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.

INITIAL BRIEF OF SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION, et al.

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INTRODUCTION

South Florida Hospital and Healthcare Association, Ann Bates Leach Eye Hospital, Aventura Hospital, Baptist Hospital of Miami, Bascom Palmer Eye Institute, Broward General Medical Center, Cedars Medical Center, Columbia Hospital, Coral Gables Hospital, Coral Springs Medical Center, Deering Hospital, Delray Medical Center, Florida Medical Center, Hialeah Hospital, Hollywood Medical Center, Imperial Point Medical Center, JFK Medical Center, Kendall Regional Medical Center, Miami Children's Hospital, Miami Heart Medical Center, Mt. Sinai Medical Center, North Broward Medical Center, North Ridge Medical Center, North Shore Medical Center Northwest Medical Center, Palm Beach Gardens Medical Center, Palmetto General Hospital, Palms West Hospital, Parkway Regional Medical Center, Plantation General Hospital, South Miami Hospital, University Hospital, University of Miami Hospital and Clinics, Vencor Hospital - Coral Gables, Vencor Hospital - Ft. Lauderdale, Vencor Hospital – Hollywood, West Boca Medical Center and Westside Regional Medical Center (collectively, the "Hospitals") appeal a decision of the Florida Public Service Commission ("Commission"). In support hereof, the Hospitals state as follows:

STATEMENT OF THE CASE AND FACTS

On appeal here is the Commission's approval of a settlement terminating the incomplete review of the retail rates of Florida Power & Light Company ("FPL"). *In re: Review of the retail rates of Florida Power & Light Company*, Order No. PSC-02-0501-AS-EI (April 11, 2002). (R.11899). The Commission approved the settlement over the Hospitals' objections and despite their request for a hearing to examine whether there was a sufficient evidentiary basis for the Commission to determine that the settlement would produce just and reasonable rates.

The Commission proceeding that was resolved by the settlement was initiated by Commission Order No. PSC-01-1346-PCO-EI. *In re: Review of Florida Power & Light Company's proposed merger with Entergy Corporation, the formation of a Florida transmission company, and their effect on FPL's rates*, 01 FPSC 6:3 78 (2001). (R. 395). In that order the Commission discussed a number of factors that led it to conclude that there should be a comprehensive review of PFL's rates.

One such factor was Governor Bush's creation of the Energy 2020 Study Commission ("Energy Commission"), which was charged with proposing an energy plan and strategy for Florida over the next 20 years. In December 2000, the Energy Commission filed an Interim Report with the Legislature that included proposed legislation designed to move Florida to a wholesale deregulated energy

market. That draft legislation included a proposal to place a cap on retail base rates. During the legislative session that considered the proposed legislation, there were concerns expressed about the earnings level of investor-owned companies (such as FPL), the value of their generation and transmission assets and whether current base rates accurately reflected costs. (R. 396).

In addition, the Commission also expressed concerns about FPL in particular that, in the Commission's view, warranted a comprehensive review of FPL's rates. One concern involved FPL's return on equity. The return on equity that FPL was authorized to earn had been capped by the terms of a stipulation that FPL and others entered into in 1999 (the "1999 Stipulation"). The cap on FPL's authorized return on equity was part of a revenue sharing plan under which FPL shared with ratepayers some level of revenues in excess of agreed-upon thresholds. The 1999 Stipulation recognized that from time to time, FPL's achieved return on equity might be outside the authorized range. The Commission's order setting this matter for hearing noted, however, that in every month since the inception of the 1999 Stipulation, FPL's achieved return on equity had exceeded the benchmark return level by a range of 4 to 157 basis points, or, figured conservatively, on average 49 basis points above the top of the range. The Commission stated that it was concerned that when the revenue sharing plan was scheduled to terminate on April

14, 2002, FPL would continue to over-earn with no protection for ratepayers from FPL's high earnings. (R. 397).

The Commission also was concerned with the portion of FPL's capitalization attributed to common equity (as opposed to for instance debt) because the higher a utility's equity component presumed or imputed to derive rates, all other things being equal, the higher the aggregate cost of service. The Commission noted that although FPL's equity ratio was capped by the 1999 Stipulation at 55.83% on an adjusted basis for purposes of surveillance reports that FPL files with the Commission, FPL's adjusted equity ratio had exceeded the cap since March 2000. The Commission further stated that FPL's actual equity ratio of 65% was well above the average for AA-rated electric utilities and that a rate proceeding would afford an opportunity to set an appropriate ratio to use for ratemaking purposes after the expiration of the revenue sharing mechanism under the 1999 Stipulation. (R. 398).

Another factor that the Commission referenced as a basis to implement a review of FPL's rates was the proposed creation of GridFlorida, a regional transmission organization ("RTO") being formed in response to an order of the Federal Energy Regulatory Commission ("FERC"). Under the FERC's order, Florida's utilities (such as FPL) that provide transmission services that are subject to the FERC's jurisdiction, would contribute their FERC jurisdictional

transmission facilities to GridFlorida. Thereafter, GridFlorida would assume operational control of the facilities, and transmission rates would be determined in a manner that would depart from the traditional manner in which rates have been set for each of the stand-alone utilities. The Commission determined that the implementation of GridFlorida would have a significant impact on FPL's investments and expenses in the future. It also determined that retail rates, which currently include a component to recover the costs of transmission facilities, would have to be reconciled with the imposition of new wholesale transmission rates that would be charged by GridFlorida. (R. 396).

In addition to the foregoing reasons for finding that an earnings review was needed, the Commission noted that FPL's most recent fully allocated cost of service study was filed in 1981 for a projected 1983 test year. Thus, a comprehensive review of FPL's rates had not taken place in 18 years.

In view of these factors, the Commission determined that it was necessary to initiate a base rate proceeding (i) to address the level of FPL's earnings, (ii) to assure appropriate retail rates on a going forward basis and (iii) to provide for appropriate benefits to ratepayers from the creation of an RTO and future restructuring of Florida's electric market. (R. 398).

On October 24, 2001, in Order No. PSC-01-2111-PCO-EI, the Commission established procedures for reviewing FPL's rates (the "Hearing Order"). *In re:*

Review of the retail rates of Florida Power & Light Company, 01 FPSC 10:484 (2001). (R. 9394). In the Hearing Order, the Commission considered a proposal by FPL that would have modified the procedures that normally would be utilized in a rate review. Under normal procedures, a utility files Minimum Filing Requirements ("MFRs"), which are schedules that set forth specified arrays of historical and projected financial and operational data that are relevant to ratemaking, after which parties conduct discovery and proceed to a hearing. Following the hearing and briefing, Commission Staff issues a recommendation to the Commission concerning the Staff's view as to the proper disposition of the particular case. The Commission then can review Staff's recommendation in the context of the comprehensive record developed by all the parties during the hearing and through briefing.

Under FPL's proposal, following Staff's review of the data in the MFRs, Staff would have issued a recommendation setting forth its preliminary assessment of the reasonableness of FPL's rates. (R. 9399). Whatever hearing then would take place would be narrowed by Staff's recommendations based upon its preliminary assessment.

The Commission declined to accept FPL's proposal. The Hearing Order noted:

> FPL's suggestion of requiring a staff recommendation on how best to proceed based upon its review of the

> extensive and comprehensive 2002 forecast data is unnecessary, not practical, and potentially prejudicial to the rights of one or more of the parties.

Order No. PSC-01-2111-PCO-EI at 7. (R. 9400).

The Commission went on to explain:

> 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 an 120.57, Florida Statutes.

Id. (R. 9400).

Consistent with this ruling, the Commission set the matter for hearing to commence on April 10, 2002. (R. 9400). However, the Commission ultimately did not follow either of the two procedures that the Hearing Order specifies are the two means available to set FPL's retail rates, *i.e.*, there neither was a unanimous settlement nor did the Commission afford parties a hearing on the merits.

What transpired instead was that the procedural schedule was aborted prior to the completion of discovery and prior to the convening of an evidentiary hearing in which parties would have been given the opportunity to cross-examine FPL's witnesses. On March 14, 2002, FPL along with other parties to the proceeding, but not the Hospitals, filed a joint motion asking the Commission to approve a proposed settlement of the case. (R. 11739). On the same day, FPL moved to suspend the procedural schedule in view of the pending proposed settlement.

(R. 11735). The motion to suspend the procedural schedule was granted on that same day. (R. 11785).

The proposed settlement is to be effective for the period April 15, 2002 through December 31, 2005. (R. 11748). Its most significant terms provide (i) for a $250 million annual reduction to FPL's base rates (*id.*) and (ii) a revenue sharing arrangement if FPL's retail base rate revenues exceed certain specified levels. (R. 11749). Notwithstanding those provisions, the settlement also provides FPL an opportunity to file for a rate increase during the term of the settlement if its retail base rate earnings fall below a 10% return on equity. (R. 11750).

The Hospitals opposed the proposed settlement for two fundamental reasons. First, the evidence they had developed up until that time and which was set forth in the prepared testimony of their expert witness, or which they intended to elicit through cross-examination of FPL's witnesses, showed that the annual base rate reduction of $250 million under the settlement was woefully short of providing just and reasonable rates. (R. 11849). The Hospitals' evidence, inclusive of evidence that would have been developed on cross-examination, supported an annual base rate reduction of $535 million. (R. 11849-50). Appendix A hereto sets forth a summary of the evidence that the Hospitals would have presented, had they been afforded a hearing, to support a rate reduction of at least $535 million. Second, the discovery process was not complete and discovery concerning two significant

issues was outstanding. (R. 11852 and 11854). Had the Hospitals been given the opportunity to obtain complete discovery concerning the two outstanding issues, they may have been able to show that even an annual reduction of $535 million to base rates was insufficient to produce just and reasonable rates.

One area of discovery that was outstanding concerned transactions between FPL's affiliates and between an unregulated affiliate and an unaffiliated entity. The Hospitals had sought information concerning those transactions to determine whether FPL had shifted value away from ratepayers to unregulated entities where the value would be used exclusively for the benefit of shareholders. (R. 11004-19).

The basis for the Hospitals' discovery requests into these transactions was information included in filings with the Securities and Exchange Commission, shareholder reports and reports FPL had filed with the Commission outside the context of the rate case. Certain of those discovery requests concerned transactions with an entity named Adelphia Communications ("Adelphia"). Adelphia uses FPL property to conduct its business, and pays FPL for the right to use that property. Adelphia, through its affiliates Adelphia Cable and Adelphia Business Solutions, pays rental for use of FPL facilities. Revenue from Adelphia is credited against the jurisdictional cost of service of electric ratepayers. The lower the revenue from Adelphia, the more residual cost must be borne by FPL's ratepayers. (R. 11679).

Adelphia is not just another entity using FPL property. FPL's general counsel was on the Board of Directors of Adelphia. (R. 11683). FPL's general counsel also was president of an entity named Cable GP, Inc., which was a partner in an entity named Olympus Communications, L.P. ("Olympus"). *Id.* The other major owner of interests in Olympus was Adelphia. (R. 11679). Adelphia's other partners in the Olympus partnership were subsidiaries of FPL Group, Inc. operating under the name "Telesat." *Id.* Olympus operates one of the largest contiguous cable systems located in some of the fastest growing markets in Florida. As of December 31, 1999, Olympus' cable system passed in front of 974,861 homes and served 651,308 basic subscribers. *Id.* To provide its services, Olympus owns or leases parcels of real property for signal reception sites (antenna towers and headends) and microwave facilities. (R. 11680).

Whether through clearing rights of way which would be charged to ratepayers but which could benefit others using the right of way or by conveying property rights in lease or in fee to Olympus or Adelphia (for example to be used by Olympus or Adelphia for antenna towers or microwave facilities), the FPL Group by means of controlling FPL could benefit Adelphia and Olympus in numerous ways. (R. 11682).

By late 1999, FPL Group sold 3.5 million shares of Adelphia common stock and had its interest in an unnamed cable limited partnership redeemed, for

aggregate after-tax gains of more than $160 million, according to FPL Group's 1999 Annual Report. (R. 11680). The circumstances described above caused the Hospitals to seek discovery to determine whether FPL in fact had shifted value to Adelphia and Olympus at ratepayer expense, and the FPL Group then appropriated increases in value for the benefit of shareholders.

There also were other transactions that caused the Hospitals to seek discovery concerning affiliate transactions. In early 2000, FPL conveyed to its wholly-owned affiliate FiberNet substantial assets involving, *inter alia*, fiber optic cables originally installed to assist in FPL's operation of its electric utility system. (R. 11680). FPL Group's annual report disclosed that FiberNet's "fiber optic network was originally developed in the late 1980s to provide internal telecommunications service to support company operations." *Id.* Since FPL's conveyance of the assets to FiberNet, FPL's revenues credited against its jurisdictional electric cost of service have fallen significantly. *Id.* Additionally, FPL has been engaged in shedding millions of dollars of property to a non-regulated affiliate named Land Resource Investment Company ("LRIC"). *Id.* What is done by LRIC with the property, including renting or selling portions of it to third parties, is not disclosed in diversification reports that FPL routinely files with the Commission. *Id.*

FPL resisted providing the requested data. Thus the Hospitals moved to compel production of requested data. (R. 11004). The Presiding Officer agreed that the Hospitals were entitled to obtain the discovery they sought concerning the transactions between FPL, non-Commission regulated affiliates and other entities. In Order No. PSC-02-0254-PCO-EI, he ruled that having considered the arguments, *i.e*., which included the argument that FPL might be shifting value from ratepayers to shareholders, the Hospitals were entitled to obtain the information they were seeking and ordered FPL to produce the information within two days. *In re: Review of the retail rates of Florida Power & Light Company*, 02 FPSC 2:194 (2002). (R. 11125). However, rather than produce the discovery, FPL filed a motion for reconsideration. (R. 11245). FPL's reconsideration motion was pending before the Presiding Officer at the time that the proposed settlement was filed and the procedural schedule was suspended. Once the Commission approved the proposed settlement, the Presiding Judge vacated the prior order that had required FPL to provide the Hospitals with discovery concerning the affiliate transactions. *In re: Review of the retail rates of Florida Power & Light Company,* 02-FPSC 3:326 (2002). (R. 11832). Thus, the Hospitals never obtained the outstanding discovery concerning affiliate transactions that might have disclosed that reductions to FPL's base rates were warranted in excess of the $535 million that the Hospitals had identified up until that time.

In lieu of completing discovery and convening a hearing, the Commission considered the proposed settlement in a special meeting held on March 22, 2002. At the outset of the meeting, the Commission indicated that parties would be given up to five minutes each to make their presentation. (R. 11838). Counsel for the Hospitals indicated that the Hospitals had assumed that they would be given an opportunity to present a thorough analysis to show why the settlement should not be approved. (R. 11848). After indicating that "we really are here to discuss the proposed settlement" (R. 11849), implying that it had not been the Commission's intention to discuss objections to the proposed settlement, the Commission ultimately allowed the Hospitals 15 minutes to explain their opposition to the proposed settlement. (R. 11849). The Hospitals concluded their remarks by asking the Commission to defer ruling on the proposed settlement and to allow the discovery process to be completed in order to obtain discovery concerning FPL's affiliate dealings as well as with respect to the other area of discovery that was outstanding. (R. 11855).

The other area involved FPL's resource planning process. (R. 11854). Information that had been provided revealed that FPL had incurred a $100 million cost overrun in connection with the repowering of one of its generation plants. (R. 11854). The Hospitals had outstanding discovery requests designed to obtain information concerning whether any other cost overruns had occurred, whether

FPL's generation resource planning process was being performed in a prudent manner and whether FPL was attempting to pass through to ratepayers costs that had been imprudently incurred associated with the construction of new electric generating capacity. (R. 11295). The Hospitals asked to be allowed to complete discovery concerning the affiliate transaction issue and the costs of new generation plant and asked that the Commission thereafter hold a hearing on the merits of the proposed settlement to find out whether it results in just and reasonable rates. (R. 11855). The Hospitals pointed out that such a determination only can be made based upon a full and adequate administrative record, which was something the Commission lacked. (R. 11855).

The Commission, however, approved the settlement over the Hospitals' objection and without affording the Hospitals either the discovery they had requested or the opportunity of a hearing. As a result, the Commission, in approving the settlement, disregarded the conclusion in the Hearing Order that there are only two ways to resolve this case under Florida Administrative Law, *i.e.*, through a unanimous settlement or a hearing conducted pursuant to Sections 120.569 an 120.57, Florida Statutes. (R. 9400). Additionally, in approving the settlement, the Commission did so without the benefit of having reviewed prepared testimony submitted either by the Office of Public Counsel ("OPC") or the Commission's own Staff. Neither of those parties filed prepared testimony in

accordance with the Commission's procedural schedule at the time the Commission approved the settlement. While Staff's position on FPL's rates is unknown, OPC disclosed that its testimony, had it been filed, would have on some issues called for larger reductions than had been identified by the Hospitals. (R. 11877).

SUMMARY OF ARGUMENT

Section 120.569(2)(b), Florida Statutes, guarantees that in a proceeding in which the substantial interests of a party will be affected by an agency determination, the agency will afford all parties the opportunity for a hearing. Section 120.569(2)(j) guarantees a party to such a proceeding a right to conduct cross-examination. Similarly, Section 120.57, Florida Statutes, guarantees that when hearings involve disputed issues of material fact, parties shall be given the opportunity to present evidence on all issues involved and to conduct cross-examination. Based upon this statutory scheme, this Court, as well as other Florida courts, consistently have ruled that it would be a denial of due process for the Commission to deny a party the hearing that is guaranteed by Sections 120.569 and 120.57, Florida Statutes. *See, e.g.*, *Florida Gas Co. v. Hawkins*, 372 So. 2d 1118 (Fla. 1979). In *Florida Gas*, this Court in fact made clear that when the fairness of a utility's rates are being considered, due process requires a fair hearing. *Id.* at 1121.

This case involves a review FPL's rates. Based upon Florida's statutory scheme, and presumably the case law addressing that statutory framework, the Commission initially scheduled a hearing in this case. In doing so, and in rejecting a proposal by FPL that would have restricted the scope of the proceeding that would take place, the Commission unequivocally ruled that there was a requirement to provide the hearing contemplated by Sections 120.568 and 120.57 lest the rights of participants 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 the parties. *Id.*

When a settlement was proposed in this case, the Hospitals opposed the settlement on the record. (R. 11848). The Hospitals argued to the Commission that the rate cut provided by the proposed settlement was well short of providing just and reasonable rates. (R. 11849). The Hospitals' evidence developed to that point showed that a rate reduction of more than double the reduction provided by the settlement was required to produce just and reasonable rates. The Hospitals thus asked the Commission to defer ruling on the settlement to allow discovery to be completed and to afford the Hospitals a hearing. (R. 11855).

Nonetheless, in disregard of its earlier ruling, the Commission rushed to judgment and approved the settlement. In doing so, it trampled on the Hospitals' due process and statutory rights. It also disregarded the jurisprudence in this state

which required that the Hospitals be provided the hearing that the Commission had promised and the Hospitals had requested.

Further, the Commission approved the settlement without the benefit of an evidentiary record to support the Commission's actions. Discovery was ongoing and had not been completed concerning critical issues that would show, *inter alia*, whether FPL's ratepayers are subsidizing the operations of unregulated companies affiliated with FPL. Further, neither the Office of Public Counsel nor Commission Staff had yet submitted prepared testimony that would have disclosed what they believe is the just and reasonable level of FPL's rates. Similarly, because a hearing never was convened, FPL's witnesses never were submitted to the scrutiny of cross-examination that might have disclosed short-comings in their prepared testimony in support of FPL's case. Thus, there simply was no evidentiary record to support a decision by the Commission.

In view of these circumstances, the Commission had insufficient information before it to answer the key questions that the Commission had posed itself in initiating the proceeding. Specifically, there was not an evidentiary record to support a conclusion that FPL would not continue to achieve unreasonable returns on equity. There was not an evidentiary record to support a conclusion that the base rates provided by the settlement accurately would reflect FPL's costs.

Additionally, the Commission did not address (much less remedy) FPL's unusually thick common equity component.

The failure to develop an evidentiary record concerning these important issues stems from the fact that the Commission aborted the discovery process and refused to convene the statutorily-required hearing. As a consequence, numerous subparts of Section 120.68(7), Florida Statutes, require that this case be remanded to the Commission with a direction to allow the Hospitals to complete discovery and afford them the hearing that is guaranteed by Sections 120.569 and 120.57, Florida Statutes.

STANDARD OF REVIEW

Section 120.68(7), Florida Statutes sets forth the standard of review applicable to this case. There are a number of provisions that dictate that this should be remanded to the Commission with directions for the Commission to afford the Hospitals procedural rights that are guaranteed under Florida law.

Section 120.68(7)(a) provides that:

> The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:
>
> (a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends on disputed facts.

Section 120.68(7)(a), Florida Statutes.

As will be discussed in more detail *infra* at 26, this provision requires that this proceeding be remanded to resolve a wealth of disputed facts.

Section 120.68(7)(b) also requires a remand. That section provides that a reviewing court shall set aside an agency decision or remand the case to the agency where:

> (b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to Sections 120.569 and 120.57 . . . ;

Section 120.68(7)(b), Florida Statutes.

This provision requires that this case be remanded because although this proceeding was supposed to take place pursuant to the requirements of Sections 120.569 and 120.57, and a Commission order in the proceeding should have been supported by findings of fact, the order approving the settlement makes no formal findings of fact. Nonetheless, the Commission assumed the ultimate fact, *i.e.*, that the settlement is "a reasonable resolution of the issues regarding FPL's level of earnings and base rates." Final Order at 4. This "finding" is not supported by substantial evidence, as no evidence was adduced in the case. In 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.

Section 120.68(7)(c) also requires a remand. That section provides that a reviewing court shall set aside an agency decision or remand the case to the agency where:

> (c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure.

Section 120.68(7)(c), Florida Statutes.

Here, both the fairness of the proceeding and the correctness of the Commission's action are severely impaired by the Commission's failure to afford the Hospitals a hearing that is mandated under Florida law.

Section 120.68(7)(d) also applies. It provides that a reviewing court shall set aside an agency decision or remand the case to the agency where:

> (d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action.

The error here was that Section 120.57 guarantees parties to administrative proceedings involving disputed facts the opportunity, *inter alia,* to present evidence and conduct cross-examination. The Commission committed an error of law in denying the Hospitals those opportunities and the correct interpretation of the law compels that the Hospitals be afforded a full hearing as provided for by statute.

Finally, Sections 120.68(7)(e)1 and 4 also apply. Those sections provide that a reviewing court shall set aside an agency decision or remand the case to the agency where:

> (e) The agency's exercise of discretion was:

> 1. Outside the range of discretion delegated to the agency by law; [or]
>
> * * * * * * *
>
> 4. Otherwise in violation of a constitutional or statutory provision.

Section 120.68(7)(e), Florida Statutes.

As will be discussed, the Commission did not have discretion to deny the Hospitals a hearing, and in declining to afford the Hospitals the hearing they requested, the Commission violated the Hospitals' due process rights.

ARGUMENT

I. THE COMMISSION ERRED IN DENYING THE HOSPITALS A HEARING

A. Due Process Requires That The Hospitals Be Afforded A Hearing

Under the laws of this state, the Hospitals clearly were entitled to the hearing which they had requested. The Commission's order approving the settlement in lieu of holding that hearing was a denial of due process.

Sections 120.569 and 120.57(1)(b), Florida Statutes guarantee a party to an administrative proceeding the right to a hearing. In particular, Section 120.569(2)(b), Florida Statutes, provides that in proceedings in which the substantial interests of a party are determined by the agency, "[a]ll parties shall be afforded an opportunity for a hearing . . . ." Further, Section 120.569(2)(j) provides a party the right to conduct cross-examination. The requirement for an agency to afford a party the right to conduct cross-examination, as well as a requirement for the agency to comply with a panoply of procedural mechanisms designed to guarantee parties' due process rights, is further mandated by Section 120.57(1)(b) when a proceeding involves disputed issues of material facts. Consistent with the requirements of Sections 120.569 and 120.57(1)(b), this Court,

and other Florida courts, have held that it is a denial of due process to deny a party a hearing in an administrative proceeding in circumstances such as these.

In *Florida Gas Co. v. Hawkins*, 372 So. 2d 1118 (Fla. 1979), the Court was asked to review a Commission order that denied a public utility a formal rate proceeding where the utility had filed for a rate increase. The Commission had denied the utility the hearing based upon the Commission's review of data preliminarily filed by the utility and its determination that summary rejection of the utility's proposed rate increase would avoid unnecessary litigation.

This Court quashed the Commission's order, ruling that the Commission had denied the utility due process. In reaching that conclusion, the Court ruled:

> When factual matters affecting the fairness of utility rates are being considered by a regulatory commission the rudiments of fair play and due process require that the Company must be afforded a fair hearing and an opportunity to explain or rebut those matters. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to avoid delay, when the minimal requirement of a fair hearing has been neglected or ignored.

372 So. 2d at 1121, *citing Ohio Bell Tel. Co. v. Public. Util. Comm'n of Ohio,* 301 U.S. 292 (1937). The Court based that decision on its holding in *Florida Rate Conference v. Florida R.R. and Public Util. Comm'n*, 108 So. 2d 601, 607 (Fla. 1959) where it stated:

> . . . [W]e have held that where a rate, rule or regulation is made without statutory authority or without giving the carrier affected by it, reasonable opportunity to be heard, or without obtaining or considering any substantial evidence, where investigation, inquiry and evidence are necessary as a basis for the action taken, the proceeding

> is not had in due course of law and this court will not enforce it. *State ex rel. Railroad Com'rs v. Florida East Coast R. Co.*, 1912, 64 Fla. 112, 59 So. 385, 393.

372 So. 2d at 1120.

The Court also relied upon its holding in *Citizens of the State of Fla. v. Mayo*, 333 So. 2d 1 (Fla. 1976). In that case, the Court held that "[t]he general procedure has been and remains that rate increases are awarded only after a public hearing in which testimony is presented by all interested parties and cross-examination is permitted." *Citizens of the State of Fla. v. Mayo*, 333 So. 2d at 4. Reflective of that holding, in *Florida Gas*, the Court stated that in *Citizens of the State of Fla. v. Mayo* "the Court reaffirmed the public policy of this state favoring traditional due process rights in utility rate hearings." 372 So. 2d at 1121.

The reasoning of the *Florida Gas* decision is fully consistent with the subsequent jurisprudence of this state. For instance, the court held in *Village Saloon, Inc. v. Division of Alcoholic Beverages & Tobacco*, 463 So. 2d 278 (Fla. 1st DCA 1985):

> Fundamental to due process is the right to a fair hearing. The provisions of Section 120.57 implement the right through the mechanism of formal proceedings or informal proceedings. Section 120.57(1) governs formal proceedings and necessarily requires the holding of a hearing. . . . While a party has the absolute right to a formal hearing under Section 120.57(1) when material facts are in dispute, the absence of disputed issues of material fact, which authorizes informal proceedings under section 120.57(2), does not, ipso facto, eliminate the right to a hearing. Hearings, whether conducted

> under Section 120.57(1) or (2), provide the essential mechanism whereby parties confront each other at a common time and situs and present evidence, legal authority, and argument in support of their respective positions.

463 So. 2d at 284-85; *see also Citizens of the State of Fla. v. Wilson*, 568 So. 2d 904, 908 (Fla. 1990) ("The Commission cannot enter a final order without giving interested parties the right to a hearing."); *Shaker Lakes Apts. Co. v. Dolinger*, 714 So. 2d 1040, 1040-41(Fla. 1st DCA 1998) ("Section 120.57(1), Florida Statutes (Supp. 1996), guarantees all parties the opportunity to present evidence in a full evidentiary hearing."). Indeed, albeit in a dissent, the now Chairman of the Commission recognized this principal herself when she wrote:

> Pursuant to Section 120.57(1)(h), Florida Statutes, a summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists. I note, in this case, that the customer may not have had the benefit of discovery (depositions, answers to interrogatories or admissions on file) that may allow the requisite demonstration of a genuine issue of material fact as contemplated by this state. For that reason alone, I dissent from the majority's decision.

In re: Petition by Florida Power & Light Company for approval of conditional settlement agreement which terminates standard offer contracts originally entered into between FPL and Okeelanta Corporation and FPL and Osccola Farms, Co., 00 FPSC 12:89 (2000); 2000 Fla. PUC LEXIS 1296* 16-17 (2000).

Thus, its is clear that due process mandates that the Commission require the completion of the discovery process and afford the Hospitals the hearing that the Commission had scheduled and which the Hospitals requested be held notwithstanding the proposed settlement. By denying the Hospitals the opportunity for that hearing and completing discovery, the Commission denied the

Hospitals due process as demonstrated by the cases relied upon above. That is particularly so given that the hearing would have involved disputes over material fact and that a hearing therefore was required under Section 120.57(1), Florida Statutes.

B. The Validity Of The Commission's Order Depends Upon Disputed Facts

The prepared testimony of FPL proposed to keep base rates at the level in effect under the 1999 Stipulation. The settlement that was approved by the Commission reduced the base rates by $250 million annually. (R. 11900). The prepared testimony of the expert witness sponsored by the Hospitals, Mr. Lane Kollen, however, raised numerous issues to support an annual reduction of $475 million. (R. 11325-431). Additionally, the Hospitals intended to introduce evidence concerning several issues through cross-examination of FPL's witnesses that would have called for annual reductions to FPL's base rates of an additional $60 million, *i.e.*, for a total annual reduction supported by the Hospitals of $535 million. (R. 11850). Further, additional discovery that had not yet been completed may have served as a basis for the Hospitals to seek a rate reduction in excess of $535 million annually.

To determine whether the settlement resulted in just and reasonable rates, or rates that are excessive and therefore are unjust and unreasonable, required the resolution of numerous factual disputes involved in the difference between the

$250 million reduction approved by the settlement and the greater reduction supported by the Hospitals. Section 120.68(7)(a), Florida Statutes, thus requires the Court to remand this case to the Commission for a hearing to resolve the factual disputes discussed below. *See, e.g., Peterson v. Department of Business Regulation*, 451 So. 2d 983 (Fla. 1st DCA 1984) (a hearing is a matter of right, *i.e.*, it is not within an agency's discretion to deny a hearing); *see also Zarifian v. Department of State*, 552 So. 2d 267 (Fla. 2nd DCA 1989) ("Section 157(1), Florida Statutes (1987) provides for a formal hearing when a disputed issue of material fact is involved."); *Saddlebrook Resorts, Inc., v. Wiregrass Ranch, Inc.*, 630 So. 2d 1123, 1126 (Fla. 2nd DCA 1993) ("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).

One issue that turns on the resolution of factual disputes concerns FPL's affiliate transactions. As was shown above, based upon the information that is known, FPL Group shareholders enjoyed a substantial gain from the sale of interests in Adelphia, a company that was doing business with FPL and which had at least one common officer with FPL. (R. 11683). Additionally, Adelphia had a direct financial relationship with Olympus, which would benefit from using FPL's rights-of-ways. (R. 11679 and 11682). FPL also transferred a fiber optic network to its affiliate, FiberNet, and thereafter, rental revenues that are credited against

FPL's jurisdictional cost of service fell precipitously. (R. 11680). And, FPL shed millions of dollars in valuable assets to LRIC, another affiliate. *Id.* These relationships and transactions, which again must be explored in greater detail through additional discovery, raise the question whether FPL has engaged in activities that result in revenues that should have benefited ratepayers as credits against FPL's jurisdictional cost of service, instead being used to benefit shareholders. If an examination of the facts ultimately shows that FPL has engaged in such activities, such a finding would require that those activities be taken into account in setting rates.

Section 366.093(1), Florida Statutes, explicitly gives the Commission access to the public records of utilities, their affiliates and their parent corporations "to ensure that a utility's ratepayers do not subsidize nonutility activities." Consistent with this provision, the Commission is required to reduce rates when necessary to ensure that a public utility's rates do not subsidize affiliates' business activities. Indeed, the Commission itself has ruled that "a basic premise of regulation is that utility operations should not subsidize other operations . . . ." *In re: Petition for a rate increase by Florida Power Corporation*, Order No. PSC-92-1197-FOF-EI, 1992 Fla. PUC LEXIS 1546* 130 (Oct. 22, 1992); *see also In re: Investigation into the earnings and authorized return on equity of Gulf Power Company. In re: Petition by Gulf Power Company for approval of proposed plan for an incentive*

revenue-sharing mechanism that addresses certain regulatory issues including a reduction to the company's authorized return on equity, Order No. PSC-99-1047-PAA-EI, 1999 Fla. PUC LEXIS 915* 6-7 (May 24, 1999).

Because the procedures before the Commission were aborted, FPL never filed testimony concerning the affiliate issue. However, based upon its statements in response to motions to compel discovery, it is clear that FPL does not believe that its transactions with affiliates would impact rates. (R. 11066 and 11245). Thus, the facts concerning FPL's affiliate transactions clearly are in dispute. As such, the only way to determine whether FPL has been engaged in activities with affiliates and other entities that have resulted in ratepayers' subsidization of non-utility operations, and to determine the impact on rates of any such activities, is to remand this case for a completion of discovery and a hearing.

Another issue turning on the resolution of factual disputes involves the question whether FPL's capital expenditures on new generation plants and repowering projects properly are included in rate base. Mr. Kollen's testimony on behalf of the Hospitals showed that FPL was proposing to include in rate base approximately $100 million representing a cost overrun on FPL's project to repower its Sanford power plant. (R. 11366; *see also* R. 10951). A confidential portion of Mr. Kollen's prepared testimony contains information that relates to the question whether cost overruns and other generation-related expenditures should

be included in rate base. (*See* p. 25 of Index of Record). Additionally, the process by which FPL estimated costs of alternatives to its existing generation construction process may be seriously flawed, resulting in skewed decisions regarding construction and procurement of generation resources. Mr. Kollen's prepared testimony further shows that FPL apparently shifted capital expenditures associated with the Sanford repowering project into 2002, the test year for determining rates. (R. 11364). By doing so, FPL appears to have improperly loaded capital costs into 2002 rate base. Resolution of whether the cost overruns of the Sanford repowering project and other generation-related expenditures were prudently incurred and should be included in rate base in 2002 thus requires a hearing in which the prudence of FPL's activities and planning processes associated with the addition of new generation can be examined.

A third issue requiring the resolution of facts that are in dispute concerns FPL's capital structure, *i.e.*, specifically, the effect of FPL's unusually thick equity component on its return on equity. As previously indicated, the level of FPL's equity component was one of the factors that caused the Commission to implement the review of FPL's rates in the first place.

If there were a hearing, the Hospitals would produce evidence through cross-examination of FPL's witnesses that shows that FPL's unregulated affiliates are engaged in high risk business activities, *i.e.*, building independent power plants in

other states. (R. 11851). The Hospitals also would show that the FPL Group, FPL's parent, maintains a very thick equity component in order to provide credit protection necessitated by the high risk activities of the unregulated entities. *Id.* The Hospitals also would show that having the thick equity component, if it is not adjusted downward for ratemaking purposes, causes FPL's ratepayers to subsidize the operations of the unregulated affiliates in violation of the requirement that ratepayers not be required to subsidize non-utility operations. *Id.* The Hospitals maintain that this subsidization has a $173 million per year effect on FPL's base rates. *Id.* These are all issues that involve disputed facts that must be resolved by a hearing.

Other factual disputes concern FPL's claimed operation and maintenance ("O&M") expenses. FPL has boasted for years about its successes in reducing O&M expenses. (R. 11350; *see also* R. 11349). Yet, when it was finally forced into a comprehensive rate review, FPL inexplicably tried to justify its rates by claiming that it expected its O&M expenses to increase by 9.2 percent. (R. 11348). The question of whether FPL's O&M expenses actually would increase by 9.2 percent, or some lesser amount, or not at all, is another issue that only can be determined through the resolution of disputed facts. The resolution of this factual dispute would have an annual impact on FPL's base rates in a range of approximately $47.4 million to $94.8 million.

Yet another disputed fact issue involves the depreciation expense related to FPL's nuclear generating units. If provided a hearing, the Hospitals would show that FPL applied for 20-year extensions on its operating licenses. (R. 11332). In fact, on June 7, 2002, the 20-year extension was granted by the Nuclear Regulatory Commission for FPL's Turkey Point Capacity.[1] The Hospitals also would show that FPL plans on operating its nuclear units as long as possible. (R. 11333). The Hospitals also would show, however, that existing depreciation rates assume only a 40-year useful life of the nuclear units, *i.e.*, not the 60-year life that is consistent with the Turkey Point authorized licenses following extension and FPL's stated intentions to operate the plants for 20-years beyond the 40-year life currently assumed for depreciation purposes. (R. 11334). Thus, the Hospitals' expert witness, Mr. Kollen, would testify that it is necessary to correct the mismatch between service lives and depreciation to prevent intergeneration inequities among ratepayers. *Id.* He also would testify that it is necessary to adjust depreciation rates to avoid distorting competition that will occur upon state adoption of legislation to deregulate the market along the lines considered by the Energy Commission. *Id.* The annual effect on FPL's base rates of adjusting depreciation is approximately $77.5 million. (R. 11336). The issue of whether this adjustment should be made to depreciation rates for FPL's nuclear units thus again requires the resolution of factual issues.

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[1] *See http://*www.fplgroup.com; click on "News"; click on "Florida Power & Light News"; click on item entitled "FPL Announces Operating Licenses Extended For Turkey Point Nuclear Power Plant" (June 7, 2002).

Another factual dispute involves a deferred pension debit that FPL included in working capital. This asset represents the cumulative effect of FPL's net pension income since 1994. (R. 11339).

The Hospitals' expert, Mr. Kollen, in his prepared testimony, testified that the rates that were in effect from 1994 through 2001 reflected the recovery from ratepayers of positive pension expense based upon the test year levels included in rates in FPL's last rate case in Commission Docket No. 830465-EI. *Id*. However, in his prepared testimony, Mr. Kollen also testified that from 1994 through 2001, FPL experienced net pension income that was retained by FPL for the benefit of shareholders. *Id.* Mr. Kollen testified that it therefore was improper to require ratepayers to pay carrying charges on the asset resulting from the net pension income. *Id.* He thus recommended that the deferred pension debit should be removed from rate base. *Id.* He calculated that removing the deferred pension debit from rate base for the 1994 – 2001 period would reduce FPL's revenue requirement by approximately $63 million. (R. 11340). As with the issues discussed above, to determine the correct accounting treatment for the deferred pension debit once again requires the resolution of disputed facts – in this case, a determination of the proper way in which to account for the deferred pension debit in view of the circumstances under which it arose.

It goes without saying that the Hospitals believe their position should prevail on each of the matters discussed above. And were the Hospitals to prevail on each of the items discussed above, which are a subset of the reductions the Hospitals are seeking to FPL's base rates, the reduction that would be called for based upon the items that can be quantified at this point would be approximately $360 million, or $100 million more than the reduction that was provided for by the settlement.

But whether the Hospitals are right with respect to these items, or whether FPL's filed case is correct, only can be decided based upon a record that will allow the Commission to consider the factual differences asserted by the parties. Thus, the validity of the Commission's action in approving the settlement only can be determined based upon consideration and resolution of disputed facts.

As a result, Section 120.68(7)(a), Florida Statutes, requires that this case be remanded with a direction that the Commission hold a hearing on these issues that involve factual disputes, *i.e.*, a court shall remand a case to an agency where no hearing was provided prior to agency action and the validity of the action depends on disputed facts. Sections 120.68(e)1 and 4, Florida Statutes, also require that this case be remanded because the Commission did not have discretion to deny the Hospitals the hearing they are seeking. *See, e.g., Gugelmin v. Division Of Admin. Hearings,* 2002 Fla. App. LEXIS 6175 (Fla. 4th DCA 2002); *see also Tampa Elec. Co. v. Garcia,* 767 So. 2d 428, 433, *corrected by* 2000, Fla. LEXIS 1901 (2000)

rehearing denied, 2000 Fla. LEXIS 1902, *cert. denied*, 532 U.S. 905 (2001) ("deference [to Commission orders] cannot be accorded when the commission exceeds its authority."). Further, the violation of the Hospitals' due process rights requires a remand under Section 120.68(7)(e)4, Florida Statutes due to the violation of the Hospitals' constitutional and statutory rights.

II. THE COMMISSION'S FINAL ORDER IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE

This Court consistently has held that in reviewing a Commission decision, the Court must determine whether the Commission's "action comports with the essential requirements of law and is supported by substantial competent evidence." *Pan American World Airways, Inc. v. Florida Public Serv. Comm'n*, 427 So. 2d 716, 717 (Fla. 1983), *relying upon Florida Tel. Co. v. Mayo*, 350 So. 2d 775 (Fla. 1977); *see also Teleco Communications Co. v. Clark*, 695 So. 2d 304, 308 (Fla. 1997) ("we will uphold the PSC's findings if competent substantial evidence exists in the record to support those findings."); *see also Schreiber Express, Inc. v. Yarborough*, 257 So. 2d 245 (Fla. 1971).

The Court also has held that it will "not affirm a decision of the Commission if it is arbitrary and unsupported by substantial competent evidence, or in violation of a statutory or a constitutionally guaranteed right." *Citizens of the State of Fla. v. Public Serv. Comm'n*, 425 So. 2d 534, 538 (Fla. 1982). Thus, the Court remanded a case to the Commission where the Commission arbitrarily selected a "fact" from outside the record, finding that such a procedure "plainly violates the notions of agency due process which are embodied in the administrative procedure act." *General Dev. Utils., Inc. v. Hawkins*, 357 So. 2d 408, 409 (Fla. 1978). Similarly, the Court quashed a Commission order where the Commission's conclusion was

not supported by substantial evidence in the record. *Fleet Transport Co. of Fla. v. Mason*, 188 So. 2d 294, 296 (Fla. 1966); *see also Tamiami Trail Tours, Inc. v. Bevis*, 299 So. 2d 22, 24 (Fla. 1974) where the Court quashed a Commission order finding that "the Commission's action cannot be based upon speculation or supposition."

Here, we have a proceeding in which there the Commission's order approving the Stipulation refers to no evidence, substantial or otherwise, as support for the Commission's decision. Rather, the Commission apparently approved the proposed settlement based upon an unstated speculation or supposition that the settlement results in just and reasonable rates. But, the Commission never critically reviewed any evidentiary record materials to make that determination because no evidentiary record ever was compiled given the lack of a hearing. As a result, the circumstances in which this case comes before the Court are analogous to the circumstances the Court faced in *Citizens of Fla. v. Mayo*, 333 So. 2d 1 (1976). In that case, the Commission chose to conduct public hearings in which it promised intervenors, including public counsel, the right to present evidence and to cross-examine a utility's witnesses. However, the Commission did not fulfill its promise. It used procedures that effectively eliminated public counsel's right to present witnesses or conduct cross-examination. In view of that circumstances, the Court ruled:

> By foreclosing public counsel's effective participation in the interim rate process after having assured it, the procedures used by the Commission to grant interim rate relief in this case were plainly improper.

Citizens of Fla. v. Mayo, 333 So. 2d at 18-19. After noting that due process under Section 120.26, Florida Statutes (1973) required each party the opportunity, *inter alia*, to conduct cross-examination, the Court found that, based upon the Commission's failure to follow the prescribed procedures, the Court lacked sufficient information to determine whether the Commission's decision was based upon substantial and competent evidence. *Id.* at 20-21. Thus, it remanded the case to the Commission for further procedures.

The circumstances in *Citizens of Fla. v. Mayo* are remarkably similar to the circumstances here, except that the circumstances here are more egregious. Here, the Hospitals were denied the opportunity to complete discovery and conduct cross-examination, and there is no record that even purports to serve as substantial evidence to support the Commission's action. Thus, because the Commission's order approving the settlement is not supported by substantial evidence, Section 120.68(7)(b), Florida Statutes requires that this case be remanded to provide the Hospitals the hearing that the Commission had promised and which is guaranteed under Sections 120.569 and 120.57(1), Florida Statutes.

III. A REMAND IS MANDATED WHERE A PROCEDURAL ERROR IS MATERIAL TO THE FAIRNESS OF THE PROCEEDING

Given that the Commission did not afford the Hospitals the hearing that it promised and that is required under Sections 120.569 and 120.57(1), Florida Statutes, Section 120.68(7)(c), Florida Statutes clearly requires a remand of this proceeding to the Commission. Florida courts repeatedly have relied upon Section 120.68(7)(c) to remand cases when agencies failed to follow prescribed procedures. *See, e.g.*, *Creel v. District Bd. Of Trustees*, 785 So. 2d 1285, 1287 (Fla. 5th DCA 2001) ("this court is required to remand to the agency or set aside the agency's action when 'the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure.' "); *see also Schrimsher v. School Bd. Of Palm Beach County*, 694 So. 2d 856, 861 (Fla. 4th DCA 1997), *review denied*, 703 So. 2d 477 (1997) ("Reversal is mandated when a procedural error is material to the fairness of the proceedings."); *see also Ryan v. Florida Dep't. of Bus. & Prof'l Regulation*, 798 So. 2d 36, 38 (Fla. 4th DCA 2001).

IV. A REMAND IS MANDATED WHERE CORRECTION OF AN ERROR OF LAW COMPELS A PARTICULAR ACTION

The Commission's failure to afford the Hospitals the hearing guaranteed by Sections 120.569 and 120.57, Florida Statutes, also requires a remand of this proceeding under Section 120.68(7)(d), Florida Statutes. That section requires a remand where an "agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." Further, as the court held in *Schrimsher v. School Bd.,* 694 So. 2d at 861, "[u]nlike with procedural errors, we may reverse any erroneous interpretation of law, whether or not the error rises to a level of materiality, so long as the correct interpretation compels a particular action."; *see also Parlato v. Secret Owners Ass'n.*, 793 So. 2d 1158 (Fla. 1st DCA 2001).

Here, Sections 120.569 and 120.57, clearly provided the Hospitals the right to a hearing and the right to conduct cross-examination. The Commission's failure to afford the Hospitals those rights was a clear error of law. And because a correct interpretation of the law would provide the Hospitals those opportunities, Section 120.68(7)(d), Florida Statutes, requires that the case be remanded with a direction compelling the action that is required by statute, *i.e.*, a hearing with full rights of cross-examination.

V. THE COMMISSION'S ORDER APPROVING THE SETTLEMENT IS NOT SUPPORTED BY FINDINGS OF FACT

Remand of this case also is required because the Commission's order is not supported by findings of fact. That failure to make findings of fact is another instance of clear error.

In *International Minerals & Chem. Corp. v. Mayo*, 336 So. 2d 548, 552-53 (Fla. 1976), this Court held that:

> [T]he PSC is required to make findings of fact in rate proceedings. Village of North Palm Beach v. Mason, 167 So. 2d 721 (Fla. 1964); Central Truck Lines, Inc. v. King, 146 So. 2d 370 (Fla. 1962) . . . . The requirement of explicit fact findings makes for more careful consideration by the Commission, helps assure that this Court does not usurp the PSC's fact finding prerogatives, and otherwise facilitates review of Commission orders by this Court. The more detailed the PSC's findings are, the more readily these important purposes are served.

Emphasis added.

The Court's holding in *International Minerals* relied upon the Court's earlier decision in *Central Truck Lines v. King* where the Court reversed a Commission decision based upon the Commission's failure to make findings of fact. As the Court stated there, "findings of fact on essential although collateral issues which might justify the entry of a final order must be made . . . ." 146 So. 2d at 373 n. 1. In rendering that decision, the Court relied upon the opinion of the United States Supreme Court in *State of Fla. v. United States*, 282 U.S. 194, 51 S. Ct. 119 (1931) requiring findings of fact.

Here, there are no findings of fact whatsoever nor could there be based upon the flawed procedures that were used by the Commission. This provides yet an additional reason to remand this case.

CONCLUSION

As shown above, Sections 120.569 and 120.57, Florida Statutes, give the Hospitals the right to a hearing in this case. However, because the Commission did not afford the Hospitals a hearing, the Commission did not have any evidentiary record to resolve key issues that the Commission itself had identified as requiring a review of FPL's rates in the first place. Accordingly, the Court should remand this case to the Commission with directions that the Commission:

(1) allow the Hospitals an opportunity for full discovery, (2) thereafter, afford the Hospitals a hearing and (3) comply with all procedural requirements specified in Section 120.57, in particular Section 120.57(2)(b).

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States mail this 2nd day of July, 2002 to the following parties of record:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point font, which is proportionately spaced.

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