

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: September 25, 2019
TO: Adam J. Teitzman, Commission Clerk, Office of Commission Clerk
FROM: Samantha Cibula, Office of the General Counsel *S.M.C.*
RE: Docket No. 20020398-EQ

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

Thank you.

Attachment

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2019 SEP 25 AM 11:44
COMMISSION
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Public Service Commission

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

020398 EQ

DATE: February 7, 2003
TO: LILA A. JABER, CHAIRMAN
J.TERRY DEASON, COMMISSIONER
BRAULIO L. BAEZ, COMMISSIONER
RUDOLPH "RUDY" BRADLEY, COMMISSIONER
CHARLES M. DAVIDSON, COMMISSIONER
FROM: HAROLD MCLEAN, GENERAL COUNSEL
RE: LETTER FROM JOINT ADMINISTRATIVE PROCEDURES COMMITTEE STAFF
CONCERNING RULE 25-22.082, F.A.C.

The Joint Administrative Procedures Committee (JAPC) Staff Attorney who is assigned to review Commission rules has written a letter asking for additional information about several subsections of Rule 25-22.082, "Selection of Generating Capacity", and commenting on one section in particular. The Commission proposed this rule in the October 25, 2002, Florida Administrative Weekly, and adopted the rule with changes at a special agenda held on January 3, 2003. A Notice of Change was published in the January 17, 2003, Florida Administrative Weekly. The rule may not be filed for adoption with the Secretary of State until we respond to JAPC's comments.

The following provides the text of each provision of the rule that has been questioned, the JAPC staff's question, and the gist of our suggested response.

Subsection (6) provides that "[n]o attribute, criterion, or methodology shall be employed that is not identified in the RFP absent a showing of **good cause**."

JAPC: The rule does not provide a definition of the term "good cause." This renders the rule vague and subject to inconsistent application. Please explain what is meant by the term.

Response: "Good cause" means "a legitimate reason." It is a term used throughout the Florida Administrative Code.

Subsection (10) provides that "[t]he public utility shall allow participants to formulate **creative responses** to the RFP. The public utility shall evaluate all proposals."

JAPC: The rule does not provide a definition for "creative processes." Please explain what is meant by this term.

Response: The correct term used in the rule is "creative responses." The term "creative" has the standard dictionary meaning; that is, innovative or imaginative, something created rather than imitated.

Subsection (18) provides "[t]he Commission **may** waive this rule or any part thereof upon a showing that the waiver would likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of

ratepayers, or is otherwise in the **public interest.**”

JAPC: Please reconcile this subsection with section 120.542, F.S., and chapter 28-104, F.A.C., establishing the procedures to obtain a waiver or variance from agency rules.

In addition, regarding the use of the term “may”, there are no standards or criteria to apprise the reader of whether or not the rule will be waived under any circumstances, or which part would be waived.

The rule does not provide a definition for “public interest.” Please explain the meaning of the term.

Response:

This provision of the rule has been in effect since January, 1994, and was unaffected by the rule changes in the current docket. Although the waiver provision was adopted prior to the enactment of section 120.542, F.S., the rule waiver statute, we do not believe there is a conflict. Section 120.542 was adopted to address the perceived failure of agencies to be flexible in the administration of their rules, and it requires an agency to waive any of its rules if a certain showing is made. Nothing in 120.542 prohibits an agency from recognizing that a specific rule is not intended to be rigidly applied and delineating alternative means for satisfying the requirements of the rule, or providing circumstance where all or part of a rule does not apply.

In this case the Commission determined that it should not prohibit other methods of complying with the rule, so long as it is shown that the other means are likely to “result in a lower cost supply of electricity to the utility’s general body of ratepayers, increase the reliable supply of electricity to the utility’s general body of ratepayers, or is otherwise in the public interest.” Without this provision, an entity would have to show that application of the rule would create a substantial hardship or would violate principles of fairness under the provisions of section 120.542, rendering the rule less flexible than intended.

As to the use of the term “may”, it means the Commission “has the authority” to waive all or part of the rule upon a specific showing. The authority is not unbridled, and it is appropriately given to the Commission acting in its quasi-judicial role. There are three standards listed. If it is shown that a waiver will result in any one of the three, the Commission would be acting arbitrarily and capriciously if it did not waive all of the rule or the part in question. The rule does not and cannot empower the Commission to act arbitrarily or capriciously.

Finally, an action is in the “public interest” when, on balance, it benefits the public. This term is commonly used in regulation of utilities and other businesses by the state pursuant to its police power. It is the standard the Legislature requires the Commission to apply without further elaboration under various provisions of the statutes prescribing the Commission’s powers. For example, section 364.3376(6), F.S., authorizes the Commission to waive a statutory requirement “upon a showing that such waiver is in the public interest.” Whether an action is in the “public interest” is a determination that often can only be judged by the Commission on a case-by-case basis on the specific facts presented.

Notice of Rule Development workshop FAW 6/7/02

Notice of Proposed Rulemaking FAW 10/25/02

Letter to JAPC with Proposed Rule 10/18/02

Notice of Change FAW 1/17/03

could reword to say “alternatively,

or, any person, or utility (or whoever we intend rule to apply to) may be exempt from part or all of rule upon demonstrating to the Commission that . . . will “result in a lower cost supply of electricity to the utility’s general body of ratepayers, increase the reliable supply of electricity to the utility’s general body of ratepayers, or is otherwise in the public interest

366.01 Legislative declaration.--The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose.

it allows entities to demonstrate that the purpose of the rule can be accomplished by other means.

Acknowledges that there may be another acceptable and reasonable way of achieving the purpose of the rule.