STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE FLORIDA ELECTRIC POWER COORDINATING GROUP, INC.,	)	
Petitioner,	)	
vs.	)	Case Nos. 01-4018
	)	01-4019
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	01-4020
	)	01-4021
	)	01-4257RU
Respondent.	)	

FINAL ORDER

These matters came before the undersigned after Respondent filed a Status Report on March 28, 2002, requesting that an order be entered dismissing the five petitions and closing these files. A Response in opposition to the request was filed by Petitioner on March 29, 2002. Further argument was filed by Respondent and Petitioner on April 5 and 15, 2002, respectively.

The procedural history of these cases is as follows. Respondent has issued a wastewater facility permit under Chapter 62-620, Florida Administrative Code, to Petitioner's members. Rule 62-620.610, Florida Administrative Code, sets forth 23 general conditions which apply to all wastewater facility permits. Those conditions are found in paragraphs (1)-(23) of the Rule and are repeated verbatim as general conditions in each member's permit. Paragraph (20) prescribes the

reporting requirements for each permittee for “any noncompliance which may endanger health or the environment.”

In November 2000, the Department issued a Notice of Minor Permit Revision (Notice) to all wastewater facility permittees in Florida, including Petitioner’s members. Among other things, the Notice advised the permittees that the Department was “revising [their] wastewater permit[s] to include instructions for reporting certain spills or unauthorized discharges”; that the “clarifying instructions are contained in paragraph b. of the enclosed permit revision”; and that “[t]he enclosed revision shall be attached to your existing Wastewater Permit.” Page 3 of the Notice contained a revised permit condition entitled “Minor Permit Revision for Reporting Noncompliance,” which tracked verbatim the existing language in paragraph (20) of the Rule. However, the Notice modified that general condition in each permit by renumbering subparagraph b. as subparagraph c. and adding a new subparagraph b. To this extent, the language in the Notice differed from the language found in paragraph (20) of the Rule.

In May 2001, Petitioner filed Petitions under Section 120.569, Florida Statutes, seeking rescission of the new language in the Notice. These cases were later referred to the Division of Administrative Hearings (DOAH) on October 17, 2001, and were assigned Case Nos. 01-4018 through 01-4021. In

addition, on October 30, 2001, Petitioner filed with DOAH a Petition under Section 120.56(4), Florida Statutes, contending that the language modifying the general condition in each permit constituted an unpromulgated rule in violation of Section 120.54(1)(a), Florida Statutes. That matter has been assigned Case No. 01-4257RU. All cases were consolidated by Order dated November 6, 2001. By agreement of the parties, the requirement that a final hearing in the rule challenge be held within 30 days was waived, and a consolidated final hearing in all cases was scheduled on December 14, 2001.

On November 29, 2001, Petitioner filed its Motion for Summary Final Order in Case No. 01-4257RU. On December 7, 2001, Respondent filed its Response to the Motion and a Motion for Final Order of Dismissal. On the same date, Respondent published its Notice of Proposed Rule Development to address the challenged agency statement, and a Notice of Proposed Rulemaking was filed with the Department of State on December 14, 2001. Publication of the latter Notice was made on December 21, 2001. Prior to the final hearing, the parties agreed that a hearing was unnecessary, and that Case No. 01-4257RU could be resolved on the basis of the papers filed by the parties.

Given Respondent’s publication of a proposed rule which addressed the challenged statement, on December 28, 2001, the undersigned entered an Order abating the cases pending the

outcome of the rulemaking process, and concluding that a ruling on the pending Motions was unnecessary. The Order also denied Petitioner's request for attorney's fees and costs on the ground that the request was premature, but "without prejudice to Petitioner renewing its request in the event the requirements of Section 120.56(4)(e) [were] not met." Finally, to ensure compliance with the requirements of the statute, the Order required that Respondent file a status report within 90 days advising the status of the rulemaking process.

On March 28, 2002, Respondent filed a Status Report advising that on the same date, new Rule 62-620.610(20), Florida Administrative Code, which addressed the agency statement, had been adopted. The new Rule became effective on April 17, 2002, or 20 days after filing with the Department of State. Because a rule addressing the agency statement has now been adopted, Respondent has asked that the pending cases be dismissed and an order entered closing the files.

In its Response to that filing, Petitioner generally contends that even though Respondent has proceeded expeditiously and in good faith to adopt a rule to address the challenged statement, the undersigned is still required to keep the cases open, conduct such further proceedings in Case No. 01-4257RU as are necessary to determine if the agency statement is a rule, and to then award Petitioner reasonable attorney's fees and

costs, if appropriate. It also contends that the doctrine of collateral legal consequences applies under the circumstances presented here, and that under relevant case law construing that doctrine, a mandatory award of attorney's fees under Section 120.595(4) is a collateral legal consequence that precludes dismissal of the underlying action for mootness. Underpinning both of these arguments is Petitioner's primary concern that "an agency can avoid attorney's fees after all of the legal work on an unpromulgated rule challenge case has been completed, merely by publishing a proposed rule." To this end, Petitioner has also filed a Motion for Reconsideration of Denial of Attorney's Fees.

Petitioner's challenge in Case No. 01-4257RU was filed under Section 120.56(4), which allows any person substantially affected by an agency's statement to seek an administrative determination that the statement violates Section 120.54(1)(a).

In Section 120.54(1)(a), the Legislature has expressed an intent that "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable." This legislative preference is reinforced because an administrative law judge is required, subject to the single exception cited in Section 120.595(4)(a), to award reasonable attorney's fees to the challenger upon the

entry of a final order concluding that all or part of an agency's statement violates Section 120.54(1)(a).

Former Section 120.535, Florida Statutes (1995), permitted persons to challenge agency statements as unpromulgated rules. That statute provided in part that "subsequent to a determination that an agency statement violates subsection (1)," an agency could still avoid costs and attorney's fees if the "agency publishe[d] proposed rules and proceed[ed] expeditiously and in good faith to adopt such rules under subsection (5)."

In 1996, the Legislature repealed Section 120.535, but incorporated into Section 120.54(1), Florida Statutes (Supp. 1996), those provisions requiring that each agency statement defined as a rule be adopted as a rule as soon as feasible and practicable. Also, the rule challenge provisions of Section 120.535 were transferred to Section 120.56(4), Florida Statutes (Supp. 1996), and provided in part that "prior to entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), if an agency publishes, pursuant to s. 120.54(3)(a), proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules," then the agency may rely upon the statement as a basis for agency action and avoid the consequences of an adverse ruling. Thus, after 1996, an agency was required to publish the statement

prior to any final disposition of the rule challenge in order to avoid the consequences of an adverse ruling.

In 1996, the Legislature also consolidated most attorney's fees provisions into a new Section 120.595, Florida Statutes (Supp. 1996). Among them was a new provision in Section 120.595(4) for the award of attorney's fees and costs in challenges to agency statements under Section 120.56(4). This provision enhanced the prior fees and costs provision in former Section 120.535(6), and apparently was "a direct result of the criticism of the former Section 120.535, which allowed an agency to avoid payment of attorney's fees and costs simply by initiating the rulemaking proceeding." Hopping and Wetherall, The Legislature Tweaks McDonald (Again): The New Restrictions on the Use of "Unadopted Rules" and "Incipient Policies" by Agencies in Florida's Administrative Procedure Act, 48 Fla. L. Rev. 135, 150 (Jan. 1996).

Here, Petitioner has received the result it requested in its Petition filed on October 30, 2001 - - that Respondent proceed to adopt a rule addressing the statements made in the Notice. Indeed, a rule was adopted on March 28, 2002, and it became effective on April 17, 2002.

In reading Sections 120.54 and 120.56(4) in pari materia, it is apparent that the Legislature's preference for rulemaking is satisfied if the agency publishes a proposed rule pursuant to

Section 120.56(4)(e) and proceeds to expeditiously and in good faith adopt the rule.

While Petitioner seeks to have Case No. 01-4257RU remain open and a "label" placed on Respondent's statement (so that it can be awarded attorney's fees), the label is of no legal consequence in light of Respondent's compliance with Section 120.56(4)(e). That is to say, Respondent has now published a proposed rule and proceeded expeditiously and in good faith to adopt the rule. As a matter of law, then, Petitioner is entitled to no further relief. Therefore, dismissal of the Petitions and closure of the files is the appropriate course of action. Savona v. Agency for Health Care Admin., 717 So. 2d 1120 (Fla. 1st DCA 1998); Osceola Fish Farmers Assoc., Inc. v. S. Fla. Water Mgmt. Dist., Case No. 00-3615RU (DOAH Final Order Denying Amended Petition December 10, 2001); Johnson v. Agency for Health Care Admin., Case No. 98-3419RU, 1999 WL 1483785 (DOAH Final Order of Dismissal May 18, 1999). This same conclusion has been reached by several legal commentators who analyzed the 1996 revisions to the Administrative Procedure Act. See Hopping and Wetherall, 48 Fla. L. Rev. at 150 ("The agency can still avoid payment of attorneys' fees and costs by initiating the rulemaking process after a challenge to its policy has been filed pursuant to the new section 120.56(4), but before the Administrative Law Judge issues a final order on the

challenge. Once rulemaking is initiated, the challenge is essentially moot."); Hopping, Sellers, and Wetherall, Rulemaking Reforms and Nonrule Policies: A "Catch-22" for State Agencies, 71 Fla. B. J. 20, 25 (Mar. 1997)("The agencies can still avoid payment of fees and costs by initiating the rulemaking process after a challenge to its policy has been filed pursuant to new s. 120.56(4), but before the administrative law judge issues a final order on the challenge.")[1]

Petitioner also cites the doctrine of collateral legal consequences as a basis for denying the relief requested by Respondent. Under that doctrine, an otherwise moot case will not be dismissed if collateral legal consequences that affect the rights of a party flow from the issue to be determined. Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992). Relying upon that doctrine, Petitioner contends that the "mandatory" attorney's fees provision in Section 120.595(4) is a collateral legal consequence that precludes dismissal of these matters on grounds of mootness.

For the doctrine to apply, Section 120.595(4) would have to provide for a mandatory award of attorney's fees whenever an action under Section 120.56(4) is filed, and the agency then resorts to rulemaking to address that challenge. Under the statutory scheme in place, however, the Legislature has specifically provided that there is no mandatory right to

attorney's fees under Section 120.595(4) unless there is an "entry of a final order that all or part of an agency statement violates s. 120.54(1)(a)." See Section 120.595(4)(a), Florida Statutes. Otherwise, as a matter of law, an award of fees and costs is not warranted. Because there has been no entry of a final order making such an adjudication, nor is one required in light of Respondent's adoption of a rule addressing the challenged statement, the attorney's fees provision does not come into play. Under these circumstances, there is no collateral legal consequence, and thus the doctrine does not apply. It is, therefore,

ORDERED that the Petitions filed in these cases are dismissed, and Case Nos. 01-4018, 01-4019, 01-4020, 01-4021, and 01-4257RU are hereby closed.

DONE AND ORDERED this 22nd day of April, 2002, in Tallahassee, Leon County, Florida.

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DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of April, 2002.

ENDNOTE

1/ In reaching this conclusion, the undersigned has again considered the case of Central States Health and Life Co. of Omaha v. Dep't of Insur. and Treas., 21 F.A.L.R. 2460 (DOAH 1998), in which the agency apparently failed to proceed expeditiously and in good faith to adopt a rule within 180 days after initiating rulemaking. Even if it had done so, the Final Order supports the view that the agency would still be liable for attorney's fees and costs. Nothwithstanding this contrary administrative ruling, the undersigned finds the cases and analysis cited in the main text of this Order to be more persuasive. Petitioner has also cited the case of Chancy v. Dep't of Highway Safety and Motor Vehicles, Case No. 97-1627RU (DOAH Final Order July 16, 1997). While the case does not address the issue of whether attorney's fees are mandatory under the circumstances presented here, to the extent it may arguably contain language favorable to Petitioner's position, the case is not deemed to be persuasive.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.