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Subject: Docket No. 120015-EI MMotion to Dismiss Pursuant to Fed.R.Civ.P 12(b)(6) and Memorandum of Points and Authorities in Support Thereof
Attachments: 2012.09.03 Motion to Dismiss.pdf

Electronic Filing

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b. Docket No. 120015-EI

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

c. The document(s) is/are being filed on behalf of Thomas Saporito.

d. The total number of pages is 9.

e. Brief description of documents being filed:

- Motion to Dismiss Pursuant to Fed.R.Civ.P 12(b)(6) and Memorandum of Points and Authorities in Support Thereof

Thank you for your cooperation and timely attention to this electronic filing.

s/Thomas Saporito

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Rate Increase by
Florida Power and Light Company

Docket No. 120015-EI
Served: 03 SEPT 2012

**MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Pursuant to Fed. R. Civ. P. 12(b)(6), *pro se* Intervenor, Thomas Saporito (Saporito), moves to dismiss Joint Motion for Approval of Settlement (Joint Motion), for failure to state a claim upon which relief can be granted.

BACKGROUND

On March 19, 2012, the Florida Power & Light Company (FPL) filed with the Florida Public Service Commission (Commission) FPL's Petition for Rate Increase - along with the direct testimony and exhibits of FPL witnesses Avera, Barret, Deaton, Dewhurst, Ender, Hardy, Kennedy, Miranda, Ousdahl, Reed, Santos, Silagy, Slattery, and Stall; and Minimum Filing Requirements (MFR's) and Schedules.

On August 6, 2012, FPL filed with the Commission a Prehearing Statement which stated FPL's position with respect to some 193-Issues being contested in its March 19, 2012 Petition.

On August 15, 2012, FPL, the South Florida Hospital and Health Care Association (SFHHA), the Florida Industrial Power Users Group (FIPUG), and the Federal Executive agencies (FEA) (collectively, "Signatories"), jointly and collectively filed a Joint Motion with the Commission for approval of a proposed settlement in the above-captioned matter.

On August 20, 2012, the Office of Public Counsel (OPC), filed with the Commission, *Office of Public Counsel's Motion to Dismiss the Settlement Submitted by FPL/SFHHA/FIPUG/FEA or Set for Expedited Oral Argument on the Motion to Approve the Settlement Submitted by FPL/SFHHA/FIPUG/FEA or in the Alternative Dismiss FPL's Petition for Rate Increase Submitted*

March 2012.

On August 20, 2012, the Commission unanimously voted down OPC's motion and allowed Docket No. 120015-EI to continue without ruling on the Joint Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

1. The Signatories to the Joint Motion are seeking substantive changes to FPL's March 2012 petition including, but not limited to, attaching new tariffs. In addition, the Joint Motion does not serve the general interests of all customers and the pleading itself is in the nature of a petition.¹ Moreover, as stated earlier, OPC is not a signatory to the Joint Motion. Therefore, the Joint Motion must fail on this basis alone because the absence of OPC - as the statutory representative of the Citizens of the State of Florida is sufficient legal basis to warrant dismissal. *See, South Florida Hospital and Healthcare Association v. Jaber*, 887 So. 2d 1210 (Fla. 2004).

2. Notably, in *Jaber*, the Florida Supreme Court held that: (1) OPC must be a signatory to any settlement agreement; and (2) all parties in the matter must have taken part in the settlement negotiations leading up to the proposed settlement agreement. In the instant action, OPC is not a signatory the Joint Motion and FPL admitted to the Commission that Saporito was not invited to take part in the settlement negotiations leading up to the proposed settlement agreement. For these reasons, in-of-themselves this Commission should dismiss the Joint Motion as a matter of law.

3. The Joint Motion is not representative of the majority of FPL customers and seeks to enrich a selective few customers who are Signatories. In deed, the Signatories would receive an aggregate amount of at least \$50-million annually in reductions of their base rates from those outlined in FPL's March 2012 petition. These reductions would be otherwise shifted and/or applied to the base rates of other customer classes.²

1 See, August 22, 2012 Response of Office of Public Counsel to the Motion for Approval Submitted by FPL/SFHHA/FIPUG/FEA at footnote 1.

2 See, August 22, 2012 Response of Office of Public Counsel to the Motion for Approval Submitted by FPL/SFHHA/FIPUG/FEA at p.2 par.2.

4. Current capital markets do not warrant the 10.7% return on equity that the Signatories are willing to accept. Indeed, FPL's current 59.62% equity ratio is ridiculously expensive in today's capital markets - but none-the-less maintained in the Joint Motion.³

5. The Joint Motion requires an increase in late fees charged by FPL from \$5 to \$6; however, FPL's March 2012 petition proposed a \$5 late fee. Thus, the Joint Motion serves to amend FPL's March 2012 petition by and through this aspect standing alone. To the extent that Florida's depressed economy (with unemployment at 8.8% and higher from previous reports) continues to cause extreme financial hardship for the majority of FPL's residential customer base - the proposal in the Joint Motion to provide concessions to large corporate customers on the backs of residential customers (who can least afford the increases) - is particularly onerous and callous.⁴

6. The Joint Motion provides for an increase of \$378-million dollars in base rate revenues on January 1, 2013 and FPL alleges that this is a decrease from the \$516-million dollar increase sought in its March 2012 petition effective in January 2013. Contrary to FPL's assertions, the company could receive higher revenues than it would normally have received under the March 2012 petition - where FPL (through the Joint Motion) be allowed to potentially recover hundreds of millions of dollars more over the four year term of the Joint Motion as compared with FPL's March 2012 petition.⁵

7. The negotiated provisions of the Joint Motion are not reflected in the \$173.9 million dollar amount of the MFRs - and the negotiated provisions of the Joint Motion overstate the amount of the Canaveral base rate step increase - and would not limit the return on equity to 10.7% due to the higher return on equity considered in the \$173.9 million dollar step increase. Notably, the Canaveral project would generate a revenue requirement based on a return on equity of 11.5% during the four-

³ See, August 22, 2012 Response of Office of Public Counsel to the Motion for Approval Submitted by FPL/SFHHA/FIPUG/FEA at p.2 par.3.

⁴ See, August 22, 2012 Response of Office of Public Counsel to the Motion for Approval Submitted by FPL/SFHHA/FIPUG/FEA at p.2 par.1.

⁵ See, August 22, 2012 Response of Office of Public Counsel to the Motion for Approval Submitted by FPL/SFHHA/FIPUG/FEA at p.3 par.4.

year term of the Joint Motion.⁶

8. The Joint Motion provides that FPL employ \$200-million dollars of fossil plant dismantlement reserve as a means of managing its earnings during its term; however, there has been no comprehensive analysis performed nor a public hearing convened for consideration of that issue by the Commission. Notably, the Joint Motion does not provide even (an appropriate basis) for the \$200-million dollar amount of fossil plant dismantlement reserve assigned by FPL. Moreover, the Joint Motion would allow FPL to improperly depart from the Commission's long-standing (and required) practice of requiring FPL to submit a depreciation/dismantlement study - now due in 2013 - until the end of the four-year term of the Joint Motion. The amortization of the \$200-million dollars of dismantlement reserve would essentially increase FPL's earnings - without reducing customers' rates to properly reflect the resulting lower depreciation expense.⁷

9. The Joint Motion serves to provide FPL a "bonus" for doing its job in providing its customers with safe, reliable electric service at the lowest achievable price - for which FPL's monopoly enterprise already receives ample opportunity to earn a fair return on equity. The Commission already awards FPL with a performance incentive by assigning an upper and lower range to the assigned ROE mid-point level. To the extent that FPL has a "protected" service territory - the Commission encourages FPL to provide superior performance to its customers by assigning an upper-range to the ROE mid-point level. To the extent that these provisions were not part of FPL's March 2012 petition, this Commission cannot properly consider or assess these measures of the Joint Motion.⁸

LEGAL ARGUMENT

In deciding a motion to dismiss, courts accept all material allegations in the complaint as true.

⁶ See, August 22, 2012 Response of Office of Public Counsel to the Motion for Approval Submitted by FPL/SFHHA/FIPUG/FEA at p.6 par.5 and p.7. par.1.

⁷ See, August 22, 2012 Response of Office of Public Counsel to the Motion for Approval Submitted by FPL/SFHHA/FIPUG/FEA at p.7 par.6.

⁸ See, August 22, 2012 Response of Office of Public Counsel to the Motion for Approval Submitted by FPL/SFHHA/FIPUG/FEA at p.9 par.1.

See, McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988). Conclusory allegations of law and unwarranted inferences, however, are insufficient to defeat a motion to dismiss for failure to state a claim. *See, E.g., Fields v. Legacy Health Sys.*, 413 F.3d 943, 951 n.5 (9th Cir. 2005)(citing *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd.*, 228 F.3d 1043, 1049 (9th Cir. 2000)); *McGlinchy*, 845 F.2d at 810 ("[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim.")

Moreover, dismissal is warranted if the complaint lacks a cognizable legal theory or insufficient facts under a cognizable legal claim. *See, SmileCare Dental Group v. Delta Dental Plan of Calif., Inc.*, 88 F.3d 780 783 (9th Cir. 1996); *Perry v. Beamer*, 933 F. Supp. 556, 557, 559 (E.D. Va.) dismissing a complaint challenging a felon disenfranchisement law because the legal theories raised by the complaint failed as a matter of law), *aff'd*, 99 F.3d 1130 (4th Cir. 1996).

A. FPL's Joint Motion Adds Items and Requests That Were Not Part Of Its Original Petition

The Joint Motion would authorize several separate base rate increases and clause recovery impacts that collectively would generate revenues that exceed the levels that its originally proposed rates (in its March 2012 petition) would have generated. In this regard, the Joint Motion fails to comply with applicable laws and rules. The Joint Motion is in all respects, a petition requesting the Commission's approval of new rates for FPL's electric service. Notably, Section 366.06(1), Florida Statutes, provides that:

- "all applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed..."

Id.

Moreover, among the "rules and regulations prescribed" are Commission Rule 25-6.140, F.A.C., Test Year Notification, and Rule 25-6.043, F.A.C., Investor-Owned Electric Utility Minimum

Filing Requirements.⁹ Here, the Joint Motion is clearly a petition for changes in FPL's rates as it includes proposed tariff sheets. Additionally, the Joint Motion requests the Commission's approval of additional general base rate increases in future years, specifically 2014 for the Riviera plant and in 2016 - four years from now - for the Port Everglades plant. None-the-less, FPL failed to file a Test Year Notification letter as required by Rule 25-6.140, F.A.C., and FPL failed to file Minimum Filing Requirements for either a 2014 test year or for a 2016 test year. As a matter of law, any proceedings conducted by the Commission must comply with the aforementioned requirements as-well-as the requirements under Chapter 366, Florida Statutes, Chapter 120, Florida Statutes, and Chapter 28-106, F.A.C. - and require: (1) the filing of complete MFRs for the 2014 test year and the 2016 test year; and (2) full and complete discovery by all parties to the proceedings; and (3) hearings in accordance with Chapter 120, Florida Statutes.¹⁰

B. The Joint Motion Fails As A Matter Of Law Because It Does Not Settle All Issues In Docket No. 120015-EI

As previously addressed above, the Joint Motion requests that the Commission approve issues which are outside of, and not included in Docket No. 120015-EI. To the extent that the Joint Motion attempts to introduce "new" issues into Docket No. 120015-EI - it must fail as a matter of law because all parties have a "due-process" right to engage in full discovery procedures including the taking of deposition testimony, filing Requests for Interrogatory Responses, and filing Requests for the Production of Documents.

C. OPC Is Not A Signatory, Saporito Is Not A Signatory, And FPL Admittedly Misled Saporito From Participation In Settlement Negotiations That Lead Up To The Joint Motion

As stated earlier, OPC is not a Signatory to the Joint Motion, Saporito is not a Signatory to the

⁹ See, August 22, 2012 Response of Office of Public Counsel to the Motion for Approval Submitted by FPL/SFHHA/FIPUG/FEA at p.10 par.9.

¹⁰ See, August 22, 2012 Response of Office of Public Counsel to the Motion for Approval Submitted by FPL/SFHHA/FIPUG/FEA at p.11 par.1.

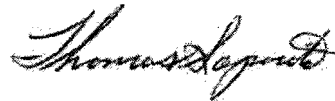
Joint Motion, and FPL admittedly misled Saporito from participation in settlement negotiations that lead up to the Joint Motion. As cited in *Jaber*, OPC must be a Signatory to the Joint Motion - as OPC represents all FPL customers. Where any party was denied participation in settlement negotiations that lead up to the Joint Motion, that party's "due-process" rights were violated - and the Joint Motion must fail as a matter of law.

RELIEF REQUESTED

FOR ALL THE ABOVE-STATED REASONS, the undersigned respectfully requests that this Commission issue an ORDER DISMISSING the Joint Motion as a matter of law.

Respectfully submitted this 3rd day of
September 2012.

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By: _____

**CERTIFICATE OF SERVICE
DOCKET NO. 120015-EI**

I HERBY CERTIFY that a true and correct copy of the foregoing document was served electronically via email/link on this 3rd day of September 2012 to the following:

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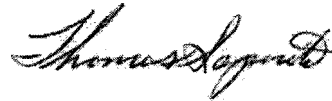
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