

Diamond Williams

100410-EI

From: Kelly Sullivan [kelly.sullivan.woods@gmail.com]
Sent: Monday, February 21, 2011 2:38 PM
To: Filings@psc.state.fl.us
Cc: ken.hoffman@fpl.com; rpjrb@yahoo.com
Subject: Electronic Filing (Docket 100410-EI)
Attachments: Petition to Intervene (Docket 100410-EI) (O0582272).PDF

Electronic Filing

a. Person responsible for this electronic filing:

Ms. Kelly Sullivan - Attorney at Law
 570 Osprey Lakes Circle
 Chuluota, FL 32766-6658
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 Email: kelly.sullivan.woods@gmail.com

b. Docket No. 100410-EI

In re: Review of Florida Power & Light Company's earnings.

c. Document being filed on behalf of:

Mr. & Ms. Frank Woods
 570 Osprey Lakes Circle
 Chuluota, FL 32766-6658

d. There are a total of 14 pages.

e. The document attached for electronic filing is: Petition to Intervene (Docket 100410-EI)(O0582272).PDF

Thank you for your attention and cooperation to this request.

Sincerely,

s/ Kelly Sullivan
 Kelly Sullivan - Attorney at Law
 Attorney for Petitioners
 Florida Bar No. 814024
 570 Osprey Lakes Circle
 Chuluota, FL 32766-6658
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power & Light
Company's earnings.

DOCKET NO.: 100410-EI

FILED: February 20, 2011

**PETITION TO INTERVENE, MOTION FOR RECONSIDERATION,
NOTICE OF PROTEST, AND REQUEST FOR FORMAL HEARING**

Pursuant to sections 120.569 and 120.57(1), Florida Statutes and Rules 25-22.039 and 28-106.205, Florida Administrative Code, Mr. Frank Woods and Ms. Kelly Sullivan, Husband and Wife, through their undersigned counsel, jointly file their Petition to Intervene, Motion for Reconsideration, Notice of Protest, and Request for Formal Hearing in the above-captioned docket. In support thereof, the petitioners state as follows:

1. Name and address of the affected agency.

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

2. Name and address of the petitioners.

Mr. & Mrs. Frank Woods
570 Osprey Lakes Circle
Chuluota, FL 32766-6658

3. Service. All pleadings, motions, orders and other documents directed to the petitioners

should be served on:

Kelly Sullivan - Attorney at Law
570 Osprey Lakes Circle
Chuluota, FL 32766-6658
Phone: (321) 287-5062
Email: kelly.sullivan.woods@gmail.com

DOCUMENT NUMBER-DATE

01167 FEB 21 =

FPSC-COMMISSION CLERK

4. Notice of Docket. Petitioners received notice of this docket by reading the media coverage of the Commission decision to deny the staff recommendation in the above-captioned docket, and by subsequently reviewing the above-captioned docket on the Florida Public Service Commission (FPSC) website.

5. Background. As detailed in the Commission Docket file, the staff recommendation in the above-captioned docket was originally issued as a Proposed Agency Action (PAA) on October 4, 2010. Although originally scheduled to be considered at the Agenda Conference on October 12, 2010, the PAA recommendation was deferred several times due to the FPL litigation pending before the 1st DCA. Under the PAA process, any action taken by the Commission is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding. *Any person* whose substantial interests are affected by the resulting PAA order may file a petition for a formal proceeding pursuant to Rule 25-22.029, Florida Administrative Code. Under the PAA process, it is not necessary for a person whose substantial interests are affected to take ANY action to intervene in the proceeding, or request a formal hearing, prior to the issuance of the PAA order. Accordingly, the PAA process provides a delayed point of entry into the proceeding and preserves the right of *any person* whose substantial interests are affected to become a party to the proceeding after evaluating the preliminary decision of the Commission.

On January 7, 2011, less than three business days before the staff recommendation was considered by the Commission, the staff recommendation was materially changed from a Proposed Agency Action (PAA) item to a Regular Agenda

item in an apparent violation of a Commission rule. Specifically, Rule 25-22.0021(1), Florida Administrative Code (Agenda Conference Participation), provides in relevant part that:

“The notice for each agenda conference contains a list of items to be discussed, and identifies the type of participation allowed. The notice is available in hard copy or on the Commission’s internet site, www.psc.state.fl.us/agendas, at least seven days before the agenda conference.” (emphasis added).

The Commission subsequently rendered a decision in the above-captioned docket at the Agenda Conference on January 11, 2011. On February 7, 2011, the Commission issued Order No. PSC-11-0103-FOF-EI, denying the staff recommendation and closing the above-captioned docket. Based on the above, the Commission materially changed the character and nature of the proceeding in a manner that adversely impacts petitioners’ substantial interests and due process rights without proper notice.

6. Statement of Substantial Interests. Petitioners are residential customers of Florida Power & Light Company (FPL) and served at the above listed address.¹ The FPL electric bill constitutes a significant portion of the petitioners’ monthly household expense. The petitioners have a substantial interest in any refund amount owed to FPL customers. Earning surveillance reports provided by FPL to the Commission clearly demonstrate that FPL is exceeding the maximum authorized Return on Equity (ROE) of 11.0%. The staff recommendation in the above-captioned docket sought to continue to monitor the FPL overearnings situation. More importantly, the staff recommendation sought to

¹ Petitioners are also residential customers of FPL in St. Augustine, Florida.

preserve and protect the ability of the Commission to authorize refunds for approximately 4.5 million FPL customers for FPL earnings exceeding the maximum authorized ROE of 11.0%. Petitioners allege that the Office of Public Counsel (OPC) failed to protect their substantial interests, as well as the substantial interests of approximately 4.5 million other FPL ratepayers, by not supporting the staff recommendation; notwithstanding the extensive staff testimony during the Agenda Conference that the ability of the Commission to authorize refunds for prior month overearnings would be lost if the staff recommendation was not approved. The Commission unanimously denied the staff recommendation thereby waiving the Commission's ability to protect the interests of approximately 4.5 million FPL customers, and adversely affecting the substantial interests of the petitioners.²

Moreover, as further discussed below, petitioners allege that the Commission effectively denied petitioners a point of entry into the above-captioned docket by improperly changing the staff recommendation from a Proposed Agency Action (PAA) item to a Regular Agenda item, *less than three business days before the staff recommendation was considered by the Commission*, without proper notice.³ Such a change appears to be designed to avoid any protest of the PAA order, and to deny petitioners the right to request a formal hearing on the above-captioned docket. On February 7, 2011, the Commission issued Order No. PSC-11-0103-FOF-EI, denying the staff recommendation and closing the above-captioned docket. Based upon the above,

² Compare to Commission vote in Docket No. 100462-GU, Joint petition of Peoples Gas System and Office of Public Counsel for approval of stipulation and settlement agreement for possible overearnings for calendar year ending December 31, 2010 (People's Gas customers entitled to overearnings refund for 2010; normalization adjustment to reduce earnings for weather was not applied). The petitioners fail to understand why Public Counsel would take such an inconsistent position against FPL customers under the same situation.

³ Rule 25-22.0021(1), Florida Administrative Code.

petitioners hereby file a Petition to Intervene, Motion for Reconsideration, Notice of Protest, and Request for Formal Hearing in the above-captioned docket to protect their substantial interests and due process rights in the proceeding.

7. Due Process Requires a Point of Entry and Notice. Petitioners allege that the Commission effectively denied petitioners a point of entry into the above-captioned docket by improperly changing the staff recommendation from a Proposed Agency Action (PAA) item to a Regular Agenda item, *less than three business days before the staff recommendation was considered by the Commission*, without proper notice.⁴ As detailed in the Commission Docket file, the staff recommendation in the above-captioned docket was originally issued as a Proposed Agency Action (PAA) on October 4, 2010. Although originally scheduled to be considered at the Agenda Conference on October 12, 2010, the PAA recommendation was deferred several times due to the FPL litigation pending before the 1st DCA. On January 7, 2011, *less than three business days before the staff recommendation was considered by the Commission*, the staff recommendation was materially changed from a Proposed Agency Action (PAA) item to a Regular Agenda item without proper notice. The Commission subsequently rendered a decision in the above-captioned docket at the Agenda Conference on January 11, 2011. Such a change appears to be designed to avoid any protest of the PAA order, and to deny petitioners and other affected parties the right to request a formal hearing in the above-captioned docket. On February 7, 2011, the Commission issued Order No. PSC-11-0103-FOF-EI, denying the staff recommendation and closing the above-captioned docket. Given the material change to the staff recommendation, petitioners allege that any final

⁴ Id.

action taken by the Commission in the above-captioned docket was improper on due process grounds.

Fundamental principals of due process require a point of entry, proper notice, and an opportunity to be heard in matters before the Florida Public Service Commission.⁵ The staff recommendation was a Proposed Agency Action item until it was improperly changed to a Regular Agenda item less than three business days before the staff recommendation was considered by the Commission. It stands to reason that the Commission cannot materially change the character and nature of the proceeding in a manner that adversely impacts petitioners' substantial interests and due process rights without proper notice. Additionally, the material change that was made to the staff recommendation, without proper notice, adversely impacted petitioners' right to protest what otherwise would have been Proposed Agency Action order and request a formal hearing in the above-captioned docket.⁶ Petitioners should not be denied the opportunity to be heard before the Commission as a result of an improper change to the staff recommendation that occurred less than three business days before the staff recommendation was considered by the Commission. Furthermore, the petitioners have been improperly denied a point of entry into the above-captioned docket which affects their substantial interests and due process rights in the proceeding.⁷ Moreover, petitioners

⁵ Capeletti Bros. v. Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978). Additionally, an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U. S. 457; Grannis v. Ordean, 234 U. S. 385; Roller v. Holly, 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U. S. 71.

⁶ Compare to Proposed Agency Action (PAA) taken by the Commission two weeks later in Docket No. 100462-GU, Joint petition of Peoples Gas System and Office of Public Counsel for approval of stipulation and settlement agreement for possible overearnings for calendar year ending December 31, 2010 (People's Gas customers entitled to overearnings refund for 2010; normalization adjustment to reduce earnings for weather was not applied).

⁷ Capeletti Bros. v. Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

contend that the final action taken by the Commission constitutes reversible error on due process grounds, and that Order No. PSC-11-0103-FOF-EI should be vacated or amended to reflect being a Proposed Agency Action Order subject to timely protest, in lieu of requiring petitioners to appeal the Commission decision before the Florida Supreme Court. Accordingly, petitioners hereby file a Petition to Intervene, Motion for Reconsideration, Notice of Protest, and Request for Formal Hearing in the above-captioned docket to protect their substantial interests and due process rights in the proceeding.

8. Standing. Petitioners are residential customers of FPL. Moreover, the petitioners' substantial interests are of the type that this proceeding is designed to protect. See, Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2nd DCA 1981). The purpose of the proceeding is to evaluate whether FPL is exceeding the maximum authorized Return on Equity (ROE) of 11.0%, and to preserve and protect the ability of the Commission to authorize refunds on behalf of approximately 4.5 million FPL customers for FPL earnings exceeding the maximum authorized ROE of 11.0%. Accordingly, the proceeding in the above-captioned docket directly coincides with the substantial interests of the petitioners to ensure that FPL rates are fair, just, and reasonable.
9. Petition to Intervene. Petitioners hereby request the Commission to grant the Petition to Intervene in the above-captioned docket on the basis set forth in Paragraphs 1-8 above.
10. Motion for Reconsideration. As a preliminary matter, petitioners assert that they were

improperly denied the ability to become a party to the proceeding by virtue of the Commission materially changing the character and nature of the proceeding without proper notice. Petitioners further assert that they were denied the right to a point of entry that existed under the PAA process.⁸ Accordingly, petitioners have a good faith belief that requesting reconsideration is proper (notwithstanding the “party” requirement of Rule 25-22.060, Florida Administrative Code) because the petitioners have been effectively denied a point of entry into the proceeding by the Commission.

Petitioners reiterate Paragraphs 1-9 above, and request that the Commission grant the relief sought herein based upon the applicable standard for review.⁹ The point of law that the Commission overlooked or failed to consider in taking final agency action in the above-captioned docket was the demonstrated lack of due process which affects petitioners’ substantial interests and right to be heard in the proceeding.¹⁰ Specifically, the Commission cannot materially change the character and nature of the proceeding midstream in a manner that adversely impacts petitioners’ substantial interests and due process rights without proper notice.¹¹ As noted above, the staff recommendation was a Proposed Agency Action (PAA) item until it was improperly changed to a Regular Agenda item *less than three business days before the staff recommendation was considered by the Commission*. Petitioners assert that the Commission failed to adhere to the notice requirements of Rule 25-22.0021(1), Florida Administrative Code, when making this material change on Friday, January 7, 2011, as the change substantially impairs the right of any person whose substantial interests are affected to become a party

⁸ Capeletti Bros. v. Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

⁹ In filing the Motion for Reconsideration the petitioners do not waive the right to challenge the validity of the Final Order or action of the Commission in the above captioned docket.

¹⁰ Capeletti Bros. v. Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

¹¹ Rule 25-22.0021(1), Florida Administrative Code.

to the proceeding. Due Process is a fundamental right and not a red herring.

Under the established PAA process, petitioners would have been afforded a point of entry into the proceeding to protest the resulting PAA Order and to request a formal hearing if the decision of the Commission affected the petitioners' substantial interests. The material change that was made to the staff recommendation, without proper notice, adversely impacted the petitioners' right to protest what otherwise would have been Proposed Agency Action order and request a formal hearing in the above-captioned docket.¹² The practical effect of the material change to the staff recommendation results in petitioners being improperly denied a point of entry into the above-captioned docket absent a direct appeal to the Florida Supreme Court. Therefore, the petitioners should not be denied the opportunity to be heard before the Commission as a result of an improper change to the staff recommendation that occurred *less than three business days before the staff recommendation was considered by the Commission*. Moreover, the Commission decision in the above-captioned docket is completely inconsistent with the decision of the Commission in Docket No. 100462-GU under an analogous fact pattern.

Accordingly, petitioners contend that the final action taken by the Commission constitutes reversible error on due process grounds, and that Order No. PSC-11-0103-FOF-EI should be vacated or amended to reflect being a Proposed Agency Action Order subject to timely protest, in lieu of requiring petitioner to appeal the Commission decision before the Florida Supreme Court. In granting the Motion for Reconsideration petitioners further request that the Commission acknowledge petitioners' Notice of

¹² Compare to Proposed Agency Action (PAA) taken by the Commission two weeks later in Docket No. 100462-GU, Joint petition of Peoples Gas System and Office of Public Counsel for approval of stipulation and settlement agreement for possible overearnings for calendar year ending December 31, 2010 (People's Gas customers entitled to overearnings refund for 2010; normalization adjustment to reduce earnings for weather was not applied).

Protest, and grant petitioners' Request for Formal Hearing in the above-captioned docket.

11. Notice of Protest. Petitioners reiterate Paragraphs 1-9 above as the basis for filing a timely protest of Order No. PSC-11-0103-FOF-EI pursuant to Rule 25-22.029, Florida Administrative Code. Petitioners assert that the final agency action taken by the Commission constitutes reversible error on the due process grounds previously cited above, and that Order No. PSC-11-0103-FOF-EI should be vacated or amended to reflect being a Proposed Agency Action Order subject to timely protest, in lieu of requiring petitioners to appeal the Commission decision before the Florida Supreme Court. Accordingly, petitioners hereby file a timely Notice of Protest asserting that the Commission improperly denied petitioners a point of entry into the above-captioned docket which affects their substantial interests and due process rights in the proceeding.¹³

Petitioners assert that the Commission cannot materially change the character and nature of the proceeding midstream in a manner that adversely impacts the petitioners' substantial interests and due process rights without proper notice. As noted above, the staff recommendation was a Proposed Agency Action (PAA) item until it was improperly changed to a Regular Agenda item *less than three business days before the staff recommendation was considered by the Commission.* Under the established PAA process, petitioners would have been afforded a point of entry into the proceeding to protest the resulting PAA Order, and request a formal hearing, if the decision of the Commission affected petitioners' substantial interests. Accordingly, petitioners' substantial interests and due process rights in the proceeding have been irreparably harmed by the improper action of the Commission. Based upon the above, petitioners

¹³ Capeletti Bros. v. Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

request that the Commission acknowledge petitioners' Notice of Protest, and grant petitioners' Request for Formal Hearing in the above-captioned docket. In making this request, petitioners allege that Order No. PSC-11-0103-FOF-EI is erroneous and should be subject to timely protest as a Proposed Agency Action based upon the due process concerns cited above.

12. Request for Formal Hearing. Petitioners reiterate Paragraphs 1-9 above, and hereby file a Request for Formal Hearing in the above-captioned docket pursuant to Rule 25-22.029, Florida Administrative Code, in conjunction with the timely protest of Order No. PSC-11-0103-FOF-EI as outlined in Paragraph 11 above. The disputed issues of material fact are set forth in Paragraph 13 below. Additionally, Order No. PSC-11-0103-FOF-EI, expressly acknowledges that FPL has exceeded its maximum authorized Return of Equity (ROE) as reported on Earnings Surveillance Reports provided to the Commission.

Petitioners assert that the Commission cannot materially change the character and nature of the proceeding midstream in a manner that adversely impacts the petitioners' substantial interests and due process rights without proper notice. As noted above, the staff recommendation was a Proposed Agency Action (PAA) item until it was improperly changed to a Regular Agenda item *less than three business days before the staff recommendation was considered by the Commission.* Under the established PAA process, petitioners would have been afforded a point of entry into the proceeding to protest the resulting PAA Order, and request a formal hearing, if the decision of the Commission affected the petitioners' substantial interests. Accordingly, petitioners' substantial interests and due process rights in the proceeding have been irreparably

harmful by the improper action of the Commission.

Petitioners further allege that the Office of Public Counsel (OPC) failed to protect their substantial interests, as well as the substantial interests of approximately 4.5 million other FPL ratepayers, by not supporting the staff recommendation; notwithstanding the extensive staff testimony during the Agenda Conference that the ability of the Commission to authorize refunds for prior month overearnings would be lost if the staff recommendation was not approved. The Commission unanimously denied the staff recommendation thereby waiving the Commission's ability to protect the interests of approximately 4.5 million FPL customers, and adversely affecting the substantial interests of petitioners.¹⁴

Based upon the above, petitioners request that the Commission acknowledge the petitioners' Notice of Protest, and grant the petitioners' Request for Formal Hearing in the above-captioned docket. In making this request, petitioners allege that Order No. PSC-11-0103-FOF-EI is erroneous and should be subject to timely protest as a Proposed Agency Action based upon the due process concerns cited above.

13. Disputed Issues of Material Fact. Disputed issues of material fact include, but are not limited to the following:

a. Should the Commission initiate a review of Florida Power & Light Company's earnings?

¹⁴ Compare to Commission vote in Docket No. 100462-GU, Joint petition of Peoples Gas System and Office of Public Counsel for approval of stipulation and settlement agreement for possible overearnings for calendar year ending December 31, 2010 (People's Gas customers entitled to overearnings refund for 2010; normalization adjustment to reduce earnings for weather was not applied). The petitioners fail to understand why Public Counsel would take such an inconsistent position against FPL customers under the same situation.

b. Should FPL be allowed to make a weather-related normalization adjustment to reduce its earnings and the corresponding Return on Equity (ROE) reported on its earnings surveillance reports?

c. Should the Commission order FPL to hold earnings, for the 12-month period ending March 31, 2011, in excess of the authorized 11.00 percent maximum of the ROE range subject to refund under bond or corporate undertaking?

WHEREFORE, petitioners respectfully request the Commission to enter an order granting the Petition to Intervene, Motion for Reconsideration, Notice of Protest, and Request for Formal Hearing in the above captioned docket.

s/ Kelly Sullivan
Kelly Sullivan - Attorney at Law
Attorney for Petitioners
Florida Bar No. 814024
570 Osprey Lakes Circle
Chuluota, FL 32766-6658
Phone: (321) 287-5062
Email: kelly.sullivan.woods@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following via Electronic Mail this 20th day of February, 2011 to all parties of record as indicated below.

s/ Kelly Sullivan

Kelly Sullivan - Attorney at Law

Attorney for Petitioners

Florida Bar No. 814024

570 Osprey Lakes Circle

Chuluota, FL 32766-6658

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Florida Power & Light Company Mr. Ken Hoffman 215 South Monroe Street, Suite 810 Tallahassee, FL 32301-1858 Phone: (850) 521-3900 Fax: (850) 521-3939 Email: ken.hoffman@fpl.com	Robert H. Smith 11340 Heron Bay Blvd. #2523 Coral Springs, FL 33076 Email: rpjrb@yahoo.com
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