100 Years of Excellence

ANDREWS & KURTH L.L.P.

ATTORNEYS

ORIGINAL

AUSTIN
DALLAS
HOUSTON
LONDON
LOS ANGELES
NEW YORK
THE WOODLANDS

1701 PENNSYLVANIA AVENUE, N.W., SUITE 300
WASHINGTON, D.C. 20006-5805

TELEPHONE 202.662.2700
FACSIMILE 202.662.2739

MARK F. SUNDBACK
DIRECT 202.662.2755

EMAIL: msundback@akllp.com

September 23, 2002

VIA FEDERAL EXPRESS

Thomas D. Hall, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399

Re: *South Florida Hospital and Healthcare Association, et al. v. Lila A. Jaber, et al.*, Case No. SC02-1023

Dear Mr. Hall:

Enclosed for filing are the original and 7 copies of the Reply Brief of South Florida Hospital and Healthcare Association, *et al.*, in the referenced proceeding. Also enclosed in a separate volume are Appendices A through C to the Reply Brief. Further please find enclosed a Request For Oral Argument in the referenced docket. Also enclosed is an additional copy of the Reply Brief to be date-stamped. Please return the copy in the enclosed self-addressed envelope.

Respectfully submitted,

Mark F. Sundback

Mark F. Sundback
An Attorney for
South Florida Hospital and Healthcare Association

Enclosures

cc: Parties of Record

AUS
CAF
CMP
COM
CTR
ECR
GCL
OPC
RMS
SEC 1
WTH

DISTRIBUTION CENTER
02 SEP 26 AM 9:13

DOCUMENT NUMBER-DATE
10297 SEP 26 02
FPSC-COMMISSION CLERK

WAS:94431.1

IN THE SUPREME COURT OF FLORIDA
Case No. SC02-1023

On Appeal from a Final Order of
The Florida Public Service Commission

SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION, et al.

Appellants,

v.

LILA A. JABER, et al.,

Appellees.

APPENDICES TO THE REPLY BRIEF OF SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION, et al.

Kenneth L. Wiseman
Mark F. Sundback
Andrews & Kurth L.L.P.
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Miriam O. Victorian
Andrews & Kurth L.L.P.
700 Louisiana Street
Houston, Texas 77002
Counsel for Appellants

INDEX TO APPENDICES

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE. DOCKET NO. 010944-EI - Complaint of South Florida Hospital and Healthcare Association, et al., against Florida Power & Light Company, request for expeditious relieve, and request for interim rate procedures with rate subject to bond.

DOCKET NO. 001148-EI - Review of Florida Power & Light Company's proposed merger with Intergy Corporation, the formation of a Florida transmission company (Florida transco) and their effect on FPL's retail rates.

BEFORE: CHAIRMAN E. LEON JACOBS, JR.
COMMISSIONER J. TERRY DEASON
COMMISSIONER LILA A. JABER
COMMISSIONER BRAULIO L. BAEZ
COMMISSIONER MICHAEL A. PALECKI

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 20

DATE: Tuesday, September 4, 2001

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

REPORTED BY: MARY ALLEN NEEL
Registered Professional Reporter

ACCURATE STENOTYPE REPORTERS
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(850)878-2221

PARTICIPANTS:

MATTHEW CHILDS, on behalf of Florida Power & Light Company.
TIM DEVLIN, Commission Staff.
COCHRAN KEATING, on behalf of the Commission Staff.
GABE NIETO, Florida Power & Light Company.
MARK SUNDBACK, on behalf of the South Florida Hospital and Healthcare Association, Inc.

STAFF RECOMMENDATION

ISSUE 1: Should the Commission grant Florida Power & Light Company's motion to dismiss the South Florida Hospital and Healthcare Association's amended petition for interim rate relief in Docket No. 010944-EI?
RECOMMENDATION: Yes. The Commission should grant Florida Power & Light Company's motion to dismiss the South Florida Hospital and Healthcare Association's amended petition for interim rate relief. On its own motion, the Commission has already considered and decided the matter of interim rates, making SFHHA's amended petition an improper collateral attack on the Commission's decision.

ISSUE 2: Should the Commission grant Florida Power & Light Company's motion to strike the South Florida Hospital and Healthcare Association's answer to FPL's response to SFHHA's request for clarification/-reconsideration?
RECOMMENDATION: Yes. The Commission should grant Florida Power & Light Company's motion to strike the South Florida Hospital and Healthcare Association's answer to FPL's response to SFHHA's request for clarification/reconsideration. The Uniform Rules of Procedure do not authorize such a reply to a response to a motion.

ISSUE 3: Should the Commission grant the South Florida Hospital and Healthcare Association's request for clarification or, in the alternative, reconsideration of Order No. PSC-01-1346-PCO-EI?
RECOMMENDATION: To clarify its intent in rendering Order No. PSC-01-1346-PCO-EI, the Commission should make the clarification requested by the South Florida Hospital and Healthcare Association. The

clarification does not have the effect of reversing

3

The Commission's decision to hold no money subject to refund

ISSUE 4: Should these dockets be closed?
RECOMMENDATION: If the Commission approves staff's recommendation to deny SFHHA's amended petition in Issue 1, Docket No. 010944-EI should be closed. Docket No. 001148-EI should remain open.

4

CHAIRMAN JACOBS: We're next on Item 20.

MR. KEATING: Commissioners, Item 20 concerns two dockets, Docket 010944-EI, which was opened to address the South Florida Hospital and Health Care Association's complaints against Florida Power & Light concerning its rates, and Docket No. 001148, which is the proceeding that's open right now in which we're reviewing GridFlorida and Florida Power & Light's rates.

Issue 1 in the recommendation -- excuse me. Issue 1 in the recommendation addresses Florida Power & Light's motion to dismiss the Hospital Association's amended petition. Issue 2 addresses FPL's motion to strike the Hospital Association's reply to FPL's response to the Hospital's motion for reconsideration. Issue 3 addresses the Hospital Association's motion for

* * * * *

initiated by OPC, and therefore wasn't like a normal rate proceeding. That's absolutely false. This was a rate proceeding. It was a rate proceeding initiated by the Office of Public Counsel. That's what led to the stipulation and settlement. The settlement was a settlement of a rate proceeding, which you clearly have the authority to do under the

Florida administrative procedure law. It permits you, in fact, it's generally encouraged if there can be a stipulation or a settlement, that that should be pursued.

The legal notice required was followed. I don't have the date now, but I do know that the notice of this matter being considered was published in the Florida Administrative Weekly. That's notice.

COMMISSIONER JABER: Mr. Childs, do you remember if that original order was issued as a PAA order approving the stipulation?

MR. CHILDS: I don't think it was issued as a PAA. I think it was issued as a final order.

However, in going to that, I think Commissioner Deason asked about some benefits, and I want to talk about that, because what

we're seeing now is a request to have rates subject to refund during the pendency of the three-year period of the stipulation and settlement. And I would ask rhetorically, should we therefore -- if they're successful, should we therefore suspend and eliminate the refund that the stipulation calls for of revenue in excess of the benchmark for the year ending

30

April of 2002? I don't think you can pick and choose. Should we suspend the $350 million reduction in rates that that stipulation called for? Should we go back and look to the early implementation of the rate reduction that the stipulation called for to the benefit all customers earlier than was necessary?

There are a number of -- and we've also refunded money in past years, I think over 150 to maybe $200 million. This is an ongoing document, and I don't think you can pick and choose, as is proposed to you.

I take strenuous objection to the assertion to you glibly that Florida Power & Light cannot argue against the conclusion that they're overearning. We do argue against that. That just not right. And has been no representation

to you about what earnings are this years or why, or whether the earnings are on a PSC adjusted basis or a pro forma basis, or anything to support that assertion at all. It's just an assertion.

But I want to come back to the point that what you're being asked to do is to pick and choose and say, "Well, let's let the stipulation

31

go ahead while we make rates subject to refund, and we'll keep you where you are as to that aspect of the stipulation." I don't think that's right.

The statement was made about the ability to come in and challenge a settlement. I'm not aware of any precedent before this Commission that says that an entity that is not a party to a proceeding can come in and challenge a settlement. I mean, maybe in some other jurisdiction, but I'm not aware of it here. In fact, I would urge to you that the contrary is the case. What you have is not just a settlement. You have a final order of the Commission. You have the final order of the Commission after a recommendation by your staff approving the settlement. It approved the

settlement and authorized the charging of rates that are consistent with the settlement. That's not an action by the parties. That's an action by the Commission.

And I would remind the Commission that when it considered that settlement and approved it, it did so over the recommendation of some of your staff, who pointed out to you that they had

32

reviewed how it would work and that they -- in their opinion, that if it was permitted and approved by you, that Florida Power & Light could and would in certain instances earn above the maximum of the range that was set forth in that agreement. This is not a surprise. This is not some changed circumstance that you weren't aware of.

And as to changed circumstance, I think that's totally inapplicable, because you had a three-year period that you approved. It was evaluated. And as this Commission I think may remember, it has in the past had its decision to approve a contract and to approve the cost recovery of payments pursuant to a contract for 30 years without adjustment due to changed circumstances. It had its power to do that

B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for a full revenue requirements rate case for Florida Power & Light Company	DOCKET NO. 990067-EI

STIPULATION AND SETTLEMENT

WHEREAS, the Office of Public Counsel of the State of Florida ("OPC") has petitioned the Florida Public Service Commission to initiate and conduct a full revenue requirements base rate proceeding for Florida Power & Light Company ("FPL"). In its Petition, the OPC, among other matters, alleges that, while long- term benefits for both FPL and its customers may have been achieved by the "Plans" approved by the Florida Public Service Commission in Dockets Nos. 950359-EI and 970410-EI, the time has now come for the customers to share in the benefits;

WHEREAS, The Florida Industrial Power Users Group ("FIPUG") and The Coalition For Equitable Rates ("Coalition")have petitioned for and been granted leave to intervene;

WHEREAS, a base rate proceeding can be costly, time consuming, lengthy and disruptive to efficient and appropriate management and regulatory efforts; and,

WHEREAS, the Parties to this Stipulation and Settlement have undertaken to resolve the matters raised in the Petition so as to effect a current and prompt reduction in base rates charged customers and achieve a degree of stability to the base rates and charges;

NOW THEREFORE, in consideration of the foregoing and the covenants contained herein, the Parties hereby stipulate and agree:

1. This Stipulation and Settlement will become effective on the day following the vote by the Florida Public Service Commission approving this Stipulation and Settlement which will be reflected in a final Order. The starting date for the three-year term of this Stipulation and Settlement will be 30 days following the vote and will be referred to as the "Implementation Date."

2. The continued amortization and booking of expenses and other cost recognition authorized and required by the Florida Public Service Commission in Dockets Nos. 950359-EI and 970410-EI will terminate on the day before the Implementation Date. Beginning on the Implementation Date, FPL is authorized to record an amortization amount of up to $100 million at the discretion of the Company per year for each twelve months of the

term of this Stipulation and Settlement which shall be applied to reduce nuclear and/or fossil production plant in service. The amortization will be separate and apart from normal depreciation, and existing depreciation practices and resulting depreciation rates will not be adjusted, either before, during or after the term hereof to eliminate the effect of the additional amortization amount recorded.

3. FPL will reduce its base rates by $350 million. The base rate reduction will be reflected on FPL's customer bills by reducing the base rate energy charge by .420 cents per kWh. FPL will begin applying the lower base rate energy charge required by this Stipulation and Settlement to meter readings made on and after the Implementation Date.

4. Effective on the Implementation Date, FPL's authorized return on equity range on a prospective basis will be 10.00% to 12.00% with a midpoint of 11.00% for all regulatory purposes; it being understood that during the term of this Stipulation and Settlement the achieved return on equity may, from time to time, be outside the authorized range and the sharing mechanism herein described is intended to be the appropriate and exclusive mechanism to address that circumstance. FPL's adjusted equity ratio will be capped at 55.83% as included in FPL's projected

1998 Rate of Return Report for surveillance purposes. The adjusted equity ratio equals common equity divided by the sum of common equity, preferred equity, debt and off-balance sheet obligations. The amount used for off-balance sheet obligations will be calculated per the Standard & Poor's methodology as used in its August 1998 credit report.

5. No party to this Stipulation and Settlement will request, support, or seek to impose a change in the application of any provision hereof. OPC, FIPUG and the Coalition will neither seek nor support any additional reduction in FPL's base rates and charges, including interim rate decreases, to take effect for three years from the Implementation Date unless such reduction is initiated by FPL. FPL will not petition for an increase in its base rates and charges, including interim rate increases, to take effect before three years from the Implementation Date. Other than with respect to the environmental cost recovery clause as herein addressed, FPL will not use the various cost recovery clauses to recover new capital items which traditionally and historically would be recoverable through base rates.

6. During the term of this Stipulation and Settlement revenues which are above the levels stated herein will be shared

between FPL and its retail electric utility customers--it being expressly understood and agreed that the mechanism for earnings sharing herein established is not intended to be a vehicle for "rate case" type inquiry concerning expenses, investment and financial results of operations. For the first 12 months beginning with the Implementation Date, FPL's retail base rate revenues in excess of $3.400 billion up to $3.556 billion will be shared between FPL and its customers on a one-third/two-thirds basis, one-third to be retained by FPL and two-thirds to be refunded to its customers. Retail base rate revenues above $3.556 billion for the first 12-month period will be refunded to FPL's customers. For the second 12-month period, retail base rate revenues in excess of $3.450 billion up to $3.606 billion will be subject to the same one-third/two-thirds sharing between FPL and its customers. Retail base rate revenues above $3.606 billion for the second 12-month period will be refunded to FPL customers. For the third and final 12-month period, retail base rate revenues in excess of $3.500 billion up to $3.656 billion will be subject to the same one-third/two-thirds sharing between FPL and its customers. Retail base rate revenues above $3.656 billion for the third 12-month period will be refunded to FPL's customers. Because implementation of this Stipulation and

Settlement may not begin on the first day of a calendar month, the three resulting 12 month periods used to calculate potential refunds may each include two partial calendar months. Revenues for these two partial calendar months will be calculated by multiplying total revenues for the full calendar month by the ratio of days the Stipulation and Settlement is in effect in the partial calendar month, or days to complete the applicable twelve month period, as the case may be, to the total days in that calendar month.

All refunds will be paid with interest at the 30-day commercial paper rate as specified in Rule 25-6.109, Florida Administrative Code, to customers of record during the last three months of each applicable 12-month period based on their proportionate share of kWh usage for the 12-month period. For purposes of calculating interest only, it will be assumed that revenues to be refunded were collected evenly throughout the preceding 12-month period at the rate of one-twelfth per month. All refunds with interest will be in the form of a credit on the customers' bills beginning with the first day of the first billing cycle of the second month after the end of the applicable twelve month period. Refunds to former customers

will be completed as expeditiously as reasonably possible.

7. FPL's recovery of costs through the environmental cost recovery docket will be phased out over a three-year period beginning January 1, 2000. FPL will be allowed to recover its otherwise eligible and prudent environmental costs, including true-up amounts, in 2000 up to $12.8 million. For 2001, FPL will be allowed to recover its otherwise eligible and prudent environmental costs, including true-up amounts, up to $6.4 million. For 2002, FPL will not be allowed to recover any costs through the environmental cost recovery docket. FPL may, however, petition to recover in 2003 prudent environmental costs incurred after the expiration of the three-year term of this Stipulation and Settlement in 2002.

8. During the term of this Stipulation and Settlement, accruals for nuclear decommissioning and fossil dismantlement expense will be capped at the level previously approved by the Commission in Order No. PSC-95-1531-FOF-EI in Dockets Nos. 941350-EI and 941352-EI as amended by Order No. PSC-95-1531A-FOF-EI and Order No. PSC-95-1532-FOF-EI in Docket No. 941343-EI. In addition, the Protests or Petitions on Proposed Agency Action by FIPUG and the Coalition of Order No. PSC-99-0073-FOF-EI will

be withdrawn and that Order will be made final. Thereafter, depreciation rates as addressed in Order No. PSC-99-0073-FOF-EI will not be exceeded for the term of this Stipulation and Settlement.

9. The construction costs associated with the Ft. Myers and Sanford plant repowering projects will be treated as CWIP in rate base and AFUDC will not be accrued on these projects.

10. This Stipulation and Settlement is contingent on approval in its entirety by the Florida Public Service Commission. This Stipulation and Settlement will resolve all matters in this Docket pursuant to and in accordance with Section 120.57(4), Florida Statutes (1997). This Docket will be closed effective on the date the Florida Public Service Commission Order approving this Stipulation and Settlement is final.

11. This Stipulation and Settlement, dated as of March 10, 1999, may be executed in counterpart originals and a facsimile of an original signature shall be deemed an original.

In Witness Whereof, the Parties evidence their acceptance and agreement with the provisions of this Stipulation and Settlement by their signature.

Florida Power & Light Company
9250 West Flagler Street

Miami, Florida 33174

Steel Hector & Davis LLP

By: _____
Matthew M. Childs, P.A.

Office of Public Counsel
111 West Madison Street
Suite 810
Tallahassee, FL 32399

By: _____
Jack Shreve

Florida Industrial
Power Users Group

John W. McWhirter, Jr., Esq.
McWhirter, Reeves, McGlothlin,
Davidson, Decker, Kaufman
Arnold & Steen, P.A.
P. O. Box 3350
Tampa, FL 33601-3350

By: _____
John W. McWhirter

The Coalition for
Equitable Rates

Ronald C. LaFace, Esq.
Seann M. Frazier, Esq.
Greenberg, Traurig, P.A.
101 East College Avenue
Tallahassee, FL 32301

By: _____
Ronald C. LaFace

C

BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

Re:	**Review of the Retail Rates of Florida Power & Light Company**	))	**Docket No. 001148-EI**

DIRECT TESTIMONY

AND EXHIBITS

OF

STEPHEN J. BARON

ON BEHALF OF

SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION

J. KENNEDY AND ASSOCIATES, INC.
ROSWELL, GEORGIA

March 2002

BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

Re:	**Review of the Retail Rates of Florida Power & Light Company**	))	**Docket No. 001148-EI**

TABLE OF CONTENTS

BEFORE THE

FLORIDA PULIC SERVICE COMMISSION

Re:	**Review of the Retail Rates of Florida Power & Light Company**	))	**Docket No. 001148-EI**

DIRECT TESTIMONY OF STEPHEN J. BARON

Introduction

Q. Please state your name and business address.

A. My name is Stephen J. Baron. My business address is J. Kennedy and Associates, Inc. ("Kennedy and Associates"), 570 Colonial Park Drive, Suite 305, Roswell, Georgia 30075.

Q. What is your occupation and by whom are you employed?

A. I am the President and a Principal of Kennedy and Associates, a firm of utility rate, planning, and economic consultants in Atlanta, Georgia.

Q. Please describe briefly the nature of the consulting services provided by Kennedy and Associates.

A. Kennedy and Associates provides consulting services in the electric and gas utility industries. Our clients include state agencies and electricity consumers. The firm provides expertise in system planning, load forecasting, financial analysis, cost-of-service, and rate design. Current clients include the Georgia and Louisiana Public Service Commissions, and consumer groups throughout the United States.

Q. Please state your educational background.

A. I graduated from the University of Florida in 1972 with a B.A. degree with high honors in Political Science and significant coursework in Mathematics and Computer Science. In 1974, I received a Master of Arts Degree in Economics, also from the University of Florida. My areas of specialization were econometrics, statistics, and public utility economics. My thesis concerned the development of an econometric model to forecast electricity sales in the State of Florida, for which I received a grant from the Public Utility Research Center of the University of Florida. In addition, I have advanced study and coursework in time series analysis and dynamic model building.

Q. Please describe your professional experience.

A. I have more than twenty-seven years of experience in the electric utility industry in the areas of cost and rate analysis, forecasting, planning, and economic analysis.

Following the completion of my graduate work in economics, I joined the staff of the Florida Public Service Commission in August of 1974 as a Rate Economist. My responsibilities included the analysis of rate cases for electric, telephone, and gas utilities, as well as the preparation of cross-examination material and the preparation of staff recommendations.

In December 1975, I joined the Utility Rate Consulting Division of Ebasco Services, Inc. as an Associate Consultant. In the seven years I worked for Ebasco, I received successive promotions, ultimately to the position of Vice President of Energy Management Services of Ebasco Business Consulting Company. My responsibilities included the management of a staff of consultants engaged in providing services in the areas of econometric modeling, load and energy forecasting, production cost modeling, planning, cost-of-service analysis, cogeneration, and load management.

I joined the public accounting firm of Coopers & Lybrand in 1982 as a Manager of the Atlanta Office of the Utility Regulatory and Advisory Services Group. In this capacity I was responsible for the operation and management of the Atlanta office. My duties included the technical and administrative supervision of the staff, budgeting, recruiting, and marketing as well as project management on client engagements. At Coopers & Lybrand, I specialized in utility cost analysis, forecasting, load analysis, economic analysis, and planning.

In January 1984, I joined the consulting firm of Kennedy and Associates as a Vice President and Principal. I became President of the firm in January 1991.

I have presented testimony as an expert witness in Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Michigan, Minnesota, Maryland, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Texas and West Virginia. I also have presented testimony as an expert witness before the Federal Energy Regulatory Commission and in United States Bankruptcy Court. A list of my specific regulatory appearances can be found in Exhibit ____ (SJB-1)

Q. On whose behalf are you testifying in this proceeding?

A. I am testifying on behalf of the South Florida Hospital and Healthcare Association ("SFHHA" or the Hospitals), a group of general service customers taking service on the Florida Power & Light Company ("FPL") system.

Q. What is the purpose of your testimony in this proceeding?

A. I am addressing issues on FPL's retail cost of service study, rate design and resource planning, with particular emphasis on demand side management.

With respect to the Company's retail class cost of service study, I have identified two problems with the methodology utilized by FPL to allocate retail revenue requirements to customer classes. These problems result in an unreliable class cost of service study from which to make determinations for revenue allocation and rate design.

With respect to rate design issues, I discuss the Hospitals' support for the use of a properly developed class cost of service study in the design of rates. In particular, the Hospitals endorse the use of the unit cost of service results in rate design, assuming that FPL's cost allocation study is modified to properly reflect a classification of costs into demand and energy categories.

The final issue that I address on behalf of the Hospitals concerns FPL's generation resource plan and, particularly, the lack of adequate consideration in this plan to the availability of backup generation currently on-site at SFHHA Hospitals. Hospital accreditation rules require the installation of backup generation in relevant facilities. This capacity would be available to FPL to assist in meeting peak demand requirements. In light of the Company's agreement to target a 20% planning reserve margin by mid-2004, the Hospitals strongly recommend that the Commission require FPL to adequately evaluate the use of the existing backup generation available in

South Florida and develop a program to employ this capacity as part of FPL's peaking resources, whether from healthcare facilities or other sources.

Retail Cost of Service Study

Q. Would you please discuss the first issue that you have identified with respect to the Company's retail cost of service study?

A. FPL has filed a retail cost of service analysis that relies, primarily, on a Florida Public Service Commission-approved "12 CP and 1/13th" methodology for allocating production demand costs. This demand allocation methodology is consistent with prior Commission decisions regarding production demand cost allocation. This allocation factor is used to assign fixed production plant and most demand-related fixed production operation and maintenance expenses (i.e., non fuel operating expenses associated with the production or generation function).

Q. What is the significance of the Company's use of a 12 CP and 1/13th methodology for assigning fixed production costs to customer classes?

A. The Florida Public Service Commission has consistently relied on this approach for many years and it is reasonable for FPL to have used this method. However, since

the cost of service study results are impacted by both the production demand allocation methodology and the cost classification methodology, it is important to examine the specific classifications that FPL has assigned to various expense accounts associated with production.

Q. Do you have specific concerns associated with the methodology used by FPL to classify production operation and maintenance expenses?

A. Yes. I have a concern with the methodology used by FPL to classify non-fuel nuclear power operation and maintenance expenses between demand and energy related costs. For the test year ended December 31, 2002, FPL is claiming nuclear power operation and maintenance expenses of $258.6 million, excluding nuclear fuel expenses. Of this $258.6 million, FPL has classified $111.7 million as demand-related and $146.8 million as energy-related. Again, this does not include nuclear fuel expense.

FPL has effectively classified only 43% of its total non-fuel nuclear O&M as demand-related, with 57% classified as energy-related. Based on a historical analysis of data associated with nuclear O&M expenses on the FPL system and the mWh output of the nuclear generation fleet, I believe that FPL has misclassified its nuclear O&M expenses in this case.

Q. What methodology did FPL use to classify non-fuel nuclear O&M expenses?

A. Based on the Company's response to MFR No. E-13, Attachment 1 of 1, the Company has allocated FERC account 524 (miscellaneous nuclear power expenses) and FERC Account 529 (maintenance of structures, nuclear) as 100% demand-related. All of the other non-fuel nuclear O&M expenses have been either fully or partially classified as energy-related.

For example, FPL has allocated the following maintenance accounts associated with nuclear power production as 100% energy-related: accounts 530, 531 and 532. These accounts, associated with the maintenance of reactor plant, the maintenance of electric plant and the maintenance of miscellaneous nuclear plant, are all deemed to be energy-related or variable in the cost classification used by the Company. For FERC account No. 520, associated with nuclear steam expenses, the Company has allocated the labor component of the account on demand, but has allocated the remainder of the account on energy. Since the operation supervision and engineering and the maintenance supervision and engineering expenses (accounts 517 and 528) are allocated based on the classification results for the underlying operation and maintenance accounts in those categories, a substantial portion of the nuclear supervision cost is classified as energy-related in FPL's cost of service study.

Q. Would you provide an example of the type of costs that are included in some of these FERC accounts?

A. FERC accounts 530, 531 and 532 are associated with the maintenance of reactor plant, electric plant (associated with nuclear facilities) and miscellaneous nuclear plant. Examples of the types of facilities associated with these expense accounts include "Fire extinguishing equipment for general station and site use", "Cranes and hoisting equipment ...", and "Station and area radiation monitoring equipment". The FERC system of accounts characterizes the types of costs that are included as "labor, materials used and expenses incurred." Unless the unit was mothballed, in which case maintenance of reactor plant and mWh output may both be "0", the level of these costs will not vary materially with the mWh output of the Company's nuclear units, nor would these costs vary with the energy use imposed by the Company's customers.

Q. What are the consequences of a misclassification of these non-fuel nuclear production O&M expenses in the Company's cost of service study?

A. First, if the costs are misclassified, the resulting allocations to rate classes are incorrect and the resulting rate of return indices that are relied upon by FPL and the Commission to allocate revenue changes would be incorrect as well. In addition, and perhaps more importantly, the Company's rate design would be incorrect and send inappropriate price signals to consumers.

For example, if the Company incorrectly classified nuclear production O&M expenses that are fixed in nature as energy-related, these costs would be assigned to rate classes on an energy basis and appear in the energy component of unit costs for each of the Company's rate schedules, pursuant to a unit cost analysis. To the extent that the Commission relies on the unit cost data to set or even guide rate design, the resulting rates for each customer class may be biased toward an over-emphasis on non-fuel energy charges, relative to demand charges. Thus, a misclassification of costs may produce an erroneous price signal that is provided to customers with respect to demand and energy costs on the FPL system.

Overstating the energy charge would give customers a disincentive to utilize energy, everything else being equal. To the extent that consumers are responsive to price signals, this means that off-peak energy consumption would be lower than it otherwise would be, had the price signal been correct.

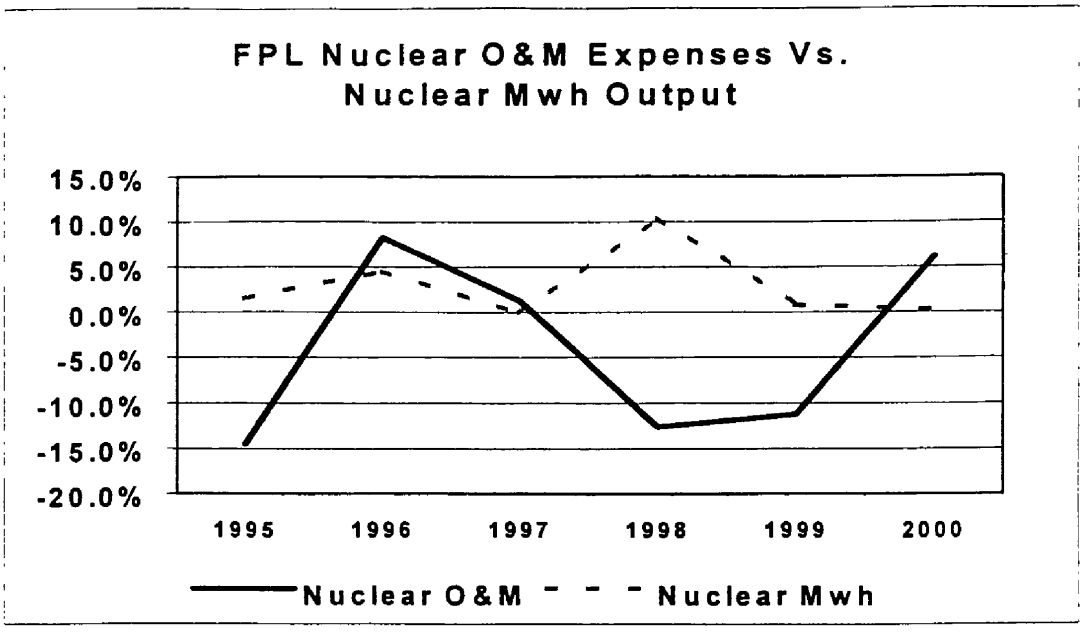
Q. **Have you performed any analysis of the historic relationship between non-fuel nuclear operations and maintenance expenses on the FPL system and nuclear mWh output, in order to assess the reasonableness of the Company's classification methodology?**

A. Yes. Exhibit ____(SJB-2), contains the results of a statistical regression analysis in which FPL's nuclear operations expenses were compared to the reported nuclear mWh output for the years 1994 to 2000. The results of this regression show a statistically significant relationship except that the relationship is a negative correlation. In other words, the greater the nuclear mWh output, the lower the nuclear operations expenses.

A similar result holds for an analysis of nuclear maintenance expenses versus nuclear mWh output on the FPL system for the years 1994 through 2000. Exhibit ____(SJB-3) shows the results of this regression analysis. The coefficient relating nuclear maintenance expenses to nuclear mWh output is negative. Again this implies that increases in nuclear plant mWh output results in lower total maintenance expenses for the plant. Finally, Exhibit ____(SJB-4) shows the results of a combined nuclear O&M expenses for FPL versus nuclear mWh output. Again, the result is a statistically significant negative correlation between the two variables.

The significance of these regression results is that there is no positive relationship between energy use and the incurrence of operations and maintenance expenses (non-fuel) associated with FPL's nuclear units. Based on this evidence, it would be inappropriate to classify nuclear O&M expenses as energy-related. In particular, the erroneous price signals that would be produced by the inclusion of energy classified nuclear O&M expenses may be significant, given the negative correlations that

actually exist between nuclear O&M expenses and energy output. To place this in perspective, the graph below shows the trends in both nuclear O&M expenses and mWh output for the years analyzed in the regression. As can be seen from the graph, there is no correlation whatsoever between the two variables.[1]



Q. What is your recommendation with respect to the classification of non-fuel nuclear power operation and maintenance expenses?

A. My analysis shows that non-fuel nuclear power operation and maintenance expenses should be classified exclusively as demand related costs.

[1] For the purposes of performing the regression analyses and the graph, the following FERC accounts were utilized: accounts 517, 520, 524, 528, 529, 530, 531 and 532.

Q. Would you please address the next issue that you have identified with respect to the Company's cost allocation study?

A. FPL has included an adjustment to test year electricity sales revenues of $34 million to reflect a "Provision for rate refunds – FPSC." This $34 million reduction in test year revenues results from the Company's April 1999 settlement in which a revenue sharing mechanism was established to provide rate refunds to customer classes in the event FPL revenues exceeded a stated threshold.

Q. Why is it inappropriate to include this adjustment in the Company's cost of service study?

A. First, as discussed by SFHHA witness Lane Kollen, the $34 million revenue adjustment should be excluded from the test year since the settlement provided for only a three-year period of revenue sharing. Therefore, this is not an ongoing test year condition and should be removed from the determination of revenue requirements.

Q. Is there another reason why the Company's treatment is inappropriate?

A. Yes. Independent of the revenue requirement issues in this case, it would be inappropriate to include this adjustment in the test year cost allocation service study. By the time rates go into effect in this case, the settlement will have been terminated; therefore, any cost of service study results used to develop rates for the rate-effective period in this case should exclude refunds that will no longer be provided to customers in the rate-effective period. These refund revenues should not be included as an adjustment to base revenues for the purposes of determining the relationship between rates and cost of service.

Rate Design

Q. Do you have any recommendations in this proceeding regarding rate design?

A. I support the use of the unit cost results from a properly developed retail cost of service study for the purposes of designing rates in this proceeding. In particular, for rate schedules that incorporate both demand and energy charges (non-fuel), it is appropriate to utilize the unit cost data to set the respective energy and demand charges. It is particularly important, in my opinion, to set the energy charges of such rates at a level commensurate with the energy component of revenue requirements for the rate class. To the extent that the non-fuel energy charges of a demand metered rate exceed cost of service, there is a disincentive for customers to improve their individual load factors and utilize energy during low cost, off-peak periods.

Q. How do FPL's current energy rates compare to the unit cost of service for the Company's general service rate schedules?

A. Based on FPL's unit cost analysis, at equalized base revenue requirements, the unit cost of energy for Rate Schedule GSLD-1 is $.003509 per kWh, compared to the

non-fuel energy charge of Rate Schedule GSLD-1 of $0.01165 per kWh. The energy charge is nearly three times unit cost of service for this rate. The same result occurs for Rate Schedule CILC-1D. The unit cost for energy is $.003462, while the tariff rate is $.00722. It is also important to note that the modifications to FPL's cost of service study that I previously discussed (the reclassification of nuclear O&M expenses) would have the effect, everything else being equal, of reducing the unit energy cost of FPL's rates. Thus, disparity between the tariff non-fuel energy charges and the unit cost of energy is even greater than shown in the Company's unit cost study.

Based on this disparity, I recommend that any Commission-approved revenue requirement decrease, found to be appropriate for a demand-metered rate schedule, be applied first to move the energy charge or charges of the rate towards cost of service. Unburdening the energy rate, pursuant to cost of service results, will increase the stability of FPL's base revenues (lower risk) and reduce the likelihood that FPL may gain a windfall if it has underestimated the test year level of sales in response to September 11th and the economic downturn.

Q. Why is it more important to focus on the energy charges of demand-metered rate schedules, rather than the demand charges?

A. Based on my experience, larger, general service customers taking service on demand-metered rate schedules tend to be more responsive to changes in the energy charges of the rate than the demand charges. This is particularly true in the short-run where the kW demand level established by a customer is, to a large extent, a function of the customer's connected load, while the energy use is a function of both the connected load and the hours of use. In the short-run, connected load (e.g., equipment) is fixed, while hours-of-use is not. To the extent that the energy charges deviate from cost of service, customer behavior with respect to additional hours of operation of physical equipment would be impacted. As a result, it is appropriate to focus on the energy charges (the non-fuel energy charges) of each rate schedule first, in developing adjustments to current rate design. Finally, if FPL is concerned that revenues and sales will be detrimentally impacted in an economic downturn, it would be counter-productive to overprice incremental energy consumption.

Commercial Industrial Demand Reduction Rider ("CDR")

Q. Would you please address your concerns with the Company's Commercial Industrial Load Reduction Rider?

A. This rider is designed to replace the now closed commercial/industrial load control ("CILC") rate that provided FPL and its firm customers an opportunity to obtain needed capacity through load curtailments of commercial and industrial customers or through the use of backup generation available to these customers. Pursuant to a Commission decision in Order PSC-99-0505-PCO-EG, issued March 10, 1999 in Docket No. 990002-EG, FPL closed the CILC program to new customers after December 31, 2000. In fact, Rate Schedule CILC was limited in this order to only customers that had entered into a CILC agreement as of March 19, 1996, but had not yet taken service under the rate. As of the time of the March 10, 1999 order, it was expected that there were over 100 outstanding CILC agreements not currently taking service under that rate that would produce about 38 mWs of effective generating capacity.

Q. Are there hospitals in the South Florida area that have been able to utilize the CILC rate?

A. Yes. One of the provisions of the CILC rate is that customers may make available to FPL backup generation at the customers' location. This generation, controllable by FPL, would provide the Company peak capacity service, in lieu of actually interrupting the load of a CILC customer. Since hospitals are required to have backup generation on-site, the CILC arrangement is ideal for both providing benefits to South Florida Hospitals and to FPL and its other customers by making

efficient use of existing generation in the South Florida area. Moreover, the generation is located within major load centers, not miles away. Of course, as I noted above, the CILC rate was closed by the Commission and is no longer available to new loads.

Q. Is there additional backup generation, on-site at South Florida hospitals, which could provide peaking capacity to FPL to meet its future requirements?

A. Yes. Healthcare facilities seeking accreditation are required to have on-site backup generation commensurate with occupancy and services provided. The "2001 Comprehensive Accreditation Manual for Hospitals: The Official Handbook" sets out the standards (including backup generation for hospitals) that must be met for accreditation. Standard EC.1.7.1 addresses the issue of emergency power systems that "suppl[y] electricity to the following areas when normal electricity is interrupted." The back up generation is depended upon to provide reliable service that can be called upon intermittently and on short notice, in the pertinent facilities, so as to maintain electrical service to elevators, acute care areas, medical systems and the like. This backup generating capacity, all of which is not currently being controlled by FPL, can provide valuable service under CILC. A potentially attractive alternative could involve the conversion of existing diesel generation to a dual fuel diesel/natural gas firing that would make these units even more economic for such peaking service.

Q. Based on your review of FPL's 10-year power plant site plan, does the Company anticipate the need for additional generation?

A. Yes. During the period 2001 through 2010, FPL is expecting net capacity increases of over 6,000 mWs to be required to meet its current planning reserve and loss of load probability planning criteria. Based on the most recent 10-year site plan that I have evaluated, the Company is planning to add substantial amounts of combined cycle generating capacity, as well as combustion turbines (2003 to 2004) to meet this requirement. In addition, the 10-year site plan shows that FPL will require 795 mWs of additional (cumulative) demand side management through 2009. Table 1 below shows FPL's summer mW reduction goals for DSM (at the meter) for the period 2000 through 2009 on a cumulative basis. Clearly, FPL has projected that it needs additional generating capacity and has, in fact, planned for substantial increases in DSM to meet its objectives. This is in addition to FPL's approximate 2,680 mWs of DSM through the year 2000.

TABLE 1

FPL's Summer MW Reduction Goals for DSM (At the Meter)

Year	Cumulative Summer mW
2000	122
2001	200
2002	269
2003	339
2004	410
2005	484
2006	554
2007	625
2008	697
2009	795

Source: 10-year power plant site plan, April 2001, P-55.

Q. You indicated previously that the Company is planning to add combustion turbine capacity in the 2003 to 2004 period. What is the expected cost per kW of this combustion turbine capacity?

A. Based on the Company's April 2001 10-year site plan, FPL is planning to add the Fort Meyers Combustion Turbines Nos. 13 and 14 to its system during the summer of 2003 at a cost of approximately $540 per kW.

Q. Given FPL's projected need for additional generating capacity and DSM, has the Company developed any programs that would replace the CILC program and provide incentives to the hospitals to make available their existing, on-site backup generation to FPL?

A. The Company has received approval from the Commission to initiate a new commercial industrial load reduction program that is available to customers taking service under Rate Schedules GSD-1, GSDT-1, GSLD-1 and GSLDT-1, among others. However, unlike the CILC program, customers are not permitted to utilize their existing backup generation to meet the load reduction requirements called for by FPL under this CDR rider. Effectively, in order to participate in the CDR rider, customers must reduce their otherwise applicable consumption during load control events. This is not feasible for hospitals. Backup generation investment is thus made significantly less efficient and, from a societal perspective, FPL's approach produces additional investment in generation capacity that is under-utilized.

Q. Does FPL's existing tariff arrangement make sense?

A. No. As in the case of the CILC program, it makes sense for FPL to permit its customers to utilize backup generation in lieu of load reductions to meet the requirements for this tariff. To the extent that customers, such as the hospitals, have existing backup generation already in service and on-site, it is wasteful and

inappropriate for the Company to exclude this capacity from participating in Rider CDR.

Q. What would happen under FPL's tariff if the hospitals were to start up their existing backup generation, in lieu of actually reducing load under Rider CDR?

A. The tariff language arguably authorizes FPL to impose a standby reservation charge associated with this backup generation, if it exceeded 20% of a customer's load (which, in all likelihood, it would).[2] As a result, although the hospitals have sufficient generating capacity to provide peaking service to FPL, in exchange for a CDR credit pursuant to the tariff, the hospitals arguably are precluded from operating their backup generation in this manner because of the provisions of the CDR tariff and the standby rate.

Given the substantial amount of generating capacity being added by FPL over the next 10 years, as well as a requirement for a substantial increase in DSM to meet the Company's expected peak demands, FPL should be required to modify its commercial industrial demand reduction rider to permit customers to utilize backup generation in lieu of actual load curtailments to meet the Company's needs. FPL is requesting approval in this case for substantial increases in its rate base associated

[2] Rate Schedule SST-1 (Standby and Supplemental Service) states as follows: "A customer is required to take service under this rate schedule if the Customer's total generation capacity is more than 20% of the Customer's total electrical load and the Customer's generators are not for emergency purposes only."

with new generating capacity that, in the Company's opinion, is necessary to meet customer needs.

The Commission should require FPL to offer to utilize existing generating capacity in South Florida to meet (in part) the Company's future requirements. By excluding this existing generating capacity from the commercial industrial load reduction rider, FPL is failing to utilize existing resources that can meet its future needs. This is clearly uneconomic and potentially wasteful. By recognizing the existing backup generation available at South Florida hospitals, the Company can provide cost-effective reliable service to all of its customers.

Q. Does that complete your testimony?

A. Yes.

IN THE SUPREME COURT OF FLORIDA
Case No. SC02-1023

On Appeal from a Final Order of
The Florida Public Service Commission

SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION, et al.

Appellants,

v.

LILA A. JABER, et al.,

Appellees.

REPLY BRIEF OF SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION, et al.

Kenneth L. Wiseman
Mark F. Sundback
Andrews & Kurth L.L.P.
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Miriam O. Victorian
Andrews & Kurth L.L.P.
700 Louisiana Street
Houston, Texas 77002

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

Florida Public Service Commission Orders

REPLY BRIEF OF THE HOSPITALS

I. INTRODUCTION

Pursuant to Fla. R. App. P. 9.210(f) and 9.420(d), the South Florida Hospital and Healthcare Association (the "SFHHA") and over 35 supporting member healthcare institutions (collectively, the "Hospitals"), representing most of the acute care community in southeastern Florida, reply to the answer briefs ("Br.") of Florida Power & Light Company ("FPL"), the Florida Public Service Commission ("PSC"), the Office of Public Counsel ("OPC") and Lee County Florida ("Lee County") (collectively, the "Opposing Parties").

The Opposing Parties argue, incorrectly, that the Hospitals lack standing to bring this appeal because the Hospitals purportedly are not adversely impacted by the PSC Order approving the Stipulation. This argument is erroneous on numerous counts, as described below. The Opposing Parties' argument that the Hospitals were not entitled to a hearing and received all the process that is due, is closely linked to the argument that the Hospitals are not adversely affected, and when the standing objections collapse, so does the Opposing Parties' claim that a hearing was unnecessary. Lacking any other arguments, the Opposing Parties also maintain that the Hospitals should abandon this appeal and initiate a separate complaint proceeding at the PSC – which the Hospitals did in 2001, to the vociferous objections of the very parties who here insist that a complaint proceeding should be the Hospitals' vehicle for relief.

II. THE OPPOSING PARTIES CANNOT CREDIBLY CLAIM THAT THE HOSPITALS SHOULD FILE ANOTHER COMPLAINT PROCEEDING BECAUSE OF THE PSC'S FAILING IN THIS CASE

Perhaps the Opposing Parties' most extraordinary argument is that the Hospitals should simply forgo the instant appeal, and instead bring a separate complaint proceeding.[1] For instance, the PSC maintains now that "there is nothing to preclude [the Hospitals] from initiating [their] own proceeding to challenge FPL's rates in the future . . . ." (PSC Br. at 31). FPL now argues that if the Hospitals simply abandon the instant appeal, they are "subject to no . . . restraint" in bringing a rate reduction action during the term of the Stipulation that is the subject of this appeal (the "2002 Stipulation"). FPL Br. at 25-26. However, the Hospitals tried precisely that approach, and the Commission rejected the complaint (filed by the Hospitals in PSC Docket No. 010944-EI), at FPL's urging, based upon, *inter alia*, language - - contained in a Stipulation resolving a 1999 proceeding involving FPL's rates (the "1999 Stipulation") - - which also is incorporated verbatim in the 2002 Stipulation here at issue.

The Hospitals served their motion to intervene in Docket No. 001148-EI on May 1, 2001 (a motion the Commission did not manage to act upon for four months). On July 6, 2001, the Hospitals filed a complaint with the Commission (the "Complaint") in Docket No. 010944-EI, which, based upon information

---

[1] *See, e.g.*, PSC Br. at 15 ("If the Hospital Association wants to try for a greater rate reduction, it must . . . bring[ ] its own case"); FPL Br. at 20; OPC Br. at 17.

available from public filings of FPL and data from the Commission's own files, sought a reduction in FPL's rates, on either an across-the-board or a customer-specific basis. Contemporaneously, the Hospitals also sought reconsideration of a Commission Order dated June 19, 2001 declining to place some of FPL's revenues subject to refund in the pending review of FPL's rates in PSC Docket No. 001148-EI. FPL contested the Hospitals' requests vigorously, based on arguments that conflict with its current position. FPL argued in the Complaint proceeding that because the 1999 Stipulation had been approved by Commission order, the Commission could not reduce rates prior to the conclusion of the Stipulation's term. As summarized by the PSC, FPL argued

> that the provisions of the [1999] FPL rate stipulation provide the exclusive means to determine FPL's rates during the three-year term of the stipulation. FPL asserts that the order approving the stipulation, Order No. PSC-99-0519-AS-EI, is final agency action that may not now be overturned. Further, FPL asserts that SFHHA's members, as retail customers of FPL, were fully represented by the . . . OPC . . . [and another customer group].

(R. Vol. 40, 7821; Order No. PSC-01-1928-PCO-EI, slip op. at 4). *See* Appendix A hereto (excerpts from a transcript of FPL's oral argument at the September 4, 2001 Agenda Conference dealing with the Hospitals' Complaint).

Of course, each of these arguments is drawn from facts associated with, or language in, the 1999 Stipulation which are paralleled by facts associated with, or language in, the 2002 Stipulation. Particularly, both the 1999 and 2002

Stipulations have been approved by the PSC; and OPC participated in both proceedings, allowing opponents to argue that the Hospitals were represented by other participants. Moreover, both the 1999 and 2002 Stipulations contain precisely the same sentence, which was claimed in the Hospitals' prior Complaint docket to preclude challenges by even non-signatories to rates established by the 1999 Stipulation:

> During the term of this Stipulation and Settlement revenues which are above the levels stated herein will be shared between FPL and its retail electric utility customers – it being expressly understood and agreed that the mechanism for earnings sharing herein established is not intended to be a vehicle for "rate case" type inquiry concerning expenses, investment and financial results of operations.

See the paragraphs numbered 6 in the Stipulations in both Docket No. 99067-EI (Appendix B hereto) and Docket No. 001148-EI (R. Vol. 61, 11746). It was the effort to obtain interim relief before the expiration of the 1999 Stipulation that precipitated the Complaint filed in 2001 by the Hospitals, opposed by FPL, and denied by the PSC *based upon the language from Paragraph No. 6 of the 1999 Stipulation. See* R. Vol. 40, 7830-31 (Order No. PSC-01-1928-PCO-EI slip op. at 13-14); *see also* R. Vol. 2, 400 (Order No. PSC-01-1346-PCO-EI slip op. at 6) (relying on the revenue-sharing mechanism as the basis for refusing to impose interim refund authority on FPL). Thus, it would seem that FPL and its allies seek to send the Hospitals back to a complaint process that only a year ago they argued (and the PSC ruled) would not afford the Hospitals relief. Indeed, the Commission

rationalized its denial of the Hospitals' Complaint by stating: "it appears that SFHHA's . . . request for relief asks for a proceeding that we have already undertaken," referring to the rate review proceeding now before this Court. (R. Vol. 40, 7829 (Order No. PSC-01-1928– PCO-EI slip op. at 12)). In other words, the PSC denied the Hospitals' Complaint because the rate review proceeding would fulfill the purpose of the Complaint docket; but here, the PSC argues that the Hospitals' concerns really do not belong in the rate review proceeding, and instead the Hospitals are invited to pursue a complaint proceeding by the very parties that opposed a separate complaint proceeding only a year ago.[2] The Opposing Parties, particularly the PSC and FPL, cannot have it both ways. They cannot here claim that the Hospitals have another avenue for relief, having just erected a roadblock denying Hospitals access to that route.

III. THE HOSPITALS HAVE STANDING

The Opposing Parties contend that the 2002 Stipulation, by lowering FPL's existing rates, deprived the Hospitals - - and effectively *all* of FPL's customers - - of standing to appeal an order approving the 2002 Stipulation. *See*, *e.g.*, OPC Br. at 18 ("No one was harmed by agency action in the PSC Docket"[3]).

---

[2] In fairness, Lee County's assertion (Br. at 9) that the "2002 Stipulation has no binding, preclusive or prejudicial effect on the SFHHA", may be attributed to the fact that Lee County intervened very late in the proceeding – only two weeks before the Stipulation was filed – and thus the County did not have the benefit of having litigated the prior complaint docket.

[3] *See* PSC Br. at 20-24; FPL Br. at 26-32; OPC Br. at 18-21.

At the outset, it is important to recognize the significance of the Opposing Parties' argument on this issue. The Opposing Parties' position means that even if the 2002 Stipulation had lowered existing FPL rates in the aggregate by $1, customers would lack standing to appeal a PSC order approving such a Stipulation. Putting aside the prudence of ratepayers' representatives making such an argument, the position is absurd.

The Opposing Parties' arguments conflict with case law that persuasively explains the proper application of the "adversely affected" standard. Courts recognize that utility customers challenging an order which, *inter alia*, reduces rates are not automatically precluded from seeking review of such an order:

> Public utilities enjoy monopolies and they are privileged to exact rates established by agencies set up by law. Consumers of the products of such utilities have the undoubted right to assert that they are adversely affected by rates so promulgated. The fact that the orders of the Public Service Commission embraced service rates was a sufficient basis for the appellees' right to a judicial review. *It is no answer to say that the order relating to rates may not be reviewed because it required a reduction.* The appellees may have believed that the reduced rates were exhorbitant.[4]

Thus, "[s]tanding is not removed because a party might be better off under a Commission order than it was prior to the order if the effect of the order is

---

[4] *Terre Haute Gas Corp. et al., v. Johnson*, 221 Ind. 499, 506, 45 N.E. 2d 484, 487 (1942), *mandate modified on other grds*, 221 Ind. 516, 48 N.E. 2d 455 (1943) (emphasis added).

nevertheless injurious."[5]

Indeed, in cases involving much more attenuated harm than presented by the instant facts, courts have recognized standing. In *Rinker Materials Corp. v Metropolitan Dade County, et al.*, 528 So. 2d 904 (Fla. 3d DCA, 1987), the court granted standing to a party that had been prohibited from presenting evidence showing that a change in zoning of adjacent property would diminish the value of the party's property interests, even though the underlying order of the zoning agency did not purport to directly affect that party's property. *Id.* at 907. Here the Hospitals' efforts to obtain adequate discovery, regarding transactions which would affect rate base and thus the derivation of rates, was not fulfilled, and thus, the Hospitals clearly have standing, under *Rinker, supra.*

In *Rabran v. Dept. of Professional Regulation*, 567 So. 2d 1283, 1287 (Fla. 1st DCA, 1990), the underlying agency order dismissed all charges against an individual, but nonetheless made certain conclusions of law. The individual who had been the target of the agency proceeding appealed and was found to have standing to challenge the agency order, given that additional proceedings involving the individual clearly were contemplated. In much the same fashion, it requires no foresight to recognize that the language contained in the 2002 Stipulation as framed here, modeled after the 1999 Stipulation, again will be used to thwart

---

5 *Home Builder's Association of Indiana, Inc. v. Indiana Utility Regulatory Commission*, 544 N.E. 2d 181, 184 (Ind. Ct. App. 3d Dist., 1989).

review of FPL's rates. *See* Part II, *supra.*

The cases the Opposing Parties rely upon to articulate the standards for standing, *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), actually reinforce the conclusion that the Hospitals have standing. In *AmeriSteel.* the appellant lacked standing to challenge an order that, according to the decision, "in no way affects AmeriSteel" and which "merely preserves the status quo." 691 So. 2d 473, 476. Understandably, lacking any injury, AmeriSteel also lacked standing. In *Agrico*, an environmental permit was requested to allow a new supplier of solid sulphur to make deliveries to a company that previously had purchased significant amounts of liquid sulphur from another supplier. The incumbent supplier of liquid sulphur (and its transporter) sought to intervene in the environmental permitting process, and were found by the court to lack standing because competitors' interests in maintaining supplier arrangements were not among those intended to be protected by the environmental statutes. 406 So. 2d 478, 482-83.[6] In contrast to *Agrico*, the Opposing Parties cannot seriously contend that the PSC should ignore whether consumers are overcharged by utilities; indeed,

---

[6] *Cf. Fairbanks Inc. v. State Dept. of Transp.*, 635 So. 2d 58 (Fla. 1st DCA 1994) (cited in FPL Br. at 23-24), where standing was granted based on the attenuated interest of a supplier to a party bidding on a state construction contract; the supplier was entitled to a hearing regarding a state agency's exclusion of the supplier's equipment from the specifications in the construction contract, even though the court acknowledged that a competitive procurement requirement was *not* incorporated in the state's regulations. *Id.* at 59.

that is one of the PSC's primary responsibilities. (*See* R. Vol. 2, 400: "Our overarching concern is that the public interest be protected. It is our responsibility to ensure that the Company's retail rates are at an appropriate level.")

The Opposing Parties' standing argument relies in large part on cases involving environmental advocacy groups that lacked standing because they asserted their injury was derived from that experienced generally by citizens of the state, or by the group's members who were *not* parties to the case. *See Legal Environment Assistance Foundation v. Clark*, 668 So. 2d 982 (Fla. 1996); *Florida Chapter of the Sierra Club v. Suwanee American Cement Co., Inc.*, 802 So. 2d 520 (Fla. 1st DCA 2001). These cases are inapplicable because, *inter alia*, in this case, individual institutions, whose costs will be directly affected by the Commission order, are seeking review of that order.

FPL argues the Hospitals lack standing based upon *Bodenstab v. Department of Prof. Reg.*, 648 So. 2d 742, 743 (Fla. 1st DCA 1994), where the court found that the appellant lacked standing to appeal an order that had provided the relief sought. Given that the Hospitals had sought a rate reduction of more than $500 million (in lieu of the Stipulation's $250 million), changes in rate design (not implemented by the Commission), discovery concerning transactions between FPL and affiliates (never provided and thwarted by the Commission's termination of discovery processes), and recognition of on-site hospital electric generation capacity (not

granted by the Stipulation), *Bodenstab* is irrelevant.

Similarly inapposite is the PSC's citation (Br. at 23) to *Dance v. Tatum*, 629 So. 2d 127 (Fla. 1993) for the proposition that when a party obtains a favorable judgment and accepts benefits thereunder, that party cannot appeal the judgment (*id.* at 129). The PSC neglects to mention that the same paragraph in *Dance* containing the cited proposition also notes the "exception to this . . . rule . . . where the appellant is entitled in any event to at least the amount received", *id.*, such as even greater reductions in utility rates than granted by the Stipulation.

Under the Opposing Parties' formulation, ratepayers cannot obtain court review of an order that reduces rates from the level that had been set by a *prior Stipulation* (which ratepayers likewise would have lacked standing to challenge, under Opposing Parties' theory, because it also included a reduction to prior rates), regardless of whether the newly agreed-upon rates are cost-justified. The fact that FPL's prior level of rates has been reduced by the Stipulation does not signify that the new level is fair and reasonable, or cost-justified, or anything other than that the prior level of rates clearly is too high for current service.[7] In that context, the Opposing Parties' position would eliminate the ability of consumers to appeal from

---

[7] OPC states (without any record citation) that FPL will exceed the sharing thresholds for calendar year 2002 (OPC Br. at 33); the last page of FPL's Appendix A2 discloses that in the first two years under the 1999 Stipulation (from 1999 to 2001), FPL's net income and related income taxes increased by $162 million (*i.e.*, $103 million in increased net income and $59 million in related income taxes), or an average of over $80 million annually.

orders reducing rates by even *de minimis* amounts, and if such orders are issued occasionally over the course of fifteen or twenty years as the utility's costs decline, then ratepayers will be precluded from effective judicial review of an agency's decisions involving the utility for extended periods. As the PSC itself noted, prior to this case FPL had not made a full MFR filing in *17 years*. (R. Vol. 2, 399; Order No. PSC 01-1346-PCO-EI slip op. at 5).

The Opposing Parties' argument that the approval of the Stipulation does not adversely affect the Hospitals is erroneous for another reason as well. The 2002 Stipulation (Paragraph No. 10[8], a provision never mentioned by OPC and FPL) permits FPL - - to the tune of $125 million *annually*, or up to $464 million over the life of the Stipulation - - to reduce, or reverse prior, depreciation amortization, and debit the "bottom line depreciation reserve over the term of this Stipulation." Resulting depreciation account reserve deficiencies "will be included in the remaining depreciation rate *and recovered over the remaining lives of the various assets*" (emphasis added). The lower the level of depreciation, the less rate base will be reduced; and the higher the level of rate base, the higher the level of base rates, when the nominal term of the 2002 Stipulation expires in 2005. In other words, the effects of the 2002 Stipulation will be experienced in 2006 and beyond, "over the remaining lives" of various long-lived assets. Obviously, higher rates in

---

[8] R. Vol. 62, 11910, contained in Appendix B to the Hospitals' Initial Brief.

2006 adversely affect ratepayers such as the Hospitals, a fact the Opposing Parties fail to even mention, much less address.

Moreover, in the rate proceeding, any change in base rates after the expiration of the 1999 Stipulation (*i.e.*, April 14, 2002) will be made effective as if the order making such change was made on April 15, 2002, provided certain conditions are met (*e.g.*, a final order was rendered by June 30, 2002).[9] Of course, any remedy implemented outside of that docket would not have this assurance of effectiveness as of April 15, 2002; thus if FPL's rates under the Stipulation still collect $100 million annually in excessive revenue, abandoning this docket would leave over half of that amount with FPL even if a new proceeding could place FPL's rates subject to refund tomorrow. Thus, the Opposing Parties are in error in contending that the Hospitals are not adversely affected, even if one attributed any credibility to their claim that the Hospitals should abandon the instant case and instead file yet another complaint with the PSC (as discussed in Part II, *supra*).

There is an additional reason why the Opposing Parties' standing arguments lack merit. The Commission's order on the Stipulation does not address several issues raised in the Hospitals' testimony. For instance, the Hospitals urged that new service agreements with FPL should recognize existing generation resources available at South Florida healthcare facilities, available on short notice and for

---

[9] R. Vol. 3, 411 (last full sentence on page).

intermittent use to supplement power from FPL's own generation, *see* Appendix C hereto (Direct Testimony of Stephen J. Baron, R. Vol. 60, 11449-55 (at 17-24 in original)), thereby reducing the amount of new, costly additional generation capacity planned by FPL, and allowing the healthcare facilities to reduce demand at critical or high-cost peak demand periods. The Hospitals also raised a rate design issue. *Id.* R. Vol. 60, 11447-49; pp. 15-17 in original. These issues are not addressed by the Stipulation.[10]

Thus, the Hospitals are "adversely affected" by, and have standing to challenge, the order at issue.

IV. DUE PROCESS

(A) The PSC Erred By Not Requiring Production Even Of Information It Had Directed Should Be Provided

Curiously absent from all of the Opposing Parties' briefs save that of FPL is any substantive discussion of the failure of the PSC to ensure that FPL responded to the Hospitals' discovery requests, and the impact of that failure upon this appeal. Affiliate-dealing or self dealing and a convoluted structure of special purpose partnerships should, given events of the past year in the energy industry, receive

[10] Perhaps animated by its effort to squeeze this case into its desired mold that the Hospitals were not adversely impacted, the PSC mischaracterizes the Hospitals' case, claiming that the Hospitals had stated that the affiliate-dealing issues and transactions with Adelphia would be part of the Hospitals' proposed $500 million in disallowance (PSC Br. at 12). That assertion is incorrect. The Hospitals maintained that the affiliate-dealing issue exposure of FPL was *not* included in the $500 million rate reduction estimate. *See* R. Vol. 62, 11852 (March 22, 2002 Agenda Conference Tr. 18).

significant scrutiny by the PSC; but the PSC, while initially acknowledging the propriety of discovery on this topic, shut down discovery, without requiring provision of information it previously had ruled should be produced, in its hurry to clear its docket of this case.

The significance of adequate discovery was highlighted in an October 24, 2001 "Order Establishing Procedure" in the rate review docket:

> The Commission expected that information in the [Minimum Filing Requirements] would be a starting point for reaching a determination on the reasonableness of FPL's rates. The MFRs in and of themselves will not provide all the information necessary to ascertain the reasonableness of FPL's rates . . . . An audit, and an *adequate period for discovery are necessary* to evaluate and, if necessary, challenge the assertions contained in the MFRs. *The discovery . . . process[ ] should be permitted to take place . . . to allow . . . a fair opportunity to review the MFRs.*

(R. Vol. 48, 9401; (underlining in original; italics added)). Yet, the Commission abandoned this position as the Hospitals sought to fully explore the multi-dimensional relations and business dealings between FPL and Adelphia Communications ("Adelphia"), the target of an SEC investigation and whose executives have been arrested and charged with fraud, self-dealing and accounting abuses.[11]

---

[11] On the Internet, go to http://www.montanaforum.com. Under related news; go to past 2002 issues, submit query 06/11/2002, go to consumer protection; go to http:///news.bbc.co.uk. Under business, search for "Adelphia"; go to http://www.comcast.net. Under News, search archive of 7/25/2002, for "Adelphia"; Wall Street Journal, September 18, 2002, p. 8.

Adelphia and its affiliates do a significant amount of business with FPL, including leasing assets (or access thereto) originally paid for by the electric ratepayers of FPL. *See* the Hospitals' Initial Brief, pp. 9-12; Appendix C to the Hospitals' Initial Brief, reproducing R. Vol. 61, 11680-722.

But Adelphia had another relationship with FPL, aside from that of lessee/tenant. Adelphia and affiliates undertook business activities in league with affiliates of FPL in various partnerships. For instance, Adelphia held interests in an entity called Olympus Communications, L.P. ("Olympus"), and the FPL Group also owned entities that were partners in Olympus. Olympus provided cable television service in Florida, acquiring or leasing real property, microwave facilities and business offices, and acquired rights on fiber optic cables to transmit signals. By late 1999, FPL had its interest in an unnamed cable limited partnership redeemed, and sold 3.5 million shares of Adelphia's stock, for aggregate after-tax gains of more than $160 million.[12]

The Hospitals propounded discovery requests concerning relationships and transactions through which value in assets and property originally paid for by FPL electric ratepayers might be conveyed to other entities (*e.g.*, Olympus), and FPL objected, in some instances denying involvement, in other instances arguing that no further disclosure was warranted. In its arguments opposing discovery,

---

[12] *See* Appendix C to the Hospitals' Initial Brief (R. Vol. 61, 11680-83)

however, FPL failed to tell the PSC that FPL's General Counsel, Dennis Coyle, was on the Board of Directors of Adelphia. FPL also failed to disclose that Mr. Coyle served as president of a general partner in Olympus (R. Vol. 61, 11683-84).

The Presiding Officer found the Hospitals' requests proper and ruled that FPL must produce information requested by the Hospitals within four calendar days of the order (R. Vol. 58, 11125-28). Instead of complying with the order, FPL stonewalled on the discovery responses and filed a motion for rehearing of the order (along with failing to respond to other discovery requests of the Hospitals subject to unresolved motions to compel).

Long after FPL was obligated to produce the outstanding data requests, the PSC on March 14, 2002 suspended the procedural schedule for the docket, and approved the Stipulation at the March 22, 2002, Agenda Conference. In a clever but misleading paraphrase of comments at the Agenda Conference, FPL attempts to imply that no data were withheld, attributing to Staff the assertion that Staff "did not believe that any information had been withheld" (FPL Br. at 22). The actual statement by Staff was carefully limited to responses to Staff's discovery requests (R. Vol. 62, 11862; March 22, 2002 Tr. at 28: "the company has provided responses to all of *our questions* so far"). In fact, FPL had failed to respond to some discovery requests for more than three months; some requests were subject to motions to compel filed by the Hospitals; and some were subject to an order of the

Presiding Officer compelling production. Once the Stipulation was approved, the Hearing Officer vacated his prior ruling requiring provision of the discovery the Hospitals sought (R. Vol. 62, 11832). Also outstanding at the time were discovery requests of the Hospitals concerning cost overruns of $100 million associated with a FPL generation construction project (*see* R. Vol. 62, 11854; R. Vol. 59, 11366).

Perhaps recognizing the somewhat unsavory nature of these circumstances, the remaining Opposing Parties avoid the issue or deal with it very obliquely. OPC's statement of facts simply omits any mention of the several motions to compel filed by the Hospitals, or the order requiring the production of the data, or the vacating of that order. The PSC, for its part, asserts that parties in the proceeding "conducted extensive discovery" (PSC Br. at 10, 37)[13] without claiming that responses to such "extensive discovery" were provided.

The failure to provide thorough discovery is especially damaging when viewed in the light of the Commissioners' own statements. The Commission's June 19, 2002 order expressly reassured participants that the Commission would be "requiring the filing of sufficient information on a timely basis" (R. Vol. 2, 399; slip op. at 5). According to one of the Commissioners at the March 22, 2002 Agenda Conference, "as a result of the thoroughness of the discovery that was done in this docket, the parties were able to negotiate from a position of strength"

---

[13] The PSC (Br. at 11) also quotes an unsworn FPL statement supporting the Stipulation, touting the "comprehensive and exhaustive review of our operations."

(R. Vol. 62, 11891, lines 9-12; Tr. 57). Another Commissioner claimed that the Commission's goal should be to "lay the issues bare" (R. Vol. 62, 11889, line 24 – 11890, line 3; Tr. 55-56). Statements at the Agenda Conference and in prehearing orders, emphasizing the importance of discovery, demonstrate the error in failing to compel production of information involving the Adelphia/affiliate dealing issue, as well as the other information requested by the Hospitals.

In sum, the Commission suppressed discovery of the issues despite:

- the occurrence of events that gained notoriety in 2002 involving partnerships operated in the shadows of large corporations;
- the Commission's professed belief in the need for full disclosure; and
- the FPL Group's significant gains (*e.g.*, $160 million) realized for its shareholders from unidentified entities positioned to benefit at the expense of electric ratepayers.

If FPL has nothing to hide, why did it conceal its ties to Adelphia and Olympus Communications and why has it refused to provide the requested information?

(B) The Procedures And Record Below Were Inadequate And Frustrate Judicial Review

The Opposing Parties' citation to a series of cases actually highlights the inadequate procedures used here by the PSC. For instance, the PSC's efforts to avoid an adequate hearing place great reliance upon *New Orleans Public Service v. FERC*, 659 F. 2d 509 (5th Cir. 1981) ("*NOPSI*"). However, factual issues in *NOPSI were* subject to a "full hearing with cross-examination" before the agency, albeit in a parallel docket. *Id.* at 514 (internal quotation marks omitted). Here, the

Hospitals tried in another docket (*i.e.*, the Complaint in Docket No. 010944-EI) to obtain review of various facts supporting a rate reduction and were turned down by the PSC (*see* Part II, *supra*). Moreover, in *NOPSI* the agency "addressed NOPSI's objections to the settlement proposal" in the order approving the settlement (*id.* at 515), in distinct contrast to the order here at issue, which does not even identify the Hospitals' arguments, much less meet them (instead, the order in a single sentence simply acknowledges the Hospitals' non-support of the Stipulation (*i.e.*, R. Vol. 62, 11900)).[14] In sum, *NOPSI* actually supports the position of the Hospitals, not that of the Opposing Parties.

In *Pennsylvania Gas and Water Company v. FERC*, 463 F. 2d 1242 (D.C. Cir 1972), relied upon by the PSC (Br. at 26, 28) and FPL (Br. at 16) (but wisely avoided by OPC), (1) evidence was formally admitted into the record; (2) all of the allegations of the party challenging the stipulation were accepted as true (thus obviating the need for a hearing); and (3) the agency's order dealt "in detail" with the challenging party's objections. *See Pennsylvania Gas,* 463 F. 2d at 1244 n. 11, 1245, 1251. None of these elements was observed in this case. In *Bryant v. Arkansas Public Service Commission,* 877 S.W. 2d 594 (Ark. 1994), cited by the

[14] In *NOPSI*, the party alleging genuine issues of material fact had not sponsored the testimony creating the alleged factual issues; the relevant testimony had been sponsored in a different phase of the proceeding (*id.* at 514) and ultimately the sponsor of the testimony changed its position and supported the settlement (*id.*), unlike our facts.

PSC, the agency approved a stipulation following (i) receipt of testimony on the specifics of the stipulation, *id.* at 597, (ii) formal admission of the evidence into the record, *id.* at 603, (iii) cross-examination on the evidence, *id* at 600, and (iv) briefs on the merits of the settlement, *id.* at 597. The foregoing cases simply emphasize the inadequacy of procedures used (or not used) by the PSC here, resulting in an order which ignored issues raised by the Hospitals, in contrast to the agency actions under review in the foregoing cases.

Betraying concern about the validity of their contentions that a hearing was unnecessary in order to conclude the rate review proceeding, the Opposing Parties erroneously attempt to depict the March 22, 2002 Agenda Conference as a quasi-hearing. Thus, Lee County cites to "competent, substantial evidence" (Lee County Br. at 11 n. 8), failing to note that in fact none of the pre-filed testimony offered by the parties was sworn or subjected to cross-examination.

Similarly, the PSC claims the "parties . . . testimony in support of the Stipulation provided the Commission with all the competent evidence it needed . . ." PSC Br. at 17. But the statements at the Agenda Conference - - the *only* statements that related to the particular features of the Stipulation as opposed to the participants' litigation positions - - were not "testimony." The statements were not sworn and generally consisted of lawyers' advocacy and praise of other settling parties. To characterize these statements as "testimony" is to underline the absence

of any real evidence in support of the Stipulation's features.

Ironically, FPL claims that the PSC "paid careful attention to the SFHHA's objections" (FPL Br. at 22) during the Agenda Conference. The Commissioners invited Opposing Parties' counsel to extol the virtues of the Stipulation and the Commission, but the Commission's only comments to the Hospitals were reminders of the short balance remaining (R. Vol. 62, 11854, lines 6-7, Tr. 20) in the Hospitals' allotted time for a presentation (which the Commission originally proposed to limit to five minutes and ultimately allotted fifteen minutes (R. Vol. 62, 11848-49; Tr. 14-15)).

V. A HEARING WAS NECESSARY BEFORE CONCLUDING THE CASE, ABSENT A UNANIMOUS SETTLEMENT

The Opposing Parties maintain that there was no need for a hearing or a unanimous settlement to terminate the rate review proceeding. As part of that argument, the Opposing Parties maintain that there was no promise by the PSC of a hearing or unanimous settlement to resolve the rate review proceeding.

This position ignores the Commission's own repeated statements to the contrary. On June 19, 2001, while indicating that it would undertake a review of FPL's rates to be effective following April 14, 2002, the PSC noted:

> We want to be clear that this decision *to initiate a rate proceeding* does not foreclose the ability of the company and the parties to reach a resolution . . . . [Additional disclosure of information] can empower parties and the Commission to reach *a settlement that everyone can agree* is in the public interest.

R. Vol. 2, 400 (emphasis added). This language signaled that (1) the PSC understood it was initiating a new "rate proceeding" distinct from prior phases of the proceeding involving GridFlorida and the Entergy/FPL-merger, and (2) any settlement resolving the "rate proceeding" would be one upon which "everyone can agree."

On October 24, 2001, the PSC detailed the procedures it was establishing for review of FPL's rates. *In re: Review of the retail rates of Florida Power & Light Company*, 01 FPSC 10:484 (2001) (the "Hearing Order") (R. Vol. 48, 9394). FPL's proposal to truncate the Minimum Filing Requirements ("MFR") procedures (R. Vol. 48, 9399), narrowing the scope of any hearing, was rejected as "unnecessary, not practical, and potentially prejudicial to the rights of one or more of the parties." Order No. PSC-01-2111-PCO-EI at 7. (R. Vol. 48, 9401; slip op. at 8). Instead,

> The Commission ordered the utility to file MFRs to determine what FPL's retail rates should be on a going forward basis. *There are two means of addressing that issue with finality in Florida Administrative Law. First, via a settlement, agreed to by all parties* to the proceeding and subsequently approved by the Commission. *Second, via a hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes.*

Id. (R. Vol. 48, 9401; emphasis added). Consistent with this ruling, the Commission set the matter for hearing beginning on April 10, 2002. (R. Vol. 48, 9400).

On February 26, 2002 the Commission further gave notice "that a hearing

will be held . . . in the . . . referenced docket" running April 10, 2002 through, if necessary, April 16, 2002 (R. Vol. 58, 11122). "At the hearing, all parties shall be given the opportunity to present testimony and other evidence . . . . All witnesses shall be subject to cross-examination . . . ." (R. Vol. 58, 11123).

Incredibly, OPC's Statement of the Case and of The Facts completely fails to quote the language excerpted above from either the June 19, 2001 or the October 24, 2002 orders. *See* OPC Br. at 6-7 and 10-11.[15] Instead, OPC cites to language from an order issued in 2000 regarding *other* phases of the docket involving different inquiries (*i.e.*, the formation of GridFlorida and FPL's ultimately unconsummated merger with Entergy Corporation) for the proposition that "[n]o hearing is currently scheduled" (OPC Br. at 4). Whatever the significance of that statement in 2000 regarding the different phases of the proceeding, and given the obvious temporal limitation in the language of the 2000 Order quoted by OPC (*i.e.*, "is currently scheduled"), it cannot trump the PSC's later statements specifically identifying the only "two means of addressing [the] issue with finality in Florida Administrative Law" for the rate review proceeding.

FPL and OPC further acknowledge that if the Hospitals' substantial interests will be affected by proposed agency action, a hearing is necessary. *See* FPL Br. at

---

[15] The Statement of the Facts of both the PSC and FPL acknowledge that the October 24, 2001 order was issued, but ignore the language in which the PSC pledged either a unanimous settlement or in the alternative a hearing. PSC Br. at 7, FPL Br. at 4.

23-25; OPC Br. at 35 ("an agency does not have to resolve disputes unless a hearing is requested by a party likely to suffer injury from the agency's contemplated action"); *see* also *id.*, 26-27 n. 12. That standard, as articulated in Section 120.569, Florida Statutes, is readily met by the Hospitals (*see* Part III, *supra*), and on that basis it is clear that the Hospitals were entitled to a hearing.

OPC offers an additional argument, urging that Section 120.57(4), Florida Statutes, authorized the PSC's action. That provision states:

> (4) INFORMAL DISPOSITION. – Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

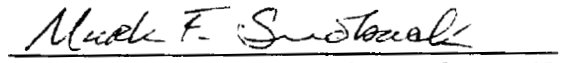
However, the opening phrase of the statutory language - - "[u]nless precluded by law" - - does not seem to have entered into OPC's consideration. As discussed above, and in the Hospitals' Initial Brief, resolution of this proceeding by stipulation *was* precluded by law; Section 120.57(4) does not apply.

OPC concedes that the Hospitals would be entitled to a hearing if "the Hospitals had petitioned for a rate decrease" (OPC Br. at 28). In fact, the Hospitals' July 6, 2001 Complaint sought to reduce FPL's rates, as OPC admits (OPC Br. at 8); *see* Part II, *supra.* What OPC does *not* disclose is that, in dismissing the Hospitals' Complaint in September 2001, the Commission stated that "SFHHA's . . . request for relief asks for a proceeding *that we have already undertaken,*" referring to the rate review proceeding initiated by the Commission's

June 19, 2002 order (R. Vol. 2, 7829; emphasis added). Obviously, the parties knew that the Hospitals sought a reduction in rates that the Hospitals repeatedly had argued were too high; when dismissing the Complaint, the Commission told the Hospitals that Docket No. 001148-EI would take the place of the Complaint proceeding. Thus, OPC's attempts to finesse the requirement of a hearing fail.

As part of the grab bag of arguments that the Hospitals should not receive a hearing, the Opposing Parties claim that the Hospitals would be worse off if the proceeding was litigated, based upon the apparent presumption that allegations about rate "parity" would drive such a result. *See* OPC Br. at 41-42; PSC Br. at 15, 20; FPL Br. at 10 n. 8 (making assertions without record citations). These contentions and the Opposing Parties' briefs completely ignore the Hospitals' evidence describing deficiencies in FPL's parity claims. *See* Appendix C hereto (Direct Testimony of Stephen J. Baron) (R. Vol. 60, 11437-46; original at 5-14). Because the Opposing Parties simply assume a result by ignoring contrary evidence, their contention on this score lacks merit.

Respectfully submitted,



Mark F. Sundback (*Admitted Pro Hac Vice*)
Kenneth L. Wiseman (*Admitted Pro Hac Vice*)
Andrews & Kurth L.L.P.
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Miriam O. Victorian
(Florida Reg. No. 355471)
Andrews & Kurth L.L.P.
700 Louisiana Street
Houston, Texas 77002

Counsel For Appellants

September 23, 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States mail this 23rd day of September, 2002 to the following parties of record:

Robert V. Elias, Esquire Division of Legal Services Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, Florida 32399-0850	David L. Cruthirds, Esquire Attorney for Dynegy, Inc. 1000 Louisiana Street, Suite 5800 Houston, TX 77002-5050
John T. Butler, P.A. Steel Hector & Davis, LLP 200 South Biscayne Boulevard, #4000 Miami, Florida 33131-2398	William G Walker, III, Vice President Florida Power & Light Company 215 South Monroe Street, Suite 810 Tallahassee, FL 32301-1859
R. Wade Litchfield, Esquire Florida Power & Light Company 700 Universe Boulevard Juno Beach, Florida 33408-0420	Michael B. Twomey, Esquire Post Office Box 5256 Tallahassee, Florida 32314-5256
Thomas A. Cloud/W. Christopher Browder Gray, Harris & Robinson, P.A. Post Office Box 3068 Orlando, Florida 32802-3068	Joseph A. McGlothlin, Esquire Vicki Gordon Kaufman, Esquire McWhirter Reeves 117 S. Gadsden Street Tallahassee, Florida 32301
John W. McWhirter, Jr., Esquire Attorney for FIPUG McWhirter Reeves 400 North Tampa Street, Suite 2450 Tampa, Florida 33601-3350	Mr. Jack Shreve/ John Roger Howe Office of Public Counsel c/o The Florida Legislature 111 West Madison Street, Room 812 Tallahassee, Florida 32399-1400
Linda Quick South Florida Hospital and Healthcare 6363 Taft Street Hollywood, FL 33024	William Cochran Keating, IV, Esquire Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, Florida 32399-0850

Mark F. Sundback

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point font, which is proportionately spaced.

Mark F. Sundback

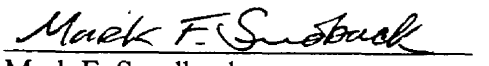
IN THE SUPREME COURT OF FLORIDA

SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION, *et al.*,	)	
Appellants,	)	
	)	Case No. SC02-1023
LILA A JABER, *et al.*,	)	
Appellees	)	

REQUEST FOR ORAL ARGUMENT

Pursuant to Fla. R. App. P. 9.320, the South Florida Hospital and Healthcare Association, and supporting members (collectively, "the Hospitals") hereby respectfully request the opportunity to present oral argument. This appeal involves a challenge by the Hospitals to an order of the Florida Public Service Commission ("PSC") approving a stipulation and settlement which terminated a proceeding to review FPL's rates in the middle of the proceeding, without a required hearing. Oral argument would assist the court in understanding the complicated procedural history of the PSC docket and the implications of the arguments made to preclude ratepayers from obtaining judicial review of orders, such as the PSC's order.

Respectfully submitted,



Mark F. Sundback
(*Admitted Pro Hac Vice*)
Kenneth L. Wiseman
(*Admitted Pro Hac Vice*)
Andrews & Kurth L.L.P.
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Miriam O. Victorian
(Florida Reg. No. 355471)
Andrews & Kurth L.L.P.
700 Louisiana Street
Houston, Texas 77002
Counsel For Appellants

September 23, 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States mail this 23rd day of September, 2002 to the following parties of record:

Robert V. Elias, Esquire Division of Legal Services Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, Florida 32399-0850	David L. Cruthirds, Esquire Attorney for Dynegy, Inc. 1000 Louisiana Street, Suite 5800 Houston, TX 77002-5050
Alvin B. Davis John T. Butler, P.A. Steel Hector & Davis, LLP 200 South Biscayne Boulevard Suite 4000 Miami, Florida 33131-2398	William G Walker, III Vice President Florida Power & Light Company 215 South Monroe Street, Suite 810 Tallahassee, FL 32301-1859
R. Wade Litchfield, Esquire Florida Power & Light Company 700 Universe Boulevard Juno Beach, Florida 33408-0420	Michael B. Twomey, Esquire Post Office Box 5256 Tallahassee, Florida 32314-5256
Thomas A. Cloud/W. Christopher Browder Gray, Harris & Robinson, P.A. Post Office Box 3068 Orlando, Florida 32802-3068	Joseph A. McGlothlin, Esquire* Vicki Gordon Kaufman, Esquire Attorneys for FIPUG McWhirter Reeves 117 S. Gadsden Street Tallahassee, Florida 32301
John W. McWhirter, Jr., Esquire McWhirter Reeves 400 North Tampa Street, Suite 2450 Tampa, Florida 33601-3350	Mr. Jack Shreve John Roger Howe Office of Public Counsel c/o The Florida Legislature 111 West Madison Street, Room 812 Tallahassee, Florida 32399-1400
Linda Quick South Florida Hospital and Healthcare 6363 Taft Street Hollywood, FL 33024	William Cochran Keating, IV, Esquire Staff Counsel Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, Florida 32399-0850
Blanca S. Bayo, Director Division of the Commission Clerk and Administrative Services Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850	David E. Smith Attorney Supervisor Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850

Mark F. Sundback