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Sent: Saturday, October 06, 2012 9:02 PM

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Subject: Docket No. 120015-EI (Petition for Writ of Certiorari)

Attachments: 2012.10.05 Florida Supreme Court (writ).pdf

Electronic Filing

a. Person responsible for this 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 18.

e. Brief description of documents being filed:

- **Petition for Writ of Certiorari**
- Appendix to Petition for Writ of Certiorari (already in the record)

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

s/Thomas Saporito

10/8/2012

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10/8/2012

IN THE FLORIDA SUPREME COURT

THOMAS SAPORITO

Petitioner, **Case No.**

vs.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

BASIS FOR INVOKING JURISDICTION

COMES NOW, Petitioner *pro se*, Thomas Saporito, and pursuant to Article V, Section 3(b)(3), Florida Constitution, and Fla. R. App. P. 9.100 and 9.030(1)(2)(B), files this petition seeking review by this Court's certiorari jurisdiction in that the Florida Public Service Commission (FPSC), entered an interlocutory order passing upon a matter which, upon final judgment, would be directly reviewable by the Supreme Court; viz: declared Florida Statutes, Section 322.26(h), 322.262, Chapter 120, 120.569, 120.57 and Rule 28-106.211, Florida Administrative Code, (F.A.C.).

FACTS UPON WHICH PETITIONER RELIES

On October 3, 2012, FPSC entered a *Third Order Revising Order*

Establishing Procedure in Docket No. 120015-EI, *In re: Petition for increase in rates by Florida Power & Light Company* (FPL).

In its order, the FPSC stated in relevant part, that:

> "This docket was opened to consider Florida Power & Light Company's (FPL) petition for a base rate increase. Eleven parties were granted intervention in the docket. By the Order Establishing Procedure, Order No. PSC-12-0143-PCO-EI, issued March 26, 2012, the hearing was set to commence on August 20, 2012. On August 15, 2012, FPL and three of the eleven intervening parties filed a Motion to Approve Settlement Agreement (Settlement Agreement) and a Motion to Suspend the Procedural Schedule. The Motion to Suspend the Procedural Schedule was denied by Order No. PSC-12-0430-PCO-EI, issued August 17, 2012. The hearing commenced as scheduled in the Order Establishing Procedure.
>
> On August 27, 2012, in my capacity as the Presiding Officer in Docket No. 120015-EI (the FPL Rate Case), I issued the Second Order Revision Order Establishing Procedure Setting Procedural Schedule for Commission Consideration of the Settlement Agreement. The Order stated that upon conclusion of the evidentiary portion of the hearing, the Commission would announce the date and time set for the sole purpose of taking up the Settlement Agreement. On August 31, 2012, I announced that the Commission would reconvene the hearing in the FPL Rate Case on September 27, 2012, at 1:00 p.m. and September 28, 2012, if necessary, to consider the Settlement Agreement. On September 27, 2012, the Commission voted to take additional testimony limited to specific issues that are part of the proposed settlement agreement, but supplemental to the issues in the rate case. Accordingly, in compliance with Section 120.569 and 120.57, Florida Statues, (F.S.), the administrative hearing will be continued on November 19-21, 2012, to take supplemental testimony on the specific issues that are a part of the settlement agreement.

> This Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code, (F.A.C.), which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.
>
> The scope of this proceeding shall be based upon specific issues that are part of the proposed settlement agreement but supplemental to the issues set out in the Prehearing Order, Order No. PSC-12-0428-PHO-EI, issued August 17, 2012, unless modified by the Commission. The hearing will be conducted according to the provisions of Chapter 120, F.S., and all administrative rules applicable to this Commission. . ."

Id. at p. 1-2.

NATURE OF RELIEF SOUGHT

Petitioner, Thomas Saporito, requests that this Court provide certiorari review as provided in the aforementioned constitution and rules of procedure provisions and for an order quashing the FPSC's Order No. PSC-12-0529-PCO-EI dated October 3, 2012 in Docket No. 120015-EI which violates Rule 28-106.211, Florida Administrative Code and Chapter 120, F.S., and all administrative rules applicable to the FPSC.

ISSUES

1. WHETHER FPSC's ORDER NO. PSC-12-0529-PCO-EI IS AUTHORIZED UNDER RULE 28-106.211, FLORIDA ADMINISTRATIVE CODE.

2. WHETHER FPSC's ORDER NO. PSC-12-0529-PCO-EI IS AUTHORIZED UNDER CHAPTER 120, F.S., AND ALL ADMINISTRATIVE RULES APPLICABLE TO THE FPSC.
3. WHETHER FPSC's ORDER NO. PSC-12-0529-PCO-EI IS UNCONSTITUTIONAL AND VIOLATED THE "DUE-PROCESS" RIGHTS OF THE NON-SIGNATORIES TO THE SETTLEMENT AGREEMENT.
4. WHETHER FPSC's ORDER NO. PSC-12-0529-PCO-EI IS UNCONSTITUTIONAL AND VIOLATED THE "DUE-PROCESS" RIGHTS OF NON-PARTY FPL CUSTOMERS.
5. WHETHER FPL'S PROPOSED SETTLMENT AGREEMENT IS IN THE PUBLIC INTEREST.

ARGUMENT

FPSC erred in (1) entering Order No. PSC-12-0529-PCO-EI in which FPSC stated it had authority to do so under Rule 28-106.211, Florida Administrative Code; (2) ordering further hearing in Docket No. 120015-EI

in which FPSC stated it had authority to do so under Chapter 120, F.S., and all administrative rules applicable to the FPSC; (3) establishing an administrative procedure that violated the "due-process" rights of the non-signatory Intervenor parties in Docket No. 120015-EI; (4) establishing an administrative procedure that violated the "due-process" rights of non-party FPL customers in Docket No. 120015-EI; and (5) establishing an administrative procedure for the purpose of considering FPL's Settlement Agreement, that (if approved by FPSC) is not in the public interest.

1. FPSC erred in entering Order No. PSC-12-0529-PCO-EI in which FPSC stated it had authority to do so under Rule 28-106.211, Florida Administrative Code.

FPSC alleges in its order that Rule 28-106.211, Florida Administrative Code proves authority for the presiding officer before whom a case is pending to issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case. *Order* at p.1.

However, FPSC's order has caused and will continue to cause, exactly the opposite effect of all aspects of the case. The order will not promote the just, speedy, and inexpensive determination of all aspects of the case. Rather, it will entangle the FPSC and the parties in a quagmire of wrangling for

months, if not years to come, and create uncertainty about FPL's rates. *See,* record transcript at Vol. 34, p.5077:20-25. Thus, to the extent that FPSC's order is inconsistent with the spirit and intent of Rule 28-106.211, Florida Administrative Code, FPSC's order must be vacated and quashed by this Court as a matter of law.

2. FPSC erred in ordering further hearing in Docket No. 120015-EI in which FPSC stated it had authority to do so under Chapter 120, F.S.

FPSC alleges in its order that it has authority under Chapter 120, F.S., and all administrative rules applicable to hold further hearing in Docket No. 120015-EI. *Order* at p.2. However, FPSC's order failed to provide for the procedural rights of the non-signatory parties to the FPL Settlement Agreement. Notably, of eleven Intervenors who were granted party status, only three have participated in the "purported settlement" and those three Intervenor parties comprise only a minute fraction of FPL's customers. In the initial hearing in Docket No. 120015-EI which was adjourned on August 31, 2012, FPL complied with Chapter 120, F.S. in filing Minimum Filing Requirements (MFR) schedules that are the foundational evidentiary element of its request for rate relief. However, FPSC's order does not require FPL to file (nor has FPL filed) any MFR schedules for which further hearing

was ordered by FPSC in Docket No. 120015-EI. Moreover, Chapter 120, F.S. requires notification of a 2014 test year and notification for 2016, but FPL failed to comply with these mandatory requirements and FPSC's order is silent with respect to these mandatory requirements. *See,* record transcript at Vol. 34, p.5093:5-20.

Thus, to the extent that FPSC's order is inconsistent with the spirit and intent of Chapter 120, F.S. in filing Minimum Filing Requirements (MFR) schedules and notification of test years, FPSC's order must be vacated and quashed by this Court as a matter of law.

3. FPSC erred in establishing an administrative procedure that violated the "due-process" rights of the non-signatory Intervenor parties in Docket No. 120015-EI.

FPSC is required under Chapter 120, F.S., and under all other administrative procedures and rules to provide due-process rights to all parties in Docket No. 120015-EI who raise disputed issues of material fact. However, FPSC's order in connection with FPL Settlement Agreement evokes due process violations in that the Settlement Agreement contains terms and issues materially different and not part of FPL's March 2012 filing. Therefore, the Settlement Agreement effectively constitutes a new rate case filing, which is not supported with required minimum filing

requirements, witness testimony, or notice to FPL customers. *See,* record transcript at Vol. 34, p.5095-96:20-25; 1-2.

In a case held in the Florida Supreme Court, Case No. SC02-1023, *Jaber, et al*, the legal counsel for FPSC argued that a proposed stipulation was reached and submitted for the Commission's approval. The parties indicate that their agreement is premised on a belief that the earnings review has provided an informed basis for an agreement on FPL's rates. They note that FPL's MFR's have been thoroughly reviewed by the FPSC staff and the parties and that FPL has filed comprehensive testimony in support of detailing its MFRs and that the parties in this proceeding have conducted extensive discovery on MFRs and FPL's testimony. *See,* record transcript at Vol. 34, p.5097:8-21. In the instant action, FPL failed to file any MFRs and FPSC's order did not require FPL to file any MFRs.

FPL failed to include party Intervenors Thomas Saporito, David & Alexandria Larson, and Larry Nelson in any of the settlement negotiations that led up to the FPL Settlement Agreement. *See,* record transcript at Vol. 34, p.5097:22-25. This Court disfavors consideration of any settlement agreement where all parties were not provided an opportunity to participate in the settlement negotiations that led up to the Settlement Agreement. *See,*

Jaber.

Thus, to the extent that FPSC failed under Chapter 120, F.S., and under all other administrative procedures and rules to provide due-process rights to all parties in Docket No. 120015-EI who raised disputed issues of material fact, FPSC's order must be vacated and quashed by this Court as a matter of law.

4. FPSC erred in establishing an administrative procedure that violated the "due-process" rights of non-party FPL customers in Docket No. 120015-EI.

As stated earlier, FPSC's order (and FPL) failed to provide notice to FPL customers, under Chapter 120, F.S. of a scheduled hearing about FPL's Settlement Agreement and their due-process right to intervene in the hearing. Moreover, FPSC failed to hold any service hearings to take the testimony of FPL customers about FPL's Settlement Agreement as required under Florida Statues. Thus, to the extent that FPSC failed under Chapter 120, F.S., and under all other administrative procedures and rules, to provide due-process rights to FPL customers in Docket No. 120015-EI to provide testimony at required service hearings to raise disputed issues of material fact, FPSC's order must be vacated and quashed by this Court as a matter of law.

5. FPSC erred in establishing an administrative procedure for the purpose of considering FPL's Settlement Agreement,

that (if approved by FPSC) is not in the public interest.

FPSC erred in entering an order that established a hearing and administrative procedure for the purpose of considering FPL's Settlement Agreement, that (if approved by FPSC) is not in the public interest. The Order would allow a hearing to take place at the expense of FPL customers, to address a Settlement Agreement that is a bad deal for the vast majority of FPL's customers, and that introduces four major new issues that are not the subject of evidence taken in Docket No. 120015-EI, and which would require an evidentiary hearing (separate and apart with a new docket number) from Docket No. 120015-EI. The four major issues are: the GBRA, the asset optimization, the $200 million of additional fossil dismantlement amortization to income, and relief from filing a depreciation study. *See,* record transcript at Vol. 34, p.5077:4-12.

The Settlement Agreement is contrary to the numbers that the Office of Public Counsel (OPC) shows as positions in Order Number PSC-12-0428, the prehearing order. It is not a settlement by mutual agreement of the contending parties to the rate case; and of the disputed issues affecting the interest of FPL's customers. It will not, as settlements should, promote the efficient, speedy, and just resolution of Docket No. 120015-EI. Instead, the

proposal will entangle the Commission and the parties in a quagmire of wrangling for months, if not years to come, and create uncertainty about FPL's rates. *See,* record transcript at Vol. 34, p.5077:13-25.

The Settlement Agreement is not agreed to by the legal representatives of 99.9% of FPL's customers, which renders it effectively just a proposal that FPL negotiated with itself with some specific rate increase offsets to the signatories. Should FPSC approve the Settlement Agreement over the strong and unwavering objection of the Public Counsel and the Florida Retail Federation (RFR), it will undermine public confidence in the Commission's ratemaking process. The Commission has never approved a purported settlement of a comprehensive rate case over the objection of the Public Counsel. *See,* record transcript at Vol. 34, p.5078:1-11.

The Settlement Agreement is not in the public interest, does not serve the public interest, and is absolutely contrary to the public interest. OPC considers the FPL proposal to be an illegitimate self-negotiated stipulation between FPL and a microscopically and impermissible small number of FPL's customers. It is a wish list the company purposely kept out of the case and now wishes to force back into the case . . . and onto the customers. . . Clearly, FPL does not represent more than 500 of the 4.6 million FPL

customers. That fraction is "0.00011" or 11 one-hundredths of 1% of FPL's customers who are represented by those parties who signed the proposal. *See,* record transcript at Vol. 34, p.5078-79:24-25:1-23.

OPC represents 4,599,500 FPL customers in this case. Section 350.061(1) states: It shall be the duty of the Public Counsel to provide legal representation for the people of the state in proceedings before the Commission. The Public Counsel shall have the following specific powers: to recommend to the Commission or urge any position which he or she deems to be in the public interest, whether consistent or inconsistent with positions previously adopted by the Commission. On its face, this statute means what it says; the Public Counsel is a necessary party. . . or a vital party to any stipulation if it is to be found in the public interest, or at least the Public Counsel must not object or it must remain neutral. *See,* record transcript at Vol. 34, p.5080:6-25.

Notably, in *Citizen v. Mayo* 333 So. 2d 1 (Fla. 1976), this Court described the Public Counsel's role in the specific context of file and suspend rate cases and noted what it perceived to be the linkage between the establishment of the Public Counsel's office and the file and suspend law. The Court stated that whatever public format the Commission chooses to

provide, however, special conditions pertain in cases where the Public Counsel has intervened. This is a consequence of the statutory nexus between the file and suspend procedures and the role prescribed for Public Counsel in rate regulation. . . That office was created with the realization that the citizens of the state cannot adequately represent themselves in utility matters, and that the rate setting functions of the Commission is best performed when those who will pay utility rates are represented in an adversary proceeding by counsel at least as skilled as counsel for the utility company. The Commission cannot schedule a public hearing and preclude Public Counsel, the public's advocate, from acting to protect the public's interest. *See,* record transcript at Vol. 34, p.5081-82:1-25:1.

Notably, in *South Florida Hospital and Healthcare Association, et al. v. Lila A. Jaber, et al.* Supreme Court of Florida Case No. SC02-1023, FPSC encouraged settlement over and over and over again throughout the proceeding in the docket. They noted that all parties actively participated in settlement negotiations that the staff marshaled. They noted that the Public Counsel, representing the citizens of Florida, characterized the stipulation as fair, reasonable, and appropriate. . . FPL noted that the Office of Public Counsel, which is mandated by Section 350.061 of the Florida Statues to

represent the people in proceedings before the FPSC, was a party. Moreover, FPL, in its argument to the Court, took great pains on pages 17 and 18 of their brief. . . to argue that the Citizens v. Mayo case was important. *See,* record transcript at Vol. 34, p.5083:1-22.

Clearly, FPL saw Public Counsel in his mandatory role then as vitally important to the public interest determination that the Commission made. . . The Commission in its argument to the Court also pointed to Mr. Shreve. . .They refer to Jack Shreve, who was the Public Counsel at the time, as the principal intervenor in the case, and they quoted his approval of the stipulation. . . The Commission told the Court that the diverse parties to the stipulation representing for all practical purposes the entire spectrum of consumers, from residential ratepayers to large industrial customers, urged . . . . that there was a reasonable basis to find the stipulation a fair resolution of the case. . . The Commission stated to the Court that they were in effect the petitioning party in that case, having initiated the earnings review on its own motion. . . through the efforts of its staff and the parties, was satisfied with the resulting agreement, it had the discretion to approve it. *See,* record transcript at Vol. 34, p.5084-85:23-25:1-20.

Intervenor FRF represents approximately 3,200 customers served by

FPL. FRF strongly agrees with the Public Counsel that the proposed settlement between FPL and the three other parties. . .who represent no more than. . .maybe 500 or so customer accounts is not in the public interest and will not provide net benefits to FPL's customers or to the State of Florida. The settlement. . . would represent a massive transfer of billions of dollars from the pockets of Floridians to FPL's shareholders. *See,* record transcript at Vol. 34, p.5088-89:19-25:1-11.

FRF further stated that the settlers ask for a $378 million base rate increase that's not fully consistent with the company's MFRs, testimony, or exhibits. This is a greater percentage, 73% of the original ask than the FPSC has ever given FPL. *See,* record transcript at Vol. 34, p.5090:9-14.

They asked for a further step increase for the Riviera unit in 2014 that is not supported by any MFRs, any testimony, any exhibits, any evidence, that would generate somewhere north of $500 million paid by FPL's customers over the settlement period, another increase for the Port Everglades plant in 2016 that would generate probably 100 to $110 million in the last six months of the settlement period and leave a 200, 220, $230 million permanent base rate increase in effect going forward thereafter. They also ask to approve using $200 million of the fossil dismantlement reserve -

that is money that should be going to the customers' account one way or the other. *See,* record transcript at Vol. 34, p.5091:10-23.

Under the settlement. . . FPL's customers will certainly be forced to pay a lot more money, at least a billion dollars over the settlement period, that is not supported by any evidence in this case at all. $500 plus million for Riviera, $100 million for Everglades, $200 million of customer money for fossil dismantlement, and something in that general ball park for the gains on sales. *See,* record transcript at Vol. 34, p.5092:12-20.

Thus, to the extent that FPSC erred in entering an order that established a hearing and administrative procedure for the purpose of considering FPL's Settlement Agreement, that (if approved by FPSC) is not in the public interest, FPSC's order must be vacated and quashed by this Court as a matter of law.

PRAYER FOR RELIEF

FOR ALL THE ABOVE STATED REASONS, Petitioner prays that this Court grant certiorari and quash the order of FPSC as a matter of law.

Respectfully submitted this 6th day of October 2012.

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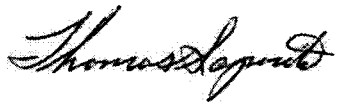

By: _____

CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing document was served by electronic means on this 6th day of October 2012 to the following:

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