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
In re: Petition for increase in rates by Progress Energy Florida, Inc.	DOCKET NO. 090079-EI
In re: Petition for limited proceeding to include Bartow repowering project in base rates, by Progress Energy Florida, Inc.	DOCKET NO. 090144-EI
In re: Petition for expedited approval of the deferral of pension expenses, authorization to charge storm hardening expenses to the storm damage reserve, and variance from or waiver of Rule 25-6.0143(1)(c), (d), and (f), F.A.C., by Progress Energy Florida, Inc.	DOCKET NO. 090145-EI ORDER NO. PSC-09-0753-PCO-EI ISSUED: November 16, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
NANCY ARGENZIANO
NATHAN A. SKOP
DAVID E. KLEMENT

ORDER POSTPONING FINAL DECISIONS ON FLORIDA POWER & LIGHT COMPANY AND PROGRESS ENERGY FLORIDA, INC.'S RATE CASES

BY THE COMMISSION:

Background

On March 18, 2009, Florida Power & Light Company (FPL) commenced its rate case by filing its testimony and exhibits, its Minimum Filing Requirements (MFR) for projected test years 2010 and 2011, and its Petition for Increase in Rates (Docket No. 080677-EI). On March 17, 2009, FPL filed its Depreciation and Dismantlement Study (Docket No. 090130). On May 7, 2009, an Order Granting Consolidation was issued, consolidating the petition for base rate increase and depreciation and dismantlement study (collectively the FPL rate case). Thirteen parties, including the Office of Public Counsel (OPC) and the Attorney General's Office, were granted intervention.

On March 20, 2009, Progress Energy Florida, Inc. (PEF) commenced its rate case by filing its testimony and exhibits, its MFRs for projected test year 2010, and its Petition for Increase in Rates (Docket No. 090079-EI). Seven parties, including the OPC and the Attorney General's Office, were granted intervention. PEF also filed two additional dockets on March 20, 2009. The first was PEF's Petition for a limited proceeding to include the Bartow Repowering Project in Base Rates (Docket No. 090144-EI). The second filing was PEF's petition for expedited approval of the deferral of pension expenses, the authorization to charge storm hardening expenses to the storm damage reserve, and the variance or waiver of Rule 25-6.0143(1)(c), (d), and (f), Florida Administrative Code (F.A.C.) (Docket No. 090145-EI). Docket No. 090144-EI was addressed at the May 19, 2009, Agenda Conference. Order No. PSC-09-0415-PAA-EI, issued on June 12, 2009, memorialized our decision and consolidated the docket with the rate case docket (Docket No. 090079-EI). Docket No. 090145-EI was addressed at the June 16, 2009, Agenda Conference. Order No. PSC-09-0484-PAA-EI, issued July 6, 2009, memorialized our decision. On July 27, 2009, the Intervenors filed a petition protesting portions of the Order. By Order No. PSC-09-0586-PCO-EI, issued August 31, 2009, this docket was consolidated with the rate case docket (Docket No. 090079-EI) for purposes of hearing.

Although the rate cases commenced upon the filing of the petitions, MFRs, testimony and exhibits, the utilities and parties to the dockets participated in several scheduling meetings prior to the filing of the MFRs. The purpose of the scheduling meetings was to discuss and determine the calendar for several docketed cases, all of which need to be heard and decisions reached in the fall of 2009. Specifically, the Commission staff and parties were concerned that we meet our statutory obligations to complete Docket No. 080407-080413-EG, the Demand Side Management goals hearing, Docket No. 090009-EI, the Nuclear Cost Recovery hearing, the Clause Docket hearings,[1] and both rate cases.

When the rate cases were filed, Orders Establishing Procedure (OEP) were issued for each rate case.[2] The OEPs set forth the procedural milestones for each docket.

The hearing for PEF's petition for base rate increase was completed on September 30, 2009. The parties to the docket filed post-hearing briefs on October 16, 2009. The original date scheduled for our decision on PEF's revenue requirements and rate design was November 19, 2009. Our decision on PEF's rates was scheduled for December 1, 2009.

The hearing for FPL's petition for base rate increase commenced on August 24, 2009. Because the hearing was not completed within the time established by the OEP, additional days were scheduled for the completion of the hearing. The FPL hearing was completed on October 23, 2009. The date scheduled for our decision on FPL's revenue requirements and rate design was December 21, 2009. Our decision on FPL's rates was scheduled for January 11, 2010.

On October 2, 2009, Governor Charlie Crist sent a letter requesting that we postpone our decision until the two newly appointed Commissioners take office. Our discussion of staff's

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[1] Docket Nos. 090001-EI, 090002-EG, 090003-GU, 090004-GU, and 090007-EI

[2] Order No. PSC-09-0159-PCO-EI, issued March 20, 2009, in Docket No. 080677-EI; and Order No. PSC-0190-PCO-EI, issued March 27, 2009, in Docket No. 090079-EI.

recommendation regarding the Governor's request was set for consideration at our October 27, 2009, Agenda Conference, and all parties to both dockets were invited to brief us on the topics of whether we can postpone the decisions on each rate case, and whether the utilities may implement rates, subject to refund. The OPC, Florida Retail Federation (FRF), Attorney General's Office, FPL, PEF, South Florida Hospital Association (SFHHA), and Associated Industries of Florida (AIF) filed memoranda on the issues.

We have jurisdiction pursuant to Sections 366.04, 366.05, and 366.06, Florida Statutes (F.S.)

Postponement of Decision – Position of Parties

Statutory Interpretation

In preparing their briefs, the parties were requested to discuss the applicability of Sections 120.569(2)(l), and Section 366.06(3), F.S., to the Governor's request to postpone our decision. Section 120.569(2)(l), F.S., states as follows:

> Unless the time period is waived or extended with consent of all parties, the final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusion of law separately stated, and it must be rendered within 90 days:
>
> 1. After the hearing is concluded, if conducted by the agency;
>
> 2. After a recommended order is submitted to the agency and mailed to all parties, if the hearing is conducted by an administrative law judge; or
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> 3. After the agency has received the written and oral material it has authorized to be submitted, if there has been no hearing.

The file and suspend provisions of Section 366.06(3), F.S., states:

> 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 a manner as it may direct, such portion of the increased rate or

> charge as by its decision shall be found not justified. . . . The commission shall take final commission action in the docket and enter its final order within 12 months of the commencement date for final agency action. As used in this subsection, the "commencement date for final agency action" means the date upon which it has been determined by the commission or its designee that the utility has filed with the clerk the minimum filing requirements as established by rule of the commission.

The intervening parties (FRF, OPC, Attorney General, and SFHHA) argue there is a conflict between the two statutory sections quoted above. The intervening parties assert that when there is a conflict between statutes, the specific statute covering a particular subject area will control over a statute covering the same subject in general terms. The intervenors argue that Section 366.06(3), F.S., is a specific statute and therefore controls over Section 120.569(2)(l), F.S.

According to the intervening parties, Section 366.06(3), F.S., provides that we shall enter our final decision within 12 months of the commencement date for final agency action. SFHHA states that the specific statutory authority granted to us under Section 366.06(3), F.S., would trump the general provision of Section 120.569(2)(l), F.S., which generally requires agency orders to be issued within 90 days following the conclusion of a hearing. OPC asserts that the requirements to render a decision within 90 days of a hearing could in some instances negate the specific 12 month time frame set out in Section 366.06(3), F.S. OPC cites to School Board of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 3d 1220 (Fla. 2009) (Survivors), in support of its position that the time limits in Section 366.06(3), F.S., take precedence over the time limits in Section 120.569(2)(l), F.S. OPC asserts that the significance of Survivors is that it involved an apparent conflict between provisions of the Administrative Procedures Act (APA) and a separate statute governing charter schools. According to OPC, at issue in Survivors was whether a school board must follow the provisions of the APA governing notice prior to terminating a charter school, or whether instead the school board could invoke the more immediate provisions of the separate charter school statute. In its brief, OPC quotes the Florida Supreme Court,

> We determine that within the express test of section 1002.33 (the charter school statute), the Legislature has given clear indication of legislative intent as to procedures to be followed relative to charter schools by providing a comprehensive, detailed statutory scheme that does not intend that the provisions of the APA be incorporated into the charter school termination process. In reaching this conclusion, we are mindful of the principle that specific statutes covering a particular subject area will control over a statute covering the same subject in general terms.

OPC brief at p. 4, citing Survivors at p. 1233. OPC concludes that, similarly, the ratemaking provisions of Chapter 366 provide a comprehensive regulatory scheme, specific to utility ratemaking, which takes the place of the more general APA requirement that an order be issued within 90 days of the hearing.

FRF argues that we clearly have the authority to take up to 12 months to make our final decisions. FRF contends that our overarching mandate under Section 366.01, F.S., to regulate public utilities "*in the public interest* and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be *liberally construed* for the accomplishment of that purpose" (emphasis added), strongly supports the conclusion that we can postpone our decision in these dockets. According to FRF, we should take whatever time is necessary to make our final decision on the unprecedented rate hike requests.

FRF views the time requirements of Section 120.569(2)(l), F.S., as not dispositive of the time requirements for issuing final orders in light of Section 366.06(3), F.S. According to FRF, as a general matter of administrative law, Section 120.569, F.S., would require that the orders be issued within 90 days following conclusion of the hearing, but we are also expressly authorized to process rate cases within 12 months, without reference to when the hearings are concluded. FRF concludes that the specific provisions of Section 366.06(3), F.S., controls the general provisions of Section 120.569(2)(l), F.S. The Attorney General's brief also argues that the specific provisions of Section 366.06(3), F.S., control the general provisions of Section 120.569(2)(l), F.S. The Attorney General, like FRF, concludes that we have the discretion to modify the procedural schedule in any way that serves our need to fully hear and analyze the evidentiary presentations, as long as we meet the 12-month requirement.

Both PEF and FPL state that the two statutes, Sections 120.569(2)(l) and 366.06(3), F.S., apply to our decisions. PEF states that we could wait as late as December 30, 2009, to issue a final order and not violate the provisions of Section 120.569(2)(l), F.S., which requires us to issue a final written order within 90 days of the conclusion of the hearing. PEF argues that it is preferable for us to act in accordance with this clear and unambiguous statutory framework set out by Section 120.569(2)(l), F.S., particularly when dealing with a matter of such significance to the company and its customers. According to PEF, postponing the decision injects an element of uncertainty into the regulatory process which could be detrimental to all participants. FPL states that the statutes should be read together in determining a cut off date for a final determination. FPL acknowledges that both of those dates under the two statutes would fall outside of January 1, 2010, for the FPL decision.

Effect of New Commissioners Deciding the Rate Case

FPL, in summary, states that we can defer/postpone our final decision until new Commissioners have taken office. But for the reasons of due process and fundamental principles of fairness, FPL argues that the better practice is for those Commissioners who have presided over the rate case since December 2008 to render the decision, rather than to postpone the decision.

FPL argues that the procedural timelines set forth in the statutes do not speak 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. FPL asserts that the record makes clear that the current Commission has presided over this proceeding from the outset. FPL states that according to the current

schedule, briefs are due on November 9, 2009, and a Special Agenda Conference on revenue requirements is set for December 21, 2009, all at a time when the current Commission remains in place.

According to FPL, in the context of the FPL rate case, we preside over a contested matter much as a judge presides over a trial. FPL argues that 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. FPL asserts that principles of due process and fundamental fairness are embodied in the case law on judicial proceedings. According to FPL, administrative proceedings are more flexible than judicial proceedings, but the judicial principles support the proposition that the sitting Commission make the decision. FPL cites Bradford v. Foundation & Marine Construction Co., 182 So. 2d 447, 449 (Fla. 2d DCA 1966) (Bradford), in which the court held:

> It 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* Section 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); Allen 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).

FPL continues to cite the Bradford case as the Court explains the reason for its ruling 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 a 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.

Id. at 449.

AIF similarly expresses concerns over the rate case decisions being made by two new Commissioners. AIF argues that as a matter of law, we should not delay our final decision simply due to the pending appointments of two new Commissioners. AIF asserts that we serve the citizens of the state of Florida in both quasi-legislative and quasi-judicial roles. AIF

concludes that to fulfill our duty, we have burdens of both policy making and legal interpretation that must be considered in deciding any matter before us, including the FPL rate case.

AIF argues that as a matter of law, we should not delay our final decision simply due to the pending appointments of two new Commissioners. AIF contends that delay in the final decision would necessitate that two of the five voting Commissioners will not have presided over the hearings. AIF asserts that it is long established in Florida and throughout the country that dependence on a successor judge to render a final decision would severely violate the due process rights of the parties. AIF also cites to Bradford to support its argument. AIF argues that it is inappropriate for individuals who have not heard all the evidence, testimony, arguments, and objections of the parties, nor observed the demeanor of the witnesses, to render a decision whereas the sitting Commissioners have been able to do so. In further support of its position AIF expresses concern over the fact that the individuals who are newly appointed Commissioners, were not under the guidance of Chapter 112, Florida Statutes, which governs standards of conduct of public officers, during the pendency of the hearings. According to AIF, the actions and activities during the duration of the hearings of the two newly appointed individuals is unknown, undisclosed and unregulated prior to their appointment.

At the outset of its brief, OPC also asserts a due process concern but with a different solution than that of FPL, PEF, and AIF. OPC states that it is confident that it has presented in each rate case docket a compelling evidentiary case to support its litigation positions. OPC states that it is equally confident the merits of its presentations will be recognized and reflected in a decision by an informed, objective panel, whether that panel consists of current Commissioners or the newly constituted Commission. OPC asserts that it does not object to postponing our decision in deference to the Governor's request, provided that certain due process safeguards are in place to allow the new Commissioners a sufficient opportunity to become immersed in the dockets to the full extent necessary to make informed and reasoned decisions. OPC believes that the procedural steps essential to assure that due process is protected include: (a) an adequate period of time between the date the new Commissioners take office and the decision date within which to become familiar with the issues contained in the Prehearing Order and the evidentiary record of the hearing on those issues, (b) an opportunity for the new Commissioners to review the archived video coverage of the actual hearings, so that the Commissioners have an opportunity to gauge the demeanor of witnesses in the same manner as the Commissioners who presided over the hearing, (c) an opportunity (following the time frame established for reviewing the record and watching the videos of the hearings) for parties to present closing oral arguments, based solely upon the evidence presented at hearing, and (d) staff recommendations should not be finalized and distributed until after the new Commissioners have become familiar with the issues, reviewed the record, viewed the videos, and heard the closing arguments.

The Attorney General likewise states that OPC, the Attorney General, and the other intervenors have already presented sufficient evidence in the two pending cases to demonstrate that a rate increase by either company is not in the public interest and is unnecessary for these companies continued profitability and their ability to meet the future electric needs of Florida. The Attorney General states that he respects and acknowledges the request of the Governor to postpone the decisions in the two pending rate cases until after January 1, 2010, but is prepared

to proceed at any time, as directed by us. The Attorney General goes on to state that he supports the implementation of the suggestions of OPC to protect the due process rights of all parties.

Additional Considerations

FRF has briefed the question of the postponement of the rate cases from a policy perspective as well as the legal perspective. FRF states that there are competing interests that weigh upon whether or not to postpone the decisions for the rate cases. While FRF comes down on the side that it is better to postpone the decisions on the rate cases, it does gives consideration to both sides of the argument.

First, FRF notes that while the Governor's request is entitled to full and fair consideration, our decision must be guided by the public interest and with due consideration for the best interests of the Commission as an institution. FRF argues that, on its own motion, we can consider postponement of our final decisions in the rate cases.

FRF asserts that the competing claims and concerns pose a difficult, complex policy decision. FRF believes that the public interest, and the best interests of the Commission as an institution, would be best served by postponing the decisions on the pending rate cases to allow for the new Commissioners to vote on them.

According to FRF, the time required for new Commissioners to review the record, probably including watching the video graphic record of the hearings, and to be briefed by the Commission staff, will entail a modest further delay of probably less than two months. FRF concludes this delay cuts against postponement to some limited degree.

FRF states that we should also think in terms of having a full Commission decide the case and that is a favorable point to postpone the decision. FRF also urges that a reasonable policy consideration is to have the same Commission vote on the rate petitions as will be serving when they take effect. According to FRF, whether there are increases or decreases in the rates, the Commission as an institution will have to live with the results and FRF concludes that it makes better policy for those who have to live with the consequences to be those who make the decisions that produce those consequences. Finally, FRF contends that because of the magnitude of the increases, postponement will allow the public to fully comprehend, understand, and believe that we took the necessary time to make our decisions.

Postponement of Decision - Analysis

Statutory Interpretation

The legislature provides us direction in Section 366.06(3), F.S., on when we must issue our final decision. According to this subsection, the legislature has mandated that we take final commission action and enter our final order within 12 months of the commencement date of final agency action. Section 366.06(3), F.S., specifically states, "The commission *shall* take final commission action in the docket and enter its final order within 12 months of the commencement

date for final agency action." (emphasis supplied) Accordingly, for FPL we must take final action on or before March 18, 2010, and for PEF on or before March 20, 2010.

Effect of New Commissioners Deciding the Rate Case

OPC, FPL, and AIF state that new Commissioners deciding the case may cause procedural due process problems. Both FPL and AIF referenced court cases which stand for the proposition that a judge who hears the case must be the same as the judge who reaches the decision. If the judge must weigh any facts in reaching his decision, then he must commence a new proceeding and weigh the facts himself. Section 38.12, F.S., governs the absence of a judge for resignation, death, or removal.

> Upon the resignation, death, or impeachment of any judge, all matters pending before that judge shall be heard and determined by the judge's successor, and parties making any motion before such judge shall suffer no detriment by reason of his or her resignation, death, or impeachment.

The courts have interpreted this statute to require a new trial or hearing anytime a judge must make a decision that involves weighing the facts in evidence heard by the prior judge. See Bradford v. Foundation & Marine Construction Co., 182 So. 2d 447, 449 (Fla. 2d DCA 1966). FPL has qualified its reliance on the court's decision because administrative procedures are somewhat more flexible. We agree that the rules involving administrative agencies are somewhat more flexible and that there are distinctions between successor judges in the judicial proceedings and successor administrative judges in administrative proceedings. In fact, Section 120.57(1)(a), F.S., allows for replacement administrative law judges as follows:

> If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary.

In University Community Hosp. v. Department of Health and Rehabilitative Services, 555 So. 2d 922 (Fla. 1st DCA 1990) (UCH), the court specifically rejected the application of Bradford to an administrative proceeding for a certificate of need to operate a medical rehabilitation facility. While this case was decided prior to the 1996 amendments to the APA, the statutory language interpreted is similar enough for comparative purposes.

> If the hearing officer assigned to a hearing becomes unavailable, the division shall assign another hearing officer who shall use any existing record and receive evidence or argument, if any, which the new hearing officer finds necessary.

Former Section 120.57(1)(b)(11), F.S. In UCH, two administrative cases were consolidated into a single hearing before an administrative law judge. The hearing lasted several days. The presiding hearing officer resigned prior to the recommended order being filed and a second hearing officer was appointed. That hearing officer reviewed the written record and documentary evidence and issued the recommended order. The appellant appealed alleging that

the new hearing officer should have conducted a new hearing pursuant to the provisions of Section 120.57(1)(b)(11). The court rejected the appellant's reliance on Tompkins Land and Housing, Inc. v. White, 431 So. 2d 259 (Fla. 2d DCA 1983) and Bradford. According to the court in UCH, the statutory language of Section 120.57(1)(b)(11), F.S., specifically places the decision of whether or not to rely on the transcript or to conduct a new or additional hearing within the discretion of the hearing officer.

We find that, consistent with our prior practice and with the APA, new Commissioners can review the record, including the transcripts and video record of the proceedings. New decision dates which are consistent with the statutory mandate of Section 366.06(3), F.S., and which give the newly appointed Commissioners ample time to review the record are available prior to March 18 and 20, 2010.

Additional Considerations

AIF raised a concern about the fact that the two newly appointed Commissioners were not governed by Section 112, F.S., during the pendency of the rate case. We find that those concerns are alleviated by the fact that the newly appointed Commissioners must take an oath prior to performing their duties. Newly appointed Commissioners take an oath of office and swear that

> I do solemnly swear (or affirm) that I will support, protect and defend the Constitution and Government of the United States and of the State of Florida; that I am qualified to hold office under the constitution of the state, and that I will well and faithfully perform at all times the duties of Florida Public Service Commissioner, on which I am now about to enter in a professional, independent, objective, and nonpartisan manner; that I do not have any financial, employment, or business interest which is prohibited by chapter 350, Florida Statutes; and *that I will abide by the standards of conduct required of me by chapters 112 and 350, Florida Statutes*, so help me God.

Section 350.05, F.S. (emphasis supplied) This oath requires the Commissioner to make decisions in a professional, independent, objective, and nonpartisan manner. The Commissioners must abide by the standards of conduct set forth by Chapters 112 and 350, F.S. Section 350.05, F.S., requires the Commissioner to remove any disqualification. Accordingly, the oath will apply to any decision a new Commissioner makes as he or she serves the term in office, including the FPL and PEF rate cases.

Postponement of Final Decision - Conclusion

Having reviewed the statutes, briefs, and cases submitted by the parties, we conclude that we can postpone our decision. Section 366.06(3), F.S., mandates the Commission render a final decision in FPL's rate case on or before March 18, 2010, and render a final decision in PEF's rate case on or before March 20, 2010. We postpone our final decision in the PEF rate case until a Special Agenda Conference on January 11, 2010, for the revenue requirements and rate design and to a Special Agenda Conference on January 28, 2010, for the rates decision. We postpone

our final decisions in the FPL rate case until a Special Agenda Conference on January 13, 2010, for the revenue requirements and rate design and to a Special Agenda Conference on January 29, 2010, for the rates decision. Postponing decisions in each of the rate cases until these dates will permit us to complete the dockets within the time prescribed by statute while allowing the newly appointed Commissioners ample opportunity to review the record in each docket.

FPL Rates Not Effective Subject to Refund – Parties Positions

Generally, Section 366.06(3), F.S., permits the utility to implement its new rates, subject to refund, if we have previously suspended the new rates, and if we fail to act within 8 months from the date of filing the new schedules. In FPL's case, the rates were suspended within 60 days of FPL's filing its petition, MFRs and testimony. The 8 months will expire on November 18, 2009. FPL indicated in its brief that, if we continue our current schedule, FPL will not exercise its ability to put rates into effect subject to refund, but will instead wait for the order of the Commission on January 11, 2010. FPL states that if we choose to postpone our final decision past the current schedule, FPL reserves its right to implement the new rates.

The intervenors argue that by entering into the 2005 Stipulation and Settlement Agreement, FPL contracted away its ability under Section 366.06(3), F.S., to begin charging rates subject to refund. FPL claims that it has not waived that right and may put rates into effect subject to refund. There is a dispute between the parties over the interpretation of the agreement. The specific language in dispute is as follows:

> 1. 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.

We approved the Stipulation and Settlement Agreement by Order No. PSC-05-0902-S-EI, issued September 14, 2005, in Docket No. 050045-EI, In re: Petition for rate increase by Florida Power & Light Company.

OPC asserts that the essential thrust of the Settlement Agreement is that FPL's base rates shall not change while the settlement is in effect. OPC argues that the Settlement Agreement continues in effect until we approve different rates in an order. OPC claims that FPL cannot change base rates until we have approved modified base rates in an order. OPC concludes that the "eight months, subject to refund" feature of Section 366.06(3), F.S., does not involve issuance of an order and is, therefore, unavailable to FPL pursuant to the Settlement Agreement.

In its brief, OPC asserts that it assumes FPL is arguing that it did not waive its ability under Section 366.06(3), F.S., to institute rates pursuant to the eight month time clock. OPC argues that when committing contractually to a particular course of action (or inaction), it is not necessary to identify every alternative course that may have been available but for the

contractual commitment. According to OPC, what matters is the intent of the parties that is expressed in the terms of the agreement. OPC asserts that the terms of the Settlement Agreement are clear and unambiguous. OPC claims that the parties, including FPL, intended to establish a condition precedent that must be satisfied before FPL may modify its base rates. OPC asserts that the condition precedent is a Commission order approving a modification of base rates. OPC concludes that FPL would have no ability to increase base rates, unless and until we issue an order approving the modification.

SFHHA agrees with OPC that FPL is barred from charging new rates subject to refund on January 1, 2010, absent our order modifying FPL's base rates. According to SFHHA, the Settlement Agreement established a clear and unambiguous termination date for the negotiated rate freeze. SFHHA cites from the settlement agreement that new base rates become effective "*pursuant to order of the FPSC* following a formal administrative hearing held either on FPSC's own motion or on request made by any of the Parties to the Stipulation and Settlement." SFHHA states that the 2005 Stipulation and Settlement Agreement was contingent on approval of the agreement "in its entirety," and any attempt to selectively reject a term of the agreement upsets the balance of the entire agreement and would be patently unfair to those who relied on the settlement.

SFHHA addresses FPL's claim that it did not intend to waive its rights to rely upon Section 366.06(3), F.S. SFHHA states that FPL cannot argue that it was taken by surprise that waiver of Section 366.03 could be a consequence of the agreed-upon rate freeze period. SFHHA states that FPL, like all parties who routinely practice before us, was fully aware of and on notice of the pertinent statutes governing rate cases when it agreed to the settlement terms. SFHHA asserts that FPL knew its statutory rights with respect to filing rate cases and implementing rates subject to refund, and it expressly limited those rights in the agreement. SFHHA concludes that FPL agreed to a rate freeze period, and it cannot now claim that it had no intention of relinquishing standard processing times for its rate filing.

FRF also states that the Stipulation and Settlement Agreement, and the order adopting the Agreement, clearly only allow FPL to implement new rates until after we issue an order. FRF states that the parties are entitled to the protection of our order. FRF asserts that protection is afforded to both FPL in the event of a base rate decrease, and the consumers in the event of a base rate increase.

The Attorney General also asserts that FPL may not, under the terms of the 2005 Stipulation and Settlement Agreement, charge new rates prior to a final order issued by us following an administrative hearing. The Attorney General asserts that charging rates, subject to refund, prior to our order changing rates, amounts to a breach of contract by FPL and would also violate our order adopting the terms of that contract.

FPL disagrees with the intervenors' position that the language in the contract constitutes a waiver of FPL's ability to implement new rates pursuant to the file and suspend provision of Section 366.06(3), F.S. FPL states that a waiver is generally characterized as "the intentional relinquishment of a known right," citing to Dooley v. Weil (In re: Garfinkle), 672 F. 2d 1340, 1347 (11th Cir. 1982). FPL states that 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).

FPL asserts that a waiver must be explicitly stated. According to FPL, to find that a waiver has occurred, the language used in the 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. FPL asserts that there is no such language in the Stipulation and Settlement Agreement waiving its rights.

FPL argues that it did not intend to waive its rights to any of the provisions afforded to it under the statutory processes for rate cases. FPL points to a different section of the paragraph from the 2005 Stipulation and Settlement Agreement. FPL states that the intent of all parties to that agreement is 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 supplied by FPL) According to FPL, this indicates that the parties intended that rates would ultimately change through a rate case process. FPL argues that to assert that FPL specifically agreed to the procedures of Chapter 366 as the mechanism for adjusting rates, but then intended to waive a crucial aspect of that same mechanism is illogical and not supported by the Stipulation and Settlement Agreement.

FPL Rates Not Subject to Refund – Analysis and Conclusion

We have reviewed the 2005 Stipulation and Settlement Agreement, the briefs of the parties, and the cases cited by the parties in reaching our decision. We agree with OPC that the principles of contract law and not the principle of waiver of an existing right govern the decision before us. The dispute between the parties is simply a dispute about the interpretation of the meaning of paragraph 1 of the Stipulation and Settlement Agreement. When a contract's language is clear and unambiguous, it is not subject to interpretation by the courts. See Pafford v. Standard Life Insurance Co. of Indiana, 52 So. 2d 910, (Fla. 1951). "Further, when the language is clear and unambiguous it must be construed to mean 'just what the language therein implies and nothing more.'" Obara v. State, 958 So. 2d 1019, 1022 (Fla. 1st DCA 2007); Walgreen Co. V. Habitat Dev. Corp., 655 So. 2d 164, 165 (Fla. 3d DCA 1995) (citations omitted). The agreement clearly requires FPL to keep its base rates in effect until we issue a new order after an administrative hearing.

Even assuming that the doctrine of waiver were applicable to this proceeding, FPL has waived its ability to institute rates after 8 months, subject to refund. As FPL states, Florida law requires the following elements to be in existence to waive a right or obligation. 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). At the time the contract was entered into, Section 366.06(3), F.S., existed. It is fairly clear that FPL had actual, as well as constructive knowledge of the provisions of the section. The intent to relinquish such right, privilege, advantage or benefit is expressed clearly in the 2005 Stipulation and Settlement Agreement. The 2005 Stipulation and Settlement

Agreement keeps FPL's base rates in effect until the date that new base rates become effective by our order. The paragraph that is the subject of dispute references Chapter 366, F.S. Chapter 366.06(3), F.S., contemplates that new base rates will go into effect by final order of the Commission within 12 months of the commencement date for final agency action. If the 2005 Stipulation and Settlement Agreement intended that FPL could take advantage of all of the provisions of Chapter 366, including the "8-month rates, subject to refund" provision, then FPL would have been able to place its rates into effect on November 18, 2009. But that conflicts with the "minimum term" of the agreement which does not end until December 31, 2009. To give full effect and meaning to the agreement and our order, we find that FPL cannot institute new rates until after we have issued our order in accordance with the 12-month time clock established for setting new rates. Accordingly, FPL waived its ability to institute rates subject to refund. FPL must wait until we enter our order to put new rates into effect.

FPL cannot begin charging rates subject to refund on January 1, 2010. We recognize that the stipulation language controls, and determine that FPL may not begin charging new rates subject to refund as of January 1, 2010, or beyond until we take final action on the docket.

PEF Rates May Be Collected Subject to Refund

Each of the parties from Docket No. 090079-EI that filed briefs agree that PEF may begin charging rates subject to refund on January 1, 2010. OPC states that the language of the Settlement Agreement between PEF and the parties is not identical to the language of the FPL Stipulation and Settlement Agreement. According to OPC, FPL agreed that, absent an order approving modified base rates, its settlement agreement would continue beyond December 31, 2009, and it would not put higher rates into effect without first receiving an order approving those rates. OPC asserts that PEF settlement agreement is different in that the "agreement will . . . continue through the last billing cycle December of 2009. . . ." FRF states that Progress's 2005 Settlement Agreement clearly terminates by its own terms at the end of December. FRF concludes that because the PEF settlement terminates as of December 31, 2009, the settlement does not operate to bar PEF from implementing its new rates subject to refund. The Attorney General concurs with OPC but suggests that PEF consider not implementing the new rates prior to entry of our final order.

PEF's position agrees with the intervenors in its docket. PEF states its rate settlement expires with the last billing cycle of December 2009 unless extended by PEF, at its sole option, for another 6-month period. PEF asserts it has not extended the period. PEF concludes that by operation of law and by the termination of its existing agreement, PEF may place rates into effect subject to refund.

While we recognize that PEF may implement its rates, subject to refund, as of January 1, 2010, we are concerned about the possibility that rates go into effect for even a short period of time that could potentially be more than what we ultimately approve. We also recognize the competing legal requirements of the statutes and understand the financial situation that brought PEF to file the rate case. Accordingly, by this Order we recognize that PEF may increase its rates on January 1, 2010, subject to refund. However, we request and direct PEF to do everything it can to minimize any potential impact on ratepayers in the short-term.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Commission's final decision on Progress Energy Florida, Inc.'s rate case be postponed as set forth in the body of this Order. It is further

ORDERED that the Commission's final decision on Florida Power & Light Company's rate case be postponed as set forth in the body of this Order. It is further

ORDERED that Florida Power & Light Company cannot begin charging rates subject to refund on January 1, 2010, because the 2005 Stipulation and Settlement Agreement is controlling. FPL may not begin charging new rates until the Commission takes final action in the docket. It is further

ORDERED that the Commission recognizes that Progress Energy Florida, Inc. may increase its rates on January 1, 2010, subject to refund. However, the Commission requests and directs Progress Energy Florida, Inc. to do everything it can to minimize any potential impact on ratepayers in the short-term.

By ORDER of the Florida Public Service Commission this 16th day of November, 2009.

ANN COLE
Commission Clerk

(SEAL)

LCB/KEF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.