



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: FEBRUARY 4, 1999

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

FROM: DIVISION OF AUDITING AND FINANCIAL ANALYSIS (LESTER, DRAPER, SLEMKEWICZ, SALAK) *DS*
DIVISION OF ELECTRIC AND GAS (HAFF) *MSW*
DIVISION OF LEGAL SERVICES (COLLINS, ELIAS) *RVE* *PLT* *199*

RE: DOCKET NO. 981390-EI - INVESTIGATION INTO THE EQUITY RATIO AND RETURN ON EQUITY OF FLORIDA POWER & LIGHT COMPANY.

AGENDA: 02/16/99 - REGULAR AGENDA - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\981390.RCM

CASE BACKGROUND

During 1998, representatives of the staff, Florida Power & Light Company (FPL), and other interested persons met on numerous occasions to consider issues related to FPL's earnings, including its equity ratio and authorized return on equity. These discussions culminated in a proposal by FPL to reduce its authorized return on equity, cap its equity ratio, and record additional expenses pursuant to the plan previously approved by the Commission in Docket No. 970410-EI. By Order No. PSC-98-1748-FOF-EI issued December 22, 1998, the Commission approved FPL's proposal as proposed agency action. The Florida Industrial Power Users Group (FIPUG); Tropicana Products, Inc. (Tropicana); the Coalition for Equitable Rates (Coalition); the Florida Alliance for Lower Electric Rates Today (ALERT) and Georgia Pacific Corporation (GP); all timely filed protests to the proposed agency action. On January 15, 1999, FPL filed a Motion to Dismiss all four protests.

DOCUMENT NUMBER-DATE

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Fpsc-RECORDS/REPORTING

DOCKET NO. 981390-EI
DATE: February 4, 1999

FPL also filed a separate Request for Oral Argument on its Motion. FIPUG, Tropicana, ALERT and GP, and the Coalition all filed timely responses to the Motion to Dismiss. No response was filed to the Request for Oral Argument. A hearing on the protests is currently scheduled for April 12-13, 1999.

On January 20, 1999, the Office of Public Counsel (OPC) filed a petition asking that the Commission conduct a full revenue requirements rate case and establish reasonable base rates and charges for FPL. Since the filing of OPC's petition, FIPUG, and the Coalition have petitioned to intervene in that proceeding. While not addressed in this recommendation, OPC's petition is related to a consideration of the arguments raised in the protests and the Motion to Dismiss. Staff plans to file a recommendation addressing OPC's petition for consideration at the March 16, 1999, agenda conference.

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. Oral argument should be limited to twenty 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 Dismiss the protests. FPL states: "...oral argument would aid the Commission in understanding and resolving matters in this docket." No party opposed the Request for Oral Argument.

In the instant case, staff believes the pleadings effectively advance the positions of the parties. However, Oral Argument could assist the Commission in evaluating FPL's Motion to Dismiss. Therefore, staff recommends that Oral Argument be limited to twenty minutes per side.

ISSUE 2: Should Florida Power & Light Company's Motion to Dismiss be granted?

RECOMMENDATION: No. Each of the entities filing a protest has sufficiently alleged that it has standing to challenge the proposed action. The question of whether or not a ratepayer's substantial interests are affected by the recordation of additional expenses, such as those proposed by FPL, has previously been answered in the affirmative.

STAFF ANALYSIS: As to the various protests, FPL raised three arguments in its Motion to Dismiss. First, FPL alleges that each and every protest fails to plead an interest sufficient to support a protest. Second, FPL argues that FIPUG, ALERT, and the Coalition have failed to establish a basis to participate as an association on behalf of their members. Finally, FPL alleges that the substantial interests of the protestants are not affected by the Commission's Order. The arguments are analyzed in reverse order.

1. The Substantial Interests of the Protestants are not Affected by the Commission's Order

The oft-cited test for standing in an Administrative proceeding is 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.

This question of ratepayer standing in a plan to record additional expenses without changing rates was extensively considered by the Commission in a previous extension of this plan in Docket No. 970410-EI. In a Motion to Dismiss and Deny the Protest of AmeriSteel, Inc., FPL argued that it was 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. Therefore, FPL alleged AmeriSteel failed to demonstrate that it has or will suffer an injury of sufficient immediacy to satisfy the first prong of the Agrico test. Second, FPL argued that AmeriSteel's claimed interest was not of the nature the proceeding was designed to protect. Therefore, FPL suggested

that AmeriSteel has failed to satisfy the second prong of the Agrico test.

By Order No. PSC-97-1070-PCO-EI, issued September 10, 1997, the Commission held that AmeriSteel did have a substantial interest in the consideration of the expense plan:

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 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.

We believe that AmeriSteel has demonstrated it has a substantial interest in this proceeding. Our finding that AmeriSteel has standing is based on two factors. First, regulatory approval is required. In the instant case, FPL is maintaining its books and records in accord with Generally Accepted Accounting Principles (GAAP), the Uniform System of Accounts (USoA), Commission Rules, and past orders of the Commission. The plan would alter the manner in which FPL maintains its books and records. Second, the amount at issue in this proceeding (potentially in excess of 200 million dollars per year) is, by any standard, material. (Order No. PSC-97-1070 at pp.7-8)

As to the plan extension proposed by FPL in this docket, the two factors discussed in the-above referenced Order are identical. Regulatory approval is required. The amount at issue is material. FPL does not reference, or otherwise distinguish, the Commission's decision in Order No. PSC-97-1070-PCO-FOF-EI from the instant protests it seeks to have dismissed. Staff believes the Commission's decision in that matter is applicable and controlling here.

As to the second prong of the test set forth in Agrico, the protestants must show that theirs substantial interests are of a type or nature which the proceeding is designed to protect. Staff believes the Commission's actions in determining what expenses are properly included in regulated earnings, as well as the determination of the appropriate return on equity, and the

appropriate level of equity in the capital structure are an integral part of determining that the rates charged by a regulated utility are fair, just and reasonable. Determining that the rates charged by a utility are fair, just and reasonable necessarily involves the balancing of the ratepayers interests against those of a utility's shareholders. It follows that this proceeding, which addresses a proposal to include certain expenses in the calculation regulated earnings, determine the appropriate return on equity, and determine the amount equity allowable in the utility's capital structure is, by that balancing, "designed to protect" the ratepayers interests in rates which are fair, just and reasonable. Therefore, the second prong of the Agrico test is satisfied.

II. Failure to Establish a Basis to Participate as an Association

In its Motion to Dismiss, FPL alleges that FIPUG, ALERT, and the Coalition each fail to establish a basis for appearing as an association on behalf of their members. FPL argues all the associations "have not pled that the subject matter is within the general scope of the interest and activity of the association or that the relief is appropriate for the association to receive on behalf of its members. Therefore, the petitions should be dismissed." (Motion at p.8)

As to FIPUG, FPL suggests that while FPL is familiar with participation by FIPUG in proceedings before the Commission, FIPUG has not identified any of its members, nor has it affirmatively indicated which of its members have agreed to represented by FIPUG in this proceeding.

As to ALERT, alleges that in addition to the insufficiency of the allegations, a substantial number of ALERT's members are not FPL customers. Further, "on information and belief, it appears that at least one member of ALERT was never asked about participation in this proceeding and therefore certainly did not agree to participation as a member of ALERT or seek to have participation pursued on its behalf."

As to the Coalition, FPL states that it attempts to "characterize itself as an "association of associations." FPL submits that this extended "derivative interest" is inadequate.

FIPUG responds that

(T)he cases cited by FPL, and a raft of others, hold that associations can represent their members before state agencies. FIPUG has been appearing in FPL matters before the Commission on behalf of its affected members without objection for over twenty years. It is not surprising, however, that FPL raises this argument at this time. FPL is for the first time publicly espousing its new theory that its special relationship with the Commission allows it to engage in private Olympian consultation with the Commission about matters affecting its customers' rates. Hopefully, this Commission will quickly and summarily dash this egotistical assumption of privileged supremacy to the nether world where it belongs.

FIPUG further suggests that allowing associations to represent their members in this context provides a level playing field. FIPUG states:

FPL collects money from customers to pay its attorneys, experts and internal analysts to develop and present its positions to the Commission, even though these positions may be adverse to consumer's interests. FPL's customer-funded war chest enables it to combat and crush dissenters at every quarter. Single customers seeking relief can be readily overwhelmed in such unequal contests. Associations provided a mechanism by which substantially affected customers can pool their resources to present a credible, if modest, case for the common good. (FIPUG's response at p. 4)

ALERT responds to FPL's motion that ALERT's petition clearly states that a substantial number of its members are located in FPL's service territory. ALERT alleges that "the PAA denies ALERT's members an electric base rate reduction and denies them refunds of amounts overcharged by FPL." By its name, the "Florida Alliance for Lower Electric Rates Today", ALERT suggests the matter of fair and reasonable rates is within ALERT's general scope of interest and activity. ALERT further states that there is "no requirement 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." (ALERT's response at pp. 3-4)

The Coalition responds that is not necessary to prove, but only to plead, a substantial interest, to withstand a Motion to Dismiss. It believes its petition is sufficient for that purpose:

(T)he Coalition has alleged a huge financial impact which will be suffered by its members, in an amount ranging between \$2.2 and \$5.1 million, if the Proposed Agency Action is allowed to stand. Further, the insistence on fair rates on behalf of its members is within the general scope of interest and activity of the Coalition and the action requested by the Coalition, essentially rate relief, is the type of relief appropriate for an association to receive on behalf of its members. The very name of the Petitioner, Coalition for Equitable Rates, indicates that its purpose includes the prevention of unfair accounting allowances which hide the profits of utilities at the expense of over-charged ratepayers.

Citing Florida Home Builders Association v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), and Friends of the Everglades v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992), FPL asserts that an association, in order to demonstrate standing, must show (1) that a substantial number of its members are substantially affected by the Commission's action, (2) that the subject matter of the proceeding is within the association's general scope of interest and activity, and (3) that the relief requested is of the type appropriate for an association to receive on behalf of its members. FPL argues that FAA fails to satisfy any one of these requirements.

Staff notes that Florida Home Builders, supra, involved an association's standing to bring a rule challenge under Section 120.56(1), Florida Statutes, which requires a person to show that it was "substantially affected" by the challenged rule. As stated above, standing to commence formal proceedings under Section 120.569, Florida Statutes, requires a person to show that its "substantial interests" are determined. The association standing test established in Florida Home Builders, however, was extended to Section 120.57, Florida Statutes, hearings in Farmworker Rights Org. v. Department of Health, 417 So. 2d 753 (Fla. 1st DCA 1982) ("[f]or the purpose of standing, there is no significant difference between a [rule challenge] and a Section 120.57 hearing").

Subsequently, the First District Court of Appeal recognized that, in the context of standing, there can be a difference between the concepts of "substantially affected" persons and persons whose "substantial interests" are affected and suggested that Farmworker Rights is not applicable to every case in which an association seeks to institute a Section 120.57 proceeding. Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279 (Fla.

1st DCA 1988). This language in the Court's decision appears aimed only at the first prong of the Florida Home Builders test which provides that an association must demonstrate that a substantial number of its members are *substantially affected* by the agency's action; the Court does not question the applicability of the second and third prongs.

Staff believes that Florida Home Builders and Florida Society of Ophthalmology, when read together, suggest that the appropriate test for association standing in this case is whether FIPUG, ALERT, and the Coalition, has each alleged (1) that a substantial number of its members have substantial interests which are affected by the Commission's proposed action, (2) that the subject matter of the proceeding is within the association's general scope of interest and activity, and (3) that the relief requested is of the type appropriate for an association to receive on behalf of its members. Staff believes that this view is supported by Friends of the Everglades, supra, which states that "[s]tanding under the Administrative Procedure Act (APA) is conferred on persons whose substantial interest will be affected by proposed agency action" and, citing Florida Home Builders, states that "[t]o meet the requirements for standing under the APA, an association must demonstrate that a substantial number of its members would have standing."

Staff believes that each protest has met this standard. To the extent that a substantial number of its members are FPL customers, which each petition has satisfactorily alleged, their substantial interests are affected. It cannot reasonably be argued that any one of these associations does not have, within its general scope of interests and activities, matters which impact the regulated earnings of monopoly retail electric utilities. Further FPL has made no showing that the relief requested is inappropriate for an association to receive on behalf of its members. Therefore, this argument in FPL's Motion to Dismiss is without merit.

The Commission previously considered the standing of an association to challenge a proposed action on one previous occasion. By Order No. PSC-98-0374-FOF-EI, issued March 9, 1998, in Docket No. 970540-EG, the Commission dismissed the Florida Apartment Association's protest to an FPL conservation program. That Order states:

FAA has not established standing to protest and request a hearing on our PAA Order and that FAA's amended protest letter should be dismissed. FAA has not satisfied the requirements for association standing because (1) the

interests pled by FAA in its amended protest letter are not the interests of its members and (2) the only interests alleged by FAA that could be construed as interests of its members are not matters within FAA's general scope of interest and activity or involve remote and speculative injury.

The protests at issue are distinguishable as to both points. Each is raising the interests of its members, and each association is asserting interests within the general scope of interest and activity.

III. Failure to Plead an Interest Sufficient to Support a Protest

Each of the protestants in this case has alleged that the equity ratio, return on equity, and authorization to record additional expenses proposed by FPL are not appropriate. But for this action, they contend, FPL would be earning in excess of a reasonable return on equity. Approval of this proposal they allege, would permit FPL to charge rates which are not fair, just and reasonable.

FPL, in its Motion to Dismiss alleges that because a rate change was not proposed in this proceeding, "it is not proper (for the protestants) to "bootstrap" themselves into a rate proceeding by protesting a Commission Order which did not change rates and did not increase either the allowed return on equity or equity ratio."

FPL suggests that the protests fail to establish the requisite interest necessary to intervene and fail to conform to the requirements of Rules 28-106.201 and 28-106.205, Florida Administrative Code.

Each of the protestants in this case has alleged either that it is a customer of FPL, or that it is an association appropriately representing customers of FPL. As discussed above in Section I, the Commission has held that a customer has standing to challenge the inclusion in the calculation of regulated earnings, expenses which are material in amount and which require Commission approval. As discussed in Section II above, staff recommends that these associations have met the standard for association participation in this proceeding. Thus, the only question left is whether the protests are deficient in failing to explain "how the Petitioners' substantial interests will be affected by the agency determination" required by Rule 28-106.201(2)(b), Florida Administrative Code. Staff believes each of the protests meets this requirement.

In its protest, FIPUG alleges that if FPL's proposal is approved, "the plan will result in no rate reductions to customers." FIPUG suggests that an alternative to approval of FPL's proposal is a base rate reduction. FIPUG asserts "As FPL customers, the Commission's decision will adversely affect FIPUG's substantial interests." Considered in light of the facts that: 1), it is an association appropriately representing a substantial number of FPL customers and; 2), the Commission has previously determined that a customer has standing to challenge the type action proposed in the protested order, FIPUG's petition makes the requisite showing.

Tropicana, in its protests disputes whether it is in the best interest of FPL ratepayers to extend and increase the amortization plan. In paragraph 5 of its protest, Tropicana states: "As an FPL customer, the Commission's decision will adversely affect Tropicana's substantial interests." Thus, Tropicana makes the requisite showing.

The Coalition devotes four paragraphs (paragraphs 13-16) of its protest to this question. The Coalition alleges that its members pay approximately \$100 million dollars to FPL annually for electric power. Considered in light of the facts that: 1), it is an association appropriately representing a substantial number of FPL customers and; 2), the Commission has previously determined that a customer has standing to challenge the type action proposed in the protested order, the Coalition's petition makes the requisite showing.

ALERT and Georgia Pacific allege in their response to the Motion to Dismiss that their petition complies with Rule 28-106.201, Florida Administrative Code. ALERT and Georgia Pacific state:

(P)aragraphs 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.

Staff agrees that these statements meet the requirements of Rule 28-106.201, Florida Administrative Code.

DOCKET NO. 981390-EI
DATE: February 4, 1999

In their response to the Motion to Dismiss, FIPUG and Tropicana state:

FPL appears to assert that this docket is a Star Chamber proceeding in which the power company meets exclusively with the agency established to protect customers against unreasonable rates. As FPL sees it, the purpose of the meeting is to decide far-reaching matters that will govern the amounts customers are required to pay, but according to FPL, the customers who will be required to pay the bill can do no more than observe while the real parties throw bones to decide the customers' fate. This is a concept that was disputed at a Tea Party in Boston and laid to rest more than two hundred years ago by the culmination of the American Revolution against intolerable trade practices. It should be allowed to repose undisturbed. (FIPUG and Tropicana's Response to Motion to Dismiss at p. 1)

The "Star Chamber" was a medieval English Court, where the quality of justice and fairness became so suspect that the court was eventually abolished. Consistent with the Administrative Procedures Act, persons whose substantial interests are affected by the Commission's proposed action are entitled to a hearing on the merits. Having made the requisite showings, staff believes the protestants in this case are entitled to their "day in court."

The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In determining whether FIPUG, Tropicana, ALERT, Georgia Pacific, and the Coalition have established claims that are cognizable by the Commission, the protests must be viewed in the light most favorable to the petitioners. Staff believes, after considering the objections raised by FPL, each protest sufficiently states a cause of action. Therefore, staff recommends that FPL's Motion to Dismiss be denied.

DOCKET NO. 981390-EI
DATE: February 4, 1999

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending resolution of the protests to the Proposed Agency Action. (ELIAS)

STAFF ANALYSIS: This docket should remain open pending resolution of the protests to the Proposed Agency Action.