

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed adoption of Rule 25-6.030,  
F.A.C., Storm Protection Plan and Rule 25-  
6.031, F.A.C., Storm Protection Plan Cost  
Recovery Clause.

DOCKET NO. 20190131-EU  
ORDER NO. PSC-2019-0468-PCO-EU  
ISSUED: October 31, 2019

ORDER DENYING MOTION FOR CONTINUANCE AND TO ESTABLISH A  
REASONABLE SCHEDULE FOR RULE HEARING

I. Background

The 2019 Florida Legislature passed SB 796 to enact Section 366.96, Florida Statutes (F.S.), entitled “Storm protection plan cost recovery.” Section 366.96, F.S., requires each investor-owned electric utility (IOU) to file a transmission and distribution storm protection plan (storm protection plan) for the Commission’s review and directs the Commission to hold an annual proceeding to determine each IOU’s prudently incurred costs to implement its plan and allow recovery of those costs through a Storm Protection Plan Cost Recovery Clause (SPPCRC).

Section 366.96(3), F.S., requires the Commission to adopt rules to specify the elements that must be included in an IOU’s filing for the Commission’s review of its storm protection plan. Section 366.96(11), F.S., further requires that the Commission adopt rules to implement and administer the section and mandates that the Commission propose a rule for adoption as soon as practicable after the effective date of the act, but not later than October 31, 2019.

In furtherance of the Legislature’s directive, the Commission’s Notice of Development of Rulemaking was published in Volume 45, No. 111, of the Florida Administrative Register (F.A.R.) on June 7, 2019. The notice included two new rules: Rule 25-6.030, Florida Administrative Code (F.A.C.), which would specify the elements that must be included in an IOU’s storm protection plan, and Rule 25-6.031, F.A.C., which would establish the SPPCRC.

The Commission voted to propose the adoption of Rules 25-6.030 and 25-6.031, F.A.C., at its October 3, 2019 Agenda Conference. Proposed Rules 25-6.030 and 25-6.031, F.A.C., were published in the October 7, 2019 edition of the F.A.R., Volume 45, Number 195. Affected persons had 21 days from the F.A.R. notice to request a hearing on the proposed rules pursuant to Section 120.54(3), F.S.

On October 25, 2019, pursuant to Section 120.54(3)(c), F.S., the Office of Public Counsel (OPC) timely filed a Petition for a Hearing on proposed Rules 25-6.030 and 25-6.031, F.A.C., (Petition). Accordingly, a public hearing has been scheduled before the full Commission on November 5, 2019, pursuant to notice appearing in the October 29, 2019 edition of the F.A.R., Volume 45, Number 211.

On October 29, 2019, OPC filed a Motion for Continuance and to Establish a Reasonable Schedule for Rule Hearing. OPC also issued several deposition notices and discovery requests directed to the IOUs.

II. OPC's motion

In its motion, OPC requests that the Commission continue the November 5 public hearing. OPC states that the date for the hearing does not provide OPC with adequate opportunity to protect its interests. Accordingly, OPC asks that the Commission “establish a time frame that allows affected persons a real opportunity to present all of their objections and concerns to the Commissioners, including essential facts required to protect the customers’ interests.” OPC states that at the October 3, 2019 Agenda Conference, it “raised a very select number of the most severe objections and errors in the proposed . . . rules.” Specifically, OPC argues that there remain “fact-dependent issues” related to determining which storm hardening projects are already included in base rates. For these reasons, OPC asks that the Commission continue the hearing and set a hearing schedule “that will accommodate the conduct of discovery to establish facts essential to the final adoption of rules and adequately protect the interests of” customers of the IOUs.

III. Ruling

According to Section 120.54(3)(c)2., F.S., rulemaking proceedings are governed solely by the provisions of Section 120.54, F.S. Section 120.54(3)(c)1., F.S., states that the purpose of the public hearing is to give affected persons an opportunity to present evidence and argument on the proposed rule and requires agency staff to be present at the hearing to explain the agency’s proposal and respond to questions and comments. In *Adam Smith Enterprises, Inc. v. State Department of Environmental Regulation*, 553 So. 2d 1260, 1270 (Fla. 1st DCA 1989), the court explained this type of public hearing by contrasting it with hearings conducted under Sections 120.569 and 120.57, F.S., which are proceedings in which the substantial interests of a party are determined by an agency. The court specifically said,

Proceedings conducted pursuant to Section 120.54(3)(a)[, F.S. (1986),] are not the same type of proceedings as are provided under Section 120.57 when an agency determines the substantial interests of a party. The rights of a particular individual are not adjudicated in this type of proceeding. Rather, Section 120.54(3) rulemaking proceedings are information-gathering proceedings, much like legislative committee proceedings where testimony is heard, which proceedings are relatively informal. The purpose of the rulemaking proceedings authorized by Section 120.54(3) is twofold: (1) to allow the agency to inform itself about the positions and problems of those who seek to present evidence and argument; and (2) to allow the public and others with particular interest in or information about the proposed rule to participate in the formulation of agency policy. The intention of the Section 120.54(3) proceeding is to facilitate the exchange of information and not to be restrictive through the technical use of evidentiary rules. Such proceedings are designed to inform an agency to its fullest, and are not intended to adjudicate any issues or to be conducted in an adversarial manner.

*Id.* (citations omitted).

The driving force behind OPC's motion for continuance appears to be its desire to conduct discovery. Section 120.54, F.S., however, does not contemplate discovery in rulemaking proceedings.

OPC appears to be conflating rulemaking proceedings under Section 120.54, F.S., with proceedings to determine the substantial interests of a party under Sections 120.569 and 120.57, F.S., and Chapter 28-106, F.A.C. OPC cites to Rule 28-106.206, F.A.C., as authority for its discovery requests and cites to Rule 28-106.210, F.A.C., as authority for its motion for continuance. Chapter 28-106, F.A.C., applies to decisions determining the substantial interests of a party, not rulemaking proceedings.

Section 120.54(3)(c)2., F.S., provides support for the contrast between hearings conducted under Section 120.54(3), F.S., and those conducted under Sections 120.569 and 120.57, F.S. Section 120.54(3)(c)2., F.S., states that rulemaking proceedings shall be governed by the provisions of Section 120.54, F.S., "unless a person timely asserts that the person's substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests." It further states that an agency must suspend rulemaking proceedings, which would presumably include the public hearing outlined in Section 120.54(3)(c)1., F.S., and convene a separate proceeding under Sections 120.569 and 120.57, F.S., if the agency determines that the rulemaking proceeding will not adequately protect the affected person's substantial interests. Thus, the statute is clear that in a rulemaking proceeding the petitioner has the duty to request a separate proceeding be conducted under the provisions of Section 120.569 and 120.57, F.S., and the agency must make a determination to convene such a proceeding.

OPC's petition for hearing filed on October 25, 2019, requested a public hearing under Section 120.54, F.S. It makes no mention of any substantial interests that will be affected in the proceeding, and it is devoid of the affirmative demonstration to the Commission that the rulemaking proceeding does not provide an adequate opportunity to protect any such substantial interests, as required by Section 120.54(3)(c)2., F.S. OPC states in its motion that the continuance is requested to facilitate the *consideration* of a separate proceeding under the provisions of Sections 120.569 and 120.57, F.S. It appears that OPC is not requesting the Commission to suspend the rulemaking proceeding and conduct a proceeding under Sections 120.569 and 120.57, F.S. However, even if it were, Section 120.54(3)(c)2., F.S., requires a person to *timely* make the assertion and affirmative demonstration, which means that OPC was required to do this in its petition for hearing filed on October 25, 2019.

Even if OPC's motion could somehow be construed as a request to convene a separate proceeding under the provisions of Sections 120.569 and 120.57, F.S., and putting aside the fact that such a request is untimely under Section 120.54(3), F.S., OPC has not demonstrated any unique circumstances that might justify conducting a Section 120.569 and 120.57, F.S., proceeding in this instance. Nothing in the motion or the discovery requests it has propounded on the IOUs affirmatively demonstrate that OPC's substantial interests are not adequately protected in this rulemaking proceeding. In its motion for continuance, OPC claims that there are fact-dependent issues related to whether specific projects are already included in base rates that bear

on the development of Rules 25-6.030 and 25-6.031, F.A.C. But whether or not specific projects are included in base rates is a fact-intensive issue for the SPPCRC hearing that will be conducted under the rules, not the language of the rules themselves. Likewise, none of OPC's discovery requests would lead to information material to the rules in question or appropriate under the circumstances. Instead, those discovery requests also seek information that would be pertinent to issues in a SPPCRC hearing, not the rule creating the clause.

Moreover, whether OPC would even have the right to obtain discovery from the IOUs if the Commission were to suspend the rulemaking proceeding and convene a separate proceeding under Sections 120.569 and 120.57, F.S., is questionable. While it is true that parties may obtain discovery after a proceeding commences under Sections 120.569 and 120.57, F.S., pursuant to Rule 28-106.206, F.A.C., the IOUs are not parties to this proceeding. And they would not automatically become parties to the proceeding, as Section 120.54(3)(c)2., F.S., states that similarly situated persons may be requested to join and participate in the separate proceeding, but does not mandate that they be forced to join the proceeding.

Finally, if OPC's fundamental objection is that the proposed rules "exceed the statutory authority granted by the Legislature," that objection is tantamount to seeking an administrative determination on the validity of the proposed rules on the grounds that the rules are an invalid exercise of delegated legislative authority under Section 120.56, F.S. The Commission is without jurisdiction to determine such an issue. Only a DOAH judge may enter a final order on a petition challenging the validity of proposed rules.

For the reasons set forth above, OPC's motion for continuance is denied. OPC will have its opportunity to present evidence and argument to the Commission at the November 5, 2019 hearing, in accordance with Section 120.54(3)(c), F.S.

It is therefore,

ORDERED by Chairman Art Graham, as Presiding Officer, that the Office of Public Counsel's Motion for Continuance and to Establish a Reasonable Schedule for Rule Hearing is denied.

By ORDER of Chairman Art Graham, as Presiding Officer, this 31th day of October, 2019.



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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.

AK/SMC

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code.