

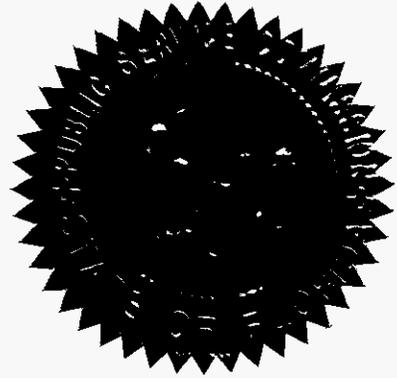
BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 080677-EI

PETITION FOR INCREASE IN RATES
BY FLORIDA POWER & LIGHT
COMPANY.

_____ /



PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 3

COMMISSIONERS
PARTICIPATING: CHAIRMAN MATTHEW M. CARTER, II
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER KATRINA J. McMURRIAN
COMMISSIONER NANCY ARGENZIANO
COMMISSIONER NATHAN A. SKOP

DATE: Tuesday, June 30, 2009

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
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(850) 413-6732

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P R O C E E D I N G S

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2 **CHAIRMAN CARTER:** With that, Commissioners
3 and staff, we now move to Item 3. Let's give staff
4 a chance to get settled in. Commissioner, you're
5 sounding loud and clear on your Blackberry.

6 **COMMISSIONER ARGENZIANO:** Well, I'm glad
7 to hear that. As long as it's clear.

8 **CHAIRMAN CARTER:** Staff, you're
9 recognized.

10 **MS. BENNETT:** Thank you, Commissioners.
11 I'm Lisa Bennett with the General Counsel's Office
12 for the Public Service Commission.

13 Item Number 3 on the agenda is staff's
14 recommendation that the Commission dismiss South
15 Florida Hospital and Health Care Association's
16 shadow proceeding for a Florida Power and Light base
17 rate proceeding. Both South Florida Hospital and
18 Health Care Association and FPL have requested an
19 opportunity to address you all. Staff is also
20 available for questions.

21 **CHAIRMAN CARTER:** Okay. Let's take the
22 appearances of the parties and you can make your
23 statements. We will start with the hospital.

24 **MR. WISEMAN:** Good morning, Mr. Chairman
25 and Commissioners. I am Kenneth Wiseman of the law

1 firm Andrews, Curtin, and Kurth. I am here
2 representing the South Florida Hospital and Health
3 Care Association.

4 **CHAIRMAN CARTER:** Do you want to make a
5 statement?

6 **MR. WISEMAN:** Yes, please.

7 **CHAIRMAN CARTER:** You're recognized.

8 **MR. WISEMAN:** Thank you.

9 Obviously, I'm sure that the Commissioners
10 have all read the recommendation by staff and would
11 understand that we take issue with the
12 recommendation and disagree with it, as well as
13 disagreeing with a number of the conclusions in it.
14 But I would like to focus this morning on one
15 specific conclusion that is stated in that
16 recommendation, because we think that one specific
17 conclusion is inconsistent with our rights, and, in
18 fact, the rights of all intervenors before the
19 Commission as expressed in the Florida Supreme
20 Court's decision in South Florida Hospital and
21 Health Care Association v. Jaber. And we think that
22 if that specific element of the recommendation is
23 included in your order, that it would undermine the
24 rights that the Florida Supreme Court guaranteed to
25 intervenors in this case -- in cases before the

1 Commission.

2 As background before I get to the issue, I
3 just would like to point out that the issue in Jaber
4 was if there's a party to a proceeding before this
5 Commission who is not a signatory to a settlement
6 agreement, that that party as a nonsignatory has the
7 right, an absolute right to a hearing in which it
8 can demonstrate or attempt to demonstrate that the
9 rates that were agreed to in the settlement were not
10 fair, just, and reasonable. And in that hearing,
11 the party, the nonsignatory party has the right to
12 seek a rate reduction below whatever was agreed to
13 in the settlement agreement.

14 We believe that that is absolutely
15 unequivocal as stated by the Florida Supreme Court,
16 and I want to just quote briefly from the Supreme
17 Court's decision. In fact, this is right in the
18 recommendation. The Supreme Court said SFHHA should
19 not be precluded or estopped from seeking a
20 reduction in the rates provided for in the
21 settlement agreement. Should not be precluded or
22 estopped. It then went on to say SFHHA has no
23 rights or liabilities thereunder and cannot be
24 precluded by its terms from petitioning for an even
25 greater rate reduction.

1 And then the court went on to state that
2 presumptively SFHHA in that instance, but really any
3 intervenor in the case would be able to rely upon
4 and access the evidence that was relied upon and put
5 into evidence in the proceeding that led to the
6 settlement. We believe that what that means in the
7 context of this case is that if there is a
8 settlement and its not unanimous, whether it's SFHHA
9 not agreeing to the settlement, or whether it's any
10 other party, that the party that is a nonsignatory
11 has an absolute right to a hearing. And in that
12 hearing it can demonstrate, if it can, that the
13 rates approved -- or the rates agreed to rather in
14 the settlement are not fair, just, and reasonable,
15 and a lower rate would be required.

16 Now, that gets me to the specific
17 recommendation, or the element of the recommendation
18 that we take issue with. At Page 6 of the
19 recommendation, and I would refer you to the last
20 paragraph on that page, it's the last full sentence
21 on the page, staff says, "Because of Jaber, FPL, all
22 intervenor, and the Commission are aware that if
23 the case settles and any party is not a signatory to
24 the settlement, a second proceeding may be
25 initiated, if warranted, using the same evidence and

1 testimony compiled in the first proceeding."

2 Mr. Chairman and Commissioners, it's the
3 phrase "if warranted" which is extremely troubling
4 to us. SFHHA v. Jaber guaranteed us rights. And
5 not just SFHHA, but to any intervenor to have the
6 hearing that I have talked about. The words if
7 warranted are so broad and vague that they could be
8 interpreted as suggesting a significant exception to
9 the Supreme Court's holding, which is so broad you
10 could drive a truck through it. We don't think
11 that's what the Florida Supreme Court said.

12 Now, I don't know whether there is going
13 to be a settlement in this case or not. Generally
14 settlements are good things. And as you know, in
15 2005 we joined in the settlement, it was a unanimous
16 settlement that I think was a terrific outcome for
17 all parties. In 2001 we didn't feel that way and we
18 did not join in the settlement. If there is a
19 settlement here, I would hope that it is one that
20 not only would we join in, but that all parties
21 would join in. But in the event that it is a
22 non-unanimous settlement, we would hope that in your
23 order in this case -- first of all, hope that you
24 grant -- in fact, that you grant our request for a
25 hearing. But if you don't grant it, we would at

1 least ask that you do not adopt this specific
2 sentence in your reasoning.

3 We hope that you would make clear that a
4 nonsignatory to the settlement is entitled by right
5 to a guaranteed hearing to demonstrate that the
6 rates agreed to are not fair, just, and reasonable.

7 Thank you, Your Honor.

8 **CHAIRMAN CARTER:** Thank you.

9 Mr. Butler.

10 **MR. BUTLER:** Thank you, Mr. Chairman.

11 John Butler appearing on behalf of Florida Power and
12 Light Company.

13 I would say, first of all, addressing
14 directly Mr. Wiseman's point that perhaps the
15 simplest thing to do is to have the staff
16 recommendation remove the words, "if warranted," and
17 then approve it as written. We would certainly not
18 object to that. And I think it probably would be
19 consistent with what the Supreme Court envisioned in
20 Jaber.

21 Now, I think probably what it is there
22 for, and certainly it's most appropriate to ask
23 staff if you are so inclined, but I suspect it is
24 acknowledging the fact that depending on what is
25 plead, whether the pleading is legally sufficient,

1 whether it raises any issues that truly need to be
2 addressed at length, a proceeding that is initiated
3 may or may not be very lengthy, it could be that the
4 party simply raises something that was already
5 before the Commission and wrapped up into the
6 settlement agreement.

7 If the Commission decides there is not
8 much that needs to be addressed regarding it, that
9 sort of thing, and, therefore, the proceeding would
10 not have to, you know, go beyond kind of the initial
11 pleadings stages. But if the sentence or the phrase
12 is troubling from the perspective that it would
13 create the impression that for some reason somebody
14 couldn't petition you, and we would agree, somebody
15 pursuant to what the Supreme Court held in Jaber
16 would always be entitled as a nonsignatory to a
17 settlement in a rate case to then petition for a
18 subsequent review if it felt that the settlement
19 wasn't appropriate for some reason or another.

20 Going to the specifics of what the
21 hospital association has requested here, let's keep
22 in mind that, you know, their reliance heavily on
23 Jaber essentially undoes their request, as well.
24 Jaber envisioned a particular fact pattern. That
25 fact pattern was that there is a settlement, the

1 settlement is not unanimous in an existing
2 proceeding, a party that either participated in the
3 existing proceeding or didn't. Anybody who is not a
4 signatory to the settlement who doesn't like the
5 settlement, they can at that point initiate a
6 proceeding.

7 We're not there. We're in the middle of
8 FPL's current rate case. And I think that the
9 timing of the Hospital Association's request to
10 initiate a proceeding now is not consistent with
11 Jaber, it's administratively inefficient as staff
12 pointed out in its recommendation, and it would lead
13 to nothing. I mean, when you look at what the
14 Hospital Association has plead in their request for
15 a hearing, you know, they don't ask for anything.

16 They say that the issues of material fact
17 are things like determining the appropriate
18 jurisdictional level of plant-in-service,
19 determining appropriate jurisdictional values of
20 FPL's operation and maintenance expenses. The
21 ultimate fact they allege, the thing they want this
22 case they are asking you to initiate to be about is
23 to request a hearing. I mean, it's circular.
24 There's nothing -- you know, there is no there
25 there. There is nothing that you could latch onto

1 and say, okay, there is a specific issue in
2 contention here, let's move forward on it.

3 It's simply a placeholder. It's premature
4 by the court's holding in Jaber, and we think that
5 the staff has properly recommended that you deny
6 their request to initiate that proceeding.

7 Thank you.

8 **CHAIRMAN CARTER:** Thank you.

9 Commissioners? Commissioner McMurrin.

10 **COMMISSIONER McMURRIAN:** I think we should
11 ask staff to address the "if warranted" phrase in
12 that sentence for us.

13 **MS. BENNETT:** The removal of "if
14 warranted" would not be a concern to staff. The
15 purpose of it was just to make sure that the
16 pleadings are legally sufficient, and you will do
17 that whether or not that phrase is in there.

18 **CHAIRMAN CARTER:** Commissioner Skop.

19 **COMMISSIONER SKOP:** Thank you, Mr.
20 Chairman.

21 Just going to the point, I tend to agree
22 with Mr. Butler's analysis of the staff
23 recommendation. But a question to staff: Assuming
24 under the holding of Jaber that a nonsignatory to
25 any settlement agreement could not be precluded from

1 petitioning for an even greater rate decrease or
2 rate reduction at a later point in time subsequent
3 to the conclusion of the docketed case before us,
4 what is the burden that the nonsignatory must carry
5 to be entitled to a hearing?

6 **MS. BENNETT:** The nonsignatory has the
7 initial burden of proof to show that the rate
8 reduction needs to be greater than what it is.

9 **COMMISSIONER SKOP:** But in light of the
10 proceeding and the length of the proceeding, in
11 light of all the record evidence which can be
12 adopted in any future proceeding, is that a
13 substantial burden to warrant readdressing or taking
14 a look at that? I mean, obviously anyone can hold a
15 proceeding hostage and essentially cause the
16 Commission, as well as the company, and all the
17 other parties to basically relitigate an issue that
18 has already been adjudicated or reached a
19 settlement. But is there a specific showing, or a
20 level of burden that the nonsignatory would need to
21 show to have a hearing to the extent that no due
22 process issues might be raised?

23 **MS. BENNETT:** I'm not sure how to answer
24 that, because I don't know what the argument would
25 be for a particular party or what rate reduction.

1 I'm assuming that, for instance, if a specific class
2 of individuals felt that, for instance, it made a
3 settlement without the Industrial Power Users Group,
4 and that issue wasn't sufficiently addressed in the
5 settlement agreement, then perhaps that burden of
6 proof would be, you know, let's just look at the
7 evidence here on the industrial class.

8 But if it was something specific and
9 residential, a proceeding where OPC was a party to
10 the settlement agreement, but maybe an individual
11 consumer was not a party, or did not agree, that
12 burden of proof may be more substantial. They may
13 have to present some additional evidence into the
14 record I guess is what I'm saying.

15 **COMMISSIONER SKOP:** So I think I heard you
16 correctly, so it is indeterminate presently and it
17 would be based on the legal sufficiency of the
18 pleading and the issues raised in that pleading?

19 **MS. BENNETT:** That is correct.

20 **COMMISSIONER SKOP:** Thank you.

21 **CHAIRMAN CARTER:** Thank you.

22 Commissioners, any further questions?

23 Hearing none, Commissioner Edgar, you're
24 recognized.

25 **COMMISSIONER EDGAR:** Mr. Chairman, at this

1 time I am prepared to offer a motion in favor of the
2 staff recommendation, but include that in the order
3 the phrase "if warranted," as has been discussed,
4 would be removed. And just as a comment, I don't
5 completely read it the way Mr. Wiseman has
6 suggested, but I do hear his concerns and think that
7 the removal of those two words would not be an
8 issue. So, again, the motion, staff recommendation
9 with the removal of that phrase and the final order
10 to be issued.

11 **COMMISSIONER SKOP:** Second.

12 **CHAIRMAN CARTER:** Commissioners, we have a
13 motion and a second before us. Any further
14 questions? Any comments? Any debate?

15 Hearing none. All in favor, let it be
16 known by the sign of aye.

17 (Simultaneous aye.)

18 **CHAIRMAN CARTER:** All those opposed, like
19 sign. Show it done. Thank you.

20 **MR. WISEMAN:** Thank you, Commissioners.

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STATE OF FLORIDA)
 : CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, Hearing Reporter Services Section, FPSC Division of Commission Clerk, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 14th day of June, 2009.



JANE FAUROT, RPR
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