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b. 090079-EI
 In Re: Petition for Increase in Rates by Progress Energy Florida, Inc.
 b. 08677-EI
 In Re: Petition for Increase in Rates by Florida Power & Light Company

c. Document being filed on behalf of the Florida Retail Federation.

d. There are a total of 15 pages.

e. The document attached for electronic filing is the Florida Retail Federation's Brief on Postponement and Related Issues.

(see attached file: FRF.BPRI.10-12-09.doc)

Thank you for your attention and assistance in this matter.

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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: Petition Increase in Rates by)
Progress Energy Florida, Inc.) DOCKET NO. 090079-EI
_____) FILED: OCTOBER 12, 2009

THE FLORIDA RETAIL FEDERATION'S BRIEF ON POSTPONEMENT AND
RELATED ISSUES

The Florida Retail Federation ("FRF" or "Federation"), pursuant to the request of the Commission's Acting General Counsel, hereby submits this brief relating to Governor Crist's written request that the Commission postpone its decisions on the rate increase requests filed by Florida Power & Light Company ("FPL") and Progress Energy Florida, Inc. ("PEF" or "Progress") in the above-styled dockets, and on related issues.

SUMMARY

In summary, the FRF believes that the Commission has ample statutory and rule authority to postpone its final decisions on revenue requirements and rates in the FPL and Progress rate cases, whether requested by the Governor or on its own motion or on motion of any other party. And, while the policy issues are somewhat difficult and complex, particularly in light of the unprecedented rate increases requested by FPL and PEF, and also in light of the unprecedented circumstances surrounding these proceedings, the FRF believes that the better policy is for the Commission to postpone its decisions.

FPL is precluded by Commission Order No. PSC-05-0902-S-EI ("Order 05-0902" or "2005 FPL Settlement Order") from implementing its rates before the issuance of a final Commission order establishing new rates; the Commission and all parties should also note that Order No. 05-0902 similarly precludes the FRF and the other Consumer Intervenors from obtaining the benefits of the rate reduction supported by their witnesses in this case any earlier, because only the issuance of a final Commission order can terminate the effectiveness of Order 05-0902. On the other hand, based on the terms of the settlement in the 2005 Progress rate case and the Commission's order approving that settlement, Progress may, if it chooses, implement its proposed rates, subject to refund, in January 2010.

BRIEF ON SPECIFIC ISSUES

The following presents the Florida Retail Federation's analysis and discussion of the legal and policy issues presented by the Commission Staff's request for briefs and by Governor Crist's request.

ISSUE 1: Can the Commission postpone its final decision on Florida Power & Light Company's Petition for Base Rate Increase, and if so, how?

ISSUE 3: Can the Commission postpone its final decision on Progress Energy Florida, Inc.'s Petition for Base Rate Increase, and if so, how?

Regardless of the Governor's written request, the Commission Chairman has the authority to schedule cases and to

issue orders pursuant to Rule 28-106.211, Florida Administrative Code, which provides that "The presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case, including bifurcating the proceeding." The FRF would understand that it was under this authority that Chairman Carter recently issued Order No. PSC-09-0646-PCO-EI, which set the remaining hearing dates and current decision schedule for the FPL rate case. Additionally, under Section 366.06(3), Florida Statutes, the Commission clearly has the authority to take up to twelve months, i.e., to March 18, 2010 in the FPL case and up to March 20, 2010 in the Progress case, to make its final decisions.¹

Additionally, the Commission's overarching mandate under Section 366.01, Florida Statutes to regulate public utilities "in the public interest . . . liberally construed" strongly supports the conclusion that the Commission can postpone its decisions in these dockets. In the first instance, the rate increase requests by FPL and Progress in these dockets are unprecedented: FPL's request reflects the first request for more than \$1 Billion per year, and thus obviously the largest base rate increase request, in the Commission's history. Progress's

¹ Section 366.06(3), Florida Statutes, defines "commencement date for final agency action" to be the date that the utility filed its Minimum Filing Requirements ("MFRs"). FPL filed its MFRs on March 18, 2009, and Progress filed its MFRs on March 20, 2009.

case presents the largest requested increase in the history of Progress or its predecessor, Florida Power Corporation. Together, these two cases involve nearly \$2 Billion per year of total consumer money at issue.

Under any circumstances, in fulfilling its mandate to regulate in the public interest, the Commission should take whatever time is necessary to make its final decision on these unprecedented rate hike requests. In light of the present, equally unprecedented allegations and circumstances surrounding the Commission, it is fully as important that the Commission take the time necessary to ensure public confidence in its decisions, rather than being rushed to judgment by FPL's specious claims.

Section 120.569(2)(1), Florida Statutes, is not dispositive of the time requirements for issuing final orders in light of Section 366.06(3), Florida Statutes. As a general matter of administrative law, Section 120.569 would require that the orders be issued within 90 days following conclusion of the hearings, i.e., by December 31, 2009 in the Progress case and by January 22, 2010 in the FPL case. However, the Commission is also expressly authorized to process rate cases within 12 months, without reference to when the hearings are concluded. The specific authority thus granted to the Commission under Section 366.06(3), Florida Statutes, controls the general provision of Section 120.569(2)(1), Florida Statutes. See

McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994) (stating that a specific statute covering a particular subject area always controls over a statute governing the same subject area in more general terms).

ISSUE 1A: Should the Commission postpone its final decision on Florida Power & Light Company's Petition for Base Rate Increase, and if so, why?

ISSUE 3A: Should the Commission postpone its final decision on Progress Energy Florida, Inc.'s Petition for Base Rate Increase, and if so, how?

The jurisdictional issue - whether the Commission can postpone its decisions - was discussed above. The "action issue" - whether the Commission should postpone its decision - is discussed here. To be sure, the present situation invokes competing claims, concerns, and considerations, including: FPL's claim for a timely decision to allow it to raise its rates, the FRF's and the other Consumer Intervenors' claims for a timely decision to reduce FPL's rates, competing claims under the Commission's 2005 FPL Settlement Order, the desire to have a full, five-member Commission decide the cases, the reasonable desire to have the same Commissioners vote on the cases as heard the evidence, and the reasonable desire for the Commissioners who will have to live with the consequences of the decisions be those who vote on them.

As a matter of comity if nothing else, the Governor's request is surely entitled to full and fair consideration, but

the Commission's decision must ultimately be guided by the public interest and with due consideration for the best interests of the Commission, as an institution. In other words, in these unprecedented circumstances, the Commission can surely consider postponement of its final decisions on its own motion, as well as in respectful response to the Governor's request.

The competing claims and concerns pose a difficult, complex policy decision. The 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. The time required for new commissioners to review the record, probably including watching the videographic record of the hearings, and to be briefed by the Staff, will entail a modest further delay, probably less than 2 months, and thus cuts against postponement to some limited degree. The desire to have a full commission decide the cases militates in favor of postponement. The reasonable policy consideration of having the same Commission vote on the requests as will be serving when they take effect likewise cuts in favor of postponement. The magnitude of the amounts of customer money at issue in the FPL case, nearly \$1.5 Billion per year, plus another \$500 million per year in the Progress case, cuts in favor of postponement so that the public will fully comprehend, understand, and believe that the Commission took the necessary time to make its

decisions, and so that the Commission that has to live with whatever consequences flow from the decision will comprise those commissioners who vote.

To the same point, the Federation believes that the best interests of the Commission, as an institution, are best served by postponement. For good or ill, whether the Commission grants part or all of the utilities' requested increases, or whether the Commission grants part or all of the Consumer Intervenors' requested rate reductions, the Commission as an institution will have to live with the results, and in that light, it makes better policy for those who have to live with the consequences to be those who make the decisions that produce those consequences.

Although this should be obvious, the Federation believes it important to state the following, unequivocally, for the record: The Federation's support for postponement of the Commission's decisions is not, in any way, predicated on a belief that the decision by new commissioners would be more favorable to the interests of the Federation's members or of other consumers. The Federation is fully confident that the sitting commissioners, whoever they are and whenever they vote, will render a fair decision with integrity. The Federation's concern is for the interests of the Commission, as an institution, and it is those concerns that lead the Federation to support postponement for the reasons stated.

ISSUE 2: Can FPL begin charging rates subject to refund on January 1, 2010?

No. FPL is precluded from implementing its proposed rates in January 2010 by the 2005 FPL Settlement Order,² which clearly states that the rates approved under the 2005 FPL settlement will "remain in effect until new base rates and charges become effective by order of the Commission." Order 05-0902 at 1. The 2005 FPL Stipulation and Settlement ("2005 FPL Settlement") was expressly incorporated into Order 05-0902 (at page 6), and the 2005 FPL Settlement unequivocally provides that "this Stipulation and Settlement . . . shall continue through . . . 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."

Thus, the Commission's 2005 FPL Settlement Order provides explicitly that the rates approved by that Order shall remain in effect until new rates take effect pursuant to a final order of the Commission following a hearing. The Parties are entitled to the protection of this Order, whether it is the Consumers'

² In Re: Petition for Rate Increase by Florida Power & Light Company, PSC Docket No. 050045-EI, "Order Approving Stipulation and Settlement," Order No. 05-0902-S-EI (Fla. P.S.C., Sept. 14, 2005).

entitlement to protection from early imposition of increased rates as sought by FPL or whether it is FPL's entitlement to protection from early imposition of reduced rates as prayed by the Consumers. The Commission's Order controls the date upon which new rates are to become effective, period.

The stipulation on Issue 172 reflected in the Prehearing Order in the current FPL rate case does not alter this result: that stipulation does not trump the express provisions of the Commission's 2005 FPL Settlement Order. Substantively, no one could reasonably have foreseen the intervening and supervening events that have delayed the case thus far, certainly no one could have foreseen the other events that have raised the postponement issue here, and none of the parties - neither FPL nor the Consumer Intervenors - waived, or would have waived, their rights to the protection of the 2005 FPL Settlement Order under any circumstances. In strict legal terms, the Prehearing Order, Order No. PSC-09-0573-PCO-EI, is a procedural order, not a final order, issued by the prehearing officer, not by the Commission, before the hearing, not "following a formal administrative hearing" as required by the 2005 FPL Settlement Order and the 2005 FPL Settlement Agreement itself. In other words, there is simply no way to translate the Prehearing Order into a final Commission order, which is expressly what is required to effectuate new rates for FPL. The Commission must also note the difference between the conditional "effective date

. . . should be" language in the stipulation on Issue 172 as compared to the mandatory "shall remain in effect" in the 2005 FPL Settlement Order. Clearly, the mandatory language in the Commission's Order supersedes the conditional language in the stipulation.

The Commission and all parties should recognize that the Federation is acknowledging that it is equally bound by Order No. 05-0902, and that it is thus not entitled to the benefit of any rate reduction that would be voted by the Commission until the new rates reflecting such reduction are implemented pursuant to a final order of the Commission following a formal administrative hearing. Thus, the postponement is bilaterally fair.

FPL's assertion, articulated in Wade Litchfield's September 25, 2009 letter to Chairman Carter, that it notified parties that it intended to terminate the agreement is meritless. FPL had no rights under the 2005 FPL Settlement to terminate the agreement (cf. the 2005 Progress Settlement, which expressly preserved the right for Progress to extend the effective period of that settlement), and more importantly, FPL has no power to terminate the effectiveness of a valid Commission order.

FPL's claim, articulated in the same letter, that it will earn an inadequate rate of return on equity in 2010 if its rate increase is not granted, is inapplicable to the legal issue at hand, which is the effectiveness of Commission Order 05-0902.

Moreover, FPL's claim is specious in that it is merely a conclusory allegation that presumes that the Commission would rule in FPL's favor on all issues in the rate case. On the other side of the ledger, the Consumer Intervenors have put competent, substantial evidence into the evidentiary record of this docket that supports a contrary conclusion: that FPL would, in fact, earn an adequate rate of return on equity if its rates were reduced so as to reflect a reduction in authorized revenue requirements of more than \$350 million per year. While this evidence makes it appealing to ask the Commission to reduce FPL's rates by this amount at the beginning of January, the FRF is not making such a request because that, too, would violate Commission Order 05-0902. Finally, FPL's suggestion that it should be allowed to increase its rates in January because, under its claimed but strongly disputed facts, it will not earn an adequate return for all of 2010 is at best misleading. As recently as the period ending April 2009, FPL earned an after-tax ROE - calculated on an FPSC-adjusted basis - of 10.88%, so at worst, for the first couple of months of 2010, FPL might earn somewhat less than that, and possibly even more than that, depending on the Commission's decisions in this case.

ISSUE 4: If the Commission postpones its final decision in the PEF rate case, can PEF begin charging rates subject to refund on January 1, 2010?

Yes, Progress Energy Florida may, if it so desires, begin charging its proposed rates as of January 2010, subject to refund. This outcome, which is obviously different from that in the FPL docket, results from the plain language of the settlement agreement between Progress and the Consumer Intervenors, which was approved by, and incorporated into, Commission Order No. PSC-05-0945-S-EI.³

The 2005 Progress Settlement will clearly terminate by its own terms as of the end of December, 2005 PEF Settlement Order at 2 and 11, and thus the Commission's order approving the Progress settlement does not operate to bar Progress from implementing its proposed rates upon the expiration of the 2005 Progress Settlement at the end of the last billing cycle of December 2009.

Progress is already collecting, subject to refund, approximately \$139 million per year in increased rates out of its request of \$500 million per year. Under the totality of the circumstances, Progress should carefully consider the advisability of further increasing its rates, but there is no bar to its doing so.

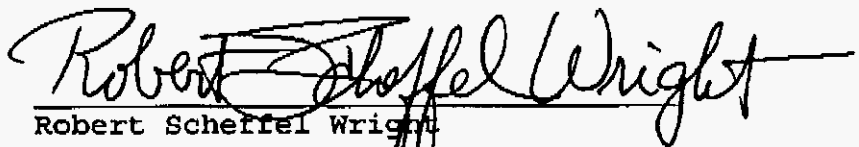
³ In Re: Petition for Rate Increase by Progress Energy Florida, Inc., PSC Docket No. 050078-EI, Order No. PSC-05-0945-S-EI (the "2005 PEF Settlement Order") at 7 (Fla. P.S.C., September 28, 2005).

CONCLUSION

In conclusion, based upon the authority described and for the reasons set forth above, the Florida Retail Federation respectfully suggests that the Commission can and should postpone its decisions in the pending FPL and Progress rate cases until the full Commission, including the new appointees named by Governor Crist, is seated and fully prepared to rule on the merits of the competing positions of the utilities and the Consumer Intervenors in these extremely important dockets.

FPL is prohibited by Commission Order No. 05-0902-S-EI from implementing any part of its proposed new rates until a final order is issued in its rate case. On the other hand, because of clear substantive differences in the Commission's order approving the 2005 Progress Settlement, and while the FRF would urge Progress to carefully consider the implications and advisability of such a decision, Progress is not barred from implementing its proposed rates in January 2010.

Respectfully submitted this 12th day of October, 2009.



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CERTIFICATE OF SERVICE

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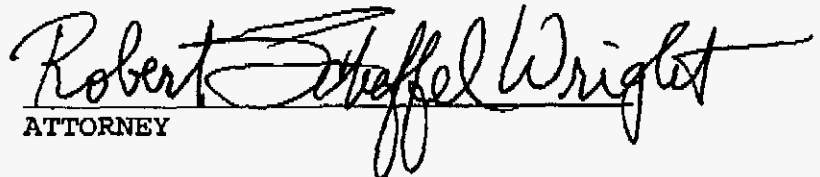
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