

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 18, 2009

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Bennett, Brown, Hartman, Williams)
Division of Economic Regulation (Slemkewicz)

RE: Docket No. 080677-EI – Petition for increase in rates by Florida Power & Light Company.

AGENDA: 06/30/09 – Regular Agenda – Decision Prior to Hearing - Parties May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\080677.RCM.DOC

Case Background

Pursuant to Rule 25-6.140, Florida Administrative Code (F.A.C.), by letter dated November 17, 2008, Florida Power & Light Company (FPL) notified the Commission that FPL intended to seek a base rate increase effective January 2010. The letter also indicated that FPL proposed a 2010 test year, and FPL indicated that it would be filing its petition in March of 2009. As a result of that letter, Docket No. 080677-EI was opened to consider FPL's rate increase. A number of parties have intervened in this docket. On March 16, 2009, South Florida Hospital and Healthcare Association (SFHHA) filed its petition to intervene which was granted on April 9, 2009.¹ On March 18, 2009, FPL filed its Petition for Rate Increase, testimony in support of its

¹ Order No. PSC-09-0216-PCO-EI

petition, and its Minimum Filing Requirements (MFR) for a base rate proceeding. On March 20, 2009, the Prehearing Officer issued an Order Establishing Procedure (OEP).² Also on March 20, 2009, SFHHA filed a Motion for Establishing Discovery Procedures in this docket. On the same day, SFHHA filed a separate Petition for Conduct of a General Rate Case and Request for Hearing (SFHHA Petition). SFHHA's Petition was placed in the docket already opened by the Commission to address FPL's petition.

SFHHA has intervened in prior FPL rate proceedings. In 2001, in Docket No. 001148-EI,³ and in 2005, in Docket No. 050045-EI,⁴ SFHHA participated as a party intervenor. In 2001 SFHHA also filed a petition for interim rate reduction which the Commission dismissed.⁵ SFHHA continued its participation in Docket No. 001148-EI as a party intervenor. The parties entered into settlement negotiations regarding FPL's rates and SFHHA participated in those settlement negotiations. Ultimately, all of the parties, except SFHHA entered into the 2001 FPL Stipulation and Settlement Agreement. The parties asked the Commission to approve the Stipulation and Settlement Agreement. After hearing from all parties, including SFHHA who opposed the stipulation, the Commission approved the 2001 FPL Stipulation and Settlement Agreement.⁶ SFHHA appealed the Commission's Order. The Supreme Court affirmed the Commission's Order approving a non-unanimous stipulation in South Florida Hospital and Healthcare Association v. Jaber.⁷

In Docket No. 050045-EI, SFHHA again participated as a party intervenor. SFHHA filed a petition in Docket No. 050045-EI, requesting a separate base rate proceeding. FPL filed a motion to dismiss the petition. SFHHA withdrew its petition in Docket No. 050045-EI, and with several other intervenors, jointly filed a separate petition to reduce base rates which was assigned a different docket number.⁸ The petitioners in Docket No. 050494-EI filed a Motion to Consolidate it with Docket No. 050045-EI, the 2005 FPL rate case. FPL filed a Motion to Dismiss. Prior to the Commission considering the multiple pleadings, all parties to Docket No. 050045-EI entered into a Stipulation and Settlement Agreement which the Commission approved (2005 FPL Stipulation and Settlement Agreement).⁹

The Commission has jurisdiction pursuant to Sections 366.04, 366.05, 366.06, 366.07, and 366.076, Florida Statutes (F.S.)

² Order No. PSC-09-0159-PCO-EI

³ In re: Review of Florida Power & Light Company's proposed merger with Entergy Corporation, the formation of a Florida transmission company, and their effect on FPL's retail rates.

⁴ In re: Petition for rate increase by Florida Power & Light Company.

⁵ Order No. PSC-01-1930-PCO-EI, issued September 25, 2001, in Docket Nos. 010944-EI, In re: Complaint of South Florida Hospital and Healthcare Association, et al. against Florida Power & Light Company, request for expeditious relief and request for interim rate procedures with rates subject to bond and 001148-EI (See footnote 3 above)

⁶ Order No. PSC-02-0501-AS-EI, issued April 11, 2002, in Docket No. 001148-EI.

⁷ South Florida Hospital and Healthcare Association v. Jaber, 887 So. 2d 1210 (Fla. 2004)

⁸ Docket No. 050494-EI, In re: Joint Complaint and Petition of the Citizens of the State of Florida, Florida Retail Federation, AARP, Federal Executive Agencies, South Florida Hospital and Healthcare Association, and Florida Industrial Power Users Group for a Decrease in the Rates and Charges of Florida Power & Light Company.

⁹ Order No. PSC-05-0902-S-EI, issued September 14, 2005, in Docket No. 050045-EI, In re: Petition for rate increase by Florida Power & Light Company.

Discussion of Issues

Issue 1: Should the Commission grant South Florida Hospital and Healthcare Association's Request for a Base Rate Proceeding for Florida Power & Light Company?

Recommendation: No. A second FPL Base Rate Proceeding which shadows this docket is administratively inefficient. SFHHA's concerns as expressed in its petition are protected through the conduct of the current rate proceeding if it proceeds to hearing, through the current stipulation if FPL withdraws its petition, and through its ability to petition the Commission for a separate rate proceeding in the event the Commission approves a settlement agreement to which SFHHA does not become a signatory. (Bennett)

Staff Analysis:

Parties' Arguments

SFHHA filed its Petition for Conduct of a General Rate Case and Request for Hearing knowing that FPL had previously filed its own Petition for Increase in Base Rates, and that Docket No. 080677-EI (this docket) had been opened by the Commission to consider FPL's petition. SFHHA asserts that it should be permitted to pursue its requested general rate case and hearing because as a mere intervenor to this docket, it will not be able to vindicate all of its rights and interests. SFHHA claims that while it is entitled to a general rate case and a hearing to determine the specific rate as a matter of statutory right under the Administrative Procedures Act, as an intervenor, it would not have an independent right to pursue this case through to a hearing and decision by the Commission. SFHHA states that as an intervenor, it may only pursue the case as long as FPL pursues it, but if FPL withdraws its petition, the case could be terminated without an opportunity for SFHHA to pursue its claim for just and reasonable rates. SFHHA concludes that its petition is necessary to protect its members' substantial interests in having the Commission fix and determine fair, just, and reasonable rates for FPL to implement on January 1, 2010.

SFHHA asserts that Chapter 366.06(2), F.S., provides that the Commission may consider "upon request made" whether the rates charged by a public utility are just, reasonable, and not unjustly discriminatory. According to SFHHA, Section 366.07, F.S., provides that the Commission is to conduct hearings on a utility's rates "either upon its own motion or upon complaint." SFHHA asserts that whether proceedings are initiated "upon request made" or "upon complaint," they both necessitate the Commission conduct a formal proceeding and make decisions involving disputed issues of material fact to ensure that a public utility's rates are just, reasonable and not unjustly discriminatory. SFHHA asserts that under Section 120.569, F.S., a right to a hearing attaches when a party's interests are subject to determination by agency action and when the agency's decision involves disputed issues of material fact. SFHHA claims that Rule 28-106.201, F.A.C., provides that persons whose substantial interests are subject to determination by an agency proceeding are entitled to petition the agency for relief. SFHHA states that a petition is the appropriate vehicle by which a party may ask an agency to conduct an evidentiary proceeding where disputed issues of material fact are involved.

SFHHA states that the requested hearing may be the same hearing as conducted in FPL's rate case docket to the extent such evidentiary hearing is held pursuant to FPL's filing. SFHHA requests that to the extent the hearing scheduled in this docket is not an evidentiary hearing held pursuant to FPL's filing, that the Commission hold a hearing 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 will be filed in this docket, South Florida Hospital and Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1214 (Fla. 2004)."

SFHHA also asserts that if FPL's proceeding settles but does not result in rates that SFHHA believes to be just and reasonable, SFHHA's petition will allow SFHHA to proceed to hearing. SFHHA argues that the Florida Supreme Court's decision in Jaber makes it clear that SFHHA is entitled to access and can rely upon the testimony compiled in FPL's current docket. SFHHA concludes that granting its petition and keeping the hearing in the instant docket on schedule will be administratively efficient, thereby reducing costs and serving the public interest.

SFHHA claims that Rule 28-106.201, F.A.C., provides that persons whose substantial interests are subject to determination by an agency proceeding are entitled to petition the agency for relief. SFHHA states that a petition is the appropriate vehicle by which a party may ask an agency to conduct an evidentiary proceeding where disputed issues of material fact are involved. SFHHA concludes that pursuant to Rule 28-106.201, F.A.C., Chapters 120 and 366, F.S., and the Jaber case, there is sufficient basis for SFHHA to have standing to petition for a general rate case and to request a hearing regarding FPL's rates and charges.

On April 13, 2009, FPL filed a response to SFHHA's Petition. In its response, FPL states SFHHA is requesting a rate proceeding that has already begun. FPL asserts that it has already initiated a general rate case and the Commission has already scheduled a formal hearing in this docket. FPL claims that SFHHA is unclear about whether or how the Jaber case applies to FPL's Petition. FPL contends that it does not believe that the Jaber case means that SFHHA's Petition for General Rate Case and Request for Hearing would secure for SFHHA any additional rights than what SFHHA already has.

According to FPL, its proceeding was initiated well in advance of SFHHA's March 20, 2009, Petition. FPL asserts that the matter was docketed November 11, 2008, when FPL filed its test year notification letter. The test year letter was followed with a March 18, 2009, filing by FPL of its Petition for a Permanent Increase in Its Base Rates and Miscellaneous Service Charges. FPL argues that SFHHA's Petition acknowledges SFHHA's requested status as an intervenor in this docket. According to FPL, under the express terms of Rule 25-22.039, F.A.C., which governs intervention, SFHHA takes the case as it finds it. FPL asserts that the Commission's rule on intervention clearly does not empower an intervenor to retroactively initiate an on-going proceeding in order to secure the ability to pursue a case even if the other parties agree to a stipulation and settlement.

Staff Analysis

In staff's opinion, the petition of SFHHA is a purely procedural placeholder for events that have not and may not happen in this docket. The placeholder would allow SFHHA to press the case to hearing under the established time schedule, in the event SFHHA is unsatisfied with either a hypothetical (1) withdrawal by FPL of its rate petition case or (2) stipulation among FPL and all other parties except SFHHA. Staff believes SFHHA's petition is premature because neither event has occurred. Further, staff believes that SFHHA's petition does not set forth sufficient grounds to establish an independent rate proceeding if FPL withdraws its petition. Staff believes that the Jaber case does not permit SFHHA to garner more rights in this docket than it already has as an intervenor.

Staff believes that SFHHA's Petition for Base Rate Proceeding does not present an actual case for the Commission to consider. SFHHA asserts that the 2005 FPL Settlement and Stipulation will soon expire and new rates will be established. But if FPL were to withdraw its 2009 Petition for Increase in Base Rates, there would be no new rates. The 2005 FPL Settlement and Stipulation has an evergreen provision which states that it remains in effect until either FPL or another party petitions the Commission for a rate adjustment pursuant to Chapter 366. Rule 28-106.201, F.A.C., requires a petitioner to state the facts which require the Commission to reverse or modify its decision. Nowhere in its petition does SFHHA complain that the rates established under the 2005 FPL Stipulation and Settlement are unjust, unfair, or unreasonable. Rule 28-106.201, F.A.C., also requires a petitioner to state precisely the action the petitioner wishes the agency to take. Nowhere in its petition does SFHHA request that the Commission change the rates established under the order approving the 2005 FPL Stipulation and Settlement. Accordingly, staff believes that SFHHA's Petition does not meet the requirements of Rule 28-106.201, F.A.C., to seek a revision to the order approving the 2005 FPL Stipulation and Settlement.

SFHHA also expressed concern that FPL and the other parties might settle the current rate case without SFHHA being a signatory to the settlement. This is a hypothetical situation; no stipulation or settlement has been presented to the Commission in this proceeding. SFHHA argues that the Jaber case supports SFHHA filing a separate petition to protect its interest should the Commission approve a non-unanimous settlement. According to SFHHA, if all the parties but SFHHA were to settle the rate case, SFHHA would still be able to continue to hearing.

SFHHA's interpretation of the Court's decision in Jaber conflicts with the Court's holding. In Jaber, the Florida Supreme Court affirmed the Commission's approval of a non-unanimous the 2001 FPL Stipulation and Settlement agreement. SFHHA argued that its procedural due process and statutory rights to a hearing under Chapter 366, F.S., had been violated by the Commission's approval of the 2001 FPL Stipulation and Settlement Agreement. SFHHA argued that the Commission must proceed to a full evidentiary hearing if it is presented with a non-unanimous settlement agreement. The Florida Supreme Court disagreed with SFHHA, and in Jaber, the Court held that the Commission did not violate SFHHA's due process or statutory rights by approving the negotiated settlement agreement. In so deciding, the Court stated that "we emphasize that SFHHA is in the same posture as any other non-signatory to the

settlement reached below, and may initiate a separate proceeding before the PSC to challenge FPL's rates." Jaber at 1213. The Court acknowledged that if the Commission approves a settlement and SFHHA is not a signatory, then:

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 reduction. 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.

Jaber at 1214.

As noted in the case background, SFHHA filed a similar petition in Docket No. 050045-EI. Commission staff prepared a Memorandum recommending the Commission dismiss SFHHA's 2005 Petition for Base Rate Proceeding. As staff noted this 2005 recommendation, SFHHA's use of dicta from Jaber would, if applied, undermine the main holding in Jaber. In its 2005 recommendation, staff noted that the petitioners (SFHHA and Florida Retail Federation (FRF) in the 2005 docket):

attempt 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 (SFHHA), the Commission, even if presented with a proposed 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 of the non-signatory petitioner to support any petition made subsequent to the Commission's approval of a non-unanimous settlement.¹⁰

In staff's opinion, the granting of SFHHA's "simultaneous rate proceeding" to set new rates for FPL is administratively inefficient. SFHHA is an intervenor to the FPL rate proceeding and has actively participated in discovery. Because of Jaber, FPL, all intervenors, and the Commission are aware that if the case settles and any party is not a signatory to the settlement, a second proceeding may be initiated, if warranted, using the same evidence and testimony compiled in the first proceeding. With these safeguards in place for each party, staff is of the

¹⁰ Staff's recommendation not cited because underlying petitions were withdrawn.

opinion that it is administratively inefficient for the clerk to open a second docket for SFHHA's petition, assign a prehearing officer and staff, and then consolidate the dockets when the ultimate result will be the same.

Staff has reached this conclusion, in part, based upon a review of the history of SFHHA's participation in FPL's prior rate proceeding in Docket Nos. 001148-EI and 050045-EI. As the history of the rate cases indicate, there was a significant amount of party and staff time spent on procedural filings and motions for the Commission to conduct shadow proceedings initiated by intervenors to the docketed rate case. In staff's opinion, the shadow proceedings would be unnecessarily duplicative and would be an inefficient use of administrative resources if SFHHA's Petition is allowed to go forward.

Having a second FPL Base Rate proceeding which shadows this docket is administratively inefficient. SFHHA's concerns are protected through the conduct of the current rate proceeding if it proceeds to hearing, through the current stipulation if FPL withdraws its petition, and through its ability to petition the Commission for a separate rate proceeding in the event the Commission approves a settlement agreement to which SFHHA does not become a signatory. Therefore, SFHHA's petition should be denied.

Docket No. 080677-EI

Date: June 18, 2009

Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open to consider Florida Power & Light's Petition for Increase in Base Rates. (Bennett)

Staff Analysis: This docket should remain open to consider Florida Power & Light's Petition for Increase in Base Rates.