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Subject: Electronic Filing / Docket 080667-EI / FPL's Memo in Response to Staff's Request for Analysis

Attachments: Memorandum in Response to Staff Requests 10.12.09 (FINAL).pdf; Memorandum in Response to Staff Requests 10.12.09 (FINAL).doc

Electronic Filing

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b. Docket No. 080677-EI
In Re: Application for Increase in Rates by Florida Power & Light Company

c. The Document is being filed on behalf of Florida Power & Light Company.

d. There are a total of 11pages

e. The document attached for electronic filing is Florida Power & Light Company's Memorandum in Response to Staff's Request for Analysis

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for increase in rates by Florida Power & Light Company	Docket No. 080677–EI
In Re: 2009 depreciation and dismantlement study by Florida Power & Light Company	Docket No. 090130-EI
	Filed: October 12, 2009

FLORIDA POWER & LIGHT COMPANY'S MEMORANDUM IN RESPONSE TO STAFF'S REQUEST FOR ANALYSIS

On October 8, 2009, Mary Anne Helton, Acting General Counsel of the Florida Public Service Commission, requested from the parties to this docket an analysis of two issues related to the potential further postponement of a final decision on FPL's rate request. FPL submits the following memorandum in response to Ms. Helton's request:

ISSUE 1: Can the Commission postpone its final decision in the Florida Power & Light Company's Petition for Base Rate Increase, and if so, how? In responding, please specifically address the applicability of Sections 120.569(2)(l), and 366.06(3), Florida Statutes, as well as any other relevant statutory and case law.

FPL has been asked specifically to address the applicability of Sections 120.569(2)(l) and 366.06(3), F.S., to the question of whether the sitting Commission can postpone its final decision on the FPL rate case until the two new Commissioners have taken office. The cited statutes simply require a final decision by the Commission within specified time frames. Section 366.06(3), F.S., requires the Commission to "take final commission action within 12 months of the commencement date for final agency action." Pursuant to Section 366.072, F.S., "Such an order shall be considered rendered on the date of the official vote for the purposes of s. 366.06(3)." Section 120.569(2)(l), F.S., essentially requires a final order to be rendered within

90 days of the conclusion of the hearing. These Sections should be read together in determining a cut off date for a final determination. In this case, both of those outside dates would fall after January 1, 2010.

However, neither statute speaks to the issue of whether a sitting Commission that conducts the hearing should defer that decision to a newly constituted Commission that includes new Commissioners who did not have the benefit of participating in the case. As will be discussed below, decisional law in the judicial context suggests that the determination of FPL's rate case should not be deferred to the new Commission.

A brief discussion of the facts is critical to an appropriate resolution of the question posed in Issue 1. The record makes clear that the current Commission has presided over this proceeding from the outset, and after nearly a two month delay in the original schedule, there is currently a schedule in place for the conclusion of testimony on or before October 23, 2009. Briefs are due November 9, 2009, and a special agenda conference on revenue requirements has been set for December 21, 2009, all at a time when the current Commission remains in place. Additionally, the Commission has approved a stipulation that "[t]he effective date for FPL's revised rates and charges for electric service should be for meter readings on and after the first cycle day of January, which is currently scheduled to be January 4, 2010 for the test year and January 4, 2011 for the subsequent year. The effective date for FPL's revised service charges should be January 1, 2010." *See* Issue 172 in the Prehearing Order, Order No. PSC-09-0573-PHO-EI, August 21, 2009, at page 171, and hearing transcript, pages 34-35. It should also be noted that, after filing its Petition in this matter on March 18, 2009, FPL has made several requests to extend hearing hours and/or add hearing days in order to allow for a final decision in this case well before January 1, 2010.

In the context of the FPL rate case, the Commission presides over a contested litigated matter much as a judge presides over a trial. Well-established Florida case law in the judicial context would militate against deferring a decision on the FPL rate case until after the new Commissioners have taken office, particularly when the sitting Commission that has presided over the hearing has the ability to render its decision prior to year's end. Principles of due process and fundamental fairness are embodied in the case law on judicial proceedings. While the procedures governing administrative proceedings such as FPL's rate case are by nature more flexible than in judicial proceedings, these judicial principles nonetheless support the proposition that a decision should be made by the sitting Commission.

The principle of law that a judge who hears a case, rather than a successor judge, should decide that case is expressed in the case of *Bradford v. Foundation & Marine Construction Co.*, 182 So.2d 447, 449 (Fla. 2nd DCA 1966) where the court held:

> "[I]t is generally stated that a successor judge may complete any acts uncompleted by his predecessor where they do not require the successor to weigh and compare testimony. (citing 48 C.J.S. *Judges* § 56a (1947)... Reason and conscience lead this court, in line with other jurisdictions, to adopt the rule that where oral testimony is produced at trial and the cause is left undetermined, the successor judge cannot render verdict or judgment without a trial de novo, unless upon the record by stipulation of the parties. *Feldman v. Board of Pharmacy of Dist. of Columbia*, D.C.Mun.App., 150 A.2d 100 (1960); *Cram v. Bach*, 1 Wis.2d 378, 83 N.W.2d 877, aff'd on rehearing, 1 Wis.2d 370, 85 N.W.2d 673 (1957); *Dawson v. Wright*, 234 Ind. 626, 29 N.E.2d 796 (1955); *McAllen v. Souza*, 24 Cal.App.2d 247, 74 P.2d 853 (1938); *State ex rel. Wilson v. Kay*, 164 Wash. 685, 4 P.2d 498 (1931)."

The *Bradford* court further explained the basis for its decision as follows:

> "Our adoption of the rule requiring a decision upon the facts from a judge who heard the evidence is not to be lightly taken. No one would contend that the permanent absence of a juror, after having heard the evidence and before a verdict is rendered, would not be ground for a mistrial. Appellate courts lean as heavily upon judge's findings as they do upon jury verdicts. This reliance on a judge, or jury as a trier of fact is in recognition of their opportunity to personally hear the witnesses and observe their demeanor in the act

of testifying. The absence of this opportunity leaves a gap in the proper procedure of trial." *Bradford* at 449.

See also Fry v. Fry, 887 So.2d 438 (Fla. 2nd DCA 2004); *Alcenat v. Alcenat*, 989 So. 2d 738 (Fla. 4th DCA 2008).

While the implications of these due process and fundamental fairness principles for FPL's rate case are necessarily attenuated by the differences between judicial and administrative proceedings, FPL believes that they are nonetheless instructive. Where the sitting Commission has presided over the FPL rate case litigation from the outset and has been on track to complete the case before the end of calendar year 2009, there is a clear preference for the current Commission to render its decision and refrain from deferring that decision to the incoming group of Commissioners.

In sum, Issue 1 asks whether the Commission "can" defer/postpone its final decision until new Commissioners have taken office. For the reasons stated, while the current Commission arguably "can" defer under these circumstances, the better practice would be for it not to do so. FPL simply asks that its rate request be judged on the facts and merits, not on political considerations. FPL expects that this is how any Commission – the currently seated Commission or one including the newly appointed Commissioners – would decide. Therefore, there is no compelling reason to postpone the decision further and, as explained above, it would be preferable to leave the decision with the current Commission that has heard the evidence and actively participated in every aspect of this case..

ISSUE 2: Can FPL begin charging rates subject to refund on January 1, 2010? In responding, please explain the authority relied upon and include in your explanation how the 2005 Rate Case Stipulation and the current approved stipulation setting January 1, 2010, as the effective date for service charges, and January 4, 2010, as the effective date for implementing rates, affects FPL's ability to begin charging new rates. Also include in your

response any alternatives available to the Commission and parties regarding collection of rates during the postponed decision timeframe.

While under Florida law, FPL would have the right to implement rates effective January 4, 2010, we neither desire to do so nor intend to do so barring further delays or inaction by the Commission. While we do not waive this right, it is our desire to see a fair, unbiased resolution on the merits and facts of the case in a timely manner. If the Commission is unwilling to make a timely decision, there are a number of options available to FPL and the Commission to implement FPL's requested rate charges. One such option is for FPL to implement service charges on January 1, 2010 and new rates on January 4, 2010, subject to refund.

Section 366.06(3), F.S., which is often referred to as the "file and suspend provision" provides:

> "Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent. Such consent shall not be withheld for a period longer than 8 months from the date of filing the new schedules. The new rates or any portion not consented to shall go into effect under bond or corporate undertaking at the end of such period, but the commission shall, by order, require such public utility to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid and, upon completion of hearing and final decision in such proceeding, shall by further order require such public utility to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified."

On March 18, 2009, FPL filed its petition to increase rates, and included in its filing proposed new rate schedules. On May 5, 2009, the Commission voted to suspend FPL's request for rate relief pursuant to Section 366.06(3). Originally, the final determination in this docket was scheduled for November 13, 2009 (Agenda Conference on Rates), with a Final Order on December 4, 2009. On September 17, 2009, the Commission unilaterally extended the time for conducting the rate case hearing and subsequently the final order beyond December into January

2010. The 8-month period from the filing date for the filing of new schedules ends on November 18, 2009, however FPL did not request that new rates go into effect until immediately after the expiration of the minimum term of its 2005 Rate Case Stipulation on December 31, 2009 (with service charges in effect January 1, 2009, and new rates in effect January 4, 2009, the dates which were stipulated by all parties). Thus, the file and suspend provision would normally become available after November 18, 2009, as the final determination in this proceeding is scheduled to be beyond that date.

The 2005 Rate Case Stipulation does not impair FPL's ability to implement new service charges and rates pursuant to the file and suspend provision on January 1 and 4, 2010, respectively. The Stipulation states, in pertinent part:

> "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."

FPL anticipates that other parties may suggest that this language contemplates a waiver on the part of FPL to implement new rates pursuant to the file and suspend provision. However, this is simply wrong. Under Florida law, a waiver requires (1) the existence at the time of waiver of a right, privilege, advantage or benefit which may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage or benefit. *Zurstrassen v. Stonier,* 786 So.2d 65, 70 (Fla. 4th DCA 2001). In short, a waiver is generally characterized as "the intentional relinquishment of a known right," *Dooley v. Weil* (*In re Garfinkle*), 672 F.2d 1340, 1347 (11th Cir.1982); *see also Fireman's Fund Ins. Co. v. Vogel,* 195 So.2d 20 (Fla. 2nd DCA 1967).

A waiver requires proof of conduct demonstrating clear intent to relinquish a known right, and as such, a waiver must be knowing, intelligent and voluntary. *Liberty Mut. Ins. Co. v. Aventura Engineering & Const. Corp.*, 534 F. Supp. 2d 1290 (S.D. Fla. 2008); *DeJesus v. State*, 848 So. 2d 1276 (Fla. 2nd DCA 2003). Thus, the language of any waiver must be explicit, clear, and unambiguous. If the waiver is clear and unambiguous it shall be given intended force and effect. *Royal Palm Sav. Ass'n v. Pine Trace Corp.,* 716 F. Supp. 1416, 1419 (M.D. Fla. 1989) (citing *Central Investment Associates, Inc. v. Leasing Service Corp.*, 362 So.2d 702, 704 (Fla. 3rd DCA 1978)). Said another way, that waiver must be explicitly stated. In order to find that a waiver of rights has occurred, the language used in an agreement must clearly and unambiguously express waiver or the language must be such that an interpretation of the agreement as a whole can lead to no other conclusion but waiver. *Sasnet v. Sasnet*, 683 So. 2d 177 (Fla. 2d DCA), *City Of Winter Springs v. Winter Springs Professional*, 885 So. 2d 494 (Fla. 1st DCA 2004). In order to be effective as a waiver under this standard, the 2005 Rate Case Stipulation would have had to include explicit language indicating that FPL intended to waive its rights to the file and suspend provision. There is no such language in the Stipulation, and thus there is no waiver.

Furthermore, an additional element of waiver enumerated in *Zurstrassen* is intent. FPL in no way intended to waive its rights to any of the provisions afforded it under the statutory processes for the rate case. In fact, the intent of all parties to the 2005 Rate Case Stipulation is itself explicit, outlining that rates remain in effect until new rates become effective pursuant to order of the FPSC following a formal administrative hearing, "in accordance with Chapter 366, Florida Statutes. (Emphasis added) Thus, as stated, the intent is that rates would ultimately change through a rate case process. The specific mention of rate setting under Chapter 366

directly contradicts any assertion that FPL in any way intended to waive that mechanism. *See Tapp v. Tapp,* 877 So.2d. 442 (Fla. 2d DCA). To assert that FPL specifically agreed to the procedures of Chapter 366 as the mechanism for adjusting rates to raise rates under the 2005 Rate Case Stipulation, but then intended to waive a crucial aspect of that same mechanism, is illogical and completely unsupported by the document or the record. FPL instead has relied on the Stipulation's explicit language and filed its request for a rate change pursuant to Chapter 366, has diligently acted in accordance with all requirements provided by Chapter 366, and has a right to all processes provided by the statute.

Other activities in this docket indicate that the file and suspend provisions have not been waived and are an available option. On April 23, 2009, Staff issued a recommendation to the Commission seeking to implement portions of the file and suspend provision, which was ultimately ordered by the Commission on May 22, 2009. Order No. PSC-09-0351-PCO-EI. In the Order, in discussing the 2005 Rate Case Stipulation, the Commission acknowledges, "[e]ssentially, the agreement terminates on December 31, 2009." By acknowledging the temporal limitations of the Rate Case Stipulation, and by implementing the provisions of Section 366.06(3), the Commission has affirmed that the file and suspend provisions are in effect, and thus are an available option and are not waived. Furthermore, as discussed previously, the Commission approved a stipulation that the effective date should be January 4, 2010 for FPL's revised rates and January 1, 2010 for FPL's revised service charges.

For these reasons, FPL has not waived its right to put its proposed rates into effect subject to refund. However, FPL would prefer to avoid the disruption and customer confusion that could result from implementing rates subject to refund, when those rates may be changed again shortly thereafter. To that end, FPL reserves the right to request a temporary recovery charge if the

Commission chooses not to complete its work under the current schedule The Commission has historically permitted the use of such charges where they are found appropriate.

In conclusion, there are at least two options under Florida law available to the Commission that address Issue 2. Implementing service charges on January 1, 2010 and new rates on January 4, 2010, subject to refund, is one option. Implementation of a temporary recovery charge is another. While either option is available under the law and therefore acceptable to FPL, our strong preference would be the timely conclusion of the rate proceeding based on the timeline as outlined by the Commission and a decision based on the facts and merits of the case. Of course, if there is no further delay in the Commission's decision on FPL's rate request, then this issue becomes moot. Conversely, a protracted delay in approving new rates would require the need for temporary rate relief and make the use of one of these alternative mechanisms essential to FPL's continuing the investments necessary to provide clean, efficient and reliable service to our customers.

Respectfully submitted,

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By: */s/ John T. Butler*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically this 12th day of October, 2009, to the following:

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