



# The Florida Senate

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Committee on Regulated Industries

Senator James E. "Jim" King, Jr., President

## REVIEW OF RULES AND POLICIES OF THE FLORIDA PUBLIC SERVICE COMMISSION

### SUMMARY

The Florida Statutes set forth a rulemaking process agencies must follow to adopt rules. To ensure that agency rules are within the statutory requirements, proposed rules must undergo review by the Joint Administrative Procedures Committee (JAPC). Additionally, each proposed and existing rule is subject to challenge by any substantially affected person.

One of the statutory requirements is that the adopting agency have a sufficient statutory grant of authority to adopt the rule. Concerns were raised about whether the Public Service Commission (PSC) had sufficient authority for two rules it had adopted or was in the process of adopting.

Staff reviewed the two rules in question. One of the rules was adopted over the complaint of a JAPC attorney that there was insufficient statutory authority; however, the PSC is in the process of changing this rule to accommodate the attorney's comments. The other rule has been through a series of workshops to develop, narrow, and refine proposed language, which is now in the preliminary phases of formal rulemaking. It is too early to make a determination on statutory authority for unknown final rule language. Staff concluded that, based on review of these two rules, the statutory rulemaking process is working as intended and no legislative action is necessary.

solicits any information not specifically required by statute or by an existing rule." s. 120.52(15), F.S. Rulemaking is not discretionary and each agency statement meeting the definition of a rule must be adopted as prescribed as soon as feasible and practicable. s. 120.54(1), F.S.

An agency may adopt a rule only as follows:

1. The agency must have both a general grant of rulemaking authority and a specific law to be implemented.
2. The agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute.
3. The agency cannot adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties.
4. The agency cannot implement statutory provisions setting forth general legislative intent or policy. s. 120.536(1), F.S.

Additionally, a rule may contain only one subject and must be in "readable language." s. 120.54(1)(g) and (2)(b), F.S. Language is readable if it avoids the use of obscure words and unnecessarily long or complicated constructions, and if it avoids the use of unnecessary technical or specialized language that is understood only by members of particular trades or professions. s. 120.54(2)(b), F.S.

In adopting a rule, an agency must follow procedures set forth in s. 120.54, F.S., including public notice and meetings and working with the Legislature's Joint Administrative Procedures Committee. JAPC is to review each proposed rule to determine whether:

1. The rule is an invalid exercise of delegated legislative authority.

### BACKGROUND

#### Rulemaking Process

The statutes define the term "rule" as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or

2. The statutory authority for the rule has been repealed.
3. The rule reiterates or paraphrases statutory material.
4. The rule is in proper form.
5. The notice given prior to its adoption was sufficient to give adequate notice of the purpose and effect of the rule.
6. The rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements.
7. The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law which the rule implements.
8. The rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule.
9. The rule could be made less complex or more easily comprehensible to the general public.
10. The rule does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
11. The rule will require additional appropriations.
12. If the rule is an emergency rule, there exists an emergency justifying the promulgation of such rule, the agency has exceeded the scope of its statutory authority, and the rule was promulgated in compliance with the requirements and limitations of s. 120.54(4). s. 120.545, F.S.

The term “invalid exercise of delegated legislative authority” means “action which goes beyond the powers, functions, and duties delegated by the Legislature” and a proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

1. The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter.
2. The agency has exceeded its grant of rulemaking authority.
3. The rule enlarges, modifies, or contravenes the specific provisions of law implemented.
4. The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency.
5. The rule is arbitrary or capricious.
6. The rule is not supported by competent substantial evidence.
7. The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by

the adoption of less costly alternatives that substantially accomplish the statutory objectives. s. 120.52(8), F.S.

If JAPC objects to a proposed or existing rule it must notify the agency, including a statement detailing its objections with particularity. s. 120.545(2), F.S. At the same time, JAPC must notify the President of the Senate and the Speaker of the House of Representatives of the objection, including with the notice a copy of the proposed rule and the statement detailing JAPC’s objections to the proposed rule. Id.

The agency then has a prescribed time (45 days in the case of the PSC) to respond to the objection. s. 120.545(3), F.S. With a proposed rule, the agency may modify the proposed rule to meet JAPC's objection, withdraw the proposed rule in its entirety, or refuse to modify or withdraw the rule. Id. With an existing rule, the agency may amend the rule, repeal the rule, or notify JAPC that it refuses to amend or repeal the rule. Id.

If JAPC objects to a proposed or existing rule and the agency refuses to modify, withdraw, amend or repeal, the rule, JAPC is to file a notice of the objection with the Department of State (department), detailing with particularity its objection to the proposed rule. s. 120.545(9), F.S. The department is to publish this notice in the Florida Administrative Weekly and to publish, as a history note to the rule in the Florida Administrative Code, a reference to JAPC's objection and to the issue of the Weekly in which the full text of the objection appears. Id.

Under such circumstances, JAPC may also submit to the President of the Senate and the Speaker of the House of Representatives a recommendation that legislation be introduced to modify or suspend the adoption of all or a portion of the proposed rule or to amend or repeal an existing rule, or portion thereof. s. 120.545(10)(a), F.S. If JAPC votes to recommend introduction of legislation to modify or suspend adoption of a proposed rule or to amend or repeal an existing rule, it must certify that fact to the adopting agency. s. 120.545(10)(b), F.S. JAPC may also request that the agency suspend the rule or the rule adoption process. Id.

After completing all public hearings and the JAPC process, an agency which is required to publish its rules in the Florida Administrative Code (which includes the PSC) is to file specified documents with the department. At the same time, JAPC is to certify

whether the agency has responded in writing to all material and timely written comments or written inquiries made on behalf of JAPC. Id. The department is to reject any rule not filed within the prescribed time limits; that does not satisfy all statutory rulemaking requirements; upon which an agency has not responded in writing to all material and timely written inquiries or written comments; upon which an administrative determination is pending; or which does not include a statement of estimated regulatory costs, if required. Id. The proposed rule is adopted on being filed with the department and becomes effective 20 days after being filed, on a later date specified in the rule, or on a date required by statute. Id.

Any person substantially affected by a rule or a proposed rule may file a petition with the Division of Administrative Hearings seeking an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority. s. 120.56(1), F.S. The petition must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it. Id.

A substantially affected person challenging a proposed rule must meet specified time requirements which vary depending on where the rule is in the rulemaking process. s. 120.56(2), F.S. The administrative law judge may declare all or a portion of the proposed rule invalid, and the rule or portion declared invalid must be withdrawn from the proposed rule. Id.

A substantially affected person may challenge an existing rule at any time during the existence of the rule. s. 120.56(3), F.S. The administrative law judge may declare all or a portion of the rule invalid, and the rule or portion declared invalid becomes void when the time for filing an appeal expires. Id.

## METHODOLOGY

Staff reviewed gas industry code of conduct rule and the electric industry bid rule. Staff also discussed these rules with JAPC and PSC staff and gathered other relevant information.

## FINDINGS

### A. Gas code of conduct rule

This rule adopts a code of conduct for gas utilities and their marketing affiliates. It defines “marketing affiliate” to mean “an unregulated business entity that is a subsidiary of a gas utility or is owned by or subject to control by the gas utility’s parent company, and sells gas at the retail level to a transportation customer on the gas utility’s system.”

The rule prohibits a gas utility from discriminating in favor of its market affiliate in its business practices. Specifically, the gas utility cannot: give its affiliate any preference relating to gas or transportation, disclose to the affiliate any non-public information, or condition any offer or agreement to a requirement that the affiliate be involved in the transaction. The utility must: apply tariff provisions in the same manner to all similarly situated entities, charge the affiliate the fully allocated costs for any general and administrative and support services provided, and maintain its books and records separately from those of its marketing affiliate.

The rule also specifically prohibits a gas utility sharing with its marketing affiliate any of its employees having direct responsibility for the day-to-day operations of a gas utility’s transportation operations, including employees involved in:

1. Receiving transportation service requests or tariff sales requests from customers (customer service inquiry employees);
2. Scheduling gas deliveries on the gas utility’s system;
3. Making gas scheduling or allocation decisions;
4. Purchasing gas or capacity; or
5. Selling gas to end users behind the city gate, and such employees will be physically separated from the gas utility’s Marketing Affiliate.

During the rulemaking process, the JAPC attorney reviewing on the proposed rule took issue with this last provision on the grounds that the PSC lacked statutory authority to mandate how a regulated entity staffs its operations. He noted that the statute cited as authority did not address employment practices of regulated entities.

The PSC attorney working on the proposed rule responded that the statute authorizes the PSC to prescribe fair and reasonable rates, and that, to the

extent that a regulated gas utility had a marketing affiliate, it would not be fair and reasonable for the gas utility's rates to reflect costs expended by the unregulated affiliate in selling the gas in competitive markets. Although this did not resolve the JAPC attorney's concerns, the PSC went on to adopt the proposed rule, which was codified at s. 25-7.072, F.A.C., and became effective July 23, 2002

However, based on conversations with staff of the JAPC and the PSC, the PSC has reconsidered the JAPC attorney's issues concerning this rule and will file a revision to cure the problems.

### **B. Electric bid rule**

The PSC conducted a number of workshops on various proposals to amend the existing bid rule, section 25-22.082, F.A.C. During the course of these workshops, the proposals were refined and made narrower and less far-reaching. On September 30, 2002, the PSC held a Special Commission Conference on recommended rule language, making further refinements to the proposed amendment language and voting to propose amending the rule. On December 9 and 10, 2002, held a two-day hearing on this proposed rule language. Representatives of a number of divergent interest groups spoke at the meeting, suggesting quite a number of changes to the proposed language. (The interest groups included the investor owned utilities; the Florida Partnership for Affordable Competitive Energy, an association of independent power producers; the Utilities Commission of the City of New Smyrna Beach; Calpine Eastern Corporation; and the Florida Action Coalition Team, a utility consumer group.) Given that the PSC is still developing the proposed rule language and that the ultimate language is unforeseeable and unpredictable, it is premature to comment on statutory authority for the proposed rule.

by the rule could have challenged the rule at any time, before or after its adoption.

As to the bid rule, while it is too early to determine statutory authority for the ultimate rule language, it should be noted that the proposals for amending the existing rule have been narrowed significantly through the workshop process.

Accordingly, staff finds that no legislative action is necessary.

## **RECOMMENDATIONS**

Based upon the review of these two rules, the statutory rulemaking process is working as intended to ensure sufficient statutory authority for rules.

While there were problems with the gas code of conduct rulemaking, these problems are being corrected as per the JAPC attorney's comments. Additionally, had the PSC not reconsidered its decision, JAPC could have followed its formal objection process to seek modifications to the rule. It could also have recommended legislation to amend or repeal the rule. Also, any person substantially affected