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ORIGINAL

IN THE SUPREME COURT OF FLORIDA
Case No. SC02-1023

On Appeal From a Final Order of
The Florida Public Service Commission

SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION, et al.

Appellant,

v.

LILA A. JABER, et al.

Appellees

ANSWER BRIEF OF FLORIDA POWER & LIGHT COMPANY

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STATEMENT OF THE CASE AND OF THE FACTS

The Answer Briefs of the Office of Public Counsel ("Public Counsel") and the Florida Public Service Commission ("FPSC") contain comprehensive statements of the facts ("Public Counsel's Statement" and "FPSC's Statement"), which set forth in detail the history of the FPSC rate-review proceeding that the Appellants (the "SFHA") have appealed. To avoid repetition, Florida Power & Light Company ("FPL") adopts and incorporates by reference Public Counsel's Statement and the FPSC's Statement.

With Public Counsel's Statement and the FPSC's Statement as a foundation, FPL will focus on two elements of this appeal that it believes require particular attention. First, FPL will highlight what the SFHA's Initial Brief attempts to obscure: that the rate-review proceeding was initiated by the FPSC, for purposes clearly articulated by the FPSC, following FPSC procedures suited to those purposes, and resolved by the FPSC once its purposes were met, in a manner that the FPSC had always contemplated. Second, FPL will demonstrate that, far from being adversely affected, the SFHA participated in the rate-review proceeding to the full extent to which it was entitled, the SFHA is receiving the full benefits of the favorable settlement resolving that proceeding, and the SFHA is perfectly free to petition the FPSC for additional relief in a separate proceeding, without jeopardizing the existing settlement or infringing the rights of the other participants in the FPSC's rate-review proceeding as the SFHA's appeal does. Accordingly, the SFHA has no valid objection to the FPSC's order resolving its rate-review proceeding and, in any event, has no standing to appeal that order.

The FPSC's Rate-Review Proceeding

The FPSC is empowered to review the rates of an electric utility such as FPL, either when the utility or an interested person petitions for a review or upon its own motion. §§ 366.06(2) and 366.07, Fla. Stat. (2001). In exercising those powers, the FPSC is authorized to conduct limited proceedings, in which the FPSC determines the scope of issues to be considered and has the discretion to grant or deny any request to expand those issues. § 366.076, Fla. Stat. (2001). Consistent with its authority to conduct rate reviews on its own initiative, the FPSC opened a docket in August 2000 to "review [] Florida Power & Light Company's (FPL) proposed acquisition of Entergy and the formation of a Florida Transco and their effect on FPL's Retail Rates." R.29 (Request to Establish Docket). In November 2000, the FPSC specifically advised interested persons that its rate review would be conducted pursuant to section 366.076 as a limited proceeding and that it might or might not hold a hearing in connection with the rate review. R.41 (Order PSC-00-2105-PCO-EI). In June 2001, the FPSC refined and focused that proceeding into the specific rate review that is the subject of this appeal. R:395 (Order No.

PSC-01-1346-PCO-EI). After identifying the four issues that initially motivated its rate review,[1] the FPSC decided to

> "initiate a base rate proceeding to address the level of FPL's earnings and to assure appropriate retail rates are implemented on a going forward basis so that appropriate benefits of the formation of the RTO and any future restructuring of the electric market are captured for the retail ratepayer."

Id. at 396. The FPSC took pains to emphasize that it did not intend to "foreclose the ability of the company and parties to reach a resolution of some or all of the issues involved in an earnings review. In fact, it is our belief that the information contained in the MFRs can empower parties and the Commission to reach a settlement that everyone can agree is in the public interest." *Id.* at 399.

"MFRs," or minimum filing requirements, are one of the principal tools used by the FPSC to conduct rate reviews. The MFRs contain voluminous data on a utility's finances and operations during the year period for which the MFRs are

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[1] The FPSC recognized that: (a) FPL had terminated its merger with Entergy and that GridFlorida (the "Florida Transco" referenced in the August 11, 2000, Request to Establish Docket) had been approved by the Federal Energy Regulatory Commission; (b) FPL was in the final year of a rate agreement that would expire on April 14, 2002, pursuant to which FPL's rates were not to be adjusted based on the levels of FPL's earnings during the term of the agreement; (c) the 2020 Study Commission's interim report had proposed a base rate cap to be applied if there were a transition to a deregulated wholesale energy market and that there were concerns expressed by the Legislature about the levels of utility earnings and whether then-current utility rates reflected costs; and (d) the formation of GridFlorida raised issues about what adjustments would be required if transmission costs were removed from the individual utilities' retail rates. R: 395-96 (Order No. PSC-01-1346-PCO-EI).

prepared (referred to as a "test year").[2] At the FPSC's direction, FPL filed MFRs in the Fall of 2001 for a 2002 test year.

From October 2001 through March 2002, FPL responded to voluminous discovery requests from the FPSC staff, Public Counsel and other parties concerning information included in the MFRs and other issues relevant to the MFR filing. As a result of the MFR filing, the FPSC staff also conducted an extensive audit of FPL, culminating in detailed audit reports to the FPSC in February and March 2002. R:11,020 (February Audit report); R:11,816 (March Audit Report).

Although the FPSC tentatively scheduled a hearing to consider evidence on FPL's 2002 test year, in doing so it reiterated that "[t]his proceeding was initiated by the Commission on its own motion. As such, if, at any point, staff believes that the proceeding should be concluded, it can prepare a recommendation for Commission consideration." R:1001 (Order No. PSC-01-2111-PCO-EI, dated October 24, 2001). While the FPSC never determined who had the burden of proof in the rate review,[3] FPL agreed to prefile testimony and exhibits explaining and supporting the test year results reflected in the MFRs. To that end, FPL

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[2] MFRs also contain information on years prior to the test year. For example, certain of the MFRs in this rate review contained information on 2001 and five years of prior history in addition to the 2002 test year information.

[3] Order No. PSC-02-0102-PCO-EI, dated January 16, 2002, set forth the issues that would be addressed in the rate review. It identified the following as Issue No. 158: "Which party(ies) has the burden of proof as to whether or not FPL's base rates should be reduced in this proceeding?" R:10,237

prefiled testimony and exhibits of 13 witnesses in January 2002, which supported the reasonableness of FPL's existing rates.

From the outset of its rate review, the FPSC encouraged the parties to resolve the proceeding by stipulation. To this end, the FPSC Staff conducted settlement discussions with all parties on January 7, 2002, and again on January 14, 2002. R:10,007 (January 4, 2002, Memorandum of Informal Meeting); R:10,092 (January 8, 2002, Memorandum of Informal Meeting). By early March 2002, all the parties to the rate-review proceeding except the SFHA had agreed to the terms of a Stipulation and Settlement (the "Stipulation"). The settling parties represented customers across the spectrum of FPL's rate classes, including the commercial rate classes in which the SFHA's members are served.[4] On March 14, 2002, the settling parties filed a joint motion to approve the Stipulation. R:11,739. Key elements of the Stipulation include:

> 1. An annual rate reduction of $250 million, effective April 15, 2002 and continuing through December 31, 2005. This rate reduction is applied as an across-the-board 7.03% reduction in the base charges of all rate classes except for two specialty rate classes for street and outdoor lights.

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[4] The parties joining in the motion were FPL, the Office of Public Counsel (which is mandated by section 350.0611 of the Florida Statutes to represent "the people [of Florida] in proceedings before the [FPSC]"), a major trade group representing industrial customers in Florida electric utility proceedings (FIPUG), a major trade group representing retail businesses in such proceedings (the Florida Retail Federation), a major grocery-store and food-distribution chain (Publix), a local government that buys power from FPL (Lee County) and individual residential customers of FPL (the Twomeys).

2. A mechanism for sharing revenues above a specified threshold, with 1/3 going to FPL shareholders and 2/3 going to customers, and a cap on revenues above a second, higher threshold that would result in all additional revenues being returned to customers.

3. During the term of the settlement, this revenue-sharing mechanism and the revenue cap are the exclusive mechanism for addressing FPL's earnings levels.

4. A $200 million reduction in the revenues that FPL will collect in 2002 through the fuel adjustment mechanism.

On March 18, 2002, the FPSC staff issued a recommendation based on its review of the Stipulation, stating that "[i]t is staff's opinion that the proposed Stipulation and Settlement is in the best interests of the ratepayers, the parties, and FPL, and should be approved by the Commission." R:11,802. The Stipulation, together with the FPSC staff recommendation that it be approved, were carefully reviewed by the FPSC at a special agenda conference held on March 22, 2002, in which all five of the FPSC Commissioners participated and at which all parties were permitted to speak for or against the Stipulation. R:11,835 (Transcript of Special Agenda Conference). After approximately one and a half hours of presentations by the parties, questions to the parties from the Commissioners, and deliberations among the Commissioners, the FPSC voted unanimously to approve the Stipulation. *Id.* at 11,895. On April 11, 2002, the Commission issued Order No. PSC-02-0501-AS-EI approving the Stipulation (the "Stipulation Order"). R:11,899.

The SFHA's Participation

On May 1, 2001, more than eight months after the FPSC initiated its rate-review proceeding, the SFHA petitioned to intervene. R:141. Although the petition acknowledged that one element in the test for intervening in an administrative proceeding is whether the prospective intervenor "will suffer injury in fact as a result of the agency action contemplated in the proceeding that is of sufficient immediacy to entitle it to a hearing," the petition identified no such injury. *Id.* at 143. In fact, it did not even identify "a result of the agency action contemplated in the proceeding" that would cause injury. Instead, the petition merely asserted that SFHA members are FPL customers, that "disposition of this case may affect rates for FPL," and that the SFHA members therefore had "an interest in the proceeding . . . ." *Id.* The petition sought no particular action by the FPSC and did not request a hearing. The August 31, 2001 order granting intervention stated that, "[p]ursuant to Rule 25-22.039, SFHA takes the case as it finds it." R:7,204 (Order No. PSC-01-1783-PCO-EI).

The SFHA conducted extensive discovery concerning the information included in FPL's MFRs and the 2002 test year. On March 4, 2002, the SFHA prefiled testimony and accompanying exhibits of two witnesses. The testimony of SFHA witness Lane Kollen identified nine purported adjustments to the revenues, expenses and investment reflected in FPL's 2002 test year that he claimed would warrant a total of $475 million in rate reductions.[5] R:11,327-28 (Kollen Direct Testimony). Mr. Kollen's proposed rate reductions were -- essentially and obviously -- insupportable. As shown in Appendix A to this Answer Brief, several of the proposed adjustments are inconsistent on their face with established principles of utility regulation in Florida.[6] Without those facially invalid adjustments, Mr. Kollen's rate reduction shrinks to almost exactly the $250 million rate reduction approved by the FPSC in the Stipulation. In other words, even if all other issues were resolved in its favor, the SFHA would have been able to justify at hearing a rate reduction equal only to what FPL and the other parties had already accepted. And that rate reduction would not have included the very meaningful opportunity for further revenue-sharing refunds provided by the Stipulation. That approach, first adopted in FPL's 1999 rate stipulation, has resulted in refunds to FPL's customers of approximately $200 million during the three years that the

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[5] The prefiled testimony of the SFHA's other witness, Stephen Baron, does not relate to the SFHA's proposed rate reductions. R:11,432.

[6] FPL does not suggest by inclusion of its Appendix A that this appeal can or should turn on an evaluation of prefiled testimony and exhibits. However, the SFHA has supplemented its Initial Brief with a voluminous Appendix C that contains Mr. Kollen's prefiled testimony and exhibits in their entirety, apparently inviting the Court to find that this "evidence" creates a real question about the sufficiency of the Stipulation's rate reduction. FPL's Appendix A merely demonstrates why that invitation should be declined.

1999 stipulation was in effect.[7] R:11,841 (Transcript of Special Agenda Conference). All of the legal and accounting principles reflected in Appendix A are, of course, well known to, and frequently applied by the FPSC and its staff.

The SFHA was encouraged by Public Counsel and other parties to participate in the Stipulation. It refused. At the March 22 agenda conference, counsel for the SFHA opposed the Stipulation. R:11,848-55 (Transcript of Special Agenda Conference). After a brief reference to Mr. Kollen's $475 million of adjustments, he moved quickly to a wholly speculative critique of FPL's affiliate transactions and resource planning process. *Id.* Mr. Kollen's testimony does not specify what, if any, rate reduction the SFHA would propose with respect to those two issues, and the SFHA's counsel offered no quantification. He provided no argument, let alone evidence, demonstrating how the SFHA's members would be harmed by the Stipulation. Instead, his sole argument was that his singular and speculative concerns would not be adequately addressed by the FPSC unless it permitted further discovery and held a hearing. *Id.*

The FPSC Chairman then posed a series of questions to the FPSC staff specifically designed to follow up on the SFHA's presentation. She asked if the

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[7] The revenue-sharing mechanism is uniquely a product of the stipulation process and has no counterpart in the cost-of-service rate regulation scheme of Chapter 366 of the Florida Statutes. As with the other provisions of the Stipulation, it was contingent upon approval of the Stipulation in its entirety by the FPSC. *See* Stipulation at ¶ 15.

staff had received adequate discovery responses from FPL, and the staff confirmed that it had. R:11,861-62. She also asked the staff whether, if the rate review proceeded to hearing, the SFHA could end up with no rate decrease or even a rate increase because of the "rate parity" issue.[8] R:11,858. The staff confirmed that this was indeed the case. *Id.* Finally, she asked the staff to summarize the cumulative effect of the Stipulation, and was advised that the Stipulation would result in $1 billion of rate reductions over its term, not even considering the potential benefits of the revenue-sharing mechanism. R:11,855-62. After this detailed, focused analysis, the FPSC approved the Stipulation unanimously. R:11,895. On April 26, 2002, the SFHA filed notice of this appeal.

[8] Attached as Appendix B hereto is an excerpt from the transcript to the March 22, 2002, agenda conference that reproduces the exchange between Chairman Jaber and the FPSC staff concerning rate parity. As may be seen in Appendix B, "rate parity" refers to the concept that the rate paid by each customer class should yield roughly the same return on investment to the utility for the facilities necessary to serve that class, as the utility's overall return on investment. It is a goal of the FPSC and its staff to move customer classes toward parity when a utility's rates are revised. The FPSC and its staff were aware that, under FPL's current rates, the classes in which the SFHA's members take service do not yield as high a return as FPL's overall return on investment. The staff advised the Commissioners that, if the rate review had gone to hearing, they would have wanted to limit the extent of the rate reduction for those classes, in order to bring them closer to parity. In fact, Chairman Jaber observed that the extent of the deviation from parity in FPL's existing rates might even require a rate *increase* for the classes serving the SFHA members.

SUMMARY OF ARGUMENT

The FPSC conducted a review of FPL's rates on its own motion, in order to ascertain whether FPL's rates remained at appropriate levels. The FPSC is entitled by statute to conduct such reviews. From the outset, the FPSC made it clear that the review was a limited proceeding, that there might not be a hearing in connection with it, and that the FPSC could terminate the proceeding whenever it and its staff satisfied themselves that FPL's rates were or would be appropriate. The review spanned more than 18 months. FPL filed or produced over 1,300 pages of MFRs and 4,100 responses to discovery. It prefiled 750 pages of direct testimony from 13 expert witnesses, detailing and explaining its 2002 test year results. The FPSC's staff carefully audited FPL's information. Ultimately, the FPSC was presented with a Stipulation, adopted by representatives of all FPL's major customer classes and endorsed by the FPSC staff, which would reduce FPL's existing rates by $250 million per year, would commit FPL to a $200 million adjustment to its fuel cost recovery charge, and would require a revenue-sharing mechanism with the potential to generate significant additional refunds to FPL's customers. After receiving input from all parties, the FPSC concluded its rate review by approving the Stipulation. This outcome achieved the FPSC's express purpose for the review.

In the face of this orderly, carefully defined process, the SFHA argues that the FPSC cannot approve the Stipulation without giving the SFHA an opportunity for its own hearing. Fundamental to this argument is the mistaken premise that the FPSC conducted the rate review to determine the SFHA's interests. That premise is entirely without foundation. The only support that the SFHA can muster for this exaggerated view of its role in the proceeding is the SFHA's intervention itself. But the SFHA's petition to intervene requested neither relief nor hearing. Moreover, the FPSC's order granting intervention specifically cautioned that the SFHA would take the proceeding as it found it. There is nothing in the record (or in the nature of this type of proceeding generally) to suggest that, by allowing the SFHA to intervene, the FPSC intended to give the SFHA veto power over its decision to conclude the review once the FPSC's articulated objectives had been met. And there is nothing in Florida law that requires the FPSC to confer that veto power.

Finally and most tellingly, putting aside all its defective arguments, the SFHA cannot even make the threshold showing that it is entitled to bring this appeal. Beyond the SFHA's intervenor status, in order to have standing to appeal, the SFHA must show that the result of the FPSC's rate-review proceeding adversely affected its interests. The SFHA has no plausible argument that the Stipulation adversely affected its interests. The Stipulation reduced FPL's rates to the SFHA's members to the same extent as for all of FPL's other customers. It appears that the SFHA's only claim of adverse effect is speculation that a hearing might have enabled it to justify a larger rate reduction. This wishful speculation is, of course, belied by the SFHA's own data. As discussed above, Appendix A demonstrates that the adjustments proposed by the SFHA's witnesses simply would not survive even casual scrutiny. Moreover, if the SFHA truly believes it could show that a further rate reduction is warranted, it is perfectly free to petition the FPSC for that relief rather than jeopardizing a settlement that is already benefiting FPL's customers.

ARGUMENT

1. The FPSC Properly Conducted its Rate Review.

The basis for the SFHA's appeal is essentially that the FPSC did not indulge the SFHA in all of the discovery it sought and did not conduct a hearing to allow the SFHA to elaborate on its hypothesis that FPL's rates should be reduced by more than is provided in the Stipulation. The SFHA has a very high burden to meet in challenging the FPSC's procedure. This Court has expressed that burden as follows:

> We begin by noting the narrow scope of this Court's review of orders of the Florida Public Service Commission. We have only to determine whether the [FPSC's] action comports with the essential requirements of law and is supported by substantial competent evidence. The burden is upon appellants to overcome the presumption of correctness attached to orders of the [FPSC].

Pan American World Airways, Inc. v. Florida Public Service Comm., 427 So. 2d 716, 717 (Fla. 1983)(citations omitted). As shown below, the SFHA does not come close to carrying that burden.

a. The FPSC is empowered to conduct limited rate-review proceedings on its own motion and may conclude those proceedings when its objectives have been met.

The Florida Legislature has given the FPSC express statutory authority to initiate proceedings to review a public utility's rates on its own motion, without regard to whether there is any outside party that seeks a change in those rates. *See* §§ 366.06 and 366.07, Fla. Stat. (2001). This Court has long recognized the power of administrative agencies to initiate proceedings on their own motion and has emphasized that it constitutes an important difference between the functions of courts and administrative agencies:

> We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated. For one thing, although courts seldom, if ever, initiate proceedings on their own motion, regulatory agencies such as the commission often do so.

McCaw Communications of Florida v. Clark, 679 So. 2d 1177, 1179 (Fla. 1996); *see also Reedy Creek Utilities Co. v. Florida Public Service Commission*, 418 So. 2d 249 (Fla. 1982); *Peoples Gas System v. Mason*, 187 So. 2d 335 (Fla. 1966).

A distinguishing characteristic between the role of a court and that of an administrative agency is that an agency is not constrained by the wishes of the parties in deciding how and when to conclude a proceeding in the same way that a court would be. For example, this Court has observed that

> [A] permitting agency is different from a court because of the fact that it may have as much interest in the outcome in protecting the public's interest as directed by the legislature as the applicant or the objector may have as a party protecting its respective property interest. In fact in this instance the Board could have agreed with some of the points made by Wiregrass. Because of this difference, the voluntary dismissal rule, Florida Rule of Civil Procedure 1.420(a)(1), cannot, in our view, be utilized to divest an adjudicatory agency of the jurisdiction granted it by the legislature. To conclude otherwise, as stated by the district court, could effectively allow an objecting party to unilaterally terminate jurisdiction and in effect declare null and void factual findings made in a proceeding clearly within an agency's area of responsibility and jurisdiction as directed by the legislature. We reject the contention of Wiregrass that it has the power to terminate the chapter 120 proceedings and the factual findings concerning an issue within the responsibility of the agency and have it separated from the jurisdiction of the water management district who must determine whether to grant or deny the permit. That, in our view, makes no sense whatever.

Wiregrass Ranch, Inc. v. Saddlebrooks Resorts, Inc., 645 So. 2d 374, 376 (Fla. 1994) (water management district not divested of jurisdiction to continue to conclusion a fact-finding proceeding concerning issuance of a permit, when party challenging the permit application withdrew its challenge).

The converse of an administrative agency's authority to <u>continue</u> in the public interest a proceeding that one of the parties wishes to terminate for its own private reasons, is the authority to <u>terminate</u> in the public interest an agency-initiated proceeding that one of the parties may wish to continue for its own private reasons. Stated another way, parties to an agency-initiated proceeding do not have unilateral veto power over the agency's decision to conclude the proceeding on terms that are in the public interest. For example, a private party does not have the power to hold hostage a settlement that an agency has determined clearly to be in the public interest.[9] This principle was well stated in *Pennsylvania Gas and Water Co. v. Federal Power Comm.*, 463 F.2d 1242, 1246 (D.C. Cir. 1972):

> It is well to note at the outset that "settlement" carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions. As we shall see later, in agency proceedings settlements are frequently suggested by some, but not necessarily all, of the parties; if on examination they are found equitable by the regulatory agency, then the terms of the settlement form the substance of an order binding on all the parties, even though not all are in accord as to the result. This is in effect a "summary judgment" granted on "motion" by the litigants where there is no issue of fact.
>
> This difference in procedure between the courts and regulatory agencies stems from the different roles each is empowered to play: the court must passively await the appearance of a litigant before it; once the court's process has been invoked, the litigant is entitled to play out the contest, unless he and the other litigant reach a mutually agreed settlement or one of several summary disposition procedures is

[9] The FPSC has approved non-unanimous settlements before. *See In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties*, Docket No. 950495-WS, Order No. PSC-99-1794-FOF-WS, 99 FPSC 9:204 (September 14, 1999); *In re: Generic investigation into the aggregate electric utility reserve margins planned for Peninsular Florida,* Docket No. 981890-EU, Order No. PSC-99-2507-S-EU, 99 FPSC 12:426 (December 22, 1999)

successfully invoked by his adversary. On the other hand, the regulatory agency is charged with a duty to move on its own initiative where and when it deems appropriate; it need await the appearance of no litigant nor the filing of any complaint; once the administrative process is begun it may responsibly exercise its initiative by terminating the proceedings at virtually any stage on such terms as its judgment on the evidence before it deems fair, just and equitable, provided, of course, that the procedural requirements of the statute are met.

In furtherance of this essential flexibility, the Florida legislature has given the FPSC specific authority to conduct limited proceedings, in which the FPSC determines the scope of issues to be considered and in which it has the discretion to accept or reject the proposals of external parties to expand the scope of the proceedings. § 366.076, Fla. Stat. (2001).

Interestingly, one of the centerpiece cases cited by the SFHA for its contention that the FPSC had no choice but to conduct a hearing instead supports the exact opposite proposition, when applied to the circumstances that exist here. In *Citizens of Florida v. Mayo,* 333 So. 2d 1 (Fla. 1976), this Court remanded to the FPSC an order in which the FPSC had awarded an interim rate increase to an electric utility without giving Public Counsel an opportunity to present direct evidence contradictory to the utility's evidence or to cross-examine the utility about its evidence. In reaching its decision, the Court noted that

> [w]e must conclude . . . that the Legislature intended to provide elected Public Service Commissioners with a range of [procedural] alternatives suitable to the factual variations which might arise from case to case.

Id. at 6. However, the Court found that

> Whatever public format the Commission chooses to provide, ... , *special conditions pertain in cases where public counsel has intervened*. This is a consequence of the statutory nexus between the file and suspend procedures and the role prescribed for public counsel in rate regulation. *Public counsel was authorized to represent the citizens of the State of Florida in rate proceedings of this type. That office was created with the realization that the citizens of the state cannot adequately represent themselves in utility matters, and that the rate-setting function of the Commission is best performed when those who will pay utility rates are represented in an adversary proceeding by counsel at least as skilled as counsel for the utility company.* The office of public counsel was created by the same enactment which brought the utilities accelerated rate relief. Under these circumstances, the Commission cannot schedule a "public hearing" and preclude public counsel, the public's advocate, from acting to protect the public's interest.

Id. at 7 (emphasis added).

Here, the shoe is on the other foot. Public Counsel is not only not opposed to the Stipulation, he was actively involved in negotiating the Stipulation and supports it enthusiastically. The "special conditions" applicable to Public Counsel make his participation in the Stipulation vitally important and, by the same token, make the FPSC's decision to conclude its rate review by approving the Stipulation without holding a hearing especially appropriate.[10]

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10 FPL recognizes that there may be instances in which the special interests of particular customers are not adequately represented by Public Counsel and that deference to protecting those interests can and should be given independently of Public Counsel's participation. For example, large industrial customers may have special concerns over issues of allocating a utility's revenue requirements among rate classes that are not necessarily aligned with Public Counsel's mandate to

b. **The FPSC's rate review proceeding was conducted consistent with the FPSC's discretion to initiate and conclude proceedings in the public interest.**

The FPSC initiated its rate-review proceeding to satisfy itself that FPL's retail electric rates were not excessive. It was not responding to a request from the SFHA or any other party to conduct this review. It promised no party that there would be a particular level of rate reduction, or that there would be any rate reduction at all. And the FPSC expressly stated on multiple occasions that it could and would terminate the rate review at any point where it felt that its objectives were achieved and that it was satisfied with the results. For example, when it required FPL to file MFRs documenting its projected financial position in 2002, the FPSC made it clear to all parties that its "over-arching concern is that the public interest be protected. It is our responsibility to ensure that [FPL's] retail rates are at an appropriate level." R:399 (Order No. PSC-01-1346-PCO-EI). Subsequently, the FPSC reminded the parties that

> This proceeding was initiated by the Commission on its own motion. As such, if, at any point, staff believes the proceeding should be

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represent the interests of customers generally. However, the SFHA has no plausible claim that it has special circumstances requiring separate attention. As noted above, the rate reduction effected under the Stipulation applies exactly the same to all relevant customer classes. Moreover, none of the SFHA's objections to the Stipulation relates uniquely to it or its members. Finally, the Stipulation was joined not only by Public Counsel, but by representatives of a wide range of FPL customer groups, including those which take service under the same types of rates that apply to the SFHA's members.

concluded, it can prepare a recommendation for Commission consideration.

R:9400 (Order No. PSC-01-2111-PCO-EI).

The review was a process initiated with specific, public objectives and goals. The FPSC conducted its review with a reasoned and clearly articulated intention of proceeding only so long as it needed in order to satisfy itself that FPL's rates were appropriate. The FPSC structured its proceeding so that this could occur in essentially one of three ways: (1) based on its staff's recommendation, it could conclude that FPL's existing rates remained appropriate; (2) based on its staff's recommendation, it could conclude that alternate, lower rates acceptable to FPL[11] would be appropriate; or (3) it could proceed to hearing to determine new rates on the basis of a contested proceeding if neither (1) nor (2) occurred. Ultimately, the FPSC relied upon the second of these paths, when it adopted its staff recommendation that the Stipulation be approved.

The SFHA -- which apparently has objectives of its own, that it is free to pursue at any time in a proceeding that it initiates -- has a different and conceptually flawed view of the FPSC's right to conclude a proceeding that the FPSC has initiated. The SFHA would exercise a non-existent and frankly obstructionist veto power by arguing that the FPSC was not free to approve the

[11] Unless a contemplated rate reduction were acceptable to FPL, its substantial interests would be adversely affected and it would be entitled to a hearing.

Stipulation without giving the SFHA a chance to develop and present objections in a hearing. The SFHA appears to be intentionally misapprehending the process. An administrative agency such as the FPSC is not beholden to the wishes of private litigants in the way that courts are: an administrative agency's decision to conclude a proceeding in the public interest may not be held hostage by a litigant's private interest in seeing it continue. The administrative agency's duty is instead to ensure that its decision is in the public interest and has been made on the basis of valid information before it.

The FPSC's decision to conclude its review by approving the Stipulation clearly meets this test. The FPSC's review took over 18 months. The FPSC reviewed over 1,300 pages of FPL's MFRs and 750 pages of direct testimony from 13 of FPL's expert witnesses. The FPSC staff carefully audited FPL's information and, on the basis of its audit and other participation in the rate review, concluded that the Stipulation was in the public interest. But the FPSC did not need to rely exclusively on its staff's conclusions. The Stipulation had been signed by representatives of all FPL's customer classes including, importantly, Public Counsel.

Finally, the FPSC heard and carefully considered at its March 22, 2002 agenda conference both the enthusiastic support of the Stipulation's signatories and the objections to the Stipulation raised solely by the SFHA. Following the SFHA's presentation, the FPSC Chair specifically questioned the FPSC staff about the SFHA's objections. The SFHA tried to raise the specter of concealed flaws in FPL's MFRs and 2002 test year results by complaining that it had not been able to complete discovery on affiliate-transaction and resource-planning issues. In response to the Chair's questioning, the staff confirmed that it had received adequate responses from FPL to its discovery and did not believe that any information had been withheld.[12] The SFHA also suggested that the $250 million rate reduction provided by the Stipulation was too small. Again in response to questions from the Chair, the staff (as well as Public Counsel) confirmed that nothing in the SFHA's presentation changed their conclusion that the Stipulation is in the public interest and should be approved.

In short, the FPSC paid careful attention to the SFHA's objections. Ultimately, however, the FPSC reasonably concluded that those objections did not warrant delaying a Stipulation that was in the best interests of FPL's customers and furthered the public interest by immediately, definitely and substantially reducing FPL's rates and by establishing a revenue-sharing mechanism that is expected to

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[12] The SFHA's plea for more time to complete discovery was disingenuous at best. It had begun discovery from FPL in October 2001 and thus had been conducting discovery for about five months by the time of the March 22 agenda conference. And it was given an early opportunity by FPL to review information on FPL's affiliate transactions but delayed doing so for more than three months. *See* FPL's Response in Opposition to Motion of South Florida Hospital and

result in further rate refunds. The FPSC promised nothing more than this result when it initiated the rate review, and the statutes it implements require nothing further.

2. The SFHA is Not Entitled to a Hearing.

a. The APA's hearing requirements do not apply.

The fundamental premise of the SFHA's Brief is that the SFHA was denied hearing rights to which it claims to be entitled by the Florida Administrative Procedure Act, Chapter 120 of the Florida Statutes ("APA"). The SFHA cites the APA's sections 120.569 and 120.57 (which set forth parties' hearing rights) no fewer than thirty-eight times, hypothesizing a case for specific rights to which the SFHA would be entitled if those sections applied and documenting how it was not afforded such rights by the FPSC.

Unfortunately, this elaborate superstructure is perched on an insupportable foundation. There are numerous cases establishing that a party is entitled to a hearing under sections 120.569 and 120.57 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. *See, e.g.*, *Fairbanks, Inc. v. State, Dep't of Transp.*, 635 So. 2d 58, 59 (Fla. 1st DCA 1994), *review denied*, 639 So. 2d 977 (Fla. 1994) ("To establish entitlement to a section 120.57 formal

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Healthcare Association to Compel Discovery Responses, dated February 6, 2002 hearing, one must show that its 'substantial interests will be affected by proposed agency action.'"); *Univ. of S. Fla. College of Nursing v. State, Dep't of Health*, 812 So. 2d 572, 574 (Fla. 2nd DCA 2002) ("Section 120.57(1), a provision of Florida's Administrative Procedure Act, provides that a party whose 'substantial interests' are determined in an agency proceeding is entitled to have disputed issues of material fact resolved in a formal evidentiary hearing. To qualify as having a substantial interest, one must show that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing and that this injury is of the type or nature which the proceeding is designed to protect.")[13]

The SFHA did not allege in its petition to intervene that it met this test, and the SFHA has no basis to argue that it could meet the test. As discussed above, while the SFHA's petition to intervene acknowledges the "substantial injury" test, it makes no allegations suggesting that the SFHA suffered such injury. Rather, it observed only that the disposition of the rate review may affect FPL's rates and that the SFHA therefore has an interest in the rate review. These allegations were made at a time when the FPSC had expressed no intended course, and proposed no outcome, for its rate review. Nor did the SFHA's petition seek a particular

R:11,020.

[13] In 1996, the APA was amended to add section 120.569 and amend section 120.57 such that the provision about "a party whose substantial interests are determined" now appears in section 120.569 instead of section 120.57. Its purpose in defining parties that are entitled to a hearing remains the same.

outcome. Thus, the SFHA had no legitimate basis at the time of its petition to allege the "injury-in-fact" that would entitle it to a hearing.

Ultimately, the only action that the FPSC proposed to take in its review was to approve the Stipulation. Certainly that action could not be plausibly argued to constitute an "injury-in-fact" to the SFHA or its members. To the contrary, the base rate reduction, fuel adjustment overrecovery refund, and potential for future revenue sharing under the Stipulation can be seen only as a "benefit-in-fact" to the SFHA's members, just as it is to FPL's other customers. In short, nothing about the Stipulation or the FPSC's decision to approve it entitled the SFHA to a hearing.

b. The SFHA's proper remedy is to petition the FPSC to reduce FPL's rates, not to remold the FSPC's rate review to the SFHA's private purposes.

Underlying the SFHA's arguments on appeal is the suggestion that the FPSC's decision to conclude its rate review without holding a hearing leaves the SFHA with no forum in which to dispute the appropriateness of FPL's rates. But this ignores the availability of a simple and expedient procedural mechanism. Sections 366.06 and 366.07 (the same statutes that give the FPSC authority to initiate its own rate reviews) provide that a private party such as the SFHA may file a complaint with the FPSC at any time to initiate a rate-reduction proceeding. *See also* Fla. Admin. Code R. 25-22.036. Whereas the signatories to the Stipulation agreed not to initiate a rate-reduction proceeding during the term of the

Stipulation, the SFHA (as a non-signatory to the Stipulation) is subject to no such constraint. If the SFHA truly feels that its proposed rate adjustments could withstand the scrutiny of a contested proceeding, it is free to petition for one.

Nor can the SFHA plausibly argue that relying upon the FPSC's complaint procedure would delay the relief it seeks. Most likely, the FPSC could have acted upon such a complaint before this appeal will be concluded. Moreover, by filing a complaint rather than seeking a remand of the Stipulation Order, the SFHA would not be placing the continued validity of the Stipulation in jeopardy as it does here.[14]

3. The SFHA Does Not Have Standing to Bring This Appeal.

The SFHA has raised no valid objections to the FPSC's Stipulation Order that would warrant the relief it seeks. But beyond the invalidity of the SFHA's objections, there is an even more fundamental reason that this appeal must be denied: the SFHA simply does not have standing to bring it.

a. Only parties who have been adversely affected by an administrative order have standing to appeal that order.

The standard for appealing a final order that results from an administrative proceeding is different and understandably more strict than the standard for

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[14] If the SFHA were to succeed in having the Stipulation Order remanded for a hearing, the parties to the Stipulation (including FPL) would not remain bound by it. The Stipulation -- and its $250 million per year rate reduction -- could be

standing to simply intervene in the administrative proceeding itself. This difference is made clear in the APA's provision on judicial review, which states that "[a] party *who is adversely affected by final agency action* is entitled to judicial review." § 120.68(1), Fla. Stat. (2001) (emphasis added).

It is clear from this formulation that being a party to an administrative proceeding is necessary but not sufficient to confer appellate standing. If section 120.68(1) were interpreted so that all parties in the administrative proceeding automatically had standing to appeal, then the phrase "who is adversely affected" would be rendered meaningless. *See Daniels v. Florida Parole & Probation Comm.*, 401 So. 2d 1351 (Fla. 1st DCA 1981), *aff'd sub nom., Roberson v. Florida Parole & Probation Comm.*, 444 So. 2d 917 (Fla. 1983). Such an interpretation would violate a fundamental principle of statutory construction: that full effect is to be given to all provisions of a statute, and that statutory language is not to be assumed superfluous. *Villery v. Florida Parole & Probation Comm.*, 396 So. 2d 1107, 1111 (Fla. 1981) ("Where possible we must give full effect to all statutory provisions and construe related statutory provisions in harmony with each other."); *Terrinoni v. Westward Ho!*, 418 So. 2d 1143, 1146 (Fla. 1st DCA 1982) ("Statutory language is not to be assumed superfluous; a statute must be construed so as to give meaning to all words and phrases contained within that statute.").

voided, with application that might be retroactive to its inception. *See, e.g.*, *GTE*

In a case involving the FPSC, this Court has recognized that a party seeking to appeal final agency action must show specifically that it has been adversely affected by the final action. In *Legal Environmental Assistance Foundation v. Clark*, 668 So. 2d 982 (Fla. 1996) ("*LEAF*"), an environmental advocacy group ("LEAF") appealed a decision of the FPSC concerning the energy conservation goals that the FPSC had adopted for electric utilities pursuant to the Florida Energy Efficiency and Conservation Act.[15] The FPSC had adopted what it called "pass/fail" energy conservation goals, meaning that if a utility did not develop and implement enough conservation programs to achieve the goals, it would be penalized or would have to implement FPSC-prescribed conservation programs. The Court found that LEAF, which the FPSC had permitted to intervene as a party, nonetheless did not have standing to appeal the FPSC's adoption of the pass/fail conservation goals because the negative consequences of the goals (*i.e.*, penalties or compelled implementation of conservation programs) would harm the utilities but not LEAF. *See also Florida Chapter of the Sierra Club v. Suwanee American Cement Co.*, 802 So. 2d 520 (Fla. 1st DCA 2001) (environmental organizations denied standing to appeal grant of cement-plant permit because they did not show how they or any individual member would be specifically harmed by the permit);

Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996).

[15] §§ 366.80-366.85 and § 403.519, Fla. Stat. (2001).

Bodenstab v. Dep't of Prof. Reg., 648 So. 2d 742, 743 (Fla. 1st DCA 1994) (doctor whose licensure was initially denied but subsequently granted on rehearing did not have standing to appeal the failure of the rehearing order to incorporate specific positive statements about his reputation, because he was not adversely affected by the absence of such statements in the order); *Fox v. Smith,* 508 So. 2d 1280 (Fla. 3d DCA 1987) (state employee was not entitled to appeal outcome of grievance proceeding, because he could not show that he was adversely affected by the outcome of the proceeding).

Thus, the SFHA is not automatically entitled to appeal the Stipulation Order by virtue of its having been granted intervention in the FPSC's rate review. The SFHA may appeal the Stipulation Order only if it shows that it is adversely affected by that order. As shown below, the SFHA is not adversely affected by the Stipulation Order; to the contrary, the order substantially benefits the SFHA's members.

b. The SFHA is not adversely affected by the Stipulation Order.

The essence of the SFHA's appeal is that the Stipulation Order did not give the SFHA members as much of a rate reduction as they would have liked. In other words, the SFHA complains that its members were positively affected by the Stipulation Order, but not positively enough. No appellate rights spring from this result. Significantly, the SFHA has not shown -- and cannot show -- that the

Stipulation Order made its members worse off than they were when the SFHA intervened in the FPSC's rate review. To the contrary, the Stipulation Order has substantially reduced the SFHA members' electric rates, and it has done so in exactly the same proportion as the rates of all FPL's other customers have been reduced.

Of course, the SFHA will assert that it has been adversely affected because the $250 million per year rate reduction provided by the Stipulation should have been larger. But this assertion is premised upon on an invalid point of reference, which again evidences the SFHA's misapprehensions about the nature of the FPSC's rate-review proceeding and the SFHA's role in it. As discussed in detail above, the FPSC never suggested that its rate review would necessarily result in a reduction of FPL's rates, much less how much that reduction might be. The SFHA's petition to intervene did not seek a rate reduction, and the FPSC's order granting intervention admonished that the SFHA took the rate review as it found it. Simply put, the SFHA cannot have a legitimately disappointed expectation about the size of the rate reduction approved by the Stipulation Order, because it had no basis for <u>any</u> expectation about the size of that rate reduction.[16]

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[16] Moreover, the SFHA has provided nothing but speculation to support its argument that a larger rate reduction would be appropriate. The SFHA proposed adjustments totaling $475 million. As shown in Appendix A, many of those proposed adjustments are inconsistent on their face with established principles of utility regulation in Florida. Without those facially invalid adjustments, the

Finally, the SFHA cannot plausibly claim to have been adversely affected procedurally by the FPSC's approval of the Stipulation. As discussed above, because it did not sign the Stipulation, the SFHA is not restricted from seeking a reduction in FPL's rates during the term of the Stipulation. The SFHA is perfectly free to petition the FPSC tomorrow to initiate a rate-reduction proceeding.[17]

Clearly, the SFHA falls well short of the appellate-standing standard set by this Court in *LEAF*. The SFHA has not shown, and cannot show, that the Stipulation adversely affected its members. It has no standing to bring this appeal.

SFHA's $475 million rate reduction shrinks to almost exactly the $250 million rate reduction approved by the FPSC in the Stipulation. Perhaps in recognition of this failing, the SFHA's Initial Brief focuses instead on two issues as to which the SFHA's prefiled testimony or exhibits did not even quantify an adjustment. And even if a larger overall rate reduction were made, the FPSC staff made it clear at the March 22, 2002 agenda conference that taking "rate parity" into account would result in the SFHA getting a smaller rate reduction and perhaps no reduction at all.

[17] Were the FPSC to deny such a petition, the SFHA would be adversely affected by that denial and hence would have standing to appeal it.

CONCLUSION

The FPSC initiated a review of FPL's retail electric rates. After a lengthy review of FPL's financial position, the FPSC reasonably concluded that it was in the public interest to approve a Stipulation that will result in nearly a billion dollars of rate reductions over the next three and three-quarters years, rather than going forward to a hearing at which the amount of rate reduction that could be supported by the record was entirely speculative. With the exception of the SFHA, every party to the rate review, including Public Counsel, enthusiastically agreed that this was the best thing to do for FPL's customers.

The FPSC was fully entitled to conduct and conclude the rate review as it did. No one's due process rights were violated by the FPSC's actions. And, in any event, the SFHA does not have standing to bring this appeal, because it was not adversely affected by the FPSC's action. If the SFHA is dissatisfied with the results of the rate review, its proper remedy is to petition the FPSC to initiate a new rate-reduction proceeding, not to appeal the rate review.

For these reasons, this appeal must be denied and the FPSC's Stipulation Order affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States mail this 30th day of August, 2002, to the following parties of record:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point font, which is proportionately spaced.

Alvin B. Davis

IN THE SUPREME COURT OF FLORIDA
Case No. SC02-1023

On Appeal From a Final Order of
The Florida Public Service Commission

SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION, et al.

Appellant,

v.

LILA A. JABER, et al.

Appellees

APPENDIX OF FLORIDA POWER & LIGHT COMPANY

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INDEX TO APPENDIX

A

Appendix A

Several of the adjustments proposed by the SFHA's witness Mr. Kollen are inconsistent on their face with established principles of utility regulation in Florida. These adjustments are referenced in boldface type below, following each of which is a brief explanation of the principle or policy that would be violated by such adjustment.

> **"Depreciation expenses for Turkey Point 3 and 4 and St. Lucie 1 and 2 nuclear plants should be reduced to reflect 20-year service life extensions."**
> **(Proposed reduction of $77.485 million)**

The SFHA argues that through the testimony of its witness it would be able to establish that FPL's depreciation rates should be lowered given the prospect of FPL operating its nuclear power plants beyond the terms of their existing operating licenses granted by the Nuclear Regulatory Commission ("NRC"). Putting aside the speculative factual basis that underlies this contention,[1] such an outcome would not have been possible in any event in

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[1] Mr. Kollen correctly observes that FPL has applied to the NRC for extensions of the operating licenses for its nuclear units at Turkey Point and Port St. Lucie. However, he incorrectly assumes that FPL necessarily will operate the units beyond the terms of their existing NRC licenses. Even though the NRC recently granted FPL an extension of its license to operate the Turkey Point units, the extension merely allows, and doesn't require, FPL to operate the units for a longer period of time. N.R.C., NUREG-1437, *Generic Env. Impact Statement for License Renewal of Nuclear Plants* (Jan. 2002 Sup. 5). Whether to operate the units beyond the term of the existing licenses is a decision that remains with FPL's management in conjunction

this proceeding given Commission practice and policy regarding the establishment of depreciation rates and their impact on rates for electric service, if any.

In Florida, depreciation rates are addressed in quadrennial or special depreciation proceedings that require the filing of comprehensive depreciation studies. Florida Administrative Code R. 25-6.0436(8)(a). These studies and their review involve complex engineering and accounting analyses that take into account many different and often competing factors, not simply the operational life expectancy of a unit – the single factor noted by Mr. Kollen. As a result of these stand-alone quadrennial proceedings, depreciation rates may be reset, but rates for electric service are not therefore automatically altered. The new depreciation rates simply become one more factor to consider, along with all other types of expenses, when electric rates

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with the FPSC's oversight responsibilities. FPL's requests for an extension were made simply to preserve as a resource option the possibility of operating the plants beyond the terms of their current licenses should it prove to be economic. Indeed, FPL has made no such decision and has publicly stated that it will operate the plants beyond the terms of their current licenses only if it is economical to do so. FPL has announced that such a decision likely will not be made until 2007 at the earliest. Thus, Mr. Kollen's recommendation is predicated upon only a possibility that the plant will be operated longer than its current life. It is well settled as a matter of ratemaking policy and law that rates may be set on the basis of future conditions only to the extent such conditions are known and imminent. Such is not the situation presented by Mr. Kollen's proposed adjustment. *See Gulf Power v. Bevis*, 289 So. 2d 401, 405 (Fla. 1974).

are next revisited in an electric rate proceeding whether initiated by the utility or the Commission.

The depreciation rates that were properly included in this rate review are the Company's existing depreciation rates established by the Commission in Dockets No. 971660-EI, 001437-EI, and 010107-EI,[2] not depreciation rates that the SFHA might think are proper. Indeed, at the time the Commission entered its initial order opening its review of FPL's rates and requiring the Company to submit MFRs detailing its costs including depreciation expense,[3] the Company's next scheduled comprehensive depreciation filing was to have been made by April 30, 2002, after the conclusion of any rate review proceedings that may have been contemplated in Docket No. 00-1148-EI. Subsequently, the Commission granted the Company's request to file its depreciation study on or before April 30, 2003, effectively reconfirming that the Commission would not consider new or revised depreciation rates in the review of FPL's rates in Docket No. 00-

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[2] By Order Nos. PSC-99-0073-FOF-EI and PSC-99-0958-FOF-EI, issued in Docket No. 971660-EI, January 8, 1999, and May 11, 1999, respectively, the depreciation rates and capital recovery schedules for FPL were revised. Subsequently, Order Nos. PSC-00-2434-PAA-EI and PSC-01-1337-PAA-EI, issued in Docket Nos. 001437-EI and 010107-EI, December 19, 2000, and June 19, 2001, addressed depreciation rates for the new Ft. Myers and Martin Simple Cycle units, respectively.

[3] R.4

1148-EI. FPSC Order No. PSC-01-3276-PAA-EI, dated December 10, 2001.

Thus, the SFHA's contention that had it been permitted to introduce evidence regarding the "proper" level nuclear depreciation rates, the Commission would have concluded to lower FPL's rates for electric service is entirely unfounded. Never at any time did the Commission intend for the review of FPL's depreciation rates to be included in the review of FPL's rates that was being conducted in Docket No. 00-1148-EI. SFHA's request to lower depreciation rates is wholly misplaced in Docket No. 00-001148 and, if meritorious, would be properly considered in the next depreciation proceeding.

"The special nuclear and fossil depreciation allowed pursuant to the 1999 Rate Agreement should be amortized over three years." (Proposed reduction of $53.574)

Mr. Kollen's recommendation directly contradicts the terms of the 1999 Stipulation and Settlement Agreement approved by the Commission in its Order No. PSC-99-0519-AS-EI and effectively seeks a reversal of that Order. Section 2 of Attachment A to Order No. PSC-99-0519-AS-EI states in pertinent part:

> The amortization will be separate and apart from normal depreciation, and existing depreciation practices and *resulting depreciation rates will not be adjusted, either before, during or after the term hereof to eliminate the effect of the additional amortization amount recorded.*

(Emphasis added).

Moreover, Mr. Kollen's recommendation asks the Commission to reverse expenses recorded in prior periods, for the purposes of setting prospective rates. Such an action would constitute retroactive ratemaking and, therefore, would be impermissible under well-established principles of utility regulation and law.[4] *City of Miami v. Florida Public Service Commission*, 208 So. 2d 249 (Fla. 1968). *See also Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission*, 453 So. 2d 780 (Fla. 1984).

"The deferred pension debit included by the Company in working capital should be removed."
(Proposed reduction of $62.873 million)

The SFHA argues that through the testimony of its expert witness it would be able to establish that FPL's rates should be lowered to provide benefits to customers of lower expenses realized in prior years. R.11332. The SFHA's position in this respect is inconsistent with basic principles of

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[4] What the Commission could not do by way of order or litigated result because of the prohibition against retroactive rate making, the Company could agree to by way of settlement and, in fact, the Settlement and Stipulation approved by the Commission in its Order No. Order No. PSC-99-0501-AS-EI does allow for the Company to reverse the special depreciation at its option during the term of the Settlement Agreement.

utility regulation in Florida and, in particular, would require the Commission to violate the prohibition against retroactive ratemaking.

Financial Accounting Standard (FAS) 87 requires that to the extent plan assets exceed the actuarial present value of the future liability for benefit payments to plan participants, earnings attributable to such excess value be booked as a credit against expenses, thus reducing the utility's cost of service and revenue requirement. But the utility also is permitted to include in its working capital the cumulative amount of these credits. Mr. Kollen agrees with this accounting treatment but says that because FPL's rates have not been reset annually between 1993 and 2001, customers didn't actually receive the benefit of the credits through lower rates. R:11,337-38.

The simplicity of Mr. Kollen's error is astounding. Almost no single expense incurred by a utility remains constant from year to year. Some expenses increase; others decrease -- all without a change in rates. By extension, under Mr. Kollen's theory of rate regulation, if the utility's capital expenditures increase from one year to the next to meet growing customer demand, and rates are not reset, the utility's shareholders are deprived of a fair return. This is simply not how rate regulation works in Florida. Unlike hospitals, the Company cannot simply raise its base rates to cover cost increases without requesting and receiving authorization to do so from the

Commission, and following a review of all of the Company's cost increases and decreases in the aggregate. Beyond his attempt to focus selectively on one factor that might decrease rates while ignoring other factors that would increase them, Mr. Kollen's proposed adjustment is also fatally flawed because it would give retroactive credit for lower expenses as a result of the pension expense credits, in the form of lower prospective rates. Again, Mr. Kollen's recommendation violates the general prohibition against retroactive rate making. *City of Miami, supra.; Southern Bell, supra.*

"Rate of return should be adjusted to reflect internal funding of storm damage reserve treated as a rate base reduction."
(Proposed reduction of $31.099 million)

Mr. Kollen recommends that the Commission treat FPL's storm fund reserve as a rate base deduction based on his premise that the storm fund is unfunded and hence that amounts accumulated in it constitute a source of internal funding for FPL. But this premise is demonstrably false. Mr. Kollen erroneously assumes that FPL has access to and uses the storm fund for internal financing and that the fund earns the Company's overall return. Neither assumption is correct. In Order No. PSC-98-0953-FOF-EI, the Commission reaffirmed its previous, long-standing practice of requiring FPL to maintain a <u>separate</u>, <u>funded</u> reserve. Copies of Order No. PSC-98-0953-FOF-EI and of Note 15 to the FPL Group, Inc./Florida Power & Light

Company Form 10-K for 2001 confirming that the storm fund is a funded reserve are attached hereto as Exhibits 1 and 2, respectively. A separate, funded reserve means that the Company cannot use the money to satisfy internal financing needs. The fund is separately managed, is maintained external to the funds of the Company, and earns its own market return that is entirely independent of the Company's authorized overall rate of return. In summary, Mr. Kollen's recommendation fundamentally misapprehends the basic facts of FPL's storm fund and directly contradicts Commission Order No. PSC-98-0953-FOF-EI which requires funding the storm fund reserve.

The total of the four adjustments discussed above is $225.031 million. Subtracting this from the total adjustment claimed by Mr. Kollen of $475 million leaves a remaining total of approximately $250 million. R.11329-11330.

In re: Petition for authority to increase annual storm fund accrual commencing January 1, 1997, to $ 35 million by Florida Power & Light Company

DOCKET NO. 971237-EI; ORDER NO. PSC-98-0953-FOF-EI

Florida Public Service Commission

1998 Fla. PUC LEXIS 1376

98 FPSC 7:354

July 14, 1998

[*1]

The following Commissioners participated in the disposition of this matter: JULIA L. JOHNSON, Chairman, J. TERRY DEASON, SUSAN F. CLARK, JOE GARCIA, E. LEON JACOBS, JR.

OPINION: NOTICE OF PROPOSED AGENCY ACTION ORDER MAINTAINING ANNUAL STORM DAMAGE ACCRUAL AT CURRENT LEVEL AND REQUIRING STUDIES

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. CASE BACKGROUND

By Order No. 24728, issued July 1, 1991, in Docket No. 910257-EI, the Commission approved Florida Power & Light Company's ("FPL" or "the Company") request to discontinue the annual accrual to its storm damage reserve. FPL asserted, and the Commission found, that given the level of insurance coverage in place for FPL's transmission and distribution (T&D) facilities, the balance in the reserve was sufficient.

In August of 1992, Hurricane Andrew severely damaged FPL's T&D system. While the damage claims related to Hurricane Andrew were paid, [*2] FPL's insurers canceled the coverage, effective May 31, 1993.

On April 19, 1993, FPL filed a petition to implement a self-insurance mechanism for storm damage to its T&D system and to resume and increase the annual contribution to its storm and property insurance reserve fund to $ 7.1 million. The amount of $ 7.1 million represented $ 3 million embedded in rates for the storm fund accrual and an additional $ 4.1 million for the traditional T&D insurance that was also embedded in rates. The $ 7.1 million was not based upon a risk study that indicated the appropriate amount that should be accrued to the fund, given the expected exposure. Because of the expiration of FPL's T&D

insurance on May 31, 1993, FPL requested consideration of its request on an emergency basis. A hearing on FPL's petition was held on May 17, 1993.

By Order No. PSC-93-0918-FOF-EI, issued June 17, 1993, in Docket No. 930405-EI, we authorized the Company to implement a self-insurance approach or plan for the costs of repairing and restoring its T&D system in the event of hurricane, storm damage or other natural disaster. FPL also was granted the discretion to establish a line of credit for storm damage liquidity. [*3] In addition, FPL was required to submit a study detailing what it believed to be the appropriate amount that should be accrued annually to the reserve and what costs it intended to charge to the storm fund. Until the appropriate amount was determined, an annual accrual of $ 7.1 million, net-of-tax, to the storm fund was set effective June 1, 1993. We denied FPL's request to "pre-approve" a surcharge on customer bills for damages in the event the reserve balance was inadequate. We indicated that in the event of a shortfall in the reserve, FPL could file a petition seeking appropriate action.

FPL filed the required study in October of 1993. FPL's 1993 study suggested that an annual accrual of $ 20.3 million would allow for storm fund growth, decrease reliance on the customer bill surcharge mechanism and provide an adequate level of insurance. The study also indicated that in order to achieve minimal storm fund growth, a $ 9 million annual accrual combined with a provision for emergency relief was required.

By Order No. PSC-95-0264-FOF-EI, issued February 27, 1995, in Docket No. 930405-EI, we found the storm damage study to be adequate. Based upon the study, we authorized FPL to increase [*4] its annual storm damage accrual to $ 10.1 million, effective January 1, 1994. The storm fund was to continue to be funded on a net-of-tax basis.

On September 28, 1995, FPL filed a petition to, among other things, increase its annual storm fund accrual to $ 20.3 million commencing January 1, 1995; and to add approximately $ 51.3 million of recoveries for damage due to Hurricane Andrew and the March 1993 Storm to the storm reserve and contribute the after tax amount to the storm fund. By letter dated November 14, 1995, the Company expanded its explanation of why it was appropriate to increase the annual accrual at that time. When the $ 10.1 million annual accrual was approved, FPL stated it had anticipated that the availability of insurance would improve. Instead, the potential for commercial or other insurance was less than before. FPL asserted that since the only cost effective measure available at that time was self-insurance, an increase in the annual accrual was needed to provide an adequate level of insurance to FPL and its customers.

By Order No. PSC-95-1588-FOF-EI, issued December 27, 1995, in Docket No. 951167-EI, we approved FPL's petition to increase the accrual [*5] to $ 20.3 million, funded on a net-of-tax basis. As of December 31, 1997, the balance in the reserve was $ 251.3 million.

On September 23, 1997, FPL filed a petition seeking authorization to increase its storm fund accrual to $ 35 million, effective January 1, 1997. This Order addresses FPL's petition.

II. APPROPRIATE ANNUAL STORM DAMAGE ACCRUAL

FPL attached to its petition two reports prepared by EQE International, Inc. (EQE) as support for increasing the accrual. The first is a Hurricane Loss

Estimation Study for Transmission and Distribution Assets. This study is a probabilistic analysis of FPL's potential T&D replacement costs due to hurricane events. No nuclear expenses or events were included in this study. The analysis addresses different storm tracks, various storm intensities, storm frequencies, the geographic location of existing T&D facilities, as well as FPL's experiences with storm damages to T&D facilities. EQE concluded that FPL's annual accrual for funding T&D hurricane restoration should be $ 42.3 million because this figure is representative of FPL's expected annual damage estimate. EQE also indicated that FPL's highest reasonable risk in any single year **[*6]** within the next 50 years is approximately $ 559 million. These results are indexed to achieving sufficient coverage for all the damage caused by 98% of all storm events over a 50 year period. Appendix E of the study shows that distribution facilities comprise 80% or $ 35 million of the expected annual damage.

FPL seeks to increase the annual accrual to $ 35 million to a storm fund which will be used for transmission restorations, distribution restorations and possibly certain nuclear events not covered by other insurance. We agree with FPL to the extent that a 98% coverage level for all events over a 50 year period is excessive. We are not persuaded that any harm will result to FPL's ratepayers if the annual contribution remains at its current level as long as the fund is used primarily for T&D restorations due to significant weather events.

The second report FPL attached to its petition is titled Storm Reserve Solvency Analysis. This report addresses policy considerations for capping the fund as well as the reasonableness of certain funding levels assuming an annual damage level of $ 42.3 million. While this report is informative, it provides no specific conclusions on the fund **[*7]** cap amount nor on the appropriate funding level for regulatory purposes because it assumes an annual damage amount which we do not believe is appropriate for regulatory purposes.

In its Petition, FPL stated that "a funding level sufficient to protect against another 'Andrew type' event is appropriate." An Andrew type event is defined by FPL in its Petition at page 2, as $ 350 million, which reflects inflation and system growth since 1992. However, FPL stated that the $ 350 million covers T&D only and an additional $ 20 million is necessary for property deductibles under the traditional insurance coverage which it currently holds. Rule 25-6.0143(1)(a), Florida Administrative Code, provides, among other things, that insurance deductibles may be charged against the reserve account. Therefore, we believe the reserve level should include this amount for insurance deductibles, and that a reasonable level for the reserve is $ 370 million in 1997 dollars.

The requested $ 35 million accrual would allow the reserve to reach Andrew level in approximately three years, while the current $ 20.3 million accrual will attain this level in approximately four years, assuming minimal future **[*8]** charges to the reserve. This calculation includes a reduction to the reserve of $ 14.5 million in charges associated with the 1998 "Groundhog Day" storm. In either scenario, any charges against the reserve will lengthen the amount of time needed to reach the $ 370 million.

FPL has two lines of credit totaling $ 900 million. $ 300 million is specifically designated for storm damage. FPL also has approximately $ 152 million, net-of-tax, in a funded reserve. It should be noted that the after tax amount in the fund equates to approximately $ 247 million in storm costs. This is true because the amounts contributed to the fund are not tax deductible until actual storm costs are incurred, i.e., the difference between the $ 152 million and $ 247 million is the tax benefit realized when FPL takes a deduction for the expenses. FPL's financial resources from the lines of credit and the fund appear to be sufficient to cover most storm emergencies. However, the costs of storm damage incurred over and above the balance in the reserve and the costs of the use of the lines of credit would still have to be recovered from the ratepayers.

In the event FPL experiences catastrophic losses, it is not unreasonable **[*9]** or unanticipated that the reserve could reach a negative balance. Rule 25-6.0143(4)(b), Florida Administrative Code, recognizes that charges to a reserve may exceed the reserve balance resulting in a negative balance, as was the case of Gulf Power Company in Order No. PSC-96-0023-FOF-EI, issued January 8, 1996, in Docket No. 951533-EI. According to FPL's Response to Interrogatories 1 and 2, it has never experienced a negative reserve balance since the reserve's inception in 1946. The December 1997 balance of $ 251.3 million, is, we believe, sufficient to protect against most emergencies. In cases of catastrophic loss, FPL continues to be able to petition the Commission for emergency relief, as reflected in Order No. PSC-95-1588-FOF-EI.

Therefore, we find that FPL shall continue the current $ 20.3 million annual accrual. Further, FPL shall file a study addressing the reasonableness of the level of the reserve and accrual by no later than December 31, 2002. If there are no significant charges to the reserve, the fund balance should reach the target level about that time.

Given our decision to maintain the annual accrual at $ 20.3 million, FPL's request to implement the increase effective **[*10]** January 1, 1997 is moot.

III. APPROPRIATE USES OF STORM DAMAGE RESERVE

FPL's study did not include any analysis of the appropriate reserve balance necessary to cover the possibility of retrospective assessments associated with FPL's insurance of its nuclcar facilities. The best information available suggests that the probability of such an assessment is low. This Commission has ongoing regulatory authority to review and determine the prudence of charges to this reserve and fund. It is not disputed that this reserve and fund is available to cover uninsured losses to FPL's transmission and distribution system, as well as insurance deductibles. We take this opportunity to make it clear that, consistent with Rule 25-6.0143, Florida Administrative Code, this reserve and fund is also available to cover retrospective assessments incident to FPL's property insurance for its nuclear facilities.

IV. SEPARATION OF TRANSMISSION, DISTRIBUTION, AND OTHER AMOUNTS

FPL does not separate transmission, distribution, and other amounts for purposes of the reserve, fund and expense. It should be stressed that this is not a physical separation, but merely an accounting allocation that **[*11]** should not affect the fund investments or any insurance risk. FPL was asked to develop a separations methodology for T&D, Nuclear, and Other. The Company responded:

Florida Power & Light (FPL) believes it is inappropriate to allocate the reserve and fund to transmission, distribution, nuclear and other and is not aware of any methodology that could be used to appropriately allocate the Storm Reserve and Fund between functions. Previous insurance coverage for storm damage to Transmission and Distribution property was not separable. If by dividing the current Storm Reserve and Fund balances into discrete portions, FPL would be required to insure Transmission and Distribution property separately, any hope of future insurability would be virtually eliminated, resulting in higher costs and less flexible risk management. It would be counter productive to create an artificial separation of funds when any real storm will have a mixture of Transmission and Distribution damages which will differ from the hypothetical separation. A separation may not be in the best interests of ratepayers, until and unless changes in regulation make such separation appropriate. In addition, any separation [*12] of the Funds between functions resulting in the liquidation or retirement of certain investments could result in losses accruing to the Storm Fund.

Without reaching the conclusion that such a separation is appropriate, we believe a reasonable methodology could be developed by the Company. FPL's storm damage study based its separation of T&D on the replacement value of the T&D assets. FPL has agreed to perform the requested study. Therefore, we find that FPL shall file a methodology for separating T&D and Other by December 31, 1998.

V. ESTABLISHMENT OF A TRUST FUND FOR STORM DAMAGE RESERVE

Currently, the storm fund is not a trust fund. The Commission does not have sufficient information to determine whether or not FPL should establish a trust fund. One advantage of a trust fund is that the funds could only be released by the trustee for the intended purpose as defined in the trust agreement. This would assure that the storm fund accrual, recovered through the company's rates, is used only for its intended purpose. Many allowances, such as nuclear decommissioning accruals and pension expense, are subject to trust funds. However, the tax consequences of having a trust [*13] fund, as opposed to not having one, have not been fully examined. Given the significant amount of money in this funded reserve, it is appropriate to examine the issue in greater detail. FPL has agreed to perform the study. Therefore, we find that FPL shall file a study addressing the feasibility of establishing a trust fund for the storm damage reserve fund by December 31, 1998.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that FPL shall continue the current $ 20.3 million annual accrual. It is further

ORDERED that FPL shall file a study addressing the reasonableness of the level of the reserve and annual accrual by no later than December 31, 2002. It is further

ORDERED that, consistent with Rule 25-6.0143, Florida Administrative Code, this reserve and fund is available to cover retrospective assessments incident to FPL's property insurance for its nuclear facilities. It is further

ORDERED that FPL shall file a methodology for separating Transmission, Distribution and Other assets covered by this reserve and fund no later than December 31, 1998. It is further

ORDERED that FPL shall file a study addressing the feasibility of establishing a trust fund [*14] for the storm damage reserve and fund no later than December 31, 1998. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 14th day of July, 1998.

BLANCA S. BAYO, Director

Division of Records and Reporting

DISSENTBY: CLARK AND GARCIA

Commissioners Clark and Garcia dissent from the decisions to maintain the annual accrual at the current level and to require the studies concerning an accounting separation and the feasibility of establishing a trust fund.

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10-K

[X] ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended **December 31, 2001**

OR

[ ] TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

Commission File Number	Exact name of registrants as specified in their charters, address of principal executive offices and registrants' telephone number	IRS Employer Identification Number
1-8841	**FPL GROUP, INC.**	59-2449419
1-3545	**FLORIDA POWER & LIGHT COMPANY** 700 Universe Boulevard Juno Beach, Florida 33408 (561) 694-4000	59-0247775

State or other jurisdiction of incorporation or organization: Florida

	Name of exchange on which registered
Securities registered pursuant to Section 12(b) of the Act:	
FPL Group, Inc.: Common Stock, $0.01 Par Value and Preferred Share Purchase Rights	New York Stock Exchange
Corporate Units	New York Stock Exchange
Florida Power & Light Company: None	

Securities registered pursuant to Section 12(g) of the Act:
FPL Group, Inc.: None
Florida Power & Light Company: Preferred Stock, $100 Par Value

Indicate by check mark whether the registrants (1) have filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months and (2) have been subject to such filing requirements for the past 90 days Yes X No ___

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrants' knowledge in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. [ ]

Aggregate market value of the voting stock of FPL Group, Inc held by non-affiliates as of February 28, 2002 (based on the closing market price on the Composite Tape on February 28, 2002) was $9,278,436,763 (determined by subtracting from the number of shares outstanding on that date the number of shares held by directors and officers of FPL Group, Inc.)

There was no voting stock of Florida Power & Light Company held by non-affiliates as of February 28, 2002

The number of shares outstanding of FPL Group, Inc common stock, as of the latest practicable date: Common Stock, $0.01 par value, outstanding at February 28, 2002: 175,824,977 shares

As of February 28, 2002, there were issued and outstanding 1,000 shares of Florida Power & Light Company's common stock, without par value, all of which were held, beneficially and of record, by FPL Group, Inc

DOCUMENTS INCORPORATED BY REFERENCE

Portions of FPL Group, Inc.'s Proxy Statement for the 2002 Annual Meeting of Shareholders are incorporated by reference in Part III hereof

This combined Form 10-K represents separate filings by FPL Group, Inc. and Florida Power & Light Company. Information contained herein relating to an individual registrant is filed by that registrant on its own behalf. Florida Power & Light Company makes no representations as to the information relating to FPL Group, Inc.'s other operations.

DEFINITIONS

Acronyms and defined terms used in the text include the following:

Term	Meaning
capacity clause	Capacity cost recovery clause
CMP	Central Maine Power Company
charter	Restated Articles of Incorporation, as amended, of FPL Group or FPL, as the case may be
conservation clause	Energy conservation cost recovery clause
DOE	U.S. Department of Energy
EMF	Electric and magnetic fields
EMT	Energy Marketing & Trading
Entergy	Entergy Corporation
environmental clause	Environmental compliance cost recovery clause
FAS	Statement of Financial Accounting Standards No.
FDEP	Florida Department of Environmental Protection
FERC	Federal Energy Regulatory Commission
FGT	Florida Gas Transmission Company
FMPA	Florida Municipal Power Agency
FPL	Florida Power & Light Company
FPL Energy	FPL Energy, LLC
FPL FiberNet	FPL FiberNet, LLC
FPL Group	FPL Group, Inc.
FPL Group Capital	FPL Group Capital Inc
FPSC	Florida Public Service Commission
fuel clause	Fuel and purchased power cost recovery clause
Holding Company Act	Public Utility Holding Company Act of 1935, as amended
IBEW	International Brotherhood of Electrical Workers
ISO	Independent System Operator
JEA	Jacksonville Electric Authority
kv	kilovolt
kwh	kilowatt-hour
Management's Discussion	Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations
MFRs	Minimum filing requirements
mortgage	FPL's Mortgage and Deed of Trust dated as of January 1, 1944, as supplemented and amended
mw	Megawatt(s)
Note ___	Note ___ to Consolidated Financial Statements
NRC	U.S. Nuclear Regulatory Commission
Nuclear Waste Policy Act	Nuclear Waste Policy Act of 1982
O&M expenses	Other operations and maintenance expenses in the Consolidated Statements of Income
PMI	FPL Energy Power Marketing, Inc.
Public Counsel	State of Florida Office of Public Counsel
PURPA	Public Utility Regulatory Policies Act of 1978, as amended
qualifying facilities	Non-utility power production facilities meeting the requirements of a qualifying facility under the PURPA
Reform Act	Private Securities Litigation Reform Act of 1995
ROE	Return on common equity
RTOs	Regional transmission organizations
SJRPP	St. Johns River Power Park
storm fund	Storm and Property Insurance Reserve Fund

Most of the remainder of the purchase price was allocated to the hydro operations. The hydro plants and related goodwill are being amortized on a straight-line basis over the 40-year term of the hydro plant operating licenses. See Note 1 – Goodwill and Other Intangible Assets.

14. Divestiture of Cable Investments

In January 1999, an FPL Group Capital subsidiary sold 3.5 million common shares of Adelphia Communications Corporation stock and in October 1999 had its one-third ownership interest in a cable limited partnership redeemed, resulting in after-tax gains of approximately $96 million and $66 million, respectively. Both investments had been accounted for under the equity method.

15. Commitments and Contingencies

Commitments – FPL has made commitments in connection with a portion of its projected capital expenditures. Capital expenditures for the construction or acquisition of additional facilities and equipment to meet customer demand are estimated to be approximately $4.4 billion for 2002 through 2004, including approximately $1.3 billion for 2002. At December 31, 2001, FPL Energy has made commitments in connection with the development and expansion of independent power projects totaling approximately $828 million. At December 31, 2001, subsidiaries of FPL Group, other than FPL, have guaranteed approximately $966 million of lease obligations, prompt performance payments, purchase and sale of power and fuel agreement obligations, debt service payments and other payments subject to certain contingencies.

Off-Balance Sheet Financing Arrangements – In 2000, an FPL Energy subsidiary entered into an operating lease agreement with a special purpose entity (SPE) lessor to lease a 535 megawatt (mw) combined-cycle power generation plant. At the inception of the lease, the lessor obtained the funding commitments required to complete the acquisition, development and construction of the plant through debt and equity contributions from investors who are not affiliated with FPL Group. At December 31, 2001 and 2000, the lessor had drawn $298 million and $127 million, respectively, on a $425 million total commitment. Construction is expected to be completed in the third quarter of 2002. The FPL Energy subsidiary is acting as the lessor's agent to construct the plant and, upon completion, will lease the plant for a term of five years. Generally, if the FPL Energy subsidiary defaults during the construction period on its obligations under the agreement, a residual value guarantee payment equal to 89.9% of lessor capitalized costs incurred to date must be made by the FPL Energy subsidiary. However, under certain limited events of default during the construction period and the post-construction lease term, the FPL Energy subsidiary can be required to purchase the plant for 100% of costs incurred to date. Once construction is complete, the FPL Energy subsidiary is required to make rent payments in amounts intended to cover the lessor's debt service, a stated yield to equity holders and certain other costs; these payments are estimated to be $3 million in 2002, $13 million in each of the years 2003-06 and $10 million thereafter. The FPL Energy subsidiary has the option to purchase the plant for 100% of costs incurred to date at any time during construction or the remaining lease term. If the FPL Energy subsidiary does not elect to purchase the plant at the end of the lease term, a residual value guarantee (equal to 85% of total costs) must be paid and the plant will be sold. Any proceeds received by the lessor in excess of the outstanding debt and equity will be given to the FPL Energy subsidiary. FPL Group Capital has guaranteed the FPL Energy subsidiary's obligations under the lease agreement, which are included in the $966 million of guarantees discussed above. Additionally, at December 31, 2001, FPL Energy has posted cash collateral related to this transaction of $256 million (included in other assets on FPL Group's consolidated balance sheets). The equity holder controls the lessor. The lessor has represented that it has essentially no assets or obligations other than the plant under construction and the related debt and that total assets, total liabilities and equity of the lessor at December 31, 2001 were $307 million, $296 million and $11 million, respectively.

Also in 2000, another FPL Energy subsidiary entered into an operating lease agreement with an SPE related to the construction of certain turbines and related equipment (equipment). At the inception of the lease, the SPE arranged a total credit facility of $650 million to be funded through debt and equity contributions from investors who are not affiliated with FPL Group. At December 31, 2001 and 2000, the amounts outstanding under the facility were $42 million and $14 million, respectively. Generally, if the FPL Energy subsidiary defaults during the construction period on its obligations under the agreement, a residual value guarantee payment equal to 89.9% of costs incurred to date must be made by the FPL Energy subsidiary. However, under certain limited events of default, the FPL Energy subsidiary can be required to purchase all equipment then in the facility for 100% of costs incurred to date. At any time during the construction period, FPL Energy may purchase any equipment for 100% of payments made to date by the SPE to the equipment vendors. Upon completion of each item of equipment, FPL Energy may choose to purchase the equipment, remarket the equipment to another party or continue under the operating lease agreement to lease the equipment for the remainder of the five year term. The minimum annual lease payments are estimated to be $1 million, $6 million, $8 million, $7 million and $2 million for 2002, 2003, 2004, 2005 and 2006, respectively. If FPL Energy chooses to continue the lease, and does not choose to purchase the equipment at the end of the lease term, the FPL Energy subsidiary is subject to a residual value guarantee payment of 84% of the equipment cost. FPL Group Capital has guaranteed the FPL Energy subsidiary's obligations under the agreement, which are included in the $966 million of guarantees discussed above The equity holder controls the lessor. The lessor has represented that it has essentially no assets or obligations other than the equipment under construction and the related debt and that total assets, total liabilities and equity of the SPE at December 31, 2001 were $41.7 million, $40.4 million and $1.3 million, respectively.

Insurance – Liability for accidents at nuclear power plants is governed by the Price-Anderson Act, which limits the liability of nuclear reactor owners to the amount of the insurance available from private sources and under an industry retrospective payment plan. In accordance with this Act, FPL maintains $200 million of private liability insurance, which is the maximum obtainable, and participates in a secondary financial protection system under which it is subject to retrospective assessments of up to $363 million per incident at any nuclear utility reactor in the United States, payable at a rate not to exceed $43 million per incident per year.

FPL participates in nuclear insurance mutual companies that provide $2.75 billion of limited insurance coverage for property damage, decontamination and premature decommissioning risks at its nuclear plants. The proceeds from such insurance, however, must first be used for reactor stabilization and site decontamination before they can be used for plant repair. FPL also participates in an insurance program that provides limited coverage for replacement power costs if a nuclear plant is out of service because of an accident. In the event of an accident at one of FPL's or another participating insured's nuclear plants, FPL could be assessed up to $71 million in retrospective premiums.

In the event of a catastrophic loss at one of FPL's nuclear plants, the amount of insurance available may not be adequate to cover property damage and other expenses incurred. Uninsured losses, to the extent not recovered through rates, would be borne by FPL and could have a material adverse effect on FPL Group's and FPL's financial condition.

FPL self-insures the majority of its transmission and distribution (T&D) property due to the high cost and limited coverage available from third-party insurers. As approved by the FPSC, FPL maintains a funded storm and property insurance reserve, which totaled approximately $235 million at December 31, 2001, for uninsured property storm damage or assessments under the nuclear insurance program. Recovery from customers of any losses in excess of the storm and property insurance reserve will require the approval of the FPSC. FPL's available lines of credit provide additional liquidity in the event of a T&D property loss. See Note 8.

Contracts – FPL Group has a long-term agreement for the supply of gas turbines through 2004 and for parts, repairs and on-site services through 2011, some of which have been assigned to the SPE that is funding the construction of turbines. See Off-Balance Sheet Financing Arrangements. In addition, FPL Energy has entered into various engineering, procurement and construction contracts to support its development activities through 2004. All of these contracts are intended to support expansion, primarily at FPL Energy, and the related commitments are included in Commitments above.

FPL has entered into long-term purchased power and fuel contracts. Take-or-pay purchased power contracts with the Jacksonville Electric Authority (JEA) and with subsidiaries of The Southern Company (Southern Companies) provide approximately 1,300 mw of power through mid-2010 and 388 mw thereafter through 2021. FPL also has various firm pay-for-performance contracts to purchase approximately 900 mw from certain cogenerators and small power producers (qualifying facilities) with expiration dates ranging from 2002 through 2026. The purchased power contracts provide for capacity and energy payments. Energy payments are based on the actual power taken under these contracts and the Southern Companies' contract is subject to minimum quantities. Capacity payments for the pay-for-performance contracts are subject to the qualifying facilities meeting certain contract conditions. In 2001, FPL entered into agreements with several electricity suppliers to purchase an aggregate of up to approximately 1,300 mw of power with expiration dates ranging from 2003 through 2007. In general, the agreements require FPL to make capacity payments and supply the fuel consumed by the plants under the contracts. FPL has medium- to long-term contracts for the transportation and supply of natural gas, coal and oil with various expiration dates through 2022. FPL Energy has long-term contracts for the transportation and supply of natural gas with expiration dates ranging from 2005 through 2017, and a contract for the supply of natural gas that expires in mid-2002.

The required capacity and minimum payments through 2006 under these contracts are estimated to be as follows:

	2002	2003	2004	2005	2006
			(millions)		
FPL:					
Capacity payments:					
JEA and Southern Companies	$ 190	$ 190	$ 190	$ 190	$ 200
Qualifying facilities	$ 340	$ 350	$ 360	$ 360	$ 310
Other electricity suppliers	$ 80	$ 100	$ 100	$ 45	$ 35
Minimum payments, at projected prices:					
Southern Companies - energy	$ 50	$ 60	$ 50	$ 60	$ 60
Natural gas, including transportation	$ 580	$ 240	$ 200	$ 200	$ 180
Coal	$ 40	$ 25	$ 15	$ 15	$ 10
Oil	$ 375	$ -	$ -	$ -	$ -
FPL Energy:					
Natural gas transportation	$ 20	$ 20	$ 15	$ 15	$ 15

Charges under these contracts were as follows:

	2001 Charges		2000 Charges		1999 Charges	
	Capacity	Energy/ Fuel	Capacity	Energy/ Fuel	Capacity	Energy/ Fuel
			(millions)			
FPL:						
JEA and Southern Companies	$ 197[a]	$ 169[b]	$ 198[a]	$ 153[b]	$ 186[a]	$ 132[b]
Qualifying facilities	$ 314[c]	$ 124[b]	$ 318[c]	$ 135[b]	$ 319[c]	$ 121[b]
Other electricity suppliers	$ 25[c]	$ 6[b]	$ -	$ -	$ -	$ -
Natural gas, including transportation	$ -	$ 763[b]	$ -	$ 567[b]	$ -	$ 373[b]
Coal	$ -	$ 49[b]	$ -	$ 50[b]	$ -	$ 43[b]
Oil	$ -	$ 294[b]	$ -	$ 354[b]	$ -	$ 115[b]
FPL Energy:						
Natural gas, including transportation and storage	$ -	$ 17	$ -	$ 17	$ -	$ 16

[a] Recoverable through base rates and the capacity clause
[b] Recoverable through the fuel clause
[c] Recoverable through the capacity clause

Litigation – In 1999, the Attorney General of the United States, on behalf of the U.S. Environmental Protection Agency (EPA), brought an action against Georgia Power Company and other subsidiaries of The Southern Company for certain alleged violations of the Clean Air Act. In May 2001, the EPA amended its complaint. The amended complaint alleges, among other things, that Georgia Power Company constructed and is continuing to operate Scherer Unit No. 4, in which FPL owns a 76% interest, without obtaining proper permitting, and without complying with performance and technology standards as required by the Clean Air Act. It also alleges that unspecified major modifications have been made at Scherer Unit No. 4 that require its compliance with the aforementioned Clean Air Act provisions. The EPA seeks injunctive relief requiring the installation of best available control technology and civil penalties of up to $25,000 per day for each violation from an unspecified date after June 1, 1975 through January 30, 1997, and $27,500 per day for each violation thereafter. Georgia Power Company has answered the amended complaint, asserting that it has complied with all requirements of the Clean Air Act, denying the plaintiff's allegations of liability, denying that the plaintiff is entitled to any of the relief that it seeks and raising various other defenses. In June 2001, a federal district court stayed discovery and administratively closed the case pending resolution of the EPA's motion for consolidation of discovery in several Clean Air Act cases that was filed with a Multi-District Litigation (MDL) panel. In August 2001, the MDL panel denied the motion for consolidation. In September 2001, the EPA moved that the federal district court reopen this case for purposes of discovery. Georgia Power Company has opposed that motion asking that the case remain closed until the Eleventh Circuit Court of Appeals rules on the Tennessee Valley Authority's appeal of an EPA administrative order relating to legal issues that are also central to this case The federal district court has not yet ruled upon the EPA's motion to reopen.

In 2000, Southern California Edison Company (SCE) filed with the FERC a Petition for Declaratory Order (petition) asking the FERC to apply a November 1999 federal circuit court of appeals' decision to all qualifying small power production facilities, including two solar facilities operated by partnerships indirectly owned in part by FPL Energy (the partnerships) which have power purchase agreements with SCE. The federal circuit court of appeals' decision invalidated the FERC's so-called essential fixed assets standard, which permitted uses of fossil fuels by qualifying small power production facilities beyond those expressly set forth in PURPA. The petition requests that the FERC declare that qualifying small power production facilities may not continue to use fossil fuel under the essential fixed assets standard and that they may be required to make refunds with respect to past usage. In August 2000, the partnerships filed motions to intervene and protest before the FERC, vigorously objecting to the position taken by SCE in its petition. The partnerships contend that they have always operated the solar facilities in accordance with certification orders issued to them by the FERC. Such orders were neither challenged nor appealed at the time they were granted, and it is the position of the partnerships that the orders remain in effect. Briefing in this proceeding is complete and the parties are currently awaiting a final determination from the FERC. In June 2001, SCE and the partnerships entered into an agreement that provides, among other things, that SCE and the partnerships will take all necessary steps to suspend or stay, during a specified period of time, the proceeding initiated by the petition. The agreement is conditioned upon, among other things, completion of SCE's financing plan. The agreement provides that, if the conditions of the agreement are satisfied, then SCE and each of the partnerships agree to release and discharge each other from any and all claims of any kind arising from either parties' performance under the power purchase agreements. Such a release would include release of the claim made by SCE in the petition for refunds with respect to past usage. For subsequent events, see Note 18 – Litigation.

In 2001, J. W. and Ernestine M. Thomas, Chester and Marie Jenkins, and Ray Norman and Jack Teague, as Co-Personal Representatives on behalf of the Estate of Robert L. Johns, filed suit against FPL Group, FPL, FPL FiberNet, LLC, FPL Group Capital and FPL Investments, Inc. in the Florida circuit court. This action is purportedly on behalf of all property owners in Florida (excluding railroad and public rights of way) whose property is encumbered by easements in favor of defendants, and on whose property defendants have installed or intend to install fiber-optic cable which defendants currently lease, license or convey or intend to lease, license or convey for non-electric transmission or distribution purposes. The lawsuit alleges that FPL's easements do not permit the installation and use of fiber-optic cable for general communication purposes. The plaintiffs have asserted claims for unlawful detainer, unjust enrichment and constructive trust and seek injunctive relief and compensatory damages. In December 2001, all defendants filed a motion to dismiss the complaint for, among other things, the failure to state a valid cause of action.

In January 2002, Roy Oorbeek and Richard Berman filed suit against FPL Group (as an individual and nominal defendant); its current and certain former directors; and certain current and former officers of FPL Group and FPL, including James L. Broadhead, Lewis Hay III, Dennis P. Coyle, Paul J. Evanson and Lawrence J. Kelleher. The lawsuit alleges that the proxy statements relating to shareholder approval of FPL Group's Long Term Incentive Plan (LTIP) and its proposed, but unconsummated, merger with Entergy were false and misleading because they did not affirmatively state that payments made to certain officers under FPL Group's LTIP upon shareholder approval of the merger would be retained by the officers even if the merger with Entergy was not consummated and did not state that under some circumstances payments made pursuant to FPL Group's LTIP might not be deductible by FPL Group for federal income tax purposes. It also alleges that FPL Group's LTIP required either consummation of the merger as a condition to the payments or the return of the payments if the transaction did not close, and that the actions of the director defendants in approving the proxy statements, causing the payments to be made, and failing to demand their return constitute corporate waste. The plaintiffs seek to have the shareholder votes approving FPL Group's LTIP and the merger declared null and void, the return to FPL Group of the payments received by the officers, compensatory damages from the individual defendants and attorneys' fees. The defendants intend to file a motion to dismiss the complaint or stay the proceeding for failure to make a demand, as required by the Florida Business Corporation Act, that the board of directors of FPL Group take action with respect to the matters alleged in the complaint. FPL Group's board of directors has established a special committee to investigate a demand by another shareholder that the board take action to obtain the return of the payments made to the officers.

FPL Group and FPL believe that they have meritorious defenses to the pending litigation discussed above and are vigorously defending the suits. Accordingly, management believes the liabilities, if any, arising from the proceedings are not anticipated to have a material adverse effect on their financial statements.

16. Segment Information

FPL Group's reportable segments include FPL, a rate-regulated utility, and FPL Energy, a non-rate regulated energy generating subsidiary. Corporate and Other represents other business activities, other segments that are not separately reportable and eliminating entries. FPL Group's operating revenues derived from the sale of electricity represented approximately 97%, 97% and 98% of FPL Group's operating revenues in 2001, 2000 and 1999, respectively. Less than 1% of operating revenues were from foreign sources for each of the three years ended December 31, 2001. At December 31, 2001 and 2000, less than 1% of long-lived assets were located in foreign countries.

FPL Group's segment information is as follows:

	2001				2000 (millions)				1999			
	FPL	FPL Energy[a]	Corp and Other	Total	FPL	FPL Energy[a]	Corp and Other	Total	FPL	FPL Energy[a]	Corp. and Other	Total
Operating revenues	$ 7,477	$ 869	$ 129	$ 8,475	$ 6,361	$ 632	$ 89	$ 7,082	$ 6,057	$ 323	$ 58	$ 6,438
Interest charges	$ 187	$ 74	$ 63	$ 324	$ 176	$ 67	$ 35	$ 278	$ 163	$ 44	$ 15	$ 222
Depreciation and amortization	$ 898	$ 77	$ 8	$ 983	$ 975	$ 50	$ 7	$ 1,032	$ 989	$ 34	$ 17	$ 1,040
Equity in earnings of equity method investees	$ -	$ 81	$ -	$ 81	$ -	$ 45	$ -	$ 45	$ -	$ 50	$ -	$ 50
Income tax expense (benefit)	$ 383	$ 25	$ (29)	$ 379	$ 341	$ 36	$ (41)	$ 336	$ 324	$ (42)	$ 41	$ 323
Net income (loss) [b][c]	$ 679	$ 113[d]	$ (11)	$ 781	$ 607	$ 82	$ 15	$ 704	$ 576	$ (46)	$ 167	$ 697
Significant noncash items	$ 70	$ -	$ -	$ 70	$ (57)	$ -	$ 100	$ 43	$ 86	$ -	$ -	$ 86
Capital expenditures and investments	$ 1,154	$ 1,977	$ 131	$ 3,262	$ 1,299	$ 507	$ 90	$ 1,896	$ 924	$ 1,540	$ 15	$ 2,479
Total assets	$ 11,924	$ 4,957	$ 582	$ 17,463	$ 12,020	$ 2,679	$ 601	$ 15,300	$ 10,608	$ 2,212	$ 621	$ 13,441
Investment in equity method investees	$ -	$ 276	$ -	$ 276	$ -	$ 196	$ -	$ 196	$ -	$ 166	$ -	$ 166

[a] FPL Energy's interest charges are based on an assumed capital structure of 50% debt for operating projects and 100% debt for projects under construction

[b] Includes merger-related expense recognized in 2001 and 2000 totaling $19 million after-tax and $41 million after-tax, respectively, of which $16 million and $38 million was recognized by FPL, none and $1 million by FPL Energy and $3 million and $2 million by Corporate and Other (see Note 11)

[c] The following nonrecurring items affected 1999 net income FPL settled litigation for $42 million after-tax (see Note 12); FPL Energy recorded $104 million after-tax impairment loss (see Note 13), and Corporate and Other divested its cable investments resulting in a $162 million after-tax gain (see Note 14).

[d] Includes an $8 million net positive effect of applying FAS 133

B

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 001148-EI

In the Matter of

REVIEW OF THE RETAIL RATES
OF FLORIDA POWER & LIGHT
COMPANY.
_______________________________/

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PROCEEDINGS:	SPECIAL AGENDA CONFERENCE
BEFORE:	CHAIRMAN LILA A. JABER COMMISSIONER J. TERRY DEASON COMMISSIONER BRAULIO L. BAEZ COMMISSIONER MICHAEL A. PALECKI COMMISSIONER RUDOLPH "RUDY" BRADLEY
DATE:	Friday, March 22, 2002
TIME:	Commenced at 8:35 a.m. Concluded at 10:05 a.m.
PLACE:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	LINDA BOLES, RPR Official FPSC Reporter (850) 413-6734

APPEARANCES:

PAUL EVANSON, and R. WADE LITCHFIELD, Florida Power & Light Company, 700 Universe Boulevard, Juno Beach, Florida 33408-0420, appearing on behalf of Florida Power & Light Company.

KENNETH L. WISEMAN, Andrews & Kurth, L.L.P., 1701 Pennsylvania Avenue, N.W., Suite 300, Washington, D.C. 20006-5805, appearing on behalf of South Florida Hospital and Health Care Association.

ROBERT SCHEFFEL WRIGHT, Landers & Parsons, P.A., 310 West College Avenue, Tallahassee, Florida 32302, appearing on behalf of Lee County.

MICHAEL B. TWOMEY, Post Office Box 5256, Tallahassee, Florida 32314-5256, appearing on behalf of Thomas and Genevieve Twomey.

SEANN FRAZIER, Greenberg, Traurig, P.A., 101 East College Avenue, Tallahassee, Florida 32302, appearing on behalf of Florida Retail Federation.

VICKI GORDON KAUFMAN, McWhirter, Reeves, McGlothlin, Davidson, Decker, Kaufman, Arnold and Steen, P.A., 117 South Gadsden Street, Tallahassee, Florida 32301, appearing on behalf of Florida Industrial Power Users Group.

APPEARANCES CONTINUED:

JACK SHREVE, Public Counsel, Office of the Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Suite 812, Tallahassee, Florida 32399, appearing on behalf of the Citizens of the State of Florida.

ED PASCHALL, 200 West College Avenue, Tallahassee, Florida 32301, appearing on behalf of AARP.

ROBERT V. ELIAS, FPSC Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, appearing on behalf of the Commission Staff.

MR. SHREVE: Okay. Madam Chairman, I think it's good that Mr. Twomey pointed out the one thing that this Commission did want and that everyone wanted was all the information that was needed to review, and I think that has been thoroughly reviewed, particularly by your Staff and all the parties and the discovery that we've had in it.

South Florida Hospital Association is also a party. Mr. Wiseman or the association has not signed on the agreement, but I'd like to call on him, if he has any remarks at this time.

CHAIRMAN JABER: Give me your name one more time.

MR. WISEMAN: Kenneth Wiseman for the South Florida Hospital Health Care Association.

First of all, I want to express our appreciation to Jack Shreve for the hard work that he's done in trying to craft what would be a universal settlement of any support in the concept of attempting to reach a settlement. Unfortunately, we cannot support the settlement in this case and I guess I'm feeling a little bit lonely over here, given the other comments.

But that being said, let me also say at the outset, and I say this with no disrespect whatsoever to the Commission, but I'm somewhat chagrined that we have but five minutes to present our position because we thought at least that we'd be given the opportunity to present a thorough analysis to show why this settlement should not be approved.

CHAIRMAN JABER: How much time do you need, Mr. Wiseman?

MR. WISEMAN: I would need at least a half an hour.

CHAIRMAN JABER: Okay. Commissioners, what's your pleasure? I mean, we've read the settlement. We really are here to discuss the proposed settlement. It was a proceeding that the Commission initiated. How about you do the best you can with 15 minutes.

MR. WISEMAN: All right. I'll take a shot at that. Thank you very much.

The first item that I'd like to point out that we disagree with strenuously is the proposition that the $250 million cost-of-service reduction is adequate. We believe that if we were given the opportunity to present evidence in this case, we could show that a cost-of-service reduction more along the lines of a minimum of $500 million is what's needed in this case, and we think the evidence would support that.

Now I don't have time, I don't believe, to go through the items individually as I had intended. But we have presented testimony concerning specific items that are included in FPL's test year, projected test year cost-of-service that are inappropriate. And when you compile those items together, it amounts to, I believe it's approximately $475 million in cost-of-service reductions.

On top of that, certain items that we can quantify at this time, but which were, we intended to develop through cross-examination and on brief, relate to FPL's requested return on equity, which we believed the evidence that's in the case right now, if you simply look at the evidence presented by Dr. Olivera, FPL's witness on return on equity, would support a 100 to 200 basis point reduction in the midpoint return on equity that he's proposed. And that produces an additional $47 million reduction to FPL's test year cost-of-service.

On top of that, there are, there's an issue related to the Sanford repowering project. Based upon the evidence that is available to us right now, we know that there's a cost overrun of approximately $100 million on that project. FPL's ratepayers shouldn't be required to pay for a cost overrun that's caused by FPL's inefficient process of constructing the repowering project. That would produce another $13 million per year reduction to the test year cost-of-service.

So when you add those items up together, and these are items that we can quantify right now, we come up with $535 million in cost-of-service reductions. And to be honest, when we compare that to the $250 million reduction that's called for in the settlement, the $250 million reduction does not seem adequate and we don't believe that it's, it will result in just and reasonable rates.

One particular item that I want to talk about in the cost-of-service reductions relates to FPL's capital structure. FPL has an extraordinarily thick equity component in its capital structure. It's 64 percent. That's excessive for an A-rated utility. If you look at Standard & Poor's, Standard & Poor's suggests that an A-rated utility facing, having a risk profile similar to FPL's should have a capital structure of approximately 50 percent common equity. That's, in fact -- by the way, the 50 percent common equity is directly consistent with a comparison group that Mr., I'm sorry, Dr. Olivera used in his testimony on behalf of FPL.

Standard & Poor's and Moody's have both said that FPL Group is engaged in high-risk business activities by its nonregulated affiliates. Those nonregulated affiliates are involved in building independent power projects in other states. And it's because of those unregulated activities in the high business risk that FPL Group has to have a very thick equity component in order to provide credit protection.

Now the effect of having that equity component, that thick equity component is FPL's ratepayers are subsidizing the activities of unregulated affiliates. And, again, those activities are the construction of power plants in other states that in no way serve the ratepayers in Florida.

The effect of that item alone is approximately $173 million in the test year cost-of-service. So you take that item alone and you're bumping right up against the

$250 million reduction that the settlement provides without even getting into the other items that I would include in our quantification of $500 million in cost-of-service reductions.

Now those are the items -- so far I've referred to items that we can quantify, but I want to stress that there are a lot of items that we can't quantify at this time. And, frankly, that's because FPL has been stonewalling on discovery in this case.

There's no question but that FPL has been engaged in numerous transactions with unregulated business affiliates. The law is clear that we have the right in discovery to obtain information about those activities to find out whether they're impacting rates or not.

In fact, as we're sitting here today, there's an order from Commissioner Baez acting as presiding officer requiring FPL to produce that information, but FPL hasn't done it. Instead what it did is it filed what we regard as a frivolous motion for reconsideration, which was a way of FPL stonewalling and not providing the information to which we're entitled.

Now what are those activities? First of all, there is a -- FPL Group's 2000 annual report indicated that the FPL Group owned interest in an entity called Adelphia Communications Corp. It sold that at a $150 million gain. The annual report also indicated that FPL Group redeemed interest in a cable TV partnership for a $108 million gain. We know for sure that FPL's been engaged in activities at least with Adelphia, and we were trying to find out whether it was engaged in activities, business activities with this other organization as well.

The business activities with Adelphia, FPL admits that Adelphia uses FPL property in conducting Adelphia's business. Now FPL does get rentals, rent revenues from Adelphia, but the question is are those adequate or not? Are they covering the costs or are FPL's ratepayers subsidizing Adelphia's investors?

We'd like to get discovery about that, but we have been denied discovery at this point because FPL just hasn't turned it over, notwithstanding the order from Commissioner Baez.

FPL also sold property in 2000 to an affiliate called FiberNet. Now those assets, and FPL admits this, those assets, it was a fiber optic network, originally were constructed to support FPL's utility operations. Since the transfer to FiberNet, FPL's rental revenues have dropped precipitously. I think that creates a clear question: What is going on with this affiliate? Again, we've sought information about this and FPL has stonewalled. We haven't gotten the information.

There's another affiliate named Land Resource Investment Company. FPL surveillance reports clearly disclose that millions of dollars of FPL property have been shed and provided to that entity. But, again, we don't know what the purpose of that is and whether that's resulting in a transfer of ratepayer value over to the investors in the unregulated business activities.

COMMISSIONER JABER: Mr. Wiseman, I just want to give you a heads-up that you have just two or three minutes left.

MR. WISEMAN: All right. Thank you.

The point is that there's an inadequate record in this proceeding. Neither the Commission nor really any members that signed onto the stipulation have any knowledge of what the impact is of the unregulated business activities on FPL's rates.

Since I only have a couple of minutes, I'll cut to the end. The bottom line is that we think there's inadequate information about FPL's dealings with affiliates. We believe that if you look at FPL's resource planning process, that also is a matter that's not been disclosed on this record because FPL stonewalled on providing discovery concerning it. And we know at a minimum that it's resulted in a $100 million overrun in at least one case.

FPL's rates haven't been examined on a comprehensive basis in 18 years. And, again, I don't say this -- well, I say this with no disrespect to the Commission, but that has got to be a record for a regulated public utility in this, in this country.

It's time that FPL's rates be examined comprehensively. What we would ask is that you defer ruling on this stipulation; that what you do is you allow the discovery process to be completed so that we obtain the information concerning FPL's affiliate dealings and concerning its resource planning process; that after obtaining that discovery, you hold a hearing on the merits of the settlement proposal to find out whether the settlement proposal, in fact, results in just and reasonable rates. And that's a determination that we submit can only be based upon a full and adequate administrative record, and that's not something that the Commission has currently before it. Thank you very much.

CHAIRMAN JABER: Thank you, Mr. Wiseman. Staff, I've got -- and, parties, I know you probably want to respond, but let's allow you to respond after the Commissioners ask questions as well.

Staff, I have a series of questions. Some go to the points raised by Mr. Wiseman, some go to your recommendation and some really serve to clarify for me the terms of the settlement.

I was trying to understand the revenue sharing mechanism, first of all. And, Dale, I'm sorry to skip around on you like this, but the revenue sharing mechanism, if I understood it correctly, for the Year 2002, all revenues between $3,580,000 and $3,740,000 would be shared one-third to the shareholders and two-thirds to retail customers. Now because we're, we've already started 2002, there's a cap, if I understand it correctly, for the Year 2002 to 71.5 percent of the revenues exceeding the cap.

MR. MAILHOT: That's correct.

CHAIRMAN JABER: For the Year 2003, revenues between $3,680,000 and $3,840,000 are shared, again, one-third to shareholders, two-thirds to the retail consumer.

MR. MAILHOT: That's right.

CHAIRMAN JABER: All -- and this is critical. I want to make sure I'm doing this right. All revenue over $3,840,000 will be refunded entirely to the retail customer. Is that your understanding of this settlement?

MR. MAILHOT: Yes.

CHAIRMAN JABER: For the Year 2004, all revenues between $3,780,000 and $3,940,000 are shared, again, one-third to the shareholders, two-thirds to the retail customers, and all revenue over the $3,940,000 will be refunded entirely to the consumers.

MR. MAILHOT: Yes.

CHAIRMAN JABER: In the Year 2005, which, if we accept the settlement, will be the last year of the settlement; right? That's all revenues between $3,880,000 and $4,040,000 will be shared one-third to shareholders and two-thirds to retail consumers. All, all revenue over $4,040,000 will be refunded entirely to the retail consumer.

MR. MAILHOT: That's correct. But all those amounts are billions, yes.

CHAIRMAN JABER: All right. Now I want to understand -- what did you say?

MR. MAILHOT: They're all billions.

CHAIRMAN JABER: Oh, thank you. See.

MR. LITCHFIELD: We appreciate that clarification from Staff.

CHAIRMAN JABER: So do I. So do I. So do I.

Now I want to understand the cost-of-service study. It's my understanding that the cost-of-service study filed by FP&L shows that some groups are below parity and some are above parity.

MS. KUMMER: Yes, ma'am.

CHAIRMAN JABER: For the hospital group, it's your representation that the Hospital Association is currently below parity.

MS. KUMMER: I would assume without first-hand knowledge that they would be served under one of the general service demand classes, and those are all below parity to some degree. Yes, ma'am.

CHAIRMAN JABER: What do you mean by parity?

MS. KUMMER: Parity is a bit of a short-hand term in cost-of-service. The purpose of a cost-of-service study is to determine if a class's revenue recovers the costs necessary to serve that class.

A benchmark we use is to compare the rate of return within a class to the system rate of return. That's what we call a parity ratio. If the system, if the class rate of return is higher than the system rate of return, it's above parity. If it's below the system rate of return, it's below parity.

CHAIRMAN JABER: And through the rate case proceeding, as I recall when we initiated the proceeding, one of the discussions we had was let's make sure that the rate classes are at parity, they're where they need to be in terms of contribution levels. And had -- if this Commission decides to go forward with the rate proceeding, what that means for the Hospital Association is we take them to parity, which in dollars, and, again, correct me if I'm wrong, but in dollars that equates to a rate increase.

MS. KUMMER: In a theoretical sense, that's correct, that we do try to bring classes as close to parity as possible in a rate case. In a case where we have a revenue reduction across the board, what would likely happen is they would get less of an increase perhaps than other classes are above parity if -- for classes which are already below parity. And that, in fact, is what happened with the lighting classes, as stated in the stipulation, that they did not get a decrease for those classes because they're already so far below parity, we didn't feel that it was necessary.

CHAIRMAN JABER: Now how does the stipulation address that? If I understand the stipulation correctly, it actually keeps the classes right where they are and allows the rate reduction to be shared with all classes regardless of the fact that they're not at parity.

MS. KUMMER: That's the proposal. It is an across-the-board reduction. This is different from what has been proposed and accepted in the other stipulations offered by the company and the parties in that those were allocated on energy. If you allocate the decrease on energy, more of the decrease goes to large customers simply because they have more kilowatt hours to allocate it on.

This method of allocating on a percentage across the board does not help parity, but it does not make it worse the way an energy allocation would tend to do.

CHAIRMAN JABER: Now from the recommendation, just a couple of things I need to understand, on Page 4 you make the comparison of a percentage reduction in base rates to, in the fashion that the stipulation sets forth, to sort of a base rate reduction based on an energy allocation. And Staff's recommendation is the settlement actually does it better, that an allocation based on energy usage is, is, and I'm reading into your sentence, is almost unfair.

MS. KUMMER: It tends --

CHAIRMAN JABER: Can you elaborate?

MS. KUMMER: That is correct. An energy allocation, again, tends to give a larger percentage of the decrease to the larger customer classes, the commercial classes which are already below parity. The across-the-board increase gives everybody a fairer shot at the pot of dollars to decrease those, yes.

CHAIRMAN JABER: In the last stipulation was the rate reduction done based on an energy allocation?

MS. KUMMER: Yes, ma'am. And we much prefer the across-the-board.

CHAIRMAN JABER: On Page 5 of your recommendation, when you're going through the individual items of the stipulation, you make reference to the fact that Item 10 probably should be clarified.

MR. SLEMKEWICZ: Yes. That the -- that -- they can take that credit of up to $125 million against depreciation expense, but it would be on a calendar year basis. So for 2002 it would just be over the rest of the year and then it would be on an annual calendar year basis for the rest of the agreement.

CHAIRMAN JABER: But the purpose of your statement, is that something we, if we accept the settlement, we should clarify in the order or should we seek clarification from the parties? What is it you need to accomplish this clarification?

MR. SLEMKEWICZ: Well, we've been looking at the, you know, the plan -- the existing plan ends this April. And we just wanted to make sure that it did not keep going from April to April on an annual basis for their proposal. And we just wanted to make sure they're doing it on a calendar year basis rather than April to April.

COMMISSIONER DEASON: Under your proposal or the way that you view this, what would be the maximum amount of credit which could be taken in the Year 2002?

MR. SLEMKEWICZ: They could take the entire $125 million, if they decided to do that.

COMMISSIONER DEASON: But it would be from April to December 31, and then after, every subsequent year it would be a calendar year basis until the termination of the agreement, which is in 2005.

MR. SLEMKEWICZ: That's correct.

COMMISSIONER DEASON: Okay. Is that the parties' understanding as well?

MR. LITCHFIELD: That's correct.

CHAIRMAN JABER: Mr. Shreve?

MR. SHREVE: Yes.

CHAIRMAN JABER: All right. Finally, Staff, we heard Mr. Wiseman's remarks. Do you have any concern that you didn't have responses to your discovery or that there was stonewalling