

State of Florida



# Public Service Commission

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

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**DATE:** February 21, 2013

**TO:** Office of Commission Clerk (Cole)

**FROM:** Office of the General Counsel (Young, Brown, Harris, Klancke) *Key MCB*  
 Division of Accounting and Finance (Maurey, Willis) *ALM*  
 Division of Economics (Dean) *J.W.D.*  
 Division of Engineering (Ballinger) *JTB*

**RE:** Docket No. 120015-EI – Petition for increase in rates by Florida Power & Light Company.

**AGENDA:** 03/05/13 – Regular Agenda – Decision on Motion for Reconsideration – Oral Argument Not Requested – Participation at the Commission’s Discretion

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** ~~Graham~~ *Brisel - ac*

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\120015.RCM.DOC

### Case Background

On March 19, 2012, pursuant to Section 366.06, Florida Statutes (F.S.), and Rules 25-6.0425 and 25-6.043, Florida Administrative Code (F.A.C.), Florida Power & Light Company (FPL) filed a petition for approval of permanent increase of its base rates and charges. In its petition, FPL requested a base rate increase of \$528 million with a Return on Equity (ROE) of 11.25%, plus a .25% performance adder to remain as long as it maintained the lowest electrical rates in the state compared to the other four investor owned utilities. Twelve parties were

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granted intervention in the docket.<sup>1</sup> However, several parties were dismissed from the docket for various reasons.<sup>2</sup> By the Order Establishing Procedure, Order No. PSC-12-0143-PCO-EI, issued March 26, 2012, the hearing was set to commence on August 20, 2012. In May, June and August 2012, nine Commission service hearings were held throughout FPL's service territory. On August 15, 2012, FPL and three of the eleven intervening parties (Signatories) filed a Motion to Approve Settlement Agreement (Settlement Agreement or Proposed Settlement Agreement) and a Motion to Suspend the Procedural Schedule.<sup>3</sup> The Motion to Suspend the Procedural Schedule was denied by Order No. PSC-12-0430-PCO-EI, issued August 17, 2012. The technical hearing commenced on August 20, 2012, and lasted 10 days.

On August 27, 2012, Order No. PSC-12-0440-PCO-EI, the Second Order Revising Order Establishing Procedure (Second Order) was issued establishing a procedural schedule for further actions necessary for the Commission to consider the proposed Settlement Agreement. The Second Order stated that upon conclusion of the evidentiary portion of the hearing, a date and time would be set for the sole purpose of taking up the proposed Settlement Agreement. Also, the Second Order gave all parties an opportunity to conduct informal discovery on the proposed Settlement Agreement. On August 31, 2012, the Commission announced that the hearing would reconvene on September 27, 2012, and continue on September 28, 2012, if necessary, to consider the proposed Settlement Agreement. On September 27, 2012, the Commission voted to take additional testimony limited to specific issues that were part of the proposed Settlement Agreement, but supplemental to the issues in the rate case. Accordingly, in compliance with Sections 120.569 and 120.57, F.S., the administrative hearing was continued to November 19-20, 2012.

On October 3, 2012, Order No. PSC-12-0529-PCO-EI, the Third Revised Order Establishing Procedure was issued establishing the necessary procedures for discovery and setting dates for filing prefiled testimony, the Prehearing Conference, and supplemental hearing dates. On November 19 and 20, 2012, the supplemental hearing was held, and on November 30 parties filed post-hearing briefs. On December 13, 2012, the Commission convened a Special Agenda Conference to consider the proposed Settlement Agreement filed by the Signatories. At the Special Agenda the Commission expressed its concerns with the proposed Settlement Agreement. The Commission engaged in an extensive discussion of the benefits and detriments

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<sup>1</sup> Office of Public Counsel (OPC), South Florida Hospital and Healthcare Association (SFHHA), Florida Retail Federation (FRF), Thomas Saporito (Saporito), Florida Industrial Power Users Group (FIPUG), Village of Pinecrest, Federal Executive Agencies (FEA), Glen Gibellina, Larry Nelson, John Hendricks, Algenol Biofuels Inc., and Daniel and Alexandria Larson.

<sup>2</sup> Mr. and Mrs. Larson and Mr. Nelson were dismissed as parties from the docket and their positions on the issues were stricken pursuant to Section VII(a) of Order No. PSC-12-0143-PCO-EI, the Order Establishing Procedure. Section VII(a) provides "[U]nless excused by the Presiding Officer for good cause shown, each party (or designated representative) shall personally appear at the hearing. Failure of a party, or that party's representative, to appear shall constitute waiver of that party's issues, and that party may be dismissed from the proceeding." Both Mrs. Larson and Mr. Nelson subsequently filed Petitions to Re-intervene and Intervene respectively in the supplemental portion of the hearing, and those petitions were denied. Mr. Gibellina was dismissed from the docket for failure to appear at the Prehearing Conference.

<sup>3</sup> FPL, FIPUG, FEA, and SFHHA are the signatories to the Settlement Agreement. While Algenol did not execute the Settlement Agreement or join in the motion, it did express its support for the Settlement Agreement. Algenol subsequently withdrew from the proceeding.

associated with the provisions of the proposed Settlement Agreement, and whether the agreement as filed was in the public interest. Upon completion of the Commission discussion, all the parties (Signatories and Non-Signatories) were given an opportunity to engage in further settlement negotiations. Upon reconvening the Special Agenda Conference, the Signatories filed a Revised Stipulation and Settlement (Revised Settlement), and the Non-Signatories reiterated their continued objections to the Commission's consideration of the proposed or modified agreement.

By Order No. PSC-13-0023-S-EI, issued on January 14, 2013, the Commission approved the Revised Stipulation and Settlement. On January 14, 2013, Mr. Saporito filed a Motion for Reconsideration of said Order. Included in his Motion were additional requests for further hearing and opportunity to engage in discovery. On January 22, 2013, the signatories filed a joint response in opposition to Mr. Saporito's Motions.<sup>4</sup> No party requested oral argument and the time for said request has expired. Pursuant to Rule 25-22.0022, F.A.C., oral argument is not permitted unless it is requested by a party at the time of the motion or unless the Commission believes that oral argument will assist in its decision. Staff believes that the parties' filings clearly present their positions and that oral argument is not necessary. The parties' arguments and staff's analysis are addressed below. The Commission has jurisdiction over these matters pursuant to Chapter 366, F.S., including Sections 366.04, 366.05, 366.06, 366.07, and 366.076, F.S.

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<sup>4</sup> Staff notes that on January 25, 2013, Mr. Hendricks filed an untimely response in support of Mr. Saporito's motions. On January 30, 2013, the signatories filed a response to Mr. Hendricks untimely response in support of Mr. Saporito's motions. On January 31, 2013, Mr. Saporito filed a Motion to Strike the signatories response to Mr. Hendricks untimely response in support of his Motion for Reconsideration. On February 2, 2013, FPL filed a response to Mr. Saporito's Motion to Strike. On February 4, 2013, FPL filed a response to Mr. Saporito's Motion to Strike.



### Discussion of Issues

**Issue 1:** Should the Commission grant Mr. Saporito's Motion for Reconsideration of Order No. PSC-13-0023-S-EI and his additional requests for further hearing and an opportunity to engage in discovery which are a part of the Motion for Reconsideration?

**Recommendation:** No. The Commission should deny the motion for reconsideration in its entirety. Mr. Saporito has failed to identify a point of fact or law that was overlooked or which the Commission failed to consider in Order No. PSC-13-0023-S-EI. (Young, Klancke, Brown, Harris)

#### Staff Analysis:

##### Mr. Saporito's Motion

In his Motion, Mr. Saporito argues that his Motion for Reconsideration should be granted because the Commission erred when it approved a new settlement document with terms and conditions which are materially different from those contained in the August 15, 2012, Proposed Settlement Agreement. Mr. Saporito states that at the conclusion of the August technical hearings, the Commission ordered a "further hearing and process" to consider the Settlement Agreement, and that the Commission held such hearing on December 13, 2012. Mr. Saporito alleges he was not invited to negotiate any settlement terms or conditions with FPL representatives during a break in the December 13 hearing, and that after the break, "certain and specific material changes which FPL had made to the Settlement" were announced by FPL and staff. Mr. Saporito further maintains that additional changes were made on the advice of staff legal counsel, and as a result, a "new settlement document" was "created solely between FPL, the Commission, and the Commission Staff."

Mr. Saporito identifies the legal standard for a motion for reconsideration, and argues that the Commission's approval of the new settlement "overlooked factual matters and is error by the Commission as a matter of law." Mr. Saporito alleges that the December 13 hearing created a new settlement document that "was negotiated solely by FPL, the Commission and the Commission staff." Mr. Saporito goes on to conclude that the new settlement is a document "separate and apart" from the August 15 Proposed Settlement Agreement, and that the Commission's consideration of the new settlement was error as a matter of law. Mr. Saporito further alleges that the Commission erred as a matter of law in failing to provide the Non-Signatories an opportunity to engage in further hearing and discovery with respect to the significant and material changes made to the August 15, 2012 Proposed Settlement Agreement. Mr. Saporito asserts that he and the other Non-Signatories have a "due-process" right under Chapters 120 and 366, F.S., and the rule before the Commission to engage in the discovery process and a "due-process" right to "engage in further hearing to challenge the significant and material changes made to the August 15, 2012 Proposed Settlement Agreement" that was subsequently approved by the Commission. As relief, Mr. Saporito requests that the Commission reconsider approval of the December 13, 2012 Revised Settlement, allow the parties to engage in further discovery, and allow the parties to participate at a further hearing regarding

the December 13, 2012 Revised Settlement to demonstrate that the Revised Settlement is not “fair, just, or reasonable and therefore not in the Public Interest as a matter of law.”

### Signatories’ Response

On January 22, 2013, the Signatories filed a joint response in opposition to Mr. Saporito’s Motion. The Signatories argue that Mr. Saporito’s Motion for Reconsideration should be denied because there is no point of fact or law that the Commission overlooked or failed to consider in rendering Order No. PSC-13-0023-S-EI, Approving Revised Stipulation and Settlement Agreement, and thus, the motion states no valid basis for reconsideration. The Signatories assert that Mr. Saporito’s two arguments: (i) that the Non-Signatories were excluded from negotiations, (ii) that the Non-Signatories’ due process rights were violated because they did not have an opportunity to engage in further hearings and discovery with respect to the changes made to the Settlement Agreement, are both incorrect and neither argument identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering the Settlement Order. The Signatories contend that the Commission did not overlook the Non-Signatories’ level of opportunity to participate in negotiating a settlement. The Signatories argue that the Non-Signatories expressed their objection to the Revised Settlement Agreement during the Special Agenda Conference and said objection was acknowledged by the Commission. Also, the Signatories assert that page five of the Order discussed the parties’ opportunity for further settlement negotiations. Thus, the Commission considered the parties’ opportunity for further negotiations.

The Signatories argue that the Commission’s decision did not violate due process rights of the Non-Signatories. The Signatories contend that due process requires that parties to a proceeding be given adequate notice and an opportunity to be heard on an issue and the principle is the same when the issue in question is approval of a settlement. The Signatories assert that the Commission provided timely notices of conferences and hearing, and gave all parties an opportunity to be heard on all issues regarding the Proposed Settlement Agreement, including the terms that were subsequently modified. The Signatories also assert that the Commission gave all parties the opportunity to take discovery and present witnesses in support of, or opposition to, the Proposed Settlement Agreement. Moreover, Mr. Saporito did not submit prefiled testimony. Thus, his due process rights were not violated and his Motion should be denied because he failed to identify a point of fact or law that the Commission overlooked or failed to consider in rendering Order No. PSC-13-0023-S-EI, Approving Revised Stipulation and Settlement Agreement.

### Analysis

#### Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. This standard has often been cited by the Commission in considering motions for reconsideration. In prior orders, the Commission has relied on several Florida cases as precedent. Mr. Saporito and the Signatories both cite cases in support of their Motion and



response to the Motion. Staff believes a review of some the cases will provide insight into the limited nature of motions for rehearing (reconsideration).

Both Mr. Saporito and the Signatories cited Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962). In Diamond Cab, the Court stated:

The purpose of a petition for rehearing is merely to bring to the attention of the trial court, or in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance . . . . It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or order . . . .

Id. at 891.

The Diamond Cab holding is similar to other Florida decisions, such as Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974), Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981), Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959), and State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). In Jaytex Realty Co., the court sets forth the limited nature of motions for reconsideration, stating:

The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision. Judges are human and subject to the frailties of humans. It follows that there will be occasions when a fact, a controlling decision or a principle of law even though discussed in the brief or pointed out in oral argument will be inadvertently overlooked in rendering the judgment of the court. There may also be occasions when a pertinent decision of the Supreme Court or of another District Court of Appeal may be rendered after the preparation of briefs, and even after oral argument, and not considered by the court. It is to meet these situations that the rules provide for petitions for rehearing as an orderly means of directing the court's attention to its inadvertence.

Jaytex Realty, 105 So. 2d at 818.

Furthermore, the court explained that it is not necessary to respond to every argument and fact raised by each party, stating:

An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.

It is not the purpose of these remarks to discourage the filing of petitions for rehearing in those cases in which they are justified. If we have, in fact, inadvertently overlooked something that is controlling in a case we welcome an opportunity to correct the mistake. But before filing a petition for rehearing a

member of the bar should, as objectively as his position as an advocate will permit, carefully analyze the law as it appears in his and his opponent's brief and the opinion of the court, if one is filed. It is only in those instances in which this analysis leads to an honest conviction that the court did in fact fail to consider (as distinguished from agreeing with) a question of law or fact which, had it been considered, would require a different decision, that a petition for rehearing should be filed.

Id. at 819.

Staff believes that Mr. Saporito applies the incorrect standard of review for its motion for reconsideration. In essence, Mr. Saporito is asking the Commission to reweigh the Commission's decisions that it made on December 13, 2012, and the Non-Signatories' motions and arguments made throughout the hearings in this docket. A review of the Order and transcripts makes it clear that the Commission considered the same arguments Mr. Saporito raises in this Motion. The Signatories argue, and staff agrees, that page five of the Order approving the Revised Stipulation and Settlement Agreement specifically stated that upon completion of the Commission's discussion of the August 15 Proposed Settlement Agreement, all the parties were given an opportunity to engage in further settlement negotiations. Moreover, upon reconvening the Special Agenda Conference, the Signatories filed the Revised Settlement and the Non-Signatories reiterated their continued objection of the Commission's consideration of the proposed or modified agreement. Moreover, it was noted during the Special Agenda Conference that parties had opportunities to engage in settlement negotiations following the November 19 and 20, 2012 technical hearing.<sup>5</sup> The transcript further indicates that the Commission acknowledged, and expressed disappointment with, the fact that not all the parties were signatories to the Revised Settlement before the Commission voted to approve said agreement.<sup>6</sup> Thus, staff believes that Mr. Saporito's Motion for Reconsideration should be denied because he failed to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. The Commission was fully aware that approving the Revised Stipulation and Settlement Agreement was final action in this docket.

Staff also believes that Mr. Saporito's Motion for Reconsideration should be denied because the Commission considered the Non-Signatories' due process rights argument before approving the Revised Stipulation and Settlement Agreement. The Commission implemented a process that gave all the parties an opportunity to be heard as it relates to the proposed Settlement Agreement, and Mr. Saporito and other Non-Signatories made objections (oral and written) to the Commission's consideration of the proposed Settlement Agreement. For example, during the hearing on November 19, 2012, Mr. Saporito objected to the Commission's consideration of the Proposed Settlement Agreement stating:

for the record I strenuously object to all the exhibits in staff's Comprehensive Exhibit List. I strenuously object to all witnesses who may testify in this proceeding on behalf and in support of FPL's proposed settlement agreement. It is my view that this proceeding is illegal and that the Commission does not have

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<sup>5</sup> Tr. at 117.

<sup>6</sup> Tr. at 116.



requisite jurisdiction or authority to hold this proceeding. Furthermore, I object to this proceeding because it's a violation of my due process rights as a United States citizen and as a citizen of Florida and as a ratepayer of Florida Power & Light Company.

Tr. 5180. This was a standing objection by Mr. Saporito for the record throughout the entire November 19 and 20 hearing. Also, Mr. Saporito joined the continued objection by the Non-Signatories regarding the Commission's consideration of the proposed or modified agreement. Thus, the Commission clearly considered Mr. Saporito's due process rights argument before approving the Revised Stipulation and Settlement Agreement.

Moreover, the Commission's approval of the Revised Stipulation and Settlement Agreement was not a violation of Mr. Saporito's due process rights. As cited by the Signatories in their response to the Motion for Reconsideration, to which staff agrees, due process requires that parties be given adequate notice and an opportunity to be heard on an issue. Bresch v. Henderson, 761 So. 2d 449, 451 (Fla. 2d DCA 2000). Staff believes that Mr. Saporito was given adequate notice of hearings and an opportunity to be heard on the proposed Settlement Agreement issues in this docket. As previously stated, the Commission implemented a process whereby all the parties could conduct discovery, held a hearing whereby all the parties were allowed to present testimony and cross-examine witnesses, enter exhibits, and allowed the filing of post hearing briefs on the terms of the proposed Settlement Agreement. Mr. Saporito fully participated in this process. The Commission deliberated the benefits and detriments associated with provisions of the proposed Settlement Agreement, and based on the discussion the Signatories filed a Revised Stipulation and Settlement. The modified terms of the Revised Stipulation and Settlement Agreement fell within the range of alternatives the Commission could consider in deciding whether to approve the proposed Settlement Agreement. The Commission ultimately approved the modified terms of the Revised Stipulation and Settlement Agreement. Thus, staff does not believe that the Commission's approval of the Revised Stipulation and Settlement Agreement violated Mr. Saporito's due process rights.

Therefore, staff believes that Mr. Saporito's Motion for Reconsideration of Order No. PSC-13-0023-S-EI, including his requests for further hearing and an opportunity to engage in discovery, should be denied in its entirety. Mr. Saporito has failed to identify a point of fact or law which was overlooked or which the Commission failed to consider when approving the Revised Stipulation and Settlement Agreement in this docket.



Docket No. 120015-EI  
Date: February 21, 2013

**Issue 2:** Should this docket be closed?

**Recommendation:** Yes. This docket should be closed upon the expiration of the time for appeal. (Young, Klancke, Brown, Harris)

**Staff Analysis:** This docket should be closed upon the expiration of the time for appeal.