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**Sent:** Monday, October 12, 2009 2:31 PM  
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**Subject:** Docket No. 080677-EI and 090130-EI- SFHHA Brief Regarding Postponement of Decision in FPL Rate Case  
**Attachments:** SFHHA Brief.pdf

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b. Docket No. 080677-EI and 090130-EI.

c. Document being filed on behalf of South Florida and Hospital Healthcare Association (SFHHA).

d. There is a total of 7 pages.

e. The document attached for electronic filing is: SFHHA's Brief Regarding Postponement of Decision in the FPL Rate Case  
(See attached SFHHA Brief.pdf)

Thank you for your attention and cooperation to this request.

Regards.  
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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: 2009 depreciation and dismantlement study by Florida Power & Light Company.

DOCKET NO. 090130-EI

**SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION'S  
BRIEF REGARDING POSTPONEMENT OF DECISION IN THE FPL RATE CASE**

The South Florida Hospital and Healthcare Association ("SFHHA") submits this brief in response to the recent request from the Commission's Acting General Counsel to address the following issues:

- (1) whether the Commission may postpone its final decision in the Florida Power & Light Company ("FPL") rate case, and
- (2) whether FPL may begin charging rates subject to refund on January 1, 2010.

**Issue 1: The Commission may postpone its final decision**

The Commission has authority to postpone its final decision in the FPL rate case. Section 366.06(3), Florida Statutes, provides that the Commission shall "enter its final order within 12 months of the commencement date for final agency action." The statute further provides that the "commencement date for final agency action" is the date upon which a utility has filed the minimum filing requirements ("MFR") as established by rule of the Commission. Because FPL filed its MFRs on March 18, 2009, the Commission would have, under Section 366.06(3), until March 18, 2010 to enter its final order in the FPL rate case. Specific statutory authority granted to the Commission under Section 366.06(3) would trump the general provision of Section

120.569(2)(1), which generally requires agency orders to be issued within 90 days following the conclusion of a hearing.<sup>1</sup>

**Issue 2: FPL is barred from charging new rates subject to refund on January 1, 2010**

FPL is also barred from charging new rates subject to refund on January 1, 2010, absent a Commission order modifying its base rates. Based on the clear terms of the 2005 Settlement Agreement,<sup>2</sup> to which SFHHA was a signatory, FPL waived its right to avail itself of Section 366.03, Florida Statutes. The 2005 Settlement Agreement established a clear and unambiguous termination date for the negotiated rate freeze. The termination date of the rate freeze was defined as the date that new base rates become effective “*pursuant to order of the FPSC following a formal administrative hearing held either on FPSC’s own motion or on request made by any of the Parties to [the] Stipulation and Settlement.*” (emphasis added). FPL’s proposal to implement rates on January 1, 2010, if permitted, would eviscerate this rate freeze protection that was clearly a negotiated term of the 2005 Settlement Agreement and ultimately adopted by Commission order. The 2005 Settlement Agreement was contingent on approval of the agreement “in its entirety,” and any attempt to selectively reject a term of the settlement should not stand. In the course of settlement negotiations, SFHHA and other parties compromised on critical issues. If the Commission were to allow FPL alone to be freed from its duty under the agreement (and the order that approved it), it would upset the balance of the whole agreement and would be patently unfair to those who relied on the settlement.

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<sup>1</sup> See *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994).

<sup>2</sup> Order No. PSC-05-0902-S-EI.

Further, the claim that FPL “never intended to—and did not—waive its rights to rely upon Section 366.06(3)” is meritless.<sup>3</sup> FPL cannot reasonably argue that it was taken by surprise that waiver of Section 366.03 could be a consequence of the agreed-upon rate freeze period. FPL, like all parties who routinely practice before the Commission, was fully aware of and on notice of the pertinent statutes governing rate cases when it agreed to the settlement terms. FPL knew its statutory rights with respect to filing rate cases and implementing rates subject to refund, and it expressly limited those rights in the agreement. Specifically, FPL agreed that “FPL’s retail base rates and base rate structure shall remain unchanged, except as otherwise permitted in [the 2005 Settlement Agreement].”<sup>4</sup> Because the settlement expressly established a rate freeze period, FPL cannot now claim that it had no intention of relinquishing standard processing times for its rate filing.

FPL’s reliance on *Zurtrassen v. Stonier* to claim that it did not waive the deadline is particularly inapposite.<sup>5</sup> The cited case has nothing to do with the situation here. In *Zurtrassen*, the court addressed the criteria for waiver of a fraud.<sup>6</sup> Unlike *Zurtrassen*, this proceeding does not involve a claim for fraudulent transfer of property. Rather, this is a rate case involving litigants who, in the context of a contested administrative proceeding, expressly waived various statutory rights in exchange for certain benefits under a comprehensive settlement agreement. If the Commission were to examine the elements of waiver as set forth in *Zurtrassen*, it would surely find that FPL expressly waived its statutory rights regarding the deadlines for processing

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<sup>3</sup> FPL Letter to the Chairman at 2 (Sept. 25, 2009).

<sup>4</sup> 2005 Settlement Agreement at 4.

<sup>5</sup> FPL Letter to the Chairman at 2 (Sept. 25, 2009) (citing *Zurtrassen v. Stonier*, 786 S.2d 65 (Fla. 4th DCA 2001)).

<sup>6</sup> *Zurtrassen*, 786 So.2d at 70.

rate cases.<sup>7</sup> However, the Commission need not engage in that exercise as the precedent cited by FPL does not address the situation at bar.

FPL is also mistaken when it asserts that failure to implement interim rates would lead to a confiscatory result. First, FPL is not entitled to have rates implemented on an interim basis because it expressly negotiated away that right. Second, there is significant evidence in the record that FPL's existing rates should be reduced. The Commission therefore should not prejudge whether FPL is entitled to any rate change until it issues an order after the close of the evidence. Before *any* new rates go into effect, the decisionmakers in this proceeding should be given the opportunity to thoroughly examine the evidence in the record and make an informed decision regarding whether FPL is entitled to a rate increase *or decrease*. Consistent with the 2005 Settlement Agreement, SFHHA therefore urges the Commission not to take any further action regarding the implementation of rates until the issuance of a final order in this matter.

Finally, the parties' statement of position on Issue No. 172 reflected in the Prehearing Order in the FPL rate case does not alter the Commission's authority to postpone its decision.<sup>8</sup> The Prehearing Order is simply a procedural order, and the Commission has authority to change its orders. Further, the Prehearing Order does not represent a stipulation of all the parties. As noted on page 169 of the Prehearing Order, Issue 172 falls under the list of issues that were addressed by Commission Staff and FPL, not all the parties. The Prehearing Order is not a final order "following a formal administrative hearing," as contemplated in the 2005 Settlement

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<sup>7</sup> *Id.* (holding that the elements of waiver of a fraud are: "the existence at the time of the waiver of a right, privilege, advantage or benefit which may be waived; the actual or constructive knowledge of the right; and (3) the intention to relinquish the right.").

<sup>8</sup> Order No. PSC-09-0573-PCO-EI at 171 ("Issue 172: What is the appropriate effective date for FPL's revised rates and charges?").

Agreement, and therefore does not obviate the parties' obligations to comply with the terms of the 2005 Settlement Agreement.

In conclusion, the Commission has authority under Section 366.06(3), Florida Statutes to postpone its decision in the FPL rate case. Further, FPL *may not* begin charging rates subject to refund on January 1, 2010.

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**CERTIFICATE OF SERVICE**  
**DOCKET NO. 080677-EI**

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