BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 120015-EI

In the Matter of:

PETITION FOR INCREASE IN RATES
BY FLORIDA POWER & LIGHT COMPANY.
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VOLUME 34

Pages 5045 through 5169

PROCEEDINGS:	HEARING
COMMISSIONERS PARTICIPATING:	CHAIRMAN RONALD A. BRISÉ COMMISSIONER LISA POLAK EDGAR COMMISSIONER ART GRAHAM COMMISSIONER EDUARDO E. BALBIS COMMISSIONER JULIE I. BROWN
DATE:	Thursday, September 27, 2012
TIME:	Commenced at 1:03 p.m. Concluded at 4:09 p.m.
PLACE:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	LINDA BOLES, RPR, CRR JANE FAUROT, RPR Official FPSC Reporter (850)413-6732/(850)413-6734
APPEARANCES:	(As heretofore noted.)

P R O C E E D I N G S

(Transcript follows in sequence from Volume 33.)

CHAIRMAN BRISÉ: Good afternoon, everyone. We are reconvening Docket Number 120015-EI.

Staff, would you -- Mr. Young, would you read the notice?

MR. YOUNG: Good afternoon, Commissioners.

On August 27th, 2012, Chairman Brisé, as the presiding officer in Docket Number 120015-EI, the FPL rate case, issued the second revised order establishing procedure setting procedural schedule for the Commission's consideration of the settlement agreement. The order stated that upon the evidentiary portion, upon completion of the evidentiary portion, the Commission will announce the date and time set for the sole purpose of taking up the settlement agreement.

At the end of the, at the end of the hearing, Chairman Brisé announced that Commission, that the Commission will reconvene the hearing in the FPL rate case on September 27th at 1:00 p.m., and September 28th, if necessary, to consider the settlement agreement.

The order further, the order further provided that each side will be granted 30 minutes for comments, to be divided among the parties as they deem

appropriate. As stated in the revised order, second revised order, the signatories to the settlement agreement are FPL, FIPUG, South Florida Hospital, and FEA. The non-signatories are Office of Public Counsel, FRF, the Village of Pinecrest, Mr. Saporito, and Mr. Hendricks.

Staff would note that Algenol is not a signatory to the settlement agreement. However, it did express support of the settlement agreement.

It is my understanding, Mr. Chairman, that the parties are here and are prepared to present oral arguments to the Commission on the settlement agreement. Staff is available for any questions you may have.

MR. REHWINKEL: Mr. Chairman, this is Mr. Rehwinkel, Charles Rehwinkel with the Office of Public Counsel.

If it would be your pleasure, I have some remarks to make and an objection to this proceeding, and I would like to make those. I do not intend to make argument. I need to state some objections for the record.

CHAIRMAN BRISÉ: Okay. You, you do not intend to make oral arguments?

MR. REHWINKEL: With respect to my objections.

CHAIRMAN BRISÉ: Okay. All right. Okay.

Let's go ahead and deal with that right now.

MR. REHWINKEL: Mr. Chairman, Commissioners, Charles Rehwinkel on behalf of the Office of Public Counsel.

I need to state for the record, as a general matter, the Public Counsel objects to the events or the procedure that the Commission is contemplating today.

We object to the noticing of this procedure insofar as the noticing as part of the hearing on FPL's March 19th petition. If the notice from the technical hearing covers the purported settlement of August 15th, it is inadequate in that it does not cover the new filing that is outside the scope of the issues established in your Prehearing Order and the OEP order that was issued.

The public has received no notice that would allow their, their participation pursuant to Section 120.57(1)(b). The very availability of this procedure to take argument has contaminated the record and has the potential, unless the Commission issues correct directions, to further contaminate the record.

This is not a hearing contemplated under Chapter 366 or Chapter 120 in order to increase rates and otherwise affect the substantial interests of an intervenor. If it is intended to be so, the Public

Counsel gives notice that it participates under protest.

This cannot be a continuation of the hearing that was concluded on August 31st, 2012. That evidentiary record is closed and, as a corollary, any further argument on the evidence is closed and legally barred. If you go forward with the procedure today, we ask that you expressly prohibit any argument on that closed record and that you prohibit the interjection of any evidence into whatever record is being generated today.

The Public Counsel strongly objects to the interpositioning of this event into what we consider the blackout period that has been established between the period that the evidentiary record has closed and that period continuing until the filing of briefs, and continuing through the time when staff prepares its recommendation, and continuing up to and including the Agenda Conference where the Commission meets publicly, pursuant to the open meetings law, to consider the evidence and argument received pursuant to Sections 120.569 and 120.57.

Thank you, Mr. Chairman.

CHAIRMAN BRISÉ: Thank you very much.

Okay. So we'll take notice of the objection.

MR. REHWINKEL: Thank you.

CHAIRMAN BRISÉ: So I think we're ready to move into oral argument at this time, and so we will begin with FPL and the signatories.

MR. LITCHFIELD: Thank you, Mr. Chairman. Commissioners, good afternoon. And I'm Wade Litchfield. Here with me is John Butler. We'd also enter an appearance for Mr. Jordan White, representing Florida Power & Light Company here today.

With an extensive record before it, the Commission is now in a position to consider the merits of the settlement agreement that, if approved, will resolve all issues in this proceeding, and it will replace the current settlement agreement which expires at the end of this year.

This agreement was negotiated extensively, vigorously, and in good faith among FPL and three of the parties here today who represent major customer groups in the State of Florida. And despite divergent positions, the parties were able to put aside their differences, we opened a constructive dialogue, and we were able to find sufficient common ground to come together in an agreement that we all now support and we now recommend for your approval, Commissioners.

Your consideration of this agreement is a very significant step in this process that was initiated in

March of this year by Florida Power & Light Company's petition for rate relief, and we believe it represents a very important opportunity for the Commission and the State of Florida.

The one thing that I think we all agree here on today is that the standard of review and approval for this agreement is whether it is in the public interest. As a general proposition, I would also hope that we could agree that the public interest will be served if customers can enjoy the prospect of low rates and high reliability sustainably into the future, and, secondly, that at the same time the company and its investors can earn a fair return on their investment. And we believe this agreement accomplishes those two things.

Now, for the sake of efficiency, the joint signatories did file a pre-position -- prehearing or joint position statement Monday, and so I'm not going to go into the detailed arguments that we lay out in that document, but they're there in support of our request. But I would like to list five summary reasons why this agreement, we believe, is in the public interest.

First, the agreement, as I mentioned, will resolve all issues in this case and provide rate stability and a high degree of certainty for all constituents for a period of four years.

Second, it will lock in low bills for customers for this same period of four years.

Third, it will provide the company and its investors with a measure of regulatory certainty, allowing the company to continue to access capital markets to sustain excellent performance, as well as supporting $7.5 billion of capital investment in the state, investment that is important to our customers, important to FPL's ability to continue to provide low bills and high reliability, and, frankly, important to the Florida economy as well.

It will also enable investors to earn a return commensurate with what they could expect to earn by investing in other southeast utilities. And I would refer you to Mr. Dewhurst's Exhibit MD-3.

Fourth, it will avoid the pancaking of rate cases over the next four years as the depreciation reserve surplus rolls off and new investment is added.

And, fifth, it accomplishes all of this with only modest bill impacts. We anticipate that residential customers will continue to enjoy the superior value proposition that comes with the highest reliability and lowest bills in the state. Most commercial customers' bills will remain flat or decrease in 2013.

Now, I mentioned pancaking rate cases, and this settlement agreement, if approved, will help to avoid disruptive, sometimes divisive, as we have seen, and certainly lengthy cases for all constituents for a significant period of time.

One point that was very, very clear in the record, unrebutted in fact, is that the test year includes a $191 million credit for the remaining depreciation reserve surplus. And this means that all other things equal, on day one of 2014, the company will have a $191 million hole in its earnings to attempt to fill.

Later in 2014, midyear, Riviera, the modernization project, will come into service, and the first tier revenue requirements for that project will be $236 million.

These two items alone represent almost 300 basis points of deterioration in the earned return for the company, virtually assuring the need for another significant rate case in 2013 for new rates in 2014.

I would point out also that absent a settlement, FPL will be filing its depreciation study next spring. That study will likely reflect required increases in accruals, given if only the significant capital investment that has occurred since 2009 in the

last depreciation study was, was put in place, over 9 billion of additional investment over that period.

So approval of this agreement will obviate the need for multiple rate cases. Now, there's context for this that is important, and particularly with regard to the base rate increase portion of the settlement agreement, the 378 million.

First, that amount reflects a substantial concession by FPL compared to our overall request. And second, on a rateable basis, and this is really the only proper basis of comparison, that base rate increase is lower than recent increases for other electric utilities achieved through either litigated or settled out accounts.

And I'm referring specifically to the Gulf Power Company rate case that, that went through a full litigated and final decision of the Commission, and I'm referring also to the Progress Energy Florida settlement agreement, yet in both cases our rates would remain lower as a result of, of this settlement agreement.

And then the third point, as context that I would submit to you for consideration, Commissioners, is, is the depreciation of the noncash theoretical depreciation reserve surplus ordered by the Commission in 2009.

That depletion of that reserve will leave the company with a major earnings gap. And this is clearly illustrated by an exhibit that we'll leave you with here today, but it's simply an exhibit that's already in the record. It's REB-6, which, as you will recall, shows the reduction of the surplus amortization alone accounts for an increase in revenue requirements between 2012 and 2013 of $367 million.

Well, it's not coincidental that that 367 million is relatively close to the $378 million base rate increase that the company agreed to settle on. Such a large hole can only be filled through rate relief.

Now, FPL recognizes its role in this state and in these proceedings, and we take it seriously. We know that we're charged with providing reasonably sufficient, adequate, and efficient electric service at fair and reasonable prices. We believe that the record clearly demonstrates that we are more than meeting this standard. And that is the standard that we set for ourselves, frankly, regardless of what the statute says.

But we also, in addition to obligations to customers, we have obligations to our investors, and we believe that we can meet both sets of obligations over the next four years through this careful balancing of

interests that we accomplished in reaching the settlement agreement with our cosignatories.

Now, we believe and recognize that the Commission's role also is to balance these same sets of interests. We do not agree with OPC's characterization of its role as it relates to this agreement. OPC derives its authority from statute, 350.061 -- 061(1) of the *Florida Statutes*, and nothing in that section endows Public Counsel with any additional authority or status other than the right to intervene in the proceeding.

And the legislative history is quite clear that OPC is to have, quote, all the rights of counsel which any other bona fide party to a suit would have, close quote. Nothing more.

Although we have had our differences with Public Counsel during this proceeding, we do respect the role that Public Counsel plays here in the State of Florida. And, in fact, we, we absolutely would have preferred to have Public Counsel onboard in the settlement, and that's why we made several efforts, beginning last year, to start our negotiations with Public Counsel.

But, Commissioners, if settlements are to remain an important part of the regulatory process and continue to be encouraged in this jurisdiction as

something that is in the public interest, then no one Intervenor and not even Public Counsel should be able to prevent a petitioner from negotiating and reaching an agreement with other Intervenors who are willing to sit down and talk.

Now, we have three major customer groups who negotiated this agreement with us and are here today to support it, and you will hear from them. There is one customer group who does not support it, and we certainly acknowledge the Retail Federation's right to make the decision to oppose the agreement.

We frankly remain a little confounded as to why Retail Federation would oppose this agreement, given that their members' bills in 2013 will remain relatively flat or even decrease effective January 1, but we, we simply don't know that all Retail's members have carefully studied our proposal.

What we do know is that Wal-Mart opposes it, and Wal-Mart claims that it opposes it in part because it would result in an ROE that is too high for us. But we also know that from 2009 to 2011 Wal-Mart has earned a three-year average of nearly 22% return on its equity during this same difficult economic period.

Now, it is noteworthy that even Retail Federation's only witness, a Wal-Mart employee, conceded

on the stand what is really an obvious point, certainly to us, and that is that the price for service that a customer pays is more important than the ROE that a utility is authorized to earn.

Well, regardless of whether Wal-Mart supports it or not, we do believe that there -- in fact, we know that there are many, many more businesses in the State of Florida that would support this agreement if provided all of the facts.

There are three principles that I want to touch on that are important in your consideration of this agreement, and the first is this. The fact that an agreement is not unanimous is not an impediment to it being in the public interest, and we refer to case law in our position statement to this effect. The Commission certainly has previously approved nonunanimous settlements. And were it not to do so, that effectively would give parties additional, effectively a veto power that could be used against the interests of other parties and customers in general, and this, we submit, would be contrary to the public interest.

The fact that an agreement includes terms that are different from the initial request also is not an impediment to it being in the public interest. Again,

the Commission has previously approved settlement agreements with terms that differ from the initial rate case request.

Third, the agreement has to be assessed in whole and not in isolated parts. The results of any good-faith negotiation is going to result in give and take, and there are concessions on all sides. So there are a number of provisions that, that, that have independent application and operation, but, but as opposed to looking at individual provisions, we submit that the entire package has to pass the public interest test and should be looked at as a whole.

Certainly how individual terms operate is important, and in that regard we've answered a lot of discovery from your staff and other parties on particular aspects of the agreement, and we have here today at your, at your disposition, at your will a few people who are able to, to speak to specific elements of the agreement or elaborate on responses to the discovery request that staff submitted.

Commissioners, we think that the litigated case supports overall approval of the agreement and that the record of this case absolutely provides relevant context.

The, the positions that have been adopted by

Retail and, and by Public Counsel are largely the same. Retail simply adopted most of Public Counsel's positions. We find them to be some of the most extreme positions that have been adopted in recent memory in proceedings in Florida.

Interestingly, they did not effectively or essentially challenge really any aspect of our service performance or our status as low bill providers. Very few questions, if you will recall, were asked of any of our operational witnesses, and they offered virtually no testimony on these topics.

So what did they challenge? They challenged the very platform, Commissioners, that allows Florida Power & Light Company to deliver excellent service. They went after FPL's financial strength, and they even challenged a portion of the compensation that employees receive who provide that service. Only in very limited instances did OPC contest that our costs were imprudent.

And what -- their target, i.e., our financial structure and position, was essentially public information and publicized and is central to their case, made clear in their opening statement.

Commissioners, we think that the record in this case leaves no doubt that further credit downgrades for FPL would occur if anything close to Public

Counsel's litigation position is adopted.

Just as one example, the fact that they would propose as the appropriate ROE for the company that is lower than any ROE awarded in the country in the last two years and even lower than an ROE awarded for a utility in the northeast that is distribution only, had poor performance, and was punished by the Commission for having poor performance, is really just beyond the pale.

You will hear that the allocation of this increase results in cost shifting, and I want to give you three points to consider as you hear that argument. Any, any time you talk about cost of service methodology or, or any proposal to allocate a base rate increase, you're going to hear parties take positions on the relative cost shifting that either should or shouldn't be authorized by the Commission. But first of all I want to make clear that this agreement does not, does not propose the adoption of any new cost of service methodology.

Second, the parity indices for the rates under our settlement for which, under which most commercial customers take service would actually improve under the settlement agreement in comparison to FPL's present rates. The parity index for residential customers would remain very close to parity.

I would point out that, that the Commission did approve a recent settlement as well regarding the MDS cost of service approach in the Gulf case, and that is frankly, on a comparable basis, very equivalent to what we're talking about here today.

We would submit in closing, Commissioners, that -- or, or remind the Commissioners that, that when we last spoke about how this hearing would play out, we did suggest at that time that additional evidence might be appropriate to take in light of the anticipated challenge that Public Counsel might bring, and I think that's been reinforced here this morning.

We, as I recall, the Commission considered that it might schedule an additional period of, an additional day or two in which to take additional evidence, and we would respectfully request that the Commission do so if, if the non-signatories today indicate that there are disputed issues of material fact, and I think we've heard that already.

On the other hand, if there are no disputed issues of material fact, we would ask that the Commission ask the non-signatories to so state on the record, and to indicate that they are not opposed to a Commission decision in this matter without taking additional evidence.

In conclusion, Commissioners, as I indicated in my opening statement at the beginning of the technical hearings, we do work very hard to provide our customers with top quality service at low rates. And we truly believe that if we take care of the customers, our investors will have earned the right to be fairly treated. And we have entered into this agreement on the belief that, taken as a whole, it will allow us to meet all of our obligations to customers and to investors, and we respectfully request that the Commission approve this request and this settlement agreement as being in the public interest. Thank you.

MR. REHWINKEL: Mr. Chairman, before you entertain argument from the next, I, I would ask you to stop the clock. I need to make several objections that are -- to fact evidence that Mr. Litchfield is attempting to interject and comment on the record that is improper.

MR. LITCHFIELD: Mr. Chairman, I would --

MR. REHWINKEL: I waited until he was done, because I didn't want to interrupt his argument. But he made specific comment on the record that is in violation of your orders. He commented on evidence and the litigation position in the record. Their brief was filed last Friday, and that was their opportunity to

comment on it, not today.

You stated in Order Number 12-0440 that no evidence would be taken today. They did not ask for reconsideration of that. You cannot take evidence in this matter today, and you cannot entertain comment on other parties' position. That is improper, and I would move to strike his reference to Mr. Dewhurst's MD-3, to Mr. Barrett's Exhibit 6, to reference to the impact of the $191 million, to the reference to the RO -- the Wal-Mart witness's testimony, and to the, what the Public Counsel challenged in the case and our position on compensation, et cetera, the impact of further credit downgrades based on the litigation position that the Public Counsel advanced.

We have been relying on your order that said no evidence would be taken today, and we've been also relying on the deadline for the filing of briefs, and I think we're entitled to rely on that. That is the basis of our objection to putting this proceeding in this dangerous period here where comment that's impermissible can be made on the, the evidence that was taken in the case.

MR. MOYLE: There was a motion to strike. I guess I would just make a brief point, which is --

CHAIRMAN BRISÉ: Are you responding --

MR. MOYLE: Yes. To --

CHAIRMAN BRISÉ: -- for the whole team on the objection? Because I'm taking one response.

MR. LITCHFIELD: Then, since the motion is --

MR. MOYLE: I say yes, but --

(Laughter.)

MR. LITCHFIELD: Thank you, Mr. Chairman.

It's -- I, I'm a little astonished, frankly, that Public Counsel would move to strike oral argument, not evidence, oral argument that, that attempts to put in context and perspective the terms of a settlement agreement as to whether they're in the public interest. And I don't know how the Commission can do that effectively without taking into account the record that we just developed over months and culminating in two weeks of technical hearings. I don't know how the Commission does that without reference.

And I think what really is going on here is, is the Public Counsel is not asking for due process. They are asking that no process be had.

MR. MOYLE: And, Mr. Chairman, I guess the point I wanted to make is almost a request for clarification, if I could.

CHAIRMAN BRISÉ: There was a -- there's an objection, there was a response to the objection, and

we're going to deal with the objection.

Mary Anne.

MS. HELTON: I'm looking at your Order 12-0440-PCO-EI, which I think was the order that Mr. Rehwinkel referenced. And the top of the second page of that order, it says, No evidence will be taken during the Commission's consideration of the settlement agreement, but comments from the parties will be permitted. Each side will be granted 30 minutes for comment, to be divided among the parties as they deem appropriate.

And I believe that in further discussions during the course of the first two weeks of the proceeding we talked about that there would be oral argument today. And I have to say that I agree with Mr. Litchfield. I don't know how you can have oral argument without discussing the information that already exists. And last time I checked, Mr. Litchfield is not a witness. Mr. Litchfield has not been sworn. Mr. Litchfield cannot give you evidence. He can argue before you about the evidence that's already in the record.

And I believe the record also states that I said that you could consider the evidence from the two weeks of hearing that we had in your thought process and

in your deliberations, deciding whether to -- what to do with the settlement.

MR. REHWINKEL: Mr. Chairman, my objection went to the comment on the record that was improper based on the filing of the brief and the closing of that process.

CHAIRMAN BRISÉ: Thank you, Mr. Rehwinkel. I think I'm going to deny your objection at this point. I don't like the terms overrule or sustain. I don't prefer those terms.

MR. REHWINKEL: And with respect to the request that you take evidence, I don't know where that stands. If there was a motion for reconsideration, the ten days for appealing or reconsidering any order of yours that you're not going to take evidence, Mr. Litchfield essentially asked you to take evidence at the end of his remarks.

MR. LITCHFIELD: I did not move to reconsider the Commission's decision, Mr. Rehwinkel -- Mr. Chairman. I simply reminded us all of the discussion that I recall everybody having that it remained an option depending on these proceedings today.

CHAIRMAN BRISÉ: Thank you.

So, as I stated, we're not going to -- so I'm in essence denying your, your objection. We're going to

continue on with the, with the oral arguments. There are 15 minutes left.

LIEUTENANT COLONEL FIKE: Thank you, Mr. Chairman. This is Lieutenant Colonel Greg Fike from FEA. I just have a few brief comments, in order to save time for the other parties that support the settlement.

I first want to say that, you know, FEA believes the settlement is a fair deal for the taxpayer that funds the operations at the affected installations in this proceeding.

As I mentioned previously, the FEA as, as a customer is a little unique in that our, our operations are funded by taxpayer dollars, and those same taxpayer dollars go to fund or pay for our utility bills.

To put it in context, two of the FEA installations that are affected by this proceeding are Patrick Air Force Base and Cape Canaveral Air Station. Those two installations collectively have nearly 15,000 employees and direct military dependents, an annual payroll of over $336 million, and total expenditures in Florida of over $701 million.

At a time when the federal government is making some hard choices about how it spends its taxpayer dollars in the budget, we think it's very critical that the Commission consider the impact that

utility bills have on these installations and the fact that potentially there's, you know, looming base realignment and closure commissions that will take place after the elections.

Those factors alone bear strong consideration. It's for those reasons why, you know, we firmly believe that during these times of shrinking federal budgets, that the, this proposal ensures a stable and fair rate for the FEA installations for the foreseeable future, and it's for those reasons that the FEA supports this settlement. Thank you.

MR. MOYLE: Thank you, Mr. Chairman. Jon Moyle on behalf of FIPUG, the Florida Industrial Power Users Group, and we have filed a joint motion. We've planned our comments to take 25 minutes, and would ask that we reserve five minutes in rebuttal, so -- it's our motion -- so that we would have the last word on that. So we'll try to hit the 25-minute mark, which we planned beforehand.

So with, with that, let me, let me harken back to where we were nearly a month ago, which was before you presenting two weeks of evidence. And FIPUG opened its remarks by saying that we support this settlement agreement and we think it's fair. We spent two weeks cross-examining and putting on evidence, and you have a

whole host of facts that are before you and that you heard testimony on and had the opportunity to question.

We firmly believe that this settlement is in the public interest and should be adopted and approved. And a couple of points are not getting a lot of mention, which is it's a four-year deal. That provides a lot of certainty and stability and predictability for not only my clients, the large industrial users that employ many, many people and are a key part of, of the fabric of, of Florida, but, but the military and the hospitals and others.

And this is an unusual situation in that, in that Public Counsel has not seen fit to, to sign onto the deal, but a number of the key customers of Public Counsel believes strongly that this is a fair deal and it should be approved and it is in the public interest.

And the public interest determination is one that you all have to make. There's, there's not an exclusive keeper of the public interest. The Public Counsel is statutorily charged to take positions, but their positions are, are argued, they're a party like us, they present evidence, but ultimately the public interest is the responsibility of this Commission to decide whether it is in the public interest.

And we maintain that it is a four-year deal,

$138 million off the ask, and, and doing some things -- the FIPUG folks in their opening statement talked about the CILC credit hadn't been raised in a number of years. It's important to us to help us to recover out of these economic doldrums, and this settlement agreement, the current rate was $4.68, the litigation position is 12, 12.07, and the settlement is at 7.30. It's an in between.

You know, Power & Light asked for 516 million and the settlement agreement is 378, and others are saying it should be negative 250. It's, it's, you know, somewhere in between. So, you know, not to get into all the give and take, but it's fair, it was negotiated in good faith, and consistent with this Commission's policy of encouraging settlement and having the parties try to sort through and, and, and reach a resolution.

We have done that, and we think it's fair and should be approved and would ask that, that you approve the motion, the joint motion that we have filed. So thank you, Mr. Chairman.

CHAIRMAN BRISÉ: Thank you. If you're trying to get to that 25-minute mark, you've got 4 minutes and 35 seconds.

MR. WISEMAN: Thank you, Mr. Chair. Kenneth Wiseman for the South Florida Hospital and Healthcare

Association.

Commissioners, from a financial standpoint, the hospital industry is among the most important business segments in south Florida. In 2011, SFHHA's member hospitals had total revenues in excess of $62 billion, they employed over 79,000 full-time employees, and they had a total payroll of almost $5 billion.

Now, as you're aware, the hospital industry also makes a contribution to south Florida that may well be far more important than its financial contribution.

In 2011, SFHHA's member hospitals served hundreds of thousands of patients. Now, among those patients were individuals and families without access to private health -- private primary care physicians, and they now tend to use emergency rooms for their primary care. Well, some of those individuals have insurance and some don't.

Through a combination of Medicare, Medicaid, negotiated rate agreements with insurance companies, bad debts, and charity to these individuals that don't have insurance or other coverage, SFHHA's members in 2011 provided over $11.2 billion in healthcare services for which they were not reimbursed.

Now, while hospitals provide at times healthcare services that aren't reimbursed, they don't

have the luxury of not paying their utility bills, and electric energy is a very significant element of their operating budgets. As a result, it's really important to hospitals to control their energy costs.

And for that reason, SFHHA strongly supports this settlement. It provides a significant rate reduction versus FPL's filed request in March, and it will allow south Florida hospitals to control their energy costs for a four-year term.

So we think that this is a benefit, that the benefit of the settlement benefits the entire south Florida economy, it provides rate stability, and it provides job creation opportunities and it ought to be approved.

Now, I want to talk about just one particular aspect of the settlement that unfortunately has been significantly mischaracterized by some of the other parties. Mr. Litchfield referred to it in his opening remarks. Other parties have referred to it as the cost shift. That is a significant and incorrect characterization.

As you observed in the two-week evidentiary hearing in this case, SFHHA strongly believes that the cost allocation methodologies that FPL uses understate the contribution that large commercial class customers

make to FPL's return, and in our opinion the continued use of those cost of, cost of service allocation methodologies improperly will make large commercial class customers like hospitals pay costs that they don't cause FPL to incur. So one of our goals in reaching a settlement with FPL was to do something to correct those cost of service class allocation methodologies.

Now, the settlement does not adopt our litigation position. It does not change the cost allocation methodologies to what we think is proper, but the settlement does, and I'm speaking now from our perspective, it does to some extent recognize our evidence. It does recognize and give at least some movement in our direction on these cost of service allocation methodology issues.

Now, in no way does it adopt our litigation position, but as a compromise we think it does provide us some recognition of the arguments we've made for a four-year term, and that is a very significant issue to the hospitals.

So the reason I raise this is that I think it's critical that when you examine this, this settlement and you evaluate it, that you evaluate it based upon the merits of the proposals and not based upon mischaracterizations of the agreement. Thank you.

CHAIRMAN BRISÉ: Thank you very much.

So, for rebuttal, there is 4 minutes and 37 seconds left.

Mr. Rehwinkel.

MR. REHWINKEL: Mr. Chairman, before we start the clock, I have two items I'd like to pass out, if that would be appropriate. These are --

CHAIRMAN BRISÉ: Sure. I hope it's not evidence.

(Laughter.)

MR. REHWINKEL: These are -- they are not -- it is not evidence. These are legal argument from a brief filed by FPL and the Commission in the South Florida case.

CHAIRMAN BRISÉ: While we're passing those documents out, I failed to mention that one of our Commissioners, Commissioner Brown, has a personal medical emergency. That's why she's not here today. So she will be fine, but she just cannot be here today. And we absolutely wish her to get well soon.

MR. REHWINKEL: We hope she's not adding to her discomfort by listening in.

(Laughter.)

MR. LITCHFIELD: Mr. Chairman, while we're waiting to have the exhibits passed out, Algenol's

counsel reminded me that he's not entered an appearance, and would it be appropriate for him to do so and simply state on the record their support for the agreement?

MR. YOUNG: We haven't had anyone enter an appearance. He can enter an appearance when he speaks, if he desires to speak.

MR. LITCHFIELD: That's fine.

MR. REHWINKEL: Ready?

CHAIRMAN BRISÉ: You may proceed, Mr. Rehwinkel.

MR. REHWINKEL: Thank you, Mr. Chairman and Commissioners. Charles Rehwinkel on behalf of the Public Counsel's office.

Let me start off by saying with regard to veto, the Public Counsel does not ever intend to be a veto or stand in the way of what's right. We dispute that FPL gets to say what's right and who has the burden of signing on or not signing on, but more about that later.

Commissioners, you are faced with a case of first impression that should take no time to resolve. You have before you a document filed on August 15th that some have generously called a settlement. I will call it the FPL proposal.

You should reject the FPL proposal from FPL

and the three signatories because it is contrary to the law that governs nonunanimous settlements and the consider -- the Commission's policy on consideration of rate increase requests. It's a bad deal for the vast majority of FPL's customers.

It covers four major new issues that are not the subject of evidence taken in the case and which would require a full evidentiary hearing for the Commission to lawfully implement: The GBRA, the asset optimization, the $200 million of additional fossil dismantlement amortization to income, and relief from filing a depreciation study.

This settlement is contrary to the numbers that the Public Counsel shows as positions in Order Number PSC-12-0428, the prehearing order.

It is not a settlement by mutual agreement of the contending parties to the rate case of the -- and of the disputed issues affecting the interest of FPL's customers.

It will not, as settlements should, promote the efficient, speedy, and just resolution of this case. Instead, the proposal will entangle the Commission and the parties in a quagmire of wrangling for months, if not years to come, and create uncertainty about FPL's rates.

The proposal is not agreed to by the legal representatives of 99.9% of FPL's customers, which renders it effectively just a proposal that FPL negotiated with itself with some specific rate increase offsets to the signatories.

Approving the FPL proposal over the strong and unwavering objection of the Public Counsel and the FRF will undermine public confidence in the Commission's ratemaking process. The Commission has never approved a purported settlement of a comprehensive rate case over the objection of the Public Counsel.

The Gulf and SSU cases that FPL cited do not contradict what I just said. In neither case did the OPC object. And, in fact, in the SSU case it expressly says that in the order, that the Public Counsel neither supports nor opposes the settlement.

The parties will never engage in settlement discussions if the sanctity of the confidentiality of negotiations, including the fact of as well as the substance of any negotiations are not preserved and respected, and outright bullying and disparaging and contract violation tactics are condoned through the approval of this proposal.

In the end, this proposal is not in the public interest, does not serve the public interest, and is

absolutely contrary to the public interest. The Public Counsel considers the FPL proposal to be an illegitimate self-negotiated stipulation between FPL and a microscopically and impermissibly small number of FPL's customers.

It is effectively a wish list the compass -- the company purposely kept out of the case and now wishes to force back into the case without evidence and thus onto the customers, while bypassing the hearings required by law and cutting out the mandatory representative established by the State of Florida.

We ask you in your deliberations to take note of the interventions that were filed by the three signatories, look at the interests, the very narrow interests they purport to represent in these interventions, look at your orders granting that.

Clearly they don't represent more than, in a conservative basis, 500 of the 4.6 million FPL customers. Just for information, that fraction is .00011, three zeros to the right of the decimal point, or 11 one-hundredths of 1% of FPL's customers are represented by those parties who signed the proposal. On this basis alone it is not even a close question.

In representing the very narrow interests they petitioned you to recognize, they cannot sell out the

vast majority of FPL's customers who they do not represent and cannot legally represent by imposing liabilities on those other customers in the form of higher rates in 2013, 2014, 2016 in base rate and capacity clause rate schedules.

So who does represent the 4,599,500 of -- 599,500 of FPL's customers? Well, let's look at the law. The State of Florida decided this question in 1974 when they established the Office of Public Counsel.

Section 350.061(1) states, It shall be the duty of the Public Counsel to provide legal representation for the people of the state in proceedings before the Commission. The Public Counsel shall have the following specific powers -- and I'm excerpting here -- one, to recommend to the Commission or urge any -- therein any position which he or she deems to be in the public interest, whether consistent or inconsistent with positions previously adopted by the Commission.

On its face this Commission -- this statute means what it says; the Public Counsel is a necessary party, or, to use FPL's words, a vital party to any stipulation if it is to be found in the public interest, or at least the Public Counsel must not object or it must remain neutral, as in the Gulf Power and SSU cases.

But don't take my word for it. Take the Florida Supreme Court's word for it in Citizen v. Mayo in 1976, when it described the Public Counsel's role in the specific context of file and suspend rate cases and noted what it perceived to be the linkage between the establishment of the Public Counsel's office and the file and suspend law.

They stated, the Court stated, Whenever public -- whatever public format the Commission chooses to provide, however, special conditions pertain in cases where the 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.

The Court goes on to say, That office was created with the realization that the citizens of the state cannot be adequately -- cannot adequately represent themselves in utility matters, and that the rate setting functions 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.

They further stated, The Commission cannot schedule a public hearing and preclude Public Counsel, the public's advocate, from acting to protect the

public's interest.

That case was from the very early days of the office, and it has not been diminished or receded from by the Court.

The South Florida Hospital case is one that the parties represent -- the signatories represent to you governs and allows you to entertain a non-unanimous decision.

I won't dwell on the facts other than to say in that case seven of the eight parties signed, the Commission found that the seven signatories represented all of the interests, even the customer class that made up the lone dissenter of the hospital association's members. There were very large rate reductions and earnings sharing in that case. The Commission initiated that limited proceeding and controlled the case. A hearing was never held nor promised, and the Public Counsel negotiated, signed, and actively supported the stipulation.

It is instructive, we believe, to fully understand the nature of the critical distinction, so I have distributed to you the briefs of the Commission and FPL. As you will note, if you, when you review the facts that are in the fact section, the Commission emphasized again and again they opened the docket, it

was their docket, they encouraged settlement over and over and over again throughout the proceeding in the docket. They noted that all parties actively participated in settlement negotiations that the staff marshaled.

They noted that the Public Counsel, representing the citizens of Florida, characterized the stipulation as fair, reasonable, and appropriate. And they noted with, with, this with approval to the Court.

In FPL's brief, FPL states on page 5 of the brief, that the settling parties represented customers across the spectrum of FPL's rate classes, including commercial rate classes in which the SFHHA's members are served. They noted that the Office of -- FPL noted that the Office of Public Counsel, which is mandated by Section 350.061 of the *Florida Statutes* to represent the people in proceedings before the PSC, was a party.

FPL, in its argument to the Court, took great pains on pages 17 and 18 of their brief, and I've highlighted those sections, to argue that, that the Citizens v. Mayo case was important. They italicized the sections that I read to you.

And then concluding their argument on this case, they stated, Here the shoe is on the other foot, comparing to the Citizens v. Mayo case. 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.

The contrast, the shoe on the other foot, was he was contrasting the argument that the hospital association was making.

Clearly FPL saw Public Counsel in his mandatory role then as vitally important to the public interest determination that the Commission made. They like us when we're on their side. However, when they can't make us see it their way, they read the law 180 degrees differently.

They might tell you this today, that we don't matter, but I don't think they're going to change their tune when they argue before the Supreme Court and recede from the way they argued there.

The Commission in its argument to the Court also pointed to Mr. Shreve, and I, and I point this out in the brief in the highlighted section. They refer to

Jack Shreve, who was the Public Counsel at the time, as the principal intervenor in the case, and they quoted his approval of the stipulation. And they also, and this is important, the Commission told the Court that the diverse parties to the stipulation representing for all practical purposes the entire spectrum of consumers, from residential ratepayers to large industrial customers, urged the Commission that there was a reasonable basis to find the stipulation a fair resolution of the case.

That is vastly different than the case here where you have less than one one-hundredth of 1% of the customers represented saying to you that you should approve the stipulation.

The Commission stated to the Court that they were in effect the petitioning party in that case, having initiated the earnings review on its own motion. And if it, through the efforts of its staff and the parties, was satisfied with the resulting agreement, it had the discretion to approve it. Clearly this argument is different than argument that could be made on the record of this case.

Commissioners, let me turn now to the other considerations beyond the fact that the South Florida Hospital case applies in no way.

We believe that this is a self-negotiated deal that unilaterally covers four major new and material issues that are facially adverse to the ratepayers' interest and are not accompanied by competent substantial evidence taken in this case. These are the provisions for the GBRA, the $200 million fossil fuel dismantlement amortization to income, the asset optimization, and relief from the, from the depreciation filing. All of those would require a full evidentiary hearing pursuant to 366 and Chapter 120.

The GBRA proposal especially is, is disappointing that that's part of this, this agreement. I would commend to you pages 13 through 16 of the most recent rate order in the FPL case in, issued in 2010, where the Commission took great pains to explain why the GBRA was inappropriate for inclusion. They specifically recognized that the Public Counsel's support of a stipulation that included that in 2005 was not a basis for accepting the GBRA proposal that FPL advanced through several witnesses in that litigated case, because they said that it was part of the give and take of negotiations and they recognized that the Public Counsel did not support it. And, in fact, the Public Counsel brought testimony against it in that case and the Commission thoroughly rejected the GBRA proposal.

The same with the asset optimization proposal. This, this cannot be accepted through unsworn, non-evidentiary characterizations. The same goes with the $200 million amortization, and the same goes for the 200 -- for the depreciation filing relief.

Commissioners, in order to stay away from the, the brief, I commend you to the positions that are taken in a prehearing -- in the order that is on file and publicly available, the Prehearing Order. That has our positions in it. The agreement, the proposal that the parties have filed is very contrary to that. There is a wide gulf of, of a disagreement there.

This proposal will not promote the efficient, speedy, and just resolution of this case, and instead it will entangle the parties and the Commission in uncertainty for years.

Once any order approving the stipulation is appealed, there will be an automatic stay. If a government official takes the appeal, the Public Counsel is a government official, that automatic stay can only be lifted upon the, placing revenue subject to refund under a bond or corporate undertaking.

If there's a remand of that appeal, the Commission will be in a very messy situation of trying to implement rates based on what could be a very stale

record that would introduce, interject many months, if not years, of uncertainty with respect to FPL's rates.

You have a record before you that is complete. It's ready for you to issue an order based on. This case did not settle. There's no dishonor in that, there's nothing wrong with that. Many cases don't settle. Some cases settle. But because a case doesn't settle doesn't mean one party has acted inappropriately.

Public Counsel has discharged its obligation and mandate that is required by the statute with honor. We have filed the testimony of seven experts, and our experts and the expertise within the office believe this settlement is not in the public interest. We await your decision in the rate case, and we expect that that's where this case should be decided. And I would conclude my remarks there.

CHAIRMAN BRISÉ: Okay.

Mr. Wright.

MR. WRIGHT: Thank you, Mr. Chairman. And good afternoon, Commissioners. Schef Wright, appearing on behalf of the Florida Retail Federation with our 8,000 members statewide, approximately 32 of whom -- 3,200 of whom are served by Florida Power & Light through probably a significantly larger number of total customer accounts.

I want to start by saying two things. First, we strongly agree with the Public Counsel that the proposed settlement between FPL and the three other parties will -- who probably together represent no more than a few hundred, maybe 500 or so customer accounts, is not in the public interest and will not provide net benefits to FPL's customers or to the State of Florida.

The settlement, like FPL's rate case request, would represent a massive transfer of billions of dollars from the pockets of Floridians to FPL's shareholders. The Commission should deny the settlement agreement on substantive grounds, as well as on legal procedural grounds that I will discuss a bit later.

Second, following what Mr. Rehwinkel said, I want to state clearly and unequivocally, regardless of the accusations that have been hurled against the Retail Federation and the Public Counsel's office, we are fully supportive of settlements, we regularly participate in them, we have a proven track record.

We settled rate cases with Florida Power & Light Company in 2002 and 2005. We resolved pending rate case issues, both post and pre, post the decision in 2010 through the settlement that y'all approved in 2010. We settled a rate case with Progress Energy Florida in 2005, and we settled global issues, NCRC

issues, Crystal River 3 issues, and potential rate case issues in January of this year through a petition -- through a settlement agreement that y'all approved following a brief hearing in January -- in February of this year. Any suggestion that the Retail Federation is opposed to settlements is simply baseless.

I'm going to focus somewhat more on the legal aspects of the proposed settlement, but first I want to provide some factual context. The settlers ask you to approve this, a $378 million base rate increase that's not fully consistent with the company's MFRs, testimony, or exhibits. This is a greater percentage, 73%, of the original ask than the Florida Public Service Commission has ever given FPL -- 63%.

And, by the way, it is not ratably less than recent decisions. In Gulf Power, the correct comparison is $67 million, 63 million originally, 4 million as a step increase, against 101 million that had, that was the substance of the, of the actual ask, when you added back the Crist rate base items into the, into the request. So that was 67%. The settlers here are asking for 73%.

And with regard to Mr. Litchfield's assertion about the Progress settlement, I don't think he can know what Progress would have asked for. I know what I was

told they would have asked for. I can't say. I'm not even going to say relative to what it was. If he knows, he can say so and then I might be able to respond. But I don't think he can know because that was confidential and we kept it as such.

They asked for a step increase for the Canaveral unit when it comes online in June of 2013. That's the only item that's actually supported by the MFRs in this case.

They asked for a further step increase for the Riviera unit in 2014 that is not supported by any MFRs, any testimony, any exhibits, any evidence, that would generate somewhere north of $500 million paid by FPL's customers over the settlement period, another increase for the Port Everglades plant in 2016 that would generate probably 100 to $110 million in the last six months of the settlement period and leave a 200, 220, $230 million permanent base rate increase in effect going forward thereafter.

They also ask you to approve using $200 million of the fossil dismantlement reserve. That is properly money that should be going to the customers' account one way or the other. If it's a surplus, we should get it back in the ordinary course of dismantlement reserve accounting and amortization. If

it's not a surplus, then it would be taking money now that customers would be entitled to have used to pay for fossil dismantlement down the road.

And another big chunk of money not clearly specified, gains from enterprise type transactions, where such gains would otherwise flow entirely to customers by the normal operation of their consideration as other operating revenues. If it was 100 million bucks a year and FPL got 50 million of that, that's another 200 million of money that customers should otherwise be entitled to.

The certainty that FPL touts here is this. Under the settlement that the four parties have agreed to, FPL's customers will certainly be forced to pay a lot more money, at least a billion dollars over the settlement period, that is not supported by any evidence in this case at all. 500 plus million for Riviera, 100 million for Everglades, 200 million of customer money for fossil dismantlement, and something in that general ball park for the gains on sales.

Now, regarding the legal and procedural aspects of the agreement and where we are, this motion is not a motion, it's a petition. It asked for base rate increases. It's four base rate increases, four base rate increases, 378 million, Canaveral, Riviera,

Port Everglades, plus fossil dismantlement, plus the authorization to keep significant amounts of gains from enterprise type transactions that would otherwise flow to customers.

Your statutes require that applications for base rate increases comply with your own rules, test year notification, and minimum filing requirements rules. No test year notification for 2014, no test year notification for 2016, no MFRs. Your statutes require this. The utility has not complied, the settlers have not complied.

Moreover, the Florida Administrative Procedure Act and the Uniform Rules of Procedure require that substantially affected persons and parties, including FPL's 4.5 million plus customers, be provided full rights of discovery, presentation of evidence, cross-examination, and the other procedural rights and protections afforded by the Florida APA with respect to the Commission's decisions that would affect their rights and interests.

Again, approving the settlement would purport to give FPL at least four big chunks of customer money, more than a billion dollars, that are not even the subject of this case, in violation of your statutes and your rules, as well as in violation of the APA and the

uniform rules. This would be a significant departure from the essential requirements of law.

And finally, responding to FPL's request that we tell you whether we oppose action without taking further evidence, you bet. We oppose taking action on this settlement agreement, we oppose taking action on this settlement agreement without the Commission taking additional evidence, taken in full compliance with your statutes, Chapter 366, your rules, 25-6.140 and .043, and the Florida Administrative Procedures Act. In other words, they want new base rate increases, they need to file new base rate cases.

In such a case, they would have the opportunity to prove that FPL needs the money to provide safe, adequate, and reliable service at the lowest possible cost. We'd have our opportunity to get our best hold, and, and, and state what we have to say.

And finally, I've got to mention this, Mr. Litchfield argues that we've taken extreme positions in this case. I'll tell you what, in 2002, Public Counsel's litigation position was negative $675 million. They agreed on a base rate decrease of negative $250 million. And, by the way, asking for a base rate decrease of $253 million in this case is nowhere near as extreme as FPL's ask for $1.3 billion of customer money

in Docket 080677, which the Commission denied 93% of.

The Public Counsel has told me that he needs -- I need to tell you that they concur with our remarks. In the public interest, following your law, your rules, and the Florida APA, APA, you should deny the settlement. Thank you.

CHAIRMAN BRISÉ: Thank you.

There's about five and a half minutes remaining.

Mr. Saporito.

MR. SAPORITO: Thank you, Mr. Chairman.

Florida Statutes require that the Florida Public Service Commission provide due process rights to all parties in this docket who raise disputed issues of material fact, and that this Commission provide parties an opportunity to engage in discovery, to present evidence and argument, and to conduct cross-examination of witnesses presented at hearing before this Commission enters the findings of fact and conclusions of law.

FPL's proposed settlement agreement evokes due process violations in that the settlement contains terms and issues materially different and not part of FPL's March 2012 filing. Thoughts of settlement effectively constitutes a new rate case filing, which is not supported with, with required minimum filing

requirements, witness testimony, or notice to FPL customers.

To be clear on the record, the Commission's authorization of data requests for the purpose of addressing FPL's proposed settlement agreement do not satisfy the non-signatory parties' due process right to engage in full discovery as provided for under *Florida Statutes*, under the *Florida Administrative Code*.

Notably, FPL refused to answer simple data requests submitted by the Florida Retail Federation about the date that the settlement negotiations commenced with the signatories or the date that the signatories signed the settlement.

When I posited a data request to FPL, their responses were not truthful. FPL accused me of posting unauthorized confidential information about the settlement on a blog, and that was the reason for excluding me from settlement negotiations. FPL subsequently backed away from that lie and falsely alleged that I was, I sent out a news alert with unauthorized confidential information about the settlement. That allegation is also a lie, and I have a document to prove the point.

In fact, it was FPL's employee Mark Bubriski who sent Susan Salisbury, a reporter with the *Palm Beach*

Post, an email detailing the entire settlement agreement, and I have a document to support that fact.

FPL falsely alleged that Mr. Nelson and the Larsons were involved in settlement negotiations; however, I personally contacted them and they denied that they were involved in any settlement negotiations with FPL at any time.

In a case held in the Florida Supreme Court, Case Number SC02-1023, *Jaber*, et al., the legal counsel for the Commission wrote in relevant part that a proposed stipulation settlement was reached and submitted for the Commission's approval. The parties indicate that their agreement is premised on a belief that the scope of the earnings review has provided an informed basis for an agreement on FPL's rates.

They note that FPL's MFRs have been thoroughly reviewed by the FPSC staff and the parties and that FPL has filed comprehensive testimony in support of detailing its MFRs and that the parties in this proceeding have conducted extensive discovery on MFRs and FPL's turn -- testimony.

Here in this docket, myself, Mr. Nelson, the Larsons were not included in the negotiations which led up to the settlement, and the MFRs submitted by FPL in this docket do not include other terms and issues which

were embedded in the settlement, and the Commission staff and parties have not had an opportunity to conduct extensive discovery on MFRs and FPL testimony relevant to the settlement.

For all the above reasons, this Commission must find FPL's settlement is not in the best interest of the ratepayers and the parties as a matter of law.

Thank you, Mr. Chairman.

CHAIRMAN BRISÉ: Mr. Hendricks, you have a minute and 30 seconds.

MR. HENDRICKS: Great. I'll confine my remarks to just one, one issue. The, the proposed equity ratio and the settlement agreement is grossly tax inefficient. It would burden the ratepayers with about $630 million per year, amounting to about $2.5 billion over the four-year term, just to gross up the equity returns to compensate for FPL's taxes.

If the equity ratio were reduced by 15%, the, the savings to ratepayers would be about $110 million a year, about $440 million over the term of the proposed settlement. Even a small incremental adjustment, for example, a 5% reduction in the equity ratio would provide savings to ratepayers of about $38 million per year and amount to about 150 million over the four years of the proposed agreement.

The, a proposed equity ratio also exposes ratepayers to an unnecessarily high risk of future rate increases because it fails to lock in the available low cost, long-term, low interest rates that's currently available. I'm trying to do this very quickly.

CHAIRMAN BRISÉ: You've got five seconds.

MR. HENDRICKS: The settlement accepts without any modification or balancing the very rich equity ratio as proposed by FPL. It does not in any sense represent a balancing of interests for this key provision, and therefore the settlement should be denied as not being in the public interest. Thank you.

CHAIRMAN BRISÉ: Thank you, Mr. Hendricks.

Four minutes and 35 seconds.

MR. LITCHFIELD: Thank you, Mr. Chairman, Commissioners.

There's frankly too much to rebut point by point, and so I will not make that attempt here. I will note at the outset though that, you know, on the one hand it appears as though the non-signatories want no process, and then on the next breath they want four full-blown rate cases as a matter of process.

The truth of the matter is that, that staff has it right. I mean, the way in which settlement agreements typically have been approved, considered and

approved is in a process something like this. The only reason that, that the signatories have suggested that maybe an additional day to take additional evidence might be necessary is, again, to be protective of the process.

But I would point out that, with regard to the four items that both non-signatories who spoke here today have identified, the GBRA, the asset optimization, the dismantlement fund, and the depreciation study, that those do have a basis in both precedent and policy for the Commission to decide without taking additional evidence. Again, we think an abundance of caution would suggest that we, we maybe identify a couple of those issues and take additional evidence.

But in terms of the GBRA, those costs have already gone through a prudence determination effectively through, through those need proceedings. We know what the estimated costs are going to be, and the GBRA mechanism has a mechanism or device in place to hold customers harmless from any incremental costs above that.

It is earned return neutral. That is a matter of record. It's, it's an inescapable, inescapable mathematical conclusion that the GBRA is earned return neutral. It is adding a dollar of cost and a dollar of

revenue. By definition, that is not going to move your, your, your earned return.

The asset optimization point, that's an extension enhancement of an existing program that the Commission has approved, and what it does is it gives the customers first, the first 45 or $46 million of savings. That is where the customer benefit is here.

With regard to the dismantlement and the depreciation study issues, those are things that have been done through settlement before, and those are questions of policy that the Commission I think should look to and should consider.

Public Counsel made the point -- and there's a lot of rhetoric here today and it's regrettable -- but Public Counsel said that we don't believe the Public Counsel matters. We have never said that. We made every effort to engage them, as I said, even, even more than a year ago in an effort to try to resolve, resolve this proceeding.

We cannot force someone to the negotiating table, but we shouldn't be constrained from moving forward with other parties that are willing to talk.

This was not a self-negotiated deal. That's frankly offensive to the folks here to my left. This was a very aggressively and extensively negotiated deal.

Public Counsel says that they were cut out. Again, that is simply not true. They point to you, point you to a Supreme Court decision, the Mayo case, for the proposition that the Commission cannot schedule a public hearing and preclude Public Counsel, the public's advocate, from acting to protect the public interest.

That's not what is happening here. That has nothing to do with where we are. This is simply about determining whether this agreement is in the public interest. For the reasons that we've articulated, we submit that it is. Public Counsel is free to take a position that it, per the statute, deems to be in the public interest, just like any other party, just like us, just like Mr. Moyle on behalf of his clients, and so on and so forth. That does not mean that Public Counsel's litigation position is, ergo, the public interest. That is within this Commission's purview.

You've, you've looked at settlement agreements in the past, you've made findings that they're in the public interest, including terms that were not part of the original petition, and you can do so here, Commissioners.

Again, we would respectfully request that you approve this agreement. And, if it's necessary to take

some additional reference, we are fully supportive of that, but we are fully supportive of the settlement agreement. Thank you.

CHAIRMAN BRISÉ: Okay. There's a minute left.

MR. MOYLE: Never miss an opportunity.

CHAIRMAN BRISÉ: You may live to regret it; right?

(Laughter.)

MR. MOYLE: No. This, this is -- a lot's been said, I guess the, my final sort of observation, you know, would be that I'm not sure that the, you know, that the facts, the two weeks' worth of facts are really being talked about as much. We may have a disagreement about the status of the record. My understanding is that the record has not been closed and it's open and we can talk about those things and have the conversation. I think it informs the Commission as they debate it.

But I just, you know, in listening to the points made by the other side, I'm not hearing, I didn't hear a lot about, you know, about the facts and some of the, you know, the dialogue and the debate that took place during that two-week hearing. Because ultimately I think this, this call that you all have to make, the public interest call, is going to spin on, you know, on the facts.

And, you know, the law and some of that stuff will all sort itself out. But the objective, as I see it, is the facts, and we think that the facts, yeah, there were disputes on them, but that the settlement fairly reaches a compromise on a whole host of disputed facts.

CHAIRMAN BRISÉ: Thank you, Mr. Moyle.

MR. MOYLE: Thank you.

CHAIRMAN BRISÉ: All right. I think we're done with oral arguments and rebuttal. We are now going into the phase of Commissioner deliberation and questions and so forth.

I see a light on, I see a couple of lights on, so, Commissioner Balbis.

COMMISSIONER BALBIS: I guess I'll comment on this one, but thank you, Mr. Chairman. And I want to just start out with a couple statements and then I have a couple questions for staff, and then obviously turn it over, and I have a lot of things that I want to cover.

But I wanted to start off with -- and I think this Commission particularly has always encouraged settlements. In fact, I mean, it was brought up by, I believe, Office of Public Counsel that we unanimously approved the Progress Energy comprehensive settlement that dealt with multiple dockets with hundreds of

millions, if not billions, of dollars' worth of impact, and that was a very complicated settlement.

What we have here today is what I feel is a standard rate case, and this is something that this Commission was formed to handle and something that is really our purpose and our mission, if you will.

And what has made this different is this settlement that is before us. And, and we deal with settlements all the time, and what's different is Office of Public Counsel is not only not a signatory but they're opposed to it. There's also items that were not included in the rate case.

So ever since this settlement has been filed, we have been in the seemingly continuous legal dispute or discussion, if you will. I personally have had four separate briefings before today on all the legal issues associated with it, and I think that's where at least I personally want to focus first is the legal issues before we get to the technical aspects of the, of the settlement.

Fortunately the Supreme Court, I believe it was yesterday, finalized, basically backed one of our decisions, recent decisions that we made that was challenged. And seeing the tone of the parties for and against this settlement, I'm sure that we have to be

very careful from a legal standpoint, that no matter what we do, there's going to be a lot of scrutiny from the legal aspects of it.

As far as the rate case goes, we've gone through technical hearings, we've gone through the public process. The only thing that's remaining is the staff recommendation.

But going back to the legal points, I have a basic question for staff, and I know we've covered it on numerous occasions, but what are our basic options that we have here today? Whoever is prepared to answer it.

MR. KISER: I'm ready.

MR. YOUNG: I'll defer it to General Counsel.

MR. KISER: Commissioner Balbis, the short of it is there's basic -- we could probably go into a number of different variations, but I think to simplify it, there's kind of three.

One would be to approve the settlement. Two would be to deny or postpone the settlement, not consider it. And the issues that are in the settlement could be addressed in later proceedings, limited type proceedings, that sort of thing. There's other ways to deal with some of that.

And the third would be to continue considering the settlement by having additional processes to help

cure potential defects that the record may not be as complete as it needs to be, there may be issues that haven't been addressed in the record that need to be included. And, of course, with that is the scrutiny of those issues by the other parties.

I would also comment, going back to option number one, we think that you, if you want to approve the settlement, it's with high risk if you do it without having some additional hearing on that. We would not recommend taking that position without providing more process to approve it.

COMMISSIONER BALBIS: Okay. So then if that would be, I would assume, the least defensible from a legal standpoint option, would there be one that is most defensible?

MR. KISER: Well, probably the strongest one would be to continue on with the regularly scheduled rate case, continue, since it's, it's already gone through all of the due process type steps that we have, all the formal procedures of -- as you just cited, there's very few left in that. The staff recommendation is one, et cetera. That's probably the cleanest one in terms of which provides the least amount of risk would be that one.

And then in order of security, the next one

would be to provide some additional hearings on the settlement and follow up on that with those kind of hearings. And the least would be going ahead and approving a settlement without any additional process.

COMMISSIONER BALBIS: Okay. And, Mr. Chairman, I just want to follow up on that for Mr. Kiser.

And just so I don't lose my train of thought, I mean, the challenge that I have or the dilemma I'm facing is that I think there are items in the settlement that I think are, are good, that are in the public interest. And, you know, and we can, if we get to that point and discuss the individual aspects of the settlement, I'm prepared to do so.

But, you know, one of the things that pops to mind are the generation rate base adjustments for the two power plants that have gone through the need determination process, that have been fully vetted, that they're standard power plants, that I believe the West County 3 and I believe 2 and 1 are the same types of technology, so we have a firm grasp on those costs.

Is there any way we can, we can take a defensible position, if you will, and still go through a process or some way so that we can eliminate the need for a full-blown rate case and eliminate the pancaking

of rate cases and address those plants so that we can encourage investment in the infrastructure?

MR. KISER: Well, I think the, the process that's outlined in the statute gives the Commission authority to do limited proceedings. Those items that you just mentioned or any others in the settlement that have support could also be addressed, but certainly the ones involving bringing the additional plants online would lend itself to the limited proceeding in the future.

COMMISSIONER BALBIS: Okay. I'll turn it over to the Commission, but, again, I think they're important aspects in the settlement if they're in the public interest. I'd like to hear your input and see how we can have a defensible position, but address all of the good points within the settlement and protect all those, including the public.

CHAIRMAN BRISÉ: Thank you, Commissioner Balbis.

Commissioner Edgar.

COMMISSIONER EDGAR: Thank you, Mr. Chairman.

And as, as always, Commissioner Balbis jumped right into, right into the middle of it early on, so I'm going to ask maybe from, from how I think about things to back up just a little bit, and then I'll catch up

with you probably.

But I was, as I know we all were, was listening very carefully to the oral arguments, and I also have had the opportunity to have, in, in the time since we all last met together, to have numerous briefings with our staff, and they will say that they were probably long briefings. And I'm glad for the opportunity today for us to have this discussion again while we're all gathered together.

But in listening, there were a couple of comments made that, that give me pause, and I'd like to have them clarified for me. And let me begin by saying I have a strong, strong respect and appreciation for powerful advocacy for a client and a client's interests, whatever the position is that's being taken.

Anybody who knows me has heard me say numerous times, and y'all might get to hear me say it a few more times, I think, I believe very strongly that the words we use matter. And there were two statements, if I may, Mr. Rehwinkel, that I thought I heard you make that I would like to, to understand better, and I will go back and read the transcript after this to make sure that I did not misunderstand.

But I believe I heard you say that bullying tactics have been used by the other parties and that,

quote, OPC will never engage in settlement negotiations again if this proposed settlement is approved. And I -- again, I was listening very carefully, but an accusation of bullying tactics in a professional forum is of great concern to me. I have had the opportunity to witness bullying a couple times in my life, and that got my attention.

Could you clarify?

MR. REHWINKEL: That was a purposefully used word, Madam Commissioner. FPL has told you publicly that we have refused to negotiate and they've been working with us for a year. I am bound by confidentiality to not disclose whether I've had negotiations with the company and what those negotiations are.

But FPL has taken to publicly disclosing that they've tried to negotiate with us. They've said that we haven't negotiated. I'm kind of restricted from talking about that. I consider that to be bullying and disparaging of this office, because what they're trying to do is force us to the table by ridiculing their perception that we won't negotiate.

Now, I know a lot of things I can't talk about --

COMMISSIONER EDGAR: And I don't want to know

what they are.

MR. REHWINKEL: And so, Madam Chair -- Madam Commissioner, that's the way we feel. There are things that I cannot talk about about that, but that's what's happened.

Now, the taking of -- the stating in the position statement that they just filed the other day that we're on record as supporting the GBRA, if that's allowed to be a basis for you to take the GBRA provisions and say, well, you can adopt that as a result of this proposal, then stipulations have no meaning and parties cannot be creative in what they agree to if those are used against them in the future.

Why would we agree with anything that's not plain vanilla that you could just get out of a Commission decision if, when that agreement or stipulation is over with, people say, well, you agreed to it there, no matter what give and take you may have had to reach an agreement with something that might not be as palatable by itself because you got sharing or you got the, the storm accrual to stop, those kind of things.

If you are allowed to be criticized for not agreeing to it at a future date because you agreed to it then, why would you want to settle and stipulate to

anything in the future? That's the point.

And I think what the Commission has to be mindful of is that you have agreements that say that no --

COMMISSIONER EDGAR: Mr. Rehwinkel, you're going way beyond my question. You've gone way beyond my question.

From where I sit, criticism is one thing and bullying is a different thing, and I will leave it at that.

You made, as I said, you made the statement that OPC will never engage in settlement negotiations again, should the Commission choose to approve the settlement. Are you able to bind a future Public Counsel?

MR. REHWINKEL: Oh, yeah, I didn't mean it in that regard.

COMMISSIONER EDGAR: Well, how did you mean never?

MR. REHWINKEL: Well, I was answering -- that's the part of the question that I was answering, I think, that you felt like I had gone beyond the first part of your question, is certainly --

COMMISSIONER EDGAR: No, I didn't feel it. I knew it.

MR. REHWINKEL: Okay. Certainly, the Public Counsel today can't say what a Public Counsel in the future would do. My statement in that regard is more a rhetorical statement of why would you ever agree to negotiate in the future if the things that you compromise on are always used against you? That was the point that I was making. I was kind of answering both questions at the same time.

So certainly, just like this Commission could not bind a future Commission, certain -- anything I say here isn't going to bind a future Public Counsel. I'm stating to the Commission that as a, as a matter of policy, the way provisions in individual stipulations come back to haunt us today is a powerful disincentive to settle in any kind of creative way in the future.

Certainly, a future Public Counsel, even this Public Counsel, could make his individual decision on an individual case. We just think it's important that, that negotiations be fair, they be equal, and they not be made under coercion, and that parties are allowed -- and I don't mean by the Commission. I'm talking about by another party.

I think parties should respect the provisions that are in the contracts that they negotiate that say you cannot use as precedent an individual position -- a

provision of a petition, or that also -- the part -- these stipulations are, are a global ball of wax, that you can't take one position, one term out, so --

COMMISSIONER EDGAR: I'm aware of that. Thank you.

MR. REHWINKEL: So that's the basis for that.

COMMISSIONER EDGAR: And I appreciate the clarification, and I will go back and look at the transcript. You're saying that it was a rhetorical statement. It certainly sounded like a commitment and a promise when you said it in your first 15 minutes of comment.

It is my recollection that the record was left open at the, the end of the last day that we were in hearing a few weeks ago. I would like to have that either confirmed or not confirmed for me.

MR. KISER: Yes, it is open.

COMMISSIONER EDGAR: The record is open. Thank you.

Commissioner Balbis also said -- you love it when I do that, I know you do -- also said that after the rate case the only thing left to do is for the staff recommendation to be worked on, or actually you said the only thing remaining is the staff recommendation, and that's something I kind of disagree with as well, in a

very friendly way. That -- my understanding, Commissioners, was that from the order the Chairman issued, which said that we would be meeting on a date, I think it said date to be determined, and then this date was, was specified, to hear oral argument, it was my understanding that we would have oral argument on, on the date determined, and that then as a Commission we would have discussion and we would determine the course forward.

So I just, I don't think that we had determined that the only thing left is the staff recommendation, and we may be saying basically the same thing from different standpoints.

But with that view of where we are, I think I have heard pretty much all parties, and I don't mean to purposefully exclude anybody, but at least a majority of the parties before us say that their preference would be if this settlement is to be a viable option on a go-forward basis for this Commission to consider, that they would request that we take additional evidentiary testimony, and that seemed to be something that I felt like I was hearing amazingly some sort of consensus on.

We also have been told, and I think we all agree, that there are basically a handful of distinct issues that kind of supplement the issues that were

identified in the initial OEP or Prehearing Order.

So with that, Mr. Chairman, at the appropriate time, and following whatever all discussion we want to have prior to that, I'd like to pursue the possibility of how, you know, the process, according to our statutes and rules and building an all due process, but candidly in a concise, specific, and with all appropriate haste time frame, to see how we could accomplish that.

CHAIRMAN BRISÉ: Okay. Did you -- Commissioner Balbis, did you want to say something?

COMMISSIONER BALBIS: No.

CHAIRMAN BRISÉ: Okay. If not, then I have a few things I need to say.

COMMISSIONER BALBIS: No. I mean, it didn't sound like Commissioner Edgar was asking me to clarify my statement.

CHAIRMAN BRISÉ: Okay.

COMMISSIONER BALBIS: But I'm willing to do so at any time.

CHAIRMAN BRISÉ: From, from where I sit, it sounds to me, and, you know, after all the briefings and so forth and looking at the settlement, I too am in the same position with probably, probably, I feel, like most of the Commissioners, that there are things in the settlement that I like and there are things that I don't

like.

And I don't know that there would be any harm if, to flesh out some of those things, that we maybe look at a process to do that. Now, I could go through the list of the things I like and go through the things that I don't like, but I don't know that that helps any today, unless we were in a position, and if we're going to be in a position maybe a little bit later to, to either do option one or option two, which is either straight up approve or straight up deny, and so forth. And if -- I may be reading everybody wrong, but we may not be in that posture.

The -- I mean, I think for me, and I guess this is a legal challenge, and I'm harkening to what Commissioner Graham has sort of stated is one of the challenges of this job is, you know, look, if I'm the decision-maker, these are the things I like, these are the things I don't like, you-all figure it out how to -- you-all figure out how to get there. But, you know, that's not the posture that we're in, and we can't necessarily force that to happen.

However, we can definitely have further conversation as to adding additional meaning to the things that may be of, of benefit to, to the general public interest within what is found in the settlement,

or, or conversely we could find that, you know, based upon whatever information is provided to us, that it may not be in the public interest.

And we may end up at the conclusion that, you know, there may be an alternate path to resolve some of these issues that are here that we may like. So that's my thought process as to where we stand today.

So to boil it down, I am not personally opposed to finding some way to maybe flesh out some other things that may need some clarification for us to make a solid decision.

Commissioner Balbis.

COMMISSIONER BALBIS: Thank you, Mr. Chairman. And, you know, I agree with 99% of those comments, and I think you read at least myself and possibly the other three accurately. And, you know, and that's why I focused on, on the legal issues.

And just to clarify my comments to Commissioner Edgar, in looking at putting the settlement aside on the rate case track, briefs have been filed, staff recommendation is due, I believe, October 25th, and then we have the special agenda for revenue requirements and then agenda for the rates. So I may have simplified it, but the next task is staff recommendation, but not with -- you put in the

settlement agreement, then I agree with you, there's a lot of steps in between. So I just wanted to clarify that.

In my numerous briefings with staff, we talked in depth about the three basic options, and then the 400 options, sub-options associated with that. And, and I agree, there are issues with the settlement that, upon review, seem like they are clearly in the public interest, there are some that may require some fleshing out.

You know, I think the challenge of removing the Office of Public Counsel from the process or at least having them against it is now we're taking on maybe an additional role of, in dealing with the settlement, of fleshing it out, which I think we can do so.

In my opinion, with the exception of the GBRAs, which if there's a separate procedure to take that into account, I think we can handle all of the other issues through the rate case process, but instead of that, I mean, getting additional information on those other outstanding issues is, is okay with me. I have questions I still want to ask, I've said that from the beginning, but I want to make sure that everything we do is legal and defensible. It sounds like the tone is

whatever we do is going to be challenged.

But the other thing is really logistics, and there's been a lot of talk about the Office of Public Counsel's due process rights. And I want to make sure if we add additional steps, that the statutory time frame we can still meet, that FPL, whatever rates we deem appropriate or the settlement, they can be in place at a time so it doesn't damage them either.

So I just want to make sure if we schedule processes that we can get it done in time, if we approve the settlement or if we deny it, the steps associated with that. So I want to make sure that all parties are protected in whatever we do.

CHAIRMAN BRISÉ: Thank you.

And before I go to Commissioner Graham, one of the things in my conversations with staff, I wanted to make sure that, from the perspective of the office of the Chair, that we were agnostic to the, to the end result.

To me, as far as I'm concerned, not that I don't care what the end result is, because I have to make a decision on that, but to the point that we arrive at making the final decision, I want to make sure that the process is laid out that, you know, everything that needs to be fleshed out can be fleshed out and all the

time frame necessary is in place. And whatever that means in between there, that those who may have to make decisions on their own as to how they're going to deal with the dates, how they fall out, will be in a position to make those decisions.

So that's, that's the way I've sort of approached this. And, and hopefully through that process, whatever the issues are that are outstanding, if there's potential for, for evidence and testimony and all those type of things, you know, the case can be made for those things or against those things through that process, if we were to go that route.

Commissioner Graham.

COMMISSIONER GRAHAM: Thank you, Mr. Chairman.

It, it sounds to me like the four of us, nobody is ready to close the door yet on the settlement. I think moving forward and going through an evidentiary process I think opens the door for us to, to solidify those things that we like in the settlement, allows for us to better understand those things that we may question or don't like in the settlement.

And at the end of the day, I think during this process, and just as long as everybody has an open mind as we go into and through this process, we may find out that there are some things from Retail Federation or

from OPC, we may hear the things that they do like about the settlement and we may hear their concerns about the things that they don't like about the settlement, and there's some things that we may be able to take to heart. And at the end of the day, we may turn the settlement down, but that doesn't stop us from putting some of those, or incorporating some of those things into the staff review anyway, or into what we pass at the end of the day.

I don't know. I, I want to see more information come. I want to hear the testimony come to put that information into the record. And this is still a very dynamic process, and we have many options as we go forward.

So I won't take away Commissioner Edgar's position of making a motion, but I think that we're, I think, I think most of us are all on the same page and I'm willing to move forward.

CHAIRMAN BRISÉ: I just want to make sure that we're in the proper posture. I don't know if we -- I don't know if we've had enough fleshing out. I see some question marks.

Commissioner Balbis.

COMMISSIONER BALBIS: Like I said, I, you know, not to repeat myself, but to add to it, I am

concerned about the company's due process. I'm concerned about logistics, I'm concerned about scheduling.

And I want to clarify from our general counsel, if we go through this process, this additional hearing process, enter in evidence, flesh out the settlement agreement, what are our options at the end? It's my understanding it's approve or deny the settlement. Is that correct?

MR. KISER: That's, that's typically the posture you would be in is that, to -- you know, let me explain a little bit.

The settlement agreement has a provision in it that says that the parties to that all agree that it's the whole agreement or nothing. That's been in other settlement agreements.

One that I'm aware of that was in one of the cases that we've had to review, the Commission chose not to adopt the entire settlement, they left one or two things out, but the parties ended up still agreeing to stick with it.

So it's in there, so you need to be aware that it says all the signatories to this agree to the, to this whole composite settlement, nothing less. And if any part comes out, the settlement is basically void.

So that's in there.

But in the past, if the final work product that you come up with is still acceptable to them, I assume they would think about it again and decide whether or not they were still on board with it or whether or not, you know, their, their provision is they no longer like it. I don't know. But that is in there and you need to be aware of that.

And so if you decide after the conclusion of the evidentiary processes that we've talked about, you could -- yes, you're in a position to, to approve it. You're also in a position to approve something less than that, knowing that that might violate one of the terms of the settlement. And we don't know what the outcome of that would be, and I'm sure they wouldn't be sitting here today willing to put on the record that they would concede some of those points. I would assume that they would say no, we'd still want the whole settlement.

But you could also at that time decide not to approve the settlement, come up with other alternatives to how still to address some of those issues that you still have a great deal of strong support for.

COMMISSIONER BALBIS: Okay. And I guess my concern, and back to due process, is if we, all or nothing, we deny the settlement at some later date,

which, you know, December or January or whenever that is, we need to be ready to vote on the parallel process of the rate case, I would assume, or else now there's an additional lag for that process.

MR. KISER: Yeah. I -- let me just also state that, you know, if after we go through this process and you vote it down or decide not to go forward with it, obviously there can still be an appeal. But at least you will have removed most of the grounds that they would want to use to try to say what the Commission did was inappropriate. Because we've gone through those extra steps, I don't think there'd be a lot of oomph behind that.

And, likewise, saying that, if you were to still either deny it or decide not to move on it, then you, you're then looking at cranking up the regular rate case process, putting it back in place, and proceeding down that line.

MR. YOUNG: Commissioner, is your question in terms of due process, how soon after the Commission has a hearing in terms of voting on the, on the proposed settlement, if it's denied, how soon after can staff bring forth a recommendation? Is that, is that --

COMMISSIONER BALBIS: Yes. Or if the recommendation is already, we already have the

recommendation, how soon can we vote on it, implement the rates, et cetera?

MR. YOUNG: It's my understanding it would be 30 days after, after that, after the Commission votes on the settlement agreement. If it's denied, staff would bring forth a recommendation within 30 days after the Commission vote.

However, I would, I would note that might require the company to waive the statutory time frame set forth in Chapter 366.

COMMISSIONER BALBIS: Okay. So then I have a question for Mr. Litchfield. You've indicated you recommend a hearing process, additional evidence entered into the record. With what staff said, and that -- you know, if at the end of the day we have a couple of options, one, approve, deny, and maybe something in between, knowing that process is likely going to pass the 8-month statutory time frame, are you -- is that your understanding? Is that acceptable?

MR. LITCHFIELD: Well, I think we actually, I think with some discussion with staff, would envision or could envision a process that could work on parallel with the existing schedule. It might require the slippage of a couple of dates, including the staff recommendation, but we think it could work without

having to waive the statutory time frame.

The alternative, of course, and this is a matter of statute as well, is that the rates as filed would go into effect, but then they're always subject to refund.

So whatever that delta or difference is as between either -- as between the filed rates and either the settlement outcome or a litigated outcome in the full rate case, those rates would be refunded in any event.

COMMISSIONER BALBIS: Okay. Thank you. And I think -- I'm glad to hear that, you know, a parallel process, that if we can make it within the statutory requirements, then I'm fully supportive of that parallel process. That way, again, FPL isn't harmed, we get the evidence into the record. And so with that I support it.

MR. YOUNG: Mr. Chairman --

CHAIRMAN BRISÉ: I just want to make sure that -- I don't think that we have a parallel process. I think that that is -- I just want to make sure that we're clear that we don't necessarily have a parallel process.

We've got a, we've got a process that is gone through, and we decided to take up the settlement. We

now are taking up the settlement and we have three options before us.

COMMISSIONER BALBIS: Well, then I want to clarify with Mr. Litchfield, because he clearly said a parallel process could be accomplished.

MR. LITCHFIELD: And I realized I misspoke as soon as the Chairman said that, used the word parallel. I really meant a sequenced process.

But there are dates -- I apologize. There are dates that, there are dates on the schedule now that, that would, that I think would, in the rate case, and this I guess is what I meant, there are dates in the rate case schedule now that we don't think necessarily would have to be altered, or if they did, maybe modestly in the meantime to accommodate another process that is moving during the same period of time. How is that?

(Laughter.)

CHAIRMAN BRISÉ: All right. Commissioner Balbis and then Commissioner Edgar.

COMMISSIONER BALBIS: Okay. I think I'm confused again, but I'll turn it over to Commissioner Edgar. But I do have -- again, I think we can handle the main issues of the settlement through the rate case process. The GBRAs are a separate issue.

If, in a perfect world, the most sound, the

most defensible position is not vote on it, proceed with the rate case, try to handle those issues, go through a limited proceeding for the GBRAs that have been -- plants have been fully vetted, encourage infrastructure, not only for FPL, but it could set the precedent for all the utilities as our infrastructure continues to age to use that process that we can control, I think it's important we have an opportunity here to do that, to continue investment in the state, to continue to stimulate the economy, not just for FPL, but for everyone.

So, perfect world, I certainly prefer that option. If we don't go that option, I want to make sure that everyone's due process rights are met.

And one last question for Mr. Litchfield. So if we cannot come up with a process to meet the 8-month, 8-month statutory deadline, would FPL be willing to waive that deadline or not?

MR. LITCHFIELD: Commissioner Balbis, today I do not have that authority to, to give you the answer. I -- my sense is no. Again, we are, we are losing the depreciation reserve surplus as a credit in a major way. We've got other major cost pressures that are occurring. And today I cannot say that FPL would be willing to, to waive that.

But, again, there is a statutory mechanism in place that would hold customers and the utility harmless through implementing the rates subject to refund, which, which is provided for in statute.

COMMISSIONER BALBIS: Okay. Thank you.

CHAIRMAN BRISÉ: Commissioner Edgar.

COMMISSIONER EDGAR: Thank you, Mr. Chairman. And I actually hadn't been going to make a motion, even though I think you thought that's what I was asking to do, but when you --

CHAIRMAN BRISÉ: I, I misread you. I do that, I do that to my wife all the time and get in trouble.

(Laughter.)

COMMISSIONER EDGAR: And she probably brings it to your attention too.

CHAIRMAN BRISÉ: Absolutely.

COMMISSIONER EDGAR: But if we get to that point where you are ready to, to entertain, then I will probably be ready to try to step up to that.

We have said it, we've all said it a couple of times, and so I will say it again. What I had in mind and what I think I'm hearing is an expedited, narrowly but appropriately focused additional day or two to take evidentiary testimony participated in by all parties who want to participate, that offers, of course, due process

in keeping with our statutes and rules and applicable administrative procedures.

And, Mr. Chairman, I'm going to kind of turn it back to you and say the way I envision that would be, because you are in the center seat and you get all that additional financial benefit from that, that -- and that's a joke, he gets none, by the way, for the record -- that your office would work with our staff, our staff would work with the parties to, to lay out the details of, of the schedule.

So that's what I am envisioning, but I, of course, as my Chairman, want to see if I am reading you and your mind correctly, and if there are any other pieces of that that we would need to flesh out so you would have what, what you need, but with the understanding that I see that as the appropriate role for, for your office to do.

I'm glad that we had some clarification on the term parallel, because from my perspective, and I don't really need a response on this, but from my perspective it potentially could put our staff in a very difficult position, and not just the workload issues, but certainly workload issues, but possibly other issues as well, to try to be parallelling issues and processes and time frames.

So when you are ready to discuss or entertain, but as I see it, we have, we have done the evidentiary hearing as had been established, we had said that we would come back, have oral argument, discuss where we go from here. I think that's what we're doing and working out how to proceed, and those next steps of staff recommendation, yes or no, would be, I think, still down the road. But, again, I would look to your office to determine the timelines, of course working with our General Counsel and our Executive Director as to the staff resources and the needs of all parties. And somewhere in there there was a question to you.

CHAIRMAN BRISÉ: To me?

COMMISSIONER EDGAR: To you. In other words, for your office to do all of that, is that kind of your understanding?

CHAIRMAN BRISÉ: Sure. Sure.

COMMISSIONER EDGAR: And if so, is there any more that we need to discuss? I think we're pretty close.

CHAIRMAN BRISÉ: Sure. If, if, if that were to be the decision of the Commission today, then my office would handle all the logistics and scheduling and all of that, providing that that would be the decision of the Commission.

Before I go to Commissioner Balbis -- actually I'll say this maybe near the end. So, Commissioner Balbis.

COMMISSIONER BALBIS: Just very quickly. Thank you for that.

The three things that I struggled with with this case were the legal aspects, obviously the technical aspects, which sounds like we're going to discuss in detail with an additional process. There's also a precedential issue, and I'm sure everyone here knows that going through this process and at the end voting up or down a stipulation is going to set a precedential issue on the elephant in the room, and having a large settlement agreement for a large electric utility where OPC is objecting and us either approving or denying it and the issues of how that, that plays out in future settlements.

So that's something I know we're all cognizant of and that's one of the reasons why I was leaning towards the, the no decision at this point, just so to handle that precedential issue. Because it may be at some time, maybe now is the time to decide on that, but, but that's something that we're going to have to, have to deal with in the future as well.

CHAIRMAN BRISÉ: Okay. And on that issue of

sort of no decision at this time, you know, for me that sort of poses a challenge. Because, in essence, down the line you, in essence, would be taking up two sort of competing recs. And I think that creates more problems, in my mind, than it solves.

So if the Commission is inclined to go this way, I think you deal with this however the outcome turns out, that's what it is, and then you move forward with what other option -- or we move forward with the regular rate case, if necessary, that route. And I think it's cleaner that way. At least it cleans up a process that has been very interesting, at the very least.

MR. REHWINKEL: Mr. Chairman, may I be heard briefly on the issue of taking of evidence and whether there's a consensus?

CHAIRMAN BRISÉ: Sure. Absolutely.

MR. REHWINKEL: Just for the record, if I could state we certainly did state and agree that if certain aspects of the stipulation are to be enacted by the Commission they would require the competent substantial evidence that the statutes call for.

In our view, for the record, we believe that the Commission has established a great body of precedent, that should be by prefiled written testimony,

some form of MFRs. I know in a limited proceeding they are certainly much more limited, but something like that. The right to discovery, the right to file responsive testimony, and the right to cross-examine. And so those minimum requirements with adequate time would be what we would see, as a minimum, of due process. Thank you.

CHAIRMAN BRISÉ: Sure. Mr. Litchfield.

MR. LITCHFIELD: Thank you, Mr. Chairman.

I mean, MFRs is a very, very broad term. In fact, it is also a very tall term, if you get my drift. And so I'm not sure that we would support a blanket statement like that. If there were some limited schedules, maybe this is a point of discussion that we have with staff and Public Counsel that would meet everybody's needs, we may support that. But a blanket statement that we would meet the minimum filing requirements, again, that's a very extensive requirement, and I do not believe that under any scenario that would be appropriate or necessary in this instance.

CHAIRMAN BRISÉ: Thank you for your comment. If the Commission were to move forward with that option, we would make sure that everybody's due process rights are respected. And we will do our best to ensure that

the process includes everything that needs to be included for us to have the appropriate record for us to make a decision, and that's all that we're going to say on that.

MR. KISER: Mr. Chairman, I just want to note that we -- it's our position that we need to follow as many of those procedures as we can. The moment we short-circuit or cut off any one of those, we increase the risk.

Now, I'm not saying we have to do every single one that we do for the regular rate case, but we sure have to do a good percentage of them. And we have a list already made out of most of those provisions that we think will meet the requirement, but it certainly would help if those parties would get together and likewise give us their input as to --

CHAIRMAN BRISÉ: Right. Let's not get ahead of where we are, okay. We have not yet made a decision. So once we have made a decision, then some of those things will flesh themselves out. And as I said, I think we will do everything within our power to make sure that the process protects the due process of everyone as much as possible. Okay.

MR. SAPORITO: Mr. Chairman, can I just make one brief comment? It reflects back on a comment I

believe you made yourself at the bench earlier, or one of the Commissioners said, anyway, to my recollection, and that goes to the response by your senior counsel over there that the settlement agreement contains a clause in it that it is all-inclusive or nothing. So it would be my suggestion that the Commission, when you are deliberating on this settlement issue, I know some of you said you like stuff and you don't like stuff. Well, yank out the stuff you don't like, and if they don't accept it, then your decision is already made. So that's all I have to say about that.

CHAIRMAN BRISÉ: Thank you very much.

Mr. Young or Mr. Marshall, which one first?

MR. YOUNG: I yield.

CHAIRMAN BRISÉ: Mr. Marshall.

MR. WILLIS: I'll go first.

Chairman, I have a concern -- I don't have a concern over the path you're following, let's put it that way. I'm okay with doing the path of going down and having a hearing on the settlement and all. What I want to discuss with you right now is I have to file -- I'm obligated to file a recommendation on the rate case towards the end of October. If I don't get clear indication from the Commission that you want that abated, I have to file it. I would recommend that you

tell staff to abate that recommendation until a decision is made on the settlement, if that's where you're headed.

CHAIRMAN BRISÉ: Okay. Thank you for that recommendation.

MR. YOUNG: Also, Mr. Chairman, Commissioner Balbis talked about it in terms of FPL waiving the clock. I don't know which way they are going to move. I think staff would like some assurance to know that they are going to waive the statutory clock or are they going to move forward with putting rates in subject to refund.

CHAIRMAN BRISÉ: I think their response, and I think it was clear to us that they are probably not going to waive their statutory clock. And if there is anything that needs to be done, if we go beyond the time frame, that they would probably seek rates subject to refund or something to that effect. I don't know if I misunderstood that, but I think that's what was stated.

Commissioner Balbis. I mean, sorry, Commissioner Graham was first.

COMMISSIONER GRAHAM: Thank you, Mr. Chairman.

I have a legal question. I always cause trouble when I ask these things. Assuming we move forward and we have an evidentiary portion added to the

hearing with the record that's currently open, and then after that happens we decide to go against the settlement, the evidentiary stuff that we put into the record, in my opinion -- well, I guess my question is is that information still usable for the creating of the staff recommendation, even if we turn down the settlement?

MR. YOUNG: Yes, in my opinion it is. Because you are building a record, and you are curing all appealable rights that the opposing parties might have in terms of your decision. You have competent substantial evidence to support your decision.

COMMISSIONER GRAHAM: Okay. Thank you.

CHAIRMAN BRISÉ: Commissioner Balbis.

COMMISSIONER BALBIS: This settlement is the gift that keeps on giving. I just want to make sure everyone understands, I want a question for staff on -- I'll wait until they finish their discussions.

(Pause.)

MR. YOUNG: I think I misspoke. If the Commission turns down the settlement, then we move forward with the rate case as filed.

CHAIRMAN BRISÉ: His question is on the record -- his question was on the record that is created during the process with the -- if there were a process

specifically to create a record for the settlement. And so he's asking what happens to that record? Can it be used as part of the decision-making process for the traditional rate case? That's really the question.

MR. YOUNG: Mr. Chairman.

CHAIRMAN BRISÉ: Let's go back to answer Commissioner Graham's question, and then we'll come back to your question.

MR. YOUNG: Mr. Chairman, if I can ask for a five-minute break to nail this down.

CHAIRMAN BRISÉ: Okay. Well, then we'll add Commissioner Balbis' question, if there's a question related to that question, so you all can take five minutes and then come back with the answers that are needed.

COMMISSIONER BALBIS: Thank you. And my question for you is now that FPL has indicated they are likely not to waive the statutory requirement, and given Mr. Willis' request to have clear direction to stop the rate case process, which I would assume that stopping the process, if we go back to it, we are not going to make the eight-month time frame. And if we can squeeze in this hearing process for the remainder of the year and do not approve the settlement, it sounds like we can't meet the eight-month process. So I just want to

make sure you confirm from a scheduling standpoint that we can go through this process and not mop ourselves into a corner not meeting our legal time frames and putting us into a whole other set of issues. So if you can, when you come back, just discuss the scheduling and the likelihood of us making the statutory time frame.

MR. BAEZ: Mr. Chairman, can we get fifteen minutes instead of five?

CHAIRMAN BRISÉ: Okay. We can accommodate the fifteen minutes, so we're looking to come back at 3:25.

MR. BAEZ: Thank you, Mr. Chairman.

CHAIRMAN BRISÉ: Thank you.

(Recess.)

CHAIRMAN BRISÉ: All right. We are going to go ahead and reconvene at this time. I think we had a question by Commissioner Graham and also a question by Commissioner Balbis, so we'll deal with the Graham question first, and then we will deal with the Balbis question second.

MR. KISER: I'm ready. Mr. Chairman, let me put it this way; if the settlement is not adopted, then you will be reverting to the rate case as filed. And only those issues identified in the prehearing order can any of the new evidence that is brought in by the additional process, it can only be applied to those

issues that were in the prehearing order of the case that was filed originally. And the thought behind that is if the settlement is not approved, then those issues haven't been approved to be basically heard by the Commission.

So to try to use some of the evidence that has been developed to work on those issues would be inappropriate, because those issues didn't get merged into this case. Whereas, if you go the other way and the settlement is adopted, then we're now following that track and that new evidence would be used to bolster the case to support that competent substantial evidence was produced at the hearing to defend whatever decision the Commission makes.

CHAIRMAN BRISÉ: Thank you very much. Commissioner Graham, does that satisfy your question?

COMMISSIONER GRAHAM: No.

(Laughter.)

CHAIRMAN BRISÉ: All right.

Commissioner Balbis -- the answer to Commissioner Balbis' question.

MR. YOUNG: Yes. If the Commission chooses to abate the staff's recommendation, that does -- staff will stop working on the recommendation, and staff cannot meet the statutory deadline in terms of filing

the recommendation on the 26th and able to have rates in effect on January 1.

COMMISSIONER BALBIS: I think that was only part of my question. You have basically all of the options -- the minute we direct staff to abate the rate case process, under every scenario after that point we're missing the statutory deadline? We're not meeting it.

MR. YOUNG: Yes, sir, staff believes you will.

COMMISSIONER BALBIS: Okay. I want to make sure that this Commission understands that, and then we have the issue of FPL not waiving that deadline and that the whole discussion on interim rates -- if that's something we feel we want to move forward with.

And I want to just follow up on what Mr. Kiser said about the evidence. And that concerns me because, again, one of the main issues that I think is the key element of the settlement agreement are the two additional plants. And if we take evidence on those two additional plants, now we can't bring that back into the rate case. Which brings me back to my original discussion on a limited proceeding to deal with those two plants. And so my question for staff, whether it's you or technical staff, have we used the limited proceeding process in the past or recently?

MR. WILLIS: Commissioners, we have used it once in the past. It was a Progress Energy case just prior to bringing the Bartow plant into service, into commercial service. That's the one time that I know of we bought a generating plant through a limited proceeding, and that was filed by the company.

COMMISSIONER BALBIS: And was it successful; was it efficient? I was not on the Commission at the time.

MR. WILLIS: That was successful, I would say. And it was efficient because it went through as a PAA, and those issues were eventually blended into the rate case, and it worked rather well.

COMMISSIONER BALBIS: Okay. And I think that's important because, again, that is one of the key issues in the settlement that I feel as the numbers play out is in the public's best interest. So I want to make sure we are not going down a path that closes that door. Which it sounds like, if we don't approve the settlement, it does.

You know, I just want to be clear. My initial statement after Mr. Kiser's comment on what is the most defensible position of either not voting or denying the settlement, because all the other issue I think we can adequately address in the rate case, whether it's base

rate increase or the revenue requirements, you know, the ROE issues, obviously, treatment of West County Energy. You know, we can go through all those issues effectively in the rate case, which brings up the GBRAs.

So I'm very concerned from a legal standpoint. I want to vet out the GBRAs. If we can do that in a limited proceeding, we can meet all the deadlines, we could be in our most defensible position, and we can determine what is in the best interest. It's something that I would support. I understand the way the Commission feels. I'm wavering on some these issues, but I'm concerned that from this point forward we are not meeting the statutory deadline with what we do.

CHAIRMAN BRISÉ: Commissioner Edgar.

COMMISSIONER EDGAR: Thank you, Mr. Chairman. Two, I think, brief comments. Maybe a question, too.

First, I appreciate the work that our staff has done. Well, always, of course, but especially here in a very quick, what felt more like ten minutes than fifteen, but to put their heads together and come up with answers to the questions that we had had here from the bench.

But I also recognize that, you know, we have asked some kind of unique legal questions. And, again, I appreciate Mr. Kiser being willing to comment on them,

but I also recognize that that is kind of at first blush with, you know, ten minutes or so to review it. And I would expect, and I guess ask, but I would expect that any additional time that we have moving forward that our staff would continue to take a look at that issue and any other related issues about the record and issues that are in or not in, and how best and most appropriately to handle those.

Also, I guess, I just want to clarify for my purposes -- Mr. Litchfield, in response to Commissioner Balbis' question a little earlier about would the company waive the January 1st deadline, basically, I thought I understood you to say that you weren't in a position to be able to answer that definitively today. Or did you say absolutely positively not never, et cetera?

MR. LITCHFIELD: No. Well, those types of questions always give the lawyer a little bit of pause, right. But let me suggest this. The reason I hesitated a little bit is this, I guess we have -- and in response to Commissioner Balbis' question as to how this could be worked within the existing schedule so as to not miss the statutory deadline and not have to rely -- not have FPL to have to rely upon the statutory framework that would put the rates in subject to refund, our impression

was that this could be done, you know, with a very abbreviated schedule.

There is nothing that requires the Commission to have prefiled written testimony. You can take live testimony. That's certainly permissible under the APA, and I guess that's, really, what we had somewhat envisioned, given that we are taking about some narrow issues. So we thought it could be done.

So the reason that I wavered just a little bit on that was if it were a matter of a week or, you know, we are slipping it by and missing it by a little bit because we are trying to aggressively get this thing done, then, you know, I felt like that was something that we would certainly talk about back at the office.

But, you know, to the extent that we're talking about a much longer process, you know, it's just really impossible for the company to forgo those types of revenues and still meet investor expectations. Having said that, you know, we will -- I think as you have suggested to staff, let's keep looking at some creative options here on some things. We will do likewise. But I can tell you that we are very concerned about, you know, a lengthy schedule for all of the obviously reasons.

So we are looking to work with staff and the

other parties to strike that right balance that preserves the appellate position, if, in fact, a decision is made and it is challenged. But on the other hand, doing something that is efficient, administratively efficient and reasonably expeditious under the circumstances given the issues that we have in play.

And that is one think that I would like us to try to nail down before we leave today, and that is that we're talking about four issues, I think, that we heard Public Counsel identify. And while we wouldn't and don't necessarily agree that they all are disputed materials of material fact and need a lot of additional evidence, those are issues that if we are going to do this proceeding, you know, let's just tee those issues up, but let's not come back and find out that there are eight issues, or twelve issues, or sixteen issues.

CHAIRMAN BRISÉ: Commissioner Edgar.

COMMISSIONER EDGAR: Thank you, Mr. Chairman.

And I think what I understood you to say is it would certainly be your preference to have everything done, whatever those resolutions ultimately fall out to be to meet the January 1 deadline, and I assure you that would be my preference, as well. But if that is not the way, the company will continue to work with all parties

and the Commission and make the best decisions possible. Note for record he is nodding yes.

MR. LITCHFIELD: I'm sorry. Yes. I told my witnesses, now the transcript is not going to show you nodding your head yes, so I need to follow my own advice.

COMMISSIONER EDGAR: Thank you.

Then, Mr. Chairman, at your pleasure I'm ready to try to make a motion that to the best of my ability at the moment encompasses the discussion that we have had.

CHAIRMAN BRISÉ: Before you go there, Commissioner Graham.

MR. McGLOTHLIN: Mr. Chairman, this is Joe McGlothlin. May I be heard very briefly?

CHAIRMAN BRISÉ: Sure, you may.

MR. McGLOTHLIN: First, let me say that Mr. Rehwinkel left because he received word of a family emergency, so for that reason I'm making an appearance. Joe McGlothlin with the Office of Public Counsel.

And I feel compelled to do this. I want to reserve the objections that we have registered with you throughout this process and today, and reiterate, first of all, we object to the purported settlement that Mr. Rehwinkel called the FPL proposal both on

substantive and procedural grounds. But primarily we object to it because it contains components that are foreign to the four corners of the petition that was filed in March and that has been the subject of litigation to this point.

And I don't want to give the impression that by stating the basis for our objections we are in any way acceding to the thought that an abbreviated schedule or some subset of MFRs is a cure to those objections. We have said throughout that those components of the purported settlement that are outside the four corners of the petition are in the nature of a new request and are subject to the requirements of statutes and rules that govern different and new requests. And we have not agreed to any kind of compromise as to what those requests, what those briefing requirements are. And thank you for letting me state that for the record.

MR. WRIGHT: Mr. Chairman, I just want to add that we agree with that, particularly as to the procedural aspects of it. And that our being relatively quiet since I made my remarks does not accede in any way to an agreement that any particular abbreviated schedule or any abbreviated schedule at all is appropriate. As I stated, whatever happens needs to happen in full compliance with your statutes and the rules. Thanks for

the opportunity.

CHAIRMAN BRISÉ: Thank you.

Commissioner Balbis.

COMMISSIONER BALBIS: Thank you. And before a motion is made, I just want to clarify the last exchange with Mr. Litchfield and Commissioner Edgar, because it's really the basis of my concerns is that we move forward. We are now locked in. And staff has said that if we move forward with this process, we are not going to meet the statutory time frame. So you're saying that a minimal slippage is okay, or what -- very clearly tell me FPL's position on scheduling and meeting the eight-month time frame as we proceed.

MR. LITCHFIELD: Well, we had -- as I said, we had contemplated perhaps only the need for a day or two of additional testimony. It could be live testimony. Again, that is certainly contemplated under the APA. It certainly meets due process concerns.

There is nothing that requires prefiled written testimony and the lengthy delays that occur between prefiled and then direct and then rebuttal. So we had envisioned being able to work towards a more abbreviated schedule that still met the requirements of due process under the APA. And we did feel -- although we had noticed the same thing that staff has noticed,

that the staff rec might need to slip under the schedule and maybe a couple of the agenda dates under the existing rate case schedule in order to accommodate this additional hearing opportunity on the settlement agreement.

But we had felt that -- of course, we certainly didn't come prepared with a proposed schedule today, because we certainly are not going to prejudge where the Commission might go with this. But we had thought we would -- if given the opportunity, we would be in a position to work with staff and other parties on a schedule like that.

In the event that we can't work out a schedule that preserves the statutory time frames, then, you know, again, as I said in my response to Commissioner Edgar, the reason I paused a little bit in my answer to you is that I wasn't sure what the schedule would look like and whether we would be looking at a week delay, ten-day delay, two-week delay, or a six-month delay. And there's a very big difference in terms of the impact to the company.

Having said that, there is a statutory framework in place that holds customers and the utility harmless, and that's something that I think we shouldn't be afraid to implement. But on the other hand, we will

absolutely go back and look at whether there are other things to do, including implementing, if it's statutorily permissible, and I don't know that it is sitting here, and we certainly would have to look at this and it probably would require the consent of all the parties, but whether we could implement instead of the filed rates the settlement rates. That's one thing that has occurred to us, but we just haven't had a chance to research that.

COMMISSIONER BALBIS: Okay. And I just want to -- I think you answered my question, because I was envisioning an accelerated process, as well. And I didn't think about the possibility of live testimony, but that does intrigue me. I always find it interesting that prefiled testimony does not have a single grammatical error or a misspoken word, and I wish I could speak that way. So I would fully support an abbreviated process that keeps the options open. And if there is a way that the Chairman's Office can come up with the specific issues, and I appreciate the requests from some the parties to focus, and maybe we can do that after the motion, I don't know the posture or procedure. But an accelerated process that still keeps the statutory time frames open is something that I would support in case that we have one or two days of

testimony, we find things in the settlement that aren't in the public interest, and we go back to the rate case and still meet that deadline. If we can do that, then I would fully support that, or make the motion to that effect.

CHAIRMAN BRISÉ: Okay. Commissioner Graham.

COMMISSIONER GRAHAM: Thank you, Mr. Chairman.

This question is to staff. Staff, this can't be the first time, not that this has happened yet, but explain to us briefly, if we miss the statutory deadline, what if any harm comes to the ratepayers? And if we have done this before, what has happened in the past when we have missed a statutory deadline?

MR. WILLIS: Commissioners, I'll take a shot at that one. There have been several cases in the past where the Commission has had to exceed the statutory deadline, and that is both the eight months and the twelve months. I believe in the last FPL rate case and probably the Progress case we did exceed the eight months in those cases. The companies in those cases were bound by a settlement that said they had to keep their rates in place until there was something else.

Otherwise, in cases where the eight months weren't met, that was in a water case. The company in those cases actually were able to put their rates into

effect, but they are subject to refund, and they are subject to refund based on the final outcome of the Commission, which means once the Commission does make a decision, you go back, you refund any excess revenues collected to the customers. So there is no harm no foul. It's refunded with interest.

As far as the 12-month deadline, there is no provision in the statute that says there is a penalty if you don't make the 12-month deadline, and the Commission has done that back in the Florida Water rate case. They did it in the Aqua rate case.

But like I said, there were reasons that had to be done for the Commission to make a good decision in that process, and there was no penalty, or there is actually no penalty in the statute for breaking the 12 months.

COMMISSIONER GRAHAM: So at the end of the day all the ratepayers are made whole and everybody is held harmless.

MR. WILLIS: Yes, they are.

COMMISSIONER GRAHAM: Thank you.

CHAIRMAN BRISÉ: All right. Commissioners? Commissioner Edgar.

COMMISSIONER EDGAR: Mr. Chairman, are you ready for a motion?

CHAIRMAN BRISÉ: Go right ahead.

COMMISSIONER EDGAR: Okay. Then I would like to propose one for our consideration. I move that we take additional testimony limited to those specific issues that are part of the proposed settlement that are supplemental to the issues in the initial MFRs, full MFRs; that the Chairman as presiding officer establishes the necessary steps and dates to accomplish such a process in keeping with due process and all statutory requirements, and that this be accomplished in a expedited manner. And that work by our staff on a written recommendation on issues contained in the rate case prehearing order be put on hold in order to accommodate this process.

CHAIRMAN BRISÉ: It has been moved. Is there a second?

COMMISSIONER GRAHAM: Second.

CHAIRMAN BRISÉ: It has been moved and seconded. Any discussion? Okay.

Commissioner Graham.

COMMISSIONER GRAHAM: I guess this question is first to Commissioner Edgar, and then either to the Chair or to staff.

What are the issues? I just want to make sure, and I think the question, as Mr. Litchfield asked

earlier, I think we need to -- I guess part of the motion, or before we leave here today, have an idea of what the issues are.

COMMISSIONER EDGAR: Certainly. And I'll, of course, try to be responsive. I worded this purposefully, maybe not as artfully as I would like, but what I did say is that additional testimony would be limited to those specific issues that are part of the settlement proposal that are supplemental to the issues that were contained in the MFRs that initiated the rate case.

And I purposefully worded that to -- my intention being to keep it to the four corners of the settlement proposal document and the rate case that is contained within the docket that we are within right now, and purposefully to give the staff and the Chairman's Office whatever latitude to work on wording, should it be necessary, rather than trying to wordsmith the specific issues right here at the bench.

But if the Commission wants to do that wordsmithing now, I'll leave that to the will of the majority. So I was trying to be specific, but yet not overly specific, that therefore once we walk out of here that there was no latitude within the parameters that I'm trying to provide.

CHAIRMAN BRISÉ: Go right ahead, Commissioner Graham.

COMMISSIONER GRAHAM: I guess I'm not looking to wordsmith the issues, but I just -- I want to know if there's four issues, if there's twenty issues. You know, I don't want for us to walk out of here and this thing to morph into something that was even bigger than the rate case that we have already gone through. And so that's why, you know, even if we just go in generalities, you know, generally Issue 1, Issue 2, and Issue 3, and that's it.

I mean, so that's why I'm throwing the question out to the Chair or the staff or to somebody that can throw those things on the table so we have an idea, so I have an idea of what we are dealing with.

COMMISSIONER EDGAR: Mr. Chairman, if you would like me to put -- let me propose it this way. In my mind I think it could be four or five, depending on how it is worked. I see the proposed modernization; the, as has been termed, asset optimization; and the dismantlement and the depreciation reporting requirements or handling.

And if I have left something out, remind me.

MS. HELTON: The ultimate issue, is it in the public interest. I mean, I guess that's the obvious

one.

COMMISSIONER EDGAR: Which clothes everything that we do, absolutely, and goes without saying, but thank you for giving me the opportunity to say that, of course, with the public interest being -- supplanting all else.

MR. SAPORITO: Mr. Chairman, wasn't there an issue of the late fees going up that wasn't in the original case, and it's in the settlement. Something about the rates are going to be higher for late payments.

CHAIRMAN BRISÉ: Within the rate case there is the issue of late fees that is included, but it might be worded a little different through this.

Mr. Willis.

MR. WILLIS: I was just going to let Commissioner Edgar know that I concur with the four issues. Those would be the ones that we would identify on the staff level as being outside the four corners of the rate case petition.

COMMISSIONER EDGAR: Thank you.

MR. WILLIS: Five issues, including the one that legal staff brought forward.

COMMISSIONER EDGAR: The public interest, of course.

And then I would say, Commissioner Graham, have I answered your question?

COMMISSIONER GRAHAM: Yes, you have. I guess my curiosity is to make sure that the signers of the settlement understand that --

COMMISSIONER BALBIS: Other Commissioners may have issues, as well.

COMMISSIONER GRAHAM: Your light's on.

(Laughter.)

CHAIRMAN BRISÉ: Commissioner Balbis before we hear from the parties.

COMMISSIONER BALBIS: Thank you, Mr. Chairman. I just wanted to stop the train a little bit.

I agree with those issues. And I have a question for staff on this that I think I know the answer, but I want to make sure.

One of the broad issues in the settlement that I believe is encompassed in the rate case is the overall base rate increase of $378 million, and I want to make sure that we can rely on the rate case evidence of what makes up the revenue requirement, or do we need additional detail as to the 378 million?

MR. WILLIS: Commissioner, I don't believe so. Remember that what you are looking at here are the four corners of the settlement. The revenue that the parties

have stipulated to, from my knowledge, has one schedule that says it's made up of sales, it's made up of, I believe, the late payment fee increase, and also the credits from the CILC CDR and a few other miscellaneous charges. Other than that, we have no idea how that was arrived at.

When we look at settlements and they come up with a revenue amount, they are strictly an agreement among the parties. And if you were to ask the parties, they would tell you more than likely that was a negotiated amount and that's how we arrived at it.

COMMISSIONER BALBIS: Okay. My main question is that we can use the testimony or we cannot?

MR. WILLIS: I might be over-stepping my bounds if I did that one.

CHAIRMAN BRISÉ: Mary Anne.

MS. HELTON: Yes, sir. I believe that you can use the record from the last two weeks of the August hearing in your consideration of the settlement and whether it's in the public interest, when you get to that point to be able to vote on it.

COMMISSIONER BALBIS: Okay. And so with that, I agree with the items listed which are the plant additions -- I have a lot of questions about the fossil dismantlement reserve, the depreciation studies, because

I don't believe there is anything in the record on that. I also want to have some discussion on the gains on purchase or sales of wholesale power. I don't believe that was discussed in the rate case.

MR. WILLIS: That's correct, Commissioner. I believe that's part of the asset optimization plan, yes, and that would be fully discussed.

COMMISSIONER BALBIS: Right. Okay. With that, I'm satisfied that evidence will be entered in on the issues that I would like to see.

CHAIRMAN BRISÉ: All right. Thank you.

Commissioner Graham, does that narrow it down sufficiently for you?

Okay. And I guess we'll hear from the parties on the issues.

FPL.

MR. LITCHFIELD: Thank you, Mr. Chairman.

I think that those issues make sense, given where we are, and we are supportive of participating in the process that is the subject of the motion. Thanks.

MR. MOYLE: FIPUG concurs on the issues that have been identified and the over-arching issue of public interest makes sense. And we appreciate, also, as part of that motion the latitude to possibly have the hearing on an expedited basis. You know, to the extent

we can do that, and it meets the statutory time clock, I think that's a good thing that we fully support.

CHAIRMAN BRISÉ: Mr. Wiseman.

MR. WISEMAN: SFHHA is in agreement with the comments of Mr. Litchfield and Mr. Moyle.

CHAIRMAN BRISÉ: Okay. Lt. Colonel Fike.

LT. COL. FIKE: FEA concurs with the comments.

CHAIRMAN BRISÉ: Okay.

OPC, Mr. McGlothlin.

MR. McGLOTHLIN: OPC believes you should reject the settlement and proceed to rule on the rate case issues that have been teed up since March. We object to any other process for the reasons we have stated throughout.

CHAIRMAN BRISÉ: Okay.

Mr. Wright.

MR. WRIGHT: We concur with the Public Counsel. We continue to be completely willing to talk settlement with everybody, Mr. Chairman. But as far as this process goes, we concur with the Public Counsel.

CHAIRMAN BRISÉ: Okay. Mr. Saporito.

MR. SAPORITO: Yes. I would also concur with Public Counsel. However, I want to make certain this record is perfected with my objection to this entire process, because myself, and as I stated on the record

earlier, there were other parties in this proceeding which were not brought into the settlement negotiations at any time. So, therefore, this Commission by going forward in this manner is putting me in a untenable position of attending a hearing about issues that I never agreed to in a settlement that I was never a part of. And so I want to protect my due process rights through this strenuous objection.

Thank you.

CHAIRMAN BRISÉ: Thank you very much.

Mr. Hendricks, or Mr. Hayes for Algenol.

MR. HAYES: Algenol concurs with FPL's position and would like to go forward with the settlement hearing.

CHAIRMAN BRISÉ: Okay. Go ahead and enter your appearance.

MR. HAYES: I'm sorry, Martin Hayes for Algenol.

CHAIRMAN BRISÉ: All right. Thank you.

Mr. Hendricks.

MR. HENDRICKS: I would concur with Public Counsel's position. The only additional point I would mention is that it seems to me the settlement offer introduces a new issue in the sense that it's a fixed term for the rates to be frozen with specific terms for

adjustment. It sets new hurdles for reconsidering those rates in the future with a fixed term of rates being effective. I would suggest that's another differential issue that should be added to the list.

CHAIRMAN BRISÉ: Thank you. Duly noted.

So I think we have a motion, and it has been seconded. Is there further discussion from Commissioners? All right.

Sure. Go right ahead, Commissioner Balbis.

COMMISSIONER BALBIS: We talked a lot about the hearing process and the accelerated process, but I would assume -- or let's talk about the next steps. So we'll have the accelerated hearing, and do we vote at that time; do we have time to question staff; is it more close to a PAA process at some point procedurally, or we can have the Chairman work all that out.

CHAIRMAN BRISÉ: I think we will work all that out. All the stuff in between, we'll work all that out. I suppose at the end we will have an opportunity to, as Commissioners, be able to discuss it, and based upon all the evidence and information that we would have gathered, that we would be in a position to reach a conclusion. And if we're going to have live testimony, we will be able to provide -- we will be able to ask questions during live testimony and so forth.

So we have a motion and it has been moved and seconded. Any further discussion?

Okay. Seeing no discussion, all in favor say aye.

(Vote taken.)

CHAIRMAN BRISÉ: Any opposed?

All right. Seeing none. So we have agreed to the Edgar motion, all right, which puts in motion a process for us to further vet the settlement. And my office will work in conjunction with staff and the parties to make sure that we have a process that works well for everyone.

With that, I guess we will recess, once again, to reconvene at a later date.

MR. SAPORITO: Mr. Chairman, so tomorrow is canceled then, right?

CHAIRMAN BRISÉ: Absolutely. You're welcome to come tomorrow if you'd like.

(Laughter.)

CHAIRMAN BRISÉ: I certainly won't be in the hearing room.

(The hearing adjourned at 4:09 p.m.)

STATE OF FLORIDA)

: CERTIFICATE OF REPORTER

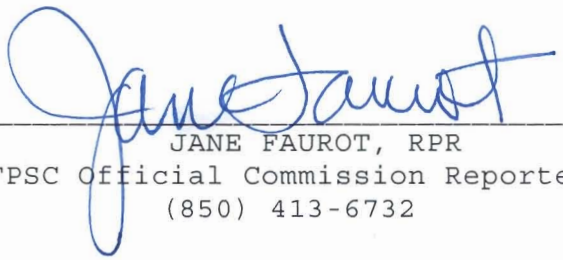
COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, Hearing Reporter Services Section, FPSC Division of Commission Clerk, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 4th day of October, 2012.



JANE FAUROT, RPR
FPSC Official Commission Reporter
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STATE OF FLORIDA)
: CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, LINDA BOLES, RPR, CRR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 4th day of October, 2012.

Linda Boles

LINDA BOLES, RPR, CRR
FPSC Official Commission Reporter
(850) 413-6734

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.

[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 1999 stipulation was in effect.[7] R:11,841 (Transcript of Special Agenda

[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.

[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

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 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

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upon approval of the Stipulation in its entirety by the FPSC. *See* Stipulation at ¶ 15.

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.

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

[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.

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 monitor and terminate 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 continue in the public interest a proceeding that one of the parties wishes to terminate for its own private reasons, is the authority to terminate 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 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.

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[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)

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 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.

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 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 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

[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.

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 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.

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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 Healthcare Association to Compel Discovery Responses, dated February 6, 2002 R:11,020.

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 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 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

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[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.

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 FPSC's review to 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 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

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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 voided, with application that might be retroactive to its inception. *See, e.g., GTE Florida, Inc. v. Clark,* 668 So. 2d 971 (Fla. 1996).

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.").

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

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

"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); *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 any expectation about the size of that rate reduction.[16]

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

[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 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.

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.

[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.

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IN THE SUPREME COURT OF FLORIDA

SOUTH FLORIDA HOSPITAL AND HEALTH CARE ASSOCIATION, ET AL.,	)	CASE NO. SC02-1023
Appellants,	)	
vs.	)	
LILA A. JABER, ET Al.,	)	
Appellees.	)	

APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF THE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATION OF THE PARTIES

Appellee, the Florida Public Service Commission, is referred to in this brief as the "Commission". Appellees, the Office of Public Counsel and Florida Power and Light Company, will be referred to as "Public Counsel" and "FPL", respectively.

Appellant, South Florida Hospital and Healthcare Association, will be referred to as the "Hospital Association".

References to the record on appeal are designated R. Vol. _, ___ (page no.), e. g., R. Vol. 1, 20.

STATEMENT OF THE FACTS

This is an appeal of the Commission's final order in Docket No. 001148-EI. The docket was opened in August, 2000, and was styled In re: Review of Florida Power and Light Company's Proposed Merger with Entergy Corporation, the formation of a Florida Transmission Company ("Florida Transco"), and their effect on FPL's retail rates. R. Vol. 1, 29; 41. The purpose of the docket was

> to consider the effect on Florida Power and Light Company's (FPL) retail rates of: 1) the planned formation of a regional transmission organization for peninsular Florida; and 2) FPL's planned merger with Entergy Corporation".

R. Vol. 1, 41.

The Commission did not initially schedule a hearing in the docket but contemplated that there would be some period for discovery before issues were identified. At that time, the necessity of a hearing would be addressed.

As it turned out, the merger between FPL and Entergy failed. The Commission, thus, did not have to consider the impact of the merger on FPL's rates. FPL's planned participation in a regional transmission organization ("RTO"), however, moved forward according to directions from the Federal Energy Regulatory Commission ("FERC"). By March, 2001, FERC had issued tentative approval to the proposed RTO, to be called the

"GridFlorida Regional Transmission Organization ("GridFlorida"). At that time, the other committed participants in GridFlorida were Tampa Electric Company (TECO) and Florida Power Corporation (FPC).

The Commission recognized that the formation of GridFlorida could have a very significant impact on the delivery of electric service in Florida. The integrated system of generation, transmission and distribution would be broken apart. Transmission assets would be controlled by the GridFlorida RTO. Consequently, it would be the Commission's task to evaluate the impact on Florida ratepayers and to reconcile the cost effect of these changes with current retail rates. Moreover, the Governor had formed the Energy 2020 Study Commission to consider the future of electric service in Florida over the next 20 years. Legislative proposals were already being floated to deregulate retail electric service in Florida. Order No. PSC-01-1346-PCO-EI (the "MFR Order"), R. Vol. 2, 396.

The proposed RTO and possible regulatory changes created a need for the Commission to thoroughly examine the operations and rates of FPL. FPL's last rate adjustment was by stipulation with Public Counsel (OPC), the Florida Industrial Power Users Group (FIPUG), and the Coalition for Equitable Rates. That stipulation was approved by the Commission on March 17, 1999, by

Order No. PSC-99-0519-AS-EI. The 1999 Stipulation provided for a $350 million annual rate reduction, a reduction in FPL's authorized midpoint for return on equity from 12 percent to 11 percent, amortization of up to $100 million annually to reduce nuclear or fossil production plant and various other items. Under the 1999 Stipulation, FPL's earnings were to be gauged not by the return on equity as such but rather by a revenue cap. Earnings above the revenue cap were to be shared two-thirds and one-third for the customers and FPL, respectively. The terms of that agreement were to expire on April 14, 2002.

In early 2001, the Commission evaluated FPL's performance under the 1999 Stipulation and concluded, in view of the impending expiration of the Stipulation and factors affecting the company's earnings level, that the time for an earnings review was at hand. Thus, the Commission directed FPL to file its Minimum Filing Requirements (MFRs) presenting the accounting, financial and other data, as well as a fully allocated cost study, necessary to "provide assurances that FPL's rates, on a going-forward basis, are fair, just and reasonable". R. Vol. 2, 399. The Commission did not require FPL to put money subject to refund pending the outcome of the case. It found instead that FPL's ratepayers would be adequately protected against excess earnings by the revenue

sharing plan of the 1999 Stipulation, which had a year to run before its expiration. R. Vol. 2, 400.

The Commission explained its rationale for initiating the earnings review as follows:

> Our overarching concern is that the public interest be protected. It is our responsibility to ensure that the company's retail rates are at an appropriate level. Moreover, it is our belief that information in the MFRs will assist this Commission in addressing questions from the Energy 2020 Study Commission and the Florida Legislature regarding the earnings level of FPL, appropriate base rates, and the level of potential stranded cost/investment associated with various plans for restructuring of the electric industry.

R. Vol. 2, 399-400.

While setting in motion the massive undertaking of a rate proceeding, the Commission recognized from the very beginning that a resolution short of the full procedural steps, involving extensive discovery and hearings, was possible. In fact, it encouraged such a resolution:

> We want to be clear that this decision to initiate a rate proceeding does not foreclose the ability of the company and the 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. However, we need to be ready to move forward to discharge our obligations in the event there is no informal resolution of the issues. The information contained in the MFRs will allow us to do that.

R. Vol. 2, 400.

The Commission's MFR Order made clear that the agency did not necessarily contemplate resolution of the case through a full evidentiary hearing. All parties, current and future, were put on notice that it was amenable to a negotiated settlement, and in fact, would encourage it.

After the Commission issued its May 15, 2001, Order initiating the earning review, Commission staff and other parties met with FPL to discuss the content and timing of the company's MFRs. A proposed schedule was submitted to the Prehearing Officer in the case, and on July 24, 2001, he issued Order No. PSC-01-1535-PCO-EI, Order Regarding Content and Timing of MFRs, approving the schedule. R. Vol. 4, 792. The Order noted that the MFRs "should provide the basis for the Commission to make a reasoned decision in this docket." Id.

In the interim, on July 5, 2001, the Hospital Association sought clarification or, alternatively, reconsideration of the MFR Order. R. Vol. 3, 457. The motion asked the Commission to clarify its order to recognize that the Hospital Association was not bound by FPL's 1999 Stipulation and could, as a non-party to the Stipulation, contest the mechanism by which rates could be reduced. R. Vol. 3, 458-460. One day later, the Hospital Association also filed a separate complaint requesting that FPL's rates be reduced and money be held subject to refund under

the Commission's interim rate statute. It filed an amended complaint on August 8, 2001. That matter was given a separate docket by the Commission, Docket No. 010944-EI. FPL moved to strike the motion for clarification/reconsideration and to dismiss the amended complaint. R. Vol. 40, 7819. The Commission found that the Hospital Association's request for interim rates amounted to "an improper collateral attack on the [MFR] Order" in which it had declined to set an interim rate or require money be held subject to refund during the pendency of the earnings review. It granted FPL's motion to dismiss and closed Docket No. 010944-EI. Order No. PSC-01-1930-PCO-EI, September 25, 2001; R. Vol. 40, 7818-7832. The Commission also granted FPL's motion to strike and denied the Hospital Association's motion for clarification/reconsideration. It found that the subject of the request, interpretation of the terms of the 1999 Stipulation as to the rights of non-parties to the Stipulation, was not addressed in the MFR Order and was, therefore, improper. R. Vol. 40, 7829.

The earnings review continued apace, with the number of intervenors in this phase of the docket growing to eight. The Hospital Association was granted intervention on August 31, 2001, by Order No. PSC-01-1783-PCO-EI. R. Vol. 37, 7203. The Commission noted in its order that the Hospital Association,

like any other intervenor under the Commission's Rule 25-22.039, F.A.C., "takes the case as it finds it". R. Vol. 37, 7204. In addition to the Hospital Association, intervenors included the Office of Public Counsel ("OPC"), consumer advocate for the citizens of Florida; the Florida Industrial Power Users Group ("FIPUG"); the Florida Retail Federation; Publix Super Markets, Inc. ("Publix"); Dynegy Midstream Services, LLP; Lee County, Florida; and Thomas P. and Genevieve Twomey, private FPL ratepayers. R. Vol. 62, 11935.

On October 24, 2001, the Commission issued its Order Establishing Procedure, No. PSC-01-2111-PCO-EI, providing a roadmap for the completion of earnings review. R. Vol. 62, 9394-9405. That Order established hearing dates, dates for filing MFRs, cutoff dates for discovery, customer service hearing dates, dates for identifying issues in the case and prefiling of testimony. R. Vol. 48, 9400. The Commission emphasized that it was adopting a schedule that would provide all parties an adequate opportunity to examine FPL's MFRs, conduct discovery and develop issues and testimony as well as provide the Commission staff adequate time to conduct an audit. R. Vol. 48, 9401. The Commission again emphasized its view that the case could end in a settlement and provided "approximately 90 days from the identification of issues to the hearing to

explore settlement of some or all of the issues short of a full hearing." R. Vol. 48, 9402.

The Commission issued another procedural order on January 16, 2002, in which it set out a list of 158 issues to be considered in the proceeding. Order No. PSC-02-0102-PCO-EI, R. Vol. 53, 10218-10237. The issues identified covered every aspect of the case, e.g., eighty issues dealt with calculation of the company's net operating income (Issues Nos. 40-119) R. Vol. 53, 10225-10233; twenty-three issues addressed rate base calculations (9-31) R. Vol. 53, 10221-10224; eight concerned cost of capital (32-39) R. Vol. 53, 10224-10225; twenty-four dealt with cost of service and rate design (122-143) R. Vol. 53, 10233-10235, and so on. Order No. 02-0102 also noted that parties and staff were "not precluded from raising and addressing additional issues that may arise through the course of this proceeding." R. Vol. 53, 10218.

During January, 2002, FPL filed the testimony of 13 witnesses in support of its case. R. Vol. 53-57, 10238-11003. The Hospital Association filed testimony of witnesses Kollen and Baron on March 4, 2002; Lee County filed the same day. R. Vol. 59-60, 11325-11473. Publix filed the testimony of its 5 witnesses on March 5, 2002. R. Vol. 60-61, 11504-11674. The testimony of FPL customers given at service hearings conducted

by the Commissioners was also filed in the docket. R. Vol. 49-50, 9675-9755; Vol. 50-51, 9982-10006; Vol. 52, 10173-10202.

Commission staff conducted an audit of FPL's filings and issued its report on February 1, 2002. R. Vol. 58, 11020-11065. The stated purpose of the audit was "to audit the Rate Base, Net Operating Income and Capital Structure schedules for the forecasted 12-month period ended December 31, 2001 and 2002, for Florida Power and Light Company." R. Vol. 58, 11024. A supplemental audit was performed by Commission auditing staff and released March 18, 2002. R. Vol. 62, 11819-11831.

Against the backdrop of massive MFR filings, development of testimony, discovery, auditing and analysis that was occurring in the earnings review, settlement negotiations were initiated. On January 4, 2002, the legal staff of the Commission advised parties of an informal meeting to take place on January 7, 2002. R. Vol. 52, 10007. One stated purpose of the meeting was "to initiate settlement discussions." After the first meeting, a second one was noticed on January 8, 2002, and set for January 14, 2002. R. Vol. 52, 10093. The purpose was to "continue settlement discussions." Id. All parties to the docket, including the Hospital Association, were invited to attend. Id.

Initial settlement discussions between staff, the parties and FPL did not progress beyond the January, 2002, meetings.

Nevertheless, negotiations continued between FPL, Public Counsel and other parties with the result that a proposed "Stipulation and Settlement" (Stipulation) was reached and submitted for the Commission's approval on March 14, 2002. R. Vol 61, 11740-11757. Of the parties actively participating in the docket, only the appellant Hospital Association refused to sign the Settlement. R. Vol. 61, 11747. FPL simultaneously filed an "Agreed Motion to Suspend Schedule for Hearings and Prehearing Procedures and to Suspend Discovery." R. Vol. 61, 11735-11738. That motion was granted by Order No. PSC-02-0348-PCO-EI, issued March 14, 2002. R. Vol. 61, 11785-11786.

On the face of the Stipulation document, the parties indicate that their agreement is premised on a belief that the scope of the earnings review has provided an informed basis for agreement on FPL's rates. They note that FPL's MFRs "have been thoroughly reviewed by the FPSC Staff and the Parties;" that FPL "has filed comprehensive testimony in support of and detailing its MFRs," and that "the parties in this proceeding have conducted extensive discovery on the MFRs and FPL's testimony." R. Vol 61, 11935.

The Commission staff was also convinced that the terms of the Stipulation were "a reasonable resolution of the issues regarding FPL's level of earnings and base rates." R. Vol. 61,

11802. It thus found the agreement to be "in the best interests of the ratepayers, the parties, and FPL . . . ." Id.

As noted by the Commission staff's recommendation for approval, the key provisions of the Stipulation were as follows:

> A $250 million permanent base rate reduction effective April 15, 2002 (7.03% base rate reduction);
>
> A continuation of a revenue cap and revenue sharing plan for 2002-2005;
>
> The discretionary ability for FPL to reduce depreciation expense by up to $125 million annually, and
>
> FPL's agreement to withdraw its request to increase its Storm Damage Reserve accrual by $30 million annually.

R. Vol. 61, 11800.

In addition to various other items, the Stipulation also included FPL's agreement to make an adjustment to its fuel cost recovery clause factor to reduce it by $200 million for the remainder of 2002. R. Vol. 61, 11812. That adjustment was incidental to the actual earnings review in Docket No. 001148-EI and was related to the annual fuel cost adjustment proceedings in Docket No. 020001-EI, Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor. R. Vol. 61, 11798. The effect of the adjustment was to lower fuel costs passed on to consumers.

The staff's recommendation for approval of the Stipulation was considered by the full Commission on March 22, 2002, at a

Special Agenda Conference convened for that purpose. Chairman Jaber invited the parties to make presentations on the settlement. R. Vol. 62, 11838. Mr. Paul Evanson, President of FPL, spoke in favor of the settlement. He noted the massive amount of documents produced by the company through MFR filings, discovery and direct testimony and concluded that "the record demonstrates this was a comprehensive and exhaustive review of our operations." R. Vol. 62, 11840. He characterized the settlement as "a win, win, win" for customers, FPL's shareholders and the State of Florida. R. Vol. 62, 11841. Jack Shreve, Public Counsel, representing the citizens of Florida, also spoke in favor of the Stipulation, characterizing it as "fair, reasonable and appropriate" and as providing "a good incentive-based regulatory structure." He, too, urged its approval, as did other interested persons and parties to the agreement. R. Vol. 62, 11843; 11845-11846.

The Hospital Association, through its counsel, Mr. Wiseman, was given fifteen minutes to present its argument against approval of the Stipulation. R. Vol. 62, 11849. Mr. Wiseman proceeded to list several issues such as cost of equity, capital structure, cost overruns, affiliate transactions, and alleged improper transactions between FPL and Adelphia Communications Group in which FPL's parent, FPL Group, had owned a subsidiary

interest. Mr. Wiseman claimed these issues could result in reductions in cost of service in the $500 million range. R. Vol. 62, 11849-11855. He concluded by asking the Commission to defer ruling on the Stipulation and "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." R. Vol. 62, 11855.

The discussion at the Special Agenda continued with the Commissioners asking staff and the parties for explanation of the terms of the Stipulation and their import. Mr. Shreve again spoke in favor of the agreement. He acknowledged Mr. Wiseman's position opposing the Stipulation but noted that the parties had asked for various levels of rate reductions, some lower than the one achieved by the Stipulation. R. Vol. 62, 11877. "I think you have to take it in perspective," he noted on the compromise reached and observed that he might have asked for more, "[i]f we could get some assurance from the Commission that we could have our way on all the issues. . . ." Id. Mr. Shreve went on to express his view that this "incentive-type stipulation" had advantages over regular rate case procedures directed toward achieving one-time refunds. The Stipulation allowed for over-earnings refunds in addition to the reduction without additional Commission proceedings. That, Mr. Shreve opined, provided "some

comfort" not only to the company, but to customers and the parties as well, and was "one of the reasons" that he felt the Stipulation should be approved. R. Vol. 62, 11880.

After hearing the presentations of the parties, the Commissioners expressed their views that the proceeding had produced the level of information they needed to make a reasoned decision. Commissioner Deason especially noted that fact:

> . . . I want to reiterate something that you said, Madam Chairman, and it's something that is identified in the, in the "whereases" to the stipulation, and that is the fact that there has been a full set of minimum filing requirements filed in this proceeding, there has been comprehensive testimony filed, there's been extensive discovery. I think that this, if this settlement is approved, that it is consistent with the idea that we have conducted a thorough rate review for this company. And I think it would be unfair to say that this Commission has not conducted a thorough rate review for this company because we have. I think that all of the information is there.

R. Vol. 62, 11897. In addition to the Chairman, Commissioners Baez and Palecki also echoed Commissioner Deason's view of the proceeding. R. Vol 62, 11884; 11889; 11891.

At the end of the Special Agenda Conference, the Commission voted unanimously to approve the Stipulation and the mid-course correction in the fuel adjustment docket. R. Vol. 62, 11895. On April 11, 2002, the Commission issued Order No. PSC-02-0501-AS-EI, Order Approving Settlement, Authorizing Midcourse Correction, and Requiring Rate Reductions. R. Vol. 62, 11927-

11946. In that Order, the Commission found that "the Stipulation and Settlement is in the best interests of FPL's ratepayers, the parties, and FPL. . . ." R. Vol. 62, 11931.

The Hospital Association filed its notice of appeal on April 26, 2002.

SUMMARY OF ARGUMENT

Under the provisions of the Florida Administrative Procedure Act (APA), section 120.68(1), Florida Statutes, the Hospital Association must show that it is "adversely affected" by the Commission's decision approving the FPL Stipulation. It cannot meet that test. The Hospital Association was the beneficiary of a $250 million per year rate reduction and earnings sharing plan, just as other ratepayer groups were beneficiaries. It also benefitted from the settlement because the rate reduction was across-the-board. If the Commission had adjusted rate structures toward parity among classes, the Hospital Association would have shouldered a greater share of the burden of FPL's cost of service than it currently does. The effect of the Stipulation on the Hospital Association was entirely positive. Mere status as an intervenor does not automatically create a right to appeal.

The Hospital Association would not have standing to bring this appeal under a traditional analysis of its appellate rights. As a party who enjoys the benefits of a settlement in a proceeding in which it participated, it cannot attempt to disrupt the settlement through an appeal. If the Hospital Association wants to try for a greater rate reduction, it must do so by bringing its own case.

The procedure followed by the Commission did not violate any right to due process owed to the Hospital Association. The Commission initiated FPL's earnings review on its own motion, and the Hospital Association enjoyed the same rights as any other intervenor. From the beginning of the earnings review, the Commission encouraged a stipulated settlement, and made no commitment to the Hospital Association or any other party that a hearing would necessarily be held.

When the Commission opted to approve the proposed settlement, the Hospital Association was not confronted with a decision which impacted it adversely or even substantially. It therefore lacked standing to request an evidentiary hearing under the standard embodied in the APA and in Florida court decisions.

Section 120.57(4) expressly recognizes that any proceeding can be informally terminated by Stipulation. In the context of that informal process, the Hospital Association had no claim to a formal hearing. It was afforded exactly the kind of opportunity to participate that Florida law allows. It was given the requested chance to present its views in opposition to the Stipulation, which it did. It is not a denial of due process that the Commission found that opposition unconvincing, especially in view of the unqualified support of Public Counsel

and other intervenors representing the broad spectrum of FPL's ratepayers.

Even assuming that the Hospital Association can evade the standing requirements of Florida law, its claims cannot succeed under the legal standard applied to approval of non-unanimous stipulations. As an intervenor, the Hospital Association had no ability to defeat the stipulation of other parties simply by withholding consent. At most, it was entitled to an opportunity to express its opposition to the Stipulation in an informal procedure.

The Commission's ability to approve the Stipulation did not require resolution of disputed facts. All relevant matters supporting the Stipulation were agreed to by the stipulating parties. The Hospital Association's attempt to assert disputed issues did not require that the Commission take them up to approve the Stipulation. In any case, the issues raised by the Hospital Association invoked policy issues well within the Commission's ratemaking discretion to reject.

The Commission made the requisite finding that the Stipulation resulted in fair, just and reasonable rates and was in the public interest. The stipulated agreement before it, the lack of factual disputes between the parties, and the parties' unflagging testimony in support of the Stipulation

provided the Commission with all the competent evidence it needed to approve the agreement. The Commission's order approving the Stipulation violated none of the provisions of the APA or other law invoked by the Hospital Association.

The Hospital Association should not be allowed to disrupt the implementation of the rate reduction and earnings sharing plan that the Commission approved and, for all practical effects, all other ratepayer groups in Florida have endorsed. The Commission's order approving the Stipulation should be affirmed.

STANDARD OF REVIEW

As this Court has said many times, orders of the Commission come to this court "clothed with the statutory presumption that they have been made within the commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." Gulf Coast Electric Cooperative v. Johnson, 727 So. 2d 259, 262 (Fla. 1999)(citations omitted). The Commission's interpretations of its statutes are entitled to great weight and a party challenging an order bears the burden of overcoming the presumption of validity by showing a departure from the essential requirements of law. Id. [citing AmeriSteel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997)]. The Commission's findings will be upheld if they are based on competent substantial evidence and are not clearly erroneous. Id. The deference afforded the Commission's orders is appropriate given the agency's special expertise in the area of utility regulation. Id. [citing Gulf Oil v. Bevis, 322 So. 2d 30, 32 (Fla. 1975); Public Service Commission v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989)].

ARGUMENT

I. THE HOSPITAL ASSOCIATION IS NOT ADVERSELY AFFECTED BY THE COMMISSION'S ORDER AND HAS NO STANDING TO BRING THIS APPEAL.

The Hospital stands before this Court in a rather peculiar posture. It, like the other customers of FPL, is the beneficiary of the $250 million rate reduction and other adjustments approved by the Commission. Moreover, it actually benefitted from the Commission's having not proceeded with a full rate case hearing. One of the issues that would have been examined was the parity of rates between customer classes. As noted by the staff and Commissioners at the agenda conference approving the Stipulation, if the issue of rate parity had been addressed, the Hospital Association would have been required to shoulder a greater share of the burden of the utility's cost in its base rates. Thus, a movement toward parity for the Hospital Association would have meant that it received less of a rate reduction than it would absent consideration of that issue. Vol. 62, R. 11858-11860.

Nowhere in its Brief does the Hospital Association urge the court to reverse the Commission's order awarding the rate reductions. Clearly, it is happy to have received the benefit of these reductions and potential refunds that the earnings sharing plan will bring. Rather its plea is purely a

formalistic one. It asks only that the Court remand the case based on an alleged procedural error. See, Brief at 35; 38-39; 40; 42.

Given these circumstances, one might well wonder from a common-sensical perspective what injury the Hospital Association has suffered as a result of the Commission's order. One might wonder the same thing from a legal perspective, and indeed, this is an instance where common sense and the law coincide. Having received the benefit from the Commission's approval of the stipulated rate reduction and revenue sharing plan, the Hospital Association does not have legal standing to bring this appeal.

The Hospital Association's Brief is fairly peppered with cites to Chapter 120, Florida Statutes (APA). It repeatedly invokes various subparts of the judicial review provisions, section 120.68, Florida Statutes, that require remand for agency transgressions. In bringing this appeal, however, the Hospital Association overlooks that most fundamental threshold requirement of Section 120.68(1) which states that "a party who is adversely affected by final agency action is entitled to judicial review." (e.s.)

It is true that the Hospital Association was granted intervenor status in this case. However, as this Court noted in Legal Environmental Assistance Foundation, Inc. v. Clark, 668

So. 2d 982 (Fla. 1996), the mere fact that a party has been granted intervenor status does not mean that party automatically has standing to challenge the Commission's order. Even a party who participates in an agency proceeding "by authorization of a statute or rule, or by permission of an agency, may not necessarily possess any interests which are adversely, or even substantially, affected by the proposed agency action". Id. at 987. The definition of "party" in the APA is defined "more narrowly for purposes of obtaining appellate review than for purposes of obtaining an administrative proceeding." Florida Chapter of the Sierra Club and Save our Suwannee, Inc. v. Suwannee America Cement Company, Inc., 802 So. 2d 520, 521 (Fla. 1st DCA 2002), citing Daniels v. Florida Parole and Probation Commission, 401 So. 2d 1351 (Fla. 1st DCA 1983), aff'd sub nom.; Roberson v. Florida Parole and Probation Commission, 444 So. 2d 917 (Fla. 1983).

The Hospital Association has suffered no detriment from the Commission's approval of a rate reduction for FPL's customers; it has received a clear and readily accepted benefit. The Hospital Association might have liked to have received a greater benefit, as no doubt the other parties to the proceeding would have. But the test of a party's standing to appeal does not turn on speculation about what might have been or what yet might

be. To argue that the receipt of a certain benefit has an adverse affect because the benefit was not as great as it conceivably could have been is to turn the concept of "adversely affected" on its head. Florida law requires a would-be appellant to show that the challenged final agency action has "created an 'injury in fact' or impending injury to its interest, . . . ," not that it might yet receive a greater benefit. Sierra Club, 802 So. 2d 520.

It is not only the requirements of the APA that stand in the way of the Hospital Association's appeal. It is axiomatic in Florida law that a person who obtains a favorable judgment and accepts the benefits of it, cannot bring an appeal to reverse the judgment. Dance v. Tatum, 629 So. 2d 127 (Fla. 1993); State Road Dept. v. Hartsfield, 216 So. 2d 61, (Fla. 1st DCA 1968)("[W]here a party recovering a judgment accepts the benefits of it, voluntarily and knowing the facts, he is estopped from afterwards seeking a reversal of the judgment by appeal therefrom.")

There is no reason not to apply this principle in this case. The Hospital Association received a favorable ruling from the Commission just as surely as if it had been the moving party and achieved a rate reduction by its own efforts. It now seeks to reopen the proceedings, irrespective of the time and expense it

might entail, to see if it might be possible to secure a greater reward while keeping what it has gained. To state such a proposition as a viable legal theory reveals its facial absurdity. The Hospital Association is a willing beneficiary who has no standing to contest the process or the Stipulation which brought that benefit. The Court could dismiss this case on this ground alone. It should certainly dismiss it in contemplation of the standing requirements of the APA and this Court's interpretive decisions.

II. THE COMMISSION DID NOT ERR IN APPROVING THE PARTIES' STIPULATION WITHOUT A FULL EVIDENTIARY HEARING.

A. The Hospitals Were Afforded Due Process Before the Commission.

Even if the Hospital Association can get past the hurdle of standing to appeal, there is no path to reach its goal of forcing the Commission to hold a separate evidentiary hearing on the Stipulation.

1. The Hospital Association lacked standing to demand an evidentiary hearing.

The Hospital Association's invocation of the hearing requirements of the APA are purely formalistic. No one would dispute that when the Commission initiates a rate proceeding, as it did in this case, it must provide the utility an opportunity for hearing and allow proper intervenors to participate in that hearing. However, the hearing requirements of the APA found in

Sections 120.569 and 120.574, Florida Statutes, do not require that the Commission conduct an evidentiary hearing in every case. On the contrary, Section 120.57(4) specifically recognizes that any proceeding before an agency may be resolved without the necessity of formal hearing. It states:

> Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

120.57(4), Florida Statutes.

There is no provision of Florida law governing the Commission's activities that precludes it from accepting an informal resolution in an earnings review proceeding. The Commission's ratemaking statutes contemplate that when the agency initiates a rate review, it will provide parties notice and opportunity for hearing, but there is no statutory preclusion of a settlement by stipulation. See, section 366.06, Fla. Stat. That would clearly be inconsistent with long standing Commission precedent and Florida law which favors settlements in the public interest. See, Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731, 732 (Fla. 1985)(The legal system favors the settlement of disputes by mutual agreement of the contending parties).

The process followed by the Commission in FPL's earnings review was consistent with the basic tenents of the APA. The Commission could not have made it clearer from the beginning of the proceeding that its primary desire was to be able to conduct a thorough review of FPL's rates based on the massive information contained in the MFRs. While it initially set a date for hearing the matter, it never made an absolute commitment to conducting the hearing, and in fact encouraged the parties to reach a stipulated agreement as they had done in past proceedings. That process is recognized in section 120.57(4).

The Hospital Association has not argued that the Commission had no authority to approve the Stipulation to which they did not consent, nor could they. There is certainly nothing in Chapter 120 nor Chapter 366 which would prevent the Commission from doing so. Indeed, it is generally recognized that administrative proceedings and utility rate proceedings in particular often involve "settlements" in which not all parties are willing to participate. As stated in Pennsylvania Gas & Water Co. v. Federal Power Commission, 463 F. 2d 1242, 1246 (D.C. Cir. 1972), in which the Court rejected a customer challenge to a non-unanimous settlement:

> "Settlement" carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in a Court . . . [I]n agency proceedings settlements are

> frequently suggested by some, but not necessarily all of the parties; if upon 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.

Whatever legal rights the Hospital Association had to a hearing on the Stipulation must be defined in the context of the APA's recognition of stipulated settlements and the inability of an intervenor to block its implementation merely by withholding consent. What counsel for the Hospital Association asked for was for the Commission to "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". R. Vol. 62, 11855. As with the question of the right to appeal, the requirement for such a hearing must be evaluated in the context of standing and the general procedural requirements for approving a non-unanimous stipulation.

Persons petitioning for an administrative hearing must show that they are "substantially affected" by the agency's proposed action. Ameristeel Corp., 691 So. 2d 477. This test requires that the petitioner show "1)that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2)that his substantial injury is of a type or nature which the proceeding is designed to protect." Id. At the point where the parties agreed to a stipulated rate

reduction and refund plan, and the Commission proposed to approve it, the Hospital Association's standing to request an evidentiary hearing was put to the test. No reasonable construction of the effect of a proposed rate reduction would classify it as an "injury in fact" to the customer, and it would be absurd to say a proceeding was "designed to protect" a customer from paying a lower rate. The Commission's proposed action of approving the Stipulation was entirely favorable to the Hospital Association. To the extent it was affected, the Hospital Association was affected favorably and in no way injured. Thus, evaluating the situation for what it was when the Stipulation was considered, the Hospital Association could not meet the test for standing to protest the Commission's proposed action. It simply was not entitled under law to demand an evidentiary hearing.

2. The Commission afforded the Hospital Association all the process it was due in allowing it to state its objections to the Stipulation.

This leaves the question of what opportunity to be heard the Hospital Association was entitled to in the context of the Commission's informal proceeding at which the Stipulation was approved. Put another way, it raises the question of what due process rights the Hospital Association could assert at that point. Even putting aside the Hospital Association's problems

of standing to demand a formal proceeding, those rights were limited.

It is not necessary that the regulatory agency conduct an evidentiary hearing in every case. Pennsylvania Gas & Water Co., supra, 463 F. 2d 1242; New Orleans Public Service, Inc. v. Federal Energy Regulatory Commission, 659 F. 2d 509 (5th Cir. 1981) ("It is clear that in some circumstances the Commission can approve contested settlements without conducting a formal evidentiary hearing".) The due process rights of a non-stipulating party are satisfied if the party is provided notice and opportunity to participate in formal and informal conferences, settlement negotiations, and is provided an opportunity to state its objections on the record. New Orleans Public Service, Inc., 659 F. 2d 512-513. See also, Bryant v. Arkansas Public Service Commission, 877 S.W. 2d 594 (Ark. 1994) (Attorney General was not denied due process in the Arkansas Commission's approval of a non-unanimous stipulation without an evidentiary hearing where the Attorney General was allowed to participate fully in the rate proceedings and was given an opportunity to present its position and participate when the Commission considered the stipulation).

Whatever due process rights the Hospital Association had to oppose a favorable stipulation were satisfied by the

Commission's proceedings. It participated fully in the Commission's proceedings leading up to the agenda conference where the stipulation was approved. It took part in various procedural conferences, including the pre-hearing conference, and meetings convened for the purpose of considering a settlement. The Hospital Association was familiar with the proposed settlement and was on notice that it would be considered at the March 22, 2002, agenda. Prior to that date it did not file any pleading requesting any particular opportunity to be heard on the Stipulation, much less request that the Commission hold a formal evidentiary proceeding on the matter. Indeed, as the transcript of the agenda conference reflects, the due process claims the Hospital Association now asserts were founded only on counsel's subjective expectation of what would occur. R. Vol. 62, 11848. In any case, however, that expectation appears to have been rather limited. Counsel only asserted that "we thought at least that we would be given the opportunity to present a thorough analysis to show why this settlement should not be approved". R. Vol. 62, 11848-11849. The amount of time associated with that expectation was rather minimal; "at least half an hour", as stated by counsel by the Hospital Association. R. Vol. 62, 11849.

In fact, the Hospital Association was given fifteen minutes to address the Commissioners and other parties in support of its view that the $250 million rate reduction was inadequate. R. Vol. 62, 11849-11855.

In the course of the Commission's consideration of the proposed stipulation, the Chairman asked the principal intervenor in the case, Public Counsel Jack Shreve, whether he had heard anything from the Hospital Association's counsel or others, that would change his positive opinion of the stipulation. He replied: "No, Commissioner, there is not". R. Vol. 62, 11876. He then proceeded to comment on the position of the Hospital Association and urged the Commission to adopt the stipulation as a reasonable resolution of the case. R. Vol. 62, 11877-11882.

So far as the Hospital Association's due process rights are concerned, one final point is worth noting. As a non-signatory to the stipulation, the Hospital Association was not bound by those terms by which the other parties committed not to protest the Stipulation or to seek rate adjustments while it was in effect. As noted by Mr. Shreve at the March 22, 2002, special agenda conference, there is nothing to preclude the Hospital Association from initiating its own proceeding to challenge

FPL's rates in the future if it believes that it can make a case for further reductions. R. Vol. 62, 11882.

Florida courts have recognized that due process is a relative concept and the amount of process that may be due depends on the context in which procedural rights are asserted. Hadley v. Department of Administration, 411 So. 2d 184, 187 (Fla. 1982) ("[T]he extent of procedural due process protection varies with the character of the interest and the nature of the proceeding involved"). In the context of the Commission's approval of the FPL Stipulation, the Hospital Association was afforded all the process it was due. There has been no violation of the Hospital Association's due process rights under the APA or any other standard.

B. The Commission's Order Approving the Stipulation is Consistent With the Hearing Requirements of the APA.

The Hospital Association asserts that the Commission was required to take up its issues and resolve all alleged "disputes of material fact" in an evidentiary hearing before approving the Stipulation. As shown in the preceding section, that is an incorrect characterization of the Commission's obligation when the parties submitted their settlement proposal. The Commission was only required consistent with its statutory duties to find that the Stipulation resulted in reasonable rates and was in the public interest.

The whole concept of a stipulated settlement is based on the idea that controversies are resolved without having to go forward with expensive and time consuming hearings. While the Florida APA requires that an agency must afford an aggrieved petitioner the opportunity to litigate disputes of fact where his interests are at stake, there is no such requirement for mere approval of a stipulated settlement. That fact is recognized in section 120.57(4) allowing for "informal disposition . . . of any proceeding by stipulation, agreed settlement, or consent order."

It hardly matters that the Hospital Association as a dissenting intervenor claimed that it would argue with FPL's initial positions in the case. The validity of the Commission's decision clearly did not turn on resolving disputes of fact. It accepted the parties' agreement to compromise on the relevant issues, including any that might involve disputed issues of fact.

The relevant question was whether there was a reasonable basis for the Commission to accept the Stipulation - not whether all issues of disputed fact had been resolved. The diverse parties to the Stipulation, representing for all practical purposes the entire spectrum of consumers from residential ratepayers to large industrial customers, urged the Commission that there was

a reasonable basis to find the Stipulation a fair resolution of the case. Moreover, as FPL, Public Counsel, and the Commissioners stated at Agenda Conference approving the agreement, that conclusion was one made on the strength of a massive and thorough inquiry into the company's operations.

It is of no consequence that the Hospital Association can enumerate a litany of disagreements with FPL's case. Its claims for greater rate reductions based on its "disputed issues" are purely speculative. The result of a hearing could have been a result much less favorable to the intervening parties than was approved. The validity of the Commission's order turns on the reasonableness of its exercise of discretion in approving the Stipulation. In the end, as stated well by Public Counsel, Jack Shreve, and Commissioner Deason, there simply was nothing in the matters argued by the Hospital Association that would lead one to believe that the Stipulation was unreasonable or that further formal hearings were necessary to evaluate it. R. Vol. 62, 11876-11877, 11897. The Commission was in effect the petitioning party in this case, having initiated the earnings review on its own motion, and if it, through the efforts of its staff and the parties, was satisfied with the resulting agreement, it had the discretion to approve it. The Hospital Association, if it should file a proper petition in its own

right raising disputed issues of fact, would be entitled to have the matters heard, but not in the context of approval of a stipulation.

Finally, ratemaking is fundamentally a legislative process that inherently involves policy judgments by the Commission as well as resolution of specific fact issues. The "disputed issues of material fact" advanced by the Hospital Association, such as cost of capital and equity structure, are hardly matters of fact at all, but policy matters in which the Commission has wide discretion. Moreover, as noted by Fifth Circuit in New Orleans Public Service, Inc., supra:

> The fact that the testimony in question presented differing figures for cost of service, rate base, advance payments and rate of return from the settlement figures for each category does not mean that a hearing was required to address those differences. . . . [T]he testimony suggest[s] to us that the differences in figures reflect disagreement in matters of policy rather than conflict in basic facts.

659 F. 2d 513-514.

The Legislature has given the Commission broad latitude in carrying out its ratemaking responsibilities. It acted within its authority in declining further hearings on the FPL Stipulation.

III. THE COMMISSION DID NOT ABUSE ITS DISCRETION IN APPROVING THE STIPULATION.

Points II. - V. of the Hospital Association's Brief hew to the line of section 120.68(7) alleging various procedural errors

which would require remand. Since the arguments are essentially variations on a theme, the Commission addresses all of them in its Point III., which it believes embodies the appropriate standard of review.

A fundamental premise of the Hospital Association's argument in these sections of its Brief seems to be "that the Commission did not afford the Hospitals the hearing that it promised . . . ." Brief at 39 (e.s.). The Commission made no such promise to the Hospital Association or any other party. On the contrary, the Commission put the parties on notice from the beginning that its "decision to initiate a rate proceeding does not foreclose the ability of the company and the parties to reach a resolution of some or all of the issues . . . ." R. Vol. 2, 400. The filing of the MFRs, the Commission stated, would allow it to "move forward to discharge our obligations in the event there is no informal resolution of the issues." Id. That hardly sounds like a promise to hold a hearing.

The Hospital Association further tries to conjure a commitment to hearing out of the Commission's Order Establishing Procedure, Order No. 01-2111. Brief at 7; 16. There, the Prehearing Officer noted, in rejecting a procedure suggested by FPL, that the usual disposition of rate cases was via stipulation of all parties or through the full hearing process.

R. Vol. 48, 9401. The Prehearing Officer's remark hardly constitutes a commitment to hold a hearing, nor is it a binding legal ruling by the Commission imposing a hearing requirement if no unanimous stipulation was reached. The Prehearing Officer would not have made such a unilateral commitment on behalf of the other Commissioners in the first place. Such a general statement of the law could hardly have contemplated the unusual situation arising from the Hospital Association's refusal to join the Stipulation.

In Point II of its Brief, the Hospital Association continues its assault on the Commission's acceptance of the Stipulation by invoking the "competent substantial evidence" standard of review. Because the Commission didn't conduct an evidentiary hearing, the argument goes, it had no competent substantial evidence before it and abused its discretion in approving the Stipulation. As with its arguments in its other points, the Hospital Association is off the mark in its analysis.

Normally, one expects the competent substantial evidence standard to be invoked where the agency has conducted an adversarial hearing and resolved issues of fact and policy. That seems to be the concept advanced by the Hospital Association.

The standard evoked by the Hospital Association is inappropriate in this case. The stipulated agreement between the parties took the place of an evidentiary proceeding. Thus, the Commission was within its discretion to conduct an informal proceeding to consider the Stipulation, as contemplated by section 120.57(4). The Stipulation itself was based on the views of the parties that there was no need to address the myriad issues which might have been considered in a formal rate proceeding. They agreed that the "MFRs have been thoroughly reviewed by the FPSC Staff and the Parties to this proceeding;" that FPL "has filed comprehensive testimony in support of and detailing its MFRs;" and "the parties have conducted extensive discovery on the MFRs and FPL's testimony." R. Vol. 62, 11747. This was the predicate on which the parties were able to enter into the Stipulation, and they confirmed their views when they testified in support of its approval. That testimony and the analysis and support of the Commission's own staff formed a reasonable basis on which the Commission could approve the Stipulation. The conclusion to be supported in this case was the reasonableness of the Stipulation, and the Commission was within its discretion to give credence to the parties and its staff.

Points III. and IV. of the Hospital Association's Brief are little more than recitations of the provisions of sections 120.68(7)(c), (d) requiring remand for "material errors" of procedure which "impair" the fairness of the proceeding or for "erroneous interpretations of law" where a correct interpretation "compels a particular action." As shown above, the Commission has committed no material error of procedure affecting the fairness of this proceeding, nor has it erroneously interpreted a provision of law. The Hospital Association participated as a party on equal footing with other parties, and when it declined to sign the Stipulation, it was afforded the opportunity to object. It retains whatever legal options it has to contest FPL's rates on its own by complaint or other means at its own discretion, but it had no recognized right to prevent approval of a rate reduction beneficial to the general body of Florida ratepayers.

As to the Hospital Association's Point V., the Commission hardly needed to make extensive factual findings to approve the Stipulation. The Commission accepted the reasons advanced by the parties and the terms of the Stipulation itself as a sufficient predicate for its acceptance. The resolution of the case by Stipulation avoided the need for extensive factual and policy determinations. In any case, the Commission made the

most important, ultimate finding of fact that the Stipulation was in the public interest and resulted in rates that were fair, just and reasonable. The Commission violated no procedural standard embodied in section 120.68(7). The Commission had a reasonable basis on which to approve the Stipulation and acted within its discretion so doing.

CONCLUSION

The Commission's orders come to this Court with a presumption that they were made within the scope of the Commission's jurisdiction and powers and that they are reasonable and just. Gulf Coast Electric Coop. v. Johnson, 727 So. 2d 259 (Fla. 1999). An appellant has a heavy burden to prove error by showing a departure from the essential requirements of law. Id.

The Hospital Association has failed to meet its burden of demonstrating reversible error in this case. The Court should affirm the Commission's order.

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Dated: August 30, 2002

CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that the font type used in this brief is Courier New 12 point.

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