

FILE 0037

PUBLIC SERVICE COMMISSION  
OF THE  
STATE OF FLORIDA

Proposal to Extend Plan for the )  
Recording of Certain Expenses for ) Docket No. 970410-EI  
The Years 1998 and 1999 for Florida ) Filed: September 8, 1997  
Power & Light Company )

**MOTION FOR RECONSIDERATION  
OF ORDER ESTABLISHING PROCEDURE**

On August 28, 1997, the Prehearing Officer in this docket issued an Order Establishing Procedure which sets forth the schedule, procedural matters and the scope of issues to be addressed in this docket. Order No. PSC-97-1035-PCO-EI ("ORDER"). Pursuant to the terms of this ORDER and Rule 25-22.0376, Intervenor, AmeriSteel Corporation ("AmeriSteel"), by its undersigned attorneys, seeks reconsideration of this ORDER by the Florida Public Service Commission ("Commission") with respect to several matters as further set forth below as follows:

1. The subject matter of this docket is a proposal to allow Florida Power & Light

ACK \_\_\_\_\_ Company ("FPL") to record certain expenses for the years 1998 and 1999. The docket does not  
AFA 5 contain any petition setting forth the reasonableness and necessity for the Plan, nor does it contain  
APP \_\_\_\_\_  
CAF \_\_\_\_\_ any in depth explanation of the Plan. The record contains a one-page sheet with six points on it (See  
CMU \_\_\_\_\_ Attachment to Staff Recommendation to Proposed Agency Action ("PAA") dated April 14, 1997 -  
CTR \_\_\_\_\_  
EAG 1 "The Plan").

LEG 1  
LI 5 2. Reconsideration is requested of the following matters which the pre-hearing officer  
C \_\_\_\_\_ may have overlooked or failed to consider in the ORDER:  
F \_\_\_\_\_

SE 1  
WAS \_\_\_\_\_  
OTH \_\_\_\_\_

DOCUMENT NUMBER-DATE  
09005 SEP-85  
FPSC-RECORDS/REPORTING

- (a) The requirement that intervenor file its direct testimony simultaneously with the utility's direct testimony. Such a requirement is unfair and unreasonable as AmeriSteel would have to file its testimony before the disclosure of the basis and details of the Plan by its advocates.
- (b) The hearing schedule denies AmeriSteel the opportunity to do meaningful discovery of the Plan's proponents.
- (c) The hearing schedule in the **ORDER** violates AmeriSteel's procedural due process safeguards. The schedule is intended to ensure final Commission action in calendar year 1997, however, there is no basis in the record mandating this arbitrary timetable. Adopting a truncated schedule to avoid recognizing excess FPL earnings in 1998 is contrary to the public interest and denies AmeriSteel the ability to conduct meaningful discovery to find out the necessity for the Plan.
- (c) The List of Issues for the proceeding. The issues as set forth in the **ORDER** are unreasonably narrow, particularly in view of the reasons stated by Staff for initiating this docket, and the lack of any clear enunciation for the necessity for the Plan.

### SUMMARY

3. The schedule established in the **ORDER** unfairly aims toward a rush to judgment on the Plan, which entails more than \$200 million in additional FPL charges per year for no purpose other than to prevent FPL from exceeding the top of its authorized return. This schedule unreasonably forces AmeriSteel to file its expert testimony before the disclosure of the testimony of either the *de facto* applicant (FPL) or the Plan initiator (Staff). AmeriSteel, therefore, is placed in the impossible, and fundamentally unfair, position of having to anticipate the reasons the proponents "might" offer in support of the Plan. AmeriSteel also is afforded no meaningful opportunity to conduct discovery once the proponents disclose their justification of the Plan in testimony and exhibits. Further, the **ORDER** disregards the issues proposed by AmeriSteel for exploration in this

docket, particularly when these proposed issues directly relate to the reasons advanced by Staff and approved by the Commission in adopting the PAA. AmeriSteel requests a fair and proper schedule be established including the issues listed on Attachment A to this motion be incorporated in the scope of this docket. If a reasonable hearing schedule does not result in Commission action until sometime in 1998, AmeriSteel urges the Commission to take the actions needed to safeguard ratepayer interests against excess FPL earnings.

### **BACKGROUND**

4. In 1996, in response to a FPL petition to accelerate recovery of its nuclear plant investment that could potentially be "stranded" in a competitive power market, the Commission approved a plan authorizing recording of certain additional expenses.<sup>1</sup> This Order, issued in April, 1996, authorized additional expenses for the previous year (1995) and the current year (1996)

5. In 1997, the Staff of the Florida Public Service Commission ("Staff") initiated the instant docket by filing a Request to Establish Docket which contains nothing more than a suggested Docket Title. The Staff explained its action in this docket by stating:

Unlike most proceedings before the Commission, there was no petition filed in this docket. Very early in 1997, Staff recognized that based on historic and projected data, FPL would exceed the maximum of its authorized return on equity (ROE) in 1998. Staff, on its own initiative, met with the Company, the Office of Public Counsel, and all other known interested persons to address this [the expected excess earnings] situation. As a result, the Plan was presented to the Commission in a recommendation.

(See Staff Recommendation Memorandum to the Commission dated August 14, 1997, for the August 18, 1997 Agenda Conference, p. 17).

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<sup>1</sup> Docket No. 950359-EI, Order No. PSC-96-0461-FOF-EI, issued April 2, 1996

Thus, this docket was initiated by the Staff for the purpose of addressing an identified excess earnings situation for FPL beginning in 1998. By "addressing the situation" through the terms of the Plan, i.e. avoid excess earnings by increasing expenses charged in 1998 and 1999, the Plan benefits FPL investors at the expense of FPL consumers. Customers have a reasonable expectation that the Commission will reduce electric rates if a utility has excess earnings.

6. As noted in prior pleadings, AmeriSteel became aware of the proposed plan extension, and requested and received a briefing from Staff on the Plan and its components. Staff did not describe the Plan as a solution to the excess earnings "situation," although AmeriSteel repeatedly suggested that that was precisely the effect of the Plan. Through its statements at that meeting, subsequent pleadings, and oral argument and discussion before the Commission, AmeriSteel has left no doubt that it did not concur with FPL and Staff regarding the Plan, that it does not advocate or support any facet of the Plan, and that to the contrary, it believes the Plan is contrary to the public interest.

7. Following the Commission's determination on August 18, 1997 to grant AmeriSteel's protest and to schedule hearings in this matter, Staff scheduled a meeting and conference call with the parties to discuss scheduling and issues. In response to a tentative list of issues circulated by the Staff, AmeriSteel provided a proposed list of issues to all parties for discussion purposes. FPL did not circulate any requested issues. During the telephone conference, Staff indicated that, notwithstanding AmeriSteel's objections, the hearing schedule would be set in a fashion that would provide for final Commission action in 1997. The parties discussed the proposed issues list, and based on that discussion, AmeriSteel subsequently modified and circulated another proposed list of issues to the parties (see Attachment A). The **ORDER** ultimately issued adopted the abbreviated

schedule Staff outlined during the telephone conference call without change, and it addressed only the issues suggested by Staff.

## ARGUMENT

### **I. The Hearing Schedule Violates AmeriSteel's Procedural Due Process Rights.**

8. The combination of the absence of a utility petition or any other statement setting forth the basis and necessity for the relief provided by the Plan, the requirement that AmeriSteel file its direct testimony prior to any disclosure by the Plan's proponents, and the unreasonably truncated schedule effectively denies AmeriSteel any semblance of procedural due process in this docket.

#### **A. AmeriSteel Should Not Be Required To File Direct Testimony At The Same Time As FPL**

9. AmeriSteel agrees with the Staff's conclusion that FPL carries the burden of proving the reasonableness of the Plan by a preponderance of the evidence. In absence of a petition, however, the Staff, as the initiator of this docket, has an obligation to come forward with reasons showing why it believes the Plan extension is reasonable and in the public interest. The only party in this docket who is not advocating the Plan is AmeriSteel. Thus, it does not carry the burden of proving the reasonableness and necessity of the Plan. In fact, it is impossible for AmeriSteel to address the Plan in its expert testimony until there has been a more detailed explanation regarding the need for it by FPL or the Staff.

10. The filing schedule in the **ORDER** requires AmeriSteel to file direct testimony at the same time as FPL (October 10, 1997), and before Staff files its testimony. AmeriSteel's witnesses would need to speculate regarding the proponents' basis for supporting the adoption of the Plan. For

example, the PAA indicates that writedowns of regulatory assets relies solely upon an expressed desire to establish a "level accounting playing field between FPL and possible non-regulated competitors." (See Staff Recommendation to Proposed Agency Action dated April 14, 1997 at p. 3). AmeriSteel has no way of knowing whether Staff will continue to advocate that policy. AmeriSteel also requires some statement from Staff explaining the basis for its novel concept of a "level accounting playing field" before AmeriSteel can be expected to form a position and present testimony on whether such a policy, at least as applied to FPL, justifies approval of the Plan. AmeriSteel posed that very question as an issue to be addressed in this docket. The **ORDER** does not contain it as an issue for the parties to address.

11. FPL has yet to file any justification for the adoption of the Plan. In general, the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1<sup>st</sup> DCA 1993)(emphasis added). At a minimum, FPL should be required to file its testimony prior to AmeriSteel.

12. It is utterly unfair to require AmeriSteel, which is not a Plan proponent and does not carry the burden of proof, to file testimony before seeing the proponent's alleged facts, reasons and supporting materials. The **ORDER**, however, creates this very dilemma and compounds this problem by allowing no meaningful opportunity for discovery before rebuttal testimony is due. Thus, the **ORDER** provides AmeriSteel no effective opportunity to respond to the reasons the Plan's advocates actually will give in support of the Plan, but must offer direct testimony regarding the merits of the Plan by guessing what its proponents *may* say. This process could not be more fundamentally unfair.

**B. The Hearing Schedule Affords AmeriSteel No Meaningful Opportunity For Discovery**

13. As Staff recognized, most proceedings before the Commission begin with a petition, application, complaint or other request for relief. The Commission's rules require a party seeking relief to state its facts in support and the reasons the relief requested should be granted. *See, e.g.*, 25-22.036 FAC. When matters are set for hearing, the petitioner files its testimonial support and intervenors, thereafter, conduct discovery based on the assertions contained in the testimony and exhibits. In fact, the very purpose of discovery is to explore the factual unpinning of the proponents' claims for relief.

14. In this case, no such documents exist and no claim of a need for relief has been asserted. AmeriSteel will not see FPL's testimony until its direct testimony must be filed, and the abbreviated case schedule does not allow even one round of discovery requests between the time Staff's testimony is filed and rebuttal testimony must be submitted.<sup>2</sup>

15. AmeriSteel has served a set of discovery requests to FPL and Staff based on the skeletal information in the record (Staff's Recommendation Memos and the PAA). However, meaningful discovery cannot be initiated until AmeriSteel has had an opportunity to examine the testimony and exhibits of the Plan's proponents. It is problematic at best to propound interrogatories for reasons not yet given and facts not yet alleged. Once the proponents' reasons are given and the supporting facts are stated, the schedule allows no time for AmeriSteel to conduct discovery needed to explore those positions revealed by proponents for the first time before it must file rebuttal. The

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<sup>2</sup> The discovery rules provide for a twenty (20) day turnaround on requests for information, but only ten (10) days are allowed between the filing of Staff's testimony and the date for filing rebuttal testimony.

schedule is not simply inefficient. It is arbitrary, discriminatory and patently unfair for any meaningful discovery in this docket.

**C. The Unnecessarily Abbreviated Schedule Seriously Impairs AmeriSteel's Right To A Fair Hearing On The Issues.**

16. While not specifically mentioned in the **ORDER**, the docket schedule is designed to facilitate a final Commission decision no later than the end of 1997 (On or before December 16th). The reason for requiring a hearing schedule to meet that deadline is undisputed: absent Commission approval of the Plan, the Commission must confront directly FPL's excess earnings in 1998. To its credit, Staff openly acknowledged that it would need to recommend action of some kind to protect ratepayer interests if the final decision in this docket were to slip into 1998 (See Memorandum dated August 14, 1997, regarding August 18, 1997 Regular Agenda - Decision Prior to Hearing pages 2 and 3). Such action, of course, would be necessary in any event if the added expense finally authorized in this docket is not big enough to avoid an excess earnings situation.

17. This docket was initiated by the Staff without a utility petition, on April 2, 1997. On the same day, the Staff filed its recommendation to approve proposed agency action adopting the Plan. Only eight (8) days after the opening of this docket, AmeriSteel filed its Petition for Leave to Intervene [in this docket] and Objection to the Proposed Agency Action. It took the Commission approximately four (4) months (from April 10, 1997 to August 18, 1997) to rule on AmeriSteel's Petition to Intervene. AmeriSteel is now being told it must complete discovery, prepare testimony (before any proponent of the Plan has filed their testimony) and be prepared to meaningfully participate in a full hearing in less than two (2) months without an adequate opportunity to conduct discovery.



18. A better approach under these circumstances is to initiate a new docket investigating FPL's over-earnings or take other appropriate steps to protect consumer interests against excessive rates. Any such docket could be closed if the resolution of this docket offsets any further need to review excess earnings and excessive rates. The path chosen in the **ORDER**, to shoehorn this proceeding into the fourth quarter of 1997, tramples on AmeriSteel's right to meaningfully participate in this docket.

## **II. The Scope Of The Proceeding Is Unreasonably Narrow**

19. Parties whose substantial interests are affected by a proposed agency action are entitled to a fair hearing on material issues in dispute. The Commission has determined that AmeriSteel's substantial interests are affected by the outcome of this docket. The Commission may not narrow its scope of inquiry in the docket in order to avoid a full hearing on issues affecting those substantial issues. The courts have consistently held that the intent of administrative processes is to encourage public participation and protect the public interest. See, Fairbanks, Inc. v. Florida Department of Transportation, 635 So. 2d 58 (Fla. 1<sup>st</sup> DCA 1994).

Six substantive issues are listed on Attachment A to the **ORDER**. Five address specific aspects of the Plan, presuming that the Plan should be approved in some form. The sixth poses the ultimate question of whether the Plan should be extended for 1998 and 1999 as proposed. The last issue appears to encompass any factors that are germane to determining if the Plan is reasonable and in the public interest. AmeriSteel, however, raised specific issues relating to the reasonableness of the Plan which were excluded from the issues list. These additional issues stem from conclusions stated in the PAA for approving the Plan, reasons for the Plan set forth in Staff's recommendation

memoranda, and matters discussed in considerable detail during the oral arguments in this docket. Specifically, these issues concern whether this Plan is being justified as an action in contemplation of competition in the electric industry, and consideration of the effects that approving or denying the Plan will have on excess FPL earnings. As shown on Attachment A, AmeriSteel has proposed these issues as follows:

- Should The Commission consider the impacts that the "Plan for Recording Certain Expenses for 1998 and 1999: (the Plan) has on FPL's capital structure, required return, and earnings?
- What are FPL's expected earnings if the Plan is not approved for 1998 and 1999?
- Should the Commission take action to facilitate establishing a level accounting playing field between FPL and possible non-regulated competition?
- Is it appropriate or necessary for FPL to take additional expense for any of the purposes listed in the PAA?

AmeriSteel believes these issues are arguably encompassed within issue No. 6 in the ORDER's Issue List, however, because they are core concerns relating to the effect of the Plan on consumers interests, AmeriSteel requests they be specified in the scope of the issues.

**A. The PAA Concludes That Competitiveness Concerns Justify The Early Writedowns Proposed In The Plan. The Basis For This Conclusion Is Disputed And Must Be An Issue Addressed In The Hearings If It Is To Be Used To Justify Any Final Action Regarding The Plan**

20. The Plan is the continuation of a settlement reached between Staff and FPL in 1996 to resolve the utility's petition seeking protection against nuclear plant stranded investment in light of increasing competition in the electric industry. Staff's reasoning in recommending that the Plan be extended to 1998 and 1999, with some accounting modifications (i.e., to add accounts where additional charges may be taken), no longer asserts the threat of stranded costs as a justification for

the Plan. Instead, it touts the need to establish a "level accounting playing field between FPL and possible non-regulated competitors" as the sole reason justifying the early writedowns of regulatory assets. (Staff Memorandum dated April 14, 1997 at p. 3; see PAA at p. 2). AmeriSteel's Protest questioned whether this consideration justifies any part of the Plan (Protest at p. 8). It is, therefore, in every respect a material issue in dispute that should be addressed in this case. In its testimony, the Staff may expand or abandon that line of reasoning, but it remains an issue in the case because the PAA relies on that justification.

**B. The Reasonableness Of Extending The Plan For 1998 And 1999 Is Directly Linked To Projected FPL Excess Earnings**

21. By permitting additional charges either to specific accounts or the unspecified depreciation reserve, the Plan will have the undisputed effect of reducing regulatory earnings in 1998 and 1999. The amounts charged under the Plan are likely to be well in excess of \$200 million per year. Thus, the impact on earnings will be substantial. AmeriSteel has maintained consistently that FPL is facing an excess earnings situation that the Commission should address to protect ratepayers against excessive rates and that the Commission's approval of the Plan would greatly reduce the level of excess earnings or actually prevent FPL from exceeding the top of its authorized return range.

22. Staff has confirmed that absent approval of the Plan, FPL is expected to be in an excess earnings situation in 1998. Staff further has stated candidly that it initiated discussions with FPL to extend the Plan to 1998 and 1999 because it needed to address this (expected excess earnings) situation. (Staff's August 14, 1997 Recommendation Memo, p. 17). Consequently, the effect of the Plan on FPL's excess earnings situation, and the more fundamental issue of whether it is reasonable and in the public interest for the Commission to approve this action to avoid excess

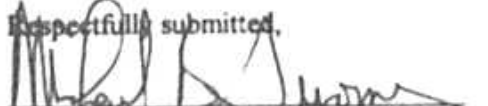
earnings from occurring in the first place are core issues to be addressed in the hearings. Certainly the Commission should consider whether the public interest is better served by denying the Plan and instead taking the appropriate steps to protect consumers from excessive and unreasonable FPL rates.

23. In requesting that this docket consider the overall need, if any, for this accounting plan for FPL and the ramification of the Plan with respect to excess FPL earnings, AmeriSteel is not asking the Commission to convert this case into a reverse make whole rate matter. While accelerated asset recovery is plainly a central element of FPL's preparation for a competitive environment, competitiveness issues arise in this proceeding only as a result of the conclusion in the PAA relying on such concerns as the reason for early writedowns of regulatory assets. AmeriSteel is not requesting that this docket address generic policy issues. It does, however, request that consumers/customers interests in this accounting scheme be fully and fairly examined to determine if this Plan is in the public interest.

### CONCLUSION

For the reasons stated above, AmeriSteel requests that the Commission reconsider and clarify the **ORDER** and direct changes in the hearing schedule that are required for a fair hearing and revise the List of Issues to ensure that consumer interests are considered, and take such additional measures as the Commission deems appropriate.

Respectfully submitted,



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Dated: September 8, 1997

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**CERTIFICATE OF SERVICE  
(PSC DOCKET NO. 970410-EI)**

**I HEREBY CERTIFY** that a true and correct copy of AmeriSteel Corporation's Motion for Reconsideration of Order Establishing Procedure as corrected herein has been furnished via facsimile to the following:

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**STATE OF FLORIDA  
PUBLIC SERVICE COMMISSION**

Proposal To Extend Plan For The Recording )  
Of Certain Expenses For The Years 1998 And ) Docket No: 970410-EI  
1999 For Florida Power & Light Company )

**AMERISTEEL'S PROPOSED ISSUES**

- ISSUE 1:** What is the appropriate revenue amount to be used to determine the level of additional expenses allocated to this Plan?
- ISSUE 2:** Should the Commission defer a decision to allow any additional decommissioning or dismantlement expense until there has been a full examination of FPL's nuclear decommissioning and fossil plant dismantlement studies?
- ISSUE 3:** Should the Commission consider whether FPL has reserve depreciation surplus balances for any of its plant accounts to offset depreciation reserve deficiencies?
- ISSUE 4:** Should FPL be authorized to accelerate the write-off of Unauthorized Loss on Reacquired Debt?
- ISSUE 5:** Should FPL be authorized to record, in an unspecified depreciation reserve, an expense amount greater than the amounts to correct any depreciation reserve deficiency, write off the Unamortized Loss on Reacquired Debt, correct any fossil dismantlement reserve deficiency, and correct any nuclear decommissioning reserve deficiency?
- ISSUE 6:** Should the Commission consider the impacts that the "Plan for Recording Certain Expenses for 1998 and 1999" (the Plan) has on FPL's capital structure, required return, and earnings?
- ISSUE 7:** What are FPL's expected earnings if the Plan is not approved for 1998 and 1999?
- ISSUE 8:** Should the Commission take action to facilitate establishing a level accounting playing field between FPL and possible non-regulated competition?
- ISSUE 9:** Is it appropriate or necessary for FPL to take additional expense for any of the purposes listed in the PAA?
- ISSUE 10:** Should the Plan be approved for 1998 and 1999 as set forth in Order No. PSC097-0499-FOF-EI?
- ISSUE 11:** Should this docket be closed?