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Timolyn Henry\*\*\*\*\*1

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**From:** Elizabeth\_Carrero@fpl.com  
**Sent:** Monday, April 25, 2005 4:15 PM  
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**Subject:** Electronic Filing for Docket No. 050045-EI/ Florida Power & Light Company's Motion to Dismiss the Florida Retail Federation's Petition to Conduct General Rate Case and Request for Hearing

**Attachments:** Motion to Dismiss FRF's Petition to Conduct General Rate Case and Request for Hearing.doc



Motion to  
Dismiss FRF's Petition

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 050045-EI

In re: Petition for rate increase by Florida Power & Light Company

c. Document being filed on behalf of Florida Power & Light Company.

d. There are a total of 6 pages.

e. The document attached for electronic filing is Florida Power & Light Company's Motion to Dismiss the Florida Retail Federation's Petition to Conduct General Rate Case and Request for Hearing

(See attached file: Motion to Dismiss FRF's Petition to Conduct General Rate Case and Request for Hearing.doc)

Thank you for your attention and cooperation to this request.

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BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by )  
Florida Power & Light Company )  
\_\_\_\_\_ )

Docket No: 050045-EI  
  
Filed: April 25, 2005

**FLORIDA POWER & LIGHT COMPANY'S  
MOTION TO DISMISS THE FLORIDA RETAIL FEDERATION'S  
PETITION TO CONDUCT GENERAL RATE CASE AND REQUEST FOR HEARING**

NOW, BEFORE THIS COMMISSION, through undersigned counsel, comes Florida Power & Light Company ("FPL" or the "Company"), and pursuant to Rule 28-106.204(2), Florida Administrative Code, moves to dismiss the Petition to Conduct General Rate Case and Request for Hearing filed April 4, 2005 by the Florida Retail Federation ("FRF"), and in support states:

1 On April 4, 2005, FRF filed a Petition to Intervene, Petition to Conduct General Rate Case, and Request for Hearing ("Petition and Request"). In support of its petition for a rate case and request for hearing, FRF stated as follows:

The FRF also petitions the Florida Public Service Commission to conduct a general investigation (a general rate case) of the rates to be charged by Florida Power & Light Company ("FPL") upon the expiration of the current Stipulation and Settlement entered into in 2002, and to conduct a hearing in that case in accordance with Chapters 120 and 366, Florida Statutes. The FRF asks and expects that its requested hearing will be the same hearing that the FRF presently expects the Commission to conduct in this docket pursuant to FPL's petition for a rate increase; if such is not the case, however, then, consistent with the Florida Supreme Court's opinion in South Florida Hospital & Healthcare Ass'n v. Jaber, the FRF asks the Commission to conduct the hearing in approximately the same time frame and to allow the FRF and all other parties to 'access and rely on the evidence and testimony' that has been filed and that will be filed in this Docket No. 050045-EI. See South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1214 (Fla. 2004). To be clear, the FRF is separately petitioning for a

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hearing, in an abundance of caution, to ensure that it does not later find itself in the same position that the South Florida Hospital and Healthcare Association found itself at the end of the 2002 proceedings.

See Petition and Request, pp. 1-2.

2. As FPL stated in its May 11, 2005 Response to FRF's Petition to Intervene, FPL does not oppose FRF's participation as a party in Docket No. 050045-EI. However, FRF's petition for a general rate case and request for hearing are legally insufficient and should be dismissed. A motion to dismiss raises as a question of law, whether the petition alleges sufficient facts to state a cause of action. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard for disposing of motions to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. See id. When making this determination, the tribunal must consider only the petition and reasonable inferences drawn from the petition must be made in favor of the petitioner. See id.

3. A party is entitled to a hearing under sections 120.569 and 120.57 only if an agency's proposed action will result in injury-in-fact to that party and if the injury is of a type that the statute authorizing the agency action is designed to prevent. See, e.g., Fairbanks, Inc. v. State, Dep't of Transp., 635 So. 2d 58, 59 (Fla. 1st DCA 1994), review denied, 639 So. 2d 977 (Fla. 1994) ("To establish entitlement to a section 120.57 formal hearing, one must show that its 'substantial interests will be affected by proposed agency action.'"); Univ. of S. Fla. College of Nursing v. State Dep't of Health, 812 So. 2d 572, 574 (Fla. 2d DCA 2002) ("Section 120.57(1), a provision of Florida's Administrative Procedure Act, provides that a party whose 'substantial interests' are determined in an agency proceeding is entitled to have disputed issues of material fact resolved in a formal evidentiary hearing. To qualify as having a substantial interest, one

must show that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing and that this injury is of the type or nature which the proceeding is designed to protect.”)

4. While the FRF’s Petition and Request acknowledges the “substantial interests” test, it makes no allegations suggesting that the FRF suffered or is in immediate danger of suffering any injury at all, much less an alleged injury that is cognizable by the statutes that govern this proceeding. Rather, FRF observed only that “FRF is entitled to intervene herein and entitled to a hearing as to the fair, just, and reasonable rates to be charged by FPL upon the expiration of the Stipulation and Settlement.” See Petition and Request, ¶ 9. These allegations are made at a time when the Commission has expressed no intended course, and proposed no outcome, for FPL’s rate case. Nor does the FRF Petition and Request seek a particular outcome or provide any basis for the Commission to act. Thus, at this time, the FRF has no legitimate claim to an “injury-in-fact” that entitles it to a hearing.

5. Further, there is no automatic right to a hearing pursuant to Chapter 366. Rather, the Commission decides pursuant to Section 366.06(2), Florida Statutes, whether a hearing is warranted. FRF’s suggestion that it is “entitled” to a hearing is unsupported by Chapter 366 and the facts as alleged by FRF.

6. South Florida Hospital & Healthcare Ass’n v. Jaber, 887 So. 2d 1210 (Fla. 2004), does not mean that FRF’s Petition to Conduct a General Rate Case and Request for a Hearing would secure for FRF any additional rights in this Docket that FRF, otherwise, would not have. The Florida Supreme Court did not find that the South Florida Hospital Association (“SFHA”) had failed in its request because it failed to ask for a hearing at the outset. See South Florida Hospital & Healthcare Ass’n v. Jaber, 887 So. 2d 1210 (Fla. 2004). Rather, it found that the SFHA was not prejudiced because it could always petition the Commission to find that FPL’s

rates were unjust and unreasonable. See id. at 1214; see also Order No. PSC-01-1930-PCO-EI, Docket Nos. 001148-EI, 010944-EI, at 9 (issued Sept. 25, 2001).

7. Indeed, FRF's Petition to Conduct a General Rate Case and Request for a Hearing is "a request for a rate proceeding ... that [has] already begun." See South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1213-14 (Fla. 2004). FPL has already initiated a general rate case and the Commission has already scheduled a formal hearing in this Docket. Therefore, FRF's Petition and Request unnecessarily complicates this proceeding. FPL has requested rate relief and FRF has whatever rights it has pursuant to Chapters 120 and 366, but no more. FRF cannot create rights in itself by prematurely requesting a hearing on the speculation that a settlement might occur and FRF may not agree to the settlement. FRF's Petition and Request defeats the purpose of the streamlined administrative process and results in administrative confusion, not administrative efficiency.

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

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic mail and by United States Mail this 25th day of April, 2005, to the following:

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