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 APPELLEE, LEE COUNTY, FLORIDA, AND NOTICE OF JOINDER IN THE ANSWER BRIEF OF THE CITIZENS OF THE STATE OF FLORIDA

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NOTICE OF JOINDER IN THE ANSWER BRIEF OF THE CITIZENS OF THE STATE OF FLORIDA

Lee County, Florida, an appellee in this proceeding, hereby gives notice that it joins in the content, statement of facts, and arguments set forth in the Answer Brief of the Citizens of the State of Florida ("Citizens"), filed in this appeal by their representative, the Office of Public Counsel. Lee County files its own Answer Brief to emphasize certain key points.

STATEMENT OF THE CASE AND OF THE FACTS

Lee County, Florida, is a political subdivision of the State of Florida within the service territory of Florida Power & Light Company ("FPL"). Lee County purchases significant amounts of electricity from FPL, pursuant to several of FPL's commercial and industrial electric service tariffs, to serve the electrical needs of various County facilities. Lee County was an intervenor below and is an appellee here. Lee County's primary interests in the proceedings below were to advocate the lowest overall rates reasonably justified by the evidence and to advocate that any rate decrease (or increase) be allocated fairly among all rate classes.

The order appealed from is the Florida Public Service Commission's ("PSC" or "Commission") Order No. PSC-02-0501-AS-EI (hereinafter "Order No.

501"), by which the PSC approved a stipulation and settlement (the "2002 Stipulation") that was negotiated among and executed 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, 02 F.P.S.C. 4:245 (2002) [Vol. 62: 11899] (hereinafter the "FPL Rate Case"). The order fully resolved all issues in the FPL Rate Case 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 "Fuel Cost Recovery Docket"). The PSC's order approving the 2002 Stipulation implemented an additional $250 million annual reduction in FPL's base rates beginning April 15, 2002, immediately upon the expiration of a previous stipulation and settlement (the "1999 Stipulation") on April 14, 2002. [Order No. 501, Vol. 62: 11901]

The South Florida Hospital and Healthcare Association (the "SFHHA" or the "Hospitals"), an intervenor in the FPL Rate Case (but not in the Fuel Cost Recovery Docket), represented its members, who, like Lee County, purchase electricity from FPL pursuant to several of FPL's commercial and industrial service tariffs. The SFHHA chose not to participate in the 2002 Stipulation. [Order No. 501, Vol. 62: 11900] In its April 26, 2002, newsletter (Newsline, Volume XXXVI, No. 3), SFHHA claimed credit for the 2002 Stipulation by the following

proclamation: "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."[1] That same day, April 26, 2002, SFHHA filed its Notice of Appeal. [Vol. 62: 11919]

With regard to other relevant facts and case background, Lee County hereby adopts the Statement of the Case and Facts contained in the Answer Brief of the Citizens of the State of Florida.

SUMMARY OF ARGUMENT

Appellant South Florida Hospital and Healthcare Association has failed to establish its standing to prosecute its appeal, and accordingly, its appeal must be dismissed. Under governing law, specifically Section 120.68(1), Florida Statutes (2001),[2] only a party adversely affected by agency action may appeal. Appellant SFHHA has not even alleged -- let alone demonstrated -- that it, or any of its members, has been adversely affected by the PSC's approval of the 2002 Stipulation. This is doubtless because it cannot do so. Substantively, the result of

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[1]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.

[2] All references herein to the Florida Statutes are to the 2001 edition thereof.

the 2002 Stipulation was a 7.03 percent decrease in the base rates[3] paid by the SFHHA's members for electric services purchased from FPL [Order No. 501, Vol. 62: 11901, 11904, 11909]; this rate reduction does not constitute an adverse effect. Procedurally, the 2002 Stipulation has not precluded, and does not preclude, the SFHHA from filing its own complaint asking the PSC to reduce FPL's rates even more. Given this total lack of either substantive or procedural injury, the SFHHA's appeal is misplaced and must be dismissed by the Court.

Moreover, Appellant SFHHA is seeking illogical and legally impossible relief. SFHHA is seeking a remand of the PSC's Order No. 501 without a reversal on the basis that Order No. 501 approving the 2002 Stipulation was procedurally erroneous . Either Order No. 501 was erroneous and defective, or it wasn't. If it

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[3] The term "base rates" refers to certain standard charges for electric service, including (a) "customer charges," which are charges (e.g., $10.00 per customer per month) imposed on customer bills to recover the costs of metering, billing, customer service, and limited electric distribution facilities located adjacent to the customer's premises; (b) "energy charges," which are charges (e.g., 3. 5 cents per kilowatt-hour of energy used) imposed on the amount of electrical energy used by a customer during a month; and (c) "demand charges," which are charges imposed on larger commercial and industrial customers based on their peak demand usage during a month (e.g., $6.00 per kilowatt of peak demand measured during the month). The other major category of charges for electric service are generically known as charges levied pursuant to "adjustment clauses" or as "cost recovery charges," e.g., the "Fuel and Purchased Power Cost Recovery Charge" approved by the PSC for FPL and other public utilities and set periodically by the PSC in its Fuel Cost Recovery Dockets.

was, the proper relief is reversal and remand; if not, the proper relief is affirmation. The Hospitals apparently want to keep the benefits of the 2002 Stipulation while somehow seeking this Court's authority for a new proceeding that would allow them to argue for "additional concessions." This is illogical and legally impossible and should not be countenanced by this Court. Accordingly, the Hospitals' appeal should be denied by the Court.

The PSC's order comes to this Court with the presumptions that it was made within the PSC's statutory powers and reached a correct result, including the presumption that the result was reasonable and just for the utility and utility customers alike. The PSC had ample statutory authority to accept the 2002 Stipulation as being in the public interest, as well as voluminous and substantial information upon which to base its decision to accept and approve the 2002 Stipulation, thereby closing its self-initiated rate review. Accordingly, the Hospitals' appeal must be denied by the Court.

STANDARD OF REVIEW

Orders of the Florida Public Service Commission come before the court "clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." Gulf Coast Electric Co-op., Inc. v. Johnson,

727 So. 2d 259, 262 (Fla. 1999). The Court "will approve the Commission's findings and conclusions if they are based on competent substantial evidence, and if they are not clearly erroneous." Id. Moreover, "in the final analysis, the public interest is the ultimate measuring stick to guide the PSC in its decisions." Id. at 264.

ARGUMENT

I.

APPELLANT SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION HAS NO STANDING TO APPEAL BECAUSE NEITHER IT NOR ITS MEMBERS WERE ADVERSELY AFFECTED BY THE PSC'S ORDER APPROVING THE 2002 STIPULATION.

To establish standing to appeal an administrative agency's decision pursuant to Section 120.68(1), Florida Statutes, a party must show that it was adversely affected by the action embodied in the agency's order. Fla. Stat. § 120.68(1); Legal Environmental Assistance Foundation v. Clark, 668 So. 2d 982, 986 (Fla. 1996) [hereinafter LEAF v. Clark]. Here, the SFHHA has not demonstrated, and cannot demonstrate, any adverse effect of the PSC's Order No. 501 to either the SFHHA or to any of its members, and accordingly, its appeal must be dismissed for lack of standing.

The first sentence of Section 120.68(1), Florida Statutes, states: "A party who is adversely affected by final agency action is entitled to judicial review." In full accord with Section 120.68(1), the notice at page 7 of Order No. 501 informed SFHHA that "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] Even so, SFHHA filed its initial brief without reference to Section 120.68(1) and without any claim by SFHHA that its members were in any way adversely affected by the 2002 Stipulation or by PSC Order No. 501 approving it.

This Court addressed the issue of appellate standing[4] to challenge a PSC order in LEAF v. Clark:

> 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 &

[4] The grounds for standing to appeal pursuant to Section 120.68(1), Florida Statutes, are similar -- but not identical -- to the grounds for standing to request a hearing pursuant to Section 120.569 and 120.57(1), Florida Statutes. The seminal administrative standing case is Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), wherein the well-known "Agrico test" was first articulated: that to have standing, a party must demonstrate that it will suffer injury in fact of sufficient immediacy to warrant a hearing and that the injury complained of is of the type that the proceeding is designed to protect against.

> 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).

LEAF v. Clark, 668 So. 2d at 987. In LEAF v. Clark, the PSC had granted LEAF's intervention in the docket, and the Court found that LEAF was a party to the PSC proceeding. The Court went on to observe, that "[t]his 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." Id.

Here, the SFHHA has not even alleged, let alone demonstrated, that it was adversely affected by the Commission's action in Order No. 501. The base rates paid by SFHHA's members and by all of FPL's customers[5] are 7.03 percent lower as a result of Order No. 501 than they were the day before the 2002 Stipulation went into effect pursuant to Order No. 501 -- this rate reduction does not constitute an adverse effect. No one was harmed by the PSC's agency action in the 2002 FPL Rate Case.

[5] The base rates of two relatively small rate classes, Street Lighting and Outdoor Lighting, were left unchanged by the Stipulation. FPL's filings indicated that the rates for these classes were already significantly below the indicated cost of service.

With regard to what SFHHA may believe to be a procedural injury -- the Commission's decision to approve the 2002 Stipulation without a hearing -- again, the SFHHA has not shown and cannot show injury. This is because the SFHHA is, as it has always been, free to file its own action[6] seeking a PSC order further reducing FPL's rates. The 2002 Stipulation has no binding, preclusive, or prejudicial effect on the SFHHA, a non-signatory to the 2002 Stipulation.

Because the SFHHA cannot show any adverse substantive or procedural effect of the PSC's action embodied in Order No. 501, it has failed to establish its standing pursuant to Section 120.68(1), Florida Statutes, and decisions of this Court. Accordingly, its appeal must be dismissed.

II.

APPELLANT SFHHA HAS ASKED FOR ILLOGICAL AND LEGALLY IMPOSSIBLE RELIEF.

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[6] If SFHHA believes that FPL's rates are excessive under the 2002 Stipulation, it should file a complaint, pursuant to Rule 25-22.036(2), Florida Administrative Code, with the PSC, assert the factual and legal basis for its position, request a hearing, and put on its case. In such a proceeding, the SFHHA would have the burden of proving that its recommended rate reductions were warranted by competent substantial evidence. In fact, in light of the SFHHA's apparent desire that the lower rates implemented pursuant to the 2002 Stipulation stay in effect while it "continue[s] pressing the energy giant for additional concessions," Lee County would suggest that the only way -- and the legally correct way -- for it to achieve that goal would be to abandon its appeal and file such a complaint.

Appellant SFHHA is seeking illogical and legally impossible relief. It is seeking a remand of Order No. 501 without a reversal, on the basis that Order No. 501 approving the 2002 Stipulation was procedurally erroneous. Either Order No. 501 was erroneous and defective, or it wasn't. If it was, the proper relief is reversal and remand; if not, the proper relief is affirmation. The Hospitals apparently want to keep the benefits of the 2002 Stipulation in effect while somehow seeking this Court's authority for a new proceeding that would allow them to argue for "additional concessions." This is illogical and legally impossible and should not be countenanced by this Court. Accordingly, the Hospitals' appeal should be denied.

III.

THE PSC HAD AMPLE AUTHORITY AND SUBSTANTIAL INFORMATION BEFORE IT TO SUPPORT AND JUSTIFY ITS DECISION TO APPROVE THE 2002 STIPULATION IN THE PUBLIC INTEREST.

The PSC has express statutory authority to approve stipulations. Fla. Stat. § 120.57(4). In the context of approving a stipulation, which by its inherent legal nature takes the place of a hearing, an agency must make its decision on the basis of the information available to it. Here, the PSC was presented with the proffered 2002 Stipulation, which it could either approve or reject. In its deliberations, the PSC had before it extensive, voluminous, substantive, and substantial information

upon which to base its decision on the proffered stipulation. The Commission is charged, above all, with protecting the public interest, Gulf Coast, 727 So. 2d at 264; Section 366.01, Florida Statutes, and has done exactly that here. The SFHHA's appeal should be denied.

Section 120.57(4), Florida Statutes, 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.

The SFHHA's argument (Brief, at 35-39) that the PSC needs competent, substantial evidence to support the stipulation is misplaced because, by their inherent legal nature, stipulations stand in the procedural place of hearings. The information that the PSC had before it in its deliberations as to whether to approve the 2002 Stipulation was voluminous, substantive, substantial, and competent, although neither side's claims[7] had been vetted by cross-examination, and entirely

[7] The PSC was informed with extensive and substantial information and knowledge regarding the parties' competing litigation positions: on one end of the spectrum, the SFHHA had prefiled the testimony and exhibits of two witnesses, which it claimed supported some $475 million in rate reductions and asserted that it could identify another $60 million through cross-examination of FPL's witnesses. FPL, on the other hand, had submitted the testimony and exhibits of thirteen witnesses, by which it supported its position that no change in rates was justified. (This is not meant to imply in any way that FPL is not fully supportive of the 2002

(continued...)

appropriate in relation to the decision before the Commission.[8] The PSC may be presumed to have been knowledgeable of the parties' positions and their evidentiary claims from their prefiled testimony and pleadings. When the PSC voted to approve the 2002 Stipulation, the record already contained the prefiled testimony of FPL, the SFHHA, and Lee County. The PSC may also rely on the judgment of its Staff, who had participated extensively in discovery in the proceedings before the 2002 Stipulation was negotiated, and who advised the PSC that the Stipulation was in the public interest.

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[7](...continued)
Stipulation.) The Citizens' testimony had not been filed by operation of an agreed-upon extension of time for doing so that did not expire until after the 2002 Stipulation was executed.

[8] See DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). There, in discussing competent substantial evidence, the Court stated the following:

> We have used the term "competent substantial evidence" advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.

Lee County submits that, in the context of the PSC's deliberations regarding a proposed stipulation that would resolve all issues in its self-initiated rate review, the extensive information before the Commission was exactly the type of "relevant evidence" appropriate to its consideration of the proposed stipulation and to its decision to approve the stipulation in the public interest and conclude its review.

By the time the Commission voted on the proposed stipulation, the Commission Staff had analyzed the stipulation and prepared a written recommendation to the Commission, in which the Staff stated:

> Staff has reviewed the terms of the Stipulation and they appear to be a reasonable resolution of the issues regarding FPL's level of earnings and base rates. The proposed $250 million base rate reduction affords FPL's ratepayers significant and immediate relief. The Stipulation also extends the revenue cap and revenue sharing plan through 2005. Since the inception of the existing revenue sharing plan in 1999, FPL has refunded $128 million to date and expects to refund an additional $84 million for the year ended April 14, 2002. 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: 11802]

Thus informed, the PSC was faced with a decision: to accept the 2002 Stipulation, endorsed and supported by all parties to the FPL Rate Case except the SFHHA, and likewise supported by its Staff's analysis and recommendation, or to reject the 2002 Stipulation and hold a hearing. The Stipulation, by its own terms, did not allow for modification.[9]

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[9] 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]

Apparently, under the SFHHA's view, the rate reductions now enjoyed by the SFHHA's members 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 had not been accepted as full and final resolution of the PSC docket, then there would be no stipulation. 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 -- on the ground that the PSC's order authorizing the current rates had been overturned -- to be reimbursed, perhaps through a surcharge on customer bills, for lost base rate and fuel cost 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."). Current projections indicate FPL will exceed the revenue threshold for calendar year 2002; so those refunds would also be lost to SFHHA's members, as well as all other customers, if PSC approval of the 2002 Stipulation were overturned.

The pole-star that guides the Commission's decision-making is the public interest. Gulf Coast, 727 So. 2d at 264; Fla. Stat. § 366.01. The Commission Staff advised the Commission that the proffered stipulation was fair and reasonable and

in the public interest; all parties to the FPL Rate Case except the SFHHA agreed. The net result of the Commission's Order No. 501 was a substantial, significant, and timely reduction in the retail rates of Florida's largest public electric utility. The Commission, wisely and soundly in Lee County's view, chose to approve the 2002 Stipulation as prayed by the Citizens of the State of Florida, FPL, Lee County, the Florida Retail Federation, and all other intervenors in the case except the SFHHA. The public interest has been served by the Commission's action, and the public interest requires that the SFHHA's appeal be denied.

In its own self-initiated docket, with the authority of Section 120.57(4), Florida Statutes, supporting its action procedurally, and (a) its fundamental working knowledge of utilities and rate cases, (b) its specific knowledge of the parties' litigation positions in the FPL Rate Case itself, and (c) its Staff's advice all supporting the substantive decision to approve the 2002 Stipulation, it was clearly reasonable for the PSC to accept and approve the 2002 Stipulation. Correspondingly, the PSC's action was not clearly erroneous, and the Court should affirm Order No. 501 in all respects.

CONCLUSION

Appellant South Florida Hospital and Healthcare Association has failed to allege, let alone to affirmatively demonstrate, that either it or any of its members was

adversely affected by the Commission's Order No. 501 approving the 2002 Stipulation, and accordingly, the SFHHA's appeal must be dismissed. Moreover, the SFHHA has requested illogical and legally impossible relief, that is, for the Court to leave the challenged Order No. 501 in effect while remanding for the SFHHA to take another bite at the apple -- which the Court cannot grant. If Order No. 501 was issued in error, as argued by the SFHHA, it should be reversed; the SFHHA cannot have it both ways: it cannot take the benefits of the 7.03 percent rate reduction enjoyed by its members since April 15, 2002 and also obtain an order from this Court remanding same to the PSC for a hearing. Finally, the Commission had ample legal authority and information before it to justify and support its approval of the 2002 Stipulation. Accordingly, pursuant to governing law, the Court must affirm the PSC's Order No. 501 and deny the SFHHA's misplaced appeal.

Respectfully submitted,

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