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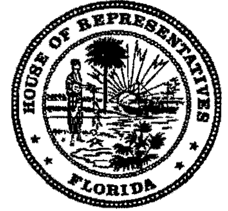

September 24, 2009

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COMMISSION CLERK

Via Hand Delivery

The Honorable Matthew M. Carter II, Chairman
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 080677-EI
In re: Petition for rate increase by Florida Power & Light Company
Case Schedule

Dear Chairman Carter:

Yesterday our office received a copy of the September 22, 2009, letter from Florida Power & Light ("FPL") Vice President Wade Litchfield, in which he expressed his concerns regarding the Commission's plan to hold a special agenda conference on January 11, 2010, for the purpose of entering its final decision in Docket No. 080677-EI, FPL's pending base rate proceeding. I am responding to Mr. Litchfield's letter to inform you that the Office of Public Counsel ("OPC") fully supports the current schedule that you announced on September 17, 2009, during the evidentiary hearing on FPL's base rate request. For the following reasons, OPC urges you to reject FPL's request for an earlier decision date.

FPL's letter proceeds from the unwarranted and biased presumption that the docket will result in an increase in base rates. In his letter, Mr. Litchfield implicitly assumes that the case will result in an increase in base rates, and that FPL will therefore be prejudiced by a decision that does not enable FPL to place the rates into effect on January 4, 2010. OPC and others have requested the Commission to *reduce* base rates, and have submitted evidence in support of their positions. FPL's argument is therefore biased and self-serving advocacy. It is inappropriate in the current context. To maintain its neutrality regarding the merits of the case, the Commission must refrain from making any decision regarding scheduling on the basis that FPL's interests are being harmed by the extended schedule; to do so would implicitly indicate

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the Commission has made its decision on matters that are very much the subjects of dispute. Instead, the Commission should determine its schedule based upon the dual objectives of deciding the case as soon as possible while providing due process to all parties. OPC sees in the schedule you announced precisely this intent.

The terms of the 2005 settlement agreement preclude FPL from placing its proposed rates into effect on January 4, 2010, or at any time prior to the entry of an order approving rates. In the body of his letter, Mr. Litchfield states that the decision date of January 11, 2010, will "necessitate FPL's putting the proposed rates into effect on January 4, 2010, subject to refund, in accordance with the provisions of Chapter 366, Florida Statutes." Mr. Litchfield is mistaken. FPL has no such ability. In the 2005 Settlement Agreement, FPL negotiated away its right to invoke the provision of Section 366.03, Florida Statutes, that otherwise would enable FPL to place its proposed rates into effect. The settlement agreement provides:

> Upon approval and final order of the FPSC, this Stipulation and Settlement will become effective on January 1, 2006 (the "Implementation Date"), and shall continue through December 31, 2009 (the "Minimum Term"), and thereafter shall remain in effect until terminated on the date that new base rates become effective *pursuant to order of the FPSC following a formal administrative hearing held either on the FPSC's own motion or on request made by any of the Parties to this Stipulation and Settlement* in accordance with Chapter 366, Florida Statutes. (emphasis provided)

The essential thrust of the Settlement Agreement is that FPL's base rates shall not change while the settlement is in effect (subject to limited exceptions not pertinent here). Further, the Settlement Agreement continues in effect until the Commission approves different rates in an order. Accordingly, FPL cannot change base rates until the Commission has approved modified base rates in an order. The "eight months, subject to refund" feature to which Mr. Litchfield alludes does not involve the issuance of an order and is, therefore, unavailable to FPL pursuant to the express terms of the Settlement Agreement.[1]

The new schedule is not inconsistent with the 2005 settlement agreement. Mr. Litchfield is mistaken when he asserts that a decision on January 11, 2010, will be inconsistent with the terms of the 2005 settlement agreement. The settlement agreement prevents FPL from changing base rates prior to January 1, 2010 (subject to exceptions not pertinent here). The settlement agreement did not mandate that different rates take effect by the first billing cycle in January 2010. In fact, the settlement agreement provides that, in the event a proceeding to fix rates has not been completed, the existing rates will continue in effect until the Commission

[1] The very fact that the parties to the Settlement Agreement identified December 31, 2009 as the end of the "Minimum Term" of the agreement negates any argument that the Settlement Agreement anticipated that new rates necessarily would become effective immediately thereafter.

authorizes a change. It is Mr. Litchfield's letter, and not the new schedule, that is inconsistent with the 2005 settlement agreement.

Even assuming *arguendo*, that FPL had not negotiated away its right to invoke Section 366.03, Florida Statutes, the assertion that a decision date of January 11, 2010, would "necessitate" placing FPL's proposed rates into effect earlier is misplaced. Because a utility is the beneficiary of the provision allowing it to place the rates into effect at the end of eight months, the utility is free to waive its right to do so. In his letter, Mr. Litchfield tacitly acknowledges this to be the case: in a footnote on page 1 of the letter, Mr. Litchfield says that FPL "*believes*"[2] it would be "*entitled*" to put the rates into effect. A measure that one is "entitled" to invoke is far different than one which "necessarily" takes effect. Again, assuming *arguendo*, that FPL has not waived its ability to implement Section 366.03, Florida Statutes, the Commission could not allow the *threat* of such *possible* action by FPL to dissuade it from the course it has properly and appropriately selected — that of scheduling the decision date at the earliest point that is consistent with the Commission's statutory responsibility to provide due process to all parties.

The length of the evidentiary hearing is primarily a function of the complexity of FPL's requests. FPL, the party who is complaining about the length of the hearing, is also the party who submitted to the Commission (1) a depreciation study revealing a depreciation reserve excess of at least $1.25 billion; (2) a proposal requesting a base rate increase of $1 billion in 2010; (3) a proposal requesting a second base rate increase (a case within a case) of another $240 million in 2011; and (4) a proposal requesting a perpetual "generation base rate adjustment" that would result in yet another base rate increase in 2011 in the amount of $180 million. As part of its case, FPL then elected to submit prefiled testimony of nineteen direct witnesses and nineteen rebuttal witnesses. Therefore, there is more than a little irony in the concern that FPL now expresses regarding the amount of time that parties and the Commission have spent in hearings on its sweeping and multi-faceted requests. OPC commends the Commission for its stated willingness, explicitly reinforced by individual Commissioners during the hearing and conspicuous in the schedule that you announced, to devote "as much time as it takes" to consider FPL's mammoth request in a thorough and sufficient manner.

FPL has not proposed a feasible alternative to the schedule that you announced during the hearing. At page 1, Mr. Litchfield says FPL is fully supportive of the Commission having adequate time "to have this matter fully heard." Mr. Litchfield proceeds to complain about the announced schedule; however, in his letter Mr. Litchfield fails — in fact, makes no effort —to demonstrate how the Commission could possibly satisfy the objective of "fully hearing" FPL's case on a timeline sooner than the schedule that results in a decision on January 11, 2010.

OPC respectfully submits that the current schedule announced by you on September 17, 2009, should be maintained. In view of the number of FPL rebuttal witnesses who have yet to testify, OPC believes the new schedule is an eminently reasonable attempt to gauge the time

[2] Nowhere in his letter does Mr. Litchfield attempt to square this "belief" with the express terms of the Settlement Agreement that contradict his stated position.

requirements of remaining work and to schedule the remaining procedural milestones accordingly.

Yours truly,

Joseph A. McGlothlin
Associate Public Counsel

JAM:bsr

cc: Honorable Lisa P. Edgar, Commission
Honorable Katrina J. McMurrian, Commissioner
Honorable Nathan A. Skop, Commissioner
Honorable Nancy Argenziano, Commissioner
All parties of Record in Docket Nos. 080677-EI
Ms. Ann Cole, Commission Clerk