

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: July 3, 2018
TO: Carlotta S. Stauffer, Commission Clerk, Office of Commission Clerk
FROM: Samantha Cibula, Office of the General Counsel *S.M.C.*
RE: Docket No. 20100062-OT

Please file the attached materials in the docket file listed above.

Thank you.

Attachment

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STATE OF FLORIDA



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Public Service Commission

May 21, 2010

Mr. Brian T. Moore
Chief Attorney
Joint Administrative Procedures
Committee
Room 120 Holland Building
Tallahassee, FL 32399-1300

RE: Docket No. 100062-OT – proposed amendment of Rule 25-22.061, F.A.C.,
Stay Pending Judicial Review.

Dear Mr. Moore:

This letter responds to the two questions raised in your letter of April 23, 2010, concerning the proposed amendment of Rule 25-22.061, F.A.C., Stay Pending Judicial Review, in Public Service Commission (PSC) Docket No. 100062-OT. Attachment A. We have included each question posed to the PSC and our response. As explained in more detail below, the PSC did not request an exception from the Uniform Rules of Procedure (URP) for Rule 25-22.061 because Administration Commission (AC) staff advised PSC legal staff prior to and during the course of AC Case APA-98-007 that Rule 25-22.061 was outside of the scope of the URP and that no exception was needed. We believe that it was and is correct to conclude that Rule 25-22.061, Stay Pending Judicial Review, is outside the scope of the URP and that therefore no exception is required. Second, we believe that § 120.68(3) is properly cited as the implementing authority of this rule. However, upon further review, as suggested by your letter, we believe that it would be appropriate for additional implementing authority and rulemaking authority citations to be added to Rule 25-22.061.

Question 1: Law Implemented.

The rule cites only section 350.127(2), Florida Statutes, as rulemaking authority and section 120.68(3) as the law implemented. Section 350.127(2) authorizes the Public Service Commission (PSC) to adopt rules "to implement provisions of law conferring duties upon it." Section 120.68(3) provides that the filing of a petition for review of final agency action does not automatically stay the enforcement of the agency's decision, addresses specific procedures relating to stays pending review of the suspension or revocation of a license, and broadly authorizes all agencies the power to "grant a stay upon appropriate terms."

Are there any other provisions of law that the PSC is implementing? For example, section 366.06 confers rate-setting duties on the PSC, as well as requirements for establishing procedures to follow when fixing rates. See also sec. 350.01 (general PSC proceedings), sec. 367.081 (water rates), and sec. 368.05(2) (gas transmission). In other words, other than a broad grant of authority to all agencies to “grant a stay upon appropriate terms,” has the Legislature conferred any duties on the PSC that would authorize a rule establishing the PSC’s procedures for ruling on a request for a stay pending judicial review? If so, these should be cited as law implemented.

Commission Staff’s Response:

Rule 25-22.061 cites § 350.127(2) as rulemaking authority and § 120.68(3) as the law implemented. Section 350.127(2) authorizes the PSC to adopt rules “to implement provisions of law conferring duties upon it.” Section 120.68(3) provides that in a judicial proceeding, an agency may grant a stay upon appropriate terms. This statute must be read in conjunction with Fla. R. App. P. 9.190(e)(2)(A), concerning applications for stays under the Administrative Procedure Act.¹ *See, e.g., Ludwig v. Dept. of Health*, 778 So. 2d 531 (Fla. 1st DCA 2001) (in a license revocation proceeding, court recognized and explained the relationship between and functions of § 120.68(3) and Fla. R. App. P. 9.190(e)(2)(C)). Rule 9.190(e)(2)(A) states that a party seeking a stay of 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.” The Committee Notes to Rule 9.190 explain in this regard:

Subdivision (e) was added to address stays pending judicial review of administrative action. Ordinarily, application for a stay must first be made to the lower tribunal, but some agencies have collegial heads who meet only occasionally. If a party can show good cause for applying initially to the court for a stay, it may do so.

[emphasis added]. Thus, § 120.68(3) confers a specific duty upon the PSC to consider and rule upon motions for stay pending judicial review. It is our opinion that § 120.68(3) was and is properly cited as the law implementing Rule 25-22.061, which sets forth the procedure for ruling on a request for a stay pending judicial review.

Your letter states that if the Legislature has conferred any duties on the PSC that would authorize a rule establishing the PSC’s procedures for ruling on a request for a stay pending judicial review, these should be cited. As an example, you cited to §§ 350.01, 366.06, 367.081, and 368.05(2), Florida Statutes. Rule 25-22.061 implements statutes related to all regulated utility industries. We have reviewed the PSC’s enabling statutes, and believe that, in addition to § 120.68(3), implementing authority is found in statutory sections from chapter 350 (general authority), chapter 364 (telecommunications), chapter 366 (gas and electric), chapter 367 (water and wastewater), and chapter 368 (gas safety).

¹ The Florida Rules of Appellate Procedure govern all appellate proceedings in the state courts and supersede all conflicting statutes and conflicting PSC rules of procedure. *See* Fla. R. App. P. 9.010, Fla. R. App. P. 9.190(a), and Fla. R. Jud. Admin. 2.130.

Staff believes that because Rule 25-22.061 addresses procedure and practice related directly to the effect a stay may have on customer utility rates due to the possibility of refund or other changes resulting from an appeal, and the need to set interest rates related to all industries, the following statutory sections should be cited as implementing authority for Rule 25-22.061:

- § 350.01(5), addressing the duties of the PSC in ruling upon matters, should be listed as implementing authority for § 25-22.061(4) that provides that motions for stay shall be heard by those Commissioners who were on the deciding panel for the order being appealed.
- § 364.01(4) lists the duties regarding when the PSC shall exercise its exclusive jurisdiction, including to protect the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate, and service regulation.
- § 366.04(1) gives the PSC jurisdiction to regulate and supervise each public utility with respect to its rates and service.
- § 366.05(1) authorizes the PSC in the exercise of its jurisdiction to prescribe fair and reasonable rates and charges and to “adopt rules pursuant to ss. 120.536(1) and 120.54 to implement and enforce the provisions of this chapter.”
- § 366.06(1) grants the PSC the authority to determine and fix fair, just, and reasonable rates.
- § 367.011(2) gives the PSC exclusive jurisdiction over each utility with respect to its authority, service, and rates.
- § 367.081(2) states that the PSC shall fix rates which are just, reasonable, compensatory, and not unfairly discriminatory.
- § 367.0814 states that § 367.081(2) shall apply to staff assisted rate cases.
- § 367.121(1)(g) states that, in the exercise of its jurisdiction, the PSC shall have power: “to exercise all judicial powers, issue all writs, and do all things necessary or convenient to the full and complete exercise of its jurisdiction and the enforcement of its orders and requirements.”
- § 368.05(2) states, in relevant part, that the PSC has the power to perform any and all acts necessary or appropriate to the exercise of the authority granted under the provisions of this law, and that the commission has authority to adopt rules to implement provisions of law conferring duties upon it.

In addition to the above sections being cited as implementing authority for Rule 25-22.061, we believe that §§368.05(2), and 366.05(1) should be added as rulemaking authority for Rule 25-22.061, based upon the specific language of those sections as quoted above.

Question 2: Uniform Rules

The PSC has obtained several exceptions to the Uniform Rules from the Administration Commission pursuant to section 120.54(5)(a)2., Florida Statutes. However, this rule is not included among those listed in Rule Section 25-40.001. Several of the listed rule sections are exceptions to Rule Chapter 28-106, which addresses decisions determining substantial interests. For example, the PSC has its own rules for point-of-entry and motions for reconsideration. It does not appear that there is a uniform rule specifically addressing petitions for stay pending judicial review, but it still appears to be a decision determining substantial interests. Has the PSC requested and obtained an exception from the Administration Commission for this rule? If the PSC does not think that an exception is required, please explain why.

Commission Staff's Response:

- I. Historical Context: Administration Commission Case No. APA-98-007, PSC's Petition for Exceptions to Uniform Rules of Procedure

Pursuant to § 120.54(a)(1), Florida Statutes (1996), the AC adopted the Uniform Rules of Procedure and the PSC prepared a petition for exceptions to certain of those uniform rules. PSC legal staff spent time working and discussing with AC staff the PSC rules from Chapters 21 and 22, F.A.C., which would need to be included in the PSC's petition for exceptions to uniform rules of procedure. During this process, PSC legal staff was provided with a March 4, 1998, Memorandum to All Agency General Counsels, from Robert B. Bradley, Secretary of the Administration Commission, Subject: Exceptions to Uniform Rules of Procedure (March 4, 1998 Memorandum). Attachment B. The AC's March 4, 1998 Memorandum specifically states that petitions for exceptions to the uniform rules are required for agency procedural rules which fall within the subject matter or scope of the existing URP, but that exceptions to procedural rules which lie beyond the scope of the URP should not be required for the following reasons:

- (1) The statute does not require exceptions for everything procedural, but rather only for matters which are addressed in the URP. By definition, to be an "exception" to a rule, the rule must apply in the first place.
- (2) The intent and policy behind adoption of the URP is rule simplification and making practice before state agencies less confusing to the public. The end result of requiring exceptions for everything procedural would be a proliferation of agency rules on account of exception chapters, required by section 120.54(5)(a)3, Florida Statutes, which would be confusing and meaningless to the public.
- (3) Requiring exceptions for everything procedural would create a great volume of purposeless busy work for the agencies and the Administration Commission.

Id. Commission staff worked closely with the AC staff in coming to the conclusion that Rule 25-22.061, F.A.C., among others, was outside of the scope of the URP. Because of this determination, reached with the consensus of AC staff, Rule 25-22.061 was not included in the Florida Public Service

Commission's Petition for Exceptions to Uniform Rules of Procedure, filed April 15, 1998 in AC Case No. 98-007 (Petition). Attachment C.

It should be noted that the Petition specifically sought exceptions for fifteen of the PSC's procedural rules "that would be in addition to the Uniform Rules of Procedure for the most efficient operation of the agency." See Petition at 54 – 60. These rules did not have URP counterparts, but were determined to be within the scope of the URP. Rule 25-22.061 was not included within this group of rules because it was considered outside the scope of the URP, whether or not there was a URP counterpart.

Following the filing of the PSC's Petition, AC staff and PSC legal staff had various conversations, resulting in the PSC filing a May 29, 1998 supplement to its Petition. Attachment D. By Memorandum of June 10, 1998, PSC legal staff confirmed the results of further discussion with AC staff, which involved the PSC withdrawing its request for exceptions for eight rules, proposing that three PSC rules are outside the scope of the URP and clarifying four requests. Attachment E. AC staff did not raise any questions concerning Rule 25-22.061.

The AC issued its final order on the PSC's Petition on June 25, 1998 (Final Order). Attachment F. The PSC proposed the new versions of Chapters 25-21 and 25-22 for adoption on February 16, 1999, in Docket No. 980500-PU, and the rules became effective on May 3, 1999. As a result of the proceedings, the rules in Chapters 21 and 22, F.A.C., fell "into one of two categories: they are either exceptions to the URP or they are outside the scope of the URP and no exception is necessary." See April 26, 1999, Memorandum from PSC legal staff to all PSC staff members. Attachment G. The April 26, 1999 Memorandum also states: "Take note, however, that because of particular requirements in Section 120.54(4), the rules outside the scope of the URP that are still included in Chapters 25-21 and 25-22 are not included in the table in Rule 25-40.001."² Rule 25-22.061 was treated consistently with this procedure: It fell in the category of being outside the scope of the URP and no exception was necessary, and therefore it was not included in the table in Rule 25-41.001.

As shown in Attachment G, the PSC retained the following sixteen rules from Chapters 21 and 22, F.A.C., due to being outside the scope of the URP:

- 25-21.050 (Acceptance of Gifts)
- 25-22.036 (in part) (Initiation of Formal Proceedings)
- 25-22.030 (Injunctions)
- 25-22.032 (Customer Complaints)
- 25-22.033 (Communications Between Commission Employees and Parties)
- 25-22.0406 (1) – (6)(Notice and Public Information on General Rate Increase Requests by Electric, Gas and Telephone Companies)
- 25-22.0407(1) – (7) and (9)(Notice of and Public Information for General Rate Increase Requests by Water and Wastewater Utilities)
- 25-22.061 (Stay Pending Judicial Review)
- 25-22.070 (Ten-Year Site Plans—Definitions)
- 25-22.071 (Ten-Year Site Plans submission and review)

² Rule 25-40.001 is the rule which lists PSC rules for which the Commission has been granted an exception.

25-22.072 (Contents of Ten-Year Site Plans.)
25-22.076 (Contents of Petition)
25-22.081 (Contents of Petition)
25-22.082 (Selection of Generating Capacity)
25-22.090 (Natural Gas Transmission Pipeline Permitting Proceedings)
25-22.091 (Contents of Petition)

With several exceptions,³ none of the sixteen rules which were determined to be outside the scope of the URP were included by the PSC in its Petition for exemption. The AC staff agreed with PSC legal staff that these rules were not required to be included in the Petition because no request for exemption was needed since the rules were outside of the scope of the URP.

- II. The treatment of Rule 25-22.061 in AC Case No. APA-98-007 was and is correct because the rule is outside the scope of the URP

Your letter states: "It does not appear that there is a uniform rule specifically addressing petitions for stay pending judicial review, but it still appears to be a decision determining substantial interest." We believe that the AC staff and PSC legal staff made a correct determination during the course of AC case No. APA-98-007 that Rule 25-22.061, Stay Pending Judicial Review, is outside of the scope of the URP and that therefore no exception to the URP was or is needed or appropriate. It is our opinion that a motion for stay pending judicial review does not determine substantial interests under chapter 120, Florida Statutes.

Rule 28-106.101, F.A.C., Scope of this Chapter, states:

This chapter shall apply in all proceedings in which the substantial interests of a party are determined by an agency and shall be construed to secure the just, speedy, and inexpensive determination of every proceeding.

Rule 28-108.001, F.A.C., Petition for Exception to Uniform Rules of Procedure, states:

(1) The agency head shall file a petition with the Administration Commission for an exception to the Uniform Rules of Procedure as provided in Section 120.54(5)(a)2., F.S., for procedural rules within the scope of any Uniform Rule of Procedure, that includes the following:

...

(b) Citation to the particular Uniform Rule of Procedure for which each exception is sought.

...

³ The PSC included Rule 25-22.036(1) – (7) and (9) – (10), 25-22.0406, and 25-22.0407, listed above, in its Petition. The AC denied the PSC's request for an exception to 25-22.036(3), (5), (6), (7)(b), (7)(c), and (7)(e) in its Final Order because those subsections "apply to applications, complaints, orders, or notices which do not involve, or which precede, proposed or final agency action determining substantial interests." Final Order at p. 3. Also, the requests for exceptions for Rule 25-22.0406(1) – (6) and 25-22.0407(1) – (7) and (9) were denied as unnecessary because those provisions apply to notice requirements which precede proposed or final agency action determining substantial interests. Final Order at p. 5.

(2) The agency shall publish notice of the petition in the next available edition of the Florida Administrative Weekly, after consultation with the agency clerk of the Administration Commission. The notice shall include:

...

(b) The uniform rule of procedure from which the exception is sought.

[emphasis added].

As recognized in your letter, there is no uniform rule of procedure which corresponds to Rule 25-22.061, Stay Pending Judicial Review. Rule 28-108.001 by its plain language contemplates that in order to require an exception, there must be a uniform rule from which the exception is sought. Because the Uniform Rules of Procedure do not address stays pending review, the PSC's rule on stays pending judicial review does not fall within the subject matter of the scope of the URP, and the PSC, therefore, was not required to apply for or receive an exception to the URP. *Crawford v. Dept. of Children and Families*, 785 So. 2d 505 (Fla. 3rd DCA 2000), *rev. disp.* 761 So. 2d 328 (Fla. 2000). In *Crawford*, the Court, citing to the AC's March 4, 1998, Memorandum, held that:

Common sense dictates that if the Uniform Rules of Procedure nowhere address motions for rehearing, then motions for rehearing do not fall within the subject matter or scope of the rules. Accordingly, PERC did not have to apply for or receive an exception to the Uniform Rules to retain and apply its rule authorizing motions for rehearing.

Id. at 507. The Third DCA certified conflict with *Department of Corrections v. Saulter*, 742 So. 2d 368 (Fla. 1st DCA 1999)(holding that because the URP do not authorize motions for reconsideration, PERC's rule on motions for reconsideration was ineffective). There is no indication that the Court in *Saulter* had before it the AC's March 4, 1998 Memorandum. Rule 25-22.061, Stay Pending Judicial Review, does not require an exception to the URP under the analysis of *Crawford*.

However, whether one follows the reasoning in *Saulter* or in *Crawford*, Rule 25-22.061 does not require an exception from the URP because a motion for stay is not part of a proceeding determining substantial interests under Chapter 120, Florida Statutes. Instead it is part of an appellate proceeding governed by the Florida Rules of Appellate Procedure and § 120.68(3), Florida Statutes. For this reason, Rule 25-22.061 is not within the scope of the URP contained in Chapter 28-106, Decisions Determining Substantial Interests.

The provisions of § 120.569, Decisions which affect substantial interests, apply in all proceedings in which the substantial interests of a party are determined by an agency.⁴ Proceedings in which the substantial interests of a party are determined by an agency are, primarily, those conducted pursuant to § 120.56, Challenges to rules, § 120.565, Declaratory statement by agencies, § 120.569, and § 120.57, Additional procedures for particular cases. A "decision determining substantial interests" is the agency action, that is, rule or order, adopted or entered in such a proceeding.⁵

⁴ See § 120.569(1), Florida Statutes.

⁵ A "final order" means a written final decision which results from a proceeding under §§. 120.56, 120.565, 120.569, 120.57, 120.573, or 120.574, Florida Statutes, which is not a rule, and which is not excepted from the

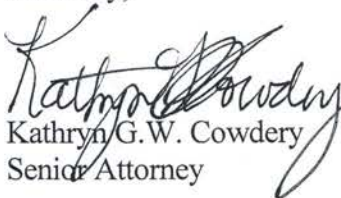
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If a party is adversely affected by final agency action,⁶ that party is entitled to judicial review pursuant to § 120.68(1), Florida Statutes.⁷ All proceedings for judicial review “shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed.”⁸ A decision, order, or rule of the PSC is an “Order” for purposes of judicial review.⁹ An order is rendered for purposes of judicial review when a signed, written order is filed with the clerk of the lower tribunal.¹⁰

Thus, judicial review proceedings are initiated by filing a notice of appeal or petition for review of a decision (order) rendered in a proceeding determining substantial interests. The judicial review proceedings follow the rules of appellate procedure, not § 120.569 or 120.57 relating to decisions determining substantial interests. A motion for stay of a PSC order pending judicial review is therefore made pursuant to appellate rules and § 120.68(3),¹¹ because the filing of such a motion occurs after the agency decision determining substantial interests has been rendered and appellate proceedings have been initiated. *See, generally*, 3 Fla. Jur. 2d, Appellate Review, Section VII, pp. 213 – 256 (discussing stays pending judicial review). The purpose of a stay is not to undo or set aside the lower tribunal’s order. In other words, a stay does not in any manner modify the decision determining substantial interests. Rather, a stay is meant to maintain the status quo pending the appellate court acting upon the decision of the lower tribunal. 3 Fla. Jur. 2d § 162. The procedure for filing a motion for stay pending judicial review is not part of a proceeding to determine substantial interests pursuant to Chapter 120, and it is therefore outside the scope of the URP.

Thank you for your considered review of proposed Rule 25-22.061. We plan to file this rule, with noted additions to rulemaking and implementing authority, with the Secretary of State on Monday, June 7, 2010. Please let me know if you have any additional questions.

Sincerely,


Kathryn G.W. Cowdery
Senior Attorney

Enclosures

definition of a rule, and which has been filed with the agency clerk, and includes final agency actions, as further defined by § 120.52(7), Florida Statutes.

⁶ “Agency action” means the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order. § 120.52(2), Florida Statutes. The term also includes any denial of a request made under s. 120.54(7). *Id.*

⁷ § 120.68(1) also sets forth the circumstances under which an interlocutory order is reviewable by the courts.

⁸ § 120.68(2)(a), Florida Statutes.

⁹ Fla. R. App. P. 9.020(f).

¹⁰ Fla. R. App. P. 9.020(h). However, if an authorized and timely motion for reconsideration has been filed, the final order is not deemed rendered until the filing of a signed, written order disposing of such motion. *Id.*

¹¹ Florida Rule of Appellate Procedure 9.310, Stay Pending Review, states that a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal. The Committee Notes to the 1977 amendment to Rule 9.310 state that the rule “implements the Administrative Procedure Act, section 120.68(3), Florida Statutes (Supp. 1976).”