

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-2019-0469-PCO-EU
ISSUED: November 4, 2019

ORDER DENYING MOTION TO SUSPEND HEARING ON PROPOSED RULES 25-6.030
AND 25-6.031, F.A.C., AND INITIATE FORMAL PROCEEDINGS

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 information that must be provided in the SPPCRC.

Staff held rule development workshops to obtain stakeholder comments on the draft rules on June 25, 2019, and August 20, 2019. The Office of Public Counsel (OPC) participated at both workshops. OPC submitted post-workshop comments on July 15, 2019, and August 27, 2019.

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., which was October 28, 2019.

On October 25, 2019, pursuant to Section 120.54(3)(c), F.S., 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 (Motion for Continuance). OPC also issued several deposition notices and discovery requests directed to the IOUs. By Order No. PSC-2019-0468-PCO-EU, issued October 31, 2019, the motion was denied, and OPC was again informed of its opportunity to present evidence and argument to the Commission at the November 5, 2019, public hearing.

On October 31, 2019, within hours of the order being issued denying OPC's Motion for Continuance, OPC filed a Motion to Suspend Hearing on Proposed Rules 25-6.030 and 25-6.031, F.A.C., and Initiate Formal Proceedings (Motion for Formal Proceedings). This Order addresses OPC's Motion for Formal Proceedings.

II. OPC's Motion for Formal Proceedings

OPC requests the Commission to suspend the public hearing scheduled for November 5, 2019, to conduct a formal evidentiary hearing on the proposed adoption of the rules. OPC alleges that its substantial interests will be affected by the proposed rules "because the proposed rules will permit direct recovery of storm protection expenses outside the normal confines of a full rate case." OPC also alleges that its substantial interests will not be adequately protected through the public hearing on November 5, 2019, because "a mere seven-days' – four business days – notice is insufficient time to conduct discovery, prepare testimony, or otherwise establish material facts." OPC further argues that due to the complexity of the issues present in this rulemaking its substantial interests can only be protected if the November 5, 2019 public hearing is held in abeyance and a formal hearing is conducted pursuant to Sections 120.569 and 120.57, F.S., "where experts for the utilities and the customers can, after conducting discovery, present their sworn testimony, subject to cross-examination, and file post-hearing briefs."

In support of its Motion for Formal Proceedings, OPC states that "[t]he proposed rules, as drafted, do not ensure that the ratepayers will not pay twice for storm protection and hardening as required by the statute." OPC states that proposed Rule 25-6.031(3)(e)2., F.A.C., "allows the IOUs to omit the project-level detail from plans and instead file program-level detail" and that this will "make it difficult, if not impossible, for the Commission to distinguish the non-recoverable (i.e., recovered through base rates) project costs from the additional recoverable costs." OPC claims this lack of detail in the plans "forecloses nearly any prudence determination" and that "[w]ithout any requirement for the IOUs to provide the project-level detail necessary to identify and separate new undergrounding project costs from existing costs being recovered through base rates in the form of costs incurred in the execution of pre-existing Storm Hardening Plans, the proposed rules do not provide the protection required by section 366.96."

OPC alleges that there are provisions of the proposed rules that depend on underlying facts that the Commission does not have and which need to be determined. The facts that OPC believes are "known and knowable" to the IOUs but are "unknown" to the Commission and OPC

include: the impact of project-level detail on the ability to separate Storm Hardening Plan costs (and any other costs being recovered through base rates) from storm protection plan costs; the availability of project-level detail; the impact of AFUDC on project-level detail as compared to the program level detail; and the purposes for installing meters and batteries and their function, if any, in the network for storm restoration and resiliency in the face of extreme weather events. OPC claims that a formal evidentiary proceeding is necessary to permit the Commission and OPC an opportunity to ascertain these facts. Moreover, OPC states that the IOUs “advocated for aggregation of undergrounding detail at the program level on the basis that the information was effectively unavailable in any year except the first year in the 10-year planning horizon” and that “[t]his is a factual matter that requires discovery and testimony to determine the veracity of the claim as well as the nature of the information available.”

OPC states that it “expect[s] that the hearing process and pending discovery will reveal additional predicate facts, the determination of which are essential to protecting the interests of the IOU customers and to the adoption of a lawful rule.” It further states that it reserves it “rights to raise such facts and seek a determination of them to the full extent allowed under the law.”

III. Ruling

Rulemaking proceedings are governed solely 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.” An agency must suspend rulemaking proceedings and convene a separate proceeding under Sections 120.569 and 120.57, F.S., if the agency determines that the rulemaking proceeding is not adequate to protect the affected person’s substantial interests.

OPC’s petition for hearing filed on October 25, 2019, requested a public hearing under Section 120.54(3)(c), F.S. OPC did not assert its substantial interests will be affected in the proceeding, and it did not include an 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. By its motion filed on October 31, 2019, OPC is now alleging that its substantial interests will be affected and is requesting that this rulemaking proceeding be suspended and that the public hearing the Commission scheduled on November 5, 2019, in response to OPC’s request for public hearing, be held in abeyance so that a “draw-out” proceeding can be conducted under Sections 120.569 and 120.57, F.S.

OPC cites to Rule 28-103.005, F.A.C., as a basis for its motion. However, Rule 28-103.005, F.A.C., was repealed on December 4, 2012. Rule 28-103.005, F.A.C., addressed evidentiary proceedings during rulemaking and specifically provided that the request for draw-out could be made at any time prior to the conclusion of a public hearing. However, the rule is no longer in effect and, thus, cannot be a basis for a decision on OPC’s motion.¹

¹ In *Balino v. Department of Health and Rehabilitative Services*, 362 So. 2d 21, 24 (Fla. 1st DCA 1978), a petitioner requested a draw-out proceeding at a public hearing. The hearing officer denied the request as untimely. The court overturned the hearing officer’s ruling based on a model rule of procedure, Rule 28-5.13, that specifically provided

To determine what “timely” means in Section 120.54(3)(c)2., F.S., the plain language of the statute must be examined. *See, e.g., Forsythe v. Longboat Key Beach Erosion Control District*, 604 So. 2d 452, 454 (Fla. 1992) (“It is a fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation.”). The timeliness requirement in subparagraph (3)(c)2. is contained in the same paragraph as the 21-day deadline by which hearing petitions must be filed pursuant to subparagraph (3)(c)1. Thus, the two subparagraphs must be read in conjunction. *See id.* (“It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole.”). When the two subparagraphs are read in conjunction, it appears OPC was required to make the assertion and affirmative demonstration required by Section 120.54(3)(c)2., F.S., within the 21-day deadline set forth in Section 120.54(3)(c)1. The 21-day deadline by which affected persons could request a hearing in this matter was October 28, 2019. OPC’s Motion for Formal Proceedings was filed on October 31, 2019. Thus, I find OPC’s request for a draw-out proceeding untimely.

Nonetheless, even if the request for a draw-out proceeding was timely, OPC has failed to demonstrate that the November 5, 2019 public hearing does not provide an adequate opportunity to protect its interests, as required by Section 120.54(3)(c)2., F.S.

OPC states that it has a number of arguments on why the proposed rules should be changed that it wishes to make to the Commission, but that it does not have sufficient time to “conduct the necessary discovery, prepare testimony, or otherwise establish material facts” to present those arguments at the November 5, 2019 public hearing. Or, in other words, OPC is alleging that it is unable to make the arguments at the November 5, 2019 public hearing contained in its Motion for Formal Proceedings because it lacks witness testimony or other evidence that has been tested through the discovery process to support its arguments. However, the transcripts of the June 25, 2019² and August 20, 2019³ rule development workshops; OPC’s post-workshop written comments filed on July 15, 2019,⁴ and August 27, 2019;⁵ and the Commission’s Agenda Conference transcript dated October 5, 2019,⁶ demonstrate that the arguments set forth in OPC’s motion can be presented by OPC at the public hearing in the ordinary context of a rulemaking proceeding. At no time during this rulemaking proceeding has OPC been barred from presenting any evidence and argument as to its positions on and suggestions for the proposed rules.⁷

that the request for draw-out could be made at any time prior to the conclusion of a public hearing conducted under Section 120.54, F.S. However, the model rule relied upon by the court, like Rule 28-103.005, F.A.C., is no longer in effect.

² Document No. 05378-2019.

³ Document No. 08442-2019.

⁴ Document No. 05556-2019.

⁵ Document No. 08471-2019.

⁶ Document No. 09357-2019.

⁷ OPC seems to cite to *Balino*, 362 So. 2d at 21, for the proposition that the right to conduct discovery is encompassed in the opportunity to present the evidence and argument referenced in Section 120.54(3)(c)1., F.S. However, the issue in *Balino* was that the hearing officer barred the petitioner from calling, examining, and cross-examining witnesses at the public hearing on the basis that the proceeding was a public hearing, not a formal adversary hearing. The court stated that the hearing officer conducting the public hearing must make every effort to

Furthermore, there has been no indication that OPC's comments and arguments have been discredited in this rulemaking proceedings on the basis that they have not been supported by witnesses testimony or other trial-type evidence. Although OPC states that it wishes to determine the veracity of the comments made by other stakeholders thus far in the rulemaking process, OPC has not provided any basis indicating that any comments or arguments made in this proceeding by any of the stakeholders have been less than truthful and may necessitate the need for sworn testimony.

Moreover, OPC has not shown any unique circumstances that might justify a draw-out proceeding. While both of the proposed rules are new, they are not new types of rules for the Commission. Rule 25-6.030, F.A.C., would specify the elements that must be included in an IOU's storm protection plan, which the Commission will review pursuant to the criteria set forth in Section 366.96(4), F.S., to determine whether the IOU's plan is in the public interest. The Commission has developed hundreds of rules through the ordinary rulemaking process that set out the information that utilities must provide in order for the Commission to render a decision. Rule 25-6.031, F.A.C., which would establish the information that must be provided in the SPPCRC, will be the Commission's third cost recovery clause rule. The other two rules were adopted through ordinary rulemaking proceedings, without the need for a draw-out proceeding.

To the extent that OPC may be alleging in its Motion for Formal Proceedings that its substantial interests cannot be protected at the November 5, 2019 public hearing because the Commission will be somehow approving the IOU's storm protection plans or approving certain amounts for cost recovery through the SPPCRC at this public hearing, this is false. Substantially affected persons will have the opportunity to participate in proceedings, conducted pursuant to Sections 120.569 and 120.57, F.S., before any storm protection plans are approved or any costs are allowed for recovery through the SPPCRC. This rulemaking in no way forecloses any future rights to formal hearings under Section 366.96, F.S.

The court stated in *Adam Smith Enterprises, Inc. v. State Department of Environmental Regulation*, 553 So. 2d 1260, 1273, n. 19 (Fla. 1st DCA 1989):

Formalized adjudicatory methods are clearly nonessential for purposes of rational rulemaking. There are procedures set forth in Section 120.54 expressly designed to provide the administrator access to all data, criticisms, suggestions, alternatives, and contingencies relevant to his decisions. Adjudicatory methods are in fact insufficient to this task. A rulemaker must typically make and coordinate many empirical conclusions dependent on raw material outside the conventional evidentiary categories of "testimony" and "exhibits." For example, the rulemaker must often draw upon prior experience, expert advice, the developing technical literature, ongoing experiments, or seasoned predictions.

assure those present have a fair opportunity to present evidence and argument which is material to the rules in question and appropriate under the circumstances. There was no issue about the right to conduct discovery.

Thus, draw-out proceedings should be reserved for only those rulemakings where there is a sufficient demonstration to the agency that the rulemaking proceeding does not provide an adequate opportunity to protect the petitioner's substantial interests, as required by Section 120.54(3)(c)2., F.S. OPC has not made this demonstration.

After careful consideration of all the arguments made in OPC's Motion for Formal Proceedings, the motion is denied. OPC will have its opportunity to present evidence and argument on proposed Rules 25-6.030 and 25-6.031, F.A.C., to the Commission at the November 5, 2019 public 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 to Suspend Hearing on Proposed Rules 25-6.030 and 25-6.031, F.A.C., and Initiate Formal Proceedings is denied.

By ORDER of Chairman Art Graham, as Presiding Officer, this 4th day of November, 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.

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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.

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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.