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

[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.
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> 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 conduct limited proceedings and may 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]

[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.

[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

[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 SFHA's private purposes.

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

Nor can the SFHA plausibly argue that relying upon the FPSC's complaint procedure would delay the relief it seeks. Most likely, the FPSC could have acted upon such a complaint before this appeal will be concluded. Moreover, by filing a

complaint rather than seeking a remand of the Stipulation Order, the SFHA would not be placing the continued validity of the Stipulation in jeopardy as it does here.[14]

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

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

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

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

[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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