

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: May 22, 2014
TO: Carlotta S. Stauffer, Commission Clerk, Office of Commission Clerk
FROM: Kathryn G. W. Cowdery, Office of the General Counsel
RE: Docket No. 140107-OT

Please file the attached letter and enclosure in the docket file listed above.

Thank you.

Attachment

RECEIVED - FPSC
14 MAY 22 AM 8:21
COMMISSION
CLERK

STATE OF FLORIDA

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Public Service Commission

May 22, 2014

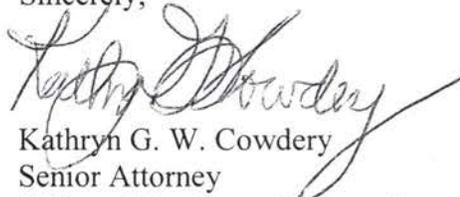
Kenneth J. Plante, Coordinator
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 W. Madison Street
Tallahassee, FL 32399-1400

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-OT

Dear Mr. Plante:

The Florida Public Service Commission received a Petition for Declaratory Statement from the Office of Public Counsel on May 20, 2014. A copy of the petition is enclosed. A notice will be published in the Florida Administrative Register on Friday, May 23, 2014.

Sincerely,


Kathryn G. W. Cowdery
Senior Attorney
Office of the General Counsel

Enclosure

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Office of Public Counsel for /
Declaratory Statement Regarding Discovery in / Docket No. _____
Dockets or Proceedings Affecting Rates or Cost of /
Service Processed with the Commission's Proposed / Filed: May 20, 2014
Agency Action Procedure. /

PETITION FOR DECLARATORY STATEMENT

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" or "Citizens"), by and through undersigned counsel, on behalf of the Citizens of the State of Florida, hereby petitions the Florida Public Service Commission ("Commission" or "PSC") to issue a declaratory statement recognizing OPC's right, under the provisions of Sections 350.0611(1), 366.093(2), 367.156(2), F.S., and Rule 28-106.206, F.A.C., to obtain discovery during a proceeding affecting rates or cost of service processed using the proposed agency action ("PAA") procedure prior to the issuance of a Notice of Proposed Agency Action. The declaratory statement sought by OPC is necessitated by inconsistent and conflicting decisions which have created doubt for OPC 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.

INTRODUCTION

1. OPC was created by the Florida Legislature to provide legal representation for the Citizens of the State of Florida in proceedings before the Commission. See Section 350.0611,

F.S. OPC's offices are located at 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400.

2. Any pleading, motion, notice, order or other document required to be served upon the Petitioner or filed by any party to this proceeding should be served upon the following individuals:

J.R. Kelly, Public Counsel
Joseph A. McGlothlin, Associate Public Counsel
Florida Bar No. 163771
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
MCGLOTHLIN.JOSEPH@LEG.STATE.FL.US
(850) 488-9330

DECLARATORY STATEMENT REQUESTED

3. Based on the description of circumstances, provisions of law, established Commission precedent, and analysis set forth in this Petition, OPC respectfully requests the Commission to issue an order declaring:

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.

**SUBSTANTIAL IMPACT ON OPC UNDER THE PARTICULAR SET OF
CIRCUMSTANCES DESCRIBED HEREIN**

4. Section 350.0611(1), F.S., empowers OPC to intervene and to conduct discovery in all PSC proceedings. Over time, whenever OPC has deemed such formal discovery necessary to carry out its statutory responsibilities in a given PAA case in which it has intervened, OPC has

initiated discovery prior to the issuance of the Commission's Notice of Proposed Agency Action. Going forward, a failure by the Commission to recognize OPC's statutory right to obtain discovery prior to the issuance of a Notice of Proposed Agency Action would impair OPC's ability to represent the Citizens of the State in any proceeding or action before the Commission fully, efficiently and effectively, in derogation of OPC's rights under Section 350.0611, F.S. Inasmuch as OPC bases its Petition in part upon Section 350.0611, F.S., which is the Public Counsel's empowering statute, the declaratory statement sought by the instant Petition will have application only to OPC in its individual, particular, and unique circumstances.

RELEVANT STATUTES, RULES, AND ORDERS

5. The following statutes, rules, and orders are relevant to the disposition of OPC's Petition:

a. **Statutes:** Sections 350.0611(1), 366.06(3) and (4), 366.093(2), 367.081(6) and (8), and 367.156(2), F.S.

b. **Agency Rules:** Commission Rules 25-22.006(1)(b), 25-22.036(1) and (3)(a) ("Initiation of Formal Proceedings"), 25-22.029, ("Point of Entry Into Proposed Agency Action Proceedings"), and Uniform Rule 28-106.206, F.A.C ("Discovery").

c. **Orders:** Order No. PSC-09-0182-PCO-GU, issued March 27, 2009, in Docket No. 080366-GU, In re: Petition for rate increase by Florida Public Utilities Company ("FPUC Order"); Order No. PSC-11-0018-PCO-WS, issued January 5, 2011, in 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. ("AUF Order"); Order No. PSC-12-0316-PCO-WU, issued June 19, 2012, in Docket No. 110200-WU, In re:

Application for increase in water rates in Franklin County by Water Management Services, Inc. (“WMSI Order”); and Order No. PSC-12-0139-PCO-WS, issued in Docket No. 110264-WS on March 26, 2012, In re: Application for increase in water and wastewater rates in Pasco County by Labrador Utilities, Inc. (“Labrador Order”). The FPUC, AUF, and Labrador Orders 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. The later WMSI Order terminated OPC’s pre-PAA order discovery initiatives specifically in that case.¹ In this Petition, OPC will demonstrate that, on a going forward basis, the Commission should affirm the principles of law reflected in OPC’s empowering statute and in the FPUC, AUF, and Labrador Orders as they relate to OPC’s discovery rights.

DEFINITIONS AND DESCRIPTION OF GENERAL PROCEDURES

6. In this section, OPC will define and differentiate certain terms as they are used within this Petition.

a. *Evidentiary hearing* is a hearing pursuant to Sections 120.569, and 120.57(1), F.S., in which witnesses testify under oath regarding disputed facts and are subject to cross-examination. The record of the evidentiary hearing becomes the basis for factual determinations underlying the Commission’s final decision.

¹ For reasons that OPC will identify below, OPC believes the difference between the WMSI Order and the earlier orders may be attributable, in whole or in part, to certain anomalous procedural circumstances that were unique to the WMSI docket. Regardless, the WMSI Order’s departure from the Commission’s past practice highlights the need for resolution and consistency going forward. Further, OPC’s right to obtain discovery in a PAA case is too fundamental to its ability to fulfill its statutory obligation to represent customers to be the ongoing subject of piecemeal, repetitive litigation. This Petition constitutes a vehicle for the complete explication of OPC’s discovery rights in PAA rate cases to be presented to the full Commission, and for the Commission to declare in a single order that, going forward, it will recognize OPC’s discovery rights in PAA cases.

b. *Notice of Proposed Agency Action, proposed agency action order, and PAA order* are used interchangeably in this Petition. In the PAA order process, the Commission announces an intended action or decision in the PAA order and states that its decision will become final and effective unless an affected party protests all or part of the PAA order and requests an evidentiary hearing on the protest.

c: *General rate case, rate case, application for rate modification, or petition for rate increase* are terms that may be used interchangeably for purposes of this Petition for Declaratory Statement.² In a *general rate case*, a utility requests authority to change its rates, charges, or cost of service pursuant to Section 366.06 or Section 367.081, F.S. A utility's rates and charges are established through one of the following mechanisms: (1) a general rate case that proceeds directly to a formal evidentiary hearing without an intervening PAA order; (2) (applicable to certain utilities that satisfy statutory criteria) a general rate case that is processed using the PAA procedure, in which case the Commission announces its intended disposition and an evidentiary hearing is conducted only if a protest to the PAA order is filed; or (3) by stipulation and settlement of rate issues by the parties of record to a general rate case.

d. The terms *adjudicated rate case* and *adjudicatory hearing* as used herein describe the situation in (c)(1) above, in which a utility's application for a general rate case pursuant to Sections 366.06(3) or 367.081(6), F.S., proceeds directly to an evidentiary hearing. See Sections 120.569, and 120.57(1), F.S. By statute, the Commission must make a decision in an adjudicated rate case within 8 months of its filing. See

² While OPC's instant Petition is specific to rate cases, the same legal authority cited herein applies to OPC's discovery rights in any PAA proceeding.

Sections 366.06(3), and 367.081(6), F.S. A prehearing officer is assigned by the Commission's Chairman to each docketed proceeding, including general rate cases. See Section 350.01(5), F.S. The prehearing officer issues an order establishing procedure (OEP). The OEP establishes all the procedures, including the scope and limits of discovery, which will govern the prehearing process. Prior to the adjudicatory hearing, a prehearing order will be issued which governs the evidentiary hearing. The Commission holds an evidentiary hearing during which the utility, through sworn testimony, exhibits, and evidence, attempts to support its application for a change in rates. This application consists of its petition, minimum filing requirements (MFRs), and testimony. An intervenor (and sometimes Commission staff) may contest the utility's request through its own testimony, exhibits, and evidence. The parties may cross-examine witnesses. Upon the conclusion of the hearing, the evidentiary record is closed. Commission staff prepares a post-hearing recommendation for final rates and charges based on the hearing record. As the finder of fact, the Commission may accept, reject, or modify staff's recommendation to the extent there is competent evidence contained in the hearing record to support its decision. The Commission's decision is memorialized by a Final Order, which is subject to reconsideration or appeal within the appropriate time periods.

e. In a *PAA rate case*, a utility specifically requests the Commission to process its petition for a general rate case using the Commission's proposed agency action procedure. See Sections 366.06(4), and 367.081(8), F.S.³ By statute, the Commission must propose action (i.e., announce its intended disposition of the

³ These statutes state: "A utility . . . may specifically request the commission to process its petition for rate relief using the agency's proposed agency action procedure, as prescribed by commission rule. . . ."

utility's request) within five months of its filing. See Sections 366.06(4), and 367.081(8), F.S. A prehearing officer is assigned to each PAA rate case, but typically does not issue an OEP or order governing discovery procedures unless specific issues – including discovery disputes – arise. There is no evidentiary hearing prior to the issuance of the PAA. Commission staff prepares a recommendation to adjust a utility's rates and charges based on the staff's assessment of the information provided to the Commission and placed in the online docket file. The information in the docket file consists of the utility's initial petition, application, MFRs, responses to staff's data requests or discovery, and notices of any responses to discovery requests. The Commission may accept, reject, or modify staff's recommendation. The Commission's decision is memorialized in a Notice of Proposed Agency Action (PAA order). Upon issuance of a PAA order, the utility, party of record, or person substantially affected by the PAA order may protest some or all of the PAA within the protest period prescribed within the PAA, and demand an evidentiary hearing on the protested portion. See Sections 366.06(4), 367.081(8), 120.569, and 120.57(1), F.S.; Rule 25-22.029, F.A.C. The scope of the hearing will depend on the issues protested and any cross-protest. Due to a statutory provision that is specific to the PSC, any portions of a Commission PAA not protested are deemed stipulated and will become final. See Section 120.80(13)(b), F.S.;⁴ Rule 25-22.029(3), F.A.C. The procedures governing the protest hearing are similar to the procedures that govern an adjudicated rate case. The prehearing officer issues an OEP. Parties file testimony,

⁴ "Notwithstanding ss. 120.569 and 120.57, F.S., a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated." Section 120.80(13)(b), F.S.

and also engage in discovery. The Commission issues a prehearing order and conducts an evidentiary hearing. Parties submit post-hearing briefs. The Commission staff prepares a written, post-hearing recommendation. The Commission must make its final decision on the protested issues within 8 months of the filing of the protest. As the finder of fact, the Commission may accept, reject, or modify staff's recommendation to the extent there is competent evidence contained in the hearing record to support its decision. The Commission issues a Final Order, which may be appealed or reconsidered within the appropriate time periods.

7. Because a change in rates and charges is an activity subject to the Commission's jurisdiction, a utility seeking to change its rates or charges must initiate a formal proceeding with the Commission. Sections 366.06 and 367.081, F.S.; Rule 25-22.036, F.A.C. The statutory provisions authorizing certain utilities to request the PSC to employ PAA procedures necessarily contemplate that the request will be made in conjunction with the submission of a request for authority to change rates that invokes the Commission's ratemaking jurisdiction. Sections 366.06(4) and 367.081(8), F.S. Rules 25-6.043 and 25-7.039, F.A.C., mandate Minimum Filing Requirements (MFRs) for electric and gas cases, respectively. General information, instructions, and required MFRs for water/wastewater rate cases are set forth in Rules 25-30.436, F.A.C., et. seq. These rules specify the information that a utility must include in its application for a general rate increase. The rules apply to all general rate cases, including those conducted using the PAA procedure.

8. After the utility files its application for a general rate case with the Office of the Commission Clerk, the Commission by letter acknowledges receipt of the application. A docket

number and prehearing officer are assigned to the application.⁵ Whether set initially for an adjudicatory hearing or to be processed using PAA procedures, all general rate cases are (a) subject to the Commission's rate setting jurisdiction, (b) are initiated by the filing of an application or petition that receives a separately identifiable docket number, and (c) are assigned a prehearing officer to rule on procedural matters which arise during the pendency of the rate case proceeding.

RELEVANT STATUTES AND RULES

9. Sections 366.093(2), and 367.156(2), F.S., are identical, and state in pertinent part:

Discovery in any docket or proceeding before the commission 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 commission shall determine whether information requested in discovery affects a utility's rates or cost of service . . .

10. Section 350.0611, F.S., states in pertinent part:

Public Counsel; duties and powers. – It shall be the duty of the Public Counsel to provide legal representation for the people of the state in proceedings before the commission. . . . 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:

⁵ For electric utilities, a docket will be assigned upon the filing of a test year letter, which the utility must submit at least 60 days in advance of the petition.

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

11. Rule 25-22.029, F.A.C., is captioned “Point of Entry Into Proposed Agency Action Proceedings.” It states that a party of record or person “whose substantial interests may or will be affected by the Commission’s proposed action may file a petition for a Section 120.569 or 120.57, F.S., hearing. . . .” It specifies a deadline within which a person may protest a PAA order, describes noticing requirements following a PAA decision, and states that the Commission will not entertain a motion for reconsideration of a PAA order. Rule 25-22.029, F.A.C., does not mention discovery. Chapter 25-40, F.A.C., identifies Rule 25-22.029 as an exception to the otherwise applicable Uniform Rules of Procedure.

12. Rule 25-22.036, F.A.C., provides that a formal proceeding is initiated by the filing of an application or a complaint with the Commission, as appropriate.

13. Rule 28-106.206, F.A.C., “Discovery,” provides:

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.

ANALYSIS OF PERTINENT STATUTES AND RULES

In the section that follows, OPC will discuss the application of these statutes and rules to the instant Petition.

14. To determine whether the Legislature intended Sections 350.0611(1), 366.093(2), and 367.156(2), F.S., to authorize OPC’s use of discovery in general rate cases processed with

the Commission's PAA procedure prior to the issuance of the PAA, one must apply the rules of statutory construction.

The guide for statutory construction is legislative intent, which must be determined primarily from the language of the statute. Hale v. State, 891 So. 2d 517, 521 (Fla. 2004). Generally, when a statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent, or resort to rules of statutory construction to ascertain intent insofar as this would constitute an abrogation of legislative power. Cherry v. State, 959 So. 2d 702, 713 (Fla. 2007). However, courts follow the general rule that the legislature does not intend to enact useless legislation. Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996). Therefore, courts should avoid interpretations that would render part of a statute meaningless. Id. Another basic rule of statutory construction requires a court to avoid a literal interpretation that would result in an absurd or ridiculous conclusion. Maddox v. State, 923 So. 2d 442, 446 (Fla. 2006); State v. Atkinson, 831 So. 2d 172, 174 (Fla. 2002).

M.D. v. State, 993 So. 2d 1061, 1063 (Fla. 1st DCA 2008)

15. The most fundamental principle of interpretation is that an unambiguous statute must be accorded its plain and ordinary meaning. See Rowe v. State, 394 So. 2d 1059, 1059 (Fla. 1st DCA 1981). In Order No. PSC-11-0095-FOF-EI, the Commission recognized this rule of construction, stating "when a statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent, or resort to rules of statutory construction to ascertain intent insofar as this would constitute an abrogation of legislative power." (Citing M.D. v. State, 993 So. 2d 1061 (Fla. 1st DCA 2008); Cherry v. State, 959 So. 2d 702, 713 (Fla. 2007)). OPC's right to conduct discovery in a proceeding in which it intervenes prior to the issuance of a Notice of Proposed Agency Action is buttressed by the application of the "plain meaning" rule.

OPC is the Statutory Representative

16. The language and intent of Section 350.0611(1), F.S., are clear. Pursuant to OPC's enabling statute, OPC has the statutory authority to appear, in the name of the state or its citizens, in *any proceeding or action* before the Commission, and, upon intervention, possesses the statutory authority to utilize therein *all* forms of discovery available to attorneys in civil actions generally. See Section 350.0611(1), F.S. There is no limitation on or prohibition of OPC's discovery rights in OPC's authorizing statute applicable to general rate cases using the Commission's PAA procedure (or any proceeding, for that matter). Therefore, any impairment of OPC's ability to obtain discovery in PAA proceedings adversely affects the customers' right to be fully represented by OPC in the manner intended by the Florida Legislature. Citizens v. Mayo, 366 So. 2d 1 (Fla. 1976).

Discovery allowed in any docket or proceeding affecting rates

17. The language of Sections 366.093(2) and 367.156(2), F.S., is likewise clear, broad, and unequivocal. In any docket or proceeding affecting a utility's rates or cost of service, discovery shall be conducted in the manner provided by Rule 1.280 of the Florida Rules of Civil Procedure. Id. Any general rate case filed with the Commission, whether an adjudicated rate case filed pursuant to Sections 366.06(3) and 367.081(6), F.S., or a rate case using the Commission's PAA procedure pursuant to Sections 366.06(4), and 367.081(8), F.S., is a docketed "proceeding" affecting rates or cost of service within the meaning of Sections 366.093(2) and 367.156(2), F.S. While Sections 366.06(4), and 367.081(8), F.S., provide that a utility "may specifically request the commission to process its petition to change rates using the agency's proposed agency action procedure," there is nothing in these statutory provisions

authorizing the PAA procedure that prohibits the use of discovery in such rate cases or which authorizes the Commission to impose such a prohibition.

Proceeding defined

18. "Initiation of Formal Proceedings" is governed by Rule 25-22.036(1) and (3)(a), F.A.C. These rule provisions prescribe the initiation of a formal proceeding by the filing of either an application or a complaint with the Commission. To initiate a change in rates, a utility must file an application with the Commission. Accordingly, any general rate case filed pursuant to Sections 366.06 or 367.081, F.S., is a proceeding before the Commission.⁶

The Uniform Rule On Discovery

19. Rule 28-106.206, F.A.C., governs discovery in proceedings determining substantial interests. This rule expressly allows discovery upon the commencement of any proceeding. It 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.

⁶ "Formal proceeding" means a proceeding docketed in the Commission's Office of Commission Clerk. Rule 25-22.006(1)(b), F.A.C., which is identified in Chapter 25-40, F.A.C., as an exception to the Uniform Rules of Procedure. While the definition is provided in the context of the Commission's procedures for safeguarding confidential information, it is consistent with Rule 25-22.036, F.A.C. (see above). All rate case proceedings, including those being processed using the Commission's PAA procedure, receive a docket number from the Commission Clerk.

Rule 28-106.206, F.A.C., authorizes the prehearing officer in a proceeding to establish reasonable discovery limits and compel responses to discovery; however, it does not authorize the prehearing officer to *prohibit* discovery after a proceeding has commenced. A rate proceeding “commences” within the meaning of this rule when a utility files an application for authority to modify its rates and the Commission establishes a docket for its processing, regardless of whether it is processed using the PAA procedure or proceeds directly to an adjudicatory hearing.

Rule 25-22.029, F.A.C., the Commission’s Point of Entry Rule

20. The title of Rule 25-22.029, F.A.C., “Point of Entry into Proposed Agency Action Proceedings” (Point of Entry Rule), clearly indicates that a docketed matter being processed using the Commission’s PAA procedure is a “proceeding.” Further, Rule 25-22.029, F.A.C., includes a statement that *all parties of record* or persons whose substantial interests may or will be affected by the PAA may petition for a hearing pursuant to Sections 120.569 and 120.57, F.S. The reference to plural, existing “parties of record” demonstrates that the rule contemplates interventions by one or more parties prior to the issuance of the PAA order. Once OPC intervenes, it is empowered to conduct discovery by its enabling statute. See Section 350.0611(1), F.S.

21. The Point of Entry Rule implements Sections 120.569, 120.57, 120.80(13)(b), 364.05, 366.06, 367.081, and 367.0817(4)(a), F.S. As this rule implements Sections 120.569 and 120.57, F.S., any case processed using the Commission’s PAA procedure falls within the Florida Administrative Procedure Act, Chapter 120, F.S.

22. The Point of Entry Rule is silent on the subject of a party's discovery rights, for the simple reason that it addresses a separate, different topic. It was not intended to have any bearing on a party's general right to conduct discovery in a given proceeding pursuant to Rule 28-106.206, F.A.C., or OPC's statutory discovery rights pursuant to Section 350.0611(1), F.S. Unlike other intervening parties, OPC possesses standing to intervene and authority to utilize discovery in any proceeding or action before the Commission as a matter of statutory right. Thus, once any rate proceeding or action commences, OPC may intervene and utilize discovery, regardless of whether the proceeding is initially scheduled for a Section 120.569 or Section 120.57 adjudicatory hearing or will utilize the PAA procedure.⁷

23. Rule 1.280(a), Florida Rules of Civil Procedure, to which Sections 366.093(2) and 367.156(2), F.S., refer, states:

Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise and under subdivision (c) of this rule, the frequency of use of these methods is not limited, except as provided in rules 1.200, 1.340, and 1.370.

This rule authorizes and governs the use of discovery in all general rate cases affecting rates or cost of service.

24. To summarize: A proceeding commences when a utility files its application for authority to change its rates. Rule 28-106.206, F.A.C., clearly allows discovery once a rate case

⁷ Sections 366.06(4) and 367.081(8), F.S., state that the Commission should process the PAA rate case according to its proposed agency action procedure "as prescribed by commission rule." As noted above, the Point of Entry Rule does not mention discovery. It does not prohibit OPC from initiating discovery prior to the entry of a PAA order; nor could it, in light of OPC's express authorization in Section 350.0611(1), F.S.

application is filed. The statutory provisions that enable certain utilities to request the Commission to apply the PAA procedure cannot be disassociated from those that authorize such a utility to initiate a proceeding by requesting a change in rates. An application filed under either approach triggers OPC's statutory authority to intervene and utilize discovery pursuant to Sections 350.0611(1), 366.093(2), and 367.156(2), F.S., Rule 28-106.206, F.A.C., and the Florida Rules of Civil Procedure. Nothing in the Florida Statutes or Commission Rules authorizes the Commission to prohibit OPC from exercising its right to conduct discovery merely because a utility requests the Commission to process its case pursuant to the PAA procedure.

THE CONFLICTING RULINGS THAT REQUIRE RESOLUTION GOING FORWARD

The FPUC Order

25. In Docket No. 080366-GU, Florida Public Utilities Company ("FPUC") objected to OPC's first round of discovery during a PAA proceeding. FPUC argued specifically that discovery is not appropriate under the PAA process until the PAA order is issued. FPUC argued that pursuant to Section 350.0611(1), F.S., and Rule 28-106.206, F.A.C., "the proceeding will not have 'commenced' until a PAA order is issued and an objection has been filed."^{8 9} FPUC further argued that allowing discovery during the PAA process was unnecessarily burdensome, served no purpose, and was contrary to the purpose of the PAA process.¹⁰ The OPC countered that it has the right to serve discovery requests in PAA dockets prior to the Commission's

⁸ See, FPUC Order No. PSC-09-0182-PCO-GU at 1.

⁹ *Id.*

¹⁰ *Id.*

issuance of a PAA Order. OPC also asserted that it “has never been the policy of the Commission to forestall discovery until after the Commission votes on the PAA Order.”¹¹

26. In the FPUC Order, the Commission rejected FPUC’s arguments and denied FPUC’s motion for a protective order. It directed the utility to respond to OPC’s discovery, stating:

The commencement of the proceeding in the instant case began with the FPUC filing its petition for a rate increase. Review of Section 350.0611(1), F.S. and Rule 28-106.206, F.A.C., indicates that there is no prohibition against proceeding with discovery prior to issuance of the PAA Order. Furthermore, this decision is consistent with prior Commission decisions. . . .^{12 13}

Thus, in a 2009 order in which it ruled specifically on a utility’s direct challenge of OPC’s right to conduct discovery prior to the issuance of a PAA order, the Commission interpreted and applied the relevant statutes and rules in a manner consistent with OPC’s analysis.

The AUF Order

27. In Docket No. 100330-WS, a PAA rate case, OPC propounded its first set of discovery to Aqua Utilities, Inc. (“AUF”) prior to the issuance of the PAA order. In a letter, AUF responded that OPC’s discovery request was voluminous and cited the Florida Rules of Civil Procedures’ numeric limitation on the number of interrogatories that may be served without additional authority. On October 14, 2010, OPC filed a motion to set discovery procedures and a motion to compel discovery responses, noting that (1) it had already served discovery, (2) no

¹¹ FPUC Order at 2.

¹² See, Order No. PSC-04-0806-PCO-TP, issued August 19, 2004, in Docket No. 040353-TP, In re: Petition to review and cancel, or in the alternative immediately suspend and postpone BellSouth Telecommunications, Inc.’s Preferred Pack Plan Tariffs, by Supra Telecommunications and Information Systems, Inc. (footnote in original)

¹³ FPUC Order at 2.

Order Establishing Procedure (OEP) had been issued, and (3) the scope of this rate case was similar to the scope of AUF's most recent prior rate case.¹⁴

28. AUF argued that OPC's Motion should be denied because it sought an "unprecedented expansion" of the discovery parameters in a PAA matter. AUF also asserted it was unnecessary to grant OPC's requested relief because AUF agreed to respond to OPC's first set of discovery by December 13, 2010 (90 days after OPC served its first set). AUF asserted that OPC would have enough time to review the discovery responses in order to "make an informed decision as to whether to protest the PAA order."¹⁵ AUF further asserted that it requested the streamlined rate case procedure of the Commission's PAA process in order to reduce rate case expense.¹⁶

29. The pre-PAA order discovery issues arose in the AUF case three years after the FPUC Order had been issued. After considering the parties' arguments, Commissioner Graham, serving as Prehearing Officer, entered an order (hereinafter "the AUF Order") in which he granted OPC's motion to set discovery parameters and compel discovery responses.¹⁷ In granting OPC's motion, the AUF Order stated that "discovery shall be conducted in accordance with the provisions of Chapter 120, F.S., and the relevant provisions of Chapter 367, F.S., Rules 25-22, 25-30, and 28-106, [F.A.C.], and the Florida Rules of Civil Procedure. . . ."¹⁸ Thus, consistent with the FPUC Order, the ruling in the AUF case implicitly recognized that OPC has a statutory right to serve discovery requests in a PAA proceeding prior to the issuance of the Notice of Proposed Agency Action.

¹⁴ Order No. PSC-11-0018-PCO-WS, at 2-3.

¹⁵ Order No. PSC-11-0018-PCO-WS, at 2.

¹⁶ Order No. PSC-11-0018-PCO-WS, at 2.

¹⁷ Order No. PSC-11-0018-PCO-WS, at 3.

¹⁸ Order No. PSC-11-0018-PCO-WS, at 3.

The WMSI Case and Order

30. In Docket No. 110200-WU, Water Management Services, Inc. (“WMSI”) requested the use of the Commission’s PAA procedure for its general rate case. OPC intervened and actively participated in the case. On March 1, 2012, OPC requested the Commission to set the case for an evidentiary hearing without first issuing a Notice of Proposed Agency Action. The Commission denied OPC’s motion.

31. Prior to the issuance of the order denying OPC’s request to proceed directly to an adjudicatory hearing, on March 14, 2012, OPC served its first set of formal discovery to the utility. WMSI objected to OPC’s interrogatories, stating that Rule 1.340 of the Florida Rules of Civil Procedure (“FRCP”), authorized OPC to serve 30 interrogatories but OPC had propounded 91. In this pleading, the utility did not object to pre-PAA order discovery by OPC *per se*. In its objection, WMSI challenged only the number of interrogatories that OPC had served.

32. On May 14, 2012, OPC served a second set of discovery requests, and also filed motions to compel responses to OPC’s first set of discovery and (mirroring the analogous posture of the AUF case) to establish discovery parameters. In its response to these motions, WMSI argued for the first time that OPC has no right to obtain discovery prior to the PAA order.

33. Following oral argument, the Prehearing Officer issued an order denying OPC’s motion to establish discovery procedures and compel discovery responses. Order No. PSC-12-0316-PCO-WU, issued June 19, 2012 (“WMSI Order”). The WMSI Order states:

The Commission began using the Proposed Agency Action (PAA) process for water and wastewater utilities in the early 1980’s. The primary drivers included streamlining the ratesetting process and reducing rate case expense. The Florida Legislature ultimately set a five-month clock for the Commission to enter its vote, and if a protest is filed requesting a hearing on the PAA decision, the Commission must render a decision within 8

months from the date of the filing of the protest. . . . There is no “agency action” until the Commission enters its PAA order. . . . Until the time the PAA order is issued, the Commission’s staff is engaged in a free-form proceeding outside the scope of the Florida Administrative Procedures Act. As the Commission stated when it denied OPC’s request to set WMSI’s rate application for a hearing, “we agree with the Utility that Rule 25-22.029, F.A.C., contemplates that it is after the Agenda Conference and issuance of the PAA action that the provisions of Section 120.569 and 120.57, F.S., become applicable.”

As is the case for all proposed agency action proceedings, OPC will have the opportunity to address the Commission at the August 2, 2012, Commission Agenda Conference when the Commission will vote on WMSI’s application. If OPC takes issue with the PAA order, OPC will have an opportunity to request a hearing pursuant to Rule 25-22.029, F.A.C. Others whose substantial interests are affected by the proposed agency action may also request a hearing. If a hearing is requested, an order establishing procedure will be entered and discovery parameters will be set, as is the case for all Commission proceedings set for hearing.

In this case, there is no reason to set discovery parameters for a free-form agency proceeding where Commission staff asked the same or similar questions to the Utility that OPC requested, and the Utility has stated it plans to respond to those questions.¹⁹ In addition, OPC raised 29 concerns plus subparts about the application, which is under review by Commission staff. Moreover, OPC has already received answers to some of its discovery requests. OPC has requested that it be authorized to propound 300 interrogatories and 300 requests for production, which is the same number allowed by the Commission when WMSI’s last rate application went to hearing. Allowing such a large number of interrogatories and requests for production, when a hearing has not been set, would significantly increase rate case expense and in no way streamline the rate setting process, contemplated by Section 367.081(8), F.S. At this juncture, the parties’ opportunity to conduct discovery must be balanced against the interests of protecting the ratepayers from excessive rate case expense. In this case, the potential of increased rate case expense is of concern and would ultimately harm the customers. For the aforementioned reasons, OPC’s Motion to Establish Discovery Procedures and Motion to Compel Discovery are hereby denied.²⁰ (footnote in original omitted)

¹⁹ The utility’s subsequent claim that staff cannot engage in formal discovery prior to a PAA order was rendered moot when staff voluntarily agreed to convert its pending discovery to informal data requests. See Order No. PSC-12-0371-PCO-WU, issued July 18, 2012, in Docket No. 110200-WU.

34. The subject of OPC's right to conduct discovery prior to the issuance of a PAA order arrived before the Prehearing Officer in the WMSI case in an anomalous, procedurally scrambled manner. Prior to the filing of OPC's motion to compel and motion to establish discovery procedures, WMSI had indicated that it would respond to certain of OPC's discovery requests. WMSI objected only to answering more interrogatories than the numeric limitation of the Florida Rules of Civil Procedure – a limitation that the Prehearing Officer has the authority to adjust to the needs and circumstances of a particular case (as happened in the AUF Order). In its motions, OPC cited and treated the AUF Order, in which the Commission granted OPC's motion to establish discovery parameters prior to the PAA order (over the utility's objection to an "expansion" of PAA discovery sought by OPC), as the "status quo" and as the pertinent precedent to overcome the utility's limited objection and support the action OPC requested of the Prehearing Officer. Only after OPC filed its motions did the utility unexpectedly raise the argument that no discovery is allowed in a PAA. Therefore, the underlying bases for OPC's right to engage in discovery, including the reference to discovery in OPC's empowering statute and the FPUC order, were not fully explicated by OPC in the pleadings and related argument that framed the issue prior to the Prehearing Officer's ruling in the WMSI case. Furthermore, given the sequence of presentations that occurred during oral argument, OPC was not able to respond meaningfully to certain of the additional reasons for the ruling that were suggested by the staff at the conclusion of the argument. OPC believes the irregular procedural history that preceded the

²⁰ WMSI Order at 2-3. OPC subsequently protested the Notice of Proposed Agency Action Order PSC-12-0435-PAA-WU, issued August 22, 2012, and requested a formal administrative hearing on the disputed issues of material fact which were the subject of OPC's first and second sets of discovery that OPC served during the PAA portion of the rate case.

WMSI ruling may have contributed to the disparity between the WMSI Order and earlier rulings that recognized OPC's right to obtain discovery prior to a PAA order. With due respect for the Prehearing Officer in the WMSI case, OPC submits 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 a Notice of Proposed Agency Action, for the following reasons:

- (a) In the FPUC Order, the Commission properly recognized that a proceeding commences, for purposes of the initiation of discovery, when a utility files its application. The WMSI Order focused instead on the timing of "agency action," which has no bearing on OPC's right to initiate discovery in a proceeding that commences with the filing of an application and in which it intervenes.
- (b) In the FPUC Order, the Commission properly recognized the import of Section 350.0611(1), F.S. (part of OPC's enabling statute), when it rejected the utility's contention that OPC's discovery was without authority and upheld OPC's right to conduct discovery prior to the issuance of the Notice of Proposed Agency Action. The WMSI Order simply did not reach Section 350.0611(1), F.S., as it relates to OPC's discovery rights.
- (c) The WMSI Order was also based in part on the fact that staff had posed some of OPC's discovery requests separately, and the utility had indicated its intent to respond to staff. To deny OPC the ability to obtain discovery from the applicant utility on the grounds that the staff may choose to pose the same questions and the utility may answer the staff would be to subordinate and subject OPC's discovery rights to the discretion of both the staff and the utility, in derogation of OPC's rights under Section 350.0611, F.S.
- (d) In a footnote, the WMSI Order cites *Manasota-88, Inc. v. Department of Environmental Regulation*, 441 So. 2d 1109, 1111 (Fla. 1st DCA 1983), and *Capeletti Bros. v. State*, 362 So. 2d 346 (Fla. 1st DCA 1978), for the proposition that, prior to the issuance of a PAA in a general rate case, the proceeding necessarily is limited to the Commission staff participating with the utility in a "free form," informal, non-APA process. The issue in *Manasota* involved standing to intervene, not discovery rights, and *Capeletti Bros.* involved the issue of whether an agency had improperly suspended a firm from a bidding list, not a rate case in which OPC may intervene as a matter of statutory right. These cases and the "free form" model that derives from case law involving environmental permitting scenarios are simply inapposite to an entity that possesses statutory standing to intervene and a statutory right to engage in

discovery in all proceedings before the PSC. Moreover, the *Manasota* and *Capeletti Bros.* cases were decided 26 and 31 years, respectively, prior to the Commission's FPUC Order, which concluded that the FPUC proceeding "commenced" when the utility filed its application and cited Section 350.0611, F.S., among other things, as the basis for OPC's right to conduct discovery prior to the PAA order. These cases provide no new legal developments or premises justifying the denial of OPC's discovery rights.

- (e) The WMSI Order cited Order No. PSC-12-0139-PCO-WS, issued on March 26, 2012 in Docket No. 110264-WS ("Labrador Order"). The Labrador Order does not support the conclusion that OPC cannot conduct discovery prior to the issuance of the PAA; to the contrary, the Labrador Order supports OPC's Petition. It is clear on the face of the Labrador Order that the Commission was ruling on the utility's contention that a *party other than OPC* should not be permitted to intervene and conduct discovery prior to the Notice of PAA: "While acknowledging that the Commission granted intervention to a party other than the Office of Public Counsel in the PAA portion of the Aqua rate case, Labrador asserts that the utility did not object to the intervention in that case." In context, it is clear that both the utility and the PSC regarded OPC's right to intervene and conduct discovery prior to the Notice of PAA as a given. Further, the docket file of the Labrador Utilities case demonstrates that, well prior to the issuance of the PAA Order in that case, OPC served notice of its intervention; the Commission acknowledged OPC's intervention; OPC served discovery requests on Labrador; and the utility responded to OPC's first discovery requests.^{21 22}
- (f) The WMSI Order cited Order No. PSC-12-0222-PCO-WU, in which the Commission stated, "we agree with the Utility that Rule 25-22.029, F.A.C., contemplates that it is after the Agenda Conference and issuance of the PAA action that the provisions of Section 120.569 and 120.57, F.S., become applicable." In Order No. PSC-12-0222-PCO-WU, the Commission denied OPC's motion to proceed directly to an evidentiary hearing in lieu of the PAA process requested by the utility. In its treatment of Section 120.569 and Section 120.57, F.S., Order No. PSC-12-0222-PCO-WU relates to the timing of a

²¹ Labrador Order, at pages 1-2; see Document Nos. 07285-11, 07344-11, 00708-12, 01309-12, and 02357-12 in Docket No. 110264-WS.

²² The AUF rate case to which Labrador referred in the portion of the WMSI Order quoted above was the same docket in which the AUF Order granted OPC's motion to set discovery parameters prior to the issuance of the PAA. Following the issuance of the AUF Order, AUF initially resisted the motion to intervene filed by the owner of a mobile home park served by AUF on the grounds that the mobile park owner had not demonstrated that its interests were not adequately represented by Public Counsel, which by that time had intervened, served discovery, and moved for appropriate discovery parameters. See Order No. PSC-11-0162-PCO-WS, issued in Docket No. 100330-WS on March 8, 2011, at page 1.

party's right to request a hearing, not OPC's right to conduct discovery. The language of Order PSC-12-0222-PCO-WU quoted in the WMSI Order, therefore, has no bearing on OPC's right to obtain discovery after a proceeding commences. OPC acknowledges the discretion of the Commission to deny a motion for adjudicatory hearing and grant instead the utility's request for the PAA process; however, that discretion does not affect OPC's statutory right, upon intervention, to conduct discovery in PAA proceedings.

CONCLUSION

Section 350.0611, F.S., authorizes OPC to intervene and conduct discovery in proceedings before the Commission. PAA dockets are "proceedings" within the meaning of that statute and the Commission's rules. Sections 366.093(2), and 367.156(2), F.S., expressly allow discovery in any docket or proceeding that affects rates and charges through the means provided by the Florida Rules of Civil Procedure. Rule 28-106.206, F.A.C., provides that discovery may proceed after the commencement of a proceeding. Rule 25-22.036, F.A.C., provides that a formal proceeding is initiated with the PSC by the filing of an application (such as an application for a change in rates) or a complaint. Under these provisions, as the Commission correctly determined in the FPUC Order and implicitly acknowledged in the subsequent AUF and Labrador Orders, OPC possesses a statutory right to conduct discovery prior to the issuance of a Notice of Proposed Agency Action. The WMSI Order provides no basis for departing from those orders. Going forward, the Commission should adhere to the principles and practices embodied in the FPUC and AUF Orders and recognize OPC's right, upon intervention, to obtain discovery prior to the issuance of a PAA order.

DECLARATORY STATEMENT SOUGHT FROM THE COMMISSION

WHEREFORE, OPC requests the Commission issue a declaratory statement recognizing that, in any Commission PAA docket or proceeding in which OPC has intervened, OPC possesses the right to obtain discovery through the means provided by the Florida Rules of Civil

Procedure, subject to any customary procedural orders designed to effectuate and regulate discovery, prior to the issuance of the Commission's written Notice of Proposed Agency Action.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Public Counsel's Petition for Declaratory Statement has been furnished by electronic mail to the following parties on this 20th day of May, 2014.

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