



## P R O C E E D I N G S

1  
2           **CHAIRMAN GRAHAM:** Okay. We are circling back  
3 around to Number 2, Item Number 2.

4           **MS. COWDERY:** Good morning, Commissioners.  
5 Kathryn Cowdery with the Office of General Counsel.

6           Item 2 is the Office of Public Counsel's  
7 petition for declaratory statement. The petition  
8 requests that the Commission issue an order declaring  
9 that upon intervention in any proceeding affecting rates  
10 or cost of service that the Commission processes under  
11 the proposed agency action procedure, Sections 350.0611,  
12 367.093(2), 367.156(2), and Rule 28-106.206, *Florida*  
13 *Administrative Code*, authorize the Office of Public  
14 Counsel to conduct discovery prior to the issuance of  
15 the Commission's written notice of proposed agency  
16 action.

17           Staff recommends that the Commission deny  
18 OPC's petition for declaratory statement for failure to  
19 meet the threshold statutory requirements necessary to  
20 obtain a declaratory statement. Pursuant to Section  
21 120.565, the Commission must issue a final order  
22 granting or denying the petition by August 18th, 2014.

23           Participation at the Agenda Conference is at  
24 the Commission's discretion. If the Commission allows  
25 participation, Mr. Charles Rehwinkel is here on behalf

1 of the Office of Public Counsel, and Mr. Marty Friedman  
2 is here on behalf of the Intervenor, Utilities, Inc.

3 **CHAIRMAN GRAHAM:** Thank you, staff.

4 Mr. Rehwinkel.

5 **MR. REHWINKEL:** Thank you, Mr. Chairman. I'm  
6 prepared to make my argument. I didn't know if the  
7 order would be that the staff would present their's  
8 first and I would respond, because I view the staff  
9 recommendation as more in line with a motion to dismiss  
10 our petition. It's not on the merits. But I'm happy to  
11 proceed however you would like; I'm at your pleasure.

12 **CHAIRMAN GRAHAM:** Commissioners. Commissioner  
13 Edgar.

14 **COMMISSIONER EDGAR:** Mr. Chairman, I have met  
15 with staff on this, but for the record and for us all  
16 here today, I would like the staff to present a little  
17 more detail what their recommendation is and then allow  
18 those interested parties to respond and respond to  
19 questions.

20 **CHAIRMAN GRAHAM:** Thank you. That works for  
21 me. Any other Commissioners?

22 Staff.

23 **MS. COWDERY:** Okay. Commissioners, the  
24 reasons that staff is stating that we believe that this  
25 petition ought to be denied is that the threshold

1 requirements of 120.565 are not met by this petition.

2           The first point is that the petition fails to  
3 allege a present ascertained set of facts. 120.565 and  
4 the *Uniform Rules of Procedure* state, in many places,  
5 that the petition has got to identify a particular set  
6 of circumstances of the petitioner. And, in our  
7 opinion, this is not done by the petition.

8           What the petition states as an allegation of  
9 circumstances, the way we read the petition, is that OPC  
10 in the future may want to conduct discovery in a PAA  
11 action in a rate case, and that failure to conduct this  
12 discovery would interfere with its ability to properly  
13 represent the citizens of the State of Florida.

14           Our reading of the statute and of court cases  
15 is that this is not specific to them, it does not meet  
16 the threshold requirements. And as a result of that,  
17 what they are really asking for is a general advisory  
18 opinion asking for an interpretation of their enabling  
19 statute, 350.0611, asking for an interpretation that  
20 under that statute they should be entitled to discovery  
21 in a PAA action. This has been specifically identified  
22 as the -- not, not this particular statute -- but  
23 general advisory petition -- general advisory opinions  
24 are not allowed in the declaratory statement petitions.

25           We also see this as really being a challenge

1 to a particular Prehearing Order in a particular case,  
2 which is also not a correct use of the declaratory  
3 statement statute in this case. Because really if you  
4 are challenging, saying "I am in doubt as to how this  
5 particular order applies to my case," you assume that  
6 order is true. And in this case what they're really  
7 saying is "Don't follow that order. That order is  
8 wrong." So they're not really addressing the problem  
9 that they see.

10 Finally, the case law goes over and over again  
11 what the actual purpose of 120.565 is. They state that  
12 the process is intended to enable members of the public  
13 to secure definitive binding advice as to the  
14 applicability of agency-enforced law to a particular set  
15 of facts where it is necessary or helpful for them to  
16 conduct their affairs in accordance of law. It's also  
17 intended to enable a petitioner to select a proper  
18 course of action in advance, thus avoiding costly  
19 administrative litigation.

20 We feel like for the reasons we've identified  
21 in the first three points that this is not the intent of  
22 this petition, and that's the basis. Thank you.

23 **CHAIRMAN GRAHAM:** Thank you, staff.

24 Mr. Rehwinkel.

25 **MR. REHWINKEL:** Thank you, Mr. Chairman.

1           For the record, my name is Charles Rehwinkel.  
2 I'm the Deputy Public Counsel. I am here on behalf of  
3 the office. And I'm also filling in for Joe McGlothlin,  
4 who is counsel of record, so I would like to enter an  
5 appearance in this docket for that reason.

6           Commissioners, I apologize in advance for what  
7 may be a slightly lengthy presentation, but this is an  
8 issue of great importance to our office.

9           This office has been around for 40 years.  
10 This is the first time we've encountered a situation  
11 where we have doubt as to our discovery rights, so we  
12 need a resolution by a declaratory statement.

13           You're presented here today with a case of  
14 immense importance to the rate paying customers of  
15 Florida, Commissioners. As I said, 40 years ago the  
16 Legislature created the Public Counsel to represent  
17 before this agency and other agencies, including local  
18 and federal offices, the very same people who elected  
19 them to office. They enacted into law a statute that  
20 directs this office to represent those customers and  
21 that we have the statutory right of intervention in any  
22 case or action commenced before this agency. And the  
23 Legislature further decreed that, in doing so, we have  
24 the right to conduct discovery in such cases.

25           This includes the right to discuss -- to

1 conduct discovery in the time frame that is defined by  
2 the filing of the case and the issuance of the PAA  
3 order. For decades this right has been acknowledged and  
4 undisturbed.

5 We filed a declaratory statement to resolve an  
6 ambiguity that has been created by a very difficult set  
7 of specific case circumstances. We have pointed out to  
8 you that there is a long and unbroken string of cases  
9 that explicitly recognizes the right of discovery that  
10 we assert. These cases codify and acknowledge the  
11 decades of OPC process of selectively utilizing  
12 discovery in PAA cases.

13 In contrast, there is a single order that,  
14 while perhaps correct on the highly specific set of  
15 facts that it was issued under, could nevertheless be  
16 read categorically to prohibit such discovery and is in  
17 irreconcilable conflict with a significant line of cases  
18 recognizing our right to conduct discovery and, more  
19 importantly, in, in contravention of our statutory  
20 rights.

21 We have in our petition, contrary to what the  
22 staff has suggested, simply asked that this ambiguity be  
23 resolved here and now in a rate case expense free  
24 environment and not in individual cases that impose  
25 needless costs on customers. Unfortunately, your staff

1 has recommend that you avoid the decision on the merits  
2 and that you not resolve this ambiguity and, thus, in  
3 effect, would prolong the uncertainty and, as a result,  
4 primarily increase rate case expense pressure on small  
5 groups of water customers.

6 But make no mistake about it; this case is not  
7 just about water and sewer PAA cases. It's about  
8 electric and gas PAA cases as well.

9 We are disappointed in the recommendation and  
10 we vigorously disagree with the legal analysis that is  
11 proffered.

12 Commissioners, what concerns us also is  
13 there's an unusual manner that this, this case is  
14 presented to you today. Without being prompted by a  
15 pleading from an Intervenor, the staff has asked you to  
16 deny our petition based a threshold legal analysis and  
17 not on the merits that is tantamount, in our view, to a  
18 motion to dismiss or a motion for -- or a -- for failure  
19 to state a cause of action or for lack of standing.

20 Staff effectively asks you not to consider the  
21 merits of the petition, and, by doing so, we believe  
22 that they also expose you to a different standard of  
23 appeal -- of review on appeal should you issue an order  
24 that denies this petition.

25 We believe the case law is that if you



1 order -- if you issue an order that denies our petition  
2 on the basis that is presented in staff's  
3 recommendation, that review will be de novo, and, as  
4 such, it would mean that your decision would not be  
5 clothed in the deference that PSC orders normally have.  
6 And I think that's the -- also cited in the *Adventist*  
7 case that the staff has put in its analysis.

8 We ask you to deny the staff recommendation  
9 and to grant our petition on the merits, based on the  
10 legal analysis and the factual predicate that we have  
11 well pled.

12 In the recommendation, the staff presents, as,  
13 as you've been told, four bases for urging you to rule  
14 that we have no standing to receive a declaratory  
15 statement. And what I want to do is address the last  
16 basis first because it supports and well illustrates our  
17 petition. It does not undermine it.

18 On page 9 of the staff recommendation, the  
19 staff states, "The petition does not conform to the  
20 intent of Section 125.565, *Florida Statutes*." In  
21 support of this contention, they inexplicably, in our  
22 view, list criteria that are drawn from Professor Dore's  
23 authoritative article on administrative practice from  
24 1986 that the Florida Supreme Court cites with approval  
25 in describing three criteria or three indices of intent

1 of a declaratory statement.

2 The first that I will bring to your attention  
3 is it is intended to enable members of the public to  
4 definitively resolve ambiguities of law arising in the  
5 conduct of their daily affairs or in the planning of  
6 their future activities, affairs.

7 It is intended to enable members of the public  
8 to secure definitive binding advice as to the  
9 applicability of agency-enforced law to a particular set  
10 of facts where it is necessary or helpful for them to  
11 conduct their affairs in accordance with the law.

12 And, three, it is intended to enable the  
13 petitioner to select a proper course of action in  
14 advance, thus avoiding costly administrative litigation.  
15 We couldn't have said it any better ourselves. This is  
16 exactly what our petition seeks and what we have pled.  
17 This is what the facts show. Granting our petition on  
18 the merits will achieve these criteria that the court  
19 adopts with approval.

20 Our intent and our petition are in accord with  
21 the statute and the Supreme Court's language. For  
22 example, let's take the avoidance of costly  
23 administrative litigation. If the Commission declines  
24 to issue the declaratory statement, the alternative is  
25 for the OPC and one or more utilities to litigate the

1 matter first in a rate case or multiple cases, if  
2 they're filed close in time, before this Commission,  
3 generating rate case expense, then generate additional  
4 rate case expense in a lengthy appeal or review in court  
5 with the real possibility of a remand for further costly  
6 activity before the Commission. This will be a far more  
7 complicated, messier, and expensive means of resolving  
8 the issue that would be likely on the backs of a very  
9 small customer base, which is what you find in the water  
10 and sewer industry, than if you did this through the  
11 issuance of a declaratory statement that resolved the  
12 issue once and for all.

13           The *Adventist Healthcare System* case, which is  
14 at Footnote 22, is solidly on point in support of the  
15 cost avoidance as an important feature of the  
16 declaratory statement. The same would go for the *Chiles*  
17 case, which the, which the Commission staff also cites,  
18 *Chiles vs. Department of State, Division of Elections*.

19           The Court notes with approval that costly  
20 litigation is avoided in advance, and that is one of the  
21 benefits of a declaratory statement. And that's what  
22 we're asking for as well.

23           With respect to resolving ambiguities, our  
24 petition accurately depicts two conflicting lines of  
25 decisions that create uncertainty in how the Public

1 Counsel can represent the clients it's statutorily  
2 obligated to represent and which, in part, are contrary  
3 to the statutory powers of the Public Counsel.

4 Similarly, let's take the other, the third  
5 point. We seek a definitive binding decision that  
6 acknowledges the Commission's long-standing recognition  
7 of our continued right to conduct discovery in the  
8 manner contemplated by the legislative directive in  
9 Section 350.0611. Such definitiveness is vital for us  
10 to evaluate how and if and to what extent we intervene  
11 or otherwise participate on behalf of customers in the  
12 inevitable, highly predictable, unceasing, and certain  
13 rate cases once they are filed.

14 We are mystified by the staff's reliance on  
15 this point in their recommendation for avoiding having  
16 you decide the case on the merits and outside of a rate  
17 case expense intensive environment.

18 Let me turn now to the other three points that  
19 the staff makes. On page 6, the staff urges that the  
20 petition should be denied for failure to allege a  
21 present ascertained set of facts. We think the staff's  
22 analysis just gets this wrong. They claim that we have  
23 posed a hypothetical question merely because we  
24 acknowledge that we make a decision in each case that is  
25 filed as to whether to engage in discovery or to pursue

1 another course of action.

2 Staff's analysis misses the point.  
3 Essentially they say unless we have an actual docket  
4 number and a live dispute, we can't get a declaratory  
5 statement from the Commission. That is not the  
6 standard, and it misses the nature of the certainty of  
7 the factual situations that we have pled. PAA rate  
8 cases are axiomatically certain, right up there with  
9 death and taxes.

10 My Exhibit A to you is Mr. Friedman. He would  
11 not be here today --

12 **MR. FRIEDMAN:** (Inaudible. Microphone not  
13 on.)

14 **MR. REHWINKEL:** -- about the certainty of PAA  
15 rate cases. I want Mr. Friedman to be around a long  
16 time. He's an old friend of mine.

17 He would not be here today on behalf of a  
18 client that cannot pass this cost through in rate case  
19 expense if he was -- if his client was not bringing PAA  
20 rate cases to you with regularity and with certainty.

21 This is the best example that we have that  
22 this is a concrete, bona fide, tangible issue and not a  
23 hypothetical one. There has never been a year where one  
24 or many more have not been filed, and there never will  
25 be such a year where PAA rate cases won't be filed.

1 That's just with the water and sewer side.

2 The Public Counsel, Mr. Kelly, personally has  
3 to evaluate each and every one of the cases that are  
4 filed. He has to decide whether and if to intervene  
5 and, if so, whether we incur costs on behalf of our  
6 clients in the form of discovery-driven rate case  
7 expense. That is a certainty.

8 There is nothing hypothetical about the  
9 question we presented in the petition. To emphasize, we  
10 intervene or make an affirmative decision not to  
11 intervene based on the expertise and the experience of  
12 the Public Counsel in each PSC case, including PAA  
13 cases. This is his duty to represent the customers, and  
14 that statement is more than just merely a factual  
15 statement. It is OPC's very reason for existing,  
16 existence; it's the reason the Legislature created us,  
17 to do exactly this. This is at the core of what we do.

18 And I ask you, Commissioners, can you  
19 serious -- is there a doubt in your minds as to whether  
20 you will see us intervene in ratemaking cases in the  
21 future? I know that you expect us to and you know that  
22 we will.

23 What is real and concrete is that we have to  
24 confront the decision whether to intervene and conduct  
25 discovery in each PAA case that is filed. As I've said,

1 it is not hypothetical, it is not speculative. We have  
2 a real and present need today -- or before the  
3 August 18th deadline -- of a final and cost-effective  
4 resolution of that question that we present in our  
5 petition now.

6 And I would say to you that the *Okaloosa*  
7 *Island Case* at Footnote 11 supports our position that,  
8 that it must be a tangible, bona fide issue that is  
9 presented. And I think we have pled and we have made  
10 argument here today that there's nothing hypothetical  
11 about what we need in the form of discovery rights or  
12 recognition of our discovery rights.

13 At Item 2, the petition -- or the point number  
14 two, page 7, the staff contends that this petition  
15 should be denied on this legal threshold basis because  
16 it requests a general advisory opinion. This is wrong  
17 as well.

18 They say we are seeking a general advisory  
19 opinion. We can't even begin to address this because we  
20 don't even know what they mean by general advisory  
21 opinion. We believe that in the recommendation as  
22 presented this is a conclusory statement that doesn't  
23 bother to define it or connect it to what we are asking.

24 On the merits, which this recommendation is  
25 really seeking to shield you from considering today, we

1 demonstrate that we are not seeking advice. Our  
2 petition is not one asked out of curiosity or  
3 speculation like, for instance, in the *Santa Rosa Island*  
4 case -- *Santa Rosa County* case where the parties settled  
5 the matter, and then one of the parties to the  
6 settlement asked for a declaratory judgment ruling from  
7 a court because they said that they would be exposed to  
8 future problems if they did not have this. That kind of  
9 illustrates to us, that case, we think, helps us because  
10 it illustrates a contingent request versus a  
11 hypothetical -- a tangible, bona fide, and real request,  
12 which is what we have, which is the ability to issue  
13 discovery, subject to protective orders and subject to  
14 rulings of the Prehearing Officer, of course, in PAA  
15 cases when they're filed. That case to us really  
16 highlights that what we're asking for is not what the  
17 *Santa Rosa Island* case says is impermissible.

18           The fact that we contend that the office has  
19 discovery rights and ask the Commission to enforce that  
20 right in each and every case in which we intervene does  
21 not constitute evidence that we are seeking a general  
22 advisory opinion. We are seeking a determination by the  
23 Commission that the, the, the statute 350.061 and the  
24 rules of the Commission that dictate when a proceeding  
25 commences give us the right to conduct discovery.



1           Finally, Commissioners, point number three,  
2           the staff says that the petition should be denied  
3           because it is a challenge to the validity of the WMSI  
4           order. We reject this assertion categorically.

5           First, staff does say accurately that we seek  
6           a declaration of the application of certain statutes to  
7           our -- including our empowering statute and Rule  
8           28-206.106 [sic], which says discovery begins with the  
9           commencement of a proceeding. They got that right, but  
10          then they jumped the track by stating that you should  
11          deny the petition because we're challenging the validity  
12          of the WMSI order. And we believe this mischaracterizes  
13          our petition.

14          What we do do in our petition is describe an  
15          inconsistent and conflicting set of orders on the  
16          subject of our discovery rights. The orders are not the  
17          basis for the petition. We are not asking for any  
18          orders to be invalidated. The statute and the rule are  
19          the basis for our petition. You don't have to look at  
20          the orders to interpret the statute and the rule. Any  
21          petitioner for a declaratory statement, of course, is  
22          going to describe -- after describing the need for the  
23          statement, is going to state the outcome that it  
24          believes is correct under the law, and that's what we  
25          have done when we asserted which of the conflicting

1 orders address the subject of discovery rights in  
2 conformity with the statutes and which did not. We are  
3 not asking that you recede from or invalidate or in any  
4 way declare invalid the WMSI order.

5 What we have done is identified an  
6 inconsistency in the Commission's practice based on  
7 these several rulings, and we simply ask the full  
8 Commission to reconcile this on a going-forward basis.

9 We do not dispute the WMSI order as it applied  
10 to the case it adjudicated. We do point out, however --  
11 and this is important -- that under the highly unusual  
12 and unfortunate circumstances of that case, the  
13 Prehearing Officer did not have the benefit of the  
14 contrary line of cases when she considered that specific  
15 dispute before her. And we lay that out in our petition  
16 as far as the chronology and the time frame. The other  
17 cases that interpret the statute the way we think is  
18 correct were not presented because of a, basically a  
19 kink in the way the process unfolded before the  
20 Prehearing Officer. We agree that the WMSI decision can  
21 be deemed correct on the facts and in that vacuum in  
22 which it was decided.

23 Finally, there was mention earlier by counsel  
24 about our lack of appealing the WMSI order or  
25 reconsideration, and I need to take a moment just to

1 address that because it is significant and it is  
2 important. And I ask that you not consider that as part  
3 of your decision-making here.

4 Our decision not to appeal or seek  
5 reconsideration of the WMSI order should be obvious to  
6 everyone here. In water and wastewater cases, rate case  
7 expense is an outsized cost problem for customers. It  
8 is not the same in an electric or a gas case because of  
9 the scale and scope of, of those operations relative to  
10 the customer bases.

11 Today we are here seeking resolution of an  
12 ambiguity in the Commission practice with respect to our  
13 statutory rights and an affirmation of the correct  
14 statutory interpretation precisely because resolution  
15 here will not impose litigation costs on customers.  
16 What staff faults us for not doing would have focused an  
17 even greater and disproportionate litigation cost on a  
18 very small number of customers on St. George Island in  
19 order to vindicate the OPC's rights and obligations on a  
20 statewide basis. That would have been wrong, and you  
21 should not consider our purposeful decision not to  
22 appeal or seek reconsideration of that order because of  
23 the impact it would have had on customers.

24 It doesn't matter what the individual orders  
25 of the Commission are in individual cases. What matters

1 is the correct implementation of the statute and the  
2 rules before you.

3           Commissioners, in sum, we reject the staff's  
4 effort to truncate your consideration of this very  
5 important issue on the merits. We urge you to reject  
6 the staff's recommendation and to grant our petition.

7           The -- in summary, the staff -- the cases that  
8 staff cites are cases that are relevant. But here mere  
9 citation to these cases does not mean that as applied to  
10 the facts of our petition that they call for denial  
11 before you on the merits.

12           I would like to be able to respond to any  
13 remarks that Mr. Friedman might make, and I would  
14 represent to you I will do that in a very brief and  
15 succinct manner. Thank you, Commissioners.

16           **CHAIRMAN GRAHAM:** Mr. Friedman.

17           **MR. FRIEDMAN:** Thank you, Commissioners. My  
18 name is Martin Friedman representing Utilities, Inc. I  
19 will be very brief.

20           The -- I, I haven't analyzed the law to  
21 determine who was right, whether it's the staff or  
22 Mr. Rehwinkel, on the legal basis for whether this is  
23 appropriate for declaratory statement. But I do find  
24 myself in the unusual situation of agreeing with  
25 Mr. Rehwinkel that if this isn't decided today, it's

1 going to be decided in a rate case. And somewhat  
2 unfortunately the most recent rate case that was filed  
3 was filed on behalf of Utility -- one of the Utilities,  
4 Inc., subsidiaries. So if I don't fight this battle  
5 here today with all of you, I'm going to be fighting it  
6 with Mr. Rehwinkel or one of his, his compatriots  
7 probably very, very soon.

8 And, and so without regard to whether it's  
9 correct from a technically legal standpoint, we would  
10 support having the Commission rule and address this  
11 issue on the merits. And at the appropriate time that  
12 you want us to address it on the merits, we're prepared  
13 to do so. Thank you.

14 **CHAIRMAN GRAHAM:** Staff, do you want to  
15 comment on Mr. Rehwinkel's comments?

16 **MS. COWDERY:** There were a lot of them, you  
17 know, so --

18 **CHAIRMAN GRAHAM:** Hopefully you were taking  
19 notes.

20 **MS. COWDERY:** I tried. I guess the bottom  
21 line is going back to the declaratory statement statute,  
22 which is 125.65. And the requirements are for a  
23 declaratory statement that a substantially affected  
24 person may seek a declaratory statement regarding an  
25 agency's opinion as to the applicability of a statutory

1 provision or any rule or order of the agency as it  
2 applies to the petitioner's particular set of  
3 circumstances.

4           What Mr. Rehwinkel is saying is that the  
5 statutory provision that they're looking to is 350.0611.  
6 He also references 366 and 367 and a rule of -- a model  
7 rule procedure. Those particular sections -- 366, 367,  
8 and the model rule procedure -- apply when you are in a  
9 proceeding under 120, when you're in a hearing posture.  
10 They do not apply, in the Office of General Counsel's  
11 opinion, in a free-form agency action, which is proposed  
12 agency action. So I've sort of not, you know, talked  
13 about that much because those just don't apply, I mean,  
14 in a PAA action.

15           When you go back to their enabling statute,  
16 the 350.0611, if the Commission believes that there has  
17 been a particular set of circumstances alleged in the  
18 petition and believe that they have the authority to  
19 interpret 350.0611, you know, then a declaratory  
20 statement could be issued. That's sort of what it boils  
21 down to. It was our analysis that under the current  
22 case law, not looking at policy or anything, just under  
23 the current case law, the threshold isn't met. And  
24 under the case law under the *Lennar* case, an agency is  
25 limited in its authority under the statute to issue a

1 petition for declaratory statement if these threshold  
2 requirements aren't met. So that's, you know, what the  
3 issue is here today, I guess, is: Have they met those  
4 thresholds? And so I don't know how much more I can add  
5 to that.

6 I mean, Mr., Mr. Rehwinkel states that it is  
7 necessary to know whether or not they can, OPC will be  
8 allowed to conduct discovery as part of their analysis  
9 on whether to intervene in a case. You know, I can't  
10 say if that's true or not. It seems to me that OPC is  
11 going to intervene in a PAA if it believes that it needs  
12 to to represent the interests of the citizens. And  
13 whether or not they can conduct discovery formally or  
14 just ask for the information like they normally do or  
15 like they usually do by submitting a letter to staff  
16 asking for information doesn't seem like that would be a  
17 determination as to whether or not they're actually  
18 going to be intervening into a PAA, but, you know,  
19 that's their determination.

20 Mr. Rehwinkel stated that his -- he thought  
21 perhaps staff was saying that unless OPC has a docket  
22 number and is in a formal proceeding, they would not be  
23 allowed to have a declaratory statement. And staff is  
24 not taking that position at all. There is an entire  
25 line of judicial cases that makes clear that -- that

1 states that if you are in a proceeding that's  
2 determining any interests and a set of facts arises in  
3 that proceeding, they need to be decided in that  
4 proceeding. You can't take it out and now ask for it  
5 also to be done in a declaratory statement. The  
6 appropriate place to have that determined is within that  
7 proceeding.

8 I think what we also have here is -- you know,  
9 it's a little unusual request -- is it is a procedural  
10 type question, it is a discovery type question. That is  
11 generally something that is decided, has always been  
12 decided by the Commission within the context of the PAA  
13 proceeding. You know, that's how we do it. You know,  
14 to determine otherwise would be to take that away from  
15 the Prehearing Officer and issue a general declaratory  
16 statement that decides it. That's, you know, that's an  
17 issue to decide if that's -- if you want to decide it on  
18 a general issue or if you want to decide it, you know,  
19 the way that we've been doing it thus far.

20 The statement that the OPC is not seeking  
21 advice -- it seems to me this is a request for an  
22 interpretation of a statute. It's a request for a  
23 general advisory opinion, so.

24 The petition has an entire line of listed  
25 issues on page 22 which explain why the WMSI order in



1 OPC's opinion is incorrect. So, to me, that is showing  
2 a request that we not follow, the Commission not follow  
3 WMSI and WMSI was wrongfully decided.

4 The fact that there may be inconsistencies in  
5 prehearing orders on a particular issue is not in and of  
6 itself a reason to allow a declaratory statement.

7 The long line of cases that OPC says that it,  
8 it gave to the Commission really is four cases, one of  
9 which had to do with intervention in a PAA, which I  
10 don't believe is applicable; two of which, the Aqua and  
11 the WMSI cases, even though they came up with sort of  
12 differing results, the parties were cooperating on  
13 discovery to begin with before -- there was, there was  
14 no issue on the utility's part that there should be no  
15 discovery -- one -- and very, very differing facts as  
16 far as what kind -- how many utilities were involved,  
17 what kind of issues were involved. And then the last  
18 case, there was a finding by the Prehearing Officer that  
19 there should be discovery, and there was -- that case  
20 had a 2004 case from a telecom where there was  
21 discovery. So there is some conflict -- different  
22 situations, different facts.

23 You know, as I say, just because you have some  
24 conflict doesn't -- that's not in and of itself the  
25 basis for a declaratory statement. That's all I can

1 think of. If you have other specific questions --

2 **CHAIRMAN GRAHAM:** Thank you, staff.

3 **MR. REHWINKEL:** Mr. Chairman, would you  
4 indulge me to respond to four points that have been  
5 raised that are, that are new to this argument and  
6 really go to the merits?

7 **CHAIRMAN GRAHAM:** Let me see what our fellow  
8 Commissioners want to do.

9 **MR. REHWINKEL:** Okay.

10 **CHAIRMAN GRAHAM:** I'll get back to you. I  
11 won't shut it down before we hear from you.

12 **MR. REHWINKEL:** Thank you.

13 **CHAIRMAN GRAHAM:** Commissioners, questions of  
14 OPC, staff, or Mr. Friedman?

15 Commissioner Balbis.

16 **COMMISSIONER BALBIS:** Yes. Mr. Chairman, I  
17 would like to hear Mr. Rehwinkel's response to staff  
18 because they did raise a couple of additional points,  
19 and then hold my questions and comments until after  
20 that.

21 **CHAIRMAN GRAHAM:** Okay. Hold on a second.

22 Anybody else?

23 Mr. Rehwinkel.

24 **MR. REHWINKEL:** Yes. First of all, the notion  
25 about -- that that segment in a PAA case that is between

1 the filing of the case and the issuance of the PAA order  
2 is not within 120 I think is wrong, and here's why.

3 We have cited to you our analysis starting at  
4 page 22, subsection (d), that distinguishes the, the  
5 cases, the *Manasota* and the *Capeletti Brothers* cases,  
6 that are relied upon for this notion that there's some  
7 sort of free-form action that's going on that forbids us  
8 from doing discovery. We show in here that these are  
9 inapplicable, inapposite, have nothing to do with the  
10 scenario where the Legislature has decided that we are a  
11 statutory intervenor and that we have statutory  
12 discovery rights.

13 But let me make one other point.

14 120.80(13)(b) is a, is a proposed agency action  
15 provision of Chapter 120 of the Administrative  
16 Procedures Act that applies to this agency specifically.  
17 And it says -- it was passed sometime in the 1980s. I  
18 should know when, but I -- and it's -- it changed the  
19 practice where a PAA order, once it was issued, if there  
20 was a protest filed, the whole thing was dissolved and  
21 you went to hearing on the whole, on the whole order.

22 When this provision was put in, it said you  
23 can segregate or you can isolate provisions that you  
24 challenge and the rest of the order goes into effect.  
25 That was a, that was a change and it applies just to

1 this agency.

2 And I would submit to you, Commissioners --  
3 because the reviewing court is going to look at this  
4 very closely. This, this impeaches this notion of some  
5 sort of free-form process that goes on up until you  
6 issue the PAA order. This statute recognizes that this  
7 agency does things differently than, say, maybe DEP does  
8 in a permit, which is kind of these *Manasota* and  
9 *Capeletti* line of cases. Whether it's PAA or file and  
10 suspend, go to hearing right away, you know, 12-month  
11 clock case, you file MFRs, you have issues, you, you --  
12 when you get to the agenda, there is a list of issues  
13 that the Commission considers in a rate case. It's kind  
14 of a standard list; it goes from, you know, rate base,  
15 NOI, capital structure, rate design. And you -- the  
16 statute recognizes that you can pick and choose which of  
17 those you disagree with and let the rest go into, into  
18 effect, which goes to why we would do discovery before  
19 that issue -- that is issued so we can know and be  
20 prepared to argue about the structure of the PAA order  
21 to try to minimize rate case expense by ensuring that we  
22 don't take the whole thing to, to hearing when we could  
23 take a narrow and limited part of it. That's not free-  
24 form agency action. That's real -- it's the same as  
25 what you do in, in your, you know, non-PAA rate cases.

1 So we, we vigorously disagree with that assertion that  
2 there's some sort of exemption.

3 Not only that, but that notion would not apply  
4 to gas and electric cases. If, if an electric company  
5 filed some sort of limited proceeding on a, that was  
6 being considered on a PAA basis, this notion would not  
7 apply and there wouldn't be a rate case expense concern  
8 either with respect to that. And we've never had an  
9 issue, by the way; no one has objected in the electric  
10 arena on that basis.

11 Ms. Cowdery said that she can't say whether we  
12 really do or do not consider discovery and our right to  
13 discovery and whether to intervene and how to intervene.  
14 You know, with all due respect, A, that's -- it's true  
15 as we stated; and, B, under the law, when you consider a  
16 declaratory statement, you have to assume that it's  
17 true. So you cannot speculate as to our motives or  
18 whether we're being truthful or not with you. I mean, I  
19 can tell you -- I've, I've been many years in this  
20 office with many Public Counsels, and that's how it  
21 happens. But that's what we said in our petition; you  
22 have to assume that that's true.

23 I, I think it was a good point made by  
24 Ms. Cowdery about case specific or Prehearing Officer  
25 discretion with respect to discovery. That's a valid

1 point. But, but I think she gets it a little bit wrong  
2 because the right to do discovery is, is, is not  
3 limited, but the way you exercise your right to do  
4 discovery -- we agree that the Prehearing Officer at the  
5 Commission has the right in that period of time when  
6 time is of the essence, when money is a real cost,  
7 especially in these small water and sewer cases, where  
8 appropriate limits can be placed on discovery. And  
9 that's what, in effect, what the WMSI order did, and we  
10 don't contest that.

11 We believe that what should happen is that we  
12 get to do the discovery or we get to have the right to  
13 do discovery, and we can step it down and do some  
14 informal discovery or we can work with staff or we can  
15 work with the company. But we always have the right  
16 where we can -- you know, having a right doesn't mean  
17 you should always exercise it. And I think that's an  
18 important point and that's an important lesson from the  
19 WMSI order, but it also is a recognition that the  
20 Prehearing Officer, whichever of the five of you it may  
21 be, has the discretion to limit discovery to the facts  
22 and circumstances. And we think that's the right thing  
23 to do, but not to say you can't do it at all. So those  
24 are my, my responses. I appreciate your indulgence.  
25 Thank you.

1                   **CHAIRMAN GRAHAM:** Commissioner Balbis.

2                   **COMMISSIONER BALBIS:** Thank you, Mr. Chairman.

3                   And I'm going to change gears a little bit and then, you  
4                   know, depending on comments from other Commissioners,  
5                   dive into staff's recommendation. And that is kind of  
6                   focus a little bit on the merits of the petition.

7                   And, you know, I believe and I feel that,  
8                   especially in the recent past, that we have had some  
9                   issues with the amount of information that's provided to  
10                  us in order for us to make an informed decision.

11                  And, Mr. Friedman, I hate to use you as  
12                  another exhibit, I think it would be Exhibit B, but in a  
13                  recent case, Mr. Friedman, you even indicated that  
14                  during the process that, you know, and I'm quoting,  
15                  "Well, nobody asked the question." And then you  
16                  continued, "How do we know what their concern is if they  
17                  don't ask us? And if they don't ask the specific  
18                  question, then how do we know how to answer it?" And I  
19                  think that kind of lies into some of the concerns that I  
20                  have in the PAA process that, you know, that questions  
21                  may not be asked and/or answered that gives us the  
22                  information we need.

23                  So I think, at least recently, I know I've  
24                  struggled with the amount of information that's  
25                  provided. And I know in the past that staff has

1 considered OPC's concerns -- concerns, and we have  
2 asked if they have taken those into account to make sure  
3 they're answered. So I think in some cases the process  
4 has worked and in some cases maybe there was something  
5 lacking.

6 But my question for Mr. Rehwinkel, and it was  
7 the last part of your last statement, and if you agree  
8 that the Prehearing Officer has the right or ability to  
9 limit discovery or somehow corral the process so that  
10 not to incur additional rate case expense, aren't you  
11 risking by requesting a declaratory statement that the  
12 Commission rules the opposite, that OPC is not allowed  
13 discovery? So, therefore, that freedom, if you will,  
14 that you have indicated that the Prehearing Officer has  
15 is now gone.

16 **MR. REHWINKEL:** Commissioner, to the contrary.  
17 I understand your point, but the -- we need an answer  
18 about whether we have the right because having the right  
19 dictates a course of action. It's the point where we  
20 may fully exercise the right. We may only intervene  
21 because we know we can -- there may be a specific issue  
22 that the customers have raised that we want to get at to  
23 decide whether to bring it to the Commission's attention  
24 in the -- at the PAA Agenda Conference or the staff's  
25 consideration as they write their recommendation. If we



1 can't get at that through compelled discovery, our  
2 reason for intervening may be diminished. Because just  
3 the mere fact of intervening will usually incur rate  
4 case expense because a utility that might not hire  
5 counsel or hire counsel of a certain level or hire  
6 consultants if we're not in the case, they might get in,  
7 and our mere intervention has the ability to increase  
8 rate case expense. So we have to be mindful of that.

9 So these are kind of a dominoes of things that  
10 the having of the right, which is fundamental in the  
11 statute, is something that needs to be recognized. We  
12 see a vast difference between having the right and  
13 having the, having the ability to exercise it. And we  
14 think the Commission has, has a lot of discretion in  
15 that regard and we're happy with that balance, but we  
16 have to have the right in the first place.

17 If you rule against us, we're going to go to  
18 court. We need a resolution of it. We get that review  
19 standard that we think is favorable to us and we will  
20 get a resolution at some point. We'd rather do it now  
21 than in an individual case where we have to impose costs  
22 on customers. So this, this vehicle is what we, we  
23 need, and we've made the determination we have to have  
24 it. You know, up or down -- we think up is, is the  
25 right way. But if it's down, we will, we will go and

1 have another trier look at it and apply the law the way  
2 they see it.

3 **COMMISSIONER BALBIS:** Okay. That's all I have  
4 for right now.

5 **CHAIRMAN GRAHAM:** Commissioner Brisé.

6 **COMMISSIONER BRISÉ:** Thank you, Mr. Chairman.  
7 This question is to staff. And just riding  
8 off the point that Mr. Rehwinkel just brought up, so if  
9 we go with the recommendation as it stands right now,  
10 what opportunity does OPC or, or the utility have to  
11 address this, the merits of the issue other than a rate  
12 case?

13 **MS. COWDERY:** The first -- well, the merits --  
14 my first -- I was thinking you were going to ask if they  
15 have, you know, they have the right to reconsideration  
16 and it's a final order and they have the right to  
17 appeal.

18 **COMMISSIONER BRISÉ:** Sure.

19 **MS. COWDERY:** As far as addressing it is on a  
20 case-by-case basis. To get the merits, just to get us  
21 to answer the merits on a case-by-case basis, I don't  
22 know about -- I think that's as far as, you know, I  
23 would go with it.

24 **COMMISSIONER BRISÉ:** Okay. Because my, my  
25 thought is for efficiency; right? If we're going

1 to potentially address this piecemeal or on a  
2 case-by-case basis, it may not be the most efficient way  
3 of doing it. And so just food for thought for my  
4 colleagues.

5 **CHAIRMAN GRAHAM:** Commissioners, motion?

6 Commissioner Balbis.

7 **COMMISSIONER BALBIS:** Thank you, Mr. Chairman.

8 I'm not in a position to make a motion at this time. I  
9 just wanted to follow up on what Commissioner Brisé  
10 indicated, and I tend to agree with him on it.

11 I, I was surprised that staff did not go into  
12 the merits of the petition. You know, I understand what  
13 their points are, their four points as to why a  
14 declaratory statement is not appropriate. And I did  
15 have some lengthy discussions with staff challenging  
16 their position on those, and I understand their, where  
17 their position is. But I think that the overreaching  
18 issue if this is going to continue to be presented in  
19 front of Prehearing Officers and challenged whether or  
20 not OPC has the right to conduct discovery in a PAA  
21 process, it may be more efficient to do so at this time,  
22 which would mean we would have to dive into the merits  
23 of the petition. So I'm kind of on the fence on this,  
24 hoping to hear some comments from my colleagues on the  
25 dais.

1           **CHAIRMAN GRAHAM:** Well, I don't see any lights  
2 on right now, but I have a couple of questions I need to  
3 bounce off of my staff. So let's take a, let's take a  
4 7-minute break, so at 20 till let's come back. So let's  
5 have a brief recess. Thank you.

6           (Recess taken.)

7           I want to thank you all for giving me that  
8 brief period of time to confer. I heard a lot of great  
9 arguments today on both sides. Mr. Rehwinkel is very  
10 eloquent on some -- a lot of the things that he said. I  
11 understand the position he's in as being Public Counsel.  
12 His job is to get out there and to be the watchdog for  
13 the, for the, for the consumer and to have as many tools  
14 in his toolbox as possible to, to do that.

15           I think as the way things sit right now  
16 doesn't take away any of those tools in his toolbox. I  
17 for one like the, the idea of having the Prehearing  
18 Officer, the discretion to make some of these calls.  
19 And this is where I've got to put things back in, as I  
20 said to our staff earlier, I've got to put things back  
21 into my engineering terms where I actually understand  
22 them.

23           To me and in my mind, the PAA process is a way  
24 of limiting costs and expediting the process. And once  
25 you start making more and more exceptions to the

1 process, you start to slow down the PAA and the reason  
2 why it was there and the reason why it was designed.  
3 And if you go back to my transportation days, when you  
4 build a limited access road, every single time you allow  
5 somebody to make another curb cut, there's more and more  
6 traffic coming in from different angles and you're  
7 slowing down the flow on that road. And I think every  
8 time you make more and more exceptions to the PAA  
9 process, you're slowing down the expediency of that  
10 process. That's kind of where the conundrum is right  
11 now where I'm kind of unclear. It doesn't take away any  
12 of the rights from OPC, because he can still object to  
13 the process and go back to a hearing and he can still  
14 pick and choose part of the process and go back to a  
15 hearing.

16 I like the fact that the Prehearing Officer  
17 has that control. Because in the case of the WMSI, when  
18 you have 300, 500, however many discovery questions,  
19 sometimes you get to the point where it's just too much.  
20 And in a specific case in a specific vacuum you can make  
21 that determination, and I like having that freedom  
22 there.

23 Commissioners, any further discussion or any  
24 further thoughts? Commissioner Balbis.

25 **COMMISSIONER BALBIS:** Mr. Chairman, I agree

1 with a lot of the points that you indicated, and I think  
2 the most important thing is the discretion of the  
3 Prehearing Officer. I mean, one of the duties, as we  
4 all know, is to eliminate delay and effectuate  
5 discovery, and a lot of times those two do not go hand  
6 in hand.

7 So the fact that in the past that individual  
8 Prehearing Officers have ruled on the specific issues  
9 associated with the docket to deal with the issue of  
10 discovery I think shows that it is working. Because I  
11 think deciding either way, a blanket decision on that  
12 may take away the benefits of the PAA process. And I  
13 think that the only way that -- and although we didn't  
14 really discuss the merits of the petition, but issuing a  
15 declaratory statement, we may have an issue with keeping  
16 that flexibility with the Prehearing Officer.

17 I think that the best direction to go in is to  
18 approve staff's recommendation that on a case-by-case  
19 basis, as has been happening in the past, OPC can ask  
20 the questions, continue to participate in the process,  
21 and especially provide concerns to staff, who in the  
22 past that they have taken their concerns into account  
23 and sifted through them and determined which ones are  
24 appropriate, which ones are not, to make sure we get the  
25 information that's needed. So I think that process

1 works. I want to encourage OPC to continue to do that.  
2 And on a case-by-case basis the Prehearing Officer can  
3 rule whether or not the questions can be asked in the  
4 process. So I think the cleanest way is to approve  
5 staff's recommendation on this and, and go from there.

6 **CHAIRMAN GRAHAM:** Is that a motion?

7 **COMMISSIONER BALBIS:** Yes.

8 **CHAIRMAN GRAHAM:** It's been moved and  
9 seconded, staff recommendation on this.

10 Commissioner Balbis, I agree. And also to add  
11 that even if there's some sort of a conflict or OPC  
12 still feels like the Prehearing Officer is incorrect, he  
13 can still move for reconsideration before the Commission  
14 as a whole. And that also allows them another bite of  
15 the apple still on this expedited process.

16 Commissioner Edgar.

17 **COMMISSIONER EDGAR:** Thank you, Mr. Chairman.  
18 And I will also support the motion. I think both of you  
19 have been very eloquent in describing the situation and  
20 the conundrum that we find ourselves in as this was and  
21 is presented to us.

22 I do not believe that a declaratory statement  
23 is the appropriate mechanism or document at this point  
24 in time as it is before us, and I think that our legal  
25 staff did an excellent job in laying out all of the

1 reasons for that to be the case.

2 I also agree that by statute and by rule and  
3 by practice that it is the responsibility for a  
4 Prehearing Officer to manage the case, and that although  
5 particularly with water and wastewater PAA and cases and  
6 others that there are many similarities, there are often  
7 also particularly many unique circumstances. And that  
8 is part of the role of the Prehearing Officer, to help  
9 recognize those unique circumstances and manage the case  
10 procedurally in a way that limits cost and adds  
11 efficiency.

12 I also have a concern that as this petition  
13 exists, that it is in many ways closed over a late  
14 reconsideration request for a WMSI procedural order, and  
15 I do not believe that that is the appropriate way to  
16 address that concern. And I recognize that Public  
17 Counsel had a different take on that and raised the  
18 concern about at the time a reconsideration request  
19 adding additional rate case -- and we certainly look to  
20 all of the parties to do everything they can to minimize  
21 rate case expense -- but a petition for a  
22 reconsideration of a procedural order I just don't think  
23 would necessarily add significant cost. So with all of  
24 that said, I support the motion that is before us.

25 **CHAIRMAN GRAHAM:** Any further comments from



1 Commissioners? Seeing none, all in favor, say aye.

2 (Vote taken.)

3 Any opposed? By your action, you've approved  
4 staff recommendation on Item Number 2.

5 OPC, thank you very much. Mr. Friedman, thank  
6 you. Staff, thank you.

7 (Agenda item concluded.)

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1 STATE OF FLORIDA )  
2 COUNTY OF LEON ) : CERTIFICATE OF REPORTER

3  
4 I, LINDA BOLES, CRR, RPR, Official Commission  
5 Reporter, do hereby certify that the foregoing  
6 proceeding was heard at the time and place herein  
7 stated.

8 IT IS FURTHER CERTIFIED that I stenographically  
9 reported the said proceedings; that the same has been  
10 transcribed under my direct supervision; and that this  
11 transcript constitutes a true transcription of my notes  
12 of said proceedings.

13 I FURTHER CERTIFY that I am not a relative, employee,  
14 attorney or counsel of any of the parties, nor am I a  
15 relative or employee of any of the parties' attorney or  
16 counsel connected with the action, nor am I financially  
17 interested in the action.

18 DATED THIS 17th day of July, 2014.

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