

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Investigation into the equity ratio
and return on equity of Florida Power &
Light Company

Docket No. 981390-EI

**FLORIDA ALERT AND GEORGIA-PACIFIC CORPORATION'S MEMORANDUM IN
OPPOSITION TO FLORIDA POWER AND LIGHT COMPANY'S
MOTION TO DISMISS**

Petitioners, Florida Alliance for Lower Electric Rates Today ("ALERT") and Georgia-Pacific Corporation (collectively "Petitioners"), pursuant to Rules 25-22.037 and 28-106.204, Florida Administrative Code, file this memorandum in opposition to the motion to dismiss filed by Florida Power & Light Company ("FPL") and in support say:

I. **BACKGROUND**

Petitioners filed a Petition on Proposed Agency Action ("the Petition") requesting a formal administrative hearing with regard to Order No. PSC-98-1748-FOF-EI ("the PAA") which order proposed, among other, to authorize a return on equity (ROE) and equity ratio for FPL and to

allow FPL to reduce it's reported earnings through the use of accelerated depreciation and

amortization. In response, FPL filed a motion to dismiss arguing that: (a) the petitioners failed to

plead a sufficient interest, (b) the petitioners' substantial interests are not affected, and (c)

ALERT and the other association petitioners lack standing to challenge the PAA.

"To state a cause of action a complaint need only contain a *short and plain statement as*

to the ultimate facts which indicate the pleader is entitled to relief." Weaver v. Leon County

Classroom Teacher Assoc., 680 So.2d 478, 481 (Fla. 1st DCA 1996) (emphasis added). When

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considering a motion to dismiss, the court "must assume that all of the facts alleged in the complaint are true and must draw all reasonable inferences in favor of the pleader." *Id.*, quoting Shahid v. Campbell, 552 So.2d 321, 322 (Fla. 1st DCA 1989). Pleadings in an administrative proceeding "must be such as to reasonably inform the affected party of the nature and purpose of the hearing to be held and the relief sought by the initiating party." Deel Motors, Inc. v. Dept. of Commerce, 252 So.2d 389, 394 (Fla. 1st DCA 1971); *see also* Hunter v. Dept. of Professional Regulation, 458 So.2d 842, 844 (Fla. 2d DCA 1984).

The requirements for a petition to initiate an administrative hearing are stated in Rule 28-106.201(2), Florida Administrative Code. Among other requirements, the Rule requires a petition to provide "an explanation of how the petitioner's substantial interests will be affected by the agency determination." Rule 28-106.201(2)(b), Florida Administrative Code. A petition shall be dismissed only if it is not in "substantial compliance" with the requirements of the rule and, if dismissed, such dismissal shall be without prejudice "unless it conclusively appears from the face of the petition that the defect cannot be cured." Rule 28-106.201(4), Florida Administrative Code.

II. THE PETITION STATES A SUBSTANTIAL INTEREST IN THE PAA

FPL alleges that the Petition failed to meet the standards for intervention under Rule 28-106.201, Florida Administrative Code, because it fails to plead an interest sufficient to support a protest. The Petition provides a straightforward explanation of what Petitioners' substantial interests are and how they are affected: paragraphs three and four of the Petition explain that Petitioners or their members are located in FPL's service territory and the PAA denies them "an electric base rate reduction and denies them a refund for amounts overcharged by FPL in the

past." This is a short and plain statement of the ultimate facts sufficient to show how petitioners' substantial interests are affected and reasonably informs FPL of the nature and purpose of the proceedings, and therefore meets the requirements of Rule 28-106.201. Although no more is required, the Petition also explains how the PAA allows FPL to accelerate depreciation and amortization to recover speculative stranded costs in advance of retail electric competition and requires Petitioners to pay for such alleged stranded costs. If FPL desires a more detailed understanding of Petitioners' substantial interests, FPL's recourse is a motion for more definite statement, not a motion to dismiss. The level of "support, explanation or authority" demanded by FPL is simply not required by the rules of pleading.

FPL also summarily argues that Petitioners fail to meet the test for standing under Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981) and Ameristeel Corp. v. Clark, 691 So.2d 473 (Fla. 1997), without explaining what the standing test is or how it applies to Petitioners. At the pleading stage, standing is dependent on an allegation of a substantial interest in the proposed agency action. Rule 28-106.201, Florida Administrative Code. Under Agrico, to demonstrate a substantial interest a petitioner 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 injury is of a type or nature which the proceeding is designed to protect. Agrico, 406 So.2d at 482. FPL complains that "the standards of Agrico . . . are not addressed at all by Petitioners." However, Petitioners are not required to plead in the level of detail demanded by FPL. The rule outlined in Agrico is not a pleading standard. Rather it is a test to determine whether a petitioner can prove a substantial interest. The pleading standard, which the Petition meets as explained above, is specifically set forth in Rule 28-106.201, Florida

Administrative Code, which requires a statement of a substantial interest and how it will be affected.

Without admitting that it is necessary to plead that Petitioners meet the Agrico standard, Petitioners do in fact meet the standard. Under the first prong of Agrico, Petitioners will suffer injury in fact because if the PAA becomes final, FPL will be allowed to earn an excessive rate of return and force Petitioners or their members to pay for FPL's alleged speculative future stranded costs. Petitioners meet the second Agrico prong because they are customers of FPL and as such, have a right to fair and reasonable rates and protection from being forced to pay stranded costs in a regulated market. Staff's initial memorandum asked the Commission to hold a hearing to determine whether FPL's equity ratio and ROE were excessive. Ensuring that customers of FPL pay fair and reasonable rates will certainly be one of the major purposes of such a hearing.

III. THE PAA AFFECTS PETITIONERS' SUBSTANTIAL INTERESTS

Petitioners' have an obvious substantial interest in paying a fair and reasonable rate for electricity. As explained in the petition, the PAA affects Petitioners' interest in fair and reasonable rates by: authorizing an excessive ROE, authorizing an excessive equity ratio, authorizing the use of off-balance obligations to artificially lower FPL's equity ratio, and authorizing improper disposition of over-earnings. Petitioners also have a substantial interest in not being forced to pay FPL's speculative stranded costs in advance of retail competition. These allegations, which must be accepted as true for purposes of FPL's motion to dismiss, clearly state the impact of the PAA on Petitioners' substantial interests. Nothing more is required of an initial pleading.

FPL argues that the PAA amounts merely to an acceptance by the Commission of a settlement offer by FPL. Whether FPL made a settlement offer to the Commission is irrelevant. What is relevant is the action the Commission proposes, which is to allow FPL to hide its over-earnings by accounting measures, to allow FPL an ROE and equity ratio which result in rates which are not fair and reasonable, and to require Petitioners to pay FPL's alleged stranded costs. And as explained above, such action substantially affects Petitioners

Incredibly, FPL also argues that Petitioners are not challenging the PAA's finding that the settlement will create substantial benefits for FPL's customers, and therefore Petitioners cannot maintain that there has been an adverse impact on their substantial interests. On the contrary, the Petition, as did the petitions of the other petitioners, challenged everything which the PAA proposed: new authorized equity ratio and ROE, adjustment of equity ratio for power purchase contracts, recovery of stranded costs, and use of regulatory liability accounts. Yet FPL would have the Commission believe that Petitioners accept that the PAA creates substantial benefits for FPL's customers.

Even assuming without admitting that FPL's offer to lower its ROE and equity ratio can only benefit customers, the same is not true with regard to recovery of stranded costs. By allowing such recovery, the PAA creates inter-generational inequity, deprives Petitioners of fair and reasonable rates based on some future speculative event, allows FPL to recover stranded costs without any attempt to calculate the amount of such stranded costs, and contravenes current law which does not allow retail electric competition.

Finally, as FPL admits in its motion to dismiss, the Commission recognized in Docket No. 970410-E1, *Proposal to Extend Plan for Recording of Certain Expenses for Years 1998 and*

1999 for FPL, that a ratepayer has a substantial interest in assuring that only prudent expenses are included in utility rates, even if rates will not change as a result. Once again, allowing FPL to recover stranded costs from its customers in advance of retail competition is not a prudent expense, and therefore the PAA affects Petitioners' substantial interests.


IV. FLORIDA ALERT HAS STANDING AS AN ASSOCIATION TO REQUEST A HEARING ON THE PAA

The standing requirements for an association are: (1) a substantial number of members, although not necessarily a majority, are substantially affected, (2) the subject matter is within the association's general scope of interest and activity, and (3) the relief requested must be of the type appropriate for an association to receive on behalf of its members. Florida Home Builders Assoc. v. Dept. of Labor and Employment Security, 412 So 2d 351, 353-354 (Fla. 1982). For purposes of a motion to dismiss, ALERT need not prove but rather merely allege that a substantial number of its members are substantially affected. Paragraph 3 clearly states that "a substantial number of its members are located in [FPL's] service territory and the PAA denies ALERT's members an electric base rate reduction and denies them a refund for amounts overcharged by FPL." As is clear by the name of the association, the "Florida Alliance for Lower Electric Rates Today," the matter of fair and reasonable rates is within ALERT'S general scope of interest and activity. As relief, ALERT requested that the Commission conduct a hearing on the issues addressed in the petition. The participation of ALERT on behalf of its members is more appropriate and desirable than the appearance of many individual members which would create unnecessary expense, duplication, and delay. Any relief provided would flow directly to the benefit of ALERT's members and other FPL customers and would not actually be received by the association.

FPL alleges that, on information and belief, a substantial number of ALERT's members are not customers of FPL and that ALERT failed to ask one of its members for consent to file the Petition. These allegations concern factual matters which FPL should address in a motion for summary judgment with supporting evidence. Meanwhile, the allegations in ALERT's petition must be accepted as true at the stage of a motion to dismiss. Even assuming, without admitting, that FPL's allegations are true, such facts would not detract from ALERT's standing as an association under the test in Florida Home Builders Association outlined above. There is simply no requirement for standing that a majority of an association's members be substantially affected or that an association obtain the consent of each and every member prior to filing a petition. See Florida Home Builders Association.

WHEREFORE Petitioners request the entry of an order denying FPL's motion to dismiss.

Dated this ²⁶27 day of January, 1999.


J. Michael Huey (Fla. Bar # 0130971)
J. Andrew Bertron, Jr. (Fla. Bar # 0982849)
HUEY, GUILDAY & TUCKER, P.A.
Post Office Box 1794
Tallahassee, Florida 32302-1794
(850) 224-7091
Attorneys for the Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been furnished by hand-delivery (*) or U.S. Mail this 27th day of January, 1999, to the following:

Robert V. Elias, Esq.*
Legal Division
Florida Public Service Commission
Gunter Building, Room 370
2450 Shumard Oak Blvd.
Tallahassee, Florida 32399-0872

Joseph McGlothlin, Vicki Kaufman
McWhirter, Reeves
117 S. Gadsden Street
Tallahassee, Florida 32301
Counsel for FIPUG and Tropicana Products


John W. McWhirter, Jr.
400 North Tampa Street, Suite 2450
P.O. Box 3350
Tampa, Florida 33601-3350
Counsel for FIPUG and Tropicana Products

Ronald C. LaFace, Seann Frazier
Greenberg Traurig, P.A.
101 East College Ave.
P.O. Drawer 1838
Tallahassee, Florida 32302
Counsel for the Coalition for Equitable Rates

Bill Walker
Florida Power and Light Company
215 South Monroe Street
Suite 810
Tallahassee, Florida 32301-1859

Matthew M. Childs
Steel, Hector & Davis LLP
215 South Monroe Street, Suite 601
Tallahassee, Florida 32301-1804

John Roger Howe, Esq.
Office of Public Counsel
111 W. Madison Street, #812
Tallahassee, Florida 32399-1400


Attorney

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