

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: March 4, 2010

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Cowdery) *W.S.M.C.*
 Division of Economic Regulation (Maurey, Springer, Salnova, Hewitt) *NS* *ALM*

RE: Docket No. 100062-OT – Initiation of rulemaking to amend Rule 25-22.061, F.A.C., Stay Pending Judicial Review.

AGENDA: 03/16/10 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

RULE STATUS: Proposal may be deferred

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\100062.RCM.DOC

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Case Background

This docket concerns Commission Rule 25-22.061, Florida Administrative Code (F.A.C.), Stay Pending Judicial Review, which addresses the Commission’s granting of stays of its orders, including provisions concerning automatic stays. This rule implements the Florida Administrative Procedure Act Section 120.68, F.S., Judicial Review, subsection (3), that provides, in part, that the filing of a petition with the court does not itself stay enforcement of the agency decision, and that the agency may grant a stay upon appropriate terms. Rule 25-22.061 applies when a party files an appeal of a Commission order and requests that the Commission stay the effect of that order pending judicial review. The rule currently includes provisions addressing automatic stays to certain public entities which appeal Commission orders.

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Two Florida Rules of Appellate Procedure govern stays pending judicial review: Rule 9.310, Stay Pending Review, and Rule 9.190, Judicial Review of Administrative Action. The Florida Rules of Appellate Procedure govern all appellate proceedings in the state courts and supersede all conflicting statutes and conflicting Commission rules of procedure.¹ Effective January 1, 2009, the Florida Supreme Court amended the rules of appellate procedure with the result that, with certain exceptions, there is no longer an automatic stay if a public entity seeks review of a Commission order.

Florida Rule of Appellate Procedure 9.310(b)(2) addresses the circumstances under which the filing by a public body or officer of a timely notice of appeal shall automatically operate as a stay pending review. Subparagraph (b)(2) was amended by the Florida Supreme Court, effective January 1, 2009,² to add the following underlined language:

(2) Public Bodies; Public Officers. The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, in administrative actions under the Administrative Procedure Act, or as otherwise provided by chapter 120, Florida Statutes, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

The Florida Bar's Appellate Court Rules Committee advocated for this change in order to provide consistency between the Florida Rules of Appellate Procedure and the explicit language in Section 120.68(3), F.S., which states that the filing of a petition for review does not itself stay enforcement of an agency decision, and Section 120.56(4)(d), F.S., which likewise does not contemplate an automatic stay. It was also noted that removing the automatic stay for public entities in the administrative appeal process correctly gives presumptive effect to the administrative tribunal's ruling pending review.³

¹ See Fla. R. App. Pro 9.010, Fla. R. App. Pro 9.190(a), and Fla. R. Jud. Admin. Rule 2.130.

² At the same time, the Florida Supreme Court amended Rule 9.190(e)(1) as follows, to give the rule flexibility in case the Legislature amends chapter 120, F.S.:

Effect of Initiating Review. The filing of a notice of administrative appeal or a petition seeking review of administrative action shall not operate as a stay, except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2) or chapter 120, Florida Statutes

See In re Amendments to the Florida Rules of Appellate Procedure, 2 So. 3rd 89, 90-91 (Fla. 2008).

³ See The Florida Bar Administrative Law Section Newsletter, Vol. XXX, No. 3, *Florida Supreme Court Eliminates Automatic Stay Pending Review for Governmental Entities in APA Proceedings*, Katherine E. Giddings and Mark D. Schellhase (March 2009). Section 120.56(4)(d), F.S., provides that if an administrative law judge enters a final order that all or part of an agency statement violates Section 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement as a basis for agency action. There is no provision for an automatic stay of such a final order.

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The notice of development of proposed rule, which included the notice of a staff workshop, was published in the October 23, 2009, edition of the Florida Administrative Weekly. The staff workshop was held on December 10, 2009. Attending the workshop were representatives from Tampa Electric Company, the Radey Thomas Yon and Clark law firm, and Florida Power & Light. None of the participants filed written post-workshop comments concerning the rule.

This recommendation addresses whether the Commission should propose the amendment of Rule 25-22.061, F.A.C. The Commission has jurisdiction pursuant to Sections 120.54, F.S., and 120.68(3), F.S.

Discussion of Issues

Issue 1: Should the Commission propose the amendment of Rule 25-22.061, F.A.C., Stay Pending Judicial Review?

Recommendation: Yes, the Commission should propose the amendment of this rule as set forth in Attachment A. (Cowdery, Maurey)

Staff Analysis: Rule 25-22.061, F.A.C., as recommended to be proposed for amendment, is set forth in Attachment A.

Staff recommends that Rule 25-22.061 be amended to delete obsolete provisions concerning automatic stays, in order to be consistent with the Florida Rules of Appellate Procedure, to delete language duplicative of the appellate rules, and to accurately reflect the factors considered by the Commission in ruling upon motions for stay pending judicial review and in setting conditions for stays.

Staff recommends that the second sentence of subsection (1) of the existing rule be amended to state:

The stay shall be conditioned upon the posting of good and sufficient bond, ~~or~~ the posting of a corporate undertaking, or and such other conditions as the Commission finds appropriate to secure the revenues collected by the utility subject to refund.

This change makes the provisions consistent with current agency practice.

Staff recommends that subparagraph (1)(b) be deleted in its entirety. This subparagraph lists the factors which the Commission may consider in determining the amount and conditions of the bond or corporate undertaking. Subparagraph (1)(b)1. lists as a factor for consideration by the Commission “terms that will discourage appeals when there is little possibility of success.” This provision is unnecessary and inappropriate in that the Commission may consider whether the petitioner has demonstrated a likelihood of success on the merits in determining whether to grant the stay in the first place. Once the Commission grants the stay, the conditions of the bond or corporate undertaking are meant to secure the revenues collected subject to refund, not to discourage appeals. Staff recommends that subparagraph (b)2., relating to the rate of interest, be deleted because it is addressed later in the rule, in subsection (3).

Staff recommends that the language of subsection (2) be clarified to state that a party seeking to stay a final or nonfinal order of the Commission pending judicial review may file a motion with the Commission, rather than stating that a party shall file a motion with the Commission. This change recognizes that under the rules of appellate procedure there are

circumstances under which a party is not required to file a motion for stay with the Commission, but may file directly with the court.⁴

Staff recommends that subsection (3) of Rule 25-22.061 should be deleted in its entirety. This subsection provides that when a public entity appeals an order involving an increase in a company's rates, which appeal operates as an automatic stay, the Commission shall vacate the stay upon motion by the company and the posting of good and sufficient bond or corporate undertaking. The controlling rules of appellate procedure no longer allow automatic stays in administrative actions under the Administrative Procedure Act when the state, any public officer, board, commission or other public body seeks review, except for an appeal concerning public records or public meeting. Because there is no longer an automatic stay of rate orders appealed by public bodies, the provision concerning vacation of a stay in the appeal of a rate case by a public entity is obsolete, contrary to the rules of appellate procedure, and should be deleted.

Subsection (3) of Rule 25-22.061 also provides that when a public body or public entity appeals an order that does not involve an increase in rates, the Commission may vacate the stay or impose any lawful conditions. Florida Rule of Appellate Procedure 9.310(b)(2) specifically states that an automatic stay shall exist for 48 hours after the filing of a notice of appeal for public records and public meeting cases. The appellate rule then provides that on motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay. There is no need to duplicate this appellate rule language in Rule 25-22.061. For this reason, staff recommends that this provision of subsection (3) should be deleted.

Rule 25-22.061(4) provides that when a stay or vacation of a stay is conditioned upon the posting of a bond or corporate undertaking, the Commission may at the time it grants the stay or vacation of the stay, set the rate of interest to be paid by the company in the event that the Court's decision requires a refund to customers. Staff recommends that subsection (4) be renumbered to subsection (3) and that it be amended to delete references to vacations of stays, which relate to the automatic stay provisions recommended for deletion. Staff also recommends that the rule be amended to be consistent with Commission practice by adding language recognizing that stays may be conditioned on forms of surety other than bonds or corporate undertaking. Finally, staff recommends that the renumbered subsection (3) be amended to be consistent with the current Commission practice of setting the rate of interest pursuant to Rule 25-4.114(4) for telecommunication companies, Rule 25-6.109(4) for electric public utilities, Rule 25-7.091(4) for gas public utilities, and Rule 25-30.360(4) for water and wastewater utilities. The methodology for setting interest under each of these rule subsections is the same.

Subsection (5) of Rule 25-22.061 states that motions filed pursuant to subsections (1) or (2) of the rule shall be heard by those Commissioners who participated in the proceeding which resulted in the order being appealed, but that motions filed under subsection (3) may be ruled upon by the Chairman or the Commissioner assigned as the prehearing officer in the case. Staff recommends that subsection (5) of Rule 25-22.061 be renumbered to subsection (4) and that it be

⁴ *E.g.* Florida Rule of Appellate Procedure 9.190 (e)(2)(A) provides that a party seeking to stay administrative action may file a motion either with the lower tribunal or, for good cause shown, with the court in which the notice or petition has been filed.

amended to delete reference to current subsection (3) concerning automatic stays, which staff recommends be deleted in its entirety. Staff further recommends that the language of this subsection be amended to clarify that motions filed pursuant to this rule shall be heard by those Commissioners who were on the deciding panel for the order being appealed, consistent with agency practice.

Statement of Estimated Regulatory Cost (SERC)

The Statement of Estimated Regulatory Costs (Attachment B) notes that the recommended Rule 25-22.061 amendments would benefit the Commission through the updating, clarifying and streamlining of the rule language. The SERC further states that utilities would benefit from the rule becoming more accurate and specific concerning the granting of stays of Commission orders pending judicial review. The SERC concludes that the recommended amendments to Rule 25-22.061 would not result in transactional costs to utilities, customers, small businesses, the Commission or local governments.

Based upon the above, staff recommends that the Commission propose the amendment of Rule 25-22.061, F.A.C., as set forth in Attachment A.

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Issue 2: Should this docket be closed?

Recommendation: Yes. (Cowdery)

Staff Analysis: If no requests for hearing or comments are filed, the rule may be filed with the Department of State, and then this docket may be closed.

1 25-22.061 Stay Pending Judicial Review.

2 (1) When the order being appealed involves the refund of moneys to customers or a
3 decrease in rates charged to customers, the Commission shall, upon motion filed by the utility
4 or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned
5 upon the posting of good and sufficient bond, ~~or the posting of a corporate undertaking, or and~~
6 such other conditions as the Commission finds appropriate to secure the revenues collected by
7 the utility subject to refund.

8 (b) ~~In determining the amount and conditions of the bond or corporate undertaking, the~~
9 ~~Commission may consider such factors as:~~

10 1. ~~Terms that will discourage appeals when there is little possibility of success; and~~

11 2. ~~A rate of interest that takes into consideration:~~

12 a. ~~The use of the money that the stay permits;~~

13 b. ~~The prime and other prevailing rates of interest at commercial banks and other~~
14 ~~potential sources of capital in the amount involved in the appeal.~~

15 (2) Except as provided in subsection (1), a party seeking to stay a final or nonfinal
16 order of the Commission pending judicial review ~~may~~shall file a motion with the Commission,
17 which ~~has~~ shall have authority to grant, modify, or deny such relief. A stay pending review
18 granted pursuant to this subsection may be conditioned upon the posting of a good and
19 sufficient bond or corporate undertaking, other conditions relevant to the order being stayed,
20 or both. In determining whether to grant a stay, the Commission may, among other things,
21 consider:

22 (a) Whether the petitioner has demonstrated a likelihood of success on the merits is
23 likely to prevail on appeal;

24 (b) Whether the petitioner has demonstrated a likelihood of sustaining ~~that he is likely~~
25 ~~to suffer~~ irreparable harm if the stay is not granted; and

CODING: Words underlined are additions; words in ~~struck through~~ type are deletions
from existing law.

1 (c) Whether the delay in implementing the order will likely cause substantial harm or
2 be contrary to the public interest if the stay is granted.

3 ~~(3)(a) When a public body or public official appeals an order involving an increase in a~~
4 ~~utility's or company's rates, which appeal operates as an automatic stay, the Commission shall~~
5 ~~vacate the stay upon motion by the utility or company and the posting of good and sufficient~~
6 ~~bond or corporate undertaking. When determining the amount and conditions of the bond or~~
7 ~~corporate undertaking, the Commission may consider such factors as those set forth in~~
8 ~~subparagraph (1)(b)2.~~

9 (b) ~~When a public body or public official appeals an order that does not involve an~~
10 ~~increase in rates, the Commission may vacate the stay or impose any lawful conditions.~~

11 ~~(34) When a stay or vacation of a stay is conditioned upon the posting of a bond, or~~
12 ~~corporate undertaking, or other appropriate form of surety, the Commission shall~~ may at the
13 time it grants the stay ~~or vacation of the stay~~, set the rate of interest to be paid by the utility or
14 company pursuant to Rule 25-4.114(4), F.A.C., for telecommunication companies, Rule 25-
15 6.109(4), F.A.C., for electric public utilities, Rule 25-7.091(4), F.A.C., for gas public utilities,
16 and Rule 25-30.360(4), F.A.C., for water and wastewater utilities in the event that the Court's
17 decision requires a refund to customers.

18 ~~(45) Motions filed pursuant to subsections (1) or (2) of this rule shall be heard by those~~
19 ~~Commissioners who were on the deciding panel for participated in the proceeding which~~
20 ~~resulted in the order being appealed. However, motions filed under subsection (3) of this rule~~
21 ~~may be ruled upon by the Chairman or the Commissioner assigned as the prehearing officer in~~
22 ~~the case.~~

23 Rulemaking Specific Authority 350.127(2) FS. Law Implemented 120.68(3) FS. History—New
24 2-1-82, Formerly 25-22.61.

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DATE: February 1, 2010
TO: Office of General Counsel (Cowdery)
FROM: Division of Economic Regulation (Hewitt) *CH* *SK* *W*
RE: Proposed Amendments to Rule 25-22.061, Stay Pending Judicial Review, F.A.C.

DETAILED DESCRIPTION OF THE PROPOSED RULE REPEALS

1. Why are the rule amendments being proposed?

Rule 25-22.061, Stay Pending Judicial Review, is proposed to be amended to be consistent with Florida Rule of Appellate Procedure 9.310(Fla. R. App. P. 9.310). Fla. R. App. P. 9.310 was amended to provide that the timely filing of a notice of appeal does not operate as a stay pending judicial review in administrative actions under Chapter 120, F.S., when the state, any public officer in an official capacity, board, commission or other public body seeks review.

The proposed rule amendment would also delete language concerning factors the Commission may consider for determining the amount and conditions of a bond or corporate undertaking. In addition, the rule amendment would have the Commissioners who were on the deciding panel rule on any motions filed pursuant to this rule.

The purpose of these amendments is to accurately reflect the factors considered by the Commission in ruling upon motions for stays pending judicial review and in getting conditions for stays.

2. What do the rules do and how do they accomplish the goal?

The rule specifies the provisions of law which govern stays pending judicial review, to specify the factors which the Commission may consider in determining whether to grant a stay, under what situations the Commission may condition a stay, and the factors that determine the amount and conditions of a bond posted for an appeal that involves the refund of money to customers or a decrease in rates.

IMPACT ON THE PSC

Incremental costs

There should be no incremental costs for the Commission.

Incremental benefits

There would be benefits from updating, clarifying and streamlining the rule language.

WHO BESIDES THE PSC WILL BE AFFECTED BY ADOPTION OF THE PROPOSED REPEALS

Utilities/Regulated Companies

Any company regulated by the Commission appealing an order involving the refund of money to customers or a decrease in rates or seeking to stay a final or nonfinal order pending judicial review would be affected. There were 1371 certificated companies regulated by the Commission as of July 1, 2009.

Customers

Customers would not be affected.

Outside business and local governments

Small businesses would not be affected.

HOW ARE THE PARTIES ABOVE AFFECTED BY THE ADOPTION OF THE PROPOSAL

Estimated transactional costs to individuals and entities

Utilities

Companies that would be affected would benefit from making the rule more accurate and specific concerning the granting of stays of Commission orders pending judicial review but would not have transactional costs.

Customers

Customers would not be affected.

Outside businesses including specifically small businesses

Outside businesses, including small business, would not be affected by the proposed rule amendments.

Local governments

Local governments would have no transactional costs from the rule repeals.

ANY OTHER PERTINENT COMMENTS REGARDING THE APPLICATION OF THE PROPOSED RULE

No other pertinent comments are germane to the proposed rule amendments.

CH:kb

cc: Tim Devlin
Chuck Hill