

080677-EI

State of Florida




# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

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**DATE:** September 29, 2010  
**TO:** Ann Cole, Commission Clerk, Office of Commission Clerk  
**FROM:** Marshall W. Willis, Director, Division of Economic Regulation   
**RE:** Docket No. 0806777-EI, September 29, 2010 Letter to Marshall Willis

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Please place the attached correspondence from John Butler, dated September 29, 2010, in the docket side of Docket No, 080677-EI.

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**Marshall Willis**

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**From:** Butler, John [John.Butler@fpl.com]  
**Sent:** Wednesday, September 29, 2010 2:15 PM  
**To:** Marshall Willis  
**Cc:** Lisa Bennett; Anna Williams; Martha Brown; 'Kelly.jr@leg.state.fl.us'; 'mcglothlin.joseph@leg.state.fl.us'; 'jess@sugarmansusskind.com'; 'sugarman@sugarmansusskind.com'; 'mbraswell@sugarmansusskind.com'; 'msundback@andrewskurth.com'; 'kwiseman@andrewskurth.com'; 'jspina@andrewskurth.com'; 'lisapurdy@andrewskurth.com'; 'linomendiola@andrewskurth.com'; 'meghangriffiths@andrewskurth.com'; 'swright@yvlaw.net'; 'jlavia@yvlaw.net'; 'jmoyle@kagmlaw.com'; 'vkaufman@kagmlaw.com'; 'jmcwhirter@mac-law.com'; 'barmstrong@ngnlaw.com'; 'cecilia.bradley@myfloridalegal.com'; 'sda@trippscott.com'; 'tperdue@aif.com'; 'shayla.mcneill@tyndall.af.mil'; 'margaret-ray.kemper@ruden.com'; 'richardb@gtlaw.com'  
**Subject:** Docket 080677-EI / Letter to Marshall Willis  
**Attachments:** 9.29.10 Letter to Marshall Willis.pdf

Mr. Willis, please see the attached correspondence that responds to your request at the September 22, 2010 informal meeting that FPL advise Staff whether it will consent to Commission jurisdiction over revenues that are determined by the Commission to result in FPL's ROE exceeding 11%.

The original of the letter will be delivered to you tomorrow.

Best regards,

John T. Butler, Esq.  
700 Universe Boulevard  
Juno Beach, FL 33408  
561-304-5639  
[John.Butler@fpl.com](mailto:John.Butler@fpl.com)

DOCUMENT NUMBER-DATE

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9/29/2010



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September 29, 2010

- VIA ELECTRONIC DELIVERY -

Mr. Marshall Willis, Director  
Division of Economic Regulation  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

**RE: Docket No. 080677-EI**

Dear Mr. Willis:

This is in response to your request at the informal meeting held by the Commission Staff on September 22, 2010 for Florida Power & Light Company ("FPL") to advise Staff as to whether FPL will consent to the Commission having jurisdiction over the disposition of any revenues received by FPL in 2010 that are determined by the Commission to result in FPL's return on equity ("ROE") exceeding 11%.

First, I must clarify that the monthly earnings surveillance reports which FPL recently filed do *not* show that FPL is earning an ROE above 11%, as measured on the basis that the Commission uses to set rates. In fact, most of those reports show that FPL is earning below the 10% mid-point of the ROE range identified by the Commission in Order No. PSC-10-0153-FOF-EI, dated March 17, 2010 ("Order 0153"). FPL's service territory experienced a record period of sustained cold weather in January 2010, while June 2010 was the second warmest month overall in the last 60 years. That extreme weather resulted in additional sales of electricity by FPL and hence additional revenues that would not have occurred had weather conditions been normal. The Commission routinely sets rates based on what revenues will be under normal weather conditions, rather than either rewarding or penalizing a utility for the unpredictable and uncontrollable vagaries of weather. That was, in fact, the approach approved by the Commission in Order 0153, and no party to FPL's rate case even suggested a different approach.

Addressing your request at the September 22 informal meeting, FPL believes that it has already provided a viable and effective response, one that is supported by the Office of Public Counsel, the Attorney General of the State of Florida, the Florida Industrial Power Users Group, the Florida Retail Federation, the South Florida Hospital

and Healthcare Association, the Federal Executive Agencies, and Associated Industries of Florida (the "Intervenor Signatories"). That response is, of course, the Stipulation and Settlement that FPL entered into with those parties on August 20, 2010 and that is currently awaiting review and approval by the Commission (the "Settlement Agreement"). Under Paragraph 7 of the Settlement Agreement, FPL would be given the authority, duty and obligation to vary the level of available depreciation surplus that it amortizes during each year that the Settlement Agreement would be in effect – 2010 through 2012 – so that FPL's ROE (measured on an FPSC actual, adjusted basis) remains within the range of 9% - 11% that was set in Order 0153.

In this respect, the Settlement Agreement works almost identically in concept to the proposal made by Peoples Gas System on June 9, 2010 for dealing with the level of its earnings, a proposal that ostensibly was made to obviate the need for a full base rate proceeding such as the one just concluded for FPL. Peoples proposed to use earnings above its ROE ceiling to fund the storm damage and environmental reserves and/or for other purposes benefiting both the company and its customers. As you will recall, Staff sent FPL a copy of the June 9 Peoples proposal shortly before the September 22 meeting and recommended that FPL consider agreeing to a similar mechanism. FPL's view is that we already have done so, with the support of all the Intervenor Signatories identified above. The only thing that remains is for the Commission to approve the Settlement Agreement, so that this mechanism can be implemented. FPL has also reviewed the other proposals made by utilities to address their earnings levels over the years that Staff forwarded to FPL and the other parties to this docket on September 24, 2010. All of those proposals follow substantially the same pattern: the utilities propose various mechanisms to use earnings above their ROE ceiling to benefit the utility and its customers. Again, that is precisely what FPL and the Intervenor Signatories have proposed in the Settlement Agreement.

Of course, it is possible that the Commission will not approve the Settlement Agreement. If the Commission were to reject the Settlement Agreement, then FPL and the Intervenor Signatories would be in the same posture as any other parties to a rejected settlement: free to consider other possible settlement approaches that might be proposed, or to pursue whatever remedies are available to them by statute and Commission rule and precedent. Such avenues and remedies, of course, were fully considered by FPL and the Intervenor Signatories and factored into the existing Settlement Agreement that awaits a staff recommendation and Commission review.

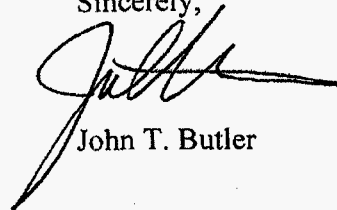
As a final matter, I note that FPL does not believe the Commission has authority to order retroactive refunds of base revenues. Whether on an interim or permanent basis and whether based on an historic or projected test period, rates are set prospectively, because the Commission is prohibited from engaging in retroactive ratemaking. See, e.g., *Southern Bell Telephone and Telegraph Co. v. Public Service Commission*, 453 So.2d 780 (Fla. 1984); *Citizens v. Public Service Commission*, 448 So.2d 1024 (Fla. 1984); *City of Miami v. Public Service Commission*, 208 So.2d 249 (Fla. 1968). We do not infer from the September 22 meeting, or from any of the materials that Staff has forwarded to

Mr. Marshall Willis, Director  
September 29, 2010  
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us for review, that Staff believes the Commission already *has* statutory authority to require a refund of base revenues previously collected; rather, Staff occasionally has asked utilities to *consent* to the exercise of jurisdiction that the Commission otherwise would not have. Such a concession on the part of a utility would have been in the nature of a settlement, if not part of an explicit settlement agreement. As noted above, FPL and the Intervenor Signatories worked long and hard to negotiate a comprehensive Settlement Agreement that achieves the same desired result. All that remains for such a mechanism to become effective is for the Commission to approve the Settlement Agreement.

We would, therefore, respectfully request that Staff finalize its recommendation and that the Settlement Agreement be presented to the full Commission for its consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Butler", with a long horizontal flourish extending to the right.

John T. Butler

cc: Parties of record