¹⁵ Because a declaratory statement is intended to address a petitioner’s particular factual circumstances, an agency does not have authority in a declaratory

⁹ Lennar Homes, Inc. v. Dep’t of Bus. & Prof’l Reg., Div. of Fla. Land Sales, Condos. & Mobile Homes, 888 So. 2d 50, 53 (Fla. 1st DCA 2004).

¹⁰ See Santa Rosa County, v. Dep’t of Admin. Hearings, 661 So. 2d 1190, 1193 (Fla. 1995); Order No. PSC-01-1611-FOF-SU, issued August 3, 2001, Docket No. 010704-SU, In re: Petition for declaratory statement by St. Johns County (petition for declaratory statement denied for failure to demonstrate a present, ascertained or ascertainable state of facts or a present controversy as to a state of facts that are not merely a hypothetical situation).

¹¹ Okaloosa Island Leaseholders Ass’n., Inc. v. Okaloosa Island Auth., 308 So. 2d 120, 122 (Fla. 1st DCA 1975).

¹² Order No. PSC-08-0374-DS-TP, issued June 4, 2008, Docket No. 080089-TP, In re: Petition for declaratory statement regarding local exchange telecommunications network emergency 911 service, by Intrado Communications Inc. (Order Denying Amended Petition for Declaratory Statement).

¹³ Santa Rosa County, 661 So 2d at 1193 (Court rejected petitioner’s argument that even though case was settled, declaratory relief was still appropriate because it would be exposed to future problems in complying with the statute and rule at issue).

¹⁴ See fn. 11, 12, and 14 above, and fn. 17 below.

¹⁵ Section 120.565(1) and (2), F.S.; Rules 28-105.001 and 28-105.002, F.A.C.; fn. 10 above.

statement proceeding to give a general legal advisory opinion¹⁶ or to announce general policy of far-reaching applicability.¹⁷ The Petition asks for relief contrary to these principles.

The Petition asks that the Commission should declare that pursuant to subsections 350.0611(1), 366.093(2), 367.156(2), F.S., and Rule 28-106.206, F.A.C., OPC always has the right to discovery in PAA rate cases. This is a request for a general advisory opinion. Because the Commission has no authority to issue a general legal advisory opinion in a declaratory statement proceeding, staff recommends that the Commission deny the Petition for Declaratory Statement.

3. *The Petition should be denied because it is a challenge to the validity of the WMSI Order.*

Because the declaratory statement procedure is intended to answer questions or doubts concerning the applicability of a statute, rule, or order:

[T]he validity of the statute, rule or order is assumed. Therefore the declaratory statement petition is not a vehicle for testing the validity of the matter on which the declaration is sought.¹⁸ (citation omitted).

The Petition does not ask the Commission to resolve questions or doubts as to how the WMSI Order applies to OPC's particular circumstances. Instead, the Petition lists reasons why OPC believes that the WMSI Order was wrongly decided. Petition, pp. 22-24, para. (a) – (f). The Petition asserts that the conclusions, determinations, and practice embodied in the WMSI Order should not be followed in the future. Petition, p. 22. The basis for the Petition is OPC's disagreement with the WMSI Order which denied OPC's motions to conduct discovery in a PAA proceeding. Petition, pp. 19-24.

OPC is using the declaratory statement procedure to ask the Commission to recede from the WMSI Order, that is, to test the order's validity. This is not a proper use of the declaratory statement procedure. The declaratory statement procedure is not appropriate for challenging, on a "going forward basis," the conclusions, reasoning, and precedential effect of the WMSI discovery order issued by the Prehearing Officer.¹⁹

¹⁶Martinez v. Scanlan, 582 So. 2d 1167, 1170-71 (Fla. 1991); Askew v. Ocala, 348 So. 2d 308, 310 (Fla. 1977) (declaratory relief properly denied where petitioners sought judicial advice different than an Attorney General's advisory opinion, where there was no present dispute, only a desire by public officials to take certain action in the future and ward off possible consequences); Fla. Dep't of Ins. v. Gaur. Trust Life Ins. Co., 812 So. 2d 459, 460-61 (Fla. 1st DCA 2002) (Court held declaratory relief not available to render what amounts to an advisory opinion upon a showing of the mere possibility of legal injury based on hypothetical facts which have not arisen); Smith v. Southern Cassadaga Spiritualist Camp Meeting Ass'n, 571 So. 2d 42, 43 (Fla. 5th DCA 1990) (a declaratory judgment will be denied if there is no allegation of present controversy, and it merely seeks legal advice).

¹⁷ Lennar Homes, 888 So. 2d at 51 (reversing the agency's declaratory statement which announced a general policy of far-reaching applicability).

¹⁸ Retail Grocers Ass'n of Fla. Self Insurers Fund v. Dep't of Labor & Employment Secur., Div. of Workers' Compensation, 474 So. 2d 379, 382 (Fla. 1st DCA 1985)(where the court noted that the orders being applied to the petitioner's specific circumstances are presumed valid).

¹⁹ See fn. 19 above.

Furthermore, in the WMSI docket, OPC participated in oral argument before the Prehearing Officer on OPC's motion to establish discovery procedures and motion to compel discovery. After the WMSI Order denying OPC's motions was issued, OPC had both the opportunity to file a motion for reconsideration and to appeal the order. OPC did not avail itself of either opportunity.

For these reasons, staff recommends that the Petition be denied.

4. *The Petition does not conform to the intent of Section 120.565, F.S.*

The Florida Supreme Court has affirmed that the declaratory statement procedure is intended to enable members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs or in the planning of their future affairs.²⁰ The process is also intended to enable members of the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts where it is necessary or helpful for them to conduct their affairs in accordance with the law.²¹ The declaratory statement procedure is intended to enable the petitioner to select a proper course of action in advance, thus avoiding costly administrative litigation.²² For the reasons illustrated in points 1 – 3 above, the Petition does not appear to advance any of these purposes of the declaratory statement procedure.

Conclusion

For the reasons identified above, staff recommends that the Commission deny the Petition for Declaratory Statement for failure to meet the statutory requirements necessary to obtain a declaratory statement.

²⁰ Fla. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutual Wagering v. Inv. Corp., 747 So. 2d 374, 382 (Fla. 1999)(citing to Patricia A Dore, Access to Florida Administrative Proceedings, 13 Fla. St. U. L. Rev. 965 (1986)).

²¹ Id.

²² Id. at 384; Adventist Health Sys./Sunbelt, Inc. v. Agency for Health Care Admin., 955 So. 2d 1173, 1176 (Fla. 1st DCA 2007); 1000 Friends of Fla., Inc. v. State, 760 So. 2d 154, 158 (Fla. 1st DCA 2000); Chiles v. Dep't of State, Div. of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998); Order No. PSC-02-1459-DS-EC, issued Oct. 23, 2002, Docket No. 020829-EC, In re: Petition for declaratory statement by Fla. Keys Elec. Coop. Ass'n.

Issue 2: Should this docket be closed?

Recommendation: Yes, the docket should be closed. (Cowdery)

Staff Analysis: Whether the Commission acts to either grant or deny the Petition, in whole, or in part, a final order must be issued by August 18, 2014, no further action will be necessary, and the docket should be closed.