



Public Service Commission
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DATE: MAY 6, 2002
TO: DIRECTOR, DIVISION OF THE COMMISSION
ADMINISTRATIVE SERVICES (BAYO)
FROM: OFFICE OF THE GENERAL COUNSEL (BELLAK) *RCB*
DIVISION OF COMPETITIVE MARKETS AND ENFORCEMENT (MAKIN) *JDJ*
DIVISION OF ECONOMIC REGULATION (HEWITT) *QBA*
RE: DOCKET NO. 011368-GU - PROPOSED ADOPTION OF NEW RULE 25-
7.072, F.A.C., CODES OF CONDUCT
AGENDA: MAY 21, 2002 - REGULAR AGENDA - PARTICIPATION IS LIMITED
TO COMMISSIONERS AND STAFF
RULE STATUS: ADOPTION MAY BE DEFERRED
SPECIAL INSTRUCTIONS: NONE
FILE NAME AND LOCATION: S:\PSC\GCL\WP\011368#2.RCM

CASE BACKGROUND

On February 19, 2002, the Commission voted to propose the adoption of Rule 25-7.072, F.A.C., Codes of Conduct. As noted in staff's recommendation dated February 4, 2002,

"Section 366.05(1), Florida Statutes, provides, in pertinent part, that

the Commission shall have power to prescribe fair and reasonable rates...

The fairness and reasonableness of rates could be negatively affected if providers of regulated services could use regulated revenues to subsidize activities of their affiliates in competitive markets. Section 366.05(1) and 350.127(2), Florida Statutes, authorize the Commission to adopt rules, including new Rule 25-7.072,

DOCUMENT NUMBER-DATE

05004 MAY-98

FPSC-COMMISSION CLERK

to implement and enforce such requirements as fair and reasonable rates.

. . . .

The ratepayers of the gas utilities would benefit if the proposed rule prevented the subsidization of unregulated affiliates with resources derived from regulated activities."

Staff recommendation, p. 2.

Subsequent to notice of the proposed rule adoption, no requests for hearing were received, only comments recommending that a similar rule be promulgated to include electric utilities. That, in turn, reflected the participation of the few affected companies at the agenda conference and their sense that the final form of the proposed rule was appropriate. Accordingly, staff went forward with the rule adoption process.

On March 13, 2002, a letter from the Joint Administrative Procedures Committee (JAPC) was received asserting that the language "city gate" was unnecessarily technical or specialized language and that the Commission lacked authority under the "map-tack" provisions of Section 120.536 "to mandate how a regulated entity must staff its operations." Attachment I.

On March 22, 2002, staff responded, noting that the legislature used the words "city gates" itself in Section 368.105(3) without defining those words in Section 368.103, thus establishing "city gate" as readable and understandable for the purposes of Section 120.54(2)(b) in the context of gas company regulation.

Staff further pointed out that rates would be neither fair nor reasonable if they reflected costs expended by a utility's unregulated marketing affiliate to sell the company's energy product in competitive markets. Therefore, Rule 25-7.072, which separated employees in the regulated business from those in the unregulated sales affiliate, was necessary to implement and enforce the "fair and reasonable rates" provision of Section 366.05(1), as well as other provisions, including Section 366.07. Attachment II.

DOCKET NO. 011368-GU

DATE: May 6, 2002

Discussions with JAPC indicated that staff's defense of the "city gates" terminology was accepted, but as indicated in JAPC's letter dated April 3, 2002, JAPC believed that

[t]here is nothing in Section 366, F.S., that confers the power of segregation [of employees] specifically to the Commission.

On that basis, JAPC concluded that the rule was invalid. Attachment III.

On April 4, 2002, staff e-mailed a list of statutes in further support of the rule. Attachment IV.

On April 5, staff sent JAPC a response to its April 3, 2002 letter, which was, procedurally the final response required for JAPC to certify the rule for adoption. Therein, the Commission pointed out that it could "map-tack" directly from its grant of general rulemaking authority in Section 366.05.(1) to specific enabling statutes, such as the fair and reasonable rates provisions of 366.05(1) itself and 366.07 (the Commission should promulgate reasonable rules to eliminate utility practices related to excessive rates whenever found). Attachment V.

On April 8, 2002, JAPC acknowledged that all statutory criteria had been met for adoption of the rule on April 10, 2002, but that JAPC's objection remained as to its invalidity. Attachment VI.

Staff was advised to seek Commission input before proceeding to rule adoption.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission file Rule 25-7.072 for adoption despite JAPC's objections?

PRIMARY RECOMMENDATION: Yes, the rule should be filed for adoption. (BELLAK, MAKIN, BULECZA-BANKS)

ALTERNATIVE RECOMMENDATION: No. the rule should not be proposed at this time. (MCLEAN)

PRIMARY STAFF ANALYSIS: As JAPC acknowledged, the rule has met the statutory requirements for adoption and, as noted previously, is considered uncontroversial by the regulated companies. No hearing was requested, only comments entered noting that the electric utilities should be subject to the same restrictions as well.

It appears that the application of the "map-tack" provision of Section 120.536, as well as the recent cases cited by JAPC, Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000) and State Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001), very much depends on the short-hand characterization of the rule. Here, JAPC's shorthand for Rule 25-7.072 is that "a power of segregation" is lacking in Chapter 366.

Staff's point is that the "map-tack" provision of Section 120.536, as well as the Save the Manatee Club and Day Cruise cases, all support the rule. The question is not whether JAPC's shorthand mischaracterization of Rule 25-7.072 requires a "power of segregation" to be found in Chapter 366. The question is whether the general rulemaking power can be map-tacked to specific enabling statutes. In this case, the Commission's power to implement and enforce fair and reasonable rates, as well as to issue reasonable rules governing utility practices which would otherwise cause excessive rates, both support Rule 25-7.072, which forbids commingling of a company's regulated operations with those of its unregulated sales and marketing affiliates. Only if a court would find that such commingling is not a utility practice which would lead to unfair, unreasonable and excessive rates would the rule fail the "map-tack" test. Moreover, Section 366.07 states that the Commission is to order reasonable rules governing such "excessive"

DATE: May 6, 2002

utility practices "whenever" found. Therefore, the statute requires Commission action under those circumstances.

In its April 5, 2002 letter to JAPC, staff noted that economic regulatory statutes are necessarily stated in the abstract because a laundry-list of prohibitions, no matter how detailed, would invite simply more ingenious strategies of evasion. Though somewhat abstract, they are not void for vagueness, and it would seem that the Commission can enforce them through rulemaking.

Instead of a questionable analogy to the conclusions in Day Cruise and Save the Manatee, a court would be likely to apply the analysis in those cases, as well as the text of Section 120.52(8), to determine that Rule 25-7.072 is not invalid. The rule appropriately implements and enforces the power in Sections 366.05(1) and 366.07 to prescribe fair and reasonable rates and to avoid a utility practice which would cause excessive rates.

If the Commission decides to file Rule 25-7.072 for adoption, the next steps in the process would be governed by Section 120.545. At that point, JAPC would have to decide whether to object to the rule and, if so, state its reasons for objecting. Numerous opportunities are then provided for resolving the objections, at which points both JAPC and/or the Commission could revisit the issues as appropriate.

ALTERNATIVE STAFF ANALYSIS: Chief Attorney Matthew A. Sirmans of the JAPC, in an exchange of letters with the Office of the General Counsel, has expressed doubt as to whether the Commission has statutory authority to support this rule. Commission staff has duly responded to Mr. Sirmans such that the Commission could legally - a least insofar as the JAPC objection goes - propose this rule.

Alternative staff does not address the competing interpretations of whether the Commission has requisite authority to support the rule adoption, except to note that both arguments, i.e., that advanced by primary staff on the one hand and by the JAPC attorney on the other, are colorable arguments upon which reasonable minds could differ. Rather, alternative staff addresses the policy issue of whether the Commission should proceed with a rule adoption over a well articulated and supported objection by JAPC's representative. Alternative staff recommends that the Commission should not.

Alternative staff believes that the Legislature has established the JAPC to advise agencies such as the Commission when it believes that the agency has exceeded its rulemaking authority. While the ultimate authority to review whether rulemaking authority is adequate in a given set of circumstances lies with the Division of Administrative Hearings (DOAH) and the courts, the JAPC is something of a reviewing authority within the legislative branch of government itself. Accordingly, alternative staff recommends that the Commission assign great weight to the doubt of requisite authority as expressed by JAPC's representative, and decline to propose this rule at this time.

Lastly, alternative staff recommends that if the substance of the proposed rule is necessary to its regulatory duties, that the Commission recommend legislation that would conclusively establish supporting statutory authority for this or a similar rule.

DOCKET NO. 011368-GU

DATE: May 6, 2002

ISSUE 2: If the rule is filed for adoption, should this docket be closed?

RECOMMENDATION: Yes, the docket should be closed.

STAFF ANALYSIS: If the rule is filed for adoption, the docket may be closed.

RCB