

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 229 Public Service Commission Rules

**SPONSOR(S):** Payne

**TIED BILLS:** IDEN./SIM. BILLS: SB 364

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Energy, Communications & Cybersecurity Subcommittee	15 Y, 0 N	Bauldree	Keating
2) Constitutional Rights, Rule of Law & Government Operations Subcommittee	11 Y, 0 N	Miller	Miller
3) State Administration & Technology Appropriations Subcommittee			
4) Commerce Committee			

### SUMMARY ANALYSIS

The role of the Florida Public Service Commission (PSC) is to ensure that Florida's consumers receive some of their most essential services – electric, natural gas, telephone, water, and wastewater – in a safe, affordable, and reliable manner. The PSC is funded through a trust fund, primarily deriving revenues from regulatory assessment fees (RAFs), which are fees imposed by the PSC on the entities which it regulates. The RAFs applicable to each regulated industry are capped by statute and may be adjusted by the PSC under that cap. Since the PSC must establish the rate of each RAF by rule, the PSC must go through the rulemaking process required under Florida law.

A rule is an agency statement of general applicability interpreting, implementing, or prescribing law or policy, including the procedure and practice requirements of an agency, as well as certain types of forms. An agency begins the rulemaking process by filing a notice of rule development that must indicate the subject, purpose and effect, legal authority for and preliminary text of the proposed rule, if any. Notices are published by the Department of State in the Florida Administrative Register. The agency then must publish a notice of proposed rule providing certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. If the projected impact of the proposed rule will exceed \$1 million in the aggregate for the five-year period after the rule is implemented, the rule cannot go into effect until ratified by the Legislature.

Under current law, for the 2023-2024 state fiscal year only, rules adopted by the PSC to implement ss. 350.113, 364.336, 366.14, 367.145, and 368.109, F.S., which include its authority to administer and set the rates for RAFs, are exempted from the SERC and rule ratification requirements, but the exemption expires on July 1, 2024.

The bill exempts rules adopted by the PSC to implement ss. 350.113, 364.336, 366.14, 367.145, and 368.109, F.S., which include its authority to administer and set the rates for RAFs, from the legislative ratification requirement. The bill removes the current one-year exemption from the SERC requirement for such rules.

The bill has no fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

##### Florida Public Service Commission

The Florida Public Service Commission (PSC) is an arm of the legislative branch of government.<sup>1</sup> The role of the PSC is to ensure that Florida's consumers receive some of their most essential services – electric, natural gas, telephone, water, and wastewater – in a safe, affordable, and reliable manner. In doing so, the PSC exercises regulatory authority over utilities in one or more of three key areas: rate base/economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues.<sup>2</sup>

The Legislature annually sets the PSC's budget,<sup>3</sup> however, the PSC does not receive any funding from Florida's General Revenue Fund. Instead, the PSC is funded through the Florida Public Service Regulatory Trust Fund,<sup>4</sup> primarily deriving revenues from regulatory assessment fees (RAFs), which are credited to the trust fund and withdrawn in accordance with the PSC's budget.<sup>5</sup>

##### *Regulatory Assessment Fees*

RAFs are fees imposed by the PSC on the entities which it regulates. Florida law requires the PSC to impose RAFs by rule to fund the operations of the Commission.<sup>6</sup> The PSC rules establishing RAFs are industry specific and implement ss. 350.113, 364.336, 366.14, 367.145, and 368.109, F.S. Under current law, rules establishing RAFs must meet certain requirements:

- RAFs cannot exceed a maximum rate established by statute for each industry;<sup>7</sup>
- RAFs for each industry must be sufficient to cover the PSC's cost to regulate the entities in that industry;<sup>8</sup> and
- RAFs imposed on one industry cannot be used to offset the cost of regulating any other industry.<sup>9</sup>

RAFs are specific to each entity the PSC regulates and are generally calculated based on gross operating revenues derived from intrastate business, excluding sales for resale between certain specified types of entities.<sup>10</sup> However, regardless of gross operating revenue, entities in most regulated industries must pay a minimum annual regulatory assessment fee specific to that industry.<sup>11</sup>

Since the PSC must establish the rate of each RAF by rule, the PSC must go through the rulemaking process required under Florida law.

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<sup>1</sup> S. 350.001, F.S.

<sup>2</sup> Florida Public Service Commission, <http://www.psc.state.fl.us/about> (last visited November 7, 2023).

<sup>3</sup> See s. 350.113, F.S.

<sup>4</sup> S. 350.113, F.S.

<sup>5</sup> Florida Public Service Commission (PSC), "Agency Analysis of 2024 House Bill 229," p. 1 (November 6, 2023), available at <https://abar.laspbs.state.fl.us/ABAR/Document.aspx?id=32087&yr=2024> (last visited January 30, 2024).

<sup>6</sup> *Id.*

<sup>7</sup> See ss. 364.336, 366.14, 367.145, and 368.109, F.S.; PSC *supra* note 5.

<sup>8</sup> See s. 350.113(3), F.S.; PSC, "Agency Analysis," *supra* note 5.

<sup>9</sup> *E.g.*, s. 367.145(3), F.S.; PSC, "Agency Analysis," *supra* note 5.

<sup>10</sup> See Rules 25-4.0161, -6.0131, -7.0131, -7.101, and -30.120, F.A.C.

<sup>11</sup> See Rules 25-4.0161, -6.0131, -7.0131, and -30.120, F.A.C.

## Agency Rulemaking and Rule Ratification

A rule is an agency statement of general applicability interpreting, implementing, or prescribing law or policy, including the procedure and practice requirements of an agency, as well as certain types of forms.<sup>12</sup> The effect of an agency statement determines whether it meets the statutory definition of a rule, regardless of how the agency characterizes the statement.<sup>13</sup> If an agency statement generally requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law, it is a rule.<sup>14</sup>

Rulemaking authority is delegated by the Legislature<sup>15</sup> by law authorizing an agency to “adopt, develop, establish, or otherwise create”<sup>16</sup> a rule. If an agency statement meets the definition of a rule, the agency does not have discretion whether to engage in rulemaking.<sup>17</sup> To adopt a rule an agency must have an express grant of authority to implement a specific law by rulemaking.<sup>18</sup> The grant of rulemaking authority itself need not be specific or detailed.<sup>19</sup> The particular statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>20</sup> A delegation of authority to an administrative agency by a law that is vague, uncertain, or so broad as to give no notice of what actions would violate the law, could be ruled unconstitutional if it allows the agency to make the law.<sup>21</sup> Because of this constitutional limitation on delegated rulemaking, the Legislature must include minimal standards and guidelines in the law creating a program to provide for its proper administration by the assigned executive agency. The Legislature may delegate rulemaking authority to agencies but not the authority to determine what should be the law.<sup>22</sup>

### *Statement of Estimated Regulatory Costs*

An agency begins the rulemaking process by filing a notice of rule development that must indicate the subject, purpose and effect, legal authority for and preliminary text of the proposed rule, if any.<sup>23</sup> Notices are published by the Department of State in the Florida Administrative Register.<sup>24</sup> The agency then must publish a notice of proposed rule providing certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule.<sup>25</sup>

A SERC must be prepared if the proposed rule will have an adverse impact on small business or if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 within one year of implementation of the rule.<sup>26</sup> Preparation of a SERC also is triggered when a substantially

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<sup>12</sup> S. 120.52(16), F.S.; *Florida Dep’t of Fin. l Servs. v. Capital Collateral Reg’l Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

<sup>13</sup> *Dep’t of Admin. v. Harvey*, 356 So. 2d 323, 325 (Fla. 1st DCA 1977)

<sup>14</sup> *McDonald v. Dep’t of Banking & Fin.*, 346 So. 2d 569, 581 (Fla. 1st DCA 1977), articulated this principle subsequently cited in numerous cases. See *State of Florida, Dep’t of Admin. v. Stevens*, 344 So. 2d 290 (Fla. 1st DCA 1977); *Dep’t of Admin. v. Harvey*, 356 So. 2d 323 (Fla. 1st DCA 1977); *Balsam v. Dep’t of Health & Rehab. Servs.*, 452 So. 2d 976, 977–978 (Fla. 1st DCA 1984); *Dep’t of Transp. v. Blackhawk Quarry Co.*, 528 So. 2d 447, 450 (Fla. 5th DCA 1988), rev. den. 536 So. 2d 243 (Fla. 1988); *Dep’t of Natural Res. v. Wingfield*, 581 So. 2d 193, 196 (Fla. 1st DCA 1991); *Dep’t of Revenue v. Vanjaria Enterprises, Inc.*, 675 So. 2d 252, 255 (Fla. 5th DCA 1996); *Volusia County School Board v. Volusia Homes Builders Ass’n*, 946 So. 2d 1084 (Fla. 5th DCA 2007); *Florida Dep’t of Financial Servs. v. Capital Collateral Reg’l Counsel*, 969 So. 2d 527 (Fla. 1st DCA 2007); *Coventry First, LLC v. State of Florida, Office of Ins. Reg.*, 38 So. 3d 200 (Fla. 1st DCA 2010).

<sup>15</sup> *SW. Florida Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

<sup>16</sup> S. 120.52(17), F.S.

<sup>17</sup> S. 120.54(1)(a), F.S.

<sup>18</sup> Ss. 120.52(8) & 120.536(1), F.S.

<sup>19</sup> *Save the Manatee Club, Inc.*, 773 So. 2d at 599.

<sup>20</sup> *Sloban v. Florida Bd. of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Askew v. Cross Keys Waterways*, 372 So. 2d 913, 918-919 (Fla. 1978); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass’n*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

<sup>21</sup> *Connerv. Joe Hatton, Inc.*, 216 So. 2d 209 (Fla. 1968).

<sup>22</sup> *Sarasota County v. Barg*, 302 So. 2d 737 (Fla. 1974).

<sup>23</sup> S. 120.54(2)(a), F.S.

<sup>24</sup> S. 120.55(1)(b), F.S.

<sup>25</sup> S. 120.54(3)(a)1., F.S.

<sup>26</sup> S. 120.54(3)(b)1., F.S.

affected person submits a good faith written proposal for a lower cost regulatory alternative which substantially accomplishes the objectives of the law being implemented.<sup>27</sup> The SERC must provide an economic analysis projecting the proposed rule's effect on specified aspects of the state's economy, including a potential increase in regulatory costs and the rule's potential impact over the five-year period after the rule goes into effect.<sup>28</sup> Each SERC must discuss the proposed rule's likely adverse impact on economic growth, private-sector job creation or employment, and private-sector investment; the likely adverse impact on business competitiveness,<sup>29</sup> productivity, or innovation;<sup>30</sup> and whether the proposed rule is likely to increase regulatory costs, including any transactional costs.<sup>31</sup> If the analysis shows the projected impact of the proposed rule will exceed \$1 million in the aggregate for the five-year period after the rule is implemented, the rule cannot go into effect until ratified by the Legislature.<sup>32</sup>

### *Legislative Ratification*

Current law distinguishes between a rule being "adopted" and becoming enforceable or "effective."<sup>33</sup> A rule must be filed for adoption before it may go into effect.<sup>34</sup> As a rule subject to ratification becomes effective only if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification. A rule requiring legislative ratification must be submitted to the President of the Senate and the Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session.<sup>35</sup>

Exemptions to the legislative ratification requirement have been made for certain rules, including adoption of federal standards,<sup>36</sup> triennial updates of the Florida Building Code<sup>37</sup> and the Florida Fire Prevention Code,<sup>38</sup> the adjustment of tolls by the Florida Department of Transportation,<sup>39</sup> and certain rules pertaining to nutrient pollution in Florida waters.<sup>40</sup> The exemption to ratification for adoption of federal standards was implemented as consistent with existing rulemaking policy.<sup>41</sup> The exemptions for updates of the Florida Building Code and the Florida Fire Prevention Code, and the adjustment of tolls, were adopted because the respective statutory procedures for such updates and adjustments ensured sufficient legislative oversight and public participation sufficient to test the economic impacts of the proposed changes.<sup>42</sup> In 2013, certain rulemaking by the Department of Environmental Regulation establishing specific requirements for nutrients in Florida waters was exempted from the ratification requirement because of the extensive public interaction between the Clean Water Act<sup>43</sup> and Florida-developed standards.<sup>44</sup>

Rules adopted by the PSC pertaining to rates, charges, terms, and conditions of utility pole attachments,<sup>45</sup> including attachments to a utility pole made redundant by subsequent replacement,<sup>46</sup>

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<sup>27</sup> S. 120.541(1)(a), F.S.

<sup>28</sup> S. 120.541(2)(a), F.S.

<sup>29</sup> This factor includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>30</sup> S. 120.541(2)(a)2., F.S.

<sup>31</sup> S. 120.541(2)(a)3., F.S.

<sup>32</sup> S. 120.541(3), F.S.

<sup>33</sup> S. 120.54(3)(e)6, F.S. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

<sup>34</sup> S. 120.54(3)(e)6, F.S.

<sup>35</sup> S. 120.541(3), F.S.

<sup>36</sup> S. 120.541(4)(a), F.S. See s. 120.54(6), F.S.

<sup>37</sup> S. 120.541(4)(b), F.S., for amendments expressly authorized by s. 553.73, F.S. See also s. 120.80(16)(d), F.S.

<sup>38</sup> S. 120.541(4)(c), F.S., for amendment expressly authorized by s. 633.202, F.S. See also s. 120.80(17), F.S.

<sup>39</sup> S. 120.80(18), F.S.

<sup>40</sup> Ch. 2013-71, ss. 2, 4, Laws of Fla.; ch. 2012-3, s. 1(1), Laws of Fla.

<sup>41</sup> See s. 120.54(6), F.S.

<sup>42</sup> See "Final Bill Analysis for CS/CS/CS/HB 993 & HB 7239 (2011)," pp. 7-11, at

<https://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=h0993z1.RRS.DOCX&DocumentType=Analysis&BillNumber=0993&Session=2011> (last visited January 30, 2024).

<sup>43</sup> 33 U.S.C. Sec. 1251, et. seq

<sup>44</sup> See "Final Bill Analysis for CS/HB 7115," p.7, at

<https://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=h7115z.ANRS.DOCX&DocumentType=Analysis&BillNumber=7115&Session=2013> (last visited January 30, 2024).

<sup>45</sup> S. 366.04(8), F.S.

<sup>46</sup> S. 366.97, F.S.

are exempt from the SERC and rule ratification requirements.<sup>47</sup> For the 2023-2024 state fiscal year only, rules adopted by the PSC to implement ss. 350.113, 364.336, 366.14, 367.145, and 368.109, F.S.,<sup>48</sup> are exempted from the SERC and rule ratification requirements, but the exemption expires on July 1, 2024.<sup>49</sup> These sections provide the PSC's authority to administer and set rates for RAFs.

### **Effect of Proposed Changes**

The bill exempts rules adopted by the PSC to implement ss. 350.113, 364.336, 366.14, 367.145, and 368.109, F.S., from the legislative ratification requirement in s. 120.541(3), F.S. These sections provide the PSC's authority to administer and set rates for RAFs. Because the PSC's budget is set by the Legislature, the PSC will not be able to withdraw additional RAF revenue from the trust fund without Legislative approval.

The bill removes the current one-year exemption from the SERC requirement for such rules.

The bill provides an effective date of July 1, 2024.

#### **B. SECTION DIRECTORY:**

**Section 1:** Amends s. 120.80, F.S., relating to exceptions and special requirements for rulemaking.

**Section 2:** Provides an effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

The Public Service Commission indicates no fiscal impact.<sup>50</sup>

##### **2. Expenditures:**

None.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

##### **1. Revenues:**

None.

##### **2. Expenditures:**

None.

#### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

#### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

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<sup>47</sup> S. 120.80(13)(g)1., F.S.

<sup>48</sup> As discussed above, the PSC rules establishing RAFs implement ss. 350.113, 364.336, 366.14, 367.145, and 368.109, F.S.

<sup>49</sup> S. 120.80(13)(g)2., F.S. See ch. 2023-240, s. 51, Laws of Fla.

<sup>50</sup> PSC, "Agency Analysis," *supra* note 5 at p. 3.

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill exempts from the legislative rule ratification requirement in s. 120.541(3), F.S., rulemaking by the PSC under ss. 350.113, 364.336, 366.14, 367.145, and 368.109, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**