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MEMORANDUM

JULY 8, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF AUDITING & FINANCIAL ANALYSIS (SLEMKEWICZ, JS)
CAUSSEAU, S. JONES, LEE, MAUREY) RVE
DIVISION OF LEGAL SERVICES (ELIAS) WMS
DIVISION OF ELECTRIC & GAS (JENKINS, COLSON) RC
JOJ

RE: DOCKET NO. 970410-EI - PROPOSAL TO EXTEND PLAN FOR
RECORDING OF CERTAIN EXPENSES FOR YEARS 1998 AND 1999 FOR
FLORIDA POWER & LIGHT COMPANY

AGENDA: 07/15/97 - REGULAR AGENDA - DECISION PRIOR TO HEARING -
INTERESTED PERSONS MAY PARTICIPATE ON ISSUES 2 AND 3 IF
FPL'S REQUEST FOR ORAL ARGUMENT (ISSUE 1) IS GRANTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\970410EI.RCM

CASE BACKGROUND

In Docket No. 950359-EI, the Commission approved a proposal by Florida Power & Light Company (FPL) that resolved all of the identified issues regarding FPL's petition to establish a nuclear amortization schedule. Per Order No. PSC-96-0461-FOF-EI, issued April 2, 1996, FPL was required (1) to book additional 1995 depreciation expense to the reserve deficiency in nuclear production; (2) to record, commencing in 1996, an annual \$30 million in nuclear amortization, subject to final determination by the Commission as to the accounts to which it is to be booked; and (3) to record an additional expense in 1996 and 1997 based on differences between actual and forecasted revenues, to be applied to specific items in a specific order.

This docket was opened to consider an extension of and modification to the plan to allow the recording of additional expenses in 1998 and 1999.

By Proposed Agency Action Order No. PSC-97-0499-FOF-EI, issued April 29, 1997, in this docket, the Commission approved staff's recommendation to extend and modify the plan. On May 20, 1997,

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AmeriSteel Corporation (hereinafter "AmeriSteel") timely filed a protest of the Proposed Agency Action. AmeriSteel has also petitioned to intervene in the docket. After reviewing the pleadings, the Prehearing Officer directed staff to file a recommendation on two pending motions for consideration by the full Commission. This recommendation addresses the two pending motions: AmeriSteel's Petition to Intervene and FPL's Motion to Deny and Dismiss the Protest of AmeriSteel. The issues raised in FPL's response to AmeriSteel's Petition to Intervene are identical to some of the issues raised in FPL's Motion to Deny and Dismiss. Therefore, the discussion of AmeriSteel's substantial interests is included in the analysis of the Motion to Deny and Dismiss. FPL also filed a request for Oral Argument on its Motion.

DISCUSSION OF ISSUES

ISSUE 1: Should Florida Power and Light Company's Request for Oral Argument be granted?

RECOMMENDATION: Yes. Oral Argument might aid the Commission in comprehending and evaluating the issues before it. Since FPL has raised identical issues of law and fact in its response to AmeriSteel's Motion to Intervene and in its Motion to Deny and Dismiss AmeriSteel's protest, parties should be permitted to address both pending motions in their arguments. Oral argument should be limited to ten minutes per side.

STAFF ANALYSIS: In accord with the provisions of Rule 25-22.058, Florida Administrative Code, FPL requested Oral Argument on its Motion to Deny and Dismiss AmeriSteel's protest. FPL states: "...oral argument would aid the Commission in understanding the permissible scope of a proceeding before this Commission after a protest of proposed agency action has been filed. This is particularly true in view of the application of Florida Statutes Section 120.80(13)(b)."

AmeriSteel responded to the request, stating: "To the extent FPL's intent in asking for oral argument is to revisit its opposition to hearings of any kind in this docket, AmeriSteel considers the filed pleadings to provide more than an adequate basis for a decision by the Hearing Officer (sic) or the full Commission. Oral Argument is not necessary."

In the instant case, staff believes the pleadings ably advance the positions of the parties. However, FPL predicates some of its arguments on an interpretation of Section 120.80(13)(b), Florida

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Statutes, that is without precedent. Oral Argument could assist the Commission in evaluating FPL's interpretation and its Motion to Deny and Dismiss AmeriSteel's Protest. Both FPL's opposition to AmeriSteel's Intervention and the Motion to Deny and Dismiss AmeriSteel's Protest allege that AmeriSteel has failed to demonstrate that it has a substantial interest that will be affected by the Commission's actions in this matter. Since these factual and legal issues are common to both motions, staff believes that the parties should be permitted to address both motions in their Oral Arguments. While Oral Argument could be helpful in evaluating the positions of the parties, both parties pleadings ably address the issues. Therefore, staff recommends that Oral Argument be limited to ten minutes per party.

ISSUE 2: Should Florida Power and Light Company's Motion to Deny and Dismiss the Petition and Protest of AmeriSteel Corporation be granted?

RECOMMENDATION: No. AmeriSteel has demonstrated it has a substantial interest in this proceeding. AmeriSteel's protest specifically identifies those factual matters that are in dispute. Further, since AmeriSteel has protested the extension and modification of the plan, and since the plan was the only action proposed in Order No. PSC-97-0499-FOF-EI, Section 120.80(13)(b), Florida Statutes, is not operative in this situation.

STAFF ANALYSIS: Order No. PSC-97-0499-FOF-EI approving the extension and modification of the plan to record additional expenses in 1998 and 1999 was issued as proposed agency action on April 29, 1997.

On May 20, 1997, AmeriSteel timely filed its Petition and Protest of AmeriSteel Corporation to Proposed Agency Action. AmeriSteel alleges that it has a substantial interest that is affected by the Commission's proposed action. In the first paragraph of its pleading, AmeriSteel:

protests the entry of the PAA and requests that hearings be held before the Commission to consider whether to finally approve an extension, with modifications, of the program authorizing Florida Power and Light Company to record additional expenses for the years 1998 and 1999 ("Accelerated Depreciation Plan" or "Plan"). (Protest p. 1)

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AmeriSteel's Substantial Interest

On April 11, 1997, AmeriSteel filed a petition for leave to intervene in this proceeding. AmeriSteel alleges that it has a substantial interest that will be directly affected by the outcome of the Commission's determination in this proceeding. AmeriSteel operates a steel recycling and manufacturing facility located within FPL's retail service territory. In essence, AmeriSteel alleges that but for the extension of the plan, FPL would earn in excess of its authorized return on equity in 1998 and 1999. AmeriSteel alleges that but for the additional expenses authorized by an extension of the plan, "...customers, including AmeriSteel should expect refunds as FPL exceeds the profit sharing threshold."

On April 25, 1997, FPL filed its response to AmeriSteel's petition to intervene. FPL asserts that the substantial interest alleged by AmeriSteel satisfies neither of the requirements of the two pronged test set forth in Agrico Chemical Company v. The Department of Environmental Regulation, 406 So. 2d 478,482 (Fla. 2d DCA 1981):

...before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and 2) that his substantial interest is of a type or nature which the proceeding is designed to protect.

Although not contemplated by Commission rules, AmeriSteel followed FPL's response with a request for Judicial Notice of Order No. PSC-95-1035-PCO-EI, issued August 21, 1995, in Docket No. 950359-EI. That Order granted Florida Steel Corporation's Motion to Intervene. Florida Steel has since changed its name to AmeriSteel Corporation. FPL then, on May 6, 1997, filed a Notice of Objection to AmeriSteel's request, saying that AmeriSteel's "...purpose is not to have the requested judicial notice taken. Instead this is used as a pretext to argue that Order No. PSC-95-1035-PCO-EI is dispositive of AmeriSteel's current petition to intervene and to do so out of time

In its Motion to Intervene, AmeriSteel states:

As a result of the return on equity cap established for FPL by the Commission, FPL customers have a profit sharing relationship with FPL. The charges collected by FPL from its customers can be reduced through Commission ordered refunds if FPL's profits exceed the range the

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Commission has specified.... AmeriSteel has a significant interest in ensuring that FPL does not take unnecessary or unwarranted charges that would prevent FPL from reaching the earnings sharings threshold and providing refunds to existing customers.... the "Added Expense Plan" described in this docket creates a huge amount of additional charges to offset revenue and earnings growth in the years 1998 and 1999. But for those charges, customers, including AmeriSteel, should expect refunds as FPL exceeds the profit sharing threshold.

In its response to the Motion to Intervene, FPL alleges that AmeriSteel has failed to meet both parts of the two-prong test set forth in Agrico Chemical vs. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), rev. denied, 415 So.2d 1359, 1361 (Fla. 1982).

In essence, FPL argues that this is not a proceeding to change rates and charges for FPL, and even if it were, the action taken can only have "a speculative and indirect impact" on AmeriSteel. Thus, FPL argues AmeriSteel has failed to demonstrate that it has or will suffer an injury of sufficient immediacy to satisfy the first prong of the Agrico test. Secondly, FPL argues that this proceeding is not for the purpose of protecting AmeriSteel's "competitive interests" or for the purpose of applying a fictional "return on equity cap". Therefore, FPL suggest that AmeriSteel has failed to satisfy the second prong of the Agrico test.

The Commission's action, protested by AmeriSteel, would authorize additional expenses supported by the rates AmeriSteel pays for electricity. AmeriSteel has alleged that, but for this plan, FPL would exceed its authorized range of return on equity. While "vested interest" is a term of art not usually applied to describe a ratepayers interest in any amount in excess of a utility's authorized range of return on equity, the determination of the appropriateness of the additional expenses is the core issue in this docket. Staff notes there is no "earnings sharings plan" or "return on equity cap" established for FPL. If it appears that FPL will earn in excess of its authorized range, affirmative action by the Commission would be required to capture jurisdiction over the excess earnings.

Section 366.04(1), Florida Statutes, grants the Commission jurisdiction to "regulate and supervise each public utility with respect to its rates and service". Part of the regulation and supervision of a public utility's rates includes the determination of the appropriate level of expense to be included by a public

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utility in its rates, and, to the extent that the rates are excessive (as compared to the utility's authorized return), the determination of what action (refund, rate reduction, change to authorized return on equity, booking additional expenses, etc.) is appropriate.

Staff believes that AmeriSteel, as a ratepayer, by alleging that the proposed action would allow FPL to record expenses which are not appropriate, has shown its substantial interests will be affected. This proceeding, which invokes the Commission's authority to supervise and regulate FPL with respect to its rate and charges, is designed to protect AmeriSteel's, as well as all other FPL ratepayers', substantial interests in assuring that the rates and charges are fair, just and reasonable. Thus, staff recommends that AmeriSteel has demonstrated it has a substantial interest in this proceeding. AmeriSteel's substantial interest in this docket is consistent with the Commission's ruling in Order No. 21651, issued August 1, 1989, in Docket No. 890256-TL, granting Florida Cable Television Association's (FCTA) request to intervene. In that docket, Southern Bell requested authority to charge accelerated depreciation in order to finance its plans to place fiber in the homes of its customers. FCTA had alleged that "as customers of Southern Bell who would be called on to pay rates and provide revenues designed to fund the depreciation represcription sought by Southern Bell, FCTA's members have an interest in assuring that the utility does not impose unfair and unreasonable charges and burdens on ratepayers beyond those rates and rate-related practices required to fairly compensate Southern Bell for telephone service they receive." The interests asserted by AmeriSteel in this docket are similar to those asserted by FCTA in Docket No. 890256-TL and previously asserted by AmeriSteel in Docket 950359-EI.

Sufficiency of AmeriSteel's Protest

Beginning on page 5 of its Protest, AmeriSteel describes in detail for approximately seven pages, why it believes the Commission should not approve the extension and modification of the plan. Among other things:

"The charges taken thus far have contributed to FPL's substantial growth in cash flow... This tremendous increase in cash flow has allowed the company to increase its equity ratio and reduce its debt significantly. The corresponding improvement in FPL's financial profile has greatly benefited stockholders at the expense of refunds for customers." (Protest, para 8, pp.5-6)

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The extension of the Accelerated Depreciation Plan raises substantial factual and policy issues that should be addressed in a formal proceeding. These issues include unreasonable rates, excessive compensation and intergenerational equity. (Protest, para. 12, p.7)

The instant proposal to modify and extend the Accelerated Depreciation Plan through the years 1998 and 1999 similarly affects AmeriSteel's substantial interests, as the amounts to be set aside for additional depreciation are likely to be substantially greater than the levels proposed by FPL in its 1995 petition. (Protest, para. 14, p. 7)

AmeriSteel suggests that extension of the "Added Expense Plan" is not in the public interest because:

- 1) the PAA's announced intent to "bring FPL's accounting in line with non-regulated companies" and to establish a "level accounting playing field between FPL and possible non-regulated competitors" are significant policy decisions which require a formal evidentiary hearing. (Protest, para. 16, p. 8)
- 2) the proposal utilizes stale, understated, revenue forecasts. (Protest, para. 17, p.9)
- 3) the scope of the added expense plan is excessive. (Protest, para. 18, pp.9-10)
- 4) Additional charges to other accounts approved by the plan have not been justified. (Protest, para. 19, p. 10)
- 5) The effect of the proposed plan extension on FPL customers must be addressed (Protest, para. 20, p. 11)
- 6) There is no demonstrated need to extend "The Added Expense Plan" (Protest paras. 21-23, pp. 11-12)

AmeriSteel concludes by saying "The proposed plan significantly enhances FPL's cash flow to the benefit of the Company's investors, but offers no benefits to consumers. In fact, the Plan may reduce FPL's reported earnings in such large amounts that it would deny customers benefits of potential refunds." (Protest, p. 12) Staff does not believe that AmeriSteel's description of this plan as an "Accelerated Depreciation Plan" is accurate.

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On June 10, 1997, FPL filed its Motion to Deny and Dismiss AmeriSteel's protest. FPL renews its arguments on AmeriSteel's failure to state a substantial interest in this docket. FPL further alleges that the protest should be dismissed because AmeriSteel has not identified any disputed issues of material fact and "seeks to expand the of the proceeding beyond that permitted by Section 120.80(13)(b), Florida Statutes."

In light of this statute, FPL states that there are five conclusions that may be drawn concerning the procedure to be followed with respect to AmeriSteel's protest:

- 1) A protest of a "proposed agency action" by the Commission does not commence a de novo proceeding.
- 2) The Commission is to decide whether the protestant adequately stated a substantial interest in the Commission's action.
- 3) If a protest is granted, the Commission is to decide whether a Section 120.57(1) or a Section 120.57(2) hearing is required.
- 4) The scope of any hearing held, if a protest is granted, is restricted to issues, in the proposed action, that are placed in dispute by the Protest.
- 5) Issues in the proposed action that are not disputed by the Protest are deemed stipulated.

FPL then suggests, over nearly five pages, that "AmeriSteel's Protest is based on mischaracterization and sparring with fictitious consequences constructed from such mischaracterization." (Motion p.5)

On June 23, 1997, AmeriSteel filed its response to FPL's Motion to Deny and Dismiss. It states: "AmeriSteel's Protest objects to the plan in its entirety and requests that hearings be held to address approving the Proposed Plan as a whole is in the public interest." It then cites what it believes are nine separate disputed factual matters raised in its May 20, 1997 protest. AmeriSteel reiterates its allegations that it has sufficiently alleged a substantial interest in the proceeding.

The Commission's PAA Order takes one and only one substantive action. It modifies and extends the previously approved plan to two future periods.

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Section 120.80(13), Florida Statutes, provides:

Notwithstanding Sections 120.569 and 120.57, a hearing on an objection to proposed agency action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

This provision does not require, as FPL seems to advocate, that a person whose substantial interests are affected by proposed action to respond in detail, listing every potentially disputed fact which might be pertinent to every issue which might be related to the protest.

As discussed above, staff believes AmeriSteel has adequately demonstrated its substantial interest in the proceeding. Staff believes that the very first paragraph of AmeriSteel's Protest is legally sufficient to advance its right to contest the approval of the plan. Staff believes the disputed issues of fact and policy detailed in the Protest are sufficient to identify the nature of the dispute.

Since the PAA contained only one substantive action (approving an extension and modification of the plan) and that action has been protested, this is a de novo proceeding. Stated differently, there are no actions taken in the PAA which are not in dispute. Therefore, there are no issues subject to the application of Section 120.80(13)(b), Florida Statutes. Therefore, Section 120.80(13)(b), Florida Statutes, is not operative with respect to AmeriSteel's protest.

Therefore, staff recommends that AmeriSteel has demonstrated it has a substantial interest in this proceeding. AmeriSteel's protest specifically identifies those factual matters that are in dispute. Further, since AmeriSteel has protested the extension and modification of the plan, and since the plan was the only action proposed in Order No. PSC-97-0499-FOF-EI, Section 120.80(13)(b), Florida Statutes, is not operative in this situation. Therefore, FPL's Motion to Deny and Dismiss the Protest of AmeriSteel Corporation should be denied.

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ISSUE 3: Should AmeriSteel Corporation's Petition for Leave to Intervene be granted?

RECOMMENDATION: Given the Commission's decision on FPL's Motion to Dismiss, this issue is moot.

STAFF ANALYSIS: AmeriSteel's right to intervene in this proceeding is addressed by the decision on Florida Power and Light Company's Motion to Deny and Dismiss the Petition and Protest of AmeriSteel Corporation. Therefore, this issue is moot.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending resolution of AmeriSteel's protest of the Proposed Agency Action.

STAFF ANALYSIS: This docket should remain open pending resolution of AmeriSteel's protest of the Proposed Agency Action.