

State of Florida



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-M-E-M-O-R-A-N-D-U-M-

DATE: September 25, 2009
TO: Ann Cole, Commission Clerk - PSC, Office of Commission Clerk
FROM: Kay Posey, Executive Secretary to Commissioner McMurrrian *KP*
RE: Communication Received in Docket No. 080677-EI

This office has received the attached letter from Mr. R. Wade Litchfield, Vice President of Regulatory Affairs and Chief Regulatory Counsel, Florida Power & Light Company, regarding the above-noted docket.

The correspondence has not been viewed or considered in any way by Commissioner McMurrrian. Under the terms of the advisory opinion from the Commission on Ethics (issued July 24, 1991 as CEO 91-31-July 19, 1991), the following letter does not constitute an ex parte communication by virtue of the fact that it was not shown to the Commissioner. Because it is not deemed to be an ex parte communication, it does not require dissemination to parties pursuant to the provisions of section 350.042, Florida Statutes. However, in such cases Commissioner McMurrrian has requested that a copy of the correspondence be placed in the record of the above-referenced docket.

cc: Advisors to Commissioners

Attachment

DOCUMENT NUMBER- DATE

09957 SEP 28 8

FPSC-COMMISSION CLERK

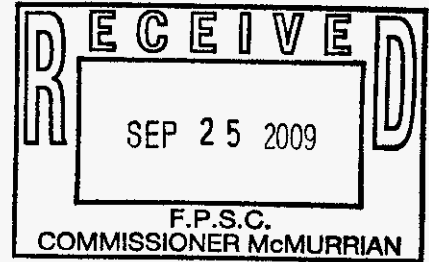


R Wade Litchfield
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September 25, 2009

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
Proposed Schedule

Dear Chairman Carter,

I am writing in response to the September 24, 2009 letter to you from Joseph McGlothlin of the Office of Public Counsel ("OPC"). OPC's letter contains significant inaccuracies that should not remain unaddressed.

A fundamental – and fundamentally inaccurate – premise of OPC's letter is that FPL has waived its right under Section 366.06(3) of the Florida Statutes to put its proposed rates into effect eight months after they were filed, if the Commission fails to take action within that time period. The 2005 Settlement Agreement to which OPC refers says nothing about such a waiver; in fact, it does not even mention Section 366.06(3). OPC cites Section 1 of the 2005 Settlement Agreement and asserts that language about when the agreement will terminate evidences FPL's waiver of its Section 366.06(3) rights. This completely misreads Section 1, which is simply expressing the "evergreen" nature of the settlement term. FPL's March 18, 2009 filing of its rate request in this docket clearly announced FPL's intention to terminate the 2005 Settlement Agreement at the end of its Minimum Term (*i.e.*, on December 31, 2009) by requesting new rates to be effective at the beginning of January 2010, and FPL's filing date allowed more than ample time for the Commission to enter an order determining FPL's new rates by the requested effective date. Moreover, at the outset of the technical hearing, the Commission approved a stipulation that new rates approved in this proceeding will go into effect on January 4, 2010 as FPL requested, and neither OPC nor any other party objected to that stipulation. *See* Order No. PSC-09-0573-PHO-EI at 171; Tr. 31-35. Unfortunately, we now find ourselves in a position where delays in concluding the technical hearing could jeopardize the Commission's ability to make a timely decision on FPL's new rates so that they may become effective consistent with that stipulation. FPL

The Honorable Matthew M. Carter II,
Chairman, Florida Public Service Commission
September 25, 2009
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never intended to – and did not -- waive its rights to rely upon Section 366.06(3) in this remote eventuality, and Florida law definitely would not support the imposition of an implied waiver under these circumstances. *See, e.g., Zurstrassen v. Stonier*, 786 So2d 65 (Fla. 4th DCA 2001).

Consider the consequences of OPC's position. As shown on FPL's Exhibit KO-4 (admitted into evidence as Hearing Exhibit 120), without rate relief FPL's 2010 return on equity is projected to decline to a grossly inadequate 4.69%. OPC's position would consign FPL to this confiscatory result starting at the beginning of January and continuing until such time as the Commission issued an order on FPL's rate request, through no fault of FPL and for no defensible reason. This would be an inequitable, arbitrary and capricious outcome.

In contrast, putting FPL's proposed rates into effect on January 4, 2010 subject to refund would give FPL the opportunity to recover the revenues generated by whatever new rates the Commission approves. At the same time, the provision for refunds would fully protect customers against overpayment: any portion of FPL's proposed rates that was not approved would be fully and promptly refunded to customers, so that their net payment starting on January 4, 2010 would be only the amounts resulting from the Commission-approved rates.

Finally, I want to emphasize that the main point of my September 22 letter was not the collection of proposed rates subject to refund, but rather urging the Commission to *avoid* that outcome by adopting a schedule that allows the Commission to reach a timely decision on FPL's rate request. FPL believes there is adequate time available to do this reasonably and fairly. For example, as I pointed out in my September 24 letter to you, there is a strong likelihood that the Progress Energy Florida technical hearing will end early and thus leave adequate time next week to conclude FPL's hearing. Of course, FPL will work to accommodate whatever approach the Commission chooses in order to reach a timely decision.

Sincerely,



R. Wade Litchfield

RWL:kw

cc: Honorable Lisa P. Edgar, Commissioner
Honorable Katrina J. McMurrin, Commissioner
Honorable Nathan A. Skop, Commissioner
Honorable Nancy Argenziano, Commissioner
All parties of Record in Docket No. 080677-EJ