State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: June 23, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (C. Keating)
Division of Economic Regulation (Willis)

RE: Docket No. 050045-EI – Petition for rate increase by Florida Power & Light Company.

AGENDA: 7/5/05 – Regular Agenda – Decision Prior to Hearing – Parties May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Baez

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Request that this recommendation immediately precede the recommendation in Docket No. 050078-EI.

FILE NAME AND LOCATION: S:\PSC\GCL\GCO\WP\2005\050045\050045.RCM.DOC

Case Background

On March 22, 2005, Florida Power & Light Company ("FPL") filed a petition for a permanent rate increase to generate $430,198,000 in additional gross annual revenues. FPL asked that its proposed rate increase begin January 1, 1996. In addition, FPL requested approval of a limited scope adjustment to produce additional gross annual revenues of $122,757,000 beginning 30 days following the commercial in-service date of Turkey Point Unit 5 in 2007. FPL's petition is set for a formal, administrative hearing before the Commission beginning August 22, 2005. The Office of Public Counsel, Florida Industrial Power Users Group, Florida Retail Federation, Commercial Group, AARP, Federal Executive Agencies, and the South Florida Hospital and Healthcare Association have intervened in this proceeding.

On April 4, 2005, the Florida Retail Federation ("FRF") filed a pleading entitled "Petition to Intervene, Petition to Conduct General Rate Case, and Request for Hearing of the Florida Retail Federation." FRF's petition to intervene was granted by the Prehearing Officer. On April 25, 2005, FPL filed a motion to dismiss FRF's "Petition to Conduct Rate Case and Request for Hearing." On May 3, 2005, FRF filed a response in opposition to FPL's motion to dismiss.

On May 6, 2005, the South Florida Hospital and Healthcare Association ("SFHHA") and unnamed individual healthcare institutions in FPL's service territory (collectively, "Hospitals") filed a pleading substantially similar to FRF's, entitled "Petition to Intervene, Petition for Conduct of a General Rate Case, and Request for Hearing." The Hospitals' petition to intervene is not opposed. On May 19, 2005, FPL filed a motion to dismiss the Hospitals' "Petition to Conduct Rate Case and Request for Hearing." On May 26, 2005, SFHHA filed a response in opposition to FPL's motion to dismiss.

This recommendation addresses the appropriate disposition of FRF's "Petition to Conduct Rate Case and Request for Hearing" ("FRF Petition") and the Hospitals' substantially similar pleading ("Hospitals' Petition"). The Commission has jurisdiction pursuant to Chapters 120 and 366, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant FPL's motions to dismiss FRF's "Petition to Conduct General Rate Case and Request for Hearing" and the Hospitals' substantially similar petition?

Recommendation: Rather than dismiss, the Commission should deny both Petitions. Although the Petitions filed by FRF and the Hospitals are styled as requests to initiate proceedings, the relief sought by FRF and the Hospitals is purely procedural. The Petitions ask the Commission to conduct rate cases for FPL and suggest that the results of these requested rate cases should become effective at the conclusion of the currently operative rate settlement for FPL. A proceeding to determine the fair, just, and reasonable rates for FPL to implement upon conclusion of the currently operative rate settlement has already been initiated, and FRF and the Hospitals may fully and fairly represent their interests in that proceeding.

What is truly being sought by FRF and the Hospitals are procedural placeholders – in the form of separate but contemporaneous rate proceedings – that would allow either party, in the event it is unsatisfied with a hypothetical stipulation among FPL and other parties to the docket, to press the case to hearing under the established time schedule. The Commission should not provide FRF and the Hospitals such additional process rights beyond the due process rights afforded to all parties. (C. Keating)

Staff Analysis: In support of its Petition, FRF offers the following:

> The FRF also petitions the Florida Public Service Commission to conduct a general investigation (a general rate case) of the rates to be charged by Florida Power & Light Company ("FPL") upon the expiration of the current Stipulation and Settlement entered into in 2002, (footnote omitted) and to conduct a hearing in that case in accordance with Chapters 120 and 366, Florida Statutes. The FRF asks and expects that its requested hearing will be the same hearing that the FRF presently expects the Commission to conduct in this docket pursuant to FPL's petition for a rate increase; if such is not the case, however, then, consistent with the Florida Supreme Court's opinion in South Florida Hospital & Healthcare Ass'n v. Jaber, the FRF asks the Commission to conduct the hearing in approximately the same time frame and to allow the FRF and all other parties to "access and rely on the evidence and testimony" that has been filed and that will be filed in this Docket No. 050045-EI. See South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1214 (Fla. 2004). To be clear, the FRF is separately petitioning for a hearing, in an abundance of caution, to ensure that it does not later find itself in the same position that the South Florida Hospital and Healthcare Association found itself at the end of the 2002 proceedings. As it did in 2002, the FRF stands fully ready to participate in good faith in any negotiations toward resolving this case via another stipulation and settlement.

FRF asserts that it is entitled to a hearing on FPL's rates because the current Stipulation and Settlement by which FPL's rates are governed will expire at the end of this year.

> In support of its Petition, the Hospitals make substantially similar remarks:

> SFHHA further petitions the Florida Public Service Commission . . . to conduct a general investigation (a general rate case) of the rates to be charged by FPL upon the expiration of the Docket No. 001148-EI Stipulation and Settlement, and to conduct a hearing in the case in accordance with Chapters 120 and 366, Florida Statutes. The requested hearing may be the same hearing as is conducted in this docket pursuant to FPL's petition for a rate increase, to the extent such evidentiary hearing is held pursuant to FPL's filing; if such is not the case, however, then consistent with the Florida Supreme Court's opinion in *South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1214 (Fla. 2004)*, a hearing should be held in approximately the same time frame to allow SFHHA and all other parties to "access and rely on the evidence and testimony" that has been filed and that will be filed in this Docket. *See South Florida Hospital & Healthcare Ass'n v. Jaber, supra, 887 So. 2d 1210, 1214 (Fla. 2004).* SFHHA seeks a hearing whether separately or as consolidated, as the Florida Supreme Court in the referenced case stated was necessary.

FPL's Motions to Dismiss

In its Motions to Dismiss, FPL contends that FRF's Petition and the Hospitals' Petition are legally insufficient and should be dismissed. FPL asserts that a party is entitled to a hearing under Sections 120.569 and 120.57, Florida Statutes, only if an agency's proposed action will result in injury-in-fact to that party and if the injury is of a type that the statute authorizing the agency action is designed to prevent. FPL states that while FRF and the Hospitals acknowledge this test, neither party makes allegations suggesting that it suffered or is in immediate danger of suffering any injury at all. FPL states that neither Petition seeks a particular outcome or provides any basis for the Commission to act. Thus, FPL argues that neither FRF nor the Hospitals have a legitimate claim to an "injury-in-fact" that would entitle either party to a hearing at this time.

In addition, FPL asserts that Chapter 366, Florida Statutes, provides no automatic right to a hearing, instead leaving the determination to the Commission whether a hearing is warranted. Further, FPL contends that the Florida Supreme Court's decision in South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1214 (Fla. 2004) ("Jaber") does not provide FRF or the Hospitals with any additional rights in this docket that they otherwise would not have.

Finally, FPL notes that a general rate case for FPL has already been initiated and asserts that FRF and the Hospitals' Petitions unnecessarily complicate this proceeding by requesting a rate case that has already begun. FPL contends that FRF and the Hospitals have whatever rights are afforded them in this proceeding under Chapters 120 and 366, Florida Statutes, and that those parties cannot create rights in themselves by prematurely requesting a hearing on the speculation that a settlement that they do not agree with might occur.

FRF's Response

In its response, FRF asserts that it has standing to initiate a proceeding because: (1) it has standing to intervene in this docket; and (2) the requirements for standing to initiate a proceeding are not different from the standing requirements for intervention. FRF further asserts that the provisions of Chapter 366, Florida Statutes, authorize the Commission to initiate a rate

proceeding "upon request made"[1] and "either upon its own motion or upon complaint"[2] and that proceedings initiated under either of these methods are materially similar. FRF notes that the Commission has, on occasion, initiated general rate cases for public utilities upon complaint by individual customers. FRF states that while such a complaint will generally articulate more definite grounds for the requested relief, FRF believes that the upcoming expiration of the currently operative rate settlement, together with the length of time since FPL's last fully litigated rate case, establishes adequate grounds for FRF's Petition. Finally, FRF asserts that granting its Petition is consistent with administrative efficiency. FRF explains that in the event that other parties settle on terms that FRF finds unreasonable, FRF would be entitled under the Jaber decision, to petition for further rate relief and to presumptively rely upon the record developed up to the point that the other parties settled. FRF states that the hearing would already be scheduled, and it and other parties would be ready to proceed without delay. FRF contends that its Petition "imposes no complication on any part of the case: if the PSC grants FRF's request, it will simply exist within [this docket] to become effective only in the event that the case evolves contrary to FRF's hopes."

Hospitals' Response

In their response, the Hospitals contend that the Court's decision in Jaber entitles the Hospitals to a hearing on FPL's rates, particularly now that the currently operative FPL rate settlement will soon be expiring. The Hospitals state that the Jaber decision entitles them to petition for rate relief at any time. Like FRF, the Hospitals argue that administrative efficiency is best served by granting their Petition. Next, the Hospitals contend that they are authorized by Chapters 120 and 366, Florida Statutes, to request a hearing on FPL's rates. Like FRF, they argue that proceedings initiated "upon request made" under Section 366.06(2), Florida Statutes, are one and the same as proceedings initiated "upon complaint" under Section 366.07, Florida Statutes. The Hospitals assert that the upcoming expiration of the currently operative rate settlement, together with the length of time since FPL's last fully litigated rate case, establishes adequate grounds for their Petition.

Staff Analysis

For the reasons set forth below, staff recommends that the Commission deny FRF's Petition and the Hospitals' Petition.

Although FRF and the Hospitals' Petitions are styled as requests to initiate proceedings, the relief sought by FRF and the Hospitals is purely procedural. Neither petition requests any substantive relief. Neither FRF nor the Hospitals allege that FPL's rates are unfair, unjust, unreasonable, or otherwise inappropriate. Instead, the Petitions ask the Commission to conduct a rate case for FPL even though both parties recognize that the Commission is already conducting a rate case for FPL. Further, the Petitions suggest that the results of their requested rate cases should become effective at the conclusion of the currently operative rate settlement for FPL, just as FPL asked in its petition that initiated this proceeding.

[1] Section 366.06(2), Florida Statutes.
[2] Section 366.07, Florida Statutes.

What is truly being sought by FRF and the Hospitals are procedural placeholders that would allow either party, in the event it is unsatisfied with a hypothetical stipulation among FPL and other parties to the docket, to press the case to hearing under the established time schedule. FRF's Petition explicitly states this intent. The Hospitals' Petition, which followed FRF's Petition and is otherwise substantially similar to FRF's Petition, is silent as to why it seeks a separate proceeding. From the context of the Hospitals' Petition and its response to FPL's motion to dismiss, the Hospitals' intent appears to be the same as that expressed by FRF.

FRF and the Hospitals attempt to use the Florida Supreme Court's opinion in South Florida Hospital & Healthcare Ass'n v. Jaber (Jaber) as support for the procedural relief sought through their Petitions. Their reliance on this case is misplaced. The Court's opinion in Jaber arose from a Commission order approving a Stipulation and Settlement resolving FPL's last rate case. SFHHA had not signed the Stipulation and Settlement and appealed the Commission's order, arguing, among other things, that the Commission's approval of the settlement in the absence of an evidentiary hearing violated SFHHA's due process and statutory rights. The Court rejected SFHHA's arguments, emphasizing that SFHHA was in the same posture as any other non-signatory to the settlement and could have initiated a subsequent proceeding before the Commission to seek an even greater rate reduction than the reduction set forth in the settlement:

> [W]e determine that in the instant context, SFHHA should not be precluded or estopped from seeking a reduction in the rates provided for in the settlement agreement approved in April 2002. SFHHA is not a signatory to the settlement agreement, has no rights or liabilities thereunder, and cannot be precluded by its terms from petitioning for an even greater rate decrease. Moreover, we resolve that in any such proceeding, SFHHA and the PSC may presumptively access and rely on the evidence and testimony compiled in the proceeding below, subject to any confidentiality or use restrictions governing the initial introduction of that evidence.

The Court's opinion in Jaber does not contemplate the novel procedural arrangement sought through FRF and SFHHA's Petitions. Instead, the Court's opinion suggests the possibility of a separate petition seeking specific relief (e.g., a rate reduction) upon conclusion of an existing rate case by non-unanimous settlement. As noted above, neither FRF nor the Hospitals have alleged in their Petitions that FPL's rates are unfair, unjust, unreasonable, or otherwise require any specific adjustment.[3] Further, the Petitions hinge upon the *possibility* that this docket may be resolved through a settlement that it may not wish to accept. The Court's opinion in Jaber does not create a separate cause of action based on such speculation, nor does it suggest or endorse the type of shadow proceedings sought by FRF and the Hospitals.[4]

[3] As noted above, neither FRF nor the Hospitals seek any change in rates prior to the conclusion of the currently operative FPL rate settlement that was the subject of the Jaber decision. FRF was a signatory to that settlement and is thus precluded from seeking a change in rates to be effective prior to the conclusion of the settlement. The Hospitals, who brought the appeal which led to the Jaber decision, were not a signatory and thus could seek a change in rates prior to the conclusion of the settlement.

[4] Oddly, the relief sought by FRF and the Hospitals attempts to take *dicta* from the Jaber decision to undermine the main holding in Jaber which affirmed the Commission's approval of a non-unanimous settlement agreement. Under the procedural arrangement sought by FRF and the Hospitals, the Commission, even if presented with a proposed

FRF and the Hospitals have intervened in this docket to represent the interests of their members who are FPL ratepayers. Neither has explained why a separate, shadow proceeding is required to fully and fairly represent those interests. It appears to staff that the only purpose for FRF and the Hospitals' Petitions is to attempt to gain, in the currently ongoing rate case proceeding, some additional process right that would serve to give those parties more control over the processing of the case.[5] The Jaber decision does not create such additional process rights for intervenors in an established, ongoing rate proceeding; instead, it simply describes the rights of parties who are unhappy with a non-unanimous settlement that is approved by the Commission at the conclusion of such a proceeding.

In the event that the Commission approves a non-unanimous settlement in this docket, as it did in FPL's last rate case, and any party who does not sign the settlement wishes to pursue a rate decrease, the Jaber decision makes it clear that such a party may subsequently petition for a rate decrease. At that point, a cause of action may be established upon which the Commission may proceed and, as the Court stated, the Commission and any parties to the new proceeding could presumably access and rely on the evidence and testimony compiled in the original proceeding.

In conclusion, staff recommends that the Commission deny FRF's Petition and the Hospitals' Petition. A proceeding to determine the fair, just, and reasonable rates for FPL to implement upon conclusion of the currently operative rate settlement has already been initiated, and FRF and the Hospitals may fully and fairly represent their interests in that proceeding without the need to create layers of shadow proceedings that provide FRF and the Hospitals some additional process right beyond the due process rights afforded to all parties.

---

settlement that it believed to be reasonable, would be forced to proceed to hearing as scheduled simply because FRF or the Hospitals did not agree with the settlement. The Jaber decision allowed the Commission to approve a non-unanimous settlement and clarified that non-signatories, *at that point*, may choose to petition for different relief. The burden of proof would presumably shift to the non-signatory petitioner to support whatever rate relief it may request. Thus, the procedure envisioned in the Petitions of FRF and the Hospitals is not consistent with the Jaber decision because it effectively eliminates the Commission's ability to approve a non-unanimous settlement and it effectively removes the burden on the non-signatory petitioner to support any petition made subsequent to the Commission's approval of a non-unanimous settlement.

[5] If the Petitions are granted, staff would not be surprised if other intervenors in this rate case files a similar petition to obtain the same additional process rights requested by FRF and the Hospitals. Further, staff can envision a scenario in which such petitions would become commonplace in rate cases and perhaps other Commission proceedings.

Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open. (C. Keating)

Staff Analysis: This docket should remain open to allow the Commission to process FPL's pending rate increase request.