IN THE SUPREME COURT OF FLORIDA

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

APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF THE FLORIDA PUBLIC SERVICE COMMISSION

HAROLD MCLEAN
General Counsel
Florida Bar No. 193591

DAVID E. SMITH
Attorney Supervisor
Florida Bar No. 309011

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0862
(850) 413-6084

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SYMBOLS AND DESIGNATION OF THE PARTIES

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

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

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

STATEMENT OF THE FACTS

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

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

R. Vol. 1, 41.

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

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

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

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

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

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

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

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

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

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

R. Vol. 2, 399-400.

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

> We want to be clear that this decision to initiate a rate proceeding does not foreclose the ability of the company and the parties to reach a resolution of some or all of the issues involved in an earnings review. In fact, it is our belief that the information contained in the MFRs can empower parties and the Commission to reach a settlement that everyone can agree is in the public interest. However, we need to be ready to move forward to discharge our obligations in the event there is no informal resolution of the issues. The information contained in the MFRs will allow us to do that.

R. Vol. 2, 400.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

R. Vol. 61, 11800.

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

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

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

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

interest. Mr. Wiseman claimed these issues could result in reductions in cost of service in the $500 million range. R. Vol. 62, 11849-11855. He concluded by asking the Commission to defer ruling on the Stipulation and "hold a hearing on the merits of the settlement proposal, to find out whether the settlement proposal, in fact, results in just and reasonable rates." R. Vol. 62, 11855.

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

120.57(4), Florida Statutes.

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

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

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

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

> frequently suggested by some, but not necessarily all of the parties; if upon examination they are found equitable by the regulatory agency, then the terms of the settlement form the substance of an order binding on all the parties, even though not all are in accord as to the result.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

659 F. 2d 513-514.

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully submitted,

HAROLD MCLEAN
General Counsel
Florida Bar No. 193591

_____
DAVID E. SMITH
Attorney Supervisor
Florida Bar No. 309011

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0862
850/413-6084

Counsel for Florida Public Service Commission

Dated: August 30, 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 30th day of August, 2002 to the following:

Mark F. Sundback
Kenneth L. Wiseman*
Andrews & Kurth, L.L.P.
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Alvin B. Davis, Esquire
John T. Butler, P.A.
Steel Hector & Davis, LLP
200 South Biscayne Blvd.
Suite 4000
Miami, FL 33131-2398

John W. McWhirter, Jr., Esquire
McWhirter, Reeves, McGlothlin,

Davidson, Decker, Kaufman
Arnold & Steen, P.A.
400 North Tampa Street
Suite 2450
Tampa, FL 33601-3350

Ronald C. LaFace, Esquire
Seann M. Frazier, Esquire
Greenberg Traurig, P.A.
P. O. Drawer 1838
Tallahassee, FL 32302

Miriam O. Victorian
Andrews & Kurth, Mayor, Day,
Caldwell, and Keaton, L.L.P.
700 Louisiana Street
Houston, TX 77002

R. Wade Litchfield
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408-0420

Thomas A. Cloud, Esquire
W. Christopher Browder, Esquire
Gray, Harris & Robinson, P.A.
P. O. Box 3068
Orlando, FL 32802-3068

Michael B. Twomey, Esquire
P. O. Box 256
Tallahassee, FL 32314-5256

Robert S. Wright, Esquire
Diane K. Kiesling, Esquire
John T. LaVia, III, Esquire
Landers & Parsons, P.A.
P. O. Box 271
Tallahassee, FL 32302

Jack Shreve
Roger Howe
Office of Public Counsel
c/o The Florida Legislature
111 West Madison St., Rm. 812
Tallahassee, FL 32399-1400

*Mailed by Federal Express

DAVID E. SMITH

CERTIFICATE OF TYPEFACE COMPLIANCE

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

_____

DAVID E. SMITH