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.,

Appellants,

v.

LILA A. JABER, et al.,

Appellees.

ANSWER BRIEF OF APPELLEES, THE CITIZENS OF THE STATE OF FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

The Florida Public Service Commission's ("PSC") Order No. PSC-02-0501-AS-EI (hereinafter "Order No. 501") approved a stipulation and settlement (the "2002 Stipulation") endorsed by all but one of the parties to Phase 2 of the PSC's Docket No. 001148-EI, In re: Review of the retail rates of Florida Power & Light Company. [Vol. 62: 11899][1] 02 F.P.S.C. 4:245 (2002). The order fully resolved FPL's rate review proceeding and also provided for accelerated refunds of fuel cost over-recoveries in Docket No. 020001-EI, In re: Fuel and purchased power cost recovery clause with generating performance incentive factor. The South Florida Hospital and Healthcare Association ("Hospitals"), an intervenor in the FPL docket (but not in the fuel docket), chose not to participate in the 2002 Stipulation. The PSC's order implemented an additional $250 million annual reduction in FPL's base rates on April 15, 2002, immediately after a previous stipulation and settlement (the "1999 Stipulation") expired on April 14, 2002. The 1999 Stipulation had, inter alia, reduced FPL's base rates by $350 million per year beginning three years earlier. The 2002 Stipulation raised the level of rate reductions

[1]Record citations will be given by the volume number followed by the page number: [Vol. xx:xxxx]

to $600 million per year (by adding an additional $250 million) and carried forward an incentive plan first adopted by the PSC when it approved the 1999 Stipulation.

The 1999 Stipulation resolved a rate case begun in early 1999 when the Office of Public Counsel petitioned the PSC to reduce FPL's base rates and charges. The Hospitals did not participate in the 1999 docket. The stipulation required FPL to lower its base rates and to refund revenues which exceeded targeted levels for each of the three succeeding twelve-month periods (April 15th of one year to April 14th of the next). The 1999 Stipulation also provided that no proceeding to change FPL's base rates, including any interim rate changes, would be filed to take effect during the three-year term of the stipulation.[2] The rate reduction and the refund of excess revenues benefited all of FPL's customers, including the Hospitals. Rate reductions under the 1999 Stipulation exceeded $1 billion, while the revenue-sharing plan generated an additional $218 million in refunds.

The revenue-sharing plan introduced a new approach to incentive regulation in Florida. For each twelve-month period, a base rate revenue range was established. FPL retained all revenues below the floor of the range. Within the

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[2]In re: Petition by the Citizens of the State of Florida for a full revenue requirements rate case for Florida Power & Light Company, Order No. PSC-99-0519-AS-EI (March 17, 1999); 99 F.P.S.C. 3:368 (1999).

range, revenues were shared, one-third being retained by the company and two-thirds being refunded to customers with accrued interest. Above the top of the range, all revenues were to be refunded to customers with interest. FPL was given an incentive to lower expenses and become as efficient as possible to maximize its profits within the constraints of the revenue thresholds. Requiring refunds above the revenue thresholds allowed customers to share in revenue growth attributable to factors outside the company's control. When the 1999 Stipulation expired, FPL might be a leaner company amenable to additional rate reductions while continuing the incentive program.

Public Counsel, FPL, and others were well aware a new agreement might be negotiated upon expiration of the 1999 Stipulation. As events developed, a PSC docket initiated for other purposes evolved into a review of FPL's rates which provided a forum for negotiations which culminated in the 2002 Stipulation.

In December, 1999, the Federal Energy Regulatory Commission (FERC) had issued its Order No. 2000 which encouraged electric utilities subject to that agency's jurisdiction to voluntarily form Regional Transmission Organizations

(RTOs).[3] Later, on July 31, 2000, FPL announced its merger with Entergy Corporation.

The PSC opened the FPL docket on its own motion on August 15, 2000, to review: (1) FPL's proposed merger with Entergy Corporation; (2) formation of an RTO in response to FERC's Order No. 2000; and (3) the effect these two events might have on FPL's rates. [Vol. 1: 29] The docket was originally entitled: In re: Review of Florida Power & 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. Public Counsel intervened on behalf of the Citizens of the State of Florida on August 18, 2000. [Vol. 1: 30, 32]

On November 6, 2000, the Prehearing Officer, Commissioner Baez, issued an "Order Establishing Procedure," which stated, at page 1: "Pursuant to the authority granted by Section 366.076, Florida Statutes, this docket was opened to consider the effect on Florida Power & 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. No hearing is currently scheduled. . . . Parties are reminded that pursuant to Section 366.076(1), Florida

[3]Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999).

Statutes, the decision to consider issues in this proceeding is vested in the Commission. The hearing, if held, will be conducted according to the provisions of Chapter 120, Florida Statutes, ..." [Emphasis added.] Order No. PSC-00-2105-PCO-EI. [Vol. 1: 41] 00 F.P.S.C. 11:87 (2000). The reference in the order to Section 366.076 meant the PSC intended the docket to be a "limited proceeding" in which the PSC itself defines the issues to be considered.[4] The pending expiration of the 1999 Stipulation, seventeen months in the future, was not a matter of PSC concern at this time.

The PSC had previously opened another docket to consider Florida Power Corporation's merger with Carolina Power & Light Company and Florida Power Corporation's role in forming an RTO. A third docket was opened to consider Tampa Electric Company's participation in the RTO. (Tampa Electric was not involved in a merger.) The three companies had jointly responded to FERC's Order No. 2000 by proposing the formation of a peninsular Florida RTO to be known as GridFlorida. The PSC bifurcated the FPL and Florida Power

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[4]Section 366.076(1), Florida Statutes (2001), provides: "Upon petition or its own motion, the commission may conduct a limited proceeding to consider and act upon any matter within its jurisdiction, including any matter the resolution of which requires a public utility to adjust its rates to consist with the provisions of this chapter. The commission shall determine the issues to be considered during such a proceeding and may grant or deny any request to expand the scope of the proceeding to include other matters."

Corporation proceedings and established schedules which allowed for the RTO issue, as it applied to each of the companies, to be heard at the same time. Phase 1 of the FPL and Florida Power Corporation dockets were combined (although not consolidated) with the Tampa Electric docket to consider GridFlorida issues. Phase 2 of the FPL and Florida Power Corporation dockets proceeded independently to consider the effects of the respective mergers on each company's rates. Consideration of FPL's retail rates went forward in the Phase 2 proceeding resulting in the order now under review.[5]

The Hospitals petitioned to intervene on May 2, 2001, while the docket was still intended to address GridFlorida and the merger with Entergy Corporation. [Vol. 1: 141] The Hospitals did not specifically allege they would suffer injury in fact from resolution of the docket, nor did they request a hearing.

The Hospitals are commercial customers of FPL, taking service under various commercial or industrial rate schedules. Other entities representing commercial customers which intervened in the FPL docket (in addition to Public

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[5]FPL petitioned the PSC (as did the other two companies) asking that its participation in GridFlorida be found prudent and asking for an expedited hearing in Phase 1. [Vol. 2: 375] No one filed a petition or asked for a hearing in Phase 2. The PSC denied a joint motion by the three companies to establish a separate generic docket for the GridFlorida RTO. Order No. PSC-01-1372-PCO-EI. [Vol. 2: 421] 01 F.P.S.C. 6:440 (2001). Thus, much of the record on appeal pertains only to Phase 1 and not to the Phase 2 procedure leading to the order on appeal.

Counsel) were the Florida Industrial Power Users Group (FIPUG), [Vol. 1: 38] Publix Super Markets, Inc., [Vol. 50: 9763] the Florida Retail Federation, [Vol. 61: 11675] Lee County, [Vol. 58: 11182] and Dynegy Midstream Services, LLP, [Vol. 1: 136] all of whom signed and supported the 2002 Stipulation. Mr. and Mrs. Twomey, residential customers of FPL, also intervened and supported the stipulation. [Vol. 36: 7118]

A PSC order issued on June 19, 2001, reported various matters which might affect FPL's base rates, including for the first time the pending expiration of the 1999 Stipulation in mid-April, 2002, (which was now less than a year in the future) and directed FPL to file minimum filing requirements (MFRs). Order No. PSC-01-1346-PCO-EI. [Vol. 2: 395] 01 F.P.S.C. 6:378 (2001). The docket's title was changed to: In re: Review of the retail rates of Florida Power & Light Company. Inasmuch as the GridFlorida matter was being considered separately in the Phase 1 proceeding and FPL had announced on April 2, 2001, that its merger with Entergy Corporation had been terminated, the PSC chose to change the focus of the Phase 2 proceeding to address FPL's rates generally. The order concluded, at page 6, that, in light of the terms of the 1999 Stipulation, the PSC would not subject any of FPL's revenues to possible refund under the interim-rate provisions of Section 366.071, Florida Statutes (2001). [Vol. 2: 400] Although FPL was directed to file

MFRs to provide the PSC and intervenors with the basic information contained in those documents, the PSC did not at that time or at any other designate the party seeking affirmative relief in the proceeding who might bear the burden of proof to change FPL's existing rates if the matter ultimately went to hearing.

The Hospitals, on July 5, 2001, (before their intervention had been granted) petitioned for clarification or, in the alternative, reconsideration of the PSC's decision not to hold interim rates subject to refund. [Vol. 2: 457] The Hospitals noted that "the June 19, 2001 Order was not the product of a complaint by a participant [in the docket]." [Vol. 2: 458]

On July 6, 2001, the day after petitioning for clarification/reconsideration, the Hospitals filed a complaint against FPL, which the PSC assigned to a separate docket. In their complaint, the Hospitals alleged they were not bound by the terms of the 1999 Stipulation and asked the PSC to impose an interim rate reduction pursuant to Section 366.071, Florida Statutes (2001). After FPL moved to dismiss the complaint, the Hospitals responded to FPL's motion and concurrently filed an amended petition for interim rate relief. FPL then moved to dismiss the Hospitals' amended petition.

Commissioner Baez granted the Hospitals' intervention on August 31, 2001, stating that, pursuant to Rule 25-22.039, Florida Administrative Code, the Hospitals

took the case as they found it. Order No. PSC-01-1783-PCO-EI, at 2. [Vol. 37: 7204] 01 F.P.S.C. 8:367 (2001). He also informed the Hospitals that any issues they might raise in the Phase 2 proceedings were "subject to the Commission's ultimate determination as to the specific issues to be addressed." Id. at 3. [Vol. 37: 7205]

FPL filed its first set of MFRs on September 17, 2001, [Vol. 38: 7394; Vol. 39: 7611] and made additional MFR filings on October 1, 2001, [Vol. 41: 8004; Vol. 42: 8205] October 15, 2001, [Vol. 46: 9002; Vol. 47: 9142] and November 9, 2001. [Vol. 49: 9552] In its October 1, 2001, transmittal letter, FPL said: "[The company] is not presently proposing to change rates, and it is not aware of the issues that need to be addressed in this docket." [Vol. 41: 8004] In its October 15, 2001, transmittal letter, FPL stated: "Because FPL is not proposing to change rates at this time, it has not incorporated into its MFRs any company adjustments to test-year results." [Vol. 46: 9002] In the November 9, 2001, transmittal letter, FPL said it had revised certain forecasts in light of events on September 11th [Vol. 49: 9552] and stated, at page 2: "As before, FPL has not incorporated into the enclosed MFRs any company adjustments to the test-year results because it is not proposing to change rates at this time." [Vol. 49: 9553]

The PSC dismissed the Hospitals' complaint and denied their motion for clarification/reconsideration on September 25, 2001. Order No. PSC-01-1930-PCO-EI, in Dockets Nos. 010944-EI (the Hospitals' complaint docket) and 001148-EI (the FPL rate review docket). [Vol. 40: 7818] 01 F.P.S.C. 9:347 (2001) The PSC said, at page 6 of its order, that "this Commission, on its own motion, initiated the current FPL rate proceeding" and "we considered, on our own motion, the question of whether to establish interim rates." [Vol. 40:7823] The PSC found, at page 11, that "[the Hospitals'] request seeks a rate reduction for select customers. Granting this relief would create unduly discriminatory rates." [Vol. 40: 7828] The Hospitals did not appeal.

On October 24, 2001, Commissioner Baez issued a second "Order Establishing Procedure." Order No. PSC-01-2111-PCO-EI. [Vol. 48: 9394] 01 F.P.S.C. 10:484 (2001). The nature of the proceeding was addressed at page 8: "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." [Vol. 48: 9401] The schedule adopted in the order allowed "[a]pproximately 90 days . . . to explore settlement of some or all of the issues short of a full hearing; and . . . [t]he staff to file a recommendation concerning an alternate procedure for processing this case if it

appears to staff to be warranted." [Vol. 48: 9402] The schedule was revised further on January 15, 2002. Order No. PSC-02-0089-PCO-EI. [Vol. 53: 10203] 02 F.P.S.C. 1:99 (2002).

The PSC staff, on January 4, 2002, filed a compilation of potential issues. [Vol. 52: 10012] FPL responded on January 7, 2002, (the date is stated incorrectly on the pleading as "January 7, 2001") expressing its concern that the purpose of the proceeding had never been made clear:

> FPL remains concerned that there are numerous issues reflected on the Compilation of Issues that FPL cannot and should not be expected to address in direct testimony. As FPL observed at the December 21 informal meeting and on several occasions previously, FPL should not generally have the burden of proof concerning the 2002 test year results that are the focus of this proceeding, because FPL did not initiate this proceeding and has not proposed to revise rates. Parties advocating adjustments to FPL's test year results and/or FPL's rates have the burden of proving by substantial competent evidence that those adjustments should be made. FPL recognizes that not all of the parties to this proceeding agree with FPL's position on burden of proof. [Vol. 52: 10074]

In his January 16, 2002, "Order Identifying Issues," Commissioner Baez said FPL's witnesses were not expected to put on an affirmative case but need only be offered to sponsor the company's MFRs:

> The attached issue list includes numerous issues concerning Florida Power & Light Company's (FPL) 2002 test year projections that are necessarily stated broadly at this time. Those broad issues are needed to provide structure to the Commission's ultimate decision in

> this docket. The parties are working cooperatively to identify specific concerns with respect to those issues. Where no specific concern has been identified, it is anticipated that FPL will address the issue in its direct testimony by sponsorship and general explanation of its MFRs, with the understanding that all parties may raise specific concerns about any of the issues in their testimony and FPL will have an opportunity to respond to those specific concerns in its rebuttal testimony. Order No. PSC-02-0102-PCO-EI. [Vol. 53: 10218] 02 F.P.S.C. 1:130 (2002).

The last issue in the "Order Identifying Issues," Issue 158, indicated the PSC had not yet identified the party which bore the burden of proof. [Vol. 53: 10237]

The PSC's February 26, 2002, "Notice of Hearing and Prehearing Conference" stated that the purpose of the hearing would be to "permit parties to present testimony and exhibits relative to the review of the retail rates of Florida Power & Light Company and to address any motions or other matters that may be pending at the time of the hearing. . . . At the hearing, all parties shall be given the opportunity to present testimony and other evidence on the issues identified by the parties to the prehearing conference held on March 25, 2002." [Vol. 58: 11122] It was still not clear who was seeking affirmative relief or who had the burden of proof. As late as March 13, 2002, the PSC was apparently not sure of the full scope of the proceeding. In his order denying intervention to NUI Energy, Inc., on that date, Commissioner Baez said: "Should issues subsequently be identified that affect NUIE's substantial interests, then NUIE may petition for leave to intervene

again." Order No. PSC-02-0324-PCO-EI. [Vol. 61: 11732] 02 F.P.S.C. 3:129 (2002).

The March 25, 2002, prehearing conference was not held. On March 14, 2002, the PSC granted "Florida Power & Light Company's Agreed Motion to Suspend Schedule for Hearing and Prehearing Procedures and to Suspend Discovery" while the PSC reviewed and ruled upon the "Joint Motion for Approval of Stipulation and Settlement" which had been filed contemporaneously on March 14, 2002. Order No. PSC-02-0348-PCO-EI. [Vol. 61: 11785] 02 F.P.S.C. 3:185 (2002).

Previously, on October 24, 2001, Commissioner Baez, had said: "[I]f at any point, staff believes the proceeding should be concluded , it can prepare a recommendation for Commission consideration." Order No. PSC-01-2111-PCO-EI, at 8. [Vol. 48: 9401] On March 18, 2002, the PSC staff filed its recommendation that the jointly proposed stipulation and settlement be approved and that the proceeding be concluded, stating: "It 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." [Vol. 62: 11798, 11802]

The PSC considered the 2002 Stipulation at its March 22, 2002, agenda conference at which all parties participated. [Vol. 62: 11835] The 2002 Stipulation was supported by all the signatories: FPL, Public Counsel, FIPUG, the Florida Retail Federation, Publix, Lee County, Dynegy Midstream and the Twomeys. A representative of AARP also spoke in favor of the stipulation. The Hospitals' attorney asked Commissioners to defer a decision on the stipulation, allow discovery to proceed, and then hold a hearing – on the stipulation. [Vol. 62: 11855] When Chairman Jaber asked what the full magnitude of the $250 million rate reduction would be over the stipulation's term, a staff member answered that "[i]t's probably close to a billion dollars over the three and three-quarters years in total." [Vol. 62: 11862]

The PSC voted unanimously to approve the 2002 Stipulation. That decision was reflected in the PSC's "Order Approving Settlement, Authorizing Midcourse Correction, and Requiring Rate Reductions," Order No. 501, issued April 11, 2002. [Vol. 62: 11899]

Shortly thereafter, on April 23, 2002, the PSC voted to accept a similar stipulation in resolution of the Florida Power Corporation docket. The stipulation in the Florida Power Corporation case reduced that company's rates by $125 million per year and provided for a revenue-sharing plan patterned after the 1999 and 2002

Stipulations for FPL. Florida Power Corporation also agreed to the early return of fuel over-recoveries, as in the FPL case. Public Counsel, FIPUG, the Florida Retail Federation, and Publix, participants in FPL's 2002 Stipulation, were also signatories to the Florida Power Corporation stipulation. (The Hospitals were not a party to the Florida Power Corporation docket.) The PSC approved the Florida Power Corporation stipulation by final order on May 14, 2002.[6] Florida's two largest electric utilities are now operating under similar revenue-sharing incentive regulation plans.

In their April 26, 2002, newsletter (News Line, Volume XXXVI, No. 3), the Hospitals claimed credit for FPL's 2002 Stipulation: "After winning an across the board reduction in electricity costs of 7% from Florida Power & Light (FPL), the hospitals participating in the Association's power project have agreed to continue pressing the energy giant for additional concessions."[7]

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[6]In re: Review of Florida Power Corporation's earning including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light, and In re: Fuel and purchased power cost recovery clause with generating performance incentive factor, Order No. PSC-02-0655-AS-EI; 02 F.P.S.C. 5:130 (2002).

[7]On the Internet, go to www.sfhha.com/newsletter.htm. Under the heading "Previous Newsletters," click on the link April 2002, then click on the link SFHHA'S POWER PROJECT MOVES AHEAD.

That same day, April 26, the Hospitals filed their Notice of Appeal. [Vol. 62: 11919]

SUMMARY OF ARGUMENT

As a result of the PSC's approval of the 2002 Stipulation, the Hospitals are currently enjoying lower base rates and lower fuel adjustment charges from FPL, and they will share in future refunds on the same basis as all other customers. Standing to appeal under relevant statutory and case law requires the appellants to demonstrate they were "adversely affected" by the order under review. The Hospitals, however, make no such allegation. Because the 2002 Stipulation was uniformly beneficial to them, the Hospitals have not alleged they were adversely affected by the order below; they have not asked for a stay of the order; and they have not asked that the PSC's order be reversed. This appeal should be dismissed because the Hospitals lack the requisite standing to appeal.

The Hospitals' only argument on appeal is that, as parties below, they were not afforded a hearing pursuant to Sections 120.569 and 120.57, Florida Statutes (2001). The Hospitals, however, have ignored relevant case law which defines a party entitled to a hearing as a person who will suffer injury in fact as a result of the agency's proposed action. The Hospitals have neither alleged nor demonstrated they suffered any injury at all from the PSC's approval of the 2002 Stipulation. In

any event, the March 22, 2002, agenda conference at which the Hospitals' attorney made a presentation to the PSC provided the Hospitals with an adequate opportunity to address the merits of the stipulation. Moreover, Section 120.57(4) allows the PSC to resolve "any proceeding" by stipulation without the need for a hearing.

Electric rates paid by FPL's various rate classes are governed, for the most part, by a concept known as rate "parity," which means that each rate class should pay rates which, to the extent practicable, provide FPL the same rate of return based on the investment and expenses necessary to serve each rate class. The rates of the Hospitals were so far below parity that a hearing would have resulted in a smaller decrease or, theoretically, even a rate increase for all commercial customers in the Hospitals' rate classes.

If the Hospitals believe that FPL's rates are excessive under the 2002 Stipulation, they should file a petition with the PSC, assert the factual and legal basis for their position, request a hearing, and put on their case. Nothing in constitutional, statutory, or case law, however, mandates that the Hospitals must have the hearing they want in the docket the PSC initiated for the agency's own purposes.

STANDARD OF REVIEW

A PSC order comes before the court with a presumption that it was made within the agency's statutory powers and that it reached a correct result, including the presumption that the result was reasonable and just for the utility and utility customers alike. Moreover, "in the final analysis, the public interest is the ultimate measuring stick to guide the PSC in its decisions." Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So. 2d 259, 262-264 (Fla. 1999).

ARGUMENT

I.

THE HOSPITALS DO NOT HAVE STANDING TO APPEAL BECAUSE THEY WERE NOT ADVERSELY AFFECTED BY THE PSC'S ORDER APPROVING THE 2002 STIPULATION.

As a result of the PSC's approval of the 2002 Stipulation, base rates paid by the Hospitals are 7% lower, as are the rates of all FPL customers (except for street and outdoor lighting customers). All customers also received their proportionate share of the $200 million of fuel cost over-recoveries, and all customers will share in future refunds. No one was harmed by agency action in the PSC docket.

The first sentence of Section 120.68(1), Florida Statutes (2001), states: "A party who is adversely affected by final agency action is entitled to judicial review." The notice at page 7 or Order No. 501 informed the Hospitals: "Any party

adversely affected by the Commission's final action in this matter may request . . . judicial review by the Florida Supreme Court." [Vol. 62: 11905] The Hospitals are obviously aware of the threshold standard for appellate review of the PSC order. Even so, the Hospitals filed their initial brief without reference to Section 120.68(1) and without any claim that they were adversely affected by the 2002 Stipulation or by the order approving it.

This court addressed the issue of appellate standing to challenge a PSC order in Legal Environmental Assistance Foundation v. Clark, 668 So. 2d 982, 987 (Fla. 1996):

> Section 120.68(1) sets forth the standard for judicial review of administrative action and states that '[a] party who is adversely affected by final agency action is entitled to judicial review.' Thus, there are four requirements for standing to seek such review: (1) the action is final; (2) the agency is subject to the provisions of the act; (3) the person seeking review was a party to the action; and (4) the party was adversely affected by the action. See Daniels v. Florida Parole & Probation Comm'n, 401 So. 2d 1351 (Fla. 1st DCA 1981), aff'd sub nom. Roberson v. Florida Parole & Probation Comm'n, 444 So. 2d 917 (Fla. 1983).

The PSC had allowed LEAF to intervene in the docket, and the court found that LEAF was a party to the PSC proceeding. "This determination, however, is not dispositive of the issue of whether LEAF has standing to appeal the Commission's

action. . . . LEAF must . . . still demonstrate that it will be adversely affected by the Commission's decision." 668 So. 2d at 987.

LEAF had disputed the PSC's application of a pass/fail standard to the utilities' achievement of assigned conservation goals. Under this approach, a utility might be penalized for failing to meet its goals or face the possibility of the PSC imposing goals upon it.[8] The court concluded that LEAF could not be harmed from the PSC's adoption of conservation goals for a utility:

> From our review of the record and LEAF's written and oral arguments, we simply find no basis to conclude that LEAF's interests are adversely affected by this agency action. Only the affected utilities would have standing to seek review of this particular agency action and none of the utilities sought review. Accordingly, we hold LEAF does not have the requisite standing to contest this portion of the Commission's order on appeal.
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> 668 So. 2d at 987.

See Florida Chapter of the Sierra Club v. Suwanee American Cement Co., Inc., 802 So. 2d 520 (Fla. 1st DCA 2001), in which the court, relying on this court's decision in Legal Environmental Assistance Foundation, granted a motion to

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[8]LEAF is an environmental organization whose interests, as would be expected, are in having electricity usage reduced as much as possible. Any conservation program would further LEAF's interests, but from the organization's perspective, the more conservation the better. It is not clear in the opinion, but apparently LEAF was concerned that the possibility of penalties being imposed would lead utilities to reject certain conservation programs.

dismiss an appeal because neither of the appellants were adversely affected by the Department of Environmental Protection's order granting the appellee a permit to construct a cement production plant.

FPL's rates to the Hospitals are lower as a result of Order No. 501. Only FPL could be adversely affected by the loss of revenues. The Hospitals should not be allowed to accept the rate reduction and other benefits from the 2002 Stipulation while at the same time insisting on further proceedings so that they might challenge the order approving the stipulation.

II.

THE PSC DID NOT HAVE TO GIVE THE HOSPITALS A HEARING.

A. THE HOSPITALS ARE NOT ENTITLED TO A HEARING IN THE PSC-INITIATED DOCKET, BUT ARE FREE TO FILE A PETITION OF THEIR OWN.

The PSC opened the FPL docket on its own motion in August, 2000, as a limited proceeding to investigate FPL's participation in the GridFlorida RTO and its proposed merger with Entergy Corporation. When the PSC – again on its own motion – changed course on June 19, 2001, and ordered FPL to file MFRs to facilitate a base rate review, the Hospitals found their May, 2001, petition to intervene pending in an altogether different proceeding. The August, 2001, order

granting the Hospitals' intervention informed them of changes in the docket and told the Hospitals that, as intervenors, they took the case as they found it. [Vol. 37: 7204] Commissioner Baez's procedural order on October 24, 2001, reiterated that the docket had been initiated on the PSC's own motion and "[a]s such, if, at any time, staff believes the proceeding should be concluded, it can prepare a recommendation for Commission consideration." [Vol. 48: 9401] The Hospitals had not asked for a hearing when they petitioned to intervene, and when they were later faced with the distinct possibility that the revised docket might be concluded without a hearing, the Hospitals still did not ask for a hearing.

The Hospitals provide only one record citation for their frequent claims (Brief, at 2, 16, 17, 21, 22, 26, and 35) that they requested a hearing, referring at page 16 of their brief to volume 62, page 11,855, of the record on appeal. The reference is to page 21 of the March 22, 2002, agenda conference transcript. There, the Hospitals' attorney, Mr. Wiseman, said: "What we would ask is that you defer ruling on this stipulation; that what you do is you allow the discovery process to be completed so that we obtain the information concerning FPL's affiliate dealings and concerning its resource planning process; that after obtaining that discovery, you hold a hearing on the merits of the settlement proposal to find out whether the settlement proposal, in fact, results in just and reasonable rates."

Mr. Wiseman did not ask the PSC to reject the 2002 Stipulation outright on either factual or legal grounds. He did not, for example, claim the PSC could not accept the stipulation under any circumstances. He only asked the PSC to "defer ruling on this stipulation." The Hospitals apparently envision a hearing in which they might contend that FPL should reduce revenues by more than the $250 million called for in the stipulation (while ignoring the fuel cost reductions and future base rate refunds which were also required). If the Hospitals prove unsuccessful at hearing, they apparently believe the PSC would then be free to adopt the 2002 Stipulation in its current form by final order.

Mr. Wiseman's request for a hearing on the stipulation might have made sense if FPL and other parties had stipulated to a rate increase. Then, Mr. Wiseman could have identified some harm to his clients. And, under those circumstances, he might reasonably insist that FPL be put to its proof. The 2002 Stipulation, however, implemented rate reductions and other benefits for his clients. Viewed in this light, consider what Commissioners did not hear from Mr. Wiseman. He did not claim entitlement to some hearing the PSC had purportedly promised at an earlier stage in the proceeding.[9] And he did not claim the Hospitals would be injured if the

[9]The Hospitals' contention that a procedural order in October, 2001, promised a hearing is addressed below beginning at page 30 of this brief.

stipulation were approved. He just suggested the PSC defer approval, hold a hearing, and see what comes out of the process.

The Hospitals waited until the PSC convened an agenda conference to consider formal acceptance of the 2002 Stipulation before asking for a hearing, and then the Hospitals asked for a hearing on the stipulation – a stipulation which reduced their base rates, reduced their fuel adjustment charges, and offered them base rate refunds in the future.[10] A fundamental tenet of Florida administrative law, however, is that a party is only entitled to a hearing if the contemplated agency action would be injurious to that party. See Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981)("We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show . . . he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing."); Manasota Osteopathic General Hosp. v. Dept. of Health & Rehabilitative Services, 523 So. 2d 710, 711 (Fla. 1st DCA 1988) ("Party status in Section 120.57(1) hearings requires a

[10]It would seem the Hospitals would have to be better off filing a case of their own after the benefits from the 2002 Stipulation were firmly in place instead of risking all by challenging the stipulation itself. On this point, as with much of the Hospitals' brief, what has not been said is more noteworthy than what is specifically argued. The Hospitals have not alleged on appeal that an alternative, fully effective remedy is unavailable to them.

'substantial interest' in the outcome, such interest being defined as a sufficiently immediate injury in fact within the zone of interest the proceeding was designed to protect. Agrico Chemical Company, Inc. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981).").

The Hospitals acknowledged the applicability of the injury-in-fact standard to the issue of standing in paragraph 9 of their petition for intervention as follows:

> For a potential intervenor to demonstrate that its substantial interests will be affected by a proceeding, the potential intervenor must show: (a) it 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; and (b) the injury suffered is of a type against which the proceeding is designed to protect. See Ameristeel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997). [Vol. 1: 143]

In spite of this correct statement of the requirements for standing, the Hospitals did not provide any allegations that they would suffer injury in fact, nor did they request a hearing; they simply asked to intervene in the PSC-initiated docket.

The Hospitals' sole argument on appeal is that Sections 120.569 and 120.57, Florida Statutes (2001), require an agency to afford any party an opportunity for hearing in any agency proceeding. FPL has approximately four million customers and provides electricity to half the population of the state. Ninety-five percent of its customers are residential or small commercial customers. Under the Hospitals' interpretation of administrative law, any one of those customers, perhaps even a

single residential customer allowed to intervene at the PSC, could stymie any attempt by other parties to reach a balanced resolution for the good of all concerned.[11]

The administrative process is not so lacking in structure, however, as the Hospitals' own petition to intervene demonstrates. Controlling case law requires a showing of injury in fact under the standard first announced in Agrico and adopted by this court in Ameristeel before an agency can be forced to hold a hearing. It must be assumed that the Hospitals, although obviously well aware of the injury-in-fact requirement, intentionally omitted reference to Agrico or Ameristeel from their brief because they are unable to demonstrate that PSC approval of the 2002 Stipulation caused any harm.

Even if we were to assume the Hospitals' substantial interests might once have been at risk because a possible (but unlikely) outcome of the docket was a rate increase, the docket took a distinctly different turn when the 2002 Stipulation was offered for consideration. At that point, the issue before the PSC was whether to accept a proposed rate reduction, and the only party who could suffer injury in fact was the utility – which had bargained away any right to object. The PSC

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[11]One residential customer was, in fact, allowed to intervene in the docket, Mr. and Mrs. Twomey. Order No. PSC-01-1675-PCO-EI. [Vol. 36: 7118] 01 F.P.S.C. 8:193 (2001). The Twomeys, however, supported the 2002 Stipulation.

should be allowed to permit intervention in its dockets on a liberal basis without running the risk that it might be forced to hold hearings upon the insistence of a party that cannot satisfy the injury-in-fact standard.[12]

The Hospitals say they opposed the 2002 Stipulation because their experts had found $475 million of adjustments, and FPL's witnesses were expected to give up another $60 million on cross-examination. (Brief, at 26-27) Presumably, FPL would not be able to fashion offsetting adjustments to increase revenues, nor would it be able to rebut the Hospitals' experts, nor could its own experts resist enormous dollar concessions on cross-examination. All trials should be so easy. In fact, the Hospitals' allegations are just large numbers, indicative of nothing.

More to the point, there is no correlation between the large dollar amounts the Hospitals dredged up and their legal arguments. Those arguments would be the

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[12]The case of Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731 (Fla. 1985), is illustrative. The City and FPL filed a territorial agreement (i.e., a stipulation) which the PSC initially approved as a proposed agency action (PAA). A group of citizens who would be transferred protested. The PSC thereafter rejected the agreement because no benefit would accrue to South Beach residents. The court reversed, noting that "the PSC refused to approve the territorial agreement without a hearing. . . . It did not say that anyone would be harmed by the agreement." 469 So. 2d at 732. "The legal system favors the settlement of disputes by mutual agreement among the parties." Id. at 732. "The agreement as a whole contained no detriment to the public and should have been approved." Id. at 733. A fair reading of the court's opinion would suggest that, where the PSC can reasonably predict no one will be harmed by the agency's actions, it can issue a final order.

same if the Hospitals had not filed testimony and instead had just said they were sure that FPL's witnesses would concede on cross-examination to $500 million, $1 billion, or any other level of revenue reduction. Distilled to its essence, the Hospitals' position is that any intervenor, once allowed to participate as a party, whether injured or not by agency action, can thwart a settlement for any reason by insisting on a hearing. Even if this might be true in a case where FPL had asked for a rate increase or a case in which the Hospitals had petitioned for a rate decrease, it makes no sense in the context of a PSC-initiated case intended to investigate whether any rate adjustment at all was appropriate. The PSC reserved the freedom to conclude its own docket at any time. The 2002 Stipulation allowed the PSC to close the case with assurances that almost everyone would be satisfied on a going-forward basis. The Hospitals were in no way prejudiced by this result because they received all of the stipulation's benefits and can, at any time, initiate their own case and ask for any relief they believe appropriate. Moreover, the Hospitals have not alleged that a hearing outside the PSC-initiated docket would not afford them ample opportunity to represent their interests.

None of the cases cited by the Hospitals in their brief require a hearing for someone in the Hospitals' position who has not been harmed by agency action. See Florida Gas Co. v. Hawkins, 372 So. 2d 1118 (Fla. 1979), (Brief, at 23-24)

(PSC cannot adversely determine a utility's substantial interests – by deciding the status quo should be maintained – without giving the utility a hearing on its request for a rate increase); Citizens v. Mayo, 333 So. 2d 1 (Fla. 1976) (Brief, at 24) (PSC could not preclude Public Counsel from a hearing on an interim rate increase adversely affecting customers); Village Saloon, Inc. v. Division of Alcoholic Beverages & Tobacco, 463 So. 2d 278 (Fla. 1st DCA 1984), (Brief, at 24-25) (Saloon could not be fined $250 without a hearing); Citizens of the State of Florida v. Wilson, 568 So. 2d 904 (Fla. 1990), (Brief, at 25) (PSC could not give final approval to a tariff increasing customer rates without a hearing and shift the burden to another party to file a complaint and prove the tariff unreasonable); Shaker Lakes Apartments Co. v. Dolinger, 714 So. 2d 1040 (Fla. 1st DCA 1998), (Brief, at 25) (Apartment complex accused of marital discrimination, which thought its insurance company would provide legal representation, should have been allowed to assert excusable neglect for its failure to appear at the hearing); Peterson v. Dept. of Business Regulation, 451 So. 2d 983 (Fla. 1st DCA 1984) (Brief, at 27) (Applicants for liquor licence alleging harm from improper selection process entitled to hearing); Zarifian v. Dept. of State, 552 So. 2d 267 (Fla. 2nd DCA 1989) (Brief, at 27) (An individual fined by the Division of Licensing for being a security guard without a license entitled to a hearing on the disputed issue whether he, in fact, held

himself out as a security guard); Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123 (Fla. 2d DCA 1993) (Brief, at 27-28) (When the court, at 630 So. 2d 1126, said "when there is a disputed issue of fact to be determined, Section 120.57 requires a formal proceeding unless waived by all parties to the proceeding" [Emphasis in original], the court was merely distinguishing between formal and informal proceedings.).

B. THE PSC DID NOT PROMISE THE HOSPITALS A HEARING.

Much of the Hospitals' argument that the PSC was required to hold a hearing turns upon an incomplete quote from one of the Commissioner Baez's procedural orders. On page 7 of the Hospitals' brief, the following quotation from page 7 of Order No. PSC- 01-2111-PCO-EI [Vol. 48: 9400] appears:

> The Commission ordered the utility to file MFRs to determine what FPL's retail rates should be on a going forward basis. There are two means of addressing that issue with finality in Florida Administrative Law. First, via a settlement, agreed to by all parties to the proceeding and subsequently approved by the Commission. Second, via a hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes.

Referring to this passage at page 16 of its brief, the Hospitals claim "the Commission unequivocally ruled that there was a requirement to provide the hearing contemplated by Sections 120.568 [sic: 120.569] and 120.57 lest the rights of the parties be prejudiced. (R.9400) The only exception that the Commission found to

the requirement to provide the hearing was in the event a unanimous settlement could be reached by all parties."

The Hospitals make this argument in an attempt to establish that, because the PSC rejected FPL's request to follow a proposed-agency-action (PAA) process, the agency obligated itself to go forward with a formal hearing. Note, however, that this is not the hearing the Hospitals say they asked for at the March 22, 2002, agenda conference. Unable to maintain a consistent position, the Hospitals argue, on the one hand, that the PSC had to hold the rate review hearing mentioned in an October, 2001, order while, on the other hand, arguing the PSC erred by not holding the far more limited hearing the Hospitals requested in March, 2002, to address the 2002 Stipulation specifically.

The passage from Order No. PSC-01-2111-PCO-EI found in the Hospitals' brief was, in fact, followed by the following three sentences in the order:

> 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. There simply is no reason to require a recommendation to reconsider the Commission's direction when, if appropriate, the option already exists. [Vol. 48: 9400]

In other words, it was completely unnecessary to follow FPL's proposed procedure when the PSC had already reserved for itself complete discretion to

terminate the docket, including an open invitation to its staff to bring forth a recommendation to conclude the docket if staff thought such an action appropriate. This is exactly what transpired. Public Counsel, FPL and others filed a proposed stipulation and settlement, and the staff recommended the docket be concluded on that basis. [Vol. 62: 11802]

C. THE HOSPITALS HAVE NOT ASKED FOR A MEANINGFUL HEARING.

The Hospitals are apparently of the opinion that they can hold the 2002 Stipulation in place as a starting point for their attempt to extract even more from the utility, claiming that "[i]n a remanded proceeding, the Hospitals would be given the opportunity to develop a factual record to show that a rate reduction is warranted in excess of the $250 million that is provided by the settlement." Brief, at 19-20. The Hospitals have not asked that Order No. 501 be reversed. They want Order No. 501 to be final, yet incomplete, so that the PSC might be forced to continue its self-initiated docket so as to serve the Hospitals' purposes.

Presumably, under the Hospitals' approach, rate reductions now enjoyed by the Hospitals would stay in place, as would the reduced fuel cost recovery factors and future refunds. Stipulations, however, do not work that way. If the 2002 Stipulation is not accepted as full and final resolution of the PSC docket, then there

is no stipulation.[13] FPL, for example, would be free to ask for a rate increase, including the $11 million of rate case expense it was claiming. FPL might also ask to be reimbursed, perhaps through a surcharge on customer bills, for lost base rate and fuel recovery revenues since April 15, 2002. See GTE Florida, Inc. v. Clark, 668 So. 2d 971, 973 (Fla. 1996) (GTE was authorized to impose surcharges because "[i]t would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall from an erroneous PSC order."). The $250 million annual rate reduction amounts to approximately $21 million per month, which FPL might seek to recoup from its customers, including the Hospitals.[14] Current projections indicate FPL's revenues will be above the sharing threshold for calendar year 2002; so those refunds might also be lost to the Hospitals, as well as all other customers.

D. THE MARCH 22, 2002, AGENDA CONFERENCE PROVIDED AN ADEQUATE OPPORTUNITY FOR THE HOSPITALS TO BE HEARD.

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[13]Paragraph 15 of the 2002 Stipulation provides: "This Stipulation and Settlement is contingent on approval in its entirety by the FPSC. This Stipulation and Settlement will resolve all matters in this Docket pursuant to and in accordance with Section 120.57(4), Florida Statutes (2001). This Docket will be closed effective on the date the FPSC order approving this Stipulation and Settlement is final." Order No. 501, at 17. [Vol. 62: 11915]

[14]This is not meant to imply in any way that FPL is not fully supportive of the 2002 Stipulation. However, if the company finds itself forced into a rate case at the PSC, it can be expected to advocate its own interests.

It would appear that if the Hospitals' attorney could fashion an argument that the Hospitals would be adversely affected by a 7% rate reduction, future refunds, and an early return of fuel over-recoveries, he would have offered such an argument at the March 22, 2002, agenda conference. It strains credulity, however, to believe the Hospitals' attorney might need additional discovery before he could take a position on whether his clients were better off as a result of the 2002 Stipulation. In the conclusion to their brief (at 43), the Hospitals ask the court to order a hearing which will "comply with all procedural requirements specified in Section 120.57, in particular Section 120.57(2)(b)." Section 120.57(2)(b) defines the record for purposes of informal proceedings which do not involve disputed issues of material fact. The information before the PSC at the March 22, 2002, agenda conference satisfied that statute. The Hospitals have already had an opportunity for "a hearing on the merits of the settlement proposal."

E. THE PSC DID NOT HAVE TO RESOLVE DISPUTED ISSUES OF MATERIAL FACT TO CONCLUDE ITS RATE INVESTIGATION.

More than nine pages of the Hospitals' brief (26-35) are devoted to their contention that the PSC's Order No. 501 "depends upon disputed facts." The Hospitals' purported disputes are framed as though the Hospitals are opposing FPL's claims. FPL, however, maintained throughout the docket that it was not

asking for anything; it was just providing the information the PSC wanted in the agency's investigation and, as such, the company bore no burden of proof to maintain the status quo. The Hospitals' "disputes" are more in the nature of factual allegations the Hospitals would make in a proceeding initiated by the Hospitals to reduce FPL's rates where the Hospitals would bear the burden of proof. Florida Power Corporation v. Cresse, 413 So. 2d 1187, 1191 (Fla. 1982) ("Burden of proof in a commission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates.). Moreover, the PSC's Order No. 501 lowered the Hospitals' electric rates, and an agency does not have to resolve disputes unless a hearing is requested by a party likely to suffer injury from the agency's contemplated action.

The 2002 Stipulation did not resolve issues in favor of one party or another. It offered a 7% base rate reduction, fuel cost reductions, and refunds in lieu of having the PSC resolve any factual disputes. The Hospitals' attorney did not ask for a hearing so the Hospitals could receive definitive statements on the various topics they chose to address in discovery (which may or may not have found their way into the prehearing order for ultimate resolution at hearing); he said the PSC should hold a hearing "to find out whether the settlement proposal, in fact, results in just and reasonable rates." [Vol. 62: 11855] That was done on March 22, 2002.

F. SECTION 120.57(4) ALLOWS THE PSC TO RESOLVE ANY PROCEEDING BY ACCEPTING A STIPULATION.

The Hospitals' argument (Brief, at 35-39) that the PSC needs competent substantial evidence to support the stipulation is illogical because it assumes that a stipulation reducing rates is analogous to one which raises rates. The Hospitals said they would try to introduce evidence that FPL's revenues should be reduced by $535 million. FPL filed the testimony of 13 witnesses to show that its rates should remain unchanged. None of these preliminary positions, however, has any bearing on whether the $250 million rate reduction and other concessions to which FPL agreed actually harm the Hospitals.

The Hospitals are incorrect in their allegations that the PSC must resolve disputes and have competent substantial evidence before it can approve the 2002 Stipulation. (Brief, at 26-39) A stipulation stands in the stead of an evidentiary proceeding; it functions as a surrogate for the hearing at which evidence would be offered. Section 120.57(4), Florida Statutes (2001), allows the PSC to resolve "any proceeding" by stipulation:

> (4) INFORMAL DISPOSITION. — Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

Paragraph 15 of the 2002 Stipulation provided: "This Stipulation and Settlement will resolve all matters in this Docket pursuant to and in accordance with Section 120.57(4), Florida Statutes (2001)." Order No. 501, at 17. [Vol. 62: 11915] Utilities Commission of New Smyrna Beach, supra, 469 So. 2d at 732 ("The legal system favors the settlement of disputes by mutual agreement among the parties."). The 2002 Stipulation balanced the interests of the company and its customers and was acceptable to both groups only if approved by a final order.

The parties to the 2002 Stipulation were well aware of the wisdom of resolving the PSC-initiated docket on their own terms, yet in a manner acceptable to the PSC. In the absence of an agreement, whether the PSC kept the docket open or not, FPL would be free to petition at any time for a rate increase, while other parties might at any time seek to reduce FPL's rates. The 2002 Stipulation offered obvious benefits and rate stability until the end of 2005. What better way for everyone, the PSC included, to draw the docket, which began as a review of a merger that never happened, to a close?

G. REQUIRING THE PSC TO GRANT THE HOSPITALS A HEARING MIGHT IMPEDE THE PSC'S ABILITY AND WILLINGNESS TO INITIATE INVESTIGATIONS.

The docket below was initiated upon the PSC's own motion. The Hospitals would apparently have the PSC bound by that initial decision so that the PSC had

to see the docket through to hearing, regardless of the likely outcome. In the Hospitals' view, once the PSC, with its liberal intervention policy, allowed the Hospitals to participate, the agency was obligated to give the Hospitals the hearing they anticipated.[15]

Placing constraints on the PSC's ability to close its own self-initiated dockets on terms the PSC believes reasonable is fraught with risks to the PSC, to the utilities the PSC regulates, and to utility customers the PSC is statutorily charged to protect. At the very least, mandating a hearing might have a chilling effect on the PSC's willingness to become fully informed because the agency could never extricate itself from a docket it improvidently opened. Would the Hospitals insist that a hearing must be held even if information developed during the pendency of the proceeding indicated the outcome of a hearing was likely to result in a rate increase for FPL? More likely, the Hospitals, under those circumstances, would applaud a PSC decision to shut the docket down and leave it up to FPL to come forward with a rate case – if the company chose to do so.

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[15]Just being a customer was generally sufficient to intervene. For example, the order granting Dynegy Midstream's intervention said: "Dynegy Midstream is a retail customer of FPL. Thus, its interest in the potential effect of this proceeding on its retail rates is sufficient to give it standing in this proceeding." Order No. PSC-01-0628-PCO-EI. [Vol. 1: 139] 01 F.P.S.C. 3:187 (2001).

The intervenors have a rate reduction in place which, when coupled with the 1999 Stipulation, has resulted in $600 million per year in reduced rates, refunds of over $218 million through April 14, 2002, and the potential for more in the future. Customers also received the early return of $200 million of fuel cost over-recoveries. And the Hospitals have received these same benefits, just as all of FPL's other ratepayers have, whether they signed the 1999 and 2002 Stipulations or not.

H. THE PSC CANNOT ALLOW DISCRIMINATORY RATES WHICH TREAT THE HOSPITALS DIFFERENTLY THAN OTHERS IN THEIR RATE GROUPS.

The Hospitals' arguments on appeal need to be considered in light of the nature of PSC rate review proceedings. The 2002 Stipulation at issue in this appeal was not entered in a traditional quasi-judicial agency proceeding; it was, instead, entered in resolution of a quasi-legislative electric utility ratemaking docket.[16] Possible outcomes had the docket gone to hearing ranged from a significant rate

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[16]The PSC is a legislative agency: "The Florida Public Service Commission has been and shall continue to be an arm of the legislative branch of government." Section 350.001, Florida Statutes (2001). See Cooper v. Tampa Electric Co., 17 So. 2d 785, 786 (Fla. 1944) ("[T]he power to prescribe rates for public utility service is a legislative prerogative which may be done directly or through a commission empowered to do so."); Miami Bridge Co. v. Railroad Commission, 20 So. 2d 356, 362 (Fla. 1944) ("[T]he power to make reasonable rates may be exercised directly by the Legislature or by some instrumentality of its own selection . . ..").

reduction to a rate increase of some magnitude.[17] And once it was over, nothing would have prevented FPL, the intervenors, or anyone else dissatisfied with the new rates and capable of establishing standing from starting another rate case because "the issue of prospective rate-making is never truly capable of finality." Sunshine Utilities v. Florida Public Service Commission, 577 So. 2d 663, 666 (Fla. 1st DCA 1991).

The nature of the ratemaking process requires the PSC to protect not only the litigants before the agency but other non-participating customers as well. C. F. Industries, Inc. v. Nichols, 536 So. 2d 234, 238 (Fla. 1998) ("In setting rates, the PSC has a two-pronged responsibility: rates must not only be fair and reasonable to the parties before the PSC, they must also be fair and reasonable to other utility customers who are not directly involved in the proceedings at hand."). The PSC's responsibility to all customers is the reason the Hospitals received the same benefits as everyone else under the 1999 Stipulation, even though they had not intervened in that case. It is also the reason the Hospitals are currently receiving all the benefits

[17]In his order granting intervention to Mr. and Mrs. Twomey, Commissioner Baez said: "The Twomeys correctly claim that the Commission action taken in this docket will include a decision to raise, lower, or leave unchanged FPL's retail rates." Order No. PSC-01-1675-PCO-EI, at 4. [Vol. 36: 7121]

under the current 2002 Stipulation even though, when offered the opportunity to become a signatory, they declined the offer.

FPL bills its customers for electric service under various rate schedules on file at the PSC. The Hospitals take service under commercial or industrial rate schedules. All customers within a rate class must pay the same rates; anything else would result in discriminatory rates.[18] The PSC's statutory obligations effectively preclude a party in a PSC proceeding from advocating a position to the exclusion of others similarly situated. In other words, the Hospitals are incapable in a PSC proceeding from representing their own interests to the exclusion of others in their rate classes.

I. THE LIKELY OUTCOME OF A HEARING WOULD BE HIGHER RATES FOR THE HOSPITALS AND OTHER LARGE COMMERCIAL CUSTOMERS.

An electric utility such as FPL is most interested in the total amount of revenues it will be allowed to collect from its customers through the imposition of rates and charges authorized by the PSC. Customers, on the other hand, are only concerned about the specific level of electric rates and charges they, as well as

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[18]In its order dismissing the Hospitals' amended complaint, the PSC rejected the Hospitals' request for an interim rate reduction because "the request seeks a rate reduction for select customers. Granting this relief would create unduly discriminatory rates." Order No. PSC-01-1930-PCO-EI, at 11. [Vol. 40: 7828]

other members of their rate class, must pay. Significantly, customer rates do not necessarily move in tandem with changes in a utility's revenue requirement because the PSC adheres to the concept of rate "parity." If rates paid by a particular rate class provide an inadequate return on investment to the utility (when compared to the company's overall return from all customers), that class is said to be below parity. A rate class providing an above-average return is said to be above parity. The residential rate class, for example, might be providing a higher return than the large commercial class. In such a case, the PSC might implement a revenue reduction by ordering a large reduction in residential rates with a smaller reduction or, in theory, even a rate increase, for the large commercial classes.

This was exactly the situation for FPL's customers. Residential and small commercial customers' rates were above parity and others, including the rate classes to which the Hospitals belong, were below parity. Commissioners and staff members discussed the parity issue and its implications for the Hospitals at the March 22, 2002, agenda conference. The 2002 Stipulation allocated the $250 million annual revenue decrease across-the-board in equal percentage to all rate classes. If a hearing were held, however, staff would want to move all classes towards parity, which might reduce or eliminate the rate reduction the Hospitals received under the stipulation. [Vol. 62: 11857-59] The Hospitals' understanding of

this fact may explain why, in spite of allegations on appeal that FPL's revenue decrease should have been larger, the Hospitals have not alleged their rates would necessarily have been lower than those authorized by the 2002 Stipulation.

CONCLUSION

A limited proceeding initiated by the PSC which evolves into a rate review is not the same as a rate case initiated by a utility or its customers. The PSC retained a range of options. It might shut down the FPL docket on its own motion, just as it had started it, or it might set rates based upon a record after hearing. Certainly, within that range, the PSC had the latitude to accept the 2002 Stipulation and implement a $250 million rate decrease, early refunds of $200 million of fuel cost over-recoveries, and base rate refunds under a revenue-sharing plan for all of FPL's customers, including the Hospitals. The Hospitals remain free, as non-signatories, to file a petition of their own. This appeal should be dismissed because the Hospitals have neither alleged nor demonstrated they were adversely affected by the PSC's Order No. 501.

Respectfully submitted,

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