ORIGINAL

Timolyn Henry

From: Hayes, Annisha [AnnishaHayes@andrewskurth.com]
Sent: Thursday, May 26, 2005 3:52 PM
To: Filings@psc.state.fl.us
Cc: Bill Walker; Bruce May; Charles Beck; Charles Beck; Craig Paulson; David Brown; Harold McLean; Jeremy Susac; John LaVia; John Mc Whirter; Katherine Fleming; Linda Quick; Mike B. Twomey; Natalie Smith; R. Miller; Rick; Sheffel Wright; Timothy J. Perry; Cochran Keating; Wade Litchfield
Subject: SFHHA's Response to FPL's Motion to Dismiss

Attachments: SFHHA's Response to FPL's Motion to Dismiss.doc¤

CMP ____
COM 5
CTR ____
ECR ____
GCL ____
OPC ____
MMS ____
RCA ____
SCR ____
SEC 1
OTH kmp

SFHHA's
onse to FPL's M

<<SFHHA's Response to FPL's Motion to Dismiss.doc¤>>

Electronic Filing
a. **Person responsible** for this electronic filing:
George E. Humphrey
Florida Reg. No. 0007943
Andrews & Kurth, LLP
600 Travis, Suite 4200
Houston, Texas 77002-3092

b. Docket No. 050045-EI & 050188-EI

c. Document being filed on behalf of South Florida Hospitals and Healthcare Association (SFHHA).

d. There is a total of 10 pages.

e. The document attached for electronic filing is South Florida Hospitals and Healthcare Association's Response to Florida Power and Light Company's Motion to Dismiss.

(See attached SFHHA Response to FPL Motion to Dismiss.doc)

Thank you for your attention and cooperation to this request.

Regards.
Annisha Hayes
AndrewsKurth, LLP
1701 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006
202-662-2783
202-662-2739 (fax)
ahayes@andrewskurth.com
www.andrewskurth.com

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition For Rate Increase By Florida Power & Light Company	)	**Docket No.: 050045-EI**
In Re: 2005 Comprehensive Depreciation Studies by Florida Power & Light Company	)	**Docket No. 050188-EI**
	)	**Filed: May 26, 2005**

SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION'S RESPONSE TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS

South Florida Hospital and Healthcare Association ("SFHHA") serving individual institutions in the Florida Power & Light Company ("FPL") service territory (the "Hospitals"), pursuant to Florida Administrative Code Rule 28-106.204(1), hereby file their response to FPL's Motion to Dismiss the Hospitals' Petition for the Conduct of a General Rate Case and Request for Hearing, by which the Hospitals asked the Commission to conduct a general investigation (a general rate case) of the rates to be charged by FPL upon the expiration of the Docket No. 001148-EI Stipulation and Settlement,[1] and to conduct a hearing in accordance with Chapters 120 and 366 of the Florida Statutes.[2] The requested evidentiary hearing may be the same hearing conducted in Docket No. 050045-EI pursuant to FPL's petition for a rate increase. But, in the event an evidentiary hearing is not held in Docket No. 050045-EI, the Hospitals request that the Commission grant its Petition for a general rate case and hearing consistent with the Florida Supreme Court's opinion in *South Florida Hospital & Healthcare Ass'n v. Jaber,* 887 So. 2d

1 *In Re: Review of the Retail Rates of Florida Power & Light Company,* Docket No. 001148-EI, "Order Approving Stipulation, Authorizing Midcourse Correction, and Requiring Rate Reductions," Order No. PSC-02-0501-AS-EI (Fla. Pub. Serv. Comm'n, April 11, 2002) (hereinafter, the "2002 FPL Stipulation," the "2002 Stipulation," "Stipulation," or "the settlement agreement").

2 All references herein to the Florida Statutes are to the 2004 edition thereof.

1210, 1214 (Fla. 2004) *("South Florida Hospital").* In summary, the Hospitals clearly have standing to intervene in the above-styled docket. Even if FPL had not filed its general rate case, the Hospitals' petition would have been timely and well-taken due to the imminent expiration of the 2002 Stipulation. In the past, the Florida PSC has initiated general rate proceedings for public utilities upon a "complaint" by customers. In this context, proceedings upon complaint and upon petition are one and the same.

Further, the Hospitals are entitled to a hearing and general rate case as FPL has not demonstrated that its rates are just and reasonable and not unjustly discriminatory. For more than 20 years, FPL has added many costs to its rate base without close regulatory scrutiny. The Florida Supreme Court's holding in *South Florida Hospital & Healthcare Ass'n v. Jaber*[3] entitles the Hospitals to initiate a hearing and a general rate case. In *South Florida Hospital,* the Court held that the Hospitals "should not be precluded or estopped from seeking a reduction in rates provided for in the settlement agreement approved in April 2002" and "cannot be precluded by its [the settlement agreement's] terms from petitioning for an even greater rate reduction."[4] The Florida Supreme Court further stated, "we resolve that in any such proceeding, SFHHA and the PSC may presumptively access and rely on the evidence and testimony compiled in the proceeding below, subject to any confidentiality or use restrictions governing the initial introduction of that evidence."[5] Thus, the holding of the Florida Supreme Court and administrative efficiency dictate that the Hospitals' petition for a general rate case and hearing be granted now.

---

3 *South Florida Hospital & Healthcare Ass'n v. Jaber,* 887 So. 2d 1210 (Fla. 2004).

4 *Id.* at 1214.

5 *Id.*

A. The Florida Supreme Court's Holding in *South Florida Hospital* Entitles the Hospitals to Initiate a General Rate Case

In light of the Florida Supreme Court's recent holding in *South Florida Hospital,* the Hospitals clearly have standing and are entitled to a hearing of FPL's rates, particularly now that the 2002 Stipulation will soon be expiring. The Florida Supreme Court in *South Florida Hospital* held that the Hospitals "should not be precluded or estopped from seeking a reduction in rates provided for in the settlement agreement approved in April 2002" and "cannot be precluded by its [the settlement agreement's] terms from petitioning for an even greater rate reduction."[6] Significantly, the Florida Supreme Court further declared, "we resolve that in any such proceeding, SFHHA and the PSC *may presumptively access and rely on the evidence and testimony compiled* in the proceeding below, subject to any confidentiality or use restrictions governing the initial introduction of that evidence."[7]

Thus, the Hospitals are clearly entitled to petition for rate relief and to presumptively rely on the record developed prior to any settlement by other parties. FPL is plainly wrong in raising a "ripeness" issue in its Motion at 4 and asserting that Hospitals must claim an injury-in-fact before being entitled to a hearing. In fact, FPL's assertions ignore the Florida Supreme Court's holding in *South Florida Hospital* and urge this Commission to *sub silentio* overrule the highest tribunal in the State. Because the Hospitals may petition for rate relief at any time, the Hospitals' Petition for the Conduct of a General Rate Case, and Request for Hearing is not premature.

Further, administrative efficiency is best served by the PSC's granting the Hospitals' Petition now. The proceedings can advance on a roughly contemporaneous path and afford the

---

6 *Id.*

7 *Id.* (emphasis supplied).

Commission the opportunity to address common issues based upon any overlapping evidence. In the event that the instant rate proceeding settles and does not result in rates that the Hospitals believe to be just and reasonable and not unjustly discriminatory, the Hospitals may use the record developed in this proceeding up to the point of settlement. Arguably, as the instant rate proceeding settled, another one dealing with the same subject matter and same foundational evidentiary record could conceivably begin afresh if FPL's Motion were granted. This could result in months of delays, increase costs to all participants (including FPL), place additional demands on Commission resources, delay effective review of the Hospitals' Petition, and, thus, would make no sense from an administrative efficiency point of view. Granting the Hospitals' Petition and keeping the hearing in the instant docket on the schedule established by the Order Establishing Procedure will be administratively efficient and, therefore, in the public's best interest.

B. Chapters 120 and 366 of the Florida Statues Provide Statutory Authority to Conduct a General Rate Case

The Hospitals cited Chapters 120 and 366 of the Florida Statutes in their Petition as statutory authority to conduct a general investigation (a general rate case) of the rates to be charged by FPL upon the expiration of the Docket No. 001148-EI Stipulation and Settlement, and to conduct a hearing. Section 120.569 of the Florida Statutes states that its provisions "apply in all proceedings in which the substantial interests of a party are determined by an agency . . . ." In this case, the substantial interests of the Hospitals' will be determined by the Commission when it grants the rate increase requested by FPL, grants a lesser rate increase, or a rate decrease, or allows the current rate to remain in effect. Section 366.06(2) provides in pertinent part that the Commission may consider "upon request made" whether the rates charged by a public utility are just and reasonable, and not unjustly discriminatory. Notably, Section 366.06(2) does not

impose any limitations on who may make such a request. Chapters 120 and 366 unquestionably provide ample basis for the Hospitals' standing to request a hearing on FPL's rates.

The Hospitals assert that, in the present circumstances, where the Commission has not made substantive decisions determining FPL's rates in more than 20 years and where the 2002 Stipulation is expiring, proceedings "upon request made" and "upon complaint" are one and the same. Both request that the Commission conduct formal proceedings and make decisions involving disputed issues of material fact to ensure that a public utility's rates are just and reasonable and not unjustly discriminatory. During the last 20-plus years, FPL has both disposed of and added substantial assets in its rate base. The Commission has not reviewed such transactions comprehensively as to the appropriate impact upon rates. The Hospitals believe that the expiring Stipulation in combination with the extraordinarily long time since the Commission last made substantive decisions determining FPL's rates establishes more than adequate grounds for the Hospitals' petition for a hearing and to conduct a general rate case.

C. Parties Whose Substantial Interests Are Subject to Determination by Agency Action Are Entitled to a Hearing Where the Agency's Decisions Involve Disputed Issues of Material Fact.

FPL asserts that the Hospitals have "no automatic right to a hearing pursuant to Chapter 366."[8] However, in accordance with Florida administrative law, a right to a hearing attaches when a party's interests are subject to determination by agency action and when the agency's decisions involve disputed issues of material fact.[9] Moreover, the Florida Supreme Court has held in *South Florida Hospital* that, notwithstanding the Stipulation, the Hospitals "cannot be precluded by its terms [*i.e.*, the Stipulation's] from petitioning for an even greater rate reduction"

---

8 FPL's Motion to Dismiss at 5.

9 *See* Chapter 120 of the Florida Statutes (2004).

and that the Hospitals and the Commission "may presumptively access and rely on the evidence and testimony compiled in the proceeding below . . . ."[10]

In accordance with the Florida Supreme Court's holding in *South Florida Hospital*, the Hospitals are entitled to a hearing in which they can seek relief from FPL's rates. The Hospitals are entitled to such a hearing because FPL has not demonstrated that its rates are just and reasonable and not unjustly discriminatory. For more than 20 years, FPL's plant accounts have been subject to significant claimed additions, and FPL has retired assets without close scrutiny from any regulatory body. For example, FPL has not demonstrated to the Commission that all the capital costs included in its jurisdictional rate base were properly incurred and allocable to its jurisdictional customers. Therefore, FPL should not be allowed to recover those costs from jurisdictional customers, such as the Hospitals, without first demonstrating that such costs were warranted and properly incurred and that the rate design used to recover those costs from jurisdictional customers was designed to recover only the approved amounts in the approved period of time. Likewise, FPL must demonstrate that it has allocated only a just and reasonable amount of approved amounts to its jurisdictional customers.

More specifically, FPL has already given notice through statements in Schedule A of its October 2001 Minimum Filing Requirements filing that among the rate adjustments that it might propose when it comes before the Commission for a rate increase include, but are not limited to, the following:

(1.) Claims for projected RTO costs not recovered in a clause mechanism. FPL estimates that these costs are $60 million on an annual basis.

---

[10] *South Florida Hospital* at 1214.

(2.) Claims for additional $2 million in O&M and $16 million in depreciation amounts associated with a new production plant put in service in 2002.

(3.) A claim of $6 million of costs associated with unburned nuclear fuel that will remain in the nuclear reactor when the nuclear units are removed at the end of their useful life.

(4.) Claimed significantly increased security costs and insurance costs associated with FPL's nuclear plants and transmission facilities.

(5.) Claimed amounts that according to the Accounting Standards Executive Committee of the American Institute of Certified Public Accountants may no longer be eligible to be capitalized. FPL estimated that these costs could result in a $129 million increase in expenses in 2002.

FPL also states in Schedule A of its 2001 MFR that it did not believe and does not now believe that the ROE it agreed to in the 2002 Stipulation was or is reasonable. FPL contends that such a low ROE "substantially increases its revenue deficiency." The Hospitals disagree. Further, the ROE analysis sponsored by FPL does not clearly delineate between those risks, involving non-Florida and non-regulated activities, that produce the need for a higher return on equity from the risks that are the outgrowth of operating in a regulated, comprehensive, cost-of-service environment. The same is true of the proxy group participants used by FPL in its attempt to justify a higher ROE. Thus, FPL and the Hospitals dispute this cost element at the very least.

Additionally, it is clear that the amounts FPL claims justify increased rates are significant. Further, the costs FPL seeks to recover from jurisdictional customers may be excessive because FPL may not have refinanced its debt at the lowest cost. Without the hearing process that the Hospitals seek, which includes discovery, the Hospitals will not be able to

examine the veracity and prudence of the various cost elements that FPL will seek to include in its jurisdictional rates; will not be able to examine the rate design that FPL proposes to use, including the accuracy and pertinence of FPL's underlying data; will not be able to determine whether the cost allocation to jurisdictional customers is just and reasonable and not unjustly discriminatory, and the accuracy and pertinence of FPL's underlying data; and will otherwise be forced to pay rates that may be unjust and unreasonable and unjustly discriminatory. Thus, the interests of justice supported by the Florida Supreme Court's holding and Florida administrative law demand that the Hospitals' petition for a general rate case and hearing be granted.

CONCLUSION

FPL has not demonstrated that the data for its cost allocation are sound, accurate and pertinent. Further, FPL has not demonstrated that its rate design is sound, accurate and pertinent to the task. Therefore, the Hospitals are entitled to petition for a general rate case and a hearing in accordance with the Florida Supreme Court's holding in *South Florida Hospital* and in accordance with Chapters 120 and 366 of the Florida Statutes. Further, administrative efficiency will be best served by allowing the Hospitals' Petition for a General Rate Case and Hearing to go forward within the FPL-initiated general rate case docket and on the same schedule established by the Commission for that docket. Accordingly, the FPL's Motion to Dismiss is without merit and should be denied.

RELIEF REQUESTED

WHEREFORE, for the reasons set forth above, the Hospitals respectfully request that the Florida Public Service Commission deny Florida Power & Light Company's Motion to Dismiss the Hospitals' Petition to Conduct a General Rate Case and Request for Hearing.

Respectfully submitted this 26th day of May, 2005.

/S/ Mark F. Sundback
Kenneth L. Wiseman
Mark F. Sundback
Gloria J. Halstead
Jennifer L. Spina
Andrews Kurth LLP
1701 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006
Ph. (202) 662-3030
Fax. (202) 662-2739

/S/ George E. Humphrey
George E. Humphrey
Florida Reg. No. 0007943
Andrews Kurth LLP
600 Travis, Suite 4200
Houston, Texas 77002-3090
Ph. (713) 220-4200
Fax. (713) 220-4285

Attorneys for the Hospitals

May 26, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the following parties of record and interested parties, this 26th day of May, 2005.

/S/ George E. Humphrey
George E. Humphrey