FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

AUGUST 14, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF AUDITING & FINANCIAL ANALYSIS (SLEMKEWICZ, CAUSSEAUX, S. JONES, LEE, MAUREY) JS ALM
DIVISION OF LEGAL SERVICES (ELIAS) RVE AFC
DIVISION OF ELECTRIC & GAS (JENKINS, COLSON) JDJ

RE: DOCKET NO. 970410-EI - PROPOSAL TO EXTEND PLAN FOR RECORDING OF CERTAIN EXPENSES FOR YEARS 1998 AND 1999 FOR FLORIDA POWER & LIGHT COMPANY

AGENDA: 08/18/97 - REGULAR AGENDA - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\970410EA.RCM

CASE BACKGROUND

In Docket No. 950359-EI, the Commission approved a proposal by Florida Power & Light Company (FPL) that resolved all of the identified issues regarding FPL's petition to establish a nuclear amortization schedule. By Order No. PSC-96-0461-FOF-EI, issued April 2, 1996, FPL was required (1) to book additional 1995 depreciation expense to the reserve deficiency in nuclear production; (2) to record, commencing in 1996, an annual $30 million in nuclear amortization, subject to final determination by the Commission as to the accounts to which it is to be booked; and (3) to record an additional expense in 1996 and 1997 based on differences between actual and forecasted revenues, to be applied to specific items in a specific order.

This docket was opened to consider an extension of and modification to the plan to allow the recording of additional expenses in 1998 and 1999.

By Proposed Agency Action Order No. PSC-97-0499-FOF-EI, issued April 29, 1997, in this docket, the Commission approved staff's recommendation to extend and modify the plan. On May 20, 1997, AmeriSteel Corporation (hereinafter "AmeriSteel") timely filed a

protest of the Proposed Agency Action. AmeriSteel has also petitioned to intervene in the docket. After reviewing the pleadings, the Prehearing Officer directed staff to file a recommendation on two pending motions for consideration by the full Commission.

Staff filed a recommendation for the July 15, 1997, Agenda Conference, addressing the two pending motions, AmeriSteel's Petition to Intervene and FPL's Motion to Deny and Dismiss the Protest of AmeriSteel. Staff also addressed FPL's request for Oral Argument on its Motion.

At the July 15, 1997, Agenda Conference, the Commission granted FPL and AmeriSteel oral argument. After oral argument from the parties and questions from the Commissioners, the Commission decided to defer consideration of the recommendation. Staff was directed to supplement its recommendation to address the issues of burden of proof, standing, and the scope of the proceeding. Herein is staff's supplemental recommendation.

This matter is currently scheduled for hearing on October 3, 4 and 6, 1997. Due to the time required to address certain legal arguments raised in this case, staff believes this hearing schedule is no longer feasible. From the date of the agenda conference, staff and the parties will have only six weeks before the start of the hearing to identify issues, prepare and conduct discovery, and file and review testimony. Due to the considerable amount of work that must be accomplished before staff and the parties will be ready for hearing, staff believes the hearing will have to be rescheduled to later dates.

Later hearing dates decrease the possibility of a final resolution by January 1, 1998. Staff believes, absent an extension of the plan, overearnings will exist on a prospective basis. For this reason, some action is necessary to protect ratepayer interests. Staff believes it may be necessary to attach jurisdiction to overearnings effective January 1, 1998 or take some other action to protect ratepayer interests. Since the interim statute is based on historic earnings, it will not adequately protect against 1998 overearnings. Therefore, staff is exploring alternative methods for protecting ratepayer interests and will appear before the Commission at a future date with a recommendation, if necessary.

On August 6, 1997, AmeriSteel filed a series of additional pleadings, including a Motion for Continuance, Motion for Leave to File an Amended and Supplemental Petition and Protest to Proposed

Agency Action, an Amended and Supplemental Petition and Protest to Proposed Agency Action, and a Request for Oral Argument.

In **ISSUE 1**, staff recommends that the Commission not address the pleadings recently filed by AmeriSteel. This recommendation addresses two pending motions on the merits: AmeriSteel's Petition to Intervene and FPL's Motion to Deny and Dismiss the Protest of AmeriSteel **(ISSUES 3 and 4)** and provides additional recommendations concerning the issues of standing, burden of proof, and the scope of the proceeding **(ISSUES 2, 5, and 6)**. The recommendations and analyses concerning the Motion to Deny and Dismiss, and the Petition to Intervene are identical to what was first presented at the July 15, 1997, agenda conference. The issues raised in FPL's response to AmeriSteel's Petition to Intervene are identical to some of the issues raised in FPL's Motion to Deny and Dismiss. Therefore, the discussion of AmeriSteel's substantial interests is included in the analysis of the Motion to Deny and Dismiss.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission address AmeriSteel's Motion to For Leave to File an Amended and Supplemental Petition and Protest to Proposed Agency Action, AmeriSteel's Request for Oral Argument, and AmeriSteel's Request for Continuance at this time?

RECOMMENDATION: No. A decision on the two motions that were first presented at the July 15, 1997 agenda conference might render these filings moot. Further, FPL has not had a full opportunity to respond to the pleadings.

STAFF ANALYSIS: On August 6, 1997, AmeriSteel filed a Motion to For Leave to File an Amended and Supplemental Petition and Protest to Proposed Agency Action, AmeriSteel's Request for Oral Argument, and AmeriSteel's Request for Continuance. FPL's response to these motions is not due until August 18, 1997, after the agenda conference. After a request from Staff, FPL filed a response on August 13, 1997. FPL believes AmeriSteel's pleadings should be summarily denied. FPL states that AmeriSteel's "attempt to submit additional legal argument after the time to do so has passed and after oral argument before this Commission is not only improper but prejudicial to FPL." FPL further states that its response "is not intended to be FPL's response to the Amended and Supplemental Petition." Staff believes it is inappropriate to resolve these recently filed pleadings without allowing FPL its full time to respond.

Staff believes the Commission has sufficient information, and the parties have been given a reasonable opportunity to provide input, to resolve FPL's Motion to Deny and Dismiss AmeriSteel's Protest and AmeriSteel's Petition to Intervene. The resolution of these two pending motions may render the recent pleadings and response moot. Staff believes it is appropriate to resolve the two motions which have now been pending for more than two months. Therefore, staff recommends that the recent pleadings filed by AmeriSteel not be addressed at this time.

ISSUE 2: Does a ratepayer have standing to challenge the inclusion of an expense in the calculation of a utility's regulated earnings where rates do not change?

RECOMMENDATION: Yes. A ratepayer has a substantial interest in assuring that only prudent expenses are included in utility rates, even if rates will not change as a result. (ELIAS)

STAFF ANALYSIS: This Commission is charged with setting rates for public utilities that are fair, just and reasonable (Sections 366.04, 366.041, 366.05, 366.06, and 366.07, Florida Statutes.) Staff believes that the notion of "just, fair, and reasonable" is broader than a mere calculation of a dollar amount to be charged.

There are numerous types of expenses the Commission has found inappropriate for inclusion in the calculation of regulated earnings: charitable contributions, luxury cars, works of art, political contributions, etc. If, as suggested, a customer suffers no "injury in fact" unless rates are changed, then a customer would have no opportunity to challenge the inclusion of these expenses in the calculation of regulated earnings until a rate case. Rates which include expenses that are unfair, unjust, or unreasonable are not fair, just and reasonable. Staff believes that the inclusion of this type of "unjust", "unfair" or "unreasonable" expense in the calculation of regulated earnings is a "harm" of "sufficient immediacy" to entitle a ratepayer to a formal proceeding pursuant to Section 120.569 and 120.57, Florida Statutes.

This Commission has long sought to assure that its regulatory process is symmetrical. That is, a policy or procedure which, under a given set of facts, works to the advantage of the ratepayers, should be similarly applied when under a changed factual circumstance, it would work to the benefit of the shareholders.

This concept of symmetry has interesting ramifications when applied to the standing question. If a ratepayer has no standing to challenge an action which has no immediate impact on rates, does it follow that a utility has no standing to challenge a decision of the Commission which has no immediate impact on earnings?

For example, FPL protested this Commission's denial of its petition to approve the BuildSmart℠ program. (Docket No. 951536-

EG) FPL maintains this program is cost effective and should be approved for cost recovery. Approving or denying this program has no impact on FPL's earnings. Therefore, under the symmetrical application of the rationale advanced by FPL at the July 15, 1997, Agenda Conference, FPL will not suffer an injury in fact as a result of the Commission's proposed action. Therefore, FPL has no standing to challenge the Commission's decision. FPL could argue that if this program is not approved, it might not meet the numeric demand and energy conservation goals established by the Commission. The failure to meet these goals would be determined in some future proceeding. FPL did not advance this argument in its petition on the proposed agency action. Staff submits that this type of injury is just as speculative as a ratepayer's entitlement to a refund/rate reduction in some future proceeding but for the inclusion of unfair, unjust or unreasonable expenses in the calculation of regulated earnings.

Similarly, Florida Power Corporation has protested the Commission's decision to not approve the buy out of its contract with Orlando Cogeneration, Ltd. (Docket No. 961184-EQ). All costs associated with this contract are currently recovered through the cost recovery clauses. The costs associated with the buy out, if approved, would be recovered through the cost recovery clauses. The decision to approve or disapprove the buy out has no immediate impact on earnings. If a utility has no substantial interest in matters which do not impact earnings, FPC's protest should be dismissed.

Note that staff recommended, and the Commission approved, the denial of OPC's motion to dismiss FPC's protest by Order No. PSC-97-0779-FOF-EQ, issued July 1, 1997. OPC advanced the argument that FPC's substantial interests were not affected by the buy out.

The suggestion that a ratepayer has no standing to challenge an action which does not change rates has implications for the Commission's PAA process as well. For example, in Docket No. 950270-EI, the Commission approved Florida Power Corporation's petition to amortize, over a period of up to four years, the approximately $24 million dollars in expenditures on the proposed Lake Tarpon Kathleen transmission line. After indefinitely postponing construction of the line, FPC sought to expense these amounts, which would have been included in the value of the asset. The proposal had no impact on rates and was approved as proposed agency action.

Under the theory that a ratepayer has no injury in fact unless rates change, this action should probably not have afforded anyone other than the utility and public counsel a point of entry to a 120.569/120.57, Florida Statutes, proceeding.

Staff believes that a ratepayer's substantial interests are not limited to just matters which immediately change rates, and a utility's substantial interests are not limited to just matters which immediately impact earnings.

The research to date has not revealed any case squarely addressing this issue. However, the case of Maule Industries v. Mayo, 342 So.2d 63 (Fla. 1976), is instructive. The Public Counsel appealed a Commission order awarding FPL approximately $70 million in interim rate relief alleging that the award included $54 million in non-recurring fuel charges, which were subsequently recovered through the fuel clause. One of the arguments advanced in support of the order was the "end result" doctrine of Federal Power Commission v. Hope Natural Gas, 320 U.S. 591, (1944), since the permanent increase was greater than the $70 million. This argument was rejected by the court and the $54 million dollar "double recovery" was ordered refunded.

While this decision may be distinguishable for several reasons, staff believes it supports the concept that what is included in a rate is "substantial", as well as the absolute level of the rate.

At the July 15, 1997, agenda conference, staff was directed to identify forums where a customer could challenge the prudence of a utility's expense or investment included in the calculation of regulated earnings. Staff has identified three options:

1) Any customer can petition the Commission for a rate reduction. This is called a reverse make whole rate case. The problem is that the customer has the burden of proof of showing why the utility is likely to be overearning. This is a heavy burden made heavier by the absence of Minimum Filing Requirements. However, the projected surveillance reports are the utility's projection of its earnings that can be used to establish a "prima-facie" overearnings case. These projected surveillance reports can be adjusted for the expense, investment, or cost of capital change the customer advocates. If the customer adjusted projected surveillance report shows the utility will exceed its ROE range, the customer should have standing to initiate a rate reduction case and, if needed to

further justify a rate reduction, ask the utility for a full set of Minimum Filing Requirements.

2) The customer could challenge the expense in a utility-initiated rate proceeding. It has been thirteen years since FPL has had a base rate proceeding. FPL's next rate case may be in the next century or never. One question unanswered by the "no-standing" argument is retroactivity. AmeriSteel is paying rates that covers costs including costs that AmeriSteel objects to. AmeriSteel would have to continue paying those rates until the next rate case. The Commission's options could be very limited in giving retroactive effect of the accounting adjustments on rates for years past.

3) At the July 15, 1997 Agenda, the implication of some of the arguments that a customer has no standing to challenge investment or expense items, incurred by the utility, outside of a rate case. This was the "staples" discussion. However, if the Commission were to decide that a customer had standing to challenge an expense or investment, and were to ultimately find in favor of the customer, the likely outcome would be to reflect the adjustment in surveillance reports. If the adjustment were large enough to cause overearnings, a reverse make-whole rate reduction could be initiated.

ISSUE 3: Should Florida Power and Light Company's Motion to Deny and Dismiss the Petition and Protest of AmeriSteel Corporation be granted?

RECOMMENDATION: No. AmeriSteel has demonstrated it has a substantial interest in this proceeding. AmeriSteel's protest specifically identifies those factual matters that are in dispute. Further, since AmeriSteel has protested the extension and modification of the plan, and since the plan was the only action proposed in Order No. PSC-97-0499-FOF-EI, Section 120.80(13)(b), Florida Statutes, is not operative in this situation.

STAFF ANALYSIS: Order No. PSC-97-0499-FOF-EI approving the extension and modification of the plan to record additional expenses in 1998 and 1999 was issued as proposed agency action on April 29, 1997.

On May 20, 1997, AmeriSteel timely filed its Petition and Protest of AmeriSteel Corporation to Proposed Agency Action. AmeriSteel alleges that it has a substantial interest that is affected by the Commission's proposed action. In the first paragraph of its pleading, AmeriSteel:

> protests the entry of the PAA and requests that hearings be held before the Commission to consider whether to finally approve an extension, with modifications, of the program authorizing Florida Power and Light Company to record additional expenses for the years 1998 and 1999 ("Accelerated Depreciation Plan" or "Plan").(Protest p. 1)

AmeriSteel's Substantial Interest

On April 11, 1997, AmeriSteel filed a petition for leave to intervene in this proceeding. AmeriSteel alleges that it has a substantial interest that will be directly affected by the outcome of the Commission's determination in this proceeding. AmeriSteel operates a steel recycling and manufacturing facility located within FPL's retail service territory. In essence, AmeriSteel alleges that but for the extension of the plan, FPL would earn in excess of its authorized return on equity in 1998 and 1999. AmeriSteel alleges that but for the additional expenses authorized by an extension of the plan, "...customers, including AmeriSteel should expect refunds as FPL exceeds the profit sharing threshold."

On April 25, 1997, FPL filed its response to AmeriSteel's petition to intervene. FPL asserts that the substantial interest alleged by AmeriSteel satisfies neither of the requirements of the two pronged test set forth in Agrico Chemical Company v. The Department of Environmental Regulation, 406 So. 2d 478,482(Fla. 2d DCA 1981):

> ...before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and 2) that his substantial interest is of a type or nature which the proceeding is designed to protect.

Although not contemplated by Commission rules, AmeriSteel followed FPL's response with a request for Judicial Notice of Order No. PSC-95-1035-PCO-EI, issued August 21, 1995, in Docket No. 950359-EI. That Order granted Florida Steel Corporation's Motion to Intervene. Florida Steel has since changed its name to AmeriSteel Corporation. FPL then, on May 6, 1997, filed a Notice of Objection to AmeriSteel's request, saying that AmeriSteel's "...purpose is not to have the requested judicial notice taken. Instead this is used as a pretext to argue that Order No. PSC-95-1035-PCO-EI is dispositive of AmeriSteel's current petition to intervene and to do so out of time.

In its Motion to Intervene, AmeriSteel states:

> As a result of the return on equity cap established for FPL by the Commission, FPL customers have a profit sharing relationship with FPL. The charges collected by FPL from its customers can be reduced through Commission ordered refunds if FPL's profits exceed the range the Commission has specified.... AmeriSteel has a significant interest in ensuring that FPL does not take unnecessary or unwarranted charges that would prevent FPL from reaching the earnings sharings threshold and providing refunds to existing customers.... the "Added Expense Plan" described in this docket creates a huge amount of additional charges to offset revenue and earnings growth in the years 1998 and 1999. But for those charges, customers, including AmeriSteel, should expect refunds as FPL exceeds the profit sharing threshold.

In its response to the Motion to Intervene, FPL alleges that AmeriSteel has failed to meet both parts of the two-prong test set forth in Agrico Chemical vs. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), rev. denied, 415 So.2d 1359, 1361 (Fla. 1982).

In essence, FPL argues that this is not a proceeding to change rates and charges for FPL, and even if it were, the action taken can only have "a speculative and indirect impact" on AmeriSteel. Thus, FPL argues AmeriSteel has failed to demonstrate that it has or will suffer an injury of sufficient immediacy to satisfy the first prong of the Agrico test. Secondly, FPL argues that this proceeding is not for the purpose of protecting AmeriSteel's "competitive interests" or for the purpose of applying a fictional "return on equity cap". Therefore, FPL suggest that AmeriSteel has failed to satisfy the second prong of the Agrico test.

The Commission's action, protested by AmeriSteel, would authorize additional expenses supported by the rates AmeriSteel pays for electricity. AmeriSteel has alleged that, but for this plan, FPL would exceed its authorized range of return on equity. While "vested interest" is a term of art not usually applied to describe a ratepayers interest in any amount in excess of a utility's authorized range of return on equity, the determination of the appropriateness of the additional expenses is the core issue in this docket. Staff notes there is no "earnings sharings plan" or "return on equity cap" established for FPL. If it appears that FPL will earn in excess of its authorized range, affirmative action by the Commission would be required to capture jurisdiction over the excess earnings.

Section 366.04(1), Florida Statutes, grants the Commission jurisdiction to "regulate and supervise each public utility with respect to its rates and service". Part of the regulation and supervision of a public utility's rates includes the determination of the appropriate level of expense to be included by a public utility in its rates, and, to the extent that the rates are excessive (as compared to the utility's authorized return), the determination of what action (refund, rate reduction, change to authorized return on equity, booking additional expenses, etc.) is appropriate.

Staff believes that AmeriSteel, as a ratepayer, by alleging that the proposed action would allow FPL to record expenses which are not appropriate, has shown its substantial interests will be

affected. This proceeding, which invokes the Commission's authority to supervise and regulate FPL with respect to its rate and charges, is designed to protect AmeriSteel's, as well as all other FPL ratepayers', substantial interests in assuring that the rates and charges are fair, just and reasonable. Thus, staff recommends that AmeriSteel has demonstrated it has a substantial interest in this proceeding. AmeriSteel's substantial interest in this docket is consistent with the Commission's ruling in Order No. 21651, issued August 1, 1989, in Docket No. 890256-TL, granting Florida Cable Television Association's (FCTA) request to intervene. In that docket, Southern Bell requested authority to change depreciation rates in order to finance its plans to place fiber in the homes of its customers. FCTA had alleged that "as customers of Southern Bell who would be called on to pay rates and provide revenues designed to fund the depreciation represcription sought by Southern Bell, FCTA's members have an interest in assuring that the utility does not impose unfair and unreasonable charges and burdens on ratepayers beyond those rates and rate-related practices required to fairly compensate Southern Bell for telephone service they receive." The interests asserted by AmeriSteel in this docket are similar to those asserted by FCTA in Docket No. 890256-TL and previously asserted by AmeriSteel in Docket 950359-EI.

Sufficiency of AmeriSteel's Protest

Beginning on page 5 of its Protest, AmeriSteel describes in detail for approximately seven pages, why it believes the Commission should not approve the extension and modification of the plan. Among other things:

"The charges taken thus far have contributed to FPL's substantial growth in cash flow.... This tremendous increase in cash flow has allowed the company to increase its equity ratio and reduce its debt significantly. The corresponding improvement in FPL's financial profile has greatly benefited stockholders at the expense of refunds for customers." (Protest, para 8, pp.5-6)

The extension of the Accelerated Depreciation Plan raises substantial factual and policy issues that should be addressed in a formal proceeding. These issues include unreasonable rates, excessive compensation and intergenerational equity. (Protest, para. 12, p.7)

The instant proposal to modify and extend the Accelerated Depreciation Plan through the years 1998 and 1999 similarly affects

AmeriSteel's substantial interests, as the amounts to be set aside for additional depreciation are likely to be substantially greater than the levels proposed by FPL in its 1995 petition. (Protest, para. 14, p. 7)

AmeriSteel suggests that extension of the "Added Expense Plan" is not in the public interest because:

1) the PAA's announced intent to "bring FPL's accounting in line with non-regulated companies" and to establish a "level accounting playing filed between FPL and possible non-regulated competitors" are significant policy decisions which require a formal evidentiary hearing. (Protest, para. 16, p. 8)

2) the proposal utilizes stale, understated, revenue forecasts. (Protest, para. 17, p.9)

3) the scope of the added expense plan is excessive. (Protest, para. 18, pp.9-10)

4) Additional charges to other accounts approved by the plan have not been justified. (Protest, para. 19, p. 10)

5) The effect of the proposed plan extension on FPL customers must be addressed (Protest, para. 20, p. 11)

6) There is no demonstrated need to extend "The Added Expense Plan" (Protest paras. 21-23, pp. 11-12)

AmeriSteel concludes by saying "The proposed plan significantly enhances FPL's cash flow to the benefit of the Company's investors, but offers no benefits to consumers. In fact, the Plan may reduce FPL's reported earnings in such large amounts that it would deny customers benefits of potential refunds." (Protest, p. 12) Staff does not believe that AmeriSteel's description of this plan as an "Accelerated Depreciation Plan" is accurate.

On June 10, 1997, FPL filed its Motion to Deny and Dismiss AmeriSteel's protest. FPL renews its arguments on AmeriSteel's failure to state a substantial interest in this docket. FPL further alleges that the protest should be dismissed because AmeriSteel has not identified any disputed issues of material fact

and "seeks to expand the of the proceeding beyond that permitted by Section 120.80(13)(b), Florida Statutes."

In light of this statute, FPL states that there are five conclusions that may be drawn concerning the procedure to be followed with respect to AmeriSteel's protest:

1) A protest of a "proposed agency action" by the Commission does not commence a de novo proceeding.

2) The Commission is to decide whether the protestant adequately stated a substantial interest in the Commission's action.

3) If a protest is granted, the Commission is to decide whether a Section 120.57(1) or a Section 120.57(2) hearing is required.

4) The scope of any hearing held, if a protest is granted, is restricted to issues, in the proposed action, that are placed in dispute by the Protest.

5) Issues in the proposed action that are not disputed by the Protest are deemed stipulated.

FPL then suggests, over nearly five pages, that "AmeriSteel's Protest is based on mischaracterization and sparring with fictitious consequences constructed from such mischaracterization." (Motion p.5)

On June 23, 1997, AmeriSteel filed its response to FPL's Motion to Deny and Dismiss. It states: "AmeriSteel's Protest objects to the plan in its entirety and requests that hearings be held to address approving the Proposed Plan as a whole is in the public interest." It then cites what it believes are nine separate disputed factual matters raised in its May 20, 1997 protest. AmeriSteel reiterates its allegations that it has sufficiently alleged a substantial interest in the proceeding.

The Commission's PAA Order takes one and only one substantive action. It modifies and extends the previously approved plan to two future periods.

Section 120.80(13), Florida Statutes, provides:

> Notwithstanding Sections 120.569 and 120.57, a hearing on an objection to proposed agency action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

This provision does not require, as FPL seems to advocate, that a person whose substantial interests are affected by proposed action to respond in detail, listing every potentially disputed fact which might be pertinent to every issue which might be related to the protest.

As discussed above, staff believes AmeriSteel has adequately demonstrated its substantial interest in the proceeding. Staff believes that the very first paragraph of AmeriSteel's Protest is legally sufficient to advance its right to contest the approval of the plan. Staff believes the disputed issues of fact and policy detailed in the Protest are sufficient to identify the nature of the dispute.

Since the PAA contained only one substantive action (approving an extension and modification of the plan) and that action has been protested, this is a de novo proceeding. Stated differently, there are no actions taken in the PAA which are not in dispute. Therefore, there are no issues subject to the application of Section 120.80(13)(b), Florida Statutes. Therefore, Section 120.80(13)(b), Florida Statutes, is not operative with respect to AmeriSteel's protest.

Therefore, staff recommends that AmeriSteel has demonstrated it has a substantial interest in this proceeding. AmeriSteel's protest specifically identifies those factual matters that are in dispute. Further, since AmeriSteel has protested the extension and modification of the plan, and since the plan was the only action proposed in Order No. PSC-97-0499-FOF-EI, Section 120.80(13)(b), Florida Statutes, is not operative in this situation. Therefore, FPL's Motion to Deny and Dismiss the Protest of AmeriSteel Corporation should be denied.

ISSUE 4: Should AmeriSteel Corporation's Petition for Leave to Intervene be granted?

RECOMMENDATION: Given the Commission's decision on FPL's Motion to Dismiss, this issue is moot. (ELIAS)

STAFF ANALYSIS: AmeriSteel's right to intervene in this proceeding is addressed by the decision on Florida Power and Light Company's Motion to Deny and Dismiss the Petition and Protest of AmeriSteel Corporation. Therefore, this issue is moot.

ISSUE 5: Who has the burden of proof in this proceeding?

RECOMMENDATION: FPL has the burden to demonstrate, by a preponderance of the evidence, that the plan to change the currently authorized expense levels for 1998 and 1999("the Plan") is reasonable, appropriate, and in the public interest. (ELIAS)

STAFF ANALYSIS: It is well established that the party seeking affirmative relief has the burden of proof. Thus, a utility seeking to increase its rates has the burden to demonstrate that the proposed rates would be fair, just and reasonable South Florida Natural Gas v. Public Service Commission 534 So.2d 695 (Fla. 1988) and Florida Power Corp. v Cresse 413 So.2d 1187, 1191 (Fla. 1982). Similarly, a customer seeking a decrease in rates has the burden to show that the current rates are outside or beyond the "zone of reasonableness" Rosalind Holding Company v. Orlando Utilities Commission 402 So.2d 1209 (Fla. App 5 Dist. 1981). In the instant case, FPL is maintaining its books and records in accord with Generally Accepted Accounting Principles (GAAP), the Uniform System of Accounts (USoA), Commission Rules, and past orders of the Commission. The plan would alter the manner in which FPL maintains its books and records. This is "affirmative relief". Therefore, if FPL believes the plan should become final it has the burden to demonstrate that the plan is reasonable, appropriate and in the public interest.

Unlike most proceedings before the Commission, there was no petition filed in this docket. Very early in 1997, staff recognized, that based on historic and projected data, FPL would exceed the maximum of its authorized return on equity (ROE) in 1998. Staff, on its own initiative, met with the Company, the Office of Public Counsel and all other known interested persons to address this situation. As a result the Plan was presented to the Commission in a recommendation. Thus, FPL, by virtue of the fact that it does not have a pending petition, does not have an affirmative request for relief pending. However, this does not alter the fact that the Plan is affirmative relief with which FPL concurred. Therefore, FPL must show the plan is appropriate, reasonable and in the public interest by a preponderance of the evidence.

ISSUE 6: What is the appropriate scope of this docket?

RECOMMENDATION: The scope of this docket should be limited to the consideration of extending the plan for 1998 and 1999 and to the examination of the elements of the plan. (SLEMKEWICZ)

STAFF ANALYSIS: In the Staff's opinion, the scope of this docket should be limited to the consideration of whether to approve the proposal to extend and modify the 1996/1997 "plan", approved in Order No. PSC-96-0461-FOF-EI, for the years 1998 and 1999. This would include the examination of the appropriateness of the elements, and their related amortization periods, included in the proposal for 1998 and 1999 that was the subject of Order No. PSC-97-0499-FOF-EI. The purpose of the plan was to mitigate the future impact of past deficiencies related to Commission prescribed depreciation, dismantlement and decommissioning accruals.

The plan contains historical expense elements that are "normally" recovered over an extended period of time in a regulated environment. Known historical amounts are related to the book-tax timing differences and the unamortized loss on reacquired debt. Historical amounts that need to be determined include depreciation reserve deficiencies, fossil dismantlement reserve deficiencies and nuclear decommissioning reserve deficiencies. The determination of these amounts will be the subject of Commission review when the required studies are filed by FPL. The prudence of these expenses does not seem to be in question in this case. The primary issue appears to be the time period over which these items should be amortized to expense. The plan has the effect of recovering of these items over a shorter time period.

Although the scope of the docket in this proceeding has been addressed, it is Staff's opinion that it is premature to attempt to identify any particular issues at this time. The proper forums for developing the issues are issue identification meetings and the Prehearing.

ISSUE 7: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending resolution of AmeriSteel's protest of the Proposed Agency Action. (ELIAS)

STAFF ANALYSIS: This docket should remain open pending resolution of AmeriSteel's protest of the Proposed Agency Action.