

4808 ORIGINAL

STATE OF FLORIDA

Commissioners:
JOE GARCIA, CHAIRMAN
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.



DIVISION OF LEGAL SERVICES
NOREEN S. DAVIS
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(850) 413-6199

Public Service Commission

August 3, 1999

980864-EI

Division of Administrative Hearings
Ms. Ann Cole, Clerk
1230 Apalachee Parkway
Tallahassee, FL 32399

Re: Case No. 98-5067: Albert Sadaka, Petitioner, v. Florida Power & Light Company, Respondent, and Florida Public Service Commission, Intervenor.

Dear Ms. Cole:

Attached are the original and two copies of the Florida Public Service Commission's Intervenor's Response in Opposition to Petitioner's Motion to Set Aside the Granting of the Motion to Intervene by Public Service Commission Staff and in the Alternative Motion for Hearing on the Motion to Intervene to be filed in the above referenced case. Please date stamp the additional copy and return to me in the enclosed postage-paid envelope. Thank you.

Yours truly,

Grace A. Jaye
Grace A. Jaye
Staff Counsel

- ___ AFA
- ___ APP
- ___ CAP
- ___ CMU
- ___ DTR
- ___ SAG
- ___ LEG
- ___ MAS
- ___ OFC
- ___ PER
- ___ REC
- ___ LAW
- ___ OTH

GAJ:js
Enclosure

cc: Division of Records and Reporting (Bayo)
Division of Consumer Affairs (Pena)
Division of Electric and Gas (Draper)

DOCUMENT NUMBER-DATE

09191 AUG-3 99

FPSC-RECORDS/REPORTING

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALBERT SADAKA,)
Petitioner,)
vs.)
FLORIDA POWER & LIGHT COMPANY,) DOAH Case No. 98-5067
Respondent)
and)
FLORIDA PUBLIC SERVICE COMMISSION,)
Intervenor)

INTERVENOR'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION TO SET
ASIDE THE GRANTING OF THE MOTION TO INTERVENE BY PUBLIC SERVICE
COMMISSION STAFF AND IN THE ALTERNATIVE MOTION FOR HEARING ON THE
MOTION TO INTERVENE.

The FLORIDA PUBLIC SERVICE COMMISSION, by and through its undersigned counsel, files this motion in opposition to petitioner's motion pursuant to Rule 28-106.204, Florida Administrative Code, and requests that petitioner's motion be denied with prejudice.

The Florida Public Service Commission (Commission) was granted intervention in this case by Order dated December 15, 1998. Pursuant to Rule 28-106.204(1), Florida Administrative Code, petitioner had seven days from the date of service of the Commission's motion for leave to intervene in which to respond. Petitioner chose not to respond during the time allowed. The Commission, therefore, argues that Rule 28-106.204(1), Florida Administrative Code, precludes the petitioner from receiving the relief requested. Further, petitioner's motion could also be construed as an untimely Motion for Reconsideration of the Order granting intervention.

First, the petitioner asserts that the Commission's motion to intervene should be set aside because "[i]t was the Staff Recommendation which was rejected by the full Public Service Commission in a four to one vote." (Petitioner's Motion at 2)

The Commission points out that the Administrative Law Judge granted the Commission intervention in this case, not Commission staff. Because Florida Power & Light Company (FPL) is an entity supplying electricity at retail to the public, it is subject to

Commission regulation under Section 366.02(1), Florida Statutes. Pursuant to Section 366.04(1), Florida Statutes, the Commission has exclusive jurisdiction "to regulate and supervise each public utility with respect to its rates and service." Thus, the Commission has exclusive jurisdiction over the subject matter of this proceeding. Pursuant to the Commission's Statement of Agency Organization & Operations (1999), subsection entitled "Parties," page 11:

The Commission staff may participate as a party in any proceeding. Their primary duty is to represent the public interest and see that all relevant facts and issues are clearly brought before the Commission for its consideration.

In cases assigned to the Division of Administrative Hearings, the Commission staff's role is to represent the public interest and be neither in favor nor against any particular party, unless the Commission is enforcing rules or statutes through a show cause or similar proceeding, or unless the Commission is a respondent at the Division of Administrative Hearings. Staff is not a party in interest and has no substantial interests that may be affected by the proceeding. Commission staff's role shall be to assist in developing evidence to ensure a complete record so that all relevant facts and issues are presented to the fact finder. Any position that staff has prior to the hearing is preliminary; final positions are based upon review of the complete record.

Second, the petitioner asserts that at the November 5, 1998, Agenda Conference, staff affirmatively represented that it had "ex parte communication with F.P.L. in making their recommendation without verifying or asking for comment from the Petitioner or his attorney." In response the Commission directs attention first to Section 120.66(1), Florida Statutes, Ex parte Communications, which states, after giving general prohibitions against ex parte communications:

Nothing in this subsection shall apply to advisory staff members who do not testify on behalf of the agency in the proceeding or to any rulemaking proceedings under s. 120.54

The Commission also points out that Rule 25-22.033, Florida Administrative Code, Communications Between Commission Employees and Parties, governs communications made between staff and parties. Subsection 1 of this rule specifically states:

This rule shall not apply in proceedings under section 120.54, 120.565. 367.0814, Fla. Stat., proposed agency action proceedings before the Commission has voted to issue a proposed agency action order, non-rate case tariffs, workshops or internal affairs meetings. [emphasis added]

The recommendation on this matter before the Commission at the November 5, 1998, Agenda Conference, and referenced in petitioner's motion was a proposed agency action. Thus, the petitioner's second reason to set aside the order granting the Commission intervention is without merit.

Third, petitioner alleges that the staff recommendation filed in this docket at the Commission was biased against petitioner because it failed "to take the complaints of the petition into considerations [sic]" and failed:

to verify the complaints of the Petitioner as to the conduct of F.P.L. toward the Petitioner and his family by terminating power to their residence pending the outcome of the complaint. The power was terminated to a residence which F.P.L. knew at a life support kidney dialysis machine used by Petitioner's daughter. [sic]

The Commission points out that the recommendation filed in this matter at the Commission and discussed at the November 5, 1998, Agenda Conference, was rendered moot when this matter was referred to DOAH for fact finding. The matter proceeds de novo before the Administrative Law Judge. Thus, petitioner's third reason for setting aside the order granting the Commission intervention is also without merit.

Fourth, petitioner completely misstates the Commission's role in sending a case to DOAH for a fact-finding hearing. As stated in the Commission's Statement of Agency Organization & Operations (1999), discussed above, the Commission has the authority to participate in DOAH hearings in order to develop the record and to represent the public interest. It is incorrect to characterize the Commission's participation in the hearing as an "opportunity for its staff to try to convince the Administrative Law Judge to agree with their findings which the Public Service Commission has already rejected." (Petitioner's Motion at 2) Once again, it must be understood that the Commission, not its staff, was granted intervention. In the majority of fact-finding hearings, the Commission, through its staff, does not participate in Administrative Hearings before an Administrative Law Judge as an advocate for either the utility or the consumer. Staff's role is

to assist in developing the evidence to ensure a complete record.

The fifth and last point petitioner makes is that it "seems rather incongruous that the very governmental entity which requested and referred the matter to the Division of Administrative Hearings would now request to be a part of the process, ie: evidentiary hearing on disputed facts. It will be upon that recommendation and finding of facts that the Public Service Commission will make its final decision." (Petitioner's Motion at 2 and 3) It is not "incongruous" at all that the Commission wishes to be present as a record is developed in a case involving its own jurisdiction. The Commission is not present in DOAH proceedings to put on a case except in limited circumstances. In most instances the Commission participates in DOAH hearings to ensure that the record is fully developed and that all relevant facts are brought to light. Commission participation ensures a complete record will be available to the Administrative Law Judge and ultimately, to the Commission.

WHEREFORE the Florida Public Service Commission moves that the petitioner's Motion to Set Aside The Granting of the Motion to Intervene By Public Service Commission Staff and In the Alternative Motion for Hearing on the Motion to Intervene be denied with prejudice for failure to demonstrate any basis for setting aside the Administrative Law Judge's order granting intervention to the Commission and for failure to comply with Rule 28-106.204(1), Florida Administrative Code.

Respectfully submitted this 3rd day of August, 1999.



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FLORIDA PUBLIC SERVICE COMMISSION,)
Intervenor)

Certificate of Service


I HEREBY CERTIFY that one true and correct copy of Intervenor's Response in Opposition to Petitioner's Motion to Set Aside the Granting of the Motion to Intervene by Public Service Commission Staff and in the Alternative Motion for Hearing on the Motion to Intervene have been furnished by U.S. Mail to the following this 3rd day of August, 1999:

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