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.

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

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REPLY BRIEF OF THE HOSPITALS

I. INTRODUCTION

Pursuant to Fla. R. App. P. 9.210(f) and 9.420(d), the South Florida Hospital and Healthcare Association (the "SFHHA") and over 35 supporting member healthcare institutions (collectively, the "Hospitals"), representing most of the acute care community in southeastern Florida, reply to the answer briefs ("Br.") of Florida Power & Light Company ("FPL"), the Florida Public Service Commission ("PSC"), the Office of Public Counsel ("OPC") and Lee County Florida ("Lee County") (collectively, the "Opposing Parties").

The Opposing Parties argue, incorrectly, that the Hospitals lack standing to bring this appeal because the Hospitals purportedly are not adversely impacted by the PSC Order approving the Stipulation. This argument is erroneous on numerous counts, as described below. The Opposing Parties' argument that the Hospitals were not entitled to a hearing and received all the process that is due, is closely linked to the argument that the Hospitals are not adversely affected, and when the standing objections collapse, so does the Opposing Parties' claim that a hearing was unnecessary. Lacking any other arguments, the Opposing Parties also maintain that the Hospitals should abandon this appeal and initiate a separate complaint proceeding at the PSC – which the Hospitals did in 2001, to the vociferous objections of the very parties who here insist that a complaint proceeding should be the Hospitals'

vehicle for relief.

II. THE OPPOSING PARTIES CANNOT CREDIBLY CLAIM THAT THE HOSPITALS SHOULD FILE ANOTHER COMPLAINT PROCEEDING BECAUSE OF THE PSC'S FAILING IN THIS CASE

Perhaps the Opposing Parties' most extraordinary argument is that the Hospitals should simply forgo the instant appeal, and instead bring a separate complaint proceeding.1 For instance, the PSC maintains now that "there is nothing to preclude [the Hospitals] from initiating [their] own proceeding to challenge FPL's rates in the future . . . ." (PSC Br. at 31). FPL now argues that if the Hospitals simply abandon the instant appeal, they are "subject to no . . . restraint" in bringing a rate reduction action during the term of the Stipulation that is the subject of this appeal (the "2002 Stipulation"). FPL Br. at 25-26. However, the Hospitals tried precisely that approach, and the Commission rejected the complaint (filed by the Hospitals in PSC Docket No. 010944-EI), at FPL's urging, based upon, *inter alia*, language -- contained in a Stipulation resolving a 1999 proceeding involving FPL's rates (the "1999 Stipulation") - - which also is incorporated verbatim in the 2002 Stipulation here at issue.

The Hospitals served their motion to intervene in Docket No. 001148-EI on May 1, 2001 (a motion the Commission did not manage to act upon for four months). On July 6, 2001, the Hospitals filed a complaint with the Commission (the "Complaint")

1 *See, e.g.,* PSC Br. at 15 ("If the Hospital Association wants to try for a greater rate reduction, it must . . . bring[ ] its own case"); FPL Br. at 20; OPC Br. at 17.

in Docket No. 010944-EI, which, based upon information available from public filings of FPL and data from the Commission's own files, sought a reduction in FPL's rates, on either an across-the-board or a customer-specific basis. Contemporaneously, the Hospitals also sought reconsideration of a Commission Order dated June 19, 2001 declining to place some of FPL's revenues subject to refund in the pending review of FPL's rates in PSC Docket No. 001148-EI. FPL contested the Hospitals' requests vigorously, based on arguments that conflict with its current position. FPL argued in the Complaint proceeding that because the 1999 Stipulation had been approved by Commission order, the Commission could not reduce rates prior to the conclusion of the Stipulation's term. As summarized by the PSC, FPL argued

> that the provisions of the [1999] FPL rate stipulation provide the exclusive means to determine FPL's rates during the three-year term of the stipulation. FPL asserts that the order approving the stipulation, Order No. PSC-99-0519-AS-EI, is final agency action that may not now be overturned. Further, FPL asserts that SFHHA's members, as retail customers of FPL, were fully represented by the . . . OPC . . . [and another customer group].

(R. Vol. 40, 7821; Order No. PSC-01-1928-PCO-EI, slip op. at 4). *See* Appendix A hereto (excerpts from a transcript of FPL's oral argument at the September 4, 2001 Agenda Conference dealing with the Hospitals' Complaint).

Of course, each of these arguments is drawn from facts associated with, or language in, the 1999 Stipulation which are paralleled by facts associated with, or language in, the 2002 Stipulation. Particularly, both the 1999 and 2002

Stipulations have been approved by the PSC; and OPC participated in both proceedings, allowing opponents to argue that the Hospitals were represented by other participants. Moreover, both the 1999 and 2002 Stipulations contain precisely the same sentence, which was claimed in the Hospitals' prior Complaint docket to preclude challenges by even non-signatories to rates established by the 1999 Stipulation:

> During the term of this Stipulation and Settlement revenues which are above the levels stated herein will be shared between FPL and its retail electric utility customers – it being expressly understood and agreed that the mechanism for earnings sharing herein established is not intended to be a vehicle for "rate case" type inquiry concerning expenses, investment and financial results of operations.

See the paragraphs numbered 6 in the Stipulations in both Docket No. 99067-EI (Appendix B hereto) and Docket No. 001148-EI (R. Vol. 61, 11746). It was the effort to obtain interim relief before the expiration of the 1999 Stipulation that precipitated the Complaint filed in 2001 by the Hospitals, opposed by FPL, and denied by the PSC *based upon the language from Paragraph No. 6 of the 1999 Stipulation*. *See* R. Vol. 40, 7830-31 (Order No. PSC-01-1928-PCO-EI slip op. at 13-14); *see also* R. Vol. 2, 400 (Order No. PSC-01-1346-PCO-EI slip op. at 6) (relying on the revenue-sharing mechanism as the basis for refusing to impose interim refund authority on FPL). Thus, it would seem that FPL and its allies seek to send the Hospitals back to a complaint process that only a year ago they argued (and the PSC ruled) would not afford the Hospitals relief. Indeed, the Commission rationalized its denial of the

Hospitals' Complaint by stating: "it appears that SFHHA's . . . request for relief asks for a proceeding that we have already undertaken," referring to the rate review proceeding now before this Court. (R. Vol. 40, 7829 (Order No. PSC-01-1928–PCO-EI slip op. at 12)). In other words, the PSC denied the Hospitals' Complaint because the rate review proceeding would fulfill the purpose of the Complaint docket; but here, the PSC argues that the Hospitals' concerns really do not belong in the rate review proceeding, and instead the Hospitals are invited to pursue a complaint proceeding by the very parties that opposed a separate complaint proceeding only a year ago.2 The Opposing Parties, particularly the PSC and FPL, cannot have it both ways. They cannot here claim that the Hospitals have another avenue for relief, having just erected a roadblock denying Hospitals access to that route.

III. THE HOSPITALS HAVE STANDING

The Opposing Parties contend that the 2002 Stipulation, by lowering FPL's existing rates, deprived the Hospitals - - and effectively *all* of FPL's customers - - of standing to appeal an order approving the 2002 Stipulation. *See, e.g.*, OPC Br. at 18 ("No one was harmed by agency action in the PSC Docket"3).

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2 In fairness, Lee County's assertion (Br. at 9) that the "2002 Stipulation has no binding, preclusive or prejudicial effect on the SFHHA", may be attributed to the fact that Lee County intervened very late in the proceeding – only two weeks before the Stipulation was filed – and thus the County did not have the benefit of having litigated the prior complaint docket.

3 *See* PSC Br. at 20-24; FPL Br. at 26-32; OPC Br. at 18-21.

At the outset, it is important to recognize the significance of the Opposing Parties' argument on this issue. The Opposing Parties' position means that even if the 2002 Stipulation had lowered existing FPL rates in the aggregate by $1, customers would lack standing to appeal a PSC order approving such a Stipulation. Putting aside the prudence of ratepayers' representatives making such an argument, the position is absurd.

The Opposing Parties' arguments conflict with case law that persuasively explains the proper application of the "adversely affected" standard. Courts recognize that utility customers challenging an order which, *inter alia*, reduces rates are not automatically precluded from seeking review of such an order:

> Public utilities enjoy monopolies and they are privileged to exact rates established by agencies set up by law. Consumers of the products of such utilities have the undoubted right to assert that they are adversely affected by rates so promulgated. The fact that the orders of the Public Service Commission embraced service rates was a sufficient basis for the appellees' right to a judicial review. *It is no answer to say that the order relating to rates may not be reviewed because it required a reduction.* The appellees may have believed that the reduced rates were exhorbitant.4

Thus, "[s]tanding is not removed because a party might be better off under a Commission order than it was prior to the order if the effect of the order is

4 *Terre Haute Gas Corp. et al., v. Johnson*, 221 Ind. 499, 506, 45 N.E. 2d 484, 487 (1942), *mandate modified on other grds*, 221 Ind. 516, 48 N.E. 2d 455 (1943) (emphasis added).

nevertheless injurious."[5]

Indeed, in cases involving much more attenuated harm than presented by the instant facts, courts have recognized standing. In *Rinker Materials Corp. v Metropolitan Dade County, et al.*, 528 So. 2d 904 (Fla. 3d DCA, 1987), the court granted standing to a party that had been prohibited from presenting evidence showing that a change in zoning of adjacent property would diminish the value of the party's property interests, even though the underlying order of the zoning agency did not purport to directly affect that party's property. *Id.* at 907. Here the Hospitals' efforts to obtain adequate discovery, regarding transactions which would affect rate base and thus the derivation of rates, was not fulfilled, and thus, the Hospitals clearly have standing, under *Rinker, supra*.

In *Rabran v. Dept. of Professional Regulation*, 567 So. 2d 1283, 1287 (Fla. 1st DCA, 1990), the underlying agency order dismissed all charges against an individual, but nonetheless made certain conclusions of law. The individual who had been the target of the agency proceeding appealed and was found to have standing to challenge the agency order, given that additional proceedings involving the individual clearly were contemplated. In much the same fashion, it requires no foresight to recognize that the language contained in the 2002 Stipulation as framed here, modeled after the 1999 Stipulation, again will be used to thwart

5 *Home Builder's Association of Indiana, Inc. v. Indiana Utility Regulatory Commission*, 544 N.E. 2d 181, 184 (Ind. Ct. App. 3d Dist., 1989).

review of FPL's rates. *See* Part II, *supra*.

The cases the Opposing Parties rely upon to articulate the standards for standing, *Agrico Chemical Co. v. Department of Environmental Regulation,* 406 So. 2d 478 (Fla. 2d DCA 1981), and *AmeriSteel Corp. v. Clark,* 691 So. 2d 473 (Fla. 1997), actually reinforce the conclusion that the Hospitals have standing. In *AmeriSteel*, the appellant lacked standing to challenge an order that, according to the decision, "in no way affects AmeriSteel" and which "merely preserves the status quo." 691 So. 2d 473, 476. Understandably, lacking any injury, AmeriSteel also lacked standing. In *Agrico*, an environmental permit was requested to allow a new supplier of solid sulphur to make deliveries to a company that previously had purchased significant amounts of liquid sulphur from another supplier. The incumbent supplier of liquid sulphur (and its transporter) sought to intervene in the environmental permitting process, and were found by the court to lack standing because competitors' interests in maintaining supplier arrangements were not among those intended to be protected by the environmental statutes. 406 So. 2d 478, 482-83.6 In contrast to *Agrico*, the Opposing Parties cannot seriously contend that the PSC should ignore whether consumers are overcharged by utilities; indeed,

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6 *Cf. Fairbanks Inc. v. State Dept. of Transp.*, 635 So. 2d 58 (Fla. 1st DCA 1994) (cited in FPL Br. at 23-24), where standing was granted based on the attenuated interest of a supplier to a party bidding on a state construction contract; the supplier was entitled to a hearing regarding a state agency's exclusion of the supplier's equipment from the specifications in the construction contract, even though the court acknowledged that a competitive procurement requirement was *not* incorporated in the state's regulations. *Id*. at 59.

that is one of the PSC's primary responsibilities. (*See* R. Vol. 2, 400: "Our over-arching 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.")

The Opposing Parties' standing argument relies in large part on cases involving environmental advocacy groups that lacked standing because they asserted their injury was derived from that experienced generally by citizens of the state, or by the group's members who were *not* parties to the case. *See Legal Environment Assistance Foundation v. Clark*, 668 So. 2d 982 (Fla. 1996); *Florida Chapter of the Sierra Club v. Suwanee American Cement Co., Inc.*, 802 So. 2d 520 (Fla. 1st DCA 2001). These cases are inapplicable because, *inter alia*, in this case, individual institutions, whose costs will be directly affected by the Commission order, are seeking review of that order.

FPL argues the Hospitals lack standing based upon *Bodenstab v. Department of Prof. Reg.*, 648 So. 2d 742, 743 (Fla. 1st DCA 1994), where the court found that the appellant lacked standing to appeal an order that had provided the relief sought. Given that the Hospitals had sought a rate reduction of more than $500 million (in lieu of the Stipulation's $250 million), changes in rate design (not implemented by the Commission), discovery concerning transactions between FPL and affiliates (never provided and thwarted by the Commission's termination of discovery processes), and recognition of on-site hospital electric generation capacity (not

granted by the Stipulation), *Bodenstab* is irrelevant.

Similarly inapposite is the PSC's citation (Br. at 23) to *Dance v. Tatum*, 629 So. 2d 127 (Fla. 1993) for the proposition that when a party obtains a favorable judgment and accepts benefits thereunder, that party cannot appeal the judgment (*id.* at 129). The PSC neglects to mention that the same paragraph in *Dance* containing the cited proposition also notes the "exception to this . . . rule . . . where the appellant is entitled in any event to at least the amount received", *id.*, such as even greater reductions in utility rates than granted by the Stipulation.

Under the Opposing Parties' formulation, ratepayers cannot obtain court review of an order that reduces rates from the level that had been set by a *prior Stipulation* (which ratepayers likewise would have lacked standing to challenge, under Opposing Parties' theory, because it also included a reduction to prior rates), regardless of whether the newly agreed-upon rates are cost-justified. The fact that FPL's prior level of rates has been reduced by the Stipulation does not signify that

the new level is fair and reasonable, or cost-justified, or anything other than that

the prior level of rates clearly is too high for current service.[7] In that context, the Opposing Parties' position would eliminate the ability of consumers to appeal from

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7 OPC states (without any record citation) that FPL will exceed the sharing thresholds for calendar year 2002 (OPC Br. at 33); the last page of FPL's Appendix A2 discloses that in the first two years under the 1999 Stipulation (from 1999 to 2001), FPL's net income and related income taxes increased by $162 million (*i.e.*, $103 million in increased net income and $59 million in related income taxes), or an average of over $80 million annually.

orders reducing rates by even *de minimis* amounts, and if such orders are issued occasionally over the course of fifteen or twenty years as the utility's costs decline, then ratepayers will be precluded from effective judicial review of an agency's decisions involving the utility for extended periods. As the PSC itself noted, prior to this case FPL had not made a full MFR filing in *17 years*. (R. Vol. 2, 399; Order No. PSC 01-1346-PCO-EI slip op. at 5).

The Opposing Parties' argument that the approval of the Stipulation does not adversely affect the Hospitals is erroneous for another reason as well. The 2002 Stipulation (Paragraph No. 108, a provision never mentioned by OPC and FPL) permits FPL - - to the tune of $125 million *annually*, or up to $464 million over the life of the Stipulation - - to reduce, or reverse prior, depreciation amortization, and debit the "bottom line depreciation reserve over the term of this Stipulation." Resulting depreciation account reserve deficiencies "will be included in the remaining depreciation rate *and recovered over the remaining lives of the various assets*" (emphasis added). The lower the level of depreciation, the less rate base will be reduced; and the higher the level of rate base, the higher the level of base rates, when the nominal term of the 2002 Stipulation expires in 2005. In other words, the effects of the 2002 Stipulation will be experienced in 2006 and beyond, "over the remaining lives" of various long-lived assets. Obviously, higher rates in

8 R. Vol. 62, 11910, contained in Appendix B to the Hospitals' Initial Brief.

2006 adversely affect ratepayers such as the Hospitals, a fact the Opposing Parties fail to even mention, much less address.

Moreover, in the rate proceeding, any change in base rates after the expiration of the 1999 Stipulation (*i.e.*, April 14, 2002) will be made effective as if the order making such change was made on April 15, 2002, provided certain conditions are met (*e.g.*, a final order was rendered by June 30, 2002).9 Of course**,** any remedy implemented outside of that docket would not have this assurance of effectiveness as of April 15, 2002; thus if FPL's rates under the Stipulation still collect $100 million annually in excessive revenue, abandoning this docket would leave over half of that amount with FPL even if a new proceeding could place FPL's rates subject to refund tomorrow. Thus, the Opposing Parties are in error in contending that the Hospitals are not adversely affected, even if one attributed any credibility to their claim that the Hospitals should abandon the instant case and instead file yet another complaint with the PSC (as discussed in Part II, *supra*).

There is an additional reason why the Opposing Parties' standing arguments lack merit. The Commission's order on the Stipulation does not address several issues raised in the Hospitals' testimony. For instance, the Hospitals urged that new service agreements with FPL should recognize existing generation resources available at South Florida healthcare facilities, available on short notice and for

9 R. Vol. 3, 411 (last full sentence on page).

intermittent use to supplement power from FPL's own generation, *see* Appendix C hereto (Direct Testimony of Stephen J. Baron, R. Vol. 60, 11449-55 (at 17-24 in original)), thereby reducing the amount of new, costly additional generation capacity planned by FPL, and allowing the healthcare facilities to reduce demand at critical or high-cost peak demand periods. The Hospitals also raised a rate design issue. *Id*. R. Vol. 60, 11447-49; pp. 15-17 in original. These issues are not addressed by the Stipulation.10

Thus, the Hospitals are "adversely affected" by, and have standing to challenge, the order at issue.

IV. DUE PROCESS

(A) The PSC Erred By Not Requiring Production Even Of Information It Had Directed Should Be Provided

Curiously absent from all of the Opposing Parties' briefs save that of FPL is any substantive discussion of the failure of the PSC to ensure that FPL responded to the Hospitals' discovery requests, and the impact of that failure upon this appeal. Affiliate-dealing or self dealing and a convoluted structure of special purpose partnerships should, given events of the past year in the energy industry, receive

10 Perhaps animated by its effort to squeeze this case into its desired mold that the Hospitals were not adversely impacted, the PSC mischaracterizes the Hospitals' case, claiming that the Hospitals had stated that the affiliate-dealing issues and transactions with Adelphia would be part of the Hospitals' proposed $500 million in disallowance (PSC Br. at 12). That assertion is incorrect. The Hospitals maintained that the affiliate-dealing issue exposure of FPL was *not* included in the $500 million rate reduction estimate. *See* R. Vol. 62, 11852 (March 22, 2002 Agenda Conference Tr. 18).

significant scrutiny by the PSC; but the PSC, while initially acknowledging the propriety of discovery on this topic, shut down discovery, without requiring provision of information it previously had ruled should be produced, in its hurry to clear its docket of this case.

The significance of adequate discovery was highlighted in an October 24, 2001 "Order Establishing Procedure" in the rate review docket:

> The Commission expected that information in the [Minimum Filing Requirements] would be a starting point for reaching a determination on the reasonableness of FPL's rates. The MFRs in and of themselves will not provide all the information necessary to ascertain the reasonableness of FPL's rates . . . . An audit, and an *adequate period for discovery are necessary* to evaluate and, if necessary, challenge the assertions contained in the MFRs. *The discovery . . . process[ ] should be permitted to take place . . . to allow . . . a fair opportunity to review the MFRs.*

(R. Vol. 48, 9401; (underlining in original; italics added)). Yet, the Commission abandoned this position as the Hospitals sought to fully explore the multi-dimensional relations and business dealings between FPL and Adelphia Communications ("Adelphia"), the target of an SEC investigation and whose executives have been arrested and charged with fraud, self-dealing and accounting abuses.11

11 On the Internet, go to http://www.montanaforum.com. Under related news; go to past 2002 issues, submit query 06/11/2002, go to consumer protection; go to http:///news.bbc.co.uk. Under business, search for "Adelphia"; go to http://www.comcast.net. Under News, search archive of 7/25/2002, for "Adelphia"; Wall Street Journal, September 18, 2002, p. 8.

Adelphia and its affiliates do a significant amount of business with FPL, including leasing assets (or access thereto) originally paid for by the electric ratepayers of FPL. *See* the Hospitals' Initial Brief, pp. 9-12; Appendix C to the Hospitals' Initial Brief, reproducing R. Vol. 61, 11680-722.

But Adelphia had another relationship with FPL, aside from that of lessee/tenant. Adelphia and affiliates undertook business activities in league with affiliates of FPL in various partnerships. For instance, Adelphia held interests in an entity called Olympus Communications, L.P. ("Olympus"), and the FPL Group also owned entities that were partners in Olympus. Olympus provided cable television service in Florida, acquiring or leasing real property, microwave facilities and business offices, and acquired rights on fiber optic cables to transmit signals. By late 1999, FPL had its interest in an unnamed cable limited partnership redeemed, and sold 3.5 million shares of Adelphia's stock, for aggregate after-tax gains of more than $160 million.12

The Hospitals propounded discovery requests concerning relationships and transactions through which value in assets and property originally paid for by FPL electric ratepayers might be conveyed to other entities (*e.g.*, Olympus), and FPL objected, in some instances denying involvement, in other instances arguing that no further disclosure was warranted. In its arguments opposing discovery, however,

12 *See* Appendix C to the Hospitals' Initial Brief (R. Vol. 61, 11680-83)

FPL failed to tell the PSC that FPL's General Counsel, Dennis Coyle, was on the Board of Directors of Adelphia. FPL also failed to disclose that Mr. Coyle served as president of a general partner in Olympus (R. Vol. 61, 11683-84).

The Presiding Officer found the Hospitals' requests proper and ruled that FPL must produce information requested by the Hospitals within four calendar days of the order (R. Vol. 58, 11125-28). Instead of complying with the order, FPL stonewalled on the discovery responses and filed a motion for rehearing of the order (along with failing to respond to other discovery requests of the Hospitals subject to unresolved motions to compel).

Long after FPL was obligated to produce the outstanding data requests, the PSC on March 14, 2002 suspended the procedural schedule for the docket, and approved the Stipulation at the March 22, 2002, Agenda Conference. In a clever but misleading paraphrase of comments at the Agenda Conference, FPL attempts to imply that no data were withheld, attributing to Staff the assertion that Staff "did not believe that any information had been withheld" (FPL Br. at 22). The actual statement by Staff was carefully limited to responses to Staff's discovery requests (R. Vol. 62, 11862; March 22, 2002 Tr. at 28: "the company has provided responses to all of *our questions* so far"). In fact, FPL had failed to respond to some discovery requests for more than three months; some requests were subject to motions to compel filed by the Hospitals; and some were subject to an order of the Presiding

Officer compelling production. Once the Stipulation was approved, the Hearing Officer vacated his prior ruling requiring provision of the discovery the Hospitals sought (R. Vol. 62, 11832). Also outstanding at the time were discovery requests of the Hospitals concerning cost overruns of $100 million associated with a FPL generation construction project (*see* R. Vol. 62, 11854; R. Vol. 59, 11366).

Perhaps recognizing the somewhat unsavory nature of these circumstances, the remaining Opposing Parties avoid the issue or deal with it very obliquely. OPC's statement of facts simply omits any mention of the several motions to compel filed by the Hospitals, or the order requiring the production of the data, or the vacating of that order. The PSC, for its part, asserts that parties in the proceeding "conducted extensive discovery" (PSC Br. at 10, 37)13 without claiming that responses to such "extensive discovery" were provided.

The failure to provide thorough discovery is especially damaging when viewed in the light of the Commissioners' own statements. The Commission's June 19, 2002 order expressly reassured participants that the Commission would be "requiring the filing of sufficient information on a timely basis" (R. Vol. 2, 399; slip op. at 5). According to one of the Commissioners at the March 22, 2002 Agenda Conference, "as a result of the thoroughness of the discovery that was done in this docket, the parties were able to negotiate from a position of strength" (R. Vol. 62, 11891, lines

13 The PSC (Br. at 11) also quotes an unsworn FPL statement supporting the Stipulation, touting the "comprehensive and exhaustive review of our operations."

9-12; Tr. 57). Another Commissioner claimed that the Commission's goal should be to "lay the issues bare" (R. Vol. 62, 11889, line 24 – 11890, line 3; Tr. 55-56). Statements at the Agenda Conference and in prehearing orders, emphasizing the importance of discovery, demonstrate the error in failing to compel production of information involving the Adelphia/affiliate dealing issue, as well as the other information requested by the Hospitals.

In sum, the Commission suppressed discovery of the issues despite:

- the occurrence of events that gained notoriety in 2002 involving partnerships operated in the shadows of large corporations;
- the Commission's professed belief in the need for full disclosure; and
- the FPL Group's significant gains (*e.g.*, $160 million) realized for its shareholders from unidentified entities positioned to benefit at the expense of electric ratepayers.

If FPL has nothing to hide, why did it conceal its ties to Adelphia and Olympus Communications and why has it refused to provide the requested information?

(B) The Procedures And Record Below Were Inadequate And Frustrate Judicial Review

The Opposing Parties' citation to a series of cases actually highlights the inadequate procedures used here by the PSC. For instance, the PSC's efforts to avoid an adequate hearing place great reliance upon *New Orleans Public Service v. FERC*, 659 F. 2d 509 (5th Cir. 1981) ("*NOPSI*"). However, factual issues in *NOPSI were* subject to a "full hearing with cross-examination" before the agency,

albeit in a parallel docket. *Id*. at 514 (internal quotation marks omitted). Here, the Hospitals tried in another docket (*i.e.*, the Complaint in Docket No. 010944-EI) to obtain review of various facts supporting a rate reduction and were turned down by the PSC (*see* Part II, *supra*). Moreover, in *NOPSI* the agency "addressed NOPSI's objections to the settlement proposal" in the order approving the settlement (*id*. at 515), in distinct contrast to the order here at issue, which does not even identify the Hospitals' arguments, much less meet them (instead, the order in a single sentence simply acknowledges the Hospitals' non-support of the Stipulation (*i.e.*, R. Vol. 62, 11900)).14 In sum, *NOPSI* actually supports the position of the Hospitals, not that of the Opposing Parties.

In *Pennsylvania Gas and Water Company v. FERC*, 463 F. 2d 1242 (D.C. Cir 1972), relied upon by the PSC (Br. at 26, 28) and FPL (Br. at 16) (but wisely avoided by OPC), (1) evidence was formally admitted into the record; (2) all of the allegations of the party challenging the stipulation were accepted as true (thus obviating the need for a hearing); and (3) the agency's order dealt "in detail" with the challenging party's objections. *See Pennsylvania Gas,* 463 F. 2d at 1244 n. 11, 1245, 1251. None of these elements was observed in this case. In *Bryant v. Arkansas Public Service Commission*, 877 S.W. 2d 594 (Ark. 1994), cited by the

14 In *NOPSI*, the party alleging genuine issues of material fact had not sponsored the testimony creating the alleged factual issues; the relevant testimony had been sponsored in a different phase of the proceeding (*id*. at 514) and ultimately the sponsor of the testimony changed its position and supported the settlement (*id*.), unlike our facts.

PSC, the agency approved a stipulation following (i) receipt of testimony on the specifics of the stipulation, *id*. at 597, (ii) formal admission of the evidence into the record, *id*. at 603, (iii) cross-examination on the evidence, *id* at 600, and (iv) briefs on the merits of the settlement, *id*. at 597. The foregoing cases simply emphasize the inadequacy of procedures used (or not used) by the PSC here, resulting in an order which ignored issues raised by the Hospitals, in contrast to the agency actions under review in the foregoing cases.

Betraying concern about the validity of their contentions that a hearing was unnecessary in order to conclude the rate review proceeding, the Opposing Parties erroneously attempt to depict the March 22, 2002 Agenda Conference as a quasi-hearing. Thus, Lee County cites to "competent, substantial evidence" (Lee County Br. at 11 n. 8), failing to note that in fact none of the pre-filed testimony offered by the parties was sworn or subjected to cross-examination.

Similarly, the PSC claims the "parties . . . testimony in support of the Stipulation provided the Commission with all the competent evidence it needed . . ." PSC Br. at 17. But the statements at the Agenda Conference - - the *only* statements that related to the particular features of the Stipulation as opposed to the participants' litigation positions - - were not "testimony." The statements were not sworn and generally consisted of lawyers' advocacy and praise of other settling parties. To characterize these statements as "testimony" is to underline the absence

of any real evidence in support of the Stipulation's features.

Ironically, FPL claims that the PSC "paid careful attention to the SFHHA's objections" (FPL Br. at 22) during the Agenda Conference. The Commissioners invited Opposing Parties' counsel to extol the virtues of the Stipulation and the Commission, but the Commission's only comments to the Hospitals were reminders of the short balance remaining (R. Vol. 62, 11854, lines 6-7, Tr. 20) in the Hospitals' allotted time for a presentation (which the Commission originally proposed to limit to five minutes and ultimately allotted fifteen minutes (R. Vol. 62, 11848-49; Tr. 14-15)).

V. A HEARING WAS NECESSARY BEFORE CONCLUDING THE CASE, ABSENT A UNANIMOUS SETTLEMENT

The Opposing Parties maintain that there was no need for a hearing or a unanimous settlement to terminate the rate review proceeding. As part of that argument, the Opposing Parties maintain that there was no promise by the PSC of a hearing or unanimous settlement to resolve the rate review proceeding.

This position ignores the Commission's own repeated statements to the contrary. On June 19, 2001, while indicating that it would undertake a review of FPL's rates to be effective following April 14, 2002, the PSC noted:

> 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 . . . . [Additional disclosure of information] can empower parties and the Commission to reach *a settlement that everyone can agree* is in the public interest.

R. Vol. 2, 400 (emphasis added). This language signaled that (1) the PSC understood it was initiating a new "rate proceeding" distinct from prior phases of the proceeding involving GridFlorida and the Entergy/FPL-merger, and (2) any settlement resolving the "rate proceeding" would be one upon which "everyone can agree."

On October 24, 2001, the PSC detailed the procedures it was establishing for review of FPL's rates. *In re: Review of the retail rates of Florida Power & Light Company*, 01 FPSC 10:484 (2001) (the "Hearing Order") (R. Vol. 48, 9394). FPL's proposal to truncate the Minimum Filing Requirements ("MFR") procedures (R. Vol. 48, 9399), narrowing the scope of any hearing, was rejected as "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. Vol. 48, 9401; slip op. at 8). Instead,

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

Id. (R. Vol. 48, 9401; emphasis added). Consistent with this ruling, the Commission set the matter for hearing beginning on April 10, 2002. (R. Vol. 48, 9400).

On February 26, 2002 the Commission further gave notice "that a hearing

will be held . . . in the . . . referenced docket" running April 10, 2002 through, if necessary, April 16, 2002 (R. Vol. 58, 11122). "At the hearing, all parties shall be given the opportunity to present testimony and other evidence . . . . All witnesses shall be subject to cross-examination . . . ." (R. Vol. 58, 11123).

Incredibly, OPC's Statement of the Case and of The Facts completely fails to quote the language excerpted above from either the June 19, 2001 or the October 24, 2002 orders. *See* OPC Br. at 6-7 and 10-11.15 Instead, OPC cites to language from an order issued in 2000 regarding *other* phases of the docket involving different inquiries (*i.e.*, the formation of GridFlorida and FPL's ultimately unconsummated merger with Entergy Corporation) for the proposition that "[n]o hearing is currently scheduled" (OPC Br. at 4). Whatever the significance of that statement in 2000 regarding the different phases of the proceeding, and given the obvious temporal limitation in the language of the 2000 Order quoted by OPC (*i.e.*, "is currently scheduled"), it cannot trump the PSC's later statements specifically identifying the only "two means of addressing [the] issue with finality in Florida Administrative Law" for the rate review proceeding.

FPL and OPC further acknowledge that if the Hospitals' substantial interests will be affected by proposed agency action, a hearing is necessary. *See* FPL Br. at

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15 The Statement of the Facts of both the PSC and FPL acknowledge that the October 24, 2001 order was issued, but ignore the language in which the PSC pledged either a unanimous settlement or in the alternative a hearing. PSC Br. at 7, FPL Br. at 4.

23-25; OPC Br. at 35 ("an agency does not have to resolve disputes unless a hearing is requested by a party likely to suffer injury from the agency's contemplated action"); *see* also *id.*, 26-27 n. 12. That standard, as articulated in Section 120.569, Florida Statutes, is readily met by the Hospitals (*see* Part III, *supra*), and on that basis it is clear that the Hospitals were entitled to a hearing.

OPC offers an additional argument, urging that Section 120.57(4), Florida Statutes, authorized the PSC's action. That provision states:

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

However, the opening phrase of the statutory language - - "[u]nless precluded by law" - - does not seem to have entered into OPC's consideration. As discussed above, and in the Hospitals' Initial Brief, resolution of this proceeding by stipulation *was* precluded by law; Section 120.57(4) does not apply.

OPC concedes that the Hospitals would be entitled to a hearing if "the Hospitals had petitioned for a rate decrease" (OPC Br. at 28). In fact, the Hospitals' July 6, 2001 Complaint sought to reduce FPL's rates, as OPC admits (OPC Br. at 8); *see* Part II, *supra*. What OPC does *not* disclose is that, in dismissing the Hospitals' Complaint in September 2001, the Commission stated that "SFHHA's . . . request for relief asks for a proceeding *that we have already undertaken,*" referring to the rate review proceeding initiated by the Commission's

June 19, 2002 order (R. Vol. 2, 7829; emphasis added). Obviously, the parties knew that the Hospitals sought a reduction in rates that the Hospitals repeatedly had argued were too high; when dismissing the Complaint, the Commission told the Hospitals that Docket No. 001148-EI would take the place of the Complaint proceeding. Thus, OPC's attempts to finesse the requirement of a hearing fail.

As part of the grab bag of arguments that the Hospitals should not receive a hearing, the Opposing Parties claim that the Hospitals would be worse off if the proceeding was litigated, based upon the apparent presumption that allegations about rate "parity" would drive such a result. *See* OPC Br. at 41-42; PSC Br. at 15, 20; FPL Br. at 10 n. 8 (making assertions without record citations). These contentions and the Opposing Parties' briefs completely ignore the Hospitals' evidence describing deficiencies in FPL's parity claims. *See* Appendix C hereto (Direct Testimony of Stephen J. Baron) (R. Vol. 60, 11437-46; original at 5-14). Because the Opposing Parties simply assume a result by ignoring contrary evidence, their contention on this score lacks merit.

Respectfully submitted,

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September 23, 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States mail this 23rd day of September, 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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