

Florida Commission on Hurricane Loss Projection Methodology

October 23, 2006

Conference Call Meeting Summary¹

1. Tracy Allen, Attorney for the Commission, discussed the following comments received from the Joint Administrative Procedures Committee on proposed Rule 19-16.001:
 - a. “Rule 19-16.001 reiterates or paraphrases much of the statute creating the Commission and establishing its powers and duties. These provisions are not properly included in a rule. See ss. 11.60(2)(b) and 120.545(1)(c), F.S.”
 - b. “Is it the Commission’s contention that these standards meet the definition of ‘rule’ in s. 120.52(15), F.S.? If not, can you identify those sections of the Report that the Commission believes do constitute a rule and explain your rationale for this conclusion?”
 - c. “In addition, s. 627.0628, F.S., is cited as both rulemaking authority and the law implemented for this rule. However, I have been unable to locate any language authorizing the Florida Commission on Hurricane Loss Projection Methodology to adopt rules.”
 - d. “Please also be advised that if the Commission does have rulemaking authority, Department of State Rule 1S-1.001, FAC, requires that Commission rules be identified by a distinctive number or letter designation.”

Tracy informed the Commission that the proposed Rule would be assigned a new Rule number, 19C-1.001, and that a Notice of Correction would need to be filed.

2. Anne Longman, Commission outside legal counsel with Lewis, Longman & Walker, P.A., discussed the options available to the Commission and the associated advantages and disadvantages for each option.

Option 1: Adopt the Proposed Rule as currently formulated.

Advantages

- a. Complies with SBA Trustee’s directive to proceed expeditiously with rulemaking.
- b. Even if challenged, the Commission’s work can continue unimpeded since the Report of Activities is incorporated as a reference document and not treated as a rule.

Disadvantages

- a. The Joint Administrative Procedures Committee is likely to file an objection based upon lack of express statutory authority. This would result in a hearing before the Joint Administrative Procedures Committee.
- b. There will be industry challenges. A lawsuit has already been filed by the Florida Insurance Council and the National Association of Mutual Insurance Companies.
- c. The Office of Insurance Regulation is likely to challenge based upon the treatment of the Report of Activities as a reference document.

¹ This document is a summary of the official minutes for the Florida Commission on Hurricane Loss Projection Methodology. The official minutes consist of the complete recorded transcript. The content of this summary has not been taken from the official transcript and should not be relied upon for any official purpose.

d. Impact of challenges:

1. There will be no impact on the Report of Activities if the challenge is based upon an assertion that the Report of Activities is an unadopted rule. The Commission could begin rulemaking, which is a defense to such a challenge, and the Commission or other interested parties would have time to seek Legislative clarification.
2. There will be no impact on the Report of Activities if the rule, as proposed, is challenged. The rule may not be adopted or used until the Administrative Law Judge has rendered a decision upholding the rule. However, this will not preclude the use of the Report of Activities to evaluate models as the Report of Activities is an incorporated reference document and not a rule.
3. There is a potential for an award of costs and attorneys' fees if the rule is found invalid, unless the Commission demonstrates its actions were substantially justified or special circumstances make such an award unfair. A fee award could be made against the Commission if it does not prevail in the litigation. The fee award would be capped at \$15,000.

Option 2: Withdraw the Proposed Rule

Advantages

- a. Gives the Legislature a chance to act to clarify statutory authority.
- b. Renders the current lawsuit moot.

Disadvantages

- a. Potential challenge to the use of the Report of Activities as an unadopted rule under §120.56(4), F.S.
 1. In order to prevail, the challenger will have to show that the Report of Activities is a rule as that term is defined by law and applied by the courts and that the challenger is substantially affected by such use of the Report of Activities by the Commission.
 2. If found to be an unadopted rule, the Commission may raise the defense that rulemaking is not feasible and practicable under §120.54(1)(a), F.S.
 3. If the Report of Activities is found to be an unadopted rule in violation of §120.54(1)(a), F.S., the "agency shall immediately discontinue all reliance upon" the statement or any substantially similar statement. However, the Commission could immediately publish proposed rules again, and then could rely on the new Report of Activities as a basis for its action pursuant to §120.54(4)(e), F.S., if it meets the standards of §120.57(1)(e), F.S.
 4. If the Report of Activities is found to be a rule in violation of §120.54(1), F.S., there is a potential for award of costs and attorneys' fees.

Option 3: File a Notice of Change to convert the Report of Activities from an incorporated reference document into rule format.

Advantages

- a. Could satisfy the Office of Insurance Regulation's objection as to the form of the rule.

Disadvantages

- a. Office of Insurance Regulation challenge likely to the contents of the Report of Activities.

- b. Industry challenge likely based upon lack of express statutory authority for rulemaking.
 - c. Objection by the Joint Administrative Procedures Committee based upon lack of express statutory authority for rulemaking.
3. After much discussion on each option with clarification provided by both attorneys, the Commission voted to withdraw the proposed Rule by a vote of 5 to 3.

Commission Members Participating: Steve Burgess, Randy Dumm, Howard Eagelfeld, Sneh Gulati, Larry Johnson, Steve Ludwig, Jai Navlakha, and Jack Nicholson

Commission Members Absent: Craig Fugate, Bob Ricker, and Hugh Willoughby