

10/12/2009 3:49 PM

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080677-EI
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From: Cecilia Bradley [Cecilia.Bradley@myfloridalegal.com]
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 Subject: FPL Rate and PEF Rate Cases, Docket Nos. 080677 and 090079 Attorney General's brief
 Attachments: AG's brief-final.343.doc



AG's
final.343.doc (6)

We are withdrawing the brief mistakenly filed at 2:53 p.m. Attached is the Attorney General's brief for filing in the above-referenced cases and which correctly reflects the Attorney General's position. Thank you for your consideration in this matter.

(See attached file: AG's brief-final.343.doc)

Please note that Florida has a broad public records law, and that all correspondence to me via email may be subject to disclosure.

DOCUMENT NO. DATE
10467-09 10.12.09
FPSC - COMMISSION CLERK

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 &

DOCKET NO. 090130-EI
DATED: October 12, 2009

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

Pursuant to the October 8th memorandum to parties from Mary Ann Helton, Acting General Counsel, the Attorney General submits this Memorandum of Law on the issues posed therein:

PRELIMINARY STATEMENT

The Attorney General supports the position of the Office of Public Counsel and appreciates the Governor's support for the citizens of Florida during these difficult economic times. The Attorney General respectfully submits that the Public Counsel, his office, and the other interveners 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 respects and acknowledges the request of the Governor to postpone the decisions in the two pending cases until after January 1, 2010 but is prepared to proceed at any time, as directed by the Commission, however constituted. In the event of a postponement, the Attorney General supports the implementation of the suggestions of the Public Counsel to protect the due process rights of all parties.

DOCUMENT NO. DATE
10467-09 10.12.09
FPSC - COMMISSION CLERK

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)(1), and 366.06(3), Florida Statutes, as well as any other relevant statutory and case law.

AG: Yes. The Attorney General concurs with the Public Counsel that the Public Service Commission has twelve (12) months to enter a final order and may postpone its decisions until after the new commissioners take office. The rules of statutory construction provide that a specific provision will take precedence over a more general provision. *See McKendry v. State*, 641 So. 2d 45 (Fla. 1994); *Gretz v. Florida Unemployment Appeals Comm'n*, 572 So. 2d 1384 (Fla. 1991) (specific statute stating no fee for transcript preparation in unemployment compensation appeals controls over general statute requiring agency to provide transcripts at actual cost); *Barnett Banks, Inc. v. Dep't of Revenue*, 738 So. 2d 502 (Fla. 1st DCA 1999); *Rowe v. Pinellas Sports Auth.*, 461 So. 2d 72 (Fla. 1984) (when a special act and a general law conflict, the special act will prevail); *Am. Bakeries Co. v. Haines City*, 180 So. 524 (Fla. 1938) (principle that last in time prevails is inapplicable where precedent act is special or particular and subsequent act is general, as later general act does not repeal former particular statute)

The specific provisions of section 366.06(3), Florida Statutes, which refer specifically to the Commission and provides that the Commission shall enter its final decision “within 12 months of the commencement date for final agency action” thus control over the more general provision of section 120.569(2)(1), Florida Statutes, which refers generally to all administrative actions. Therefore, the Commission has the discretion to modify the procedural schedule in any way that serves its need to fully hear and analyze the evidentiary presentations, as long as it meets the twelve (12) month requirement.

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.

AG: 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, and agreed as follows:

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. (italics added)

FPL may not unilaterally modify the terms of this contract by implementing the eight-month provision of section 366.06(3), Florida Statutes, and charge new rates prior to the Commission entering a final order following an administrative hearing. To attempt to modify the plain and unambiguous language of the contract and prematurely charge such rates would not only breach the contract entered into with this office, Public Counsel, and other parties, but would also violate the Commission's order adopting the terms of the contract.

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)(I), and 366.06(3), Florida Statutes, as well as any other relevant statutory and case law.

OPC: Yes. The Attorney General incorporates its position on 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.**

AG: The Attorney General concurs with the position of the Public Counsel that Florida law does not prevent Progress from implementing the requested rates after eight months from its filing, subject to a refund obligation. However, since implementation of such rates prior to a final decision of the Commission would not be in the public interest, the Attorney General suggests that Progress should consider not implementing the requested rates prior to entry of the Commission's final order.

BILL MCCOLLUM
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/s/ Cecilia Bradley
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DOCKET NOS. 080677-EI & 090130-EI
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Attorney General's MEMORANDUM ON ISSUES IDENTIFIED BY ACTING GENERAL COUNSEL has been furnished by electronic mail to the following parties on this 12th day of October 2009.

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