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May 3, 2005

BY HAND DELIVERY

Blanca Bayo, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

COMMISSION
CLERK
MAY - 3 PM 4:08

Re: Petition of Florida Power & Light Company for a Rate Increase, Docket No. 050045-EI

Dear Ms. Bayo:

Enclosed for filing are the original and fifteen copies of the Florida Retail Federation's Response to FPL's Motion to Dismiss in the above-styled docket. Also enclosed is a 3.5" diskette with the FRF's Response in WORD format. I will appreciate your confirming receipt of this filing by stamping the attached copy thereof and returning same to my attention.


As always, my thanks to you and to your professional Staff for their kind and courteous assistance. If you have any questions, please give me a call at (850)681-0311.

Cordially yours,

Robert Scheffel Wright
Robert Scheffel Wright

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- COM 5 _____
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DOCUMENT NUMBER-DATE
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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Rate Increase by)	DOCKET NO. 050045-EI
Florida Power & Light Company)	
)	
In Re: 2005 Comprehensive)	DOCKET NO. 050188-EI
Depreciation Studies by)	
Florida Power & Light Company)	FILED: May 3, 2005
)	

THE FLORIDA RETAIL FEDERATION'S RESPONSE TO
FPL'S MOTION TO DISMISS

The Florida Retail Federation ("FRF"), pursuant to Rule 28-106.204(1), Florida Administrative Code ("F.A.C."), hereby files its response to Florida Power & Light Company's ("FPL") Motion to Dismiss the FRF's Petition for General Rate Case and Request for Hearing, by which the FRF asked the Commission to conduct a general investigation of the appropriate rates to be charged by FPL upon the expiration of the current Stipulation and Settlement entered into in 2002,¹ and to conduct a hearing in that case in accordance with Chapters 120 and 366, Florida Statutes.² In summary, the FRF clearly has standing to intervene in the above-styled docket, and the requirements for standing to initiate a proceeding are not different from the standing requirements for intervention. Even if FPL had not filed its general rate case,

¹ In Re: Review of the Retail Rates of Florida Power & Light Company, Docket No. 001148-EI, "Order Approving Stipulation, Authorizing Midcourse Correction, and Requiring Rate Reductions," Order No. PSC-02-0501-AS-EI (Fla. Pub. Serv. Comm'n, April 11, 2002) (hereinafter the "2002 FPL Stipulation," the "2002 Stipulation," or "Stipulation").

² All references herein to the Florida Statutes are to the 2004 edition thereof.

the FRF's petition would have been timely and well-taken because of the imminent expiration of the 2002 Stipulation. **In the past,** the PSC has initiated general rate proceedings for public utilities upon "complaint" by customers, and, in this context, proceedings upon complaint and upon petition are materially similar. Finally, applicable pronouncements of the Florida Supreme Court indicate that the FRF would, at a minimum, be entitled to petition for further rate relief based upon the record developed herein if this case were settled non-unanimously, so administrative efficiency dictates that the FRF's petition should be granted now to avoid delays later.

A. For the Same Reasons That the FRF Has Standing To Intervene, The FRF Has Standing To Initiate a General Rate Case for FPL.

The FRF clearly has standing to intervene in this general rate proceeding because the FRF represents the interests of several thousand of FPL's commercial customers, including some of the largest customers that FPL serves. Even FPL does not challenge the FRF's right to intervene as a full party in this docket. FPL, however, asserts that a party is only entitled to a hearing if an agency's proposed action will result in injury in fact and such injury is of the type the statute protects. This is not entirely accurate: specifically, Section 120.569, Florida Statutes, applies "in all proceedings in which the substantial interests of a party are determined by an agency." Here, regardless of the outcome, the interests of the Florida Retail Federation's members will be determined, whether the Commission

grants a rate increase as requested by FPL, grants a rate decrease as may be requested and advocated by some consumer parties, or allows the current rates to remain in effect upon expiration of the 2002 Stipulation.

Similarly, it is of no consequence that the PSC has not yet expressed an intended course of action in this case. Rule 28-106.201, F.A.C., provides that a petition is the appropriate vehicle by which a party may ask an agency to conduct evidentiary proceedings where disputed issues of material fact are involved. Clearly, the proper rates to be charged by FPL upon expiration of the 2002 Stipulation is a matter that will determine the substantial interests of the FRF's members, and clearly there will be a host of disputed issues of material fact involved in the PSC's determination as to what FPL's future rates should be.

The crux of the matter is this: that the standards for standing to petition to initiate a proceeding are the same as those for standing to intervene in a case already begun, namely, that the petitioner-initiator must demonstrate that its interests are subject to being determined by the agency (here the PSC) and that the interests that it seeks to protect are within the zone of interests protected under applicable statutes and rules. See In Re: Review of Tampa Electric Company's 2004-2008 Waterborne Transportation Contract with TECO Transport and Associated Benchmark, Docket No. 031033-EI, "Order Granting Intervention", Order No. PSC-04-0025-PCO-EI (Fla. Pub. Serv. Comm'n, Jan. 12, 2004) (applying Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981) to determine

intervenor's standing); see also Ameristeel Corp. v. Clark, 691 So. 2d 473, 477 (applying Agrico test to request to intervene.) Indeed, the now-standard Agrico standing test was developed when challengers to an environmental permit petitioned the Department of Environmental Regulation to deny the permit. Agrico, 406 So. 2d at 479. Additionally, the PSC's own Proposed Agency Action procedures and orders provide for "any person whose substantial interests are affected by the action proposed" to initiate formal proceedings by filing a petition. See, e.g., In Re: Petition for Approval of New Environmental Program for Cost Recovery Through Environmental Cost Recovery Clause, by Tampa Electric Company, Docket No. 041300-EI, Order No. PSC-05-0164-PAA-EI at 5 (Fla. Pub. Serv. Comm'n, February 10, 2005). It is clear that the Florida Retail Federation satisfies the requirements for standing to intervene, and accordingly, it has standing to initiate the general rate case as requested in its petition.

To see this more clearly, consider the hypothetical scenario wherein all of today's facts were the same except that FPL had (by hypothesis) not petitioned for a rate increase. In this instance, at least, where 20 years have elapsed since the PSC has actually made substantive decisions determining FPL's rates, and where the 3-year-old Stipulation is about to expire, the FRF and other similarly situated customers and customer groups have standing to ask the PSC to determine the fair, just, and reasonable rates for FPL upon expiration of the Stipulation. Therefore, FPL's motion to dismiss should be denied.

Moreover, albeit dicta, the Florida Supreme Court has clearly

articulated a view of the statutory scheme in which non-signatories to rate case settlement agreements cannot be precluded from petitioning for rate relief beyond that reached through a settlement by some parties.³ The FRF strongly believes that this establishes standing for the FRF to request a general rate investigation and hearing, and it should not and does not matter when the FRF makes its request: the substantial interests of the FRF's many members are subject to determination by the PSC, and those interests are squarely within the scope of interests - the right to fair, just, and reasonable electric rates - to be protected by Chapter 366, Florida Statutes.

B. Rate Proceedings "Upon Complaint" and "Upon Request Made" Are Materially Similar, and the Imminent Expiration of the 2002 Stipulation Establishes Adequate Grounds for Proceeding With the FRF's Requested Case Here.

The Florida Retail Federation cited as statutory authority for its Petition to Intervene, Petition to Conduct General Rate Case, and Request for Hearing, Sections 120.569, 120.57(1), 366.04(1), 366.05(1), 366.06(1)&(2), and 366.07, Florida Statutes. Section 366.06(2) provides, in pertinent part, that the Commission may consider "upon request made" whether the rates charged by a public utility are fair, just, and reasonable; there is no limitation on who may make such a request. Similarly, Section 366.07 provides that the Commission is to conduct hearings on utility's rates "either upon its own motion or upon complaint."⁴

³ South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1214 (Fla. 2004).

⁴ The FRF cheerfully concedes that it did not style its initial

Both of these sections provide ample basis for the FRF's standing to request a hearing on PEF's rates.

The PSC has, on occasion, initiated general rate cases for public utilities upon complaint by individual customers. In Re: Request by Occidental Chemical Corporation for Reduction of Retail Electric Service Rates Charged by Florida Power Corporation, 88 FPSC 1:89.⁵ The FRF asserts that, at least in the present circumstances, i.e., where it has been more than 20 years since the PSC made substantive decisions determining FPL's rates and where the 3-year-old Stipulation is expiring, proceedings "upon complaint" or "upon request made" are materially similar: both ask the PSC to conduct formal proceedings, and to make decisions involving disputed issues of material fact, to ensure that a public utility's rates are fair, just, and reasonable. While a complaint will generally articulate more definite grounds for the requested relief, e.g., Occidental Chemical's request for \$362.6 million in permanent annual rate reductions, 88 FPSC 1:89, the FRF believes that the fact of the expiring Stipulation, combined with the extraordinarily long time since the PSC last made substantive decisions determining FPL's rates, establishes more than adequate grounds for the FRF's Petition to Initiate General Rate Case.

pleading as a "complaint," because at that time, and even now, the record in this case has not been developed to the point where the FRF can state definitively what specific rates it wants the PSC to set for FPL. Of course, the FRF fully expects to be in a position to declare its positions on these issues by the scheduled start of the hearing.

⁵ See also In Re: Complaint by Coastal Lumber Company Against Talquin Electric Cooperative, Inc. Regarding Rate Structure, PSC Docket No. 921128-EC (Order No. PSC-93-1784-AS-EC, Fla. Pub. Serv. Comm'n, December 13, 1993).

C. Granting the FRF's Petition for General Rate Case Now Is Consistent With Both Administrative Efficiency and the Florida Supreme Court's Pronouncements.

FPL also raises a "ripeness" issue, asserting that the FRF has made its hearing request "prematurely," FPL's Motion at 4, and immediately follows this assertion with an argument that the FRF's petition is contrary to administrative efficiency. Id. The FRF respectfully but strongly disagrees. In the first instance, for the reasons set forth above, the FRF does not agree that its Petition for General Rate Case and request for hearing are premature.

Moreover, administrative efficiency would be best served by granting the FRF's request now. It is clear that, in the un hoped-for event that the case were to be settled by other parties in a manner that the FRF believes unfair or unreasonable, the FRF may petition for a hearing and use the record developed in this proceeding up to the point of the settlement. Albeit technically dicta, the Florida Supreme Court declared that, in the scenario contemplated above, an identically situated party "should not be precluded or estopped from seeking a reduction in the rates provided for in the settlement agreement," and that such party "cannot be precluded by [the settlement agreement's] terms from petitioning for" further rate relief. South Florida Hospital, 887 So. 2d at 1214 (emphasis supplied). Perhaps more significantly, the Court went on to declare that the Court "resolve[s] that in any such proceeding, [the non-settling party] and the PSC may presumptively access and rely on the evidence and testimony compiled in the proceeding below," subject to confidentiality

limitations. Id. (emphasis supplied).

Here, in the unlikely and unhopd-for event that other parties settle on terms that the FRF believes unfair or unreasonable, the FRF would be entitled to petition for further rate relief and to presumptively rely upon the record developed up to the point that the other parties settled. Thus, the FRF would, in all likelihood, be ready to proceed to hearing and would also, in all likelihood, have articulated its positions as to what further relief (i.e., relief different from that hypothetically provided by a non-unanimous settlement) it believes warranted by the record. In other words, the hearing would already be scheduled and the FRF (and potentially other parties) would be ready to proceed consistently with the Court's pronouncements in South Florida Hospital. This is arguably the epitome of administrative efficiency: the issues are clearly defined, the parties are ready, and the case proceeds to hearing as already scheduled by the Commission. On the other hand, denying the FRF's petition now would likely leave the FRF, and any similarly situated parties, facing a delay, potentially of several months, if that unhopd-for event were to occur. This makes no sense: if, as the Florida Supreme Court has stated, the FRF is entitled to petition for additional rate relief based on the record already developed, then the hearing should go forward as soon as possible in any event. Keeping the hearing on the schedule established by the Order Establishing Procedure, unless the case is settled by all parties, will accomplish this goal most efficiently.

Moreover, if, as the FRF hopes, the case is settled with all

parties in agreement, then the only paper that would have been filed to protect the FRF's interests would have been the FRF's Petition to Conduct General Rate Case. The FRF's request imposes no complication on any part of the case: if the PSC grants the FRF's request, it will simply exist within Docket No. 050045-EI to become effective only in the event that the case evolves contrary to the FRF's hopes. In that unhoped-for event, the case will be in a posture to proceed expeditiously, without further delay and without further motion practice. This is administrative efficiency. It is FPL's objections that are unnecessarily adding to the document index listing in this docket.

D. Parties Whose Substantial Interests Are Subject To Determination By Agency Action Are Entitled To a Hearing Where the Agency's Decisions Involve Disputed Issues of Material Fact.

FPL asserts that the FRF has no "automatic right to a hearing pursuant to Chapter 366." FPL's Motion at 3. The FRF agrees with this simple assertion, which is why the FRF requested a hearing rather than demanding one. However, it is also clear that, under Florida administrative law, where a party's interests are subject to determination by agency action and where the agency's decisions involve disputed issues of material fact, a right to a hearing attaches. This principle is further bolstered here by the Florida Supreme Court's statements in South Florida Hospital.

CONCLUSION

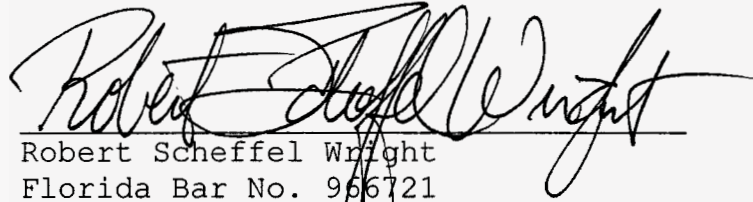
The Florida Retail Federation is entitled to petition for a general rate case and a hearing pursuant to Sections 366.06(2) and 366.07, Florida Statutes. These rights have at least been

strongly supported by the Florida Supreme Court in South Florida Hospital. Moreover, administrative efficiency will be best served by allowing the FRF's Petition for General Rate Case to go forward, within the FPL-initiated general rate case docket and on the same schedule established by the Commission for that docket. Accordingly, FPL's Motion to Dismiss should be denied.

RELIEF REQUESTED

WHEREFORE, for the reasons set forth above, the Florida Retail Federation respectfully requests that the Florida Public Service Commission **DENY** Florida Power & Light Company's Motion to Dismiss the FRF's Petition To Conduct a General Rate Case and Request for Hearing.

Respectfully submitted this 3rd day of May, 2005.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail, hand delivery (*) or facsimile and U.S. Mail (**) on this 3rd day of May, 2005, on the following:

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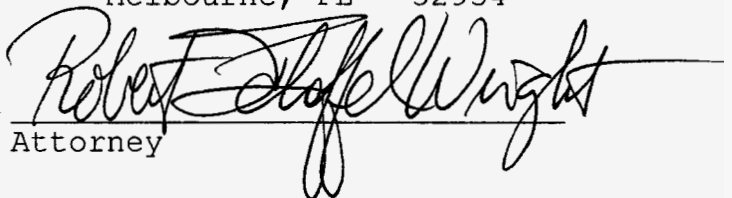
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