

State of Florida



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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: August 13, 2015
TO: Carlotta S. Stauffer, Commission Clerk, Office of Commission Clerk
FROM: Kathryn G.W. Cowdery, Senior Attorney, Office of the General Counsel 
RE: Docket No. 140107-PU - Petition for declaratory statement regarding discovery in dockets or proceedings affecting rates or cost of service processed with the Commission's proposed agency action procedures – Revised Recommendation

Attached for filing is the revised recommendation in the above-named docket. This recommendation was deferred from the July 21, 2015 agenda and is to be heard at the August 27, 2015 agenda. The revision corrects a scrivener's error and is on page 11 of the recommendation in underline-and-strike format.

EXE Approval _____

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned over a horizontal line.

KGWC
Attachment

State of Florida



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

DATE: July 9, 2015

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Cowdery)
Division of Accounting and Finance (Maurey)

RE: Docket No. 140107-PU – 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.

AGENDA: 07/21/15 – Regular Agenda – Parties may participate at the Commission's discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On May 20, 2014, pursuant to Section 120.565, Florida Statutes (F.S.), the Office of Public Counsel filed a petition for declaratory statement with the Commission. The Petition alleges that Order No. PSC-12-0316-PCO-WU (Order Denying OPC's Motion to Establish Discovery Procedures and Motion to Compel Discovery Responses), issued June 19, 2012, in Docket No. 110200-WS, *In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.* (the WMSI Order), created doubt regarding whether the Commission will enforce OPC's statutory discovery rights in docketed Proposed Agency Action (PAA) rate proceedings in which it intervenes prior to the issuance of a Notice of PAA.

The Petition asks the following question:

Upon intervention in any proceeding affecting rates or cost of service that the Commission processes under proposed agency action procedures, do 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?

Utilities, Inc. requested and was granted intervenor status in this docket. Utilities, Inc. asked the Commission to reach the merits of the Petition.

By Final Order No. PSC-14-0392-DS-PU, the Commission denied OPC's Petition for failing to meet the threshold requirements of Section 120.565, F.S., for issuance of a declaratory statement. OPC appealed the Final Order to the First District Court of Appeal.

On appeal, the Court stated that although it expressed no view as to the merits, there was no reason for the Commission not to address the matter of OPC's discovery rights in PAA rate cases prior to issuance of Notices of PAA. *Citizens v. Florida Public Service Commission*, 2015 Fla. App. LEXIS 6551, at *15. Accordingly, the Court reversed and remanded the case with directions that the Commission consider the Petition on the merits and issue a declaratory statement. The Court noted that by ruling on the merits of the Petition, the Commission "can resolve questions concerning the applicability of language in the WMSI order to other PAA rate cases." *Id.* at *10. The Court stated that "OPC's petition is limited to seeking clarification of its rights, as a creature of statute, to conduct discovery, upon its intervention in PAA rate cases." *Id.* at *15. The Court also stated that the Commission's response to the narrow question posed by the petition need not involve rulemaking. *Id.*

This recommendation addresses the merits of OPC's Petition for Declaratory Statement. The Commission has jurisdiction under Section 120.565, and Chapters 366 and 367, F.S.

Discussion of Issues

Issue 1: Should the Commission grant OPC's Petition for Declaratory Statement?

Recommendation: Yes, the Commission should grant the Petition for Declaratory Statement and declare that the Office of Public Counsel has the authority under Section 350.0611(1), F.S., to utilize discovery pursuant to Fla. R. Civ. Pro. 1.280 – 1.390 in any proceeding affecting rates or cost of service processed using the proposed agency action procedures of Sections 366.06(4) and 367.081(8), F.S. (Cowdery)

Staff Analysis:

OPC's Requested Declaratory Statement

OPC's Petition for Declaratory Statement asks the Commission to issue an order declaring that:

Upon intervention in any proceeding affecting rates or cost of service that the Commission processes under proposed agency action (PAA) procedures, Sections 350.0611(1), 366.093(2), 367.156(2), F.S., and Rule 28-106.206, F.A.C., authorize the Office of Public Counsel to conduct discovery prior to the issuance of the Commission's written Notice of Proposed Agency Action.

The Petition alleges that the WMSI Order, which denied OPC's motion to set discovery parameters and motion to compel discovery, creates doubt regarding whether, going forward, the Commission will enforce OPC's statutory discovery rights in docketed PAA rate case proceedings in which it intervenes prior to the issuance of a Notice of Proposed Agency Action. The Petition further states that a declaratory statement is necessitated by what OPC characterizes as inconsistent and conflicting decisions and to avoid piecemeal, repetitive litigation concerning OPC's right to conduct discovery in PAA proceedings.

OPC alleges that the WMSI Order conflicts with the FPUC Order,¹ which explicitly determined that OPC has the right to obtain discovery prior to the issuance of a Notice of PAA, and with the AUF Order² and Labrador Order,³ which implicitly acknowledged that right. Although OPC acknowledged at the July 10, 2014, Agenda Conference that the WMSI Order was correctly decided under the facts of that docket, OPC argues that, going forward, the conclusions, determinations, and practice embodied in the FPUC, AUF, and Labrador Orders, not the WMSI Order, must govern OPC's ability to conduct discovery prior to the issuance of a Notice of PAA.

¹ Order No. PSC-09-0182-PCO-GU, issued March 27, 2009, Docket No. 080366-GU, *In re: Petition for rate increase by Florida Public Utilities Company* (Order Denying Florida Public Utilities Company's Objections and Motion for Protective Order).

² Order No. PSC-11-0018-PCO-WS, issued January 5, 2011, Docket No. 100330-WS, *In re: Application for increase in water/wastewater rates in Alachua, Brevard, DeSoto, Hardee, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.* (Order Granting Citizens Motion to Set Discovery Parameters and Motion to Compel Discovery Responses).

³ Order No. PSC-12-0139-PCO-WS, issued March 26, 2012, Docket No. 110264-WS, *In re: Application for increase in water and wastewater rates in Pasco County by Labrador Utilities, Inc.* (Order Denying Motion to Intervene. This order does not address any discovery issues.)

To resolve what it believes are inconsistent and conflicting decisions, OPC asks the Commission to declare in a single order that, going forward, it will recognize OPC's discovery rights in PAA cases.

Utilities, Inc.'s Comments and OPC's Response

In its motion to intervene, Utilities, Inc., alleges that if the interpretation of the PAA procedure sought by OPC is adopted by the Commission, it will drastically increase the rate case expense incurred by Utilities, Inc.'s subsidiaries, will otherwise exacerbate an already tight deadline within which the Commission has to rule in a PAA proceeding, and is contrary to the purpose of the PAA process.

OPC responds to Utilities, Inc.'s allegations by stating that OPC is not advancing a new interpretation of the PAA procedure, but is asking for affirmation of OPC's statutory right to discovery in a PAA proceeding as set forth in the FPUC Order. OPC states that its discovery activities and related rate case expense have been part of PAA ratemaking in the past and that the continuation of that practice is neither new nor incremental in nature. Further, OPC states that any argument in opposition to OPC's Petition that is based on the level of rate case expense would not be relevant to the timing of discovery but to establishing appropriate discovery parameters in a given case. OPC concludes that to the extent that the purpose of the PAA process is to shorten the amount of time necessary to complete a rate case, OPC's discovery rights are consistent with, and in some cases are likely essential to, that goal.

Statement of Substantial Impact on OPC Under its Particular Set of Circumstances

OPC states that whenever it has deemed formal discovery pursuant to Section 350.0611(1), F.S., necessary to carry out its statutory responsibilities in a given PAA case in which it has intervened, it has initiated discovery prior to the issuance of the Commission's Notice of Proposed Agency Action Order. OPC further states that going forward, if the Commission does not allow OPC to conduct this discovery, it would impair OPC's ability to fully, efficiently and effectively represent the citizens of the State in any proceeding or action before the Commission, in derogation of OPC's rights under Section 350.0611, F.S. OPC alleges that because the Petition is based in part upon Section 350.0611, F.S., OPC's empowering statute, the declaratory statement sought will apply only to OPC in its individual, particular, and unique circumstances.

OPC's Legal Arguments Concerning Sections 350.0611(1), 366.093(2), 367.156(2), F.S., and Rule 28-106.206, F.A.C.

OPC asks the Commission to issue a declaratory statement recognizing OPC's right to obtain discovery under the provisions of Sections 350.0611(1), 366.093(2), 367.156(2), F.S., and Rule 28-106.206, F.A.C., during any future PAA proceedings affecting rates or cost of service. These legal provisions and OPC's arguments are set forth below.

Section 350.0611(1), F.S.

Section 350.0611(1), F.S., provides that OPC shall have the power:

to appear in the name of the state or its citizens, in any proceeding or action before the [C]ommission . . . and utilize therein all forms of discovery available to attorneys in civil actions generally, subject to protective orders of the [C]ommission.

OPC cites to *Rowe v. State*, 394 So. 2d 1059 (Fla. 1st DCA 1981), for the proposition that the most fundamental principle of statutory interpretation is that an unambiguous statute must be accorded its plain and ordinary meaning. OPC argues that pursuant to the plain meaning rule, OPC has the statutory authority pursuant to Section 350.0611(1), F.S., to appear in any proceeding or action before the Commission, including PAA proceedings, and utilize therein all forms of discovery available to attorneys in civil actions generally. OPC recognizes that its right to obtain discovery pursuant to the Florida Rules of Civil Procedure is subject to any customary procedural orders designed to effectuate and regulate discovery. At the July 10, 2014 Agenda Conference, OPC acknowledged that a prehearing officer in a PAA rate case has discretion to issue protective orders and to limit discovery under the facts and circumstances of the docket, when time is of the essence and when expense is an issue.

Sections 366.093(2) and 367.156(2), F.S.

Section 366.093(2), F.S., concerning the confidentiality of electric and gas utilities' records, and 367.156(2), F.S., concerning the confidentiality of water and wastewater utilities' records, state, in part, that 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. OPC argues that Sections 366.093(2) and 367.156(2), F.S., apply to Section 366.06(4) and 367.081(8), F.S., PAA rate cases because PAA rate cases are "docketed proceedings." OPC further states that there is nothing in Sections 366.06(4) and 367.081(8), F.S., that authorizes the Commission to prohibit the use of discovery in PAA rate cases.

Rule 28-106.206, F.A.C.

Rule 28-106.206, F.A.C., addressing discovery in hearings involving disputed issues of material facts, states:

After commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanctions in accordance with the Florida Rules of Civil Procedure, except contempt.

OPC states that PAA rate case proceedings are subject to Rule 28-106.206, F.A.C., because a rate proceeding commences when a utility files a PAA rate case application and the Commission

establishes a docket. OPC argues that Rule 28-106.206, F.A.C., authorizes the prehearing officer, after commencement of any 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.

Commission Orders Addressed by OPC

OPC states that the WMSI Order conflicts with the FPUC Order, the AUF Order, and the Labrador Order as they relate to OPC's discovery rights⁴ and that the conflicting rulings require resolution by the Commission. OPC alleges that the FPUC, AUF, and Labrador Orders support its position that OPC has the right to obtain discovery in PAA rate cases prior to the issuance of a Notice of PAA. OPC states that the WMSI Order terminated its pre-PAA order discovery initiatives in that case and constituted a departure from the Commission's past practice, highlighting the need for resolution and consistency going forward. These orders and OPC's position on them are described below.

- **The FPUC Order**

Section 366.06(4), F.S., authorizes the use of a PAA procedure for petitions for rate relief for a natural gas utility or a public electric utility whose annual sales to end-use customers amount to less than 500 gigawatt hours. In Docket No. 080366-GU, *In re: Petition for rate increase by Florida Public Utilities Company* (FPUC Docket), FPUC filed a PAA rate case pursuant to Section 366.06(4), F.S. OPC intervened and propounded discovery on FPUC. FPUC filed its Objections and Motion for Protective Order on the first sets of discovery on the grounds that discovery was premature in a PAA proceeding.

Citing to Section 350.0611(1), F.S., and Rule 28-106.206, F.A.C., FPUC argued that a proceeding commences upon protest of a PAA Order, at which time OPC would have the opportunity to conduct discovery to the same extent as any other party. FPUC also argued that to allow OPC to conduct discovery in the PAA process is unnecessarily burdensome, serves no purpose, and is arguably contrary to the purpose of the PAA.⁵ In response, OPC argued that FPUC's request was for a \$10 million annual increase and PAA rate case expense of \$850,000. OPC argued that administrative efficiency and Commissioners' time would likely be better served if the issues identified by OPC were explored in discovery and then shared with the utility and staff in an informal setting rather than at the agenda conference. OPC also objected to the

⁴ To staff's knowledge, the FPUC Order, the AUF Order, and the WMSI Order are the only three orders where the prehearing officers addressed a discovery dispute between OPC and a utility in a PAA rate case since enactment of Section 366.06(4) and 367.081(8), F.S. The Labrador Order ruled on a motion to intervene by a customer group, and did not involve OPC discovery issues.

⁵ Through its second set of interrogatories, OPC asked a total of 81 interrogatories. The utility's Second Objections and Motion for Protective Order on OPC's second set of discovery included an objection to the number of interrogatories, stating that if the Commission were to allow discovery, it should be subject to the 30 interrogatory limit required by Fla. R. Civ. Pro. 1.340(a).

suggestion that rates set pursuant to a PAA Order must go into effect before the issues it identified could be explored and preliminarily tested through discovery.⁶

The Prehearing Officer denied FPUC's motion for protective order and directed the utility to respond to all OPC discovery to which it does not otherwise object in a timely manner. In ruling on this issue, the Prehearing Officer stated:

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.

FPUC Order at p. 2. OPC states that the FPUC Order properly recognized that, for purposes of initiation of discovery, a proceeding commences when a utility files its application. OPC further argues that the FPUC Order properly recognized the import of Section 350.0611(1), F.S., in rejecting the utility's objections and upholding OPC's right to conduct discovery prior to issuance of the Notice of PAA.

- **The AUF Order**

Section 367.081(8), F.S., allows a water or wastewater utility to specifically request the Commission to process its petition for rate relief using the agency's PAA procedure. Docket No. 100330-WS, *In re: Application for increase in water/wastewater rates by Aqua Utilities Florida, Inc.*, (AUF Docket), was a Section 367.081(8), F.S., PAA rate case proceeding for 87 systems in 17 counties. OPC intervened and propounded 118 numbered interrogatories and 97 numbered requests for production. AUF served a portion of the responses and proposed to provide the remaining responses in increments of 30, every thirty days. OPC filed a Motion to Set Discovery Procedure and Motion to Compel, asking the Prehearing Officer to set a discovery process establishing discovery limits of 750 interrogatories, 750 requests for production of documents, and 750 requests for admission and to direct AUF to respond within 30 days. AUF objected, asserting that the discovery exceeded the 30 interrogatory limit of the Florida Rules of Civil Procedure and Rule 28-106.206, F.A.C., and that the discovery was oppressive, unduly burdensome and would cause rate case expense to customers to increase dramatically. AUF did not, however, object to OPC conducting discovery during a PAA rate case proceeding.

The Prehearing Officer granted OPC's motion to set discovery parameters and motion to compel discovery responses, stating:

[D]iscovery shall be conducted in accordance with the provisions of Chapter 120, F.S., and the relevant provisions of Chapter 367, Rules 25-22, 25-30, and 28-106, Florida Administrative Code (F.A.C.), and the Florida Rules of Civil Procedure (as applicable), as modified herein or as may be subsequently modified by the Prehearing Officer.

⁶ OPC subsequently filed a protest of the PAA Order, and the docket was resolved by an order approving stipulation and settlement.

* * *

This rate case is unique in that AUF's request contains 87 systems in 17 counties throughout Florida. Given the broad scope of this matter, the parties' opportunity to conduct ample discovery must be balanced against the interests of protecting the ratepayers from excessive rate case expense. Taking these two countervailing considerations into account, I find that the following limitations on discovery shall apply: [interrogatories and requests for production of documents were limited to 400 each, and requests for admissions were limited to 250]

AUF Order at p. 3-4. As mentioned above, there was no issue as to whether OPC had a right to discovery in PAA rate case proceedings. The Prehearing Officer balanced the opportunity to conduct discovery against protecting the ratepayers from excessive rate case expense and significantly limited the amount of discovery that had been requested by OPC.

- **The WMSI Order**

In Docket No. 110200-WS, *In re: application for increase in water rates by Waste Management Services, Inc.* (WMSI Docket), the utility filed a rate increase application under the Section 367.081(8), F.S., PAA process. OPC intervened and propounded discovery. WMSI responded to OPC's first request for production of documents by answering some requests and objecting to others. WMSI filed objections to the interrogatories, stating that when subparts were counted, the interrogatories exceeded the 30 interrogatory limit of Florida Rules of Civil Procedure 1.340 and that OPC had not obtained permission from the Prehearing Officer to enlarge that number on motion and notice and for good cause, as required by Rule 1.340.

OPC filed a Motion to Establish Discovery Procedures and Motion to Compel Discovery Responses, asking that discovery be enlarged beyond the limits of Fla. R. Civ. Pro 1.340, to 300 interrogatories, 300 requests for production of documents, and 100 requests for admission. OPC argued that the good cause for this enlargement was that the PAA Order would likely be protested, and enlarging discovery limits could help narrow any issues which might be protested; that the Commission routinely increases discovery beyond the 30 interrogatory limit in recognition of the scope of a utility's comprehensive revenue requirements determination; and that enlargement was warranted because of certain described issues specific to the WMSI Docket. The next day, OPC filed its second set of interrogatories (Nos. 27-38) and requests for production of documents (Nos. 43-48).

In response to OPC's Motion to Compel, WMSI argued, in part, that the PAA procedure does not contemplate or allow for discovery and that commencement of a proceeding pursuant to Rule 28-106.206, F.A.C., does not occur until after a PAA Order is entered and the parties are given a point of entry. WMSI stated that OPC's request was contrary to the purpose of the PAA process, which is to provide an inexpensive and expedient proposed determination to an entitlement to a rate increase.

The Prehearing Officer balanced OPC's opportunity to conduct discovery against the interests of protecting the ratepayers from excessive rate case expense. The WMSI Order discussed the purpose of the PAA process, which includes streamlining the rate setting process and reducing rate case expense, and explained that the PAA process is not subject to Section 120.57, F.S. The

order noted that OPC would have the opportunity to address the Commission at the Agenda Conference when the Commission would vote on WMSI's application and that OPC would have an opportunity to request a hearing pursuant to Rule 25-22.029, F.A.C., after the PAA order's issuance. The order also explained that if a hearing were to be requested, an order establishing procedure would be entered and discovery parameters would be set.

The Prehearing Officer denied OPC's motion to establish discovery procedures and motion to compel discovery, finding that under the facts of the case, the potential of increased rate case expense was of concern and would ultimately harm the customers. The WMSI Order stated that there was no reason to set discovery parameters for a free-form agency proceeding where Commission staff asked the same or similar questions to WMSI that OPC had requested, and WMSI planned to respond to those questions; where OPC provided staff with a letter raising 29 concerns plus subparts about the application, which Commission staff was reviewing; where OPC had already received answers to some of its discovery requests; and where the large number of interrogatories and requests for production being requested would significantly increase rate case expense and would not streamline the PAA rate setting process as contemplated by Section 367.081(8), F.S.

In its Petition for Declaratory Statement, OPC argues that the conclusions, determinations, and practice embodied in the WMSI Order should not be followed in the future because the order did not address OPC's right to discovery under Section 350.0611(1), F.S.; because the timing of agency action, and whether or not the docket was or will be set for hearing, has no bearing on OPC's right to initiate discovery; and because the WMSI Order improperly denied OPC discovery on the grounds that staff may choose to pose the same questions and the utility may answer the staff, which subordinated and subjected OPC's discovery rights to the discretion of staff and the utility, in derogation of OPC's Section 350.0611, F.S., rights.

- **The Labrador Order**

In Docket No. 110264-WS, *In re: Application for increase in water and wastewater rates by Labrador Utilities, Inc.* (Labrador Docket), the utility filed an application for a water and wastewater rate increase using the Section 367.081(8), F.S., PAA procedure. A customer group filed a motion to intervene, to which the utility objected on the grounds that intervention is premature in the PAA portion of a proceeding. The Prehearing Officer denied the motion to intervene, stating that there is potential for considerable administrative inefficiency if interested persons are granted formal party status during the PAA process, which would thwart the purpose of providing an inexpensive and expedient proposed determination. The order further stated that there is no need for formal intervention because all interested persons have the ability to participate in the PAA process and may intervene if the matter goes to hearing.

In its Petition for Declaratory Statement, OPC argues that the Labrador Order implicitly acknowledged OPC's right to discovery in PAA rate cases because it noted that the utility had acknowledged that a party "other than OPC" was granted intervention in the PAA portion of the Aqua rate case. OPC concludes that it is clear that both the utility and the Commission regarded OPC's right to intervene and conduct discovery prior to the Notice of PAA as a given. OPC

states that, furthermore, OPC had served discovery requests on the utility during the PAA proceeding in the Labrador Docket, and the utility responded to OPC's first discovery requests.

Discussion and Recommendation

As previously stated, the question posed by OPC's Petition for Declaratory Statement is as follows:

Upon intervention in any proceeding affecting rates or cost of service that the Commission processes under proposed agency action procedures, do 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?

OPC's Petition is limited to clarification of its right to conduct discovery in PAA rate cases. As such, the declaratory statement issued by the Commission will be limited to responding to this question and will apply solely to OPC and not to any other persons or entities.

OPC argues that Sections 366.093(2) and 367.156(2), F.S., and Rule 28-106.206, F.A.C., authorize it to conduct discovery prior to the issuance of the Commission's PAA order. Although OPC is correct that Sections 366.093(2) and 367.156(2), F.S., apply to PAA proceedings, the purpose and application of these statutes concern the confidential treatment of proprietary confidential business information. Sections 366.093(2) and 367.156(2), F.S., do not address standing or authority to conduct discovery in proceedings before the Commission. Rather, staff believes those sections are properly interpreted to provide that if discovery is conducted in any docket or proceeding, it shall be in the manner provided for in Fla. R. Civ. Pro. 1.280. Likewise, although Rule 28-106.206, F.A.C., addresses discovery, that rule applies to hearings involving disputed issues of material fact pursuant to Section 120.57(1), F.S., and not to PAA actions. For these reasons, staff does not believe that Sections 366.093(2) and 367.156(2), F.S., and Rule 28-106.206, F.A.C., are dispositive of OPC's question.

OPC also argues that Section 350.0611(1), F.S., authorizes it to conduct discovery prior to the issuance of the Commission's written Notice of PAA. Staff believes that the plain meaning of the phrase "proceedings or action" in Section 350.0611(1), F.S., is broad and gives OPC the authority to conduct discovery in PAA rate case proceedings. This interpretation of Section 350.0611(1), F.S., is consistent with the FPUC Order, which denied FPUC's motion for protective order and allowed OPC to conduct discovery in a PAA rate proceeding, and with the AUF and WMSI Orders, which balanced the opportunity to conduct discovery against the harm to ratepayers of excessive rate case expense in ruling on OPC's motions to compel.

Utilities, Inc. alleges that if the interpretation of the PAA procedure sought by OPC is adopted by the Commission, it will drastically increase the rate case expense incurred by Utilities Inc.'s subsidiaries, will otherwise exacerbate an already tight deadline within which the Commission has to rule in a PAA proceeding, and is contrary to the purpose of the PAA process. Staff believes that application of the Florida Rules of Civil Procedure alleviates these concerns.

Docket No. 140107-PU
Date: July 9, 2015

Issue 1

Section 350.0611(1), F.S., provides that OPC may utilize all forms of discovery available to attorneys in civil actions generally, subject to protective orders of the Commission. The forms of discovery available to attorneys in civil actions generally are Fla. R. Civ. Pro. 1.280 – 1.390. Under these rules, interrogatories and requests for admission are limited to 30 each, including all subparts. Fla. R. Civ. Pro. 1.340(a) and 1.370(a). Consistent with the goals of the PAA process, these limits may not be exceeded unless stipulated to by the parties or unless the prehearing officer first permits a larger number on notice and motion for good cause shown. Id. Upon motion showing good cause, the prehearing officer may make a protective order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including that the discovery not be had or that discovery be limited or subject to conditions. See Fla. R. Civ. Pro. 1.280(c)(1)–(8). Likewise, OPC may move for an order compelling discovery, and, if denied, the prehearing officer may make such protective order as it would have been empowered to make on a motion made pursuant to Fla. R. Civ. Pro. 1.280(c). See Fla. R. Civ. Pro. 1.380(a).

In addition, the limit of 30 interrogatories and requests for admission ~~production of documents~~ applies to the entire course of the docket. This procedure was followed in the FPUC Docket and in the AUF Docket, where OPC propounded discovery in both the PAA portion and the Section 120.57, F.S., proceeding in each docket. As discussed above, the prehearing officer has the discretion to grant more discovery or limit discovery pursuant to the applicable Florida Rules of Civil Procedure.

Conclusion

For the reasons set forth above, staff recommends that the Commission grant the Petition for Declaratory Statement and declare that the Office of Public Counsel has the authority under Section 350.0611(1), F.S., to utilize discovery pursuant to Fla. R. Civ. Pro. 1.280 – 1.390 in any proceeding affecting rates or cost of service processed using the proposed agency action procedures of Sections 366.06(4) and 367.081(8), F.S.

Issue 2: Should this docket be closed?

Recommendation: Yes, this docket should be closed. (Cowdery)

Staff Analysis: Upon issuance of the Final Order, no further action will be necessary, and the docket should be closed.