

760025-81

Commissioners:
SUSAN F. CLARK, CHAIRMAN
J. TERRY DEASON
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FILE COPY

Public Service Commission

August 14, 1996

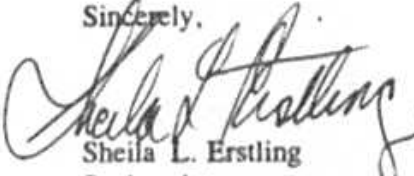
Clerk of the Court
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32399

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RE: Broward County, Florida, vs. Florida Power & Light Company
Case No. 96-2367

Dear Sir:

Enclosed for filing please find the original and one copy of the Florida Public Service Commission's Answer and Memorandum of Law in Response to Broward County's Objection to Florida Public Service Commission Motion to Intervene in the above referenced docket.

Sincerely,

Sheila L. Erstling
Senior Attorney

SLE/js
Enclosure

DOCUMENT NUMBER-DATE
08535 AUG 14 96

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY, FLORIDA)
)
 Petitioner,)
)
 VS.)
)
 FLORIDA POWER & LIGHT COMPANY)
)
 Respondent.)
 _____)

CASE NO. 96-2367

THE FLORIDA PUBLIC SERVICE COMMISSION'S
ANSWER AND MEMORANDUM OF LAW IN RESPONSE TO
BROWARD COUNTY'S OBJECTION TO FLORIDA PUBLIC
SERVICE COMMISSION MOTION TO INTERVENE

On July 26, 1996, the Florida Public Service Commission (FPSC) filed a Motion for Leave to Intervene in this case. On August 6, 1996, the FPSC received Broward County's Response And Objection To Florida Public Service Commission Motion To Intervene. The Certificate of Service indicates the pleading was served by U.S. Mail on August 2, 1996. The FPSC files this Answer and Memorandum of Law in support of its Motion to Intervene in accordance with Rule 60Q-2.002 and Rule 60Q-2.016, Florida Administrative Code. In answer to Broward County's response and objection, the FPSC states:

1. This case was initiated by a complaint filed with the FPSC by Broward County concerning the rates and charges for electric service provided by Florida Power & Light Company (FPL), a public utility. Pursuant to Section 366.04(1), Florida Statutes, the FPSC has exclusive jurisdiction "...to regulate and supervise each public utility with respect to its rates and service...."

2. On April 8, 1996, the FPSC issued Order No. PSC-96-0492-FOF-EI, Notice of Proposed Agency Action Order Denying Refund.

3. On April 29, 1996, Broward County timely filed a protest of the Commission's Order and the matter was referred to the Division of Administrative Hearings.

4. Rule 25-22.026(3), Florida Administrative Code, specifically allows Commission staff to participate as a party in any proceeding.

5. Rule 25-22.026(4), Florida Administrative Code, states that, in cases assigned to DOAH, the Commission staff's role is to represent the public interest and to assist in developing evidence to ensure a complete record. The rule states that Commission staff is not a party in interest (unless a show cause proceeding) and that the staff's role is to assist in developing evidence to ensure a complete record. The County argues that the public does not have an interest in the proceeding and even if it did such interest is neither direct or substantial as required by Rule 60Q-2.010, Florida Administrative Code. The FPSC respectfully disagrees. The FPSC as the agency regulating public utilities, does have a direct interest, Chapter 366, Florida Statutes. Florida Power & Light Company, like all investor-owned utilities, is required to have Commission-approved published tariffs for all its rates, services and charges. It is the responsibility of the FPSC to see that the

investor-owned utility complies with its published tariffs. A decision regarding the applicability of a particular tariff, or a finding that approximately \$1,000,000 be refunded as is sought by Broward County, could impact the earnings of the utility and, ultimately, all the ratepayers of the utility.

6. The purpose of the FPSC's intervention is to represent the public interest. The FPSC can offer impartial expertise concerning utility regulation. Further, in compliance with Rule 25-22.026(4), the FPSC staff will ensure that all relevant facts and issues are presented to the fact finder.

7. Broward County questions FPSC participation in this proceeding claiming the Commission would not be impartial because the Commission entered Order No. PSC-96-0492-FOF-EI, which precipitated the request for a Section 120.57(1), Florida Statutes, hearing. Broward County fails to recognize that an objection to a proposed agency action order in effect causes that order to become a nullity; it is regarded as only preliminary in nature. Capeletti Brothers Inc. v. Department of Transportation, 362 So.2d 346 (Fla. 1st DCA 1978); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, (Fla. 1st DCA 1981). The petition for a formal 120.57(1) hearing commences a de novo proceeding. See General Development Corporation v. Division of State Planning, 353 So.2d 1199 (Fla. 1st DCA 1977); Couch Construction Company v. Department of Transportation, 361 So.2d 172 (Fla. 1st DCA 1978). Section

120.57, Florida Statutes, proceedings formulate final agency action and do not review earlier actions. McDonald v. Department of Banking and Finance, 346 So.2d 569, at 584; Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, (Fla. 1st DCA 1981).

8. Section 120.57(1)(b)10, Florida Statutes, details the options available to the FPSC once the DOAH Hearing Officer renders her Recommended Order. The FPSC may not reject or modify the findings of fact unless it determines from the record, and states with particularity in the order, that (a) the findings of fact were not based on competent substantial evidence, or (b) that the proceedings on which the findings were based did not comply with essential requirements of law. Therefore, the FPSC submits that it is essential that it be allowed to fulfill its function, as described in Rule 25-22.026(4), Florida Administrative Code, and be allowed to intervene to ensure that all relevant facts are before the fact finder.

9. The FPSC's position, as an intervenor, is impartial with respect to this proceeding; the FPSC is neither an adversary to, nor advocate for, either party. The FPSC's impartiality is further secured by excluding those persons who represent the FPSC before the DOAH Hearing from the final decision making process. Different staff prepare the staff recommendation to the Commissioners

concerning the Recommended Order and will prepare the FPSC's final order.

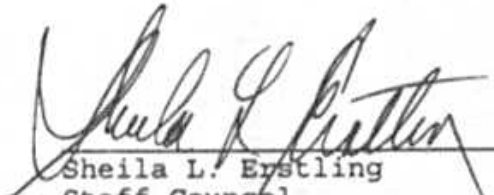
10. Assuming arguendo, that the FPSC was not an "impartial" participant in the proceeding, a lack of impartiality is not a basis for denying intervention. Therefore, the allegation of a lack of impartiality is irrelevant.

11. The FPSC has been granted intervention in other matters that have been referred to DOAH. See for example, Thomas L. Fuller v. Florida Power Corporation, Case 95-4253; Globe International Realty & Mortgage Corporation v. Florida Power & Light Company, Case 95-2514; Jory Bricker v. Florida Power Corporation, Case 93-5713; Janet Knauss v. Florida Power & Light Company, Case 91-4910; Larry Timm v. Florida Power & Light Company, Case 91-2755; Arturo Toboada v. Florida Power & Light Company, Case 91-0331.

In conclusion, the FPSC's role in this proceeding is to represent the public interest and assure that a complete record is available to the Hearing Officer. The FPSC is entitled to participate in the proceeding as a matter of statutory right and pursuant to agency rule.

WHEREFORE, the Florida Public Service Commission, respectfully requests that its Motion for Leave to Intervene be granted.

Respectfully submitted this 14th day of August, 1996.



Sheila L. Erstling
Staff Counsel
Florida Bar No. 933635


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer and Memorandum of Law in Response to Broward County's Objection to Florida Public Service Commission Motion to Intervene has been furnished by U.S. Mail to the following on this 14th day of August, 1996.

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