

**ORIGINAL**

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**Subject:** Filing Docket No. 050078  
**Attachments:** PEF Motion Dismiss FRF Petition to Conduct Rate Case & Req for Hrg.pdf

Attached for filing in Docket No. 050078 on behalf of Progress Energy Florida, Inc. is Progress Energy Florida's Motion to Dismiss the Florida Retail Federation's Petition to Conduct General Rate Case and Request for Hearing (7 pages).

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 COMMISSION CLERK

ORIGINAL

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for Rate Increase by Progress  
Energy Florida, Inc.

DOCKET NO. 050078-EI

Submitted for Filing: April 8, 2005

**PROGRESS ENERGY FLORIDA'S MOTION TO DISMISS  
THE FLORIDA RETAIL FEDERATION'S PETITION  
TO CONDUCT GENERAL RATE CASE AND REQUEST FOR HEARING**

Progress Energy Florida ("PEF"), hereby moves to dismiss the Florida Retail Federation's ("FRF") Petition to Conduct General Rate Case and Request for Hearing, and states as follows:

**INTRODUCTION**

On April 4, 2005, FRF filed a document with the Commission titled "Petition to Intervene, Petition to Conduct General Rate Case, and Request for Hearing." In that document, FRF seeks leave to intervene in this docket. Additionally, FRF requests that the Commission "conduct a general investigation (a general rate case) of the rates to be charged by [PEF]..." and "conduct a hearing in that case in accordance with Chapters 120 and 366, Florida Statutes." While PEF has no objection to FRF intervening in this docket, the FRF's unusual attempt to initiate a "general rate case" proceeding and hearing in a docket where PEF has already initiated a base rate case is both superfluous and legally unsupported.

First, there is no statutory or rule-based authority that allows any entity other than utilities such as PEF and the Commission itself to initiate a base rate proceeding (i.e. a "general rate case"). Accordingly, FRF has no legal basis upon which to request a "general rate case proceeding" and hearing, and those requests in FRF's instant petition must be dismissed.

Second, even if there were some legal basis for FRF to request and initiate a base rate proceeding for PEF, a simple glance at the style of this case indicates that PEF has already

initiated a general rate case with the Commission and the FRF's request is redundant and superfluous and should be dismissed. Similarly, PEF has requested and fully expects a hearing in this matter, so FRF's request for a hearing is also redundant and superfluous, and therefore should be dismissed.

## ARGUMENT

### I. **There is No Legal Authority that Allows the FRF to Initiate a General Rate Case Proceeding for PEF.**

As can be seen from the language in Section 366.06, Florida Statutes, and Rule 25-6.043 Florida Administrative Code, there is no specific authority that allows entities such as the FRF to initiate a general rate case for an investor-owned utility. In fact, the only entities that can initiate a general rate case before the Commission under those authorities are utilities like PEF and the Commission itself. §366.06, Fla. Stats.; Rule 25-6.043, F.A.C. Without regard to this fact, FRF has nonetheless petitioned the Commission to “conduct a general rate case” of the rates to be charged by PEF. Since Florida law does not provide for entities like FRF to initiate rate case proceedings, FRF's request to do so in its instant petition should be dismissed.

### II. **Even if FRF Did Have the Authority to Initiate a Rate Case Proceeding, Its Instant Request is Redundant and Superfluous.**

While FRF does not have the authority to initiate a base rate proceeding for PEF, FRF's request in this matter is, in any event, redundant and superfluous because PEF has already initiated a base rate proceeding in this docket. PEF has no objection to FRF intervening as a party in this docket, and as an intervenor FRF can fully participate in this case, both at the pre-hearing and hearing phases. Similarly, FRF's request for a hearing in this matter is equally

redundant and superfluous because PEF has already asked for and fully expects to receive a hearing from the Commission.

In its petition, however, FRF suggests that its request for a base rate proceeding and hearing is necessary in case other parties in this matter enter into a settlement agreement with PEF that, if approved by the Commission, will obviate the need for a hearing in this docket. In support of this argument, FRF cites to South Florida Hospital and Healthcare Ass'n v. Jaber, 887 So. 2d 1210 (Fla. 2004).

In the Jaber matter, the Commission initiated a proceeding to consider the effect of Florida Power & Light Company's ("FP&L") base rates based on the formation of Florida's regional transmission organization, and FP&L's then-planned merger with Entergy Corporation. See Jaber, 887 So. 2d at 1211. Later, the Commission issued an order expanding the scope of the proceeding for a more thorough rate review and ordered FP&L to submit minimum filing requirements. See id. After extensive discovery, all of the parties in the case, except for the South Florida Hospital and Healthcare Association ("SFHHA"), entered into a settlement agreement that was later approved by the Commission. See id.

On appeal, SFHHA argued that the Commission denied it its due process and statutory rights by approving the settlement in question without an evidentiary hearing. Specifically, SFHHA argued that the Commission erred by not holding a full evidentiary hearing; by approving a non-unanimous settlement agreement; and that the Commission's approval was not supported by competent, substantial evidence and findings of fact. See id. at 1212. Ruling against SFHHA, the court in Jaber held that "there is no basis upon which to conclude that the PSC's approval of the negotiated settlement violated SFHHA's due process or statutory rights."

Id. (emphasis added). **Accordingly, nothing in the court’s holding in Jaber supports an** argument that an entity such as FRF can initiate a general rate case and full evidentiary hearing for an investor-owned utility, especially when such a proceeding is already pending.

Without acknowledging the actual holding in the Jaber opinion, FRF apparently cites Jaber as authority for the proposition that any of PEF’s millions of customers can initiate a general rate case proceeding and full evidentiary hearing for PEF at will. In support of this position, FRF cites to dicta in Jaber where the court states that nothing in the settlement agreement in that case precluded SFHHA from petitioning the Commission for a rate reduction greater than the rate reduction included in the operative settlement agreement. See Jaber, 887 So. 2d at 1214. However, the court in Jaber was clear to note that its comment was made in the “instant context” of the facts in Jaber. See id. (stating that “we determine that in the instant context, SFHHA should not be precluded or estopped from seeking a reduction in the rates provided for in the settlement agreement approved in April 2002.”). Since courts are bound by the statutory limitations and parameters set forth by the Legislature, the court’s comment in Jaber that SFHHA has the authority to “initiate a separate rate proceeding” necessarily must refer to a customer’s ability to file a complaint regarding a utility’s rates under section 366.07, Florida Statutes, since there is no specific statutory authority that allows a customer to actually initiate a general rate case proceeding. See Jaber, 887 So. 2d at 1213; Van Pelt v. Hilliard, 78 So. 693, 694-95 (Fla. 1918) (recognizing that courts cannot set aside, evade, or give unreasonable construction to statutes enacted by the Legislature).

To be clear, section 366.06, Florida Statutes, and Rule 25-6.043 Florida Administrative Code, show that the only entities that can initiate a general rate case before the Commission are

utilities like PEF and the Commission itself. Section 366.07, Florida Statutes, provides that the Commission, upon a complaint from a customer, can initiate a general rate case proceeding upon a finding that a utility's rates are, among other things, excessive, unjust, or discriminatory.

§366.07, Fla. Stats. Therefore, in the context of this case, the Jaber opinion, read in context with the applicable statutes and rules, shows that FRF is free to file a complaint with the Commission challenging PEF's rates if FRF has a supportable basis for doing so. However, only the Commission, and not FRF, can actually initiate a general rate case based on such a complaint. See §§ 366.06; 366.07, Fla. Stats. At this juncture, it would be unnecessary and premature for FRF to file a complaint and ask the Commission to initiate a base rate proceeding for PEF under Section 366.07 because PEF has already initiated such a proceeding in this docket.

However, even if the Jaber opinion did support FRF's request to initiate a general rate case and full evidentiary hearing for PEF, which is not the case, there is no need for the Commission to consider or rule on any such request now. FRF's speculation that the parties in this case may enter into a settlement that FRF may not agree with, that may be approved by the Commission, possibly obviating the need for an evidentiary hearing in this matter, does not provide the Commission with any reasonable basis to rule on FRF's request. At best, FRF's request is speculative and premature, and the Commission should dismiss FRF's request to initiate a general rate case and evidentiary hearing on that basis as well.

## CONCLUSION

While PEF has no objection to FRF intervening in this docket, the FRF's attempt to initiate a "general rate case" proceeding and hearing in a docket where PEF has already initiated a general rate case and hearing is both superfluous and legally unsupported. There is no

statutory or rule-based authority that allows FRF to initiate a general rate case for PEF, and those requests in FRF's instant petition must be dismissed. Finally, FRF's reasons for its requests, at this time, are at best speculative and premature, and FRF's requests to initiate a general rate case and evidentiary hearing should be dismissed for those reasons as well.

WHEREFORE, PEF respectfully requests that the Commission dismiss FRF's Petition to Conduct General Rate Case and Request for Hearing.

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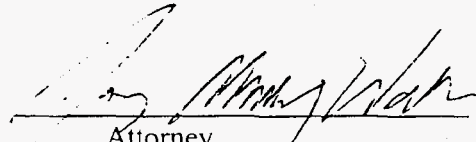


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically and via U.S. Mail this 11<sup>th</sup> day of April, 2005 to all counsel of record as indicated below.

  
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