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080677-EI

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Subject: Electronic Filing Docket 08-0677-EI AIF Memorandum
Attachments: AIF memo re postponement.pdf

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b. In Re: Docket No. 080677-EI Petition for Increase in Rates by Florida Power & Light Company

c. Document being filed on behalf of Associated Industries of Florida

d. There are a total of 9 pages.

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

(see attached file: AIF memo re postponement.pdf)

Thank you



ASSOCIATED INDUSTRIES OF FLORIDA

The Voice of Florida Business Since 1920

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DOCUMENT NUMBER-DATE

10469 OCT 12 09

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for increase in rates by)
Florida Power & Light Company)
)
)
_____)

Docket No. 080677-EI

Filed: October 12, 2009

**Associated Industries of Florida's Memorandum in Response to
Certain Issues Before by the Florida Public Service Commission**

COMES NOW, Associated Industries of Florida ("AIF"), pursuant to request by the Staff ("Staff") of the Florida Public Service Commission ("Commission" or "PSC") dated October 8, 2009, and respectfully responds and asserts the following argument on the issues identified therein.

Staff's request for this Memorandum enumerated four issues for which it sought responses, two of which pertain specifically to Docket Number 080677-EI in which AIF is an Intervenor. The remaining two issues, although substantively identical, are specifically related to Docket Number 090079, in which AIF is not a party. Accordingly, AIF will not respond to the specific issues raised relative to Docket Number 090079; however, the arguments and policy concerns asserted herein by AIF are applicable and should be weighed in both cases.

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?

There is no legal or policy authority upon which the Commission could reasonably postpone its votes or decisions in this case. The request to postpone the Commission's final decision is before the Commission only as a result of a letter from the Governor to the Commissioners dated October 2, 2009. The letter reports the Governor's recent actions in appointing two new individuals to serve as Commissioners who will not take office until January 1, 2010. Thus, the question is not being raised as a motion before the PSC asserted by one of its

member Commissioners nor is it a request from any of the parties to the case before the Commission.

It is significant to note that the Governor's letter only requests delay of the final Commission decision and does not request postponement of the remaining hearing dates for the matter at which additional direct and rebuttal testimony and cross examination will be presented by the parties. Instead, the question of postponement was prompted by the Governor, whose is not a party to the instant case, and whose standing to pose such a question to the tribunal in this matter must be questioned. The Governor is essentially asserting his belief that the current Commissioners, including the Commission Chairman, who have heard or will hear all the evidence, testimony, arguments, and objections of the parties, and who have observed the demeanor of the witnesses, should not be permitted to render a final decision in this matter. Rather, the Governor would have the decisions rendered by two individuals who have not heard the evidence presented and who have not observed the witnesses providing testimony, and whose actions and dealings have not been governed by the standards of conduct required by public officers required by Chapter 112, Florida Statutes during the time these hearings were conducted. Their actions and activities during the duration of the hearings is entirely unknown, undisclosed and unregulated, leaving wide open the possibility that their judgment and opinions have been unduly and improperly influenced by the parties, the media, the Governor or any other myriad of information sources beyond the limitations of the evidence before the Commission upon which its decision can only be based.

The members of the Florida Public Service Commission are appointed by the Governor to serve the citizens of Florida in both quasi-legislative and quasi-judicial roles. As such, the Commissioners have burdens of both policy making and legal interpretation that must be

considered in deciding any matter or issue before them. The question of postponing a final decision on the instant matter is no exception.

As a matter of law, the Commission should not delay its final decision simply due to the pending appointments of two new Commissioners. Delay in the final decision would necessitate that two of the five voting Commissioners will not have presided over the hearings. 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. "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" *Bradford v. Foundation & Marine Construction Co.*, 182 So.2d 447, 449 (Fla. 2nd DCA 1966),. See also *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); *McAllen 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).

Additionally, the Parties to this case are subject to the requirements of all Orders of the OSC previously issued. Specifically, Chairman Carter issued an Order dated September 25, 2009, establishing the remainder of the hearing and decision schedule in this case. The second page of that Order contains a "notice of Further Proceedings or Judicial Review" which governs how the parties must have acted if adversely impacted by that Order, including matters which are procedural, preliminary or immediate in nature. No party of record has initiated any review or reconsideration of that Order. Therefore, the PSC is likely without proper jurisdiction to

consider any change in the terms for the remainder of the hearing or the decision schedule enumerated therein.

Finally, as a matter of public policy, which the Public Service is bound to consider, additional delay in this case will only further jeopardize the stability of Florida's regulatory environment. This directly impacts the ability of Florida businesses to attract capital and continue providing adequate infrastructure and investment in our state's economy at this critical time in our history. Several of the witnesses testifying in this matter have been asked whether FPL's credit rating and ability to access outside capital markets effectively and efficiently will be impacted by the PSC's decision in this case. The Commissioners who have participated in the hearings thus far have heard the various answers provided by the witnesses. More recently, however, the Florida News Service reports that Moody's Investor Services, a leading financial rating agency, has publicly voiced its concern over the credit scoring impact that Florida's regulatory environment will create if the system continues to be politicized. The article provides in pertinent part that:

Moody's views the highly politicized atmosphere surrounding the base rate proceedings of Florida Power & Light Company and Progress Energy Florida, Inc. as negative to the credit quality of both utilities and an indication that the political and regulatory environment for investor-owned utilities in Florida may be deteriorating. Moody's views political intervention in the utility regulatory process as detrimental to credit quality, sometimes resulting in adverse rate case outcomes...Moody's notes that such intervention is highly unusual for the state of Florida, which has traditionally been one of the more constructive utility regulatory jurisdictions in the nation, characterized by fair and balanced regulatory proceedings with little to no political interference or controversy." Laing, Keith, "*Moody's: Take The Politics Out Of The PSC*" The News Service Of Florida, October 6, 2009.

The current members of the Public Service Commission must act responsibly and timely in rendering a vote on the rate requests before it. These Commissioners are in the best position

to make the decision on rate requests pending based on the testimony and evidence they have observed and received. Additionally, as the body responsible for creating and enforcing Florida's utility regulatory policies, the current Commissioners further owe a duty to all Florida citizens to establish regulatory policies that foster a fair and equitable system that addresses the economic needs of our business community in these challenging times. To delay a final decision on this matter any further is nothing more than an avoidance of the Commission's duties. Accordingly, AIF respectfully requests this Commission to make its final decisions in accordance with the terms of the September 25, 2009 Order and deny any request for additional delay or other deviation therefrom.

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

The members of AIF have a significant interest in the instant matter pending before this Commission. Availability of reliable electric service is essential for much-needed economic development and growth in the state of Florida. Moreover, AIF members require predictability in all their costs in order to render competitive and effective services to their customers. Predictable electric costs are included in this requirement. Any additional delay in rate implementation makes Florida business costs more unpredictable and volatile.

AIF believes that the Commission and Florida customers should welcome FPL's forward-thinking efforts to invest in electric infrastructure. FPL's proposal will make Florida's infrastructure stronger, more storm resistant, smarter, better controlled, more reliable, more fuel efficient and more environmentally friendly. Moreover, AIF also views FPL's investments as a much-needed Florida economic stimulus package providing direct employment for many Florida

residents as well as numerous business opportunities for many Florida businesses, including AIF members.

Accordingly, AIF adopts and supports the position of FPL in regards to this issue and respectfully requests the Commission to authorize FPL to implement one or more of the requests or alternative proposals FPL has presented.

Respectfully submitted,

Dated: October 12, 2009

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically this 12th day of October, 2009 to the following:

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