

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 140107-PU
ORDER NO. PSC-14-0392-DS-PU
ISSUED: July 30, 2014

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

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.¹ OPC states in its Petition that it requests 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. The parties were allowed to participate at the July 10, 2014 Agenda Conference.

¹ The Petition is specific to rate cases in the electric, gas, water and wastewater industries.

We have jurisdiction pursuant to Section 120.565, and Chapters 366 and 367, F.S.

STATUTES AND RULES GOVERNING DECLARATORY STATEMENTS

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.² The appropriate action 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.³

OPC'S PETITION FOR DECLARATORY STATEMENT

The Petition alleges that four procedural orders issued by Prehearing Officers in PAA proceedings create doubt regarding whether, going forward, we 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.

² Rule 28-105.003, F.A.C.

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

OPC states that in three of the procedural orders, the FPUC Order,⁴ the AUF Order,⁵ and the Labrador Order,⁶ we 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 us to declare "in a single order that, going forward, [the Commission] 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, it will drastically increase the rate case expense incurred by the UI's subsidiaries and will otherwise exacerbate an already tight deadline within which we have 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.

Subsections 350.0611(1), 366.093(2), 367.156(2), F.S., and Rule 28-106.206, F.A.C.

OPC asks for a declaratory statement recognizing its 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,

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).

F.A.C., during any future PAA proceedings affecting rates or cost of service. 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, states:

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, states:

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 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 we do 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 us, in derogation of OPC's rights under Section 350.0611, F.S. Id.

FINDINGS AND CONCLUSIONS

For the reasons discussed in detail below, we 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 is 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 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." Our authority 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 Petitioner'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

⁸ Rule 28-105.001, F.A.C.

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).

the requirements for a statement of facts setting out with particularity the petitioner's set of circumstances.¹⁴

2. *The Petition is 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 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 we 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 we have no authority to issue a general legal advisory opinion in a declaratory statement proceeding, we deny the Petition for Declaratory Statement.

3. *The Petition is 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 us 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

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.

¹⁶ Martinez 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).

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 us 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

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.

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.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petition for Declaratory Statement is denied for failure to meet the statutory requirements necessary to obtain a declaratory statement as set forth in the body of this order. It is further

ORDERED that this docket shall be closed.

¹⁹ See fn. 18 above.

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.

By ORDER of the Florida Public Service Commission this 30th day of July, 2014.



CARLOTTA S. STAUFFER
Commission Clerk
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or
- 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.