Eric Fryson

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Sent: Friday, February 22, 2013 4:01 PM
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Subject: Docket No. 120015 Larry Nelson's Motion to Florida Supreme Court for Leave to File Amicus Brief Re: Appellee Florida Public Service Commission's Motion to Relinquish Jurisdiction and to Reestablish Filing Dates
Attachments: Supreme Court Motion.docx

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Electronic Filing:

a. The full name, address, telephone number, and e-mail address of the person responsible for the electronic filing.

Larry Nelson
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b. The docket number and title if filed in an existing docket,

Docket No. 120015-EI, Florida Power & Light Company, Request for an increase in base rates.

c. The name of the party on whose behalf the document is filed.

The document is being filed on behalf of Larry Nelson.

d. The total number of pages in each attached document is 5 pages (One document).

e. A brief but complete description of each attached document.

LARRY NELSON'S MOTION FOR LEAVE TO FILE AMICUS BRIEF RE: APPELLEE FLORIDA PUBLIC SERVICE COMMISSION'S MOTION TO RELINQUISH JURISDICTION AND TO REESTABLISH FILING DATES to be filed this date in the Florida Supreme Court.

Larry Nelson

IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, ETC.

Appellants,

CASE NO.: SC13-144
L.T. Case No.: 120015-EI

v.

FLORIDA PUBLIC SERVICE COMMISSION

Appellee.
_____/

LARRY NELSON'S MOTION FOR LEAVE TO FILE AMICUS BRIEF RE: APPELLEE FLORIDA PUBLIC SERVICE COMMISSION'S MOTION TO RELINQUISH JURISDICTION AND TO REESTABLISH FILING DATES

Larry Nelson hereby files this Motion for Leave to File an Amicus Brief Re: APPELLEE FLORIDA PUBLIC SERVICE COMMISSION'S MOTION TO RELINQUISH JURISDICTION AND TO REESTABLISH FILING DATES in the above entitled matter.

I, Larry Nelson, am an inactive member of the California Bar, #108833, who was a party in the underlying action from July 12, 2012 until August 20, 2012. My initial interest in the case concerned the low payment by Florida Power and Light Company ("FPL") for customer generated solar power by FPL (lower than the fuel cost "pass through") and various rules which further minimize payment for

customer generated solar power. Florida Statutes Section 366.82(10) states that "The commission shall also consider the performance of each utility pursuant to [the Florida Energy Efficiency and Conservation Act] when establishing rates for those utilities over which the commission has ratesetting authority".

I therefore intervened to address the issue before the Florida Public Service Commission ("FPSC"). However, during the course of my participation it became clear that the FPSC was not conducting a fair and impartial hearing in the case. This was, and remains, of great concern to me. This is my interest in the case.

APPELLEE FLORIDA PUBLIC SERVICE COMMISSION'S MOTION TO RELINQUISH JURISDICTION AND TO REESTABLISH FILING DATES is so erroneous, so frivolous, and made in such bad faith that this court should examine it, and act on it, under the inherent authority of this court despite its "withdrawal" occasioned this date by the withdrawal of Mr. Saporito's Motion for Reconsideration in the underlying matter, which was, in essence, caused by the FPSC using Mr. Saporito's Motion for Reconsideration to unduly delay the appeal filed in this court by the Office of Public Counsel ("OPC").

The basic premise of APPELLEE FLORIDA PUBLIC SERVICE COMMISSION'S MOTION TO RELINQUISH JURISDICTION AND TO REESTABLISH FILING DATES is that the Notice of Appeal filed by the Office of Public Counsel divests the Florida Public Service Commission of jurisdiction to

rule on Mr. Saporito's Motion for Reconsideration, which the Florida Public Service Commission has failed to make a ruling on for five weeks, despite the Motion for Reconsideration raising no legitimate issues. Without going into pro se litigant Mr. Saporito's treatment by FPSC, or his previous motion for reconsideration during the case, suffice it to say that rejection of his current Motion for Reconsideration on the grounds that it raised no new facts or law was inevitable - as shown by the FPSC staff recommendation on it released yesterday.

The idea set forth by FPSC, that this court must grant a motion to relinquish jurisdiction in order for the FPSC to rule on Mr. Saporito's Motion for Reconsideration is based on bald assertions that contradict the plain statutes FPSC cites and refers to, is frivolous, made in bad faith, and is made for the purpose of delay. Frankly, the motion is deserving of sanctions, if not referral to the State Bar. Unfortunately this is symptomatic of exactly the conduct of the FPSC in the entire underlying case .

In numbered paragraph 6 of the FPSC's Motion to Relinquish Jurisdiction, FPSC states:

> Because the motion for reconsideration is a substantive matter relating to the cause on appeal, the notice of administrative appeal divested the Commission's jurisdiction over the matter pursuant to Rule 9.600(a) of the Florida Rules of Appellate Procedure.

But the Rule 9.600(a) cited says exactly the opposite:

> RULE 9.600. JURISDICTION OF LOWER TRIBUNAL PENDING REVIEW
>
> (a) Concurrent Jurisdiction. Only the court may grant an extension of time for any act required by these rules. Before the record is transmitted, the lower tribunal shall have concurrent jurisdiction with the court to render orders on any other procedural matter relating to the cause, subject to the control of the court.

More importantly, the FPSC motion refers to, in its numbered paragraph 2, Rule 25-22.060 as authorizing Mr. Saporito's Motion for Reconsideration. The part referred to is in subsection (3). What the FPSC does not mention is subsection (1)(c) which states:

> (c) A final order shall not be deemed rendered for the purpose of judicial review until the Commission disposes of any motion and cross motion for reconsideration of that order, but this provision does not serve automatically to stay the effectiveness of any such final order.

I have to honestly say that few things upset me as much as attorneys misstating and omitting statutes that they are referring to. It is essentially an attempt to perpetrate a fraud on the court under the guise of incompetence and/or the hope that nobody will bother to check.

There is a clear statutory scheme concerning appeals and motions for reconsideration. The lower tribunal has until the record is filed to dispose of

pending matters, except that motions for reconsideration specifically prevent the case from becoming final for purposes of review until disposed of.

But the FPSC brings forth the bizarre proposition, flying in the face of not only the statutes it cites, but also in the face of logic, that a Notice of Appeal filed by one party divests the FPSC of jurisdiction to rule on a Motion for Reconsideration by another party.

Let us consider what would be the consequence of this court denying the FPSC Motion to Relinquish Jurisdiction on Mr. Saporito's Motion for Reconsideration. Who would then have jurisdiction? Not the FPSC, according to their theory. Would the Supreme Court have original jurisdiction over Mr. Saporito's Motion for Reconsideration as part of the appeal? I don't think so. Would the FPSC regain jurisdiction over Mr. Saporto's Motion for Reconsideration after this court's final ruling on the OPC appeal? I wouldn't think that would be it either.

As a non-practicing attorney, I like to recall the phrase I first heard in law school, "the law is not an ass" (actually a paraphrase of a line from Dickens' novel, Oliver Twist). None of this FPSC behavior would make any sense, except in FPSC's bizzaro world where any argument, no matter how absurd, can be ruled to be the law and fact.

Unfortunately, the world of the FPSC in this case is so lawless, that the OPC, who is quite aware of the law and of what goes on in the FPSC, was forced by the FPSC delay in ruling on Mr. Saporito's Motion for Reconsideration to file the OPC Notice of Appeal to avoid the assertion that they did not file their notice of appeal within 30 days of the order appealed from. OPC knows the law. The public counsel, J. R. Kelley, was quoted in a January 15, 2013, Palm Beach Post Article as follows:

> Because of a motion for reconsideration filed by Thomas Saporito, a Jupiter FPL customer who participated in the case, the PSC's order cannot be appealed yet, Kelly said.

But OPC likely did not want to be fighting a spurious battle that their Notice of Appeal was untimely due to FPSC delay on Mr. Saporito's Motion for Reconsideration, so they likely decided to be safe rather than sorry. And such fears are well founded, as shown by the instant motions of FPSC.

To understand how such a manifestly bizarre situation would be brought to this court by the FPSC requires an explanation of the bizarre world of the FPSC, which is, I am sad to say, not a pretty picture. Essentially, the FPSC does not follow the law, or try to follow the law, when it comes to this FPL rate case. I have personally witnessed the FPSC make rulings and preside over a biased atmosphere that would shock the conscience. Because of this bias, the Office of Public Counsel presumably decided to file its Notice of Appeal and be safe rather than sorry. They

would not want their appeal to be foreclosed on some lunatic theory of FPL which the FPSC would be happy to support.

Thus, FPSC having sat on Mr. Saporito's Motion for Reconsideration for five weeks, with absolutely no intention or chance of granting it, or any part of it, under any circumstances, now brings it's pendency to this court seeking further delay in the OPC appeal of their previous bizarre ruling in the underlying case.

I personally witnessed the FPSC allow FPL to pack public hearings with witnesses recruited by FPL and to allow FPL to intercept unhappy customers in the lobby of public hearings and divert them to special FPL rooms set up with FPL personnel and computers in order to give unhappy customers whatever it takes to prevent them from testifying against FPL. I personally witnessed the Pre-Hearing Officer rule over and over again that all specific statutory language and criteria for the setting of rates was "subsumed' to the question of whether the FPL rate increase and rate of return was "appropriate". I personally witnessed FPSC staff act as the alter ego of FPL in the "informal issue identification" process whereby any and all issues deemed "biased" against FPL were rejected or extremely discouraged. I personally witnessed the Pre-Hearing Officer rule that the statute requiring the FPSC to "consider the performance of each utility pursuant to [the Florida Energy Efficiency and Conservation Act] when establishing rates for those utilities over which the commission has ratesetting authority" was not applicable

because that is a matter not for the rate hearing, but for the "Energy Conservation Cost Recovery" proceeding. All of this is set forth in my 14 page letter attached as an exhibit and which I declare under penalty of perjury to be true and correct. And all of it is in the record from actual witnesses, in the actual transcript (except the "informal issue identification" meetings which were not, to my knowledge, recorded).

Not mentioned in my letter, but even more absurd, I observed, via live video, the bought and paid for former Chairman of the FPSC, Terry Deason, testify (as a paid expert witness for FPL) that a settlement vehemently opposed by OPC on behalf of the residential rate payers of Florida, was a perfectly fine settlement, even though it was only between FPL and industrial customers who got a sweetheart deal from FPL, because a settlement doesn't have to involve actually settling, but rather, if some other party was initially opposed to FPL in good faith, and then settles, that makes it a fine settlement to bind the residential rate payers of Florida whose legislatively appointed representative opposes it and wants an actual ruling on the merits. As if a settlement between your two neighbors in a three way fight with you is a settlement with you.

It is not politically correct to say this, and it sounds like something a vexatious litigant or an unsophisticated paranoid pro se litigant would say, but in this case it is true: what I witnessed was a cross between a soviet style show trial

and a kangaroo court. If I were allowed to make a recommendation to the court, it would be to stay the order of the FPSC in the underlying case or to invite the OPC to move for such a stay. The manifest injustice has gone on long enough in this case.

Therefore, I respectfully request that this Motion for Leave to File Amicus Brief be granted, and that this motion be treated as the Amicus Brief unless this court would like further documentation and citation to the record of the matters referred to herein. I also declare under penalty of perjury that my letter attached hereto, that I request be treated as a declaration, is true and correct

Respectfully submitted this 22nd day of February, 2012.

/s Larry Nelson
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EXHIBIT - LARRY NELSON LETTER OF 12/13/2012

December 13, 2012

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Tallahassee, FL 32399-1300

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1101 The Capitol
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Re: Florida Public Service Commission

Dear Honorable Representatives:

My name is Larry Nelson and I am one of the private citizens who intervened in the current FPL rate case, Florida Public Service Commission ("FPSC") docket #120015. My intervention was granted by order of the FPSC on July 12, 2012 and I subsequently spoke as a party at four of the ten public service hearings, specifically those held in Miami, Miami Gardens, Plantation and Pembroke Pines on August 7 & 8, 2012. I drove from Sarasota to the FPSC in Tallahassee twice, and I participated in the Pre-Hearing Conference on August 14, 2012. I withdrew from the case on August 20, 2012, after it became clear to me that the FPSC system was hopelessly biased in favor of FPL. In all, I spent about $1300, mostly for travel expenses to the public service hearings and to Tallahassee, and I have no direct or indirect economic or other interest of any kind related to this matter except that I am an FPL customer who has rooftop photovoltaic solar panels.

The reason for my intervention was my interest in clean renewable energy, specifically the treatment of electricity generated from rooftop photovoltaic solar panels, and more generally with the Florida legislative mandate in the Florida Energy Efficiency and Conservation Act to encourage clean renewable energy.

With the renewed consideration of climate change in the wake of Superstorm Sandy, I am writing to you to request your consideration of those aspects of the existing FPSC system which serve to discourage energy production from rooftop photovoltaic solar panels.

I would also like to bring to your attention some of the absolutely shocking ways I witnessed in which the FPSC system operates to the advantage of FPL and to the disadvantage of citizens of the State of Florida.

I have two 10kw rooftop solar photovoltaic systems, one on my residence and a second on a duplex I rent as a vacation rental property. I bought these in 2011 and subsequently discovered that the excess electricity that may be generated above our own use would receive seemingly illogical and unfair treatment. This would seem to be contrary to the legislative mandate to encourage this type of energy. Since the FPSC is mandated by Florida Statutes 366.82(10) to consider utility company treatment of alternative energy in rate cases, I intervened in the FPL rate case to attempt to address the unfair and suppressive treatment of clean rooftop photovoltaic solar energy.

There are three ways that solar power produced by rooftop photovoltaic panels are treated unfairly in my opinion:

1) The amount that a utility pays for excess electricity from rooftop panels is too low. FPL charges a residential customer around 11 cents per kilowatt hour ("kwh") for power but pays around 3 cents or less per kilowatt hour for power generated from rooftop photovoltaic solar panels. The amount paid for the power is actually less than the "pass through fuel charge" which is supposed to be the actual cost of the fuel per kilowatt hour passed through without profit. Yet FPL pays less than that for the renewable energy it receives. FPL accomplishes this in two ways. The first is that the computation of the "fuel pass through" is different than the computation of the "avoided cost" which is how the amount paid for the solar power is computed. The "avoided cost" is computed from a specific designated generation facility and is the cost of the fuel not burned to not generate the last bit of electricity divided by the electricity not produced. The "fuel pass through" cost is computed differently. The second way FPL pays too little for electricity from rooftop photovoltaic solar panels is the fiction that solar rooftop power creates no "capacity". It is said to replace or add nothing to infrastructure. The value of the solar power replacing power plants, transmission lines, operations, maintenance, repair, etc. is said to be zero. This fiction is based on the idea that a cloud might come over the sun. Therefore the solar power might or might not be there and is as random as if you turn off a generator for six months. The power is considered "as available" - if it is there they pay for it, if not, not. You can't count on it so it replaces no "capacity". Except this is not true. The solar power is exactly as reliable as the sun. The solar power is no more unreliable than the chance that the sun won't rise tomorrow and might not rise for the next month. In the aggregate, all of the rooftop solar systems put out an amount of "capacity" that is exactly known. A certain part of the state may have a certain amount of cloud cover on certain days, but overall, the amount of solar power generated per day or per year at any location is a statistical certainly and known. So no matter how much rooftop solar power is produced by however many solar arrays, FPL excludes any value for transmission lines not built, power plants not built, repairs and maintenance, etc.

2) FPL does not allow excess power generated in the fall to offset usage the following summer. In theory the system in place in Florida for residential rooftop solar panels is "Net Metering". Net metering would mean, and the clear initial intent of the Florida legislature was for it to mean, that if you generate 12,000 kwh per year and you use 12,000 kwh per year, that you can offset the two and pay only the charges for being a customer. But it doesn't quite work like that. The way it works is that the air conditioning part of your bill is less in October, November and December so you may have extra electricity generated. FPL then cashes you out at the 3 cents per kwh at the end of the calendar year and you end up buying that electricity back the following summer at 11 cents per kwh during peak air conditioning season.

3) A building with multiple meters (and the law specifies that new buildings like duplexes must have multiple meters) cannot apply the power from a rooftop solar array to more than one meter. In jurisdictions where this is done, it is called meter aggregation. FPL opposes meter aggregation. Without meter aggregation either the building meters must be rewired into fewer meters, which costs thousands of dollars, or multiple solar systems must be installed which also increases costs by thousands of dollars.

All of this means that the incentive to put solar arrays on rooftops in Florida that would replace additional power plants and additional transmission lines and additional greenhouse gases is seriously suppressed.

So anyway, off I went, to the FPSC rate case process to see what the heck is the problem, and what could be done about it.

My first stop on my adventure was the public service hearing held in Sarasota on May 31, 2012. Here I first saw the most shocking thing about the public hearing process. In the lobby of the hearing site (Sarasota City Hall) were numerous FPL customer service representatives wearing FPL shirts who are greeting members of the public arriving to speak to the rate increase proposal. And FPL seems to have their own dedicated room. Which made no sense at all. It's like a court hearing but one of the parties to the case gets to have their own room in the courthouse and a staff to lobby everyone, judges, jurors and the public as they walk by as to why their side is right. FPL also gets to have a table handing out literature. Nobody else gets to have a room or a table or representatives right outside the hearing room. There is no Audubon Society, no Environmental Defense Fund, no Florida Public Interest Research Group in the lobby lobbying (I guess that is where the term comes from!) against the rate increase or against the proposals or actions of FPL.

The importance of this cannot be overstated. I had not yet intervened in the case but when I did subsequently intervene and speak from the stage as a party at the four Miami area public service hearings, I found that FPL gets a special room at every public hearing. They get to intercept members of the public who come to the hearings with complaints, before those members of the public enter the hearing room, and redirect them to the special FPL room and give them whatever it takes to "resolve their complaint". The evidence indicates they are much more generous in achieving customer satisfaction in the special FPL rooms at the public hearings than they are in the normal course of their business. Essentially they run bribery rooms at every public hearing site with FPSC blessing. One

customer's account of this was given at the public service hearing in Pembroke Pines and I quote that account in full here (the tone of the person in the video leaves no doubt as to what exactly is being said):

> **GINGER JEANETTE MAHADEO**
> was called as a witness on behalf of the Citizens of the State of Florida and, having been duly sworn, testified as follows:
> **DIRECT STATEMENT**
> **MS. MAHADEO:** Well, how is everyone doing? My name is already with my address over there, so I live at 24 Pines Place across the hall -- it's across the street over there.
>
> I don't want to feel like the bad guy, but I may, because I had a big problem with FPL for over three years, and I could not get it resolved. I called even yesterday, and the people that I spoke to on the phone was giving me this long drawn out story about why they could not help me. I said, listen, this is the problem. Y'all sent someone over to my home to do a home survey, but whenever you got here you said you only did it in the residential areas with people that have homes. Well, I live in an apartment, so she did the survey. So I told her I didn't have a lot of hot water and my bill was really hi.
>
> So she got on the floor and she made some adjustment, and, Lord have mercy, the next month my bill was sky high. Where am I going to get the money to pay this bill? I called and I got an extension the first time. The next time (knocking on podium) somebody knocking at my door. I am on a fixed income. When I was working it was different. Now the reality of it is whenever you get Social Security, that's another problem, but you have to live with whatever you get. So I said to him can I pay part of the bill? Ma'am, you have to pay all the bill. If you don't we are going to disconnect your lights. And I said, well, hold on a second. Just give me a moment here.
>
> Listen, all of this good stuff about FPL sounds fantastic until you have to live the dream. It is not all it is cut out to be, because I had to go through it. When I came through that door today and I told these people that I had a problem, the next thing I know everybody was loving me and took me upstairs. It took me 15 minutes to get everything resolved. And I just called yesterday, so you do the math.
>
> (Audience laughter.)
>
> **CHAIRMAN BRISÉ:** Thank you very much for your testimony.

Moreover, at the very beginning of every public hearing, FPL is allowed to make an official announcement that FPL is there with a special room full of FPL computers to resolve any customer complaints thereby giving the people in the hearing room one last chance to get up and go to the FPL bribery room before the substance of the hearing begins. The statement made at the Miami service hearing by FPL attorney Bryan was as follows:

> In a moment you will hear from FPL's president, Eric Silagy. He will explain to you what we're asking for in this rate request and why we're asking for it.

> But before he speaks, I wanted to inform you that we've also brought several Customer Service Representatives along with us today. If you have a question or a problem with your electric bill or your service, please feel free to talk to them. They're set up in a room that's just out these chambers to the left. They have computers and can access your account information. And if it's possible for them to resolve your question or problem today, they will do so.
>
> We have a couple of FPL representatives in the room, if you'd raise your hands, who would be happy to assist you in locating the customer service room.

Furthermore, it appeared that FPL had lots of supporters in the audience. People who almost all said the same thing. They said that they didn't have any position on whether the rate increase should be granted, but that FPL was generally wonderful. I subsequently found out that FPL recruits customers to speak for them. Now maybe that is, on its face, not such a bad thing, but like sausage making, the details are not pretty. I was also told that in past rate cases FPL would sign up all its recruits first, leaving members of the public no time to speak. This is not surprising given the "joint venture" atmosphere between FPL and PSC staff in the lobby of the hearing venues where the signup sheets for members of the public are located.

Anyway, it didn't take too long during my participation in the four public hearings before I decided to start asking the pro-FPL witnesses at the public hearing if they had been asked to come there by FPL (as an intervenor, I could do this) . Virtually every one said yes. As the four hearings went on I would ask more questions and more details would come out. Eventually the extent of the FPL recruitment began to be clear. FPL managers would recruit mostly business customers, sometimes with promises, sometimes with threats, but mostly on the strength of customer relationships. FPL also held briefings where business customers were given the case for an FPL rate increase and recruited to come to the public service hearings to speak on FPL's behalf.

How right or wrong this is, is, I suppose, a matter of debate. But one thing is for sure. FPL used its customers' information to identify and recruit pro-FPL witnesses to come to the public hearings and this customer information was not available to any anti-FPL groups. The equivalent action would be if anti-FPL groups were given access to FPL customer records to identify a bunch of unhappy FPL customers who had complained, had their power turned off, had damage claims denied, suffered numerous power outages. etc. who were then approached about coming to the public hearing to speak against FPL. FPL's recruitment efforts stack the deck and turn "public hearings" into "members of the public vs. friends of FPL" hearings. And all of this is perfectly fine with the FPSC commissioners and the FPSC staff who are right there with full knowledge of, and in full cooperation with, all this.

Not having any actual knowledge of administrative law or FPSC proceedings, I entered the FPSC rate case litigation process relying on the actual Florida governing statutes. The Florida statutes that specify the duties and standards for rates, etc. This was, admittedly, a rookie mistake and understandably, a body of custom, practice, and decision has evolved which governs day to day reality in a way that statutory principles cannot.

However, in the case of the FPSC and FPL, the day to day customs, practices and decisions have been used to wash the statutory principles away as much as possible.

Two of the more basic statutory principles are 1) that rates have to be fair, just and reasonable (recited numerous times in different Florida Statutes), and 2) any type of charge to a customer is a rate.

So, leaving out the details of my intimidation and manipulation by FPSC staff attorney Keino Young, I was compelled to bring forth issues at the officially not mandatory "informal issue identification" meetings and I basically raised the solar power issues and applied the statutory language to the various "rates". In other words, is the new increased monthly customer charge "fair, just and reasonable", ditto the new late fee, the new base rates, the new returned payment fees, etc. I applied statutory language saying rate increases have to have a cost basis to new late fees, etc. All of these proposed issues were submitted in writing before the "informal meeting".

Then FPSC staff attorney Keino Young called me up right before the meeting and told me that "staff" felt that ALL my issues were "subsumed" to other issues. Most of which other issues were broadly and ambiguously defined, not as issues of law or of fact, but in the form of "Is the ____ rate increase appropriate". Coincidentally, at the actual issue identification meeting some minutes later, the exact same words came out of the mouth of the FPL attorney: FPL believes all of my issues are "subsumed" to other issues.

Let me be clear what "subsumed" means. It means that throughout the subsequent rate case, including the final briefs and FPSC Commissioners voting on the individual issues, the actual statutory standards set by the legislature will never be directly argued or voted on.

I stuck to my issues and one of the Commissioners sitting as Pre-Hearing Officer had to rule on them. At the Pre-Hearing Conference in Tallahassee the Pre-Hearing Officer ruled every statutory issue I raised was "subsumed" to other issues. The process would go like this:

FPSC Commissioner: "What is FPL's position?"

FPL attorney: "FPL believes the issue is subsumed to other issues"

FPSC Commissioner: "Staff?"

Staff: "Staff agrees with FPL"

FPSC Commissioner: "Ruling for FPL"

And this is pretty much how it went, not just with my issues, but with most opposition to FPL, whether from the Office of Public Counsel ("OPC"), Florida Retail Federation, or other intervenors.

Eventually I had two core issues left. The first being the statute that states the FPSC must consider alternative energy efforts in rate increase cases. The second being that the overall rate increase (as opposed to each subsidiary rate) was statutorily required to be fair, just and reasonable (thereby allowing this to be directly argued to the FPSC).

The Pre-Hearing Officer ruled for FPL on the alternative energy issue, after staff apparently stated overtly for the first time that the rationale for excluding the issue is that the clean renewable energy issue is handled in the "Energy Conservation Cost Recovery" Clause proceeding (which is a pass through proceeding where the costs of environmental efforts claimed by FPL are charged to customers, seemingly the exact opposite of what the statute would seem to require which is that environmental efforts be considered for reward or punishment (i.e. via profit or other incentives) in rate increase request proceedings.)

The transcript of this is as follows:

> **MR. NELSON:** I, I understand, I understand about the conservation goals being a separate proceeding. But in, in Section 366.82(10) it says, The Commission shall also consider the performance of each utility pursuant to the Energy Conservation Act when establishing rates for those utilities over which the Commission has rate setting authority. And that's a separate subparagraph from any of the subparagraphs talking about achievement of the goals or setting of the goals.
>
> **COMMISSIONER GRAHAM:** Staff?
>
> **MS. HELTON:** Mr. Chairman, Mr. Nelson, it's my belief that that provision that you just read to us from the FEECA statute, which is the -- I knew I shouldn't have said that -- the Florida Energy Efficiency and Conservation Act, relates to the annual clause proceeding that the Commission holds every year in November for cost recovery, for conservation costs. That's also known as the ECCR clause, innovation -- energy conservation cost recovery. There's two different -- there's different types of ratemaking processes here at the Commission, and that docket, the ECCR docket is designed to address the cost recovery for conservation costs.
>
> **MR. NELSON:** Well, I don't know. The plain language says, The Commission shall also consider the performance when establishing rates for those utilities over which the Commission has rate setting authority. So it would seem to me that it's supposed to be considered in this proceeding. That's my position.
>
> **MS. HELTON:** Not that I would like to engage in argument, but the Commission has consistently interpreted that language to mean that it is addressed in the ECCR docket.

Upon this ruling (by staff!) it became crystal clear that further participation in the proceeding was pointless because this was not an impartial judiciary body and day would be ruled to be night if that was what FPL advocated (because of course there could be dense cloud cover or a solar eclipse and so therefore day could be night and therefore day is night. FPSC: "ruling for FPL, day is held to be night".)

My last issue, whether the overall rate increase was "fair, just and reasonable" was strenuously argued (much as a last stand at the Alamo) by me and was supported by the Florida Retail Federation, and Thomas Saporito in that the central statutory standard should appear somewhere as an actual issue. Clearly angered and flustered by the confrontation, the Commissioner sitting as Pre-hearing Officer stated he would make a ruling "by noon tomorrow" and then ruled against the issue outside the presence of the parties.

The transcript of that portion of the Pre-Hearing Conference follows:

> **COMMISSIONER GRAHAM:** Mr. Nelson.
>
> **MR. NELSON:** Your Honor, in the, in the proposed hearing order FPL indicates only that they believe it's subsumed under Issue 126, and that's not going to address the issue. The new issues that they claim it's subsumed under, I'm not going to, to address that. May I, may I speak to the issue, or do you want to hear their objections further?
>
> **COMMISSIONER GRAHAM:** Well, he listed three or four other ones.
>
> **MR. NELSON:** All right. Very good. Okay. My position is this is the ultimate issue in this case. There's four separate statutes that say that the decision that this Commission has to make, that this full Commission has to vote on is whether the rates are, both the proposed rates and the existing rates are fair, reasonable, just, and compensatory. And how you define this issues defines how, how the Commissioners will vote, it defines how the issues will be argued, it defines how the issues will be briefed. FPL's position as set down here is that it's subsumed to Issue Number 126. And Issue Number 126 is is the operating revenue increase of FPL appropriate? And if, if this Commission accepts that argument, then in my mind that is saying that the public interest in fair, reasonable, and just and compensatory rates is subsumed to the interest of the revenue of FPL. And, and to me it's as simple as that. That's the statutory standard. To be able to argue that something is fair, reasonable, just, and compensatory allows you to argue the entire universe of, of the fairness of the issue, which is the ultimate issue the Commissioners will be, will be deciding. And to exclude that issue is to simply say, you know, the interest here that we are concerned with is, is the revenue required of FPL and, and fairness is subsumed to that.
>
> **COMMISSIONER GRAHAM:** Florida Power & Light, what are the other issues that you mentioned?

MR. BUTLER: Commissioner, it's Issues 126, 142, and 144 we had identified specifically. But this is essentially just the ultimate question. I mean, to some extent every issue in the case is about, you know, reaching a conclusion on whether our proposed rates are fair, just, and reasonable, compensatory. So it just, it seems like it's restating something that doesn't need to be restated. But the specific issues that I had mentioned were 126, 142, and 144.

MR. LAVIA: Mr. Commissioner, this is J. Lavia for Retail Federation. We took a position on this issue and we should -- think it should be included. It is the ultimate issue. And as the ultimate issue, it's hard to argue that it's been subsumed under non-ultimate issues. I think it is fair to include this. We think it should be included. We think it's appropriate for the Commission to actually vote on this issue. This is the statutory standard. Thank you.

MR. SAPORITO: Commissioner Graham, this is Thomas Saporito. I took a position on this issue too, and I agree with the prior counsels' statements.

COMMISSIONER GRAHAM: Staff?

MR. YOUNG: I think staff agrees with Florida Power & Light that inherently by Commission findings the, the remaining issues are proving, proving any part of FPL's request, it is ultimately finding it fair, reasonable, and just and we believe it's subsumed.

COMMISSIONER GRAHAM: I was just getting ready to say to me this question is basically what the rate case is all about. And all the 100 and 200 issues for the most part all roll into answering that question. So why is it needed?

MR. NELSON: In my opinion it's needed so that it can be directly argued, it can be directly briefed and not subsumed into subsidiary issues of what's the correct ROE or what's the correct revenue requirement. To me that is making things completely backwards, that you determine the, the ROE and then you determine the revenue requirement and then you determine where you're going to put the revenue requirement. And, you know, you have to put it here or put it somewhere else. And that is not in my mind how you determine what's fair, just, and reasonable in this case. And I don't think the members of the public or the members of the public that testified at the public hearings would think that that's a reasonable way to determine what is fair, just, and reasonable in this case.

The pro-FPL bias was present throughout the proceedings. FPL attorneys nudged every issue, every precedent, every gray area; they chipped away at every principle until the whole resembled nothing.

As one last example from the public service hearings: every party (FPL, OPC myself, etc.) was given a fixed number of minutes for their presentation to the public. As a nervous newbie, never "on the lights" before, I was very conscious of the time of my first presentation in the Miami public service hearing. But somehow FPL ended up with 11 minutes to speak instead of its allotted eight. (I embarrassingly initially

jumped up and objected to this). Over the course of the public hearings I figured out how this was going on. The timekeeper (the Chairman of the FPSC) would not start the timing until each speaker's introduction had finished. So I would say: "My name is Larry Nelson and I am a private citizen who came here today to speak in favor of alternative energy and against this rate increase", or whatever, and then the timing light would go on. But in the case of FPL, a first FPL employee made lengthy introductory comments (including the comments about going to the customer service room to resolve your problems) before the main FPL representative spoke and the timing didn't start until the second FPL speaker started speaking.

In this way FPL's army of attorneys and representatives fight every fight forever. For every fight they win, there is another fight right next to it pushing one little step farther and they just keep pushing the FPSC more into pro-FPL territory. Apparently in the academic literature of regulation (!) this is known as the "repeat player problem".

The FPL rate "settlement" approved today which excludes OPC is a perfect example of this. The underlying "precedent" allowing this, according to FPL, is the 2004 case of *South Florida Hospital and Healthcare Association v. Jaber*, 887 *So.* 2d 1210, in which a party that was not OPC, was held not to be necessary to a settlement, in a case that was not a rate case, but rather was a special proceeding initiated by the FPSC under its own jurisdiction, and did not involve a rate increase but rather a rate decrease shared by all parties including the non-settling, non-OPC party. In the law this isn't even "dicta", let alone "precedent". But to FPL it is an argument, and that is all they need. Under FPL's reasoning, they could have drafted a "settlement" with me while I was in the case, giving me free electricity for life, then used the "settlement" with me to agree with me as to what the rates for all the other ratepayers should be.

The history of the law creating the Office of Public Counsel is pretty clear that the FPSC was not living up to its charge under Florida Statutes 366.01 that:

> **"The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose."**

Therefore the Office of Public Counsel was created to give the residential utility customers a representative and advocate of somewhat similar skill and resources to that of the utility companies. A normal system of judicial process or settlement by the parties would seem to be reasonable and similar to what might occur in an actual court case. But the outcome that FPL and the FPSC engineered today avoids both judicial process and actual settlement for the benefit of the FPSC and FPL and to the detriment of the citizens of Florida. An actual ruling on the rate case is easily reviewable by a court on long established legal and statutory grounds. A settlement of all the parties may well be an acceptable substitute if all parties are fully represented. However, what happened today was a sham masquerading as a settlement. Convoluted testimony was taken as to abstract characteristics of settlements in an

effort to claim this was a fine settlement even though the most important party, appointed by the Florida legislature to represent the people of Florida, vehemently refused to settle. In that case there should be no settlement and the FPSC should have to decide the rate case on the merits fair and square. Instead, a sham settlement among minor parties was seen by the FPSC as a "good deal" no matter what the Legislatively appointed citizens' representative says, and thus the precedent was set that as long as FPL can drum up a buddy to settle with, and present it to the FPSC, the Office of Public Counsel is no longer needed and has no power. If OPC can't insist on a ruling on the merits of the rate case or refuse to join an unfair settlement, then FPL and FPSC are just running the show by themselves which is exactly how it looked from my very first day in the proceedings.

I was very tempted to attach hundreds of pages of exhibits to this letter and I would still be happy to do so upon request. Virtually everything stated in this letter is available in the form of statutes, proceedings, transcripts, video, etc. As you can imagine, just the transcripts of the pro-FPL witnesses at the public hearings admitting they were invited and recounting the details are quite voluminous.

The answer to my original question of "how could clean renewable rooftop electricity be treated so poorly?" turns out to be quite simple. The primary way that a utility makes money is through "return on investment" ("ROI") at a rate set by the FPSC. This means that if a utility owns a pole that cost $100, then every year it gets a return (profit) of 10.5% (plus another 1%, for a total of 11.5% -after taxes!). The ROI determines the "revenue requirement" - the amount that must be charged customers to result in the set profit. So a $100 pole = $11.50 return every year (not counting operation, maintenance and repair which is also charged to the customers). Unfortunately for FPL, the $40,000 photovoltaic solar systems on each of my roofs are not owned by FPL. Therefore FPL gets zero because 11.5% on zero is zero. Therefore FPL will never, never, never do anything but oppose rooftop photovoltaic solar power because they cannot make money on it. No matter what lip service they pay, or what PR they put out, they will always do everything they can to crush it. What they will do however, is continue to build wildly expensive capital projects (and their own massive land using, non-distributed solar farms) upon which to have the 11.5% ROI computed. This is known as the Averch-Johnson effect:

> The Averch-Johnson effect is the tendency of utilities to over-invest in capital compared to labor. The short form of the Averch-Johnson effect is that permitting a rate of return on investment will have the predictable effect of encouraging more investment than is optimal. This can manifest itself in the "build versus buy" decisions of integrated utilities and is often cited as a reason utilities might "gold plate" their assets. This effect can also be observed in the "invest versus conserve" decisions that utilities face. Under traditional regulatory rules, most utilities do not naturally turn toward energy efficiency investment, even though such investments are usually least cost for customers.

FPL antipathy to rooftop solar photovoltaic energy, even though only about 1700 of its 4.5 million customers have such systems, is shown in FPL's responses to my interrogatories I served on them in the rate case. In those interrogatories, FPL admitted they paid only $15,744 in total for all customer owned renewable generation in 2011 (Nelson Interrogatory No.40), mischaracterized meter aggregation as

"conjunctive billing" and therefore opposed it (Nelson Interrogatory No. 41) and opposed changing the Administrative Code rule which prohibits rolling over excess fall power to the following summer rather than cashing it out and then forcing the customer to buy it back next summer at over 3 times the price FPL paid for it. FPL stated its position (and its overall attitude towards net-metered customers) as follows:

> "The current rule already provides a subsidy to net metered customers by allowing them to shift responsibility for fixed costs to other customers. Paying net metered customers for any unused energy credits at the end of the year based on the average avoided cost of generation limits the amount of subsidy to net metered customers. Allowing such customers to continuously roll over such credits would increase the subsidy and FPL would oppose increasing the subsidy already provided." (FPL Answer to Nelson Interrogatory No. 42)

I don't even know what that means. FPL gets peak daytime and summer power from rooftop solar and exchanges off-peak nighttime and winter power for it. FPL denies any payment for "capacity", yet rooftop solar gives them capacity and takes load off of their system. My fear is that what they mean by their answer is that they don't get the 11.5% ROI, that that is the "fixed cost" they are referring to, and somehow that makes the 1700 customers who got about $10 average each, which immediately goes back to FPL for summer peak power and for monthly customer charges, freeloaders. With an attitude like that, I can guarantee you that FPL is never going to be a partner with the people of Florida in moving into a cleaner more renewable energy future and distributed rooftop photovoltaic solar power is never going to get a fair shake.

FPL has, through its parent company, returned 21% annual total shareholder return to its stock holders, even in this bad economic climate, even through the recession. In fact, according to their annual report, they have returned 21% every year for the last ten years, or a total of 210% for the last 10 years. Most of the anti-FPL testimony at the FPL rate case public service hearings consisted of people begging for rates not to be raised and stating how hard it was for many people to afford the necessities of life and how much money FPL shareholders and executives make.

These pleas apparently fell on deaf ears because even though all five FPSC Commissioners heard these pleas hundreds of times, they were perfectly happy to approve rate increases for FPL that will ensure a continued return of 21% per year for FPL shareholders or even better.

I will leave you with excerpts of some of the relevant Florida Statutes below my signature in the form of a postscript.

December 13, 2012

Larry Nelson
312 Roberts Road
Nokomis, FL 34275

ps:

Excerpts of Some Governing Florida Statutes

366.01 - The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose.

366.82 (10) The commission shall also consider the performance of each utility pursuant to ss. 366.80-366.85 and 403.519 when establishing rates for those utilities over which the commission has ratesetting authority.

366.80 Short title.—Sections 366.80-366.85 and 403.519 shall be known and may be cited as the "Florida Energy Efficiency and Conservation Act."

366.81 Legislative findings and intent.—The Legislature finds and declares that it is critical to utilize the most efficient and cost-effective demand-side renewable energy systems and conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens. Reduction in, and control of, the growth rates of electric consumption and of weather-sensitive peak demand are of particular importance.

the Legislature intends that the use of solar energy, renewable energy sources, highly efficient systems, cogeneration, and load-control systems be encouraged.

The Legislature further finds and declares that ss. 366.80-366.85 and 403.519 are to be liberally construed in order to meet the complex problems of reducing and controlling the growth rates of electric consumption and reducing the growth rates of weather-sensitive peak demand; increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use; encouraging further development of demand-side renewable energy systems; and conserving expensive resources, particularly petroleum fuels.

366.03 - All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and reasonable.

366.041 - In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities; and energy conservation and the efficient use of alternative energy resources;

366.05 - In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges . . .

366.06 - . . . the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service . . . In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.

February 22, 2013: I hereby declare and affirm that I have personal knowledge of the matters set forth in the above letter and that I declare the letter, to be treated as a declaration, to be true and correct, under penalty of perjury.

/s/ Larry Nelson

February 22, 2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 22nd day of February 2013, to the following:

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I hereby certify that this Motion, if treated as an Amicus Brief, complies with the font requirement of Florida Rules of Appellate Procedure Rule 9.210(2). The Font used is Times New Roman 14 point.

s/ Larry Nelson

Larry Nelson