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Sent: Thursday, May 19, 2005 4:19 PM
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Subject: Electronic Filing for Docket No. 050045-EI / Docket No. 050188-EI - Florida Power & Light Company's Motion to Dismiss the South Florida Hospital and Healthcare Association's Petition to Conduct General Rate Case and Request for Hearing

Attachments: Motion to Dismiss SFHHA's Petition to Conduct General Rate Case and Request for Hearing.doc



Motion to
Dismiss SFHHA's Pe

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 050045-EI / Docket No. 050188-EI

In re: Petition for rate increase by Florida Power & Light Company In re: 2005 Comprehensive Depreciation Studies by Florida Power & Light Company

c. Document being filed on behalf of Florida Power & Light Company.

d. There are a total of 6 pages.

e. The document attached for electronic filing is Florida Power & Light Company's Motion to Dismiss the South Florida Hospital and Healthcare Association's Petition to Conduct General Rate Case and Request for Hearing

(See attached file: Motion to Dismiss SFHHA's Petition to Conduct General Rate Case and Request for Hearing.doc)

Thank you for your attention and cooperation to this request.

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OTH Kim P.

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by)
Florida Power & Light Company.)
_____)
In re: 2005 comprehensive depreciation)
study by Florida Power & Light Company.)
_____)

Docket No: 050045-EI

Docket No. 050188-EI

Filed: May 19, 2005

**FLORIDA POWER & LIGHT COMPANY'S
MOTION TO DISMISS THE SOUTH FLORIDA HOSPITAL AND HEALTHCARE
ASSOCIATION'S PETITION TO CONDUCT GENERAL RATE CASE
AND REQUEST FOR HEARING**

NOW, BEFORE THIS COMMISSION, through undersigned counsel, comes Florida Power & Light Company ("FPL" or the "Company"), and pursuant to Rule 28-106.204(2), Florida Administrative Code, moves to dismiss the Petition to Conduct General Rate Case and Request for Hearing filed May 6, 2005 by the South Florida Hospital and Healthcare Association ("SFHHA"), and in support states:

1. On May 6, 2005, SFHHA filed a Petition to Intervene, Petition to Conduct General Rate Case, and Request for Hearing ("Petition and Request"). In support of its petition for a rate case and request for hearing, SFHHA stated as follows:

SFHHA further petitions the Florida Public Service Commission ('Commission') to conduct a general investigation (a general rate case) of the rates to be charged by FPL upon the expiration of the Docket No. 001148-EI Stipulation and Settlement, and to conduct a hearing in that case in accordance with Chapters 120 and 366, Florida Statutes. The requested hearing may be the same hearing as is conducted in this docket pursuant to FPL's petition for a rate increase; if such is not the case, however, then, consistent with the Florida Supreme Court's opinion in *South Florida Hospital & Healthcare Ass'n v. Jaber*, 887 So. 2d 12310 [sic], 1214 (Fla. 2004), a hearing should be held in approximately the same time frame to allow SFHHA and all other parties to 'access and rely on the evidence and testimony' that has been filed and that will be filed in this Docket. *See South*

Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1214 (Fla. 2004). SFHHA seeks a hearing whether separately or as consolidated, as the Florida Supreme Court in the referenced case stated was necessary.

See Petition and Request, p. 1.

2. SFHHA's petition for a general rate case and request for hearing are legally insufficient and should be dismissed. A motion to dismiss raises as a question of law, whether the petition alleges sufficient facts to state a cause of action. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard for disposing of motions to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. See id. When making this determination, the tribunal must consider only the petition and reasonable inferences drawn from the petition must be made in favor of the petitioner. See id.

3. A party is entitled to a hearing under sections 120.569 and 120.57 only if an agency's proposed action will result in injury-in-fact to that party and if the injury is of a type that the statute authorizing the agency action is designed to prevent. See, e.g., Fairbanks, Inc. v. State, Dep't of Transp., 635 So. 2d 58, 59 (Fla. 1st DCA 1994), review denied, 639 So. 2d 977 (Fla. 1994) ("To establish entitlement to a section 120.57 formal hearing, one must show that its 'substantial interests will be affected by proposed agency action.'"); Univ. of S. Fla. College of Nursing v. State Dep't of Health, 812 So. 2d 572, 574 (Fla. 2d DCA 2002) ("Section 120.57(1), a provision of Florida's Administrative Procedure Act, provides that a party whose 'substantial interests' are determined in an agency proceeding is entitled to have disputed issues of material fact resolved in a formal evidentiary hearing. To qualify as having a substantial interest, one must show that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing and that this injury is of the type or nature which the proceeding is designed to protect.")

4. While SFHHA's Petition and Request acknowledges the "substantial interests" test, it makes no allegations suggesting that SFHHA suffered or is in immediate danger of suffering any injury at all, much less an alleged injury that is cognizable by the statutes that govern this proceeding. Rather, SFHHA observed only that its member "[i]nstitutions supporting this filing have substantial interests that are subject to determination in this docket, including a hearing as to the fair, just, and reasonable rates to be charged by FPL upon the expiration of the Settlement Rates" See Petition and Request, ¶ 5. These observations are made at a time when the Commission has expressed no intended course, and proposed no outcome, for FPL's rate case. Nor does the SFHHA Petition and Request seek a particular outcome or provide any basis for the Commission to act. Thus, at this time, SFHHA has no legitimate claim to an "injury-in-fact" that entitles it to a hearing.

5. Further, there is no automatic right to a hearing pursuant to Chapter 366. Rather, the Commission decides pursuant to Section 366.06(2), Florida Statutes, whether a hearing is warranted. SFHHA's suggestion that it is entitled to a hearing is unsupported by Chapter 366 and the facts as alleged by SFHHA.

6. South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210 (Fla. 2004), does not mean that SFHHA's Petition to Conduct a General Rate Case and Request for a Hearing would secure for SFHHA any additional rights in this Docket that SFHHA, otherwise, would not have. The Florida Supreme Court did not find that SFHHA had failed in its request because it failed to ask for a hearing at the outset. See South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210 (Fla. 2004). Rather, it found that the SFHHA was not prejudiced because it could always petition the Commission to find that FPL's rates were unjust and unreasonable.

See id. at 1214; see also Order No. PSC-01-1930-PCO-EI, Docket Nos. 001148-EI, 010944-EI, at 9 (issued Sept. 25, 2001).

7. Indeed, SFHHA's Petition to Conduct a General Rate Case and Request for a Hearing is "a request for a rate proceeding ... that [has] already begun." See South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1213-14 (Fla. 2004). FPL has already initiated a general rate case and the Commission has already scheduled a formal hearing in this Docket. Therefore, SFHHA's Petition and Request unnecessarily complicates this proceeding. FPL has requested rate relief and SFHHA has whatever rights it has pursuant to Chapters 120 and 366, but no more. SFHHA cannot create rights in itself by prematurely requesting a hearing. SFHHA's Petition and Request defeats the purpose of the streamlined administrative process and results in administrative confusion, not administrative efficiency.

WHEREFORE, FPL respectfully requests that the Commission dismiss SFHHA's Petition to Conduct General Rate Case and Request for Hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and by United States Mail this 19th day of May, 2005, to the following:

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