080677-EI
090130-EI
090079-EI
090144-EI
090145-EI

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Sent: Monday, October 12, 2009 2:53 PM

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Subject: e-filing (Dtk. Nos. 080677 & 090130-EI AND Dkt. Nos. 090079-EI, 090144-EI & 090145-EI

Attachments: OPC brief on issues ID'd by Acting GC--final.sversion.doc

Electronic Filing

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

Docket No. 090130-EI
In re: 2009 depreciation study by Florida Power & Light Company.

Docket No. 090079-EI
In re: Petition for increase in rates by Progress Energy Florida, Inc.

Docket No. 090144-EI
In re: Petition for limited proceeding to include Bartow repowering project in base rates, by Progress Energy Florida, Inc.

Docket No. 090145-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.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 17 pages.

e. The document attached for electronic filing is OPC Memorandum of Law on Issues Identified by Acting General Counsel.
(See attached file: OPC brief on issues ID'd by Acting GC–final.sversion.doc)

Thank you for your attention and cooperation to this request.

10/12/2009

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase 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 DATED: October 12, 2009

OPC'S MEMORANDUM OF LAW ON ISSUES IDENTIFIED BY ACTING GENERAL COUNSEL

Pursuant to the memorandum to parties dated October 8, 2009 from Mary Ann Helton, Acting General Counsel, the Citizens of the State of Florida, through the Office of Public Counsel ("OPC"), submit this Memorandum of Law on the issues posed therein:

PRELIMINARY STATEMENT

OPC understands that the reason for considering delays in the procedural schedules in the above dockets would be to enable the recent appointees to the Commission to take office and participate fully in the decisions in the pending rate cases for Florida Power & Light Company

("FPL") and Progress Energy Florida ("PEF"). OPC wishes to emphasize two points at the outset of this Memorandum.

OPC is confident that it has presented in each rate case docket a compelling evidentiary case to support its litigation positions. OPC 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 that will hold office after January 4, 2010.

However, the Governor of the State of Florida, who has the statutory responsibility of appointing Commissioners, has requested the Commission to delay the decision-making process of the FPL and PEF rate case dockets so that the two most recent appointees may take office and participate fully in the decisions. OPC acknowledges that his request should be treated seriously and with appropriate deference. If the Commission decides to postpone the decision until the recent appointees take office, OPC does not object to that course, *provided* the revised procedural schedule is established in a manner that provides due process to parties and gives 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, if the decisions are postponed, the procedural steps essential to accomplishing these objectives would 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 new Commissioners have an opportunity to gauge the demeanor of witnesses in the same manner as the Commissioners who presided over the hearing. If the Commission grants the Governor's request and there is disagreement among the parties regarding the ability of the Commissioners to access the videos, OPC will move to make the videos of the hearings part of the record.

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. OPC believes a minimum of two and a half hours should be set aside for this purpose for each case.

d. Staff's 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.

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.

OPC: Yes. Section 366.06(3), Florida Statutes, provides that the Commission shall enter its final decision "within 12 months of the commencement date for final agency action." OPC submits the Commission has the discretion to modify the procedural schedule in any way that serves the Commission's need to fully hear and thoroughly analyze the evidentiary presentations, as long as it meets the 12 month requirement.

This specific provision takes precedence over the more general provision of Section 120.569(1)(l). That subsection provides generally that an agency must render a decision within

90 days of the evidentiary hearing on the pending matter. However, to require the Commission to render a decision within 90 days of a hearing could in some instances negate the specific 12 month time frame given to the Commission in Section 366.06(3). Such a result would be contrary to statutory intent, and repugnant to the basic tenets of statutory construction, a fundamental example of which is that, in cases of apparent conflict, a specific enactment will be deemed to control over a general provision. The Supreme Court of Florida recognized this rule of construction recently in *School Board of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So.3rd 1220 (Fla. 2009). Significantly, the case involved an apparent conflict between provisions of the Administrative Procedures Act ("APA") and a separate statute governing "charter schools." At issue 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 that are available where good cause is established. The Court stated, "We determine that within the express text 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." Similarly, the ratemaking provisions of Chapter 366 provide a comprehensive regulatory scheme, specific to utility ratemaking, that takes the place of the more general requirement that an order be issued within 90 days of the hearing.

The statutory interpretation advanced by OPC does no violence to the protection that the Legislature intended to provide litigants in Section 120.569(1)(l), as the Legislature incorporated within the specific 12 month time frame given to the Commission equally specific protections to petitioning utilities. First, the Legislature provided that, in the event the Commission has not acted within eight months of the commencement date for final agency action, the utility may place its proposed rates into effect subject to refund (that is, unless the utility has negotiated away its right to do so within the terms of a settlement agreement, as FPL did in this case — see below). OPC notes that, in a given factual situation, this "eight month" measure could come into play at an earlier point in time than the 90 day provision of Section 120.569(1((l).

Next, if the Commission fails to act within 12 months, the utility may place its proposed rates into effect on a permanent basis.

These specific protective provisions effectively take the place of the more general measures of Section 120.569(1)(l). Together with the separate provision authorizing an interim increase within 60 days of filing that is available to petitioning utilities (when not affected by the terms of a settlement agreement), they operate to balance the potential effect of a lengthy ratemaking proceeding on a utility's financial condition with the need to give the Commission a time frame adequate to protect customers by a thorough analysis of evidentiary presentations that are frequently complex and technical in nature.

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.**

OPC: FPL has no ability to begin charging higher rates subject to refund on January 1, 2010. In the 2005 Settlement Agreement, FPL bargained away its right to invoke the provision of Section 366.03, Florida Statutes, that otherwise would enable FPL to place its proposed rates into effect at the end of eight months from the filing date. The settlement agreement provides:

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

The essential thrust of the Settlement Agreement is that FPL's base rates shall not change while the settlement is in effect (subject to limited exceptions not pertinent here). Further, the Settlement Agreement continues in effect until the Commission approves different rates in an order. Accordingly, FPL cannot change base rates until the Commission has approved modified base rates in an order. The "eight months, subject to refund" feature of Section 366.06(3) to which FPL Vice President Wade Litchfield alluded in his September 22, 2009, letter does not involve the issuance of an order and is, therefore, unavailable to FPL pursuant to the express terms of the Settlement Agreement.[1]

OPC reiterates here the same position it expressed in its September 24, 2009, letter response to Mr. Litchfield's letter. Mr. Litchfield then replied to OPC's letter. In his reply of

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

September 25, 2009, Mr. Litchfield observed that the Settlement Agreement does not refer to Section 366.06(3). He asserted that FPL has not "waived" its right to place the proposed rates into effect subject to refund. He further argued that FPL indicated its intent to end the Settlement Agreement on December 31, 2009, when it filed a petition in March 2009 and provided "ample time" within which the Commission could take action prior to January 4, 2010. For the purpose of this Memorandum, OPC will assume that FPL continues to rely on these arguments, and will address them here. All of these arguments are bogus.

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. For example, if a professional golfer agrees in an endorsement contract to drink only Coca-Cola, would the agreement unravel if it does not mention Pepsi or Royal Crown Cola? The answer is obviously "no." What matters is the intent of the parties that is expressed in the terms of the agreement, which in the case of the FPL Settlement Agreement is clear and unambiguous on this subject. The parties, including FPL, intended to establish a condition precedent that must be satisfied before FPL may modify its base rates. The condition precedent is an order of the Commission approving a modification of base rates. No reference to Section 366.06(3) was necessary to establish the condition precedent. The condition has not been satisfied, and will not be satisfied until the Commission memorializes its final decision in FPL's rate case docket.

When Mr. Litchfield asserts that FPL did not "waive" its right under Section 366.06(3), he is attempting to invoke a legal principle that is wholly inapposite to the situation before the Commission. The principles of contract law, not the principles attending a unilateral waiver of an existing right, govern this situation. Simply put, the principle of "waiver" has no application

in this instance because, once having contracted away its right to invoke Section 366.06(3), FPL had nothing to waive.

The case cited by FPL in its letter of September 25, 2009, helps make OPC's point. In *Zurstassen v. Stonier,* 786 So.2d 65 (Fla. App., 4th DCA, 2001), brothers Klaus and Rolf Zurstassen jointly held interests in two parcels of real estate. While Klaus was out of the country, his brother forged Klaus' signature on a deed and claimed to own the property outright. Unaware of the forgery, but shown that the chain of title showed only Rolf's name, Klaus signed an agreement stating that, while only Rolf's name appeared as owner, both brothers would share in the proceeds of a sale. Subsequently, Klaus Zurstassen learned of his brother's forgery and commenced an action to quiet title. A forged deed is invalid and does not convey title. The issue before the court was whether the absent, wronged brother ratified the forgery by his subsequent actions and thereby waived his right to object to the forgery. Quoting other authority, the court said, *inter alia:* "The elements of waiver are: (1) the existence at the time of the waiver of a right, privilege, advantage or benefit which may be waived. . ."

Clearly, the facts of the *Zurstassen* case cited by FPL differ greatly from the situation before the Commission. Before the case could have any relevance to the matters pending before the Commission, one would have to inject an agreement between the brothers, the terms of which convey the absent brother's interest in the property to his brother. At that point the issue in the case cited by FPL, like the situation before the Commission, would involve contract law — and, as here, the requirements attending a unilateral waiver would have no application. With respect to the application of Section 366.03, FPL has no right or advantage to waive, because it agreed to the condition precedent. Rather, *OPC* has a (contractual) right or advantage — the

requirement that FPL not modify base rates until the Commission issues an order approving the modification. *OPC does not waive the condition precedent of the Settlement Agreement.*

The plain and unambiguous language of the Settlement Agreement, which FPL participated in drafting, states that FPL shall not modify its base rates unless and until the Commission issues an order approving the modification. FPL is, therefore, mistaken when it argues that it could accomplish a rate increase by "declaring its intent" to terminate the Settlement Agreement through the filing of a petition to increase rates. Had the parties intended to vest FPL with the unilateral ability to terminate the agreement simply by declaring its intent to do so, the parties would have said so in the terms of the Settlement Agreement. Instead, the parties, including FPL, decided on a very different approach. FPL and the other signatories agreed that the Settlement Agreement would continue in effect, and FPL would have no ability to increase base rates, unless and until the Commission issues an order approving the modification. There is no room in the clear language of the Settlement Agreement quoted above for the notion that a unilateral "statement of intent to terminate" by FPL can take the place of the issuance of an order specified within the Agreement.

Further, FPL mischaracterizes the situation when it complains of "untimely" decision-making. The governing statute gives the Commission 12 months within which to act. If FPL wanted to ensure that the condition precedent of the Settlement Agreement — that is, an order of the Commission authorizing a modification to base rates — would be in place by the first of January 2010, FPL could have filed its petition in December 2008 rather than in March 2009[2]. Instead, FPL gambled that a petition containing a request for an increase of $1 billion annually in 2010; a subsequent year adjustment of $240 million annually in 2011; a perpetual generation base rate adjustment that would operate to increase rates by another $180 million annually in

[2] FPL prepared the projections that form the basis for its MFRs in November 2008.

2011 and would similarly act to roll the revenue requirements of future power plants into base rates without reference to an earnings test; a depreciation reserve excess of at least $1.25 billion; prefiled testimony of nineteen FPL direct witnesses; and prefiled testimony of nineteen FPL rebuttal witnesses, would be processed in the same amount of time that far less complicated cases required in the past. FPL filed its notice of intent to file the rate case in November 2008. FPL did not file its MFRs until March 18, 2009. FPL apparently assumed the case would be completed and an order issued by December 2009. FPL simply miscalculated. Now, in an attempt to avoid the consequences of its miscalculation, FPL is threatening to abrogate the terms of the Settlement Agreement. This would violate the Commission's order as well.[3]

While FPL contracted away its right to place proposed rates into effect after eight months of the filing, it continues to be protected by the twelve month clock under which the Commission must operate. Prior to the end of March 2010, the Commission must satisfy the requirement that it act within 12 months. It will take final agency action on FPL's pending petition. Its order memorializing that decision will constitute and satisfy the condition precedent in FPL's 2005 Settlement Agreement.

It follows that FPL's reference in its letter of September 25, 2009, to a *projection* that, absent an increase in base rates, its earned rate of return will decline to 4.69% is grossly misleading. First, the projections are based upon the very assumptions that have been challenged by the parties and are at issue in the proceeding. OPC witnesses testified, and OPC continues to assert, that when needed and appropriate adjustments to FPL's filing are taken into account, existing base rates are higher than necessary to provide FPL a fair rate of return in 2010. Equally as important, the exhibit projecting a 4.69% rate of return was based upon the predicted results of

[3] Had FPL filed its MFRs earlier, instead of filing them at the same time Progress Energy was initiating a major rate case, it would have created a degree of spatial separation from the PEF case, the proximity to which has complicated the commission's ability to complete the evidentiary hearing in the FPL docket.

operations during the full twelve months of 2010 — in other words, the exhibit assumed that FPL's earned rate of return would decline over the course of a *year*. It is a projection of what the earned rate of return would be at the end of 2010. At the time FPL wrote its letter, FPL was complaining about a schedule that contemplated a final decision of January 11, 2010, eleven and a half months earlier than the time frame covered by the (disputed) projection. Even if the Commission extends the schedule to accommodate the Governor's request, its decision must be made prior to March 18, 2009, or nine months earlier than the time frame encompassed by the (contested) projection to which Mr. Litchfield referred in his letter of September 25, 2009.

In support of its position that FPL was promised a decision prior to January 2010, FPL cites the stipulation that "the 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 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." FPL's effort to rely on this language in support of its stated intent to place proposed rates into effect prior to the decision has no basis. The notion that parties would agree, prior to the evidentiary hearing, to subordinate their due process rights to a specific, predicted effective date is absurd. It dissipates upon inspection. First, the verb "should" is significant — it is not the mandatory "shall" used in directives and legal contexts. The choice of wording alone defeats FPL's attempt to rely on the "stipulation" as a basis for premature action on its part. At most, the statement reflects the parties' *expectation* that the proceeding would follow a schedule that would make feasible the indicated effective dates. As it turns out, the hearing is requiring more time than the parties anticipated.

Next, as the Commission is aware, OPC actively and vigorously opposes FPL's request for the subsequent year adjustment. The stipulation regarding effective dates encompasses the

date the subsequent year adjustment "should" become effective. Under FPL's strained reasoning, the anticipatory "stipulation" would override OPC's active opposition to the subsequent year adjustment; however, FPL does not contend (nor could it) that OPC's position in opposition to the subsequent year adjustment and OPC's supporting evidence are inconsistent with the stipulation regarding effective dates contained in the prehearing order. Instead, it is clear that the stipulation on effective dates means "*in the event that*" the Commission approves a subsequent year adjustment, the effective date *should be* the first billing cycle of 2011. Similarly, the same stipulation means only "*in the event that*" the procedural posture permitted, the effective dates should be the first billing cycles of January 2010 and 2011, respectively. The principal effect of the stipulation was to address whether the revised rates would take effect immediately following the decision, or whether instead notice would be given to customers prior to the dates on which the revised rates would be applied to consumption.

Even if one were to assume, *arguendo*, that FPL had not negotiated away its right to invoke Section 366.03, the assertion that a decision date of January 11, 2009, would necessitate placing FPL's proposed rates into effect earlier is nonsensical. Because a utility is the beneficiary of the provision allowing it to place the rates into effect at the end of eight months, the utility is free to waive its right to do so. In his letter, Mr. Litchfield tacitly acknowledges this to be the case; in a footnote on page __ of the letter, Mr. Litchfield says that FPL "*believes*" it would be "*entitled*" to put the rates into effect. A measure that one is "entitled" to invoke is far different than one which "necessarily" takes effect. Even if one were to assume that FPL has not waived its ability to implement Section 366.03, the Commission could not allow the *threat* of such *possible* action by FPL to dissuade it from the course that it believes best meets the needs of the parties and the Commissioners.

In her letter, the Acting General Counsel asked parties to comment on alternative mechanisms for collecting costs if the Settlement Agreement prevents FPL from invoking Section 366.06(3). There is no occasion for doing so. The case is unfolding in a manner that is fully consistent with the Commission's governing statute and with the terms of the Settlement Agreement that FPL helped draft, and that the Commission approved. OPC submits that it would be a mistake, and prejudicial to OPC and other interveners, for the Commission to attempt to create an extraordinary mechanism to avoid the impact of the Settlement Agreement that it approved by order. Having approved the Settlement Agreement and dispensed with the rate case that was settled, the Commission essentially endorsed all of the terms of the Settlement Agreement — including the provision that prevents FPL from raising base rates unless and until the Commission issues an order approving modified rates.

Further, there is no basis upon which the Commission could issue such an order prior to its decision. To provide for collections prior to the final decision would be to prejudge matters that are the subject of a vigorous dispute. OPC and other interveners have presented testimony demonstrating that current rates are too high. In OPC's view, any additional time required to decide the case will postpone the rate reduction to which customers are entitled. However, OPC intends to abide by the terms of the Settlement Agreement and understands the Commission has discretion to use the full year authorized by statute if the Commission determines the full increment of time is needed to enable it to perform its ratemaking role.

ISSUE 3: **Can the Commission postpone its final decision in the Progress Energy Florida, Inc.'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.**

OPC: Yes. As its position on Issue 3, OPC adopts its position as stated in its response to Issue 1, above.

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? In responding, please explain the authority relied upon and include in your explanation how the 2005 Rate Case Stipulation affects PEF'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.**

OPC: The language of the Settlement Agreement between PEF and parties is not identical to the language of the FPL Settlement Agreement. 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. PEF did not. Instead, the PEF settlement agreement says the "agreement will. . .continue through the last billing cycle in December of 2009. . ." Whereas OPC asserts that FPL clearly negotiated away its right to place proposed rates into effect subject to refund at the end of eight months, OPC does not assert that the same is true in PEF's case. However, as in the FPL situation, the Commission should not allow the threat of charging higher rates subject to refund to dissuade it from establishing and adhering to the procedural schedule that it believes best meets the needs of parties and the Commission.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing OPC'S MEMORANDUM OF LAW ON ISSUES IDENTIFIED BY ACTING GENERAL COUNSEL has been furnished by U.S. Mail and electronic mail to the following parties on this 12th day of October, 2009.

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