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Matthew M. Childs, P.A.

January 15, 1999

Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
4750 Esplanade Way, Room 110
Tallahassee, FL 32399

RE: DOCKET NO. 981390-EI

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen(15) copies of Florida Power & Light Company's Motion to Dismiss in the above referenced docket.

Very truly yours,



Matthew M. Childs, P.A.

MMC:ml
Enclosure
cc: All Parties of Record

- ACK
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- OTH [Signature]

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Investigation Into the) DOCKET NO. 981390-EI
Equity Ratio and Return on Equity) DATE: JANUARY 15, 1999
Of Florida Power & Light Company)
_____)

MOTION TO DISMISS

Florida Power & Light Company ("FPL") hereby files this its Motion to Dismiss the Petitions on Proposed Agency Action in this docket by: (1) The Florida Industrial Power User's Group; (2) The Coalition for Equitable Rates; (3) The Florida Alliance for Lower Electric Rates Today and Georgia Pacific Corporation; and (4) Tropicana Products, Inc. As is discussed more fully below the basis for the dismissal of the aforementioned petitions include the failure to plead and establish a basis for standing as an association; the failure to plead and allege that the petitioners substantial interests will be affected by the Commission's action being protested, that is, Order No. PSC-98-1748-FOF-EI; the failure to meet the two-pronged test for standing under Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981); and AmeriSteel Corporation v. Clark, 691 So. 2d 473 (Fla. 1997); the lack of a basis to challenge the acceptance by the Commission of FPL's agreement to reduce its authorized return on

equity and cap its adjusted ratio and the lack of any adverse impact on the interests of the Petitioner's from those actions. Moreover, the relief requested is not proper and hearings should not be held for the purposes requested. In support of this Motion, FPL states:

1. Introduction

The history and current status of this docket is significant. The docket was initiated on the Commission's own motion and, its scope is clearly indicated by the style of the docket:

"In re: Investigation Into The Equity Ratio
And Return On Equity Of Florida Power & Light
Company."

No party has petitioned to adjust FPL's rates or to adjust its authorized return on equity or its equity ratio. Instead, the docket was initiated, as an investigation, by the Commission. No entity, other than Tropicana Products, Inc., had been authorized to intervene in the proceeding at the time the Commission issued its Order No. PSC-98-1748-FOF-EI. The Commission was not requested to and did not vote to hold hearings on FPL's return on equity, its equity ratio or any other matter. Moreover, the Commission did not vote to change FPL's return on equity or its equity ratio, instead the Order clearly accepted FPL's offer to take certain action to its detriment as a part of a settlement proposal.

In the proposal, a copy of which is attached hereto together with the Commission's Order, FPL agreed:

(1)...to lower its authorized return on equity mid-point from 12% to 11.2% (range: 10.2%-12.2%) for all regulatory purposes on a perspective basis.;

(2)...cap its adjusted equity ratio at 55.83% until December 31, 2000 as included in FPL's projected 1998 rate of return report for surveillance purposes.;

(3)... amortize \$140 million dollars per year through December 31, 2000 as a fixed amount in addition to the expense recorded under the current plan....

This docket is not a rate case. The Commission's action with respect to return on equity and equity ratio have not increased FPL's rates or for that matter even provided a basis for upward pressure on FPL's rates. Instead, these actions have the opposite effect as is clearly reflected by the findings of Order No. PSC-98-1748-FOF-EI.

2. Failure to Plead "Interest" Sufficient to Support Protest

As previously noted, only one entity has intervened in this docket. In order to support a "protest on proposed agency action," a person must establish that it has the requisite interest to support intervention in the docket and, the petition filed with the Commission must conform to the requirements of Uniform Rule 28-106.201. FPL submits that the Petitions on Proposed Agency Action fail to meet the standards for intervention as addressed by Uniform Rule 28-106.205, Fla. Admin. Code and the tests for standing set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981) and

AmeriSteel Corporation v. Clark, 691 So. 2d 473 (Fla. 1997). In addition, the Petitions on Proposed Agency Action, in general, fail to explain "how the petitioners substantial interests will be affected by Order No. PSC-98-1748-POF-EI." For instance, both Florida Industrial Power Users Group and Tropicana Products, Inc. merely allege in paragraph 5 of each respective petition that:

...the Commission's decision in this matter will adversely affect [Tropicana's or FIPUG's] substantial interests."

FPL's submits that this is opaque and that it no way complies with the requirement that there be an explanation of how substantial interests will be affected as set forth by Rule 28-106.201 (2) (b). It is apparent that by failing to even explain the impact of the Order being challenged that the standards of AgriCo, supra, are not addressed at all by Petitioners.

The petitions of the Coalition for Equitable Rates and the Florida Alliance for Lower Electric Rates Today are also deficient in failing to meet the requirements for standing as herein outlined. For instance, the petition by the Florida Alliance without support, explanation or authority, simply presumes or, hopes the reader will presume, that this docket and the Commission's action in this docket is a rate proceeding or was intended to examine the extent of a charge in rates. Thus, the petition of Florida Alliance in paragraphs 3 and 4 asserts that the Commission's action "...denies [ALERT's members /or Georgia-

Pacific] an electric base rate reduction and deny's [it /or them] a refund for amounts overcharged for FPL in the past." It is obvious that this is not a rate case proceeding. It is also obvious that none of the predicates necessary for establishing a rate proceeding have been initiated.

The petition filed by the Coalition engages in a similar but unstated "begging of the question" as does that of the Florida Alliance. Thus, in paragraphs 14 and 15, the Coalition asserts that "...it [the Order being challenged] would not provide rate relief to ratepayers, such as the Coalition and its members" and that..."the Order under challenge has the effect of a rate increase from amounts which would otherwise be paid to FPL." The Commission's Order does not authorize or change rates for Florida Power & Light Company and neither the Order nor the Docket was intended to. Therefore, the Order cannot have the effect of a rate increase. Moreover, the Order did not do or address what the Coalition suggests it did.

If the Coalition or any Protestant desires to pursue a rate proceeding and has the adequate interest and can make the necessary allegations, then it is certainly within its legal right to petition for a change in rates. But as to the Coalition and the other persons filing protests of the Commission's Order in this proceeding, it is not proper to "bootstrap" themselves into a rate proceeding by protesting a Commission Order which did not change

rates and did not increase either the allowed return on equity or equity ratio.

3. Failure to Establish a Basis to Participate as an Association

The attempts by the Florida Industrial Power Users Group (FIPUG), the Florida Alliance for Lower Electric Rates Today (ALERT) and the Coalition for Equitable Rates (the Coalition) to establish a basis for appearing as an association on behalf of their members are deficient. A series of cases beginning with Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982) and including the Farmworker Rights Organization v. Department of Health and Rehabilitative Services, 417 So. 2d 753 (Fla. 1st DCA 1982) and Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. App. 1 Dist. 1992) established the showings necessary where the party seeking to demonstrate that it is substantially affected is an association. The showings required where the party is an association are that: (a) a substantial number of its members, although not necessarily a majority, are substantially affected, (b) the subject matter is within the association's general scope of interest and activity, and (c) the relief requested is of a type appropriate for the association on behalf of its members. See Florida Home Builders Association v. Department of Labor and Employment Security, supra.

FPL is familiar with participation by FIPUG in proceedings before the Commission. However, in this present proceeding, FPL submits that FIPUG's petition has not made the necessary showing to justify its participation as an association on behalf of its members. It identifies none of those members and it identifies none of the members that have agreed to be represented in this proceeding by FIPUG.

The petition by ALERT is in a different category. Not only does ALERT fail to make allegations sufficient to support its participation as an association but also, on information and belief, FPL submits that a substantial number of ALERT members are not customers of Florida Power & Light Company. Moreover, on information and belief, it appears that at least one member of ALERT was never asked about participation in this proceeding and therefore certainly did not agree to participation as a member of ALERT or seek to have participation pursued on its behalf. ALERT totally fails to meet the standards of participation for an association.

The petition by the Coalition is similarly deficient in meeting the pleading standards for participation as an association. Moreover, it appears in part, to attempt to characterize itself as an "association of associations." FPL submits that this extended "derivative interest" is inadequate. In paragraph 1 of its petition "representative examples" of entities within the Coalition

are identified as being the Florida Health Care Association, the Florida Retail Federation and the Florida Hotel and Motel Association. None of these entities are even customers of Florida Power & Light Company. No other information is provided by the Coalition.

FPL submits that the petitions have not established the appropriate basis for the associations to participate in this proceeding as they seek to do. They have not pled that the subject matter is within the general scope of the interest and activity of the association or that the relief requested is appropriate for the association to receive on behalf of its members. Therefore, the petitions should be dismissed

4. The Substantial Interests of Protestants Are Not Affected

The substantial interests of the Protestants and, the substantial interest of their members where appropriate, are not adversely affected by the Order being protested in this docket.

Florida Power & Light Company submitted a proposed settlement to the Commission in the Commission's investigation docket. Certainly the Commission has the authority to independently monitor the performance and actions of utilities subject to its jurisdiction and to consider whether it is appropriate for the Commission on its own behalf and on its own motion to initiate formal proceedings. FPL submits that this docket involved just

such an exercise of authority by the Commission. No entity independent of the Commission petitioned for any relief much less for a change in the rates and charges of Florida Power & Light Company. Florida Power & Light Company's proposal was in the nature of a settlement. Its acceptance should not give rise to a complaint of an adverse impact on substantial interests. Moreover, three aspects of that proposal which are challenged by the Protestants operate to the betterment of the position of all FPL retail customers. These included the reduction in the return on equity, the cap on the adjusted equity ratio, and the minimum amortization amount committed to by Florida Power & Light Company. Amortizations during 1999 were authorized by the Commission previously pursuant to its Order No. PSC-98-0027-FOF-EI entered in Docket No. 970410-EI on January 5, 1998. The amortizations in 1999 pursuant to that Order, would proceed independent of the Order being protested herein.

Recognizing that the Commission was appropriately acting pursuant to its authority and that it accepted a settlement from FPL in that regard, FPL submits that it is inappropriate and impermissible for petitioners to maintain that their substantial interests have been affected because "something" else "may have been, could have been or should have been" done.

Most significantly, each of the protests filed in this docket improperly seeks to bootstrap the return on equity and equity ratio

as issues to be independently tried in this docket. Thus, the petition by the Coalition identifies as disputed issues of material fact:

- a. whether a more reasonable return on equity should be imposed upon FPL by PSC;
- b. whether more reasonable equity ratio should be imposed upon FPL by PSC;
- c. whether FPL's ratepayers Are[sic] entitled to immediate rate relief...

The petition filed by FIPUG similarly seeks to identify as a disputed of material fact:

- d. whether the return on equity (ROE) set in the PAA is reasonable given current facts and circumstances;
- e. whether FPL's equity ratio is reasonable given current facts and circumstances;
- f. whether is it reasonable to treat FPL's purchase power obligations as debt in the regulatory context.

FIPUG and the other parties expand further their suggestions and requests for hearings addressing these issues. The issues these parties seek to raise for hearing and the relief requested are totally inappropriate.

Quite clearly, the Commission's acceptance of FPL's proposed settlement reduced the return on equity, it capped or restricted the amount of equity that FPL could have in its capital structure when reviewing rates and it imposed obligation on FPL to amortize

a minimum amount of at least \$140 million dollars annually. No protest identifies how the Commission action of accepting these portions of the settlement adversely affected the interest or substantial interest of anyone other than FPL. In addition, Order being challenged specifically finds as follows:

"FPL's proposed settlement provides a reasonable resolution of the issues raised in this docket. We believe that FPL's proposal will create substantial benefits for its customers and represents a vast improvement over the status quo. For these reasons, we find that FPL's proposed settlement should be approved."

The Protests in this docket do not challenge these findings. Petitioners cannot maintain that there has been an adverse impact on their substantial interest and, as has been addressed elsewhere in this Motion, there can be no adverse impact.

Rule 28-106.201, Fla. Admin. Code, in subsection (2)(d), calls for the petition to contain "a statement of all disputed issues of material fact." FPL submits that this is not an invitation to identify as a material fact matters which are not material to the action taken by the agency. Therefore, the attempts by the petitioners to have this proceeding initiated to address return on equity and the equity ratio for Florida Power & Light Company are inappropriate and should be denied.

Although any person having sufficient interest may seek to

initiate a rate proceeding it is not proper to permit these rate case issues to be bootstrapped into a matter for consideration in connection with a protest of a proposed agency action order which does not set rates for Florida Power & Light Company.

It is fundamental that the Commission's decision establishing FPL's rates and charges are final and that the Commission's jurisdiction to set rates extends only to prospective rate determinations. City of Miami v. Public Service Commission, 208 So. 2d 249 (Fla. 1968); and Richter v. Florida Power Corporation, 366 So. 2d 798 (Fla. 1979). It is clear that this presumption of validity can only be overcome after an appropriate proceeding before the Commission. Here, the Commission accepted FPL's offer to reduce the return on equity it is entitled to receive and to cap the adjusted equity ratio. This action did not and cannot harm the Protestants herein. Moreover, the return on equity and equity ratio was not changed so as to increase rates and charges and there was no underlying issue as to that effect in the proceeding before the Commission. There is therefore no basis to seek to raise these matters as issues to be determined by the Commission now.

FPL has maintained in the past before this Commission that an Order by the Commission authorizing amortizations such as are addressed herein does not adversely affect the substantial interest of an FPL customer. Although FPL continues to maintain that position, it is aware of the Commission's ruling which resulted in

the entry of Order PSC-98-0027-FOF-EI on January 5, 1998. The proceeding that led to the entry of that order did not involve consideration of equity related issues for Florida Power & Light Company.

WHEREFORE, for the reasons herein stated, Florida Power & Light Company respectfully requests that the petitions on proposed agency action be dismissed.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP
Suite 601
215 South Monroe Street
Tallahassee, FL 32301
Attorneys for Florida Power
& Light Company

By: _____
Matthew M. Childs, P.A.

CERTIFICATE OF SERVICE
DOCKET NO. 981390-EI

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Motion to Dismiss have been furnished by Hand Delivery (*), or U.S. Mail this 15th day of January, 1999, to the following:

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