BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season that exceed storm reserve balance, by Florida Power & Light Company.	DOCKET NO. 041291-EI ORDER NO. PSC-05-0187-PCO-EI ISSUED: February 17, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

ORDER DENYING MOTIONS TO DISMISS/STRIKE AND GRANTING PETITION FOR IMPLEMENTATION OF STORM COST RECOVERY SURCHARGE SUBJECT TO REFUND

BY THE COMMISSION:

I. CASE BACKGROUND

On November 4, 2004, Florida Power & Light Company (FPL) filed a petition seeking authority to recover prudently incurred restoration costs, in excess of its storm reserve balance, related to the hurricanes that struck its service territory in 2004 (Storm Cost Recovery Petition). In its petition, FPL asserts that as a result of Hurricanes Charley, Frances, and Jeanne, FPL incurred extraordinary storm-related costs of approximately $710 million, net of insurance proceeds, which will result in a negative balance of approximately $354 million in its storm reserve fund at the end of December 2004. By its petition, FPL proposes to initiate recovery of this estimated deficit through a monthly surcharge to apply to customer bills based on a 24 month recovery period commencing January 1, 2005.

On November 17, 2004, the Office of Public Counsel (OPC) and the Florida Industrial Power Users Group (FIPUG) (collectively, Joint Movants) filed a joint motion to dismiss FPL's Storm Cost Recovery Petition.[1] FPL filed a response to the joint motion on November 24, 2004.

[1] OPC's intervention in this docket was acknowledged in Order No. PSC-04-1171-PCO-EI, issued November 24, 2004. FIPUG was granted intervenor status in this docket by Order No. PSC-04-1207-PCO-EI, issued December 7, 2004.

By Order No. PSC-04-1150-PCO-EI, issued November 18, 2004, a hearing schedule and procedures were established to govern the proceeding on FPL's Storm Cost Recovery Petition. By that Order, a formal administrative hearing was set for April 20-22, 2005.

On November 19, 2004, FPL filed a petition in this docket seeking authority to implement its proposed monthly surcharge effective January 1, 2005, or as soon as practicable, subject to refund (Preliminary Surcharge Petition). Along with this petition, FPL filed proposed Original Tariff Sheet No. 8.033 reflecting its proposed surcharge by rate class. On December 1, 2004, OPC and FIPUG filed a joint response to FPL's Preliminary Surcharge Petition, asking that it be "denied and/or dismissed." Because this joint response sought affirmative relief by asking the Commission to deny or dismiss the Preliminary Surcharge Petition, FPL filed a response to the joint response on December 3, 2004. FPL treats the joint response as a motion to strike and asks that the Commission deny Joint Movants' request to strike its Preliminary Surcharge Petition, or, alternatively, to accept its Preliminary Surcharge Petition as an amendment to the Storm Cost Recovery Petition.

At our January 4, 2005, Agenda Conference, we heard oral argument on the joint motion to dismiss FPL's Storm Cost Recovery Petition and the joint response to FPL's Preliminary Surcharge Petition. By vote at that Agenda Conference, we denied the joint motion to dismiss FPL's Storm Cost Recovery Petition for the reasons set forth in Section II of this order. In light of arguments questioning our authority to approve FPL's Preliminary Surcharge Petition, which were presented by OPC, FIPUG, and counsel for two FPL residential customers[2] for the first time during oral argument, we deferred our vote on the joint response to FPL's Preliminary Surcharge Petition and took no action on FPL's Preliminary Surcharge Petition. We requested that the parties file legal memoranda addressing the question of our authority by 2:00 p.m., Friday, January 7, 2005, and instructed our staff to bring a recommendation on this question to our January 18, 2005, Agenda Conference.

FPL timely filed a memorandum of law addressing the Commission's authority. OPC and FIPUG also timely filed a joint memorandum of law addressing the Commission's authority to approve FPL's Preliminary Surcharge Petition. The two FPL residential customers adopted the arguments in OPC and FIPUG's joint memorandum. At our January 18, 2005, Agenda Conference, we considered our staff's recommendation on this matter and heard oral argument concerning our authority. As set forth in Section III of this order, we deny the request for relief contained in the joint response to FPL's Preliminary Surcharge Petition and find that we have authority to grant that petition. In addition, as set forth in Section IV of this order, we grant FPL's Preliminary Surcharge Petition.

We have jurisdiction over this matter pursuant to Chapters 120 and 366, Florida Statutes.

---

[2] Thomas P. and Genevieve E. Twomey filed a petition to intervene on December 30, 2004.

II. JOINT MOTION TO DISMISS FPL'S STORM COST RECOVERY PETITION

OPC and FIPUG's Arguments

In their motion, Joint Movants contend that FPL's Storm Cost Recovery Petition should be dismissed because it fails to state a claim upon which relief may be granted. Joint Movants state that FPL has failed to plead or offer to prove that its storm-related expenses in excess of its storm reserve fund have caused it to earn less than a fair rate of return or its approved earnings.

Joint Movants note that this Commission established a storm reserve fund for FPL through Order No. PSC-93-0918-FOF-EI, issued June 17, 1993, in Docket No. 930405-EI. Joint Movants state that in that order, the Commission acknowledged that hurricane-related expenses were included in base rates and declined to create a 100% pass-through mechanism for recovery of such expenses. They further state that the Commission noted that a 100% pass-through mechanism would effectively transfer all risk associated with storm loss directly to ratepayers and would insulate the utility from that risk. Joint Movants assert that the Commission also noted that FPL's proposal at that time did not take into account the utility's earnings or achieved rate of return. They contend that FPL, by the surcharge proposed in its Storm Cost Recovery Petition, is essentially asking the Commission to create the same type of pass-through mechanism that was rejected in Order No. PSC-93-0918-FOF-EI.

Joint Movants cite the provisions of Rule 25-6.0143, Florida Administrative Code, which address the treatment of actual expenses from storm damage that exceed the storm reserve fund. In particular, Joint Movants note that the rule states that the balance in the storm reserve fund shall be evaluated at the time of a rate proceeding and adjusted as necessary, but permits a utility to petition this Commission for a change in the provision level and accrual rate outside a rate proceeding. They argue that because storm damage expenses are part of FPL's base rates, FPL's earnings must be taken into account when evaluating the appropriate amount of storm-related costs, if any, to pass on to customers.

Joint Movants note that in Order No. PSC-93-0918-FOF-EI, this Commission stated that it would address storm-related costs in excess of the storm reserve fund based on a petition filed by FPL. Until that time, the Commission permitted FPL to defer storm damage loss over the amount in the reserve. Joint Movants assert that due to the magnitude of FPL's estimated 2004 storm-related costs, the costs should be thoroughly analyzed. They contend that this would best be done in conjunction with FPL's next rate proceeding, allowing for a full picture of FPL's financial situation.

FPL's Response

In its response, FPL contends that Joint Movants' motion to dismiss should be denied because it is inconsistent with the Stipulation and Settlement approved by this Commission in Order No. PSC-02-0501-AS-EI, issued April 11, 2002, in Docket No. 01148-EI, In re: Review of the retail rates of Florida Power & Light Company, and because it is based on an incorrect premise that the Commission can grant recovery of storm losses only upon a showing that the utility will not achieve its authorized rate of return. FPL asserts that, when taking all facts

contained in its Storm Cost Recovery Petition as true, the joint motion to dismiss does not meet the standard for a motion to dismiss.

FPL notes that both OPC and FIPUG are signatories to the Stipulation and Settlement approved in Order No. PSC-02-0501-AS-EI to resolve this Commission's review of FPL's retail rates in Docket No. 001148-EI. Citing the terms of the Stipulation and Settlement, FPL asserts that in exchange for its agreement to reduce base rates by $250 million annually and share revenues over a certain threshold (¶¶ 2, 6-7 of the Stipulation), OPC, FIPUG, and the other signatories agreed that FPL would no longer have an authorized return on equity (ROE) range for the purpose of addressing earnings levels (¶ 3 of the Stipulation). FPL notes that paragraph 3 of the Stipulation states in part: "[T]he revenue mechanism herein described will be the appropriate and exclusive mechanism to address earnings levels." Further, FPL notes that the parties agreed to the following language in paragraph 13 of the Stipulation and Settlement, which expressly addresses the storm reserve fund:

> In the event there are insufficient funds in the Storm Damage Reserve and through insurance, FPL may petition the FPSC for recovery of prudently incurred costs not recovered from those sources. The fact that insufficient funds have been accumulated in the Storm Damage Reserve to cover costs associated with a storm event or events shall not be evidence of imprudence or the basis of a disallowance. Parties to this Stipulation and Settlement are not precluded from participating in such a proceeding.

FPL asserts that its Storm Cost Recovery Petition is expressly permitted by paragraph 13 of the Stipulation and Settlement. Further, FPL asserts that Joint Movants' argument that the Storm Cost Recovery Petition should be dismissed on grounds that FPL did not allege how its storm reserve fund deficit would impact its earnings or achieved rate of return ignores that FPL does not have an authorized rate of return during the term of the Stipulation and Settlement and thus does not have an achieved rate of return. FPL states that even if its earnings were relevant, the estimated $354 million in storm-related costs amounts to approximately one half of FPL's annual net income.

FPL argues that it is a fallacy for Joint Movants to contend that this Commission cannot grant relief without taking earnings into consideration. FPL contends that the only circumstance in which the Commission has ever said that it should review earnings in the context of storm restoration costs was in Order No. PSC-93-0918-FOF-EI, when FPL asked the Commission to establish a cost recovery clause mechanism to operate in perpetuity addressing all future storm costs. FPL claims that if the Commission were to approve recovery of extraordinary storm restoration costs only upon a showing that a utility was not achieving its authorized rate of return, it would create a perverse incentive for utilities facing massive storm restoration efforts and would be inconsistent with the public policy of safe and rapid service restoration.

FPL notes that in Order No. PSC-93-0918-FOF-EI, at page 5, this Commission declined to implement a cost recovery clause mechanism for storm loss recovery "at this time." Instead, the Commission approved a self-insurance mechanism consisting of an annual accrual amount in base rates coupled with the ability to request a specific recovery mechanism in the event of a

shortfall. FPL cites Commission orders issued subsequent to Order No. PSC-93-0918-FOF-EI which also indicate that FPL may petition the Commission for relief in cases of catastrophic storm losses.[3]

Finally, FPL challenges Joint Movants' claim that FPL, through its Storm Cost Recovery Petition, seeks to be held risk-free. FPL states that it was not held harmless by the storms because, pursuant to the Stipulation and Settlement, it bears the risk of lost revenues as a result of the hurricanes, which amount to $38 million. FPL further states that it does not have access to commercial insurance for repair and restoration of physical damage or access to Federal Emergency Management Agency assistance, unlike most other proprietors.

Analysis and Rulings

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. See id. at 350. In determining the sufficiency of the petition, we must confine our consideration to the petition and documents incorporated therein and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958); Rule 1.130, Florida Rules of Civil Procedure. Because FPL's petition states a cause of action upon which relief may be granted, we deny Joint Movants' motion to dismiss.

This Commission has jurisdiction to regulate and supervise each public utility, such as FPL, with respect to its rates and service[4] and has the power to prescribe fair and reasonable rates and charges to be applied by each public utility.[5] The courts have recognized that we have considerable discretion and latitude in the ratemaking process.[6]

Under this authority and broad discretion, we approved, in April 2002, a Stipulation and Settlement between FPL, OPC, FIPUG, and several other parties to resolve our then-pending review of FPL's retail rates. Pursuant to paragraph 3 of the Stipulation, FPL would not have an authorized return on equity range during the term of the Stipulation.[7] Instead, as shown in

---

[3] Order No. PSC-95-1588-FOF-EI, issued December 27, 1995, in Docket No. 951167-EI, In re: Petition for authorization to increase the annual storm fund accrual commencing January 1, 1995 to $20.3 million; to add approximately $51.3 million of recoveries for damage due to Hurricane Andrew and the March 1993 storm; and to re-establish the storm reserve for the costs of Hurricane Erin by increasing the storm reserve and charging to expense approximately $5.3 million, by Florida Power & Light Company; Order No. PSC-98-0953-FOF-EI, issued July 14, 1998, in Docket No. 971237, In re: Petition for authority to increase annual storm fund accrual commencing January 1, 1997 to $35 million by Florida Power & Light Company.

[4] Section 366.04(1), Florida Statutes.

[5] Section 366.05(1), Florida Statutes.

[6] See, e.g., Gulf Power Company v. Bevis, 296 So. 2d 482, 487 (Fla. 1974) ("As pointed out by the Commission, it has considerable discretion and latitude in the rate-fixing process."); and City of Miami v. FPSC, 208 So. 2d 249 (Fla. 1968) (stating that the Public Service Commission has considerable discretion in the ratemaking process).

[7] Under traditional rate-of-return regulation, the Commission would establish an authorized return on equity range in setting rates for a public utility.

paragraphs 2, 6, and 7 of the Stipulation, the parties agreed that FPL would reduce its base rates by $250 million and share with its customers any revenues over a specified threshold.

Pursuant to paragraphs 5 and 8 of the Stipulation, the parties agreed that during the term of the Stipulation, FPL would not petition for an increase in its base rates and charges unless its retail base rate earnings fell below a 10% ROE as reported on a Commission-adjusted or pro-forma basis on an FPL monthly earnings surveillance report during the term of the Stipulation. However, paragraph 13 of the Stipulation specifically provided that FPL may petition this Commission for recovery of prudently incurred storm-related costs in excess of the funds available in its storm reserve fund and through insurance.

Given the terms of the Stipulation and Settlement, we do not find that FPL has failed to state a cause of action by failing to plead that its storm-related expenses in excess of its storm reserve fund have caused it to earn less than a fair rate of return. The Stipulation clearly establishes that FPL will not have an authorized ROE range for the term of the Stipulation and expressly allows for FPL to file a petition for recovery of prudently incurred storm-related costs in excess of its storm reserve fund and insurance coverage. The parties may pursue at hearing questions as to whether the provisions of paragraphs 5 and 8 of the Stipulation were intended to establish a condition precedent to FPL obtaining recovery of prudently-incurred storm-related costs sought pursuant to paragraph 13 of the Stipulation.

Further, the language in Order No. PSC-93-0918-FOF-EI, whereby this Commission established a storm reserve fund for FPL but declined to adopt a pass-through mechanism for recovery of storm losses, indicates that this Commission has not foreclosed consideration of a pass-through mechanism similar to the surcharge presently proposed by FPL:

> Our vote today does not foreclose or prevent further consideration of some type of a cost recovery mechanism, either identical or similar to what has been proposed in this petition. The Commission could implement a cost recovery mechanism, or defer the costs, or begin amortization, or such other treatment as is appropriate, depending on what the circumstances are at that time.

Exercising the discretion and latitude afforded this Commission in the process of ratemaking, we have established pass-through mechanisms for certain costs in the form of the continuing fuel and capacity cost recovery clauses and the purchased gas adjustment true-up. It is likewise within our discretion to consider FPL's proposed surcharge as a means of cost recovery. While we may ultimately find that the effects of FPL's storm-related costs on its earnings are relevant to the disposition of FPL's Storm Cost Recovery Petition, FPL does not fail to state a cause of action by failing to address such effects in its petition.

For the reasons set forth above, we deny Joint Movants' motion to dismiss FPL's Storm Cost Recovery Petition.

III. JOINT RESPONSE TO FPL'S PRELIMINARY SURCHARGE PETITION

As previously noted, Joint Movants filed a response to FPL's Preliminary Surcharge Petition, asking that it be "denied and/or dismissed." In effect, Joint Movants' response asks this Commission to strike the petition as an unauthorized pleading or, alternatively, to dismiss the petition on the grounds stated in the Joint Movants' motion to dismiss FPL's Storm Cost Recovery Petition. As set forth above, we have denied Joint Movants' motion to dismiss FPL's Storm Cost Recovery Petition. Thus, we deny Joint Movants' request to dismiss the Preliminary Surcharge Petition to the extent it is based on the grounds stated in Joint Movants' original motion to dismiss. The remainder of this section addresses: (1) Joint Movants' request to strike the Preliminary Surcharge Petition; and (2) the question of our authority to grant FPL's Preliminary Surcharge Petition without a hearing.

Request to Strike Preliminary Surcharge Petition

Joint Movants argue that FPL's Preliminary Surcharge Petition should be stricken because, in essence, it is an attempt to amend its Storm Cost Recovery Petition without the necessary approval of the Presiding Officer. Joint Movants also contend that the petition is substantively defective because it prejudges the issues of whether any cost recovery mechanism is necessary and what amount will flow through that mechanism.

FPL contends that its Preliminary Surcharge Petition was not an amended petition but a separate petition seeking approval to implement its surcharge subject to refund. FPL notes that its Storm Cost Recovery Petition sought implementation of its proposed surcharge effective January 1, 2005. FPL states that when this Commission set that petition for hearing in April 2005, FPL realized that it would need to ask us to approve implementation of the surcharge commencing January 1, 2005, subject to refund because the 2005 hurricane season would be upon the company by the time the hearing phase of this docket ends. FPL asserts that its Preliminary Surcharge Petition does not interfere with the schedule for reviewing the prudence and reasonableness of the deficit in FPL's storm reserve fund that is the subject of its Storm Cost Recovery Petition. FPL contends that Joint Movants' argument that the Preliminary Surcharge Petition is an unauthorized pleading is one of form over substance. In the event we determine that the Preliminary Surcharge Petition was effectively an amendment to the Storm Cost Recovery Petition, FPL requests that we accept the Preliminary Surcharge Petition as an amendment.

FPL also contends that its Preliminary Surcharge Petition does not seek to prejudge any issue in this case. Rather, FPL states, the petition seeks to implement the proposed surcharge subject to refund, thus preserving the issues to be addressed at hearing.

Regardless of whether FPL's Preliminary Surcharge Petition is viewed as an amendment to its Storm Cost Recovery Petition or as a separate petition, we deny Joint Movants' request to strike the Preliminary Surcharge Petition.

First, we do not believe that the Preliminary Surcharge Petition, whether viewed as an amendment or a separate petition, prejudges the issues to be addressed in the April 2005 hearing

concerning FPL's Storm Cost Recovery Petition. The purpose of requiring a utility to hold revenues from such rate increases subject to refund is to preserve the issues and ensure that ratepayers are protected in the event that, upon hearing, we ultimately decide that a smaller rate increase, or no rate increase at all, is appropriate.

Second, we do not view FPL's Preliminary Surcharge Petition as an amendment to its Storm Cost Recovery Petition. In the context of base rate proceedings, a utility almost always files a "petition" for interim rate relief separately from its petition for permanent rate relief. Such pleadings have never been treated as procedurally infirm attempts by the utility to amend its petition for permanent rate relief. While we recognize that FPL's Storm Cost Recovery Petition seeks relief distinct from the relief sought through a petition to initiate a full base rate proceeding, we agree with FPL that Joint Movants' request to strike the Preliminary Surcharge Petition as an unauthorized pleading emphasizes form over substance.

Even if we were to determine that FPL's Preliminary Surcharge Petition was effectively an amendment to its Storm Cost Recovery Petition, the law is clear that leave to amend pleadings should be freely granted in order to allow disputes to be resolved on their merits. At this early point in this proceeding, we believe that no parties would be prejudiced if FPL were granted leave to amend its Storm Cost Recovery Petition.

For these reasons, we deny Joint Movants' request to strike FPL's Preliminary Surcharge Petition.

Authority to Approve Preliminary Surcharge Petition Subject to Refund

OPC and FIPUG's Arguments

Joint Movants state that fundamental principles of due process and the provisions of Chapters 120 and 366, Florida Statutes, require this Commission to conduct an evidentiary hearing on FPL's request prior to authorizing a rate change. They contend that the sole statutory exception to the hearing requirement is limited to applications for a general rate increase in base rates accompanied by minimum filing requirements prescribed by the Commission. In addition, Joint Movants argue that the Florida Supreme Court has ruled that any and all "implied" or "judicially created" authority to grant interim rate changes was superseded by, and did not survive, the enactment of the statutory provisions governing interim increases in base rates.

Joint Movants argue that pursuant to Section 120.569, Florida Statutes, an agency is required to provide the parties whose substantial interests would be affected by agency action an opportunity for hearing, preceded by notice of not less than 14 days. Section 120.57(1), Florida Statutes, applies to cases involving disputed issues of material fact unless waived by all the parties. In a Section 120.57(1) proceeding, parties are entitled to an opportunity to respond, to present evidence on all issues, and to conduct cross-examination. Joint Movants argue that these provisions apply to the Commission's ratemaking activities unless the Legislature has created an exception in the statutes which gives the Commission its specific authority.

Joint Movants argue that the requirement that the Commission provide notice and an opportunity for a hearing prior to authorizing a change in rates is firmly embedded in Chapter 366, Florida Statutes. Joint Movants state that statutes referring to general powers provide no authority to change rates in a manner inconsistent with the Legislature's specific instructions on the matter. They argue that because the Legislature has prescribed a mandatory hearing process in the provisions of Chapter 366 that relate specifically to changes in rates, the agency's general grant of jurisdiction, under Section 366.05, Florida Statutes, cannot be interpreted to read that an agency has the ability to authorize a rate change without a hearing.

Joint Movants argue that interim relief is available only in connection with applications for full base rate increases. In support of their argument, they state that the Florida Supreme Court observed that the statutory interim mechanism applies only to applications for general increases in base rates, and does not disturb or alter the requirement that hearings precede rulings on other rate change requests. Citizens v. Mayo, 333 So. 2d 1 (Fla. 1976). Joint Movants also argue that over time the Legislature has modified the statutory language for interim rate increases and that those modifications have been specific to, and confined to, applications for base rate increases in which the utility has prepared minimum filing requirements.

In conclusion, Joint Movants argue that the interim provisions of Section 366.071, Florida Statues, apply to applications for base rate increases in which the utility has prepared minimum filing requirements that enable the Commission to assess whether the utility has made a prima facie showing that it is earning below the bottom of the range of return authorized by the Commission. Joint Movants argue that all other rate increases can be awarded only after a public hearing in which testimony is presented by all interested parties and cross-examination is permitted.

FPL's Arguments

FPL states that this Commission has very broad authority in determining just and reasonable rates and the means through which costs are recovered and rates established. FPL contends that this exercise of authority often takes into account public policy objectives, such as those used in establishing a regulatory framework for the recovery of storm restoration costs.

FPL argues that the Legislature, through Chapter 366, Florida Statutes, has given the Commission broad authority in determining the rates and charges of public utilities. FPL contends that within that grant of authority, the Commission has considerable latitude to determine through what means the rates and charges are to be allocated and collected. FPL asserts that consistent with its grant of authority, the Commission has established mechanisms through which recovery of costs is achieved outside of base rates. In addition, FPL notes that the Commission has approved incremental recovery of items that are traditionally included in base rates for a limited period of time in order to serve the public policy objectives. As an example, FPL cites Order No. PSC-01-2516-FOF-EI, issued December 26, 2001, in Docket No. 010001-EI, in which the Commission authorized the recovery of incremental security costs in response to the terrorist acts of September 11, 2001. FPL asserts that in the same respect, the Commission, by Order No. PSC-93-0918-FOF-EI, issued June 17, 1993, in Docket No. 930405-EI, put a

regulatory plan in place after Hurricane Andrew. Instead of adopting a permanent clause mechanism, the Commission instead instituted a two-part plan consisting of a target reserve amount, coupled with the right for the utility to petition for recovery of prudently incurred costs in excess of its storm reserve.

Based on Commission practice and judicial precedent, FPL argues that the law is clear on this issue. FPL contends that the Commission's ratemaking authority enables it to determine the rates and charges of public utilities and pursue public policy objectives. FPL asserts that its petition for implementation of a preliminary storm reserve deficiency surcharge subject to refund is consistent with the regulatory framework established by the Commission for the recovery of hurricane related costs and is fully within the scope of the Commission's statutory authority.

FPL states that the interim provisions of Section 366.071, Florida Statutes, do not apply to FPL's request for implementation of a limited, temporary, emergency storm deficit recovery surcharge subject to refund. FPL also argues that Section 366.071, Florida Statutes, applies only to requests for interim rates in conjunction with a petition for permanent base rate relief and does not preclude interim or temporary relief in other circumstances.

In support of its argument, FPL states that in Citizens v. Mayo, 333 So. 2d 1 (Fla. 1976), the Florida Supreme Court has confirmed that Section 366.071 applies to "a general rate increase request for which a full rate proceeding is required." FPL also argues that in establishing specific rules governing interim base rate relief, the Legislature cannot be presumed to have eviscerated the Commission's broad authority over rates and charges of jurisdictional utilities. One example cited is the fact that when the Legislature provided for the establishment of clause recovery for certain environmental costs, under Section 366.8255, Florida Statutes, it did not diminish the Commission's authority to institute other forms of cost recovery outside of base rates, including clauses and surcharges.

Analysis and Rulings

Both Joint Movants and FPL appear to agree that our authority to set interim rates pursuant to Section 366.071, Florida Statutes, is limited to use in full base rate proceedings. We agree. We have previously recognized that Section 367.082, Florida Statutes, the water and wastewater counterpart to Section 366.071, provides for interim rates only in the context of full rate proceedings.[8]

Based on the petitions filed by FPL, this docket does not involve a full base rate proceeding. Instead, FPL requests rate relief in the form of a temporary surcharge to recover a deficit in its storm damage reserve. Undoubtedly, such a request by a public utility for rate relief is within this Commission's jurisdiction.[9]

---

[8] Order No. PSC-93-0525-FOF-WU, issued April 7, 1993, in Docket No. 910963-WU, In re: Petition for a Limited Proceeding to Adjust Water Rates in Pasco County by Betmar Utilities, Inc.

[9] Section 366.04(1), Florida Statutes ("the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service"); Section 366.05, Florida Statutes ("[i]n the exercise of such jurisdiction, the commission shall have the power to prescribe fair and reasonable rates and charges . . . to be observed by each

What remains at issue are two questions: (1) does this Commission have authority to approve rates subject to refund in a proceeding other than a full base rate proceeding; and (2) if so, can we do so without first conducting a full administrative hearing. We find that the answer to both questions is yes.

As noted above, the interim rate provisions in Section 366.071, Florida Statutes, apply only in the context of a full base rate proceeding. This docket does not involve a full base rate proceeding. OPC and FIPUG argue that we lack the authority, prior to a final hearing, to establish rates subject to refund in any proceeding other than a full base rate proceeding. We disagree.

Prior to 1974, the Florida Supreme Court ("the Court") recognized this Commission's inherent authority to set interim rates. In Southern Bell Telephone and Telegraph Company v. Bevis, 279 So. 2d 285 (Fla. 1973) ("Southern Bell"), the Court quashed an order of the Commission that denied an interim rate increase for Southern Bell, finding that the utility had presented a prima facie case that it was earning below its authorized minimum rate of return. The Court noted that it had "never held the Commission powerless to make interim increases contingent on the outcome of a full hearing, and thus refundable if the full hearing discloses that the interim increase was improvidently granted." Id. at 287.

In 1974, the Legislature enacted the "file and suspend" provisions of Section 366.06(4), Florida Statutes (1974 Supp.) through the adoption of Chapter 74-195, Laws of Florida. Those provisions have been interpreted by this Commission and the Court to allow utility-proposed rates to go into effect subject to refund pending a final hearing on the proposed rates, provided that the Commission had not suspended the rates within 30 days of filing or the suspension was subsequently lifted based on additional data or clarification provided by the utility.[10] Under these "file and suspend" provisions, we can, based on adequate factual justification, approve rates subject to refund without the requirement of a hearing.[11] The Court has determined that this process provides adequate due process protections.[12] The "file and suspend" provisions apply to "[a]ll applications for changes in rates"[13] and are activated from the date of filing the proposed new rate schedules.[14]

The statutory provisions giving this Commission implied authority to implement rates subject to refund are the same today as they were prior to the 1974 enactment of the "file and

---

public utility"); Section 366.06(1), Florida Statutes ("[a] public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission" and "[a]ll applications for changes in rates shall be made to the commission in writing . . . and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested . . . by any public utility")

[10] Citizens v. Mayo, 333 So. 2d 1 (Fla. 1976); Maule Industries, Inc. v. Mayo, 342 So. 2d 63 (Fla. 1976); Citizens v. Public Service Commission, 425 So. 2d 534 (Fla. 1982).

[11] Citizens v. Mayo, 333 So. 2d 1 (Fla. 1976); Maule Industries, Inc. v. Mayo, 342 So. 2d 63 (Fla. 1976); Citizens v. Public Service Commission, 425 So. 2d 534 (Fla. 1982).

[12] Citizens v. Mayo, 316 So. 2d 262 (Fla. 1975).

[13] Section 366.06(2), Florida Statutes (1974 Supp.).

[14] Section 366.06(4), Florida Statutes (1974 Supp.).

suspend" provisions. The relevant language in the current provisions of Chapter 366, as shown in footnote 9 above, is identical to the statutory language that empowered this Commission prior to 1974. Further, the relevant language in the current "file and suspend" provisions is exactly the same as it was when enacted in 1974, except that we now have 60 rather than 30 days to withhold our consent. Both the current and original versions of these provisions include the following language:

> Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within [the specified number of] days, a reason or written statement of good cause for withholding its consent. Such consent shall not be withheld for a period longer than 8 months from the date of filing the new schedules. The new rates or any portion not consented to shall go into effect under bond at the end of such period, but the commission shall, by order, require such utility to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and upon completion of hearing and final decision in such proceeding shall by further order require such utility to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. Any portion of such refund not thus refunded to patrons or customers of the utility shall be refunded or disposed of by the utility as the commission may direct; however, no such funds shall accrue to the benefit of the utility.[15]

Neither before or after enactment of the 1974 "file and suspend" provisions did Chapter 366, Florida Statutes, state that our authority to establish rates subject to refund was limited to full base rate proceedings. Further, in Citizens v. Wilson, 571 So. 2d 1300 (Fla. 1990) ("Wilson 1") and Citizens v. Wilson, 568 So. 2d 904 (Fla. 1990) ("Wilson 2"), the Court confirmed the application of the "file and suspend" provisions to proceedings other than full base rate proceedings. In Wilson 1, the Court affirmed an order of this Commission determining that a petition filed by Tampa Electric Company outside of a full base rate proceeding constituted a filing under the "file and suspend" provisions of Chapter 366. In the underlying Commission proceeding, Tampa Electric Company petitioned to modify its tariffs to remove an energy conservation cost recovery factor from its interruptible service schedules and shift the related costs to its firm service schedules. Tampa Electric had attached to its petition the proposed new charges. The Court agreed that the Commission appropriately determined Tampa Electric's filing to be a tariff under the "file and suspend" law stating:

> While public counsel argues to the contrary, we agree that TECO's petition constituted a filing under the file-and-suspend law. The petition reflected a proposed rate change as contemplated by section 366.06(3). Under that law, TECO's proposed rate change went into effect automatically when the

[15] Section 366.06(4), Florida Statutes (1974 Supp.) and Section 366.06(3), Florida Statutes (2003).

> Commission did not act to suspend the rates within sixty days after TECO's filing. Therefore, [public counsel] was not entitled to a hearing on the Commission's decision whether to withhold its consent to the proposed rate change.

Id. at 1302-1303.[16]

OPC and FIPUG argue that the "file and suspend" law has always applied only to full base rate proceedings. In support of this position, OPC and FIPUG argue that the Court's decision in Citizens v. Mayo, 333 So. 2d 1 (Fla. 1976) determined that the interim rate mechanism in the "file and suspend" law applies only to full base rate proceedings. In pertinent part, the Court stated that "Section 366.06 (4) was created to provide a series of alternatives for the Commission whenever, in conjunction with a general rate increase for which a full rate proceeding is required, a utility seeks immediate financial relief." Id. at 8. OPC and FIPUG's reliance on this case is misplaced. First, the Court's subsequent decisions in the Wilson cases make clear that the "file and suspend" law is not limited to full base rate proceedings. The plain language of Section 366.06 has always specified that it applies to "[a]ll applications for changes in rates." We have for years, without challenge, used these "file and suspend" provisions as the procedural basis for handling proposed tariffs outside of full base rate proceedings. Second, the question of whether Section 366.06(4) applied to anything other than full base rate proceedings was simply not before the Court in Citizens v. Mayo. The Court was presented with an appeal from a full base rate proceeding and correctly noted that the provisions of Section 366.06(4) applied to that proceeding.

In further support of their position, OPC and FIPUG note that the current "file and suspend" provisions reference minimum filing requirements, a term associated with full base rate proceedings. This argument ignores the fact that the reference to minimum filing requirements in the "file and suspend" law did not appear until 1980, well after the law was first used to establish interim rates subject to refund. More importantly, this argument runs contrary to the Court's Wilson decisions, which were issued ten years after the reference to minimum filing requirements was added to Section 366.06.

Since enactment of the "file and suspend" provisions in 1974, the only statutory change involving the concept of setting rates subject to refund was the 1980 addition of the specific interim rate provisions of Section 366.071, Florida Statutes. As stated at the outset, there is no dispute that Section 366.071 is limited to the context of full base rate proceedings. Because the Legislature left the "file and suspend" and other ratemaking provisions of Chapter 366 intact when it added Section 366.071, we must conclude that the addition of Section 366.071 was not intended to diminish the Legislature's previous grants of authority to this Commission in any

[16] In Wilson 2, the Court affirmed a Commission order approving, pursuant to the "file and suspend" provisions of Chapter 364, Florida Statutes, a Southern Bell tariff reflecting increased rates for custom calling services. The Court noted that the Commission's order was "surplusage" because the Commission could have allowed the proposed tariff to go into effect by simply not withholding consent within the statutory time frame. The Court stated that the Office of Public Counsel was entitled to a hearing on the proposed tariffs prior to issuance of a final order, but was not entitled to a hearing prior to the proposed rates going into effect on an interim basis.

measure. Rather, it simply defined how interim rates should be established in the context of full base rate proceedings.[17] Notably, Section 120.80(13)(f), Florida Statutes, expressly provides that utilities regulated by this Commission are entitled to proceed under the procedures for interim rates set forth in the "file and suspend" law (Chapter 74-195, Laws of Florida), notwithstanding any other provisions of Chapter 120, Florida Statutes.

Based on the foregoing, we conclude that pursuant to the authority granted by the "file and suspend" provisions of Section 366.06(3), Florida Statutes, this Commission may establish, prior to an evidentiary administrative hearing, rates subject to refund outside of full base rate proceedings.[18]

IV. FPL'S PRELIMINARY SURCHARGE PETITION

FPL's Preliminary Surcharge Petition contains a tariff sheet listing its proposed charges. Thus, FPL's petition triggered application of the "file and suspend" provisions of Section 366.06, Florida Statutes. Pursuant to our authority under these provisions, we may, without hearing, approve or deny recovery of the proposed charges subject to refund, pending the outcome of our final hearing in this matter. Alternatively, we may take no action on the proposed tariff within the 60-day suspension period, thus allowing the proposed charges to go into effect by operation of law. Under this course of action, however, the amounts collected by FPL would not be subject to refund.

To obtain relief under the "file and suspend" law, FPL must make a preliminary evidentiary showing that application of its proposed surcharge on an immediate basis is fair, just, and reasonable.[19] The evidentiary basis for a rate increase subject to refund is not subject to the same scrutiny as required in a final hearing[20] but must be stated with particularity.[21]

FPL has requested that it be authorized to implement its proposed surcharge as soon as practicable, subject to refund, rather than sometime after our post-hearing vote in this docket, which is currently scheduled for July 5, 2005. In its petition, FPL offers several bases for immediate implementation of its proposed surcharge. FPL states that an immediate implementation of the storm surcharge would better match the recovery of the 2004 storm recovery costs with the customers who benefited from those restoration efforts. FPL also notes that its storm damage reserve has been fully depleted, that it has spent an additional unrecovered amount of $354 million in excess of the amount that was in the reserve, and that, unless

---

[17] The Court's decision in Citizens v. Wilson, which confirmed the application of the "file and suspend" law to proceedings other than full rate base proceedings, was issued ten years after the addition of Section 366.071.

[18] We also believe that our broad authority to fix fair, just, and reasonable rates provides us the power to set rates subject to refund outside of full base rate proceedings. Citing the Commission's authority under the provisions of Sections 366.05(1) and 366.06(2), Florida Statutes (1979), which are identical to the current provisions in Sections 366.05(1) and 366.06(1), Florida Statutes, the Court noted in Citizens v. Public Service Commission, 425 So. 2d 534 (Fla. 1982) that it "has consistently recognized the broad legislative grant of authority which these statutes confer and the considerable license the Commission enjoys as a result of this delegation."

[19] Citizens v. Mayo, 333 So. 2d 1, at 5, 8 (Fla. 1976); Maule Industries, Inc. v. Mayo, 342 So. 2d 1976).

[20] Citizens v. Public Service Commission, 425 So. 2d 534 (Fla. 1982).

[21] Citizens v. Mayo, 333 So. 2d 1, at 5, 8 (Fla. 1976).

otherwise authorized by this Commission, FPL can recover this amount and attempt to replenish the storm damage reserve only through its currently authorized storm damage annual accrual of $20.3 million. FPL further states that prompt implementation of the surcharge would reduce the amount of interest to be recovered, if such recovery is ultimately allowed. Lastly, FPL points out that implementing any surcharge after the start of the 2005 hurricane season would leave FPL having not recovered any of its 2004 storm damage costs in excess of its reserve.

Without rendering any opinion on the merits of implementing a surcharge or the reasonableness and prudence of any of the costs to be included, we believe that FPL has presented reasonable arguments for implementing a surcharge on a preliminary basis. Taking those arguments together with the information provided in the written testimony filed by FPL in support of its request and in the affidavit of K. Michael Davis, FPL Vice President, Controller and Chief Accounting Officer, attesting that FPL incurred extraordinary storm-related costs more than double the amount of its storm reserve, we find that FPL has made the necessary preliminary showing for relief under the "file and suspend" law. Because FPL's proposed surcharge is subject to refund with interest, its ratepayers will be fully protected if, at the conclusion of the evidentiary hearing in this docket, we take final action to deny implementation of a surcharge or to modify the amount of costs to be recovered. Therefore, we grant FPL's petition to implement a preliminary storm surcharge subject to refund.

Although our staff has expressed concerns with the method that FPL used to develop the per kWh charges in its preliminary surcharge tariff, our staff has determined, based on a preliminary analysis, that the allocation factors used by FPL do not result in a major cost shift. Therefore, we approve, on a preliminary basis, the tariff contained in FPL's proposed Original Tariff Sheet No. 8.033 as filed, with the understanding that FPL's allocation methodology may be at issue in the upcoming hearing and that adjustments may be made on a going-forward basis.

Consistent with the Florida Supreme Court's decision in Gulf Power Company v. Cresse, 410 So. 2d 492 (Fla. 1982), the requested charges shall become effective for meter readings beginning 30 days after the date of our vote approving the charges. Thus, the factors set forth in Original Tariff Sheet No. 8.033 shall become effective for meter readings on or after February 17, 2005.

Finally, we find that the appropriate security to guarantee the amount collected subject to refund through the preliminary surcharge is a corporate undertaking. The criteria for use of a corporate undertaking include sufficient liquidity, ownership equity, profitability, and interest coverage to guarantee any potential refund. The 2001, 2002, and 2003 financial statements of FPL were used to determine its financial condition. Based on our analysis, we believe FPL has the financial capability to support a corporate undertaking to guarantee all amounts collected subject to refund through the preliminary surcharge.

It is therefore

ORDERED by the Florida Public Service Commission that the Office of Public Counsel and Florida Industrial Power Users Group's joint motion to dismiss Florida Power & Light Company's Storm Cost Recovery Petition is denied. It is further

ORDERED that the Office of Public Counsel and Florida Industrial Power Users Group's joint request to dismiss or strike Florida Power & Light Company's Preliminary Surcharge Petition is denied. It is further

ORDERED that Florida Power & Light Company's Preliminary Surcharge Petition is granted. It is further

ORDERED that Florida Power & Light Company's proposed Original Tariff Sheet No. 8.033 is approved and shall become effective for meter readings on or after February 17, 2005, with all amounts collected subject to refund. It is further

ORDERED that Florida Power & Light Company shall provide a corporate undertaking to guarantee all amounts collected subject to refund under Original Tariff Sheet No. 8.033.

By ORDER of the Florida Public Service Commission this 17th day of February, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

WCK

DISSENT

COMMISSIONER DAVIDSON dissents only with respect to the question of the Commission's authority to approve implementation of the proposed surcharge subject to refund and with respect to approval of the proposed surcharge subject to refund.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the action taken in this order to approve FPL's Preliminary Surcharge Petition, which is non-final in nature, may request (1) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Citizens of the State of Florida v. Mayo, 316 So.2d 262 (Fla. 1975), states that an order on interim rates is not final or reviewable until a final order is issued. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

Any party adversely affected by the action taken in any other portion of this order, which is preliminary, procedural, or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural, or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.