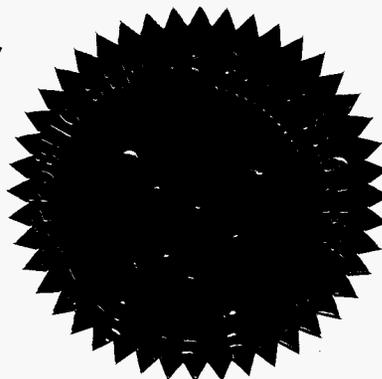


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 100410-EI

In the Matter of:

REVIEW OF FLORIDA POWER & LIGHT
COMPANY'S EARNINGS.



PROCEEDINGS: COMMISSION CONFERENCE AGENDA
ITEM NO. 10

COMMISSIONERS
PARTICIPATING: CHAIRMAN ART GRAHAM
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER RONALD A. BRISÉ
COMMISSIONER EDUARDO E. BALBIS
COMMISSIONER JULIE I. BROWN

DATE: Tuesday, January 11, 2011

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
Official FPSC Reporter
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P R O C E E D I N G S

1
2 **CHAIRMAN GRAHAM:** Item 10.

3 **MR. SLEMKEWICZ:** I'm John Slemkewicz.

4 Item Number 10 is a review of Florida Power and
5 Light's earnings. Based on FPL's earnings
6 surveillance reports through October 2010, FPL has
7 been reporting returns on equity in excess of its
8 maximum authorized ROE of 11 percent. In the event
9 that FPL is still earning in excess of 11 percent
10 for the 12 months ending March 31st, 2011, staff is
11 recommending that the Commission order FPL to hold
12 excess earnings, if any, for that period subject to
13 refund under a corporate undertaking.

14 Staff is prepared to answer any of the
15 Commissioners' questions, and representatives of the
16 company are here and Public Counsel.

17 **CHAIRMAN GRAHAM:** Thank you, sir. Let's
18 hear from FIPUG. You don't look like Mr. Moyle.
19 No. That's all right, we don't need to drag you
20 down here.

21 Yes, sir.

22 **MR. BUTLER:** FPL. Should I speak first?

23 **CHAIRMAN GRAHAM:** Let's hear from the
24 intervenors first, and then we'll let you close out.

25 **MR. BUTLER:** Thank you.

1 **MR. BECK:** Thank you, Mr. Chairman.

2 Good morning, Commissioners. My name is
3 Charlie Beck. I'm with the Office of Public Counsel.

4 And, Commissioners, we believe the agreement
5 that we and a number of other intervenors signed last
6 August covers the overearnings of Florida Power and
7 Light and makes the staff's recommendation
8 unnecessary.

9 Let me just review briefly our agreement, if
10 I could, and some of the important points. Last
11 August, our office along with a number of others,
12 including the Attorney General, FIPUG, who you heard
13 from on the previous issue, the Retail Federation, the
14 Federal Executive Agencies, and the South Florida
15 Hospital Association signed an agreement with Florida
16 Power and Light that covered their earnings and their
17 base rates for a three-year period of 2010, 2011, and
18 2012. There's a couple of important points from that
19 agreement I think you should at least be aware of.

20 First is the return on equity that was set
21 in the agreement. In the last rate case the
22 Commission set Florida Power and Light's return on
23 equity at 10 percent with a range of 9 to 11, probably
24 one of the lowest return on equities that this
25 Commission has set. Now our witness actually proposed

1 a lower return on equity. We had Professor Randy
2 Woolridge from Penn State testify. And the Commission
3 relied on our testimony on that, but nonetheless you
4 ordered this return on equity.

5 Our agreement cements that for a three-year
6 period. So no matter what interest rates do or
7 anything else over this period happens, the customers
8 can be assured that the company won't come in asking
9 for a higher return on equity. Certainly there are
10 signs that could be happening. This past October, I
11 think, set the lowest rates on 30-year mortgages we
12 have seen in a long, long time. Those have gone up by
13 a full percentage point since that time. But no
14 matter what happens, if interest rates skyrocket
15 during this period, the customers are assured that the
16 rates set using a low return on equity stay the same.

17 Another unique aspect of the last rate case
18 was depreciation and that takes us into the issue
19 before you. We sponsored a witness, Jack Pose
20 (phonetic), who identified a very large depreciation
21 surplus that had been collected from customers over
22 the past from Florida Power and Light, and he proposed
23 returning that surplus over a four-year period, and
24 the Commission relied on that and set a four-year
25 flowback of that at \$224 million a year approximately.

1 That kept rates lower by \$224 million a year by doing
2 that.

3 What our agreement has done, has used that
4 to keep Florida Power and Light's rates within a
5 reasonable range of earnings, and at the same time
6 protect customers from any rate increase over the
7 three years. If Florida Power and Light's earnings
8 are below the range that have been set by the
9 Commission, they are able to use additional amounts to
10 bring them up to the very bottom of the range, and if
11 their earnings go above the top of the range, 11
12 percent, they have to not flow that back. And I think
13 that's the position we are in now.

14 Customers benefit by that, because to the
15 extent that the company does not use up that
16 depreciation surplus, that is available for later to
17 benefit customers at a later time. Now, our agreement
18 has a comprehensive plan to cover the base rates and
19 earnings of Florida Power and Light, and we think that
20 that covers the issue that is in front of you today.
21 And that's all I have. I'll be happy to answer any
22 questions.

23 **CHAIRMAN GRAHAM:** Thank you, Mr. Beck.

24 Mr. Butler.

25 **MR. BUTLER:** Thank you, Mr. Chairman.

1 Good morning. John Butler on behalf of Florida
2 Power and Light Company, and good morning to you and
3 to the fellow Commissioners.

4 I would start by saying that I agree with
5 Mr. Beck's comments and concur with all of the points
6 that he has made.

7 **CHAIRMAN GRAHAM:** Sir, could you say that
8 again. I don't ever hear that.

9 (Laughter.)

10 **MR. BUTLER:** I will say it slowly and
11 distinctly. FPL agrees with Mr. Beck and all the
12 points that he made today for this purpose. Be sure
13 and get that qualification in there.

14 We would urge you, respectfully, to deny
15 staff's recommendation. I think that an earnings
16 review for FPL is unnecessary. As Mr. Beck noted, you
17 approved a settlement agreement among FPL, all of the
18 major intervenors, including Public Counsel in the
19 proceeding. The settlement agreement stabilized FPL's
20 base rates through the end of 2012. One of the
21 principal motivations for the parties to settle was
22 avoiding the need for a rate case or a rate review
23 while providing FPL with the tools that it needed to
24 do so.

25 Paragraph 7 of the settlement agreement

1 gives FPL the tool it needs to keep earnings within
2 the authorized 9 to 11 percent range by varying the
3 amount of reserve surplus we amortize. As Mr. Beck
4 noted, the order that was entered last March that's
5 superseded by the settlement on this issue would have
6 set a flat \$223 million per year amortization back of
7 a credit that has the effect of increasing earnings
8 for the company.

9 What the settlement agreement did, and it is
10 very important and very effective, is it gives us
11 flexibility to vary the amount of the reserve surplus
12 that we amortize back, and basically only use the
13 amount that we need so that we are not a position as
14 we were actually earlier in this year where we are
15 both amortizing surplus we don't need because of very
16 extreme weather, and as a result showing real high
17 earnings and at the same time, you know, using up
18 reserve surplus that otherwise would be left over at
19 the end of the agreement to the benefit of customers.
20 So Paragraph 7 gave us the mechanism we needed to vary
21 the amount of reserve surplus and keep it within the 9
22 to 11 percent range.

23 On December 17th, once the settlement
24 agreement had been approved and it was clear we could
25 utilize that Paragraph 7 to control earnings, we filed

1 our forecasted earnings surveillance report for 2010.
2 I admit it is a little odd to be filing a forecasted
3 report for 2010 on December 17 of that year, but what
4 happened is that we asked for and were given the
5 opportunity to defer filing the forecasted earnings
6 surveillance report for the year until we had clarity
7 on either the approval of the settlement, or if it
8 wasn't approved, our reconsideration motions, both of
9 which affected what our earnings would end up looking
10 like for 2010.

11 The forecasted earnings surveillance report
12 we filed for 2010, it took into account all of the
13 extreme weather that actually occurred up to that
14 point in the year, shows that FPL will be within the 9
15 to 11 percent range on the actual nonweather
16 normalized basis that the settlement envisions and
17 that staff has been focusing on. And we fully intend
18 to continue using Paragraph 7 throughout the term of
19 the settlement agreement to keep earnings within that
20 9 to 11 percent range on an actual nonweather
21 normalized basis. So we have the tool, we have been
22 using it, we are going to use it to keep our earnings
23 within that range as envisioned. And in the extremely
24 unlikely event that we cannot maintain earnings within
25 that range throughout the settlement term, Paragraph 6

1 of the agreement gives Public Counsel, the Attorney
2 General, and all the other intervenors full authority
3 to initiate a rate proceeding.

4 Let me turn briefly to the monthly earnings
5 surveillance report, or ESRs I will refer to them as
6 for shorthand that FPL has filed so far. They do not
7 indicate a need to adjust rates. First and foremost,
8 as I mentioned a moment ago, they were filed before
9 the settlement agreement was approved, and thus they
10 don't fully reflect FPL's use of Paragraph 7
11 to control earnings.

12 As shown in the forecasted 2010 ESR that I
13 was just describing, once you take the settlement
14 agreement into account and reflect its effects, we are
15 within that range, and that is where we intend to keep
16 it. The reason that the ESRs, the monthly ESRs that
17 had been filed earlier were showing such -- you know,
18 showing earnings above the top of the 11 percent range
19 is due to one simple fact, the extreme weather that
20 Florida has been experiencing within the 12 months
21 that are measured in those ESRs.

22 FPL and the state had the coldest January
23 and the second hottest June ever recorded in 2010. In
24 addition, the fourth quarter of 2009 had very extreme
25 weather. These reports are for a rolling 12-month

1 period, so well on up into the, you know, end of the
2 third quarter of 2010, the reports would have been
3 reflecting extreme weather in 2009 that wasn't even
4 within the period covered by the current rates.

5 I also should point out that each of the
6 monthly ESRs for 2010 is based, in part, on earnings
7 for months prior to March 2010, and in that earlier
8 period, FPL was operating under a Commission-approved
9 settlement agreement that did not set an ROE to
10 measure earnings. So, in other words, it's looking at
11 earnings in a period where by agreement FPL wasn't
12 being measured by its earnings.

13 Now, initiating an earnings review based on
14 revenue spikes due to extreme weather is inconsistent
15 with both how rates are set, which is on a weather
16 normalized basis, and with the intent of the
17 settlement agreement. Initiating an earnings review
18 at the same time that a settlement agreement is in
19 effect would send the wrong signal to settling
20 parties. If a settlement is approved, then it should
21 be given an opportunity to work as it is intended.

22 And, finally, initiating an unnecessary
23 earnings review sends the wrong signal to the
24 investment community about stability of rates and rate
25 regulation in Florida. It's destabilizing impact on

1 our regulatory construct can increase the cost of
2 capital for FPL and other Florida regulated utilities
3 which ultimately will translate into higher rates for
4 all of our customers.

5 With that, I close. I ask you to deny
6 staff's recommendation and I welcome any questions
7 that you have. Thank you.

8 **CHAIRMAN GRAHAM:** I guess I'll start. Mr.
9 Butler, I have a question for you. It's your -- I
10 guess what you are trying to say is you feel that
11 this overearnings case or docket is moot after the
12 fact that we approved the stipulation.

13 **MR. BUTLER:** I think that's right. I
14 think it's unnecessary. I think we have the tools
15 to control our earnings. We intend to, it's what
16 the settlement envisions, and we are, so it is
17 just -- it is moot and unnecessary. And as I say,
18 it sends the wrong signal to start one where you
19 have got a settlement in place that is supposed to
20 address the very issue that the earnings review
21 would be opened to address.

22 **CHAIRMAN GRAHAM:** Now, the question I
23 have, the stipulated agreement also speaks to if
24 there is an underearnings you guys can reopen it,
25 and if there is an overearnings that we still have

1 the ability to address that.

2 **MR. BUTLER:** That's right.

3 **CHAIRMAN GRAHAM:** Now, the question is
4 let's just assume for some reason you guys aren't
5 able to capture all the money that is there, and
6 there is an overearnings that is there. What
7 happens to the control that the PSC is trying to
8 gain through this docket? Does that control go
9 away?

10 **MR. BUTLER:** No. You always have the
11 ability to initiate a rate decrease proceeding,
12 including an interim rate decrease proceeding if you
13 find that, you know, we are unable to use the
14 settlement mechanism to keep our earnings within the
15 allowed range. So, you know, not approving staff's
16 recommendation here doesn't, you know, give up any
17 rights on your part. The other parties have all of
18 the rights that I mentioned under Paragraph 6 of the
19 agreement to initiate a proceeding on their own
20 initiative, if it turns out that we are unable to
21 control rates within our ROE within that range.
22 But, again, I think that is an extremely unlikely
23 circumstance.

24 2010 was kind of the -- in many respects,
25 the most challenging year if you want to look at it

1 from that perspective of keeping earnings within the
2 range. Because as we move forward in 2011, and
3 certainly 2012, the company is continuing to invest in
4 its system. It is continuing to incur increases in
5 costs as other businesses will, and we'll start
6 finding a point where this turns around, where we
7 actually are needing to use reserve surplus
8 amortization to keep our earnings where they need to
9 be within the range from sort of the lower end
10 pressure. So, we really don't see practically any
11 likelihood whatsoever of being in the situation where
12 we were unable with the mechanism of the settlement
13 agreement to avoid overearnings in, you know, 2010,
14 pretty much already there, or 2011, or 2012.

15 **CHAIRMAN GRAHAM:** To staff, I guess my
16 question is because I see that this thing was filed
17 back in October. After the passing of the
18 stipulated agreement is this pretty much moot, or
19 why is it that we need to continue moving forward
20 with this, or how do you disagree with FPL's
21 position?

22 **MR. WILLIS:** I'll be happy to respond to
23 that, Chairman. And let me go back in response to
24 that by addressing some of the points made by Public
25 Counsel and Mr. Butler.

1 First and foremost, staff does not envision
2 that anything we are going to do in this earnings
3 review would change the rates of this company. We are
4 not looking on a prospective basis to open up a
5 full-blown rate case and change those rates by any
6 means. Staff is aware of what Mr. Butler said as far
7 as abnormal weather for last winter and during the
8 summer of 2010. Staff is also aware of the abnormally
9 extreme cold weather in December and as forecasted for
10 January of 2011.

11 All staff is asking the Commission to do
12 with this recommendation is simply to look at any
13 earnings during the period of time April 1st through
14 March 31 that may exceed the 11 percent threshold.
15 And I use the term may exceed, because staff can't sit
16 here today and assure this Commission that because of
17 the abnormal weather conditions that the company will
18 not overearn.

19 Now, Mr. Butler made a comment a minute ago
20 about weather normalization adjustments, and he and I
21 have an extreme disagreement over whether weather
22 normalization, an adjustment is something that the
23 Commission should take into account with overearnings.
24 As far as staff is concerned, overearnings of the
25 company are overearnings. Weather normalization

1 adjustments are only used when you are actually
2 forecasting consumption for a future test period in
3 which rates are going to be set. That consumption is
4 what we used to divide the revenue requirement of the
5 company over to set future rates.

6 Now, if the company underearns or overeans
7 based on those rates, we don't look back and say it
8 was due to weather, therefore, a company cannot come
9 in for a rate case because of abnormally warm or,
10 actually, abnormally normal weather conditions. Nor
11 would we say a company did not overearn because of
12 extremely severe weather conditions such as abnormally
13 hot weather or abnormally cold weather.

14 The company at this point has used the
15 settlement agreement. Staff would like to see the
16 settlement agreement work, also. We by no means are
17 trying to do anything to undo the settlement
18 agreement. We'd like it to go all the way through to
19 the end of its term.

20 As far as the overearnings for this period,
21 the company has continued to exceed its 11 percent
22 high end of the range all the way through the last
23 earnings surveillance report which we received in
24 October. That exceeding of the 11 percent return is
25 even with the fact that the company has reversed all

1 of the amortization of the reserve surplus from its
2 books. In other words, they have not amortized any of
3 that reserve surplus whatsoever at this point.

4 Does it mean they will not if they earn
5 below the 11 percent in the future? All of that is
6 pursuant to the settlement. It would be available for
7 future periods all the way through to the end of the
8 settlement agreement. Anything left over will be to
9 the benefit of the customers, as Mr. Butler said.

10 Mr. Butler also mentioned that any
11 overearnings pursuant to the settlement, and I believe
12 it is Paragraph 5, that any party could at any point
13 petition the Commission for a proceeding to take care
14 of those. What was failed to be mentioned is that
15 that is prospective in nature. When the Chairman
16 asked will the settlement agreement be able to take
17 care of any overearnings that might happen during this
18 period of time staff is looking at, if a party were to
19 bring forward an earnings proceeding, for instance, in
20 March or April, that would be prospective. These
21 earnings above 11 percent would not be available to
22 the Commission. They would be gone at that point.
23 That's why staff is here today with the recommendation
24 asking you to take this action to go forward and set
25 revenues, anything in excess of that 11 percent

1 earnings cap level going forward for that 12-month
2 period, and let us test just for that 12-month period
3 to see if there's any earnings.

4 Staff's intention is that if there are
5 overearnings above 11 percent that the staff would
6 come forward at that point in time, along with the
7 company, to make suggestions on how the Commission
8 might use any of those overearnings. We don't
9 anticipate those earnings to be great at this point.
10 The Commission would probably act somewhere in
11 October. We would not until May, actually, get an
12 earnings surveillance report in to cover that period
13 of time. That's when the March earnings surveillance
14 report would be issued for that 12-month period. The
15 Commission at that point would get a recommendation
16 probably in the summertime as to whether there were
17 any overearnings. If there aren't, this docket
18 disappears.

19 Staff would come down to the Commission and
20 ask for this docket to be closed because there are no
21 overearnings. It is kind of like a no harm/no foul
22 docket. The company says the overearnings --
23 actually, the stipulation entered into by the parties
24 and the company that the Commission approved will
25 actually cause the company not to exceed its

1 11 percent. If that is true, this docket goes away.
2 Nothing happens under this docket.

3 **CHAIRMAN GRAHAM:** Let me tell you what my
4 concern is at this docket. I love the fact that we
5 had all the intervenors, FPL and everybody come to
6 the table and staff and come up with the stipulated
7 agreement. I think that is the direction -- I speak
8 for myself -- but I think that's the direction that
9 the PSC should be going towards in most of that
10 stuff is bringing everybody to the table and you
11 guys come up with the happy median, and it's win/win
12 for everybody. So I applaud that effort.

13 My concern is this docket may send a message
14 that regardless if you guys all came to the table and
15 came up with a happy median, we still want to pick and
16 twist and do what we can just to -- I don't want to
17 say undermine the stipulated agreement, but I just
18 don't want for that to feel like that's the case. And
19 I guess my question to you is if we don't move forward
20 with this docket, what potentially do we lose by doing
21 that? I mean, do we still have the same control if we
22 don't have this docket and you decided in March that
23 they are overearning? Does that mean that we are just
24 going from March moving forward, or can we go back all
25 the way to, I guess it's March of last year, April 1st

1 of last year?

2 I guess I'm trying to understand, you are
3 saying that if everything is fine, if their auditors
4 are creative, then there is not going to be an issue
5 here. But if everything is not fine and their
6 auditors aren't creative, then there is going to be an
7 overearnings issue. And I guess my question is can
8 you still do that in three months and not pass this
9 docket?

10 **MR. WILLIS:** Chairman, my opinion is that
11 in three months 2010 will be closed at that point
12 and you will have no ability whatsoever to attach
13 any revenues that the company might have overearned
14 during that period of time. You might be able to go
15 forward in 2011 from January forward, but normally
16 we look at a calendar year for overearnings, and in
17 my opinion is you would have no ability except on a
18 going-forward basis.

19 **CHAIRMAN GRAHAM:** Now, if this stipulation
20 was passed eight months ago, I think it may have
21 been a different story. The fact that it just
22 passed last month -- I'm sorry, Commissioner Brown.

23 **COMMISSIONER BROWN:** Thank you. Just a
24 few questions.

25 First, how much earnings do we have over the

1 11 percent that are actual, through what date? I know
2 we have June and May, what are the full amount of
3 actual overearnings, per se?

4 **MR. WILLIS:** Commissioner Brown, based on
5 the company's earnings surveillance reports, I can
6 go right down the list. In March of 2010 we had
7 11 percent; in April it went down below 11 to 10.77;
8 May, 11.28 percent; June, 11.43 percent; July,
9 11.68 percent; August was 11.79 percent. You can
10 see the hot summer months. September,
11 11.34 percent; and the latest, October,
12 11.16 percent.

13 I would truly expect November will be back
14 down close to 11 percent. I'm not sure it will be
15 under, but it will be pretty close. And based on the
16 cold December month, it may go back up again.

17 **COMMISSIONER BROWN:** Do we have
18 prospective numbers taking it out through March?

19 **MR. WILLIS:** Commissioner, only the
20 company would be able to produce prospective
21 numbers. What you do have is the company filing an
22 estimated earnings surveillance report like Mr.
23 Butler said, and in the earnings surveillance report
24 they have indicated that they believe the settlement
25 will work and they will earn 11 percent for the

1 period of time.

2 **COMMISSIONER BROWN:** I'm just trying to
3 grasp this, because under the stipulated settlement
4 agreement it does address under Paragraph 6 that an
5 intervenor can come in and petition for a rate case.
6 But I guess that language is specifically for
7 prospective, you know, surveillance reports.

8 **MR. WILLIS:** That's correct. The staff
9 initiated their recommendation in October, that's
10 when we filed it. And that was October 2010,
11 because we were trying to capture 2010. Once the
12 company closes the books, I truly believe we have
13 lost the jurisdiction at that point. We are only
14 here today because of the litigation that was in
15 place, and the inability for staff to bring our
16 recommendation forward to the Commission and the
17 Commission to act. And I think now that the court
18 has relinquished that, the Commission can take this
19 action now, even though we are in 2011, because the
20 court was responsible for stopping this action.

21 **COMMISSIONER BROWN:** I would just feel
22 more comfortable with the prospective numbers rather
23 than the actual numbers, because typically the
24 Commission doesn't look back, so say that the
25 earnings that the company is underearning, we are

1 not going to surplus, you know, the customers or
2 vice versa. So I just feel more comfortable from a
3 prospective moving forward rather than looking at
4 the actual earnings, because have we -- I know there
5 was a case cited, a TECO case that was analogous,
6 although it was prospective in nature and not actual
7 earnings. So just to distinguish this case, it
8 seems a little unusual that we are basing these
9 overearnings on actual rather than prospective.

10 **MR. WILLIS:** Well, Commissioner, in that
11 TECO case the overearnings came to the Commission's
12 attention because of a filed estimated earnings
13 surveillance report which was required to be filed
14 in March by our own rules.

15 **COMMISSIONER BROWN:** Right.

16 **MR. WILLIS:** That is where the company
17 indicated that based on their estimate they were
18 going to start overearning because of a prior rate
19 case at that point. In this case, you have a
20 company filing that same estimated earnings
21 surveillance report later in the year estimating
22 three months out in their own estimate saying that
23 based on their figures and their calculations they
24 will not overearn. They will, pursuant to the
25 settlement, earn 11 percent.

1 We, as staff, don't have of the ability
2 because we don't have the numbers the company has
3 before them to go out and do this kind of estimation
4 of what the earnings are going to be. That is why we
5 have to look at what has actually --

6 **COMMISSIONER BROWN:** Actual.

7 **MR. WILLIS:** -- occurred, and that is why
8 we require actual calculations of earnings by month.
9 And these are rolling 12-month periods, by the way.
10 As a new month comes on, an older month drops off.

11 **COMMISSIONER BROWN:** Now, does the
12 company, and Mr. -- pardon me.

13 **MR. BUTLER:** Butler.

14 **COMMISSIONER BROWN:** Thank you. Mr.
15 Butler, have you provided surveillance reports
16 prospectively through, up until what date to the
17 Commission?

18 **MR. BUTLER:** We have not presented any
19 surveillance reports that go past the end of 2010.
20 We will be providing that information, you know,
21 later in this year. I don't have any precise
22 figures that I could share with you other than, as I
23 mentioned earlier, it is fully FPL's intent to use
24 the settlement agreement, Paragraph 7, to stay
25 within the 9 to 11 percent range. And in view of

1 the sort of inevitable increases in investment and
2 increases in cost, it actually become, if you want
3 to call it that, easier to stay within that range as
4 the costs go up and the rates don't. We have no
5 reason at all to expect that we would have
6 difficulty, you know, maintaining the earnings
7 within the 9 to 11 percent range during 2011 or
8 2012, the last year of the agreement.

9 **COMMISSIONER BROWN:** Just two more
10 questions. And then has a party come in under the
11 stipulated Paragraph 6, under the stipulated
12 settlement agreement intervening, challenging, or
13 petitioning for a rate case to your knowledge?

14 **MR. BUTLER:** No one has at this point
15 because we have been -- we have the settlement
16 agreement, of course, just to prove -- I think
17 everybody is waiting to watch it work as it is
18 supposed to, and following the earnings surveillance
19 reports as they are filed in the upcoming months and
20 years. But, you know, if it did end up getting out
21 of that range, I am confident that my good
22 colleague, Mr. Beck, would be quick to initiate a
23 proceeding to reduce the rates. You know, if it was
24 because of some reason that their office felt that
25 legitimately the company was in a position that it

1 was going to be continuing to overearn.

2 If I may, Commissioner Brown and Mr.
3 Chairman, I'd like to just briefly touch on this point
4 that Mr. Willis raised about sort of reaching back,
5 this sort of retroactive effect.

6 **CHAIRMAN GRAHAM:** Actually I want to hear
7 it, but I am already past the time that I need to
8 get -- and rather than me leaving just a panel of
9 four to make this decision, I think I'm going to
10 take a recess. We will break for lunch now, and we
11 will come back here at 1:00 o'clock, and we will go
12 from there. And you will be the one to take over
13 then, because I was going to ask you the same
14 question, but I know it is not going to be a
15 two-minute answer, and, therefore, let's just --
16 we'll take a recess and we will come back at 1:00
17 and we continue this.

18 **MR. BUTLER:** Thank you.

19 **CHAIRMAN GRAHAM:** Thank you.

20 (Lunch recess.)

21 **CHAIRMAN GRAHAM:** Okay. I want to thank
22 everybody for their patience. I had something I had
23 to do at the Capitol, so sorry for my recess to run
24 out of here. But we need to get back to where we
25 were.

1 We are on Item Number 10, and the question
2 was before Mr. Butler about Item Number 10, basically,
3 and if it's going to be moot or not, and rebuttal from
4 what Marshall Willis had said.

5 **MR. BUTLER:** Thank you, Mr. Chairman.

6 I want to start by addressing this question
7 of prospective versus retroactive rates. FPL's
8 understanding is that the Commission, you know, rates
9 are to be changed prospectively only. We don't
10 believe the Commission has authority to change rates
11 retroactively. And this is confirmed in
12 Section 366.07 of the Florida Statutes, which provides
13 that, quote, "When the Commission determines that
14 rates need to be adjusted, it may by order fix the
15 fair and reasonable rates to be imposed, observed,
16 furnished, or followed in the future." The words in
17 the future is in the statute.

18 Similarly, the Commission has a mechanism
19 for adjusting rates on a, sort of, quick turnaround
20 basis, the interim rate statute. But it, too,
21 envisions that the adjustment that is made once the
22 quick assessment is completed will be prospectively.
23 And Statute 366.071 provides that, "Any refund ordered
24 by the Commission shall be calculated to reduce the
25 rate of return of the public utility during the

1 pendency of the proceeding to the same level within
2 the range of the newly authorized rate of return which
3 is found fair and reasonable on a prospective basis."

4 What that means is that you can initiate an
5 interim rate proceeding to make a quick determination
6 of what, if any, rate or portion of the rates are
7 excessive, and there can be a refund of that amount,
8 but it's during the proceeding, during the pendency of
9 the proceeding, not looking backward to what may have
10 occurred before a proceeding was initiated.

11 This works the same way for rate increases
12 and decreases. It's parallel and applies equally and
13 fairly in both directions. So, for example, FPL could
14 not come to the Commission and ask for additional
15 revenues to make up for underearnings it experienced
16 since our new base rates and went into affect in March
17 of 2010. Now, if we were in an underearning position,
18 you know, what we could do is to petition the
19 Commission to increase our rates prospectively to give
20 us an opportunity thereafter for reasonable earnings.
21 If we wanted an interim rate increase, we could make
22 an application for that. But, again, it would be
23 interim starting with the point where we are asking
24 for new rates, not something that goes back, and, you
25 know, gives us money that we hadn't been collecting

1 because of an underearnings situation up to that
2 point.

3 **CHAIRMAN GRAHAM:** I have a question for
4 you.

5 **MR. BUTLER:** Sure.

6 **CHAIRMAN GRAHAM:** Specifically to that
7 issue, that being the case, looking here at this
8 docket, this thing was based off the numbers that
9 the PSC was given from May and June of last year.
10 So if they are doing from the point of the
11 information that we are getting in, they are doing
12 it from May or June of last year moving forward, is
13 that correct, or it is from where this thing was
14 filed, which was October of last year moving
15 forward?

16 **MR. BUTLER:** If they are -- I'm sorry.

17 **CHAIRMAN GRAHAM:** I guess my question is,
18 and I guess after I hear from you I'll hear from
19 them, but my question is is it from May or June when
20 the PSC got the information that says that we think
21 there is overearning, is it from where they file it,
22 or is it from, because of the stay that we have been
23 under, is it from when that stay has been released?
24 And I just want to hear what your answer from that
25 is. Because what is sounds like, even if it is from

1 this point moving forward, you know, it's almost
2 like you are making the staff's argument that if you
3 don't do it now, if you do it some other time then
4 you are missing all of this opportunity of all the
5 way back to either June, or September, or where we
6 currently are today.

7 **MR. BUTLER:** Well, if there were a --
8 let's just pick a month, say October of 2010, that
9 earnings surveillance report is reflecting the
10 results from November of 2009 through October 2010,
11 that 12-month period. So it is measuring what the
12 company earned in that period. You know, our
13 understanding, our view of this is that if you were
14 to order a refund of money in that period, you know,
15 based on that information, not prospectively, but
16 saying, okay, you collected a certain amount in that
17 period, you would be ordering a refund
18 retroactively. You would be requiring a refund of
19 amounts of revenues that were collected in the past
20 based on a determination that is being made now.

21 Now, of course, you could initiate a
22 proceeding at this point, if you felt that there was
23 reason to do so. And I will have to pause and say
24 that for all of the reasons we were discussing before
25 lunch, I don't think there is any reason to do so. We

1 are not overearning in 2010. We are not going to be
2 overearning in 2011 or 2012. We will be filing a
3 forecasted earnings surveillance report for 2011 in
4 March of this year, 2011, that will show what we are
5 expecting as our earnings for the year. So I don't
6 see that as being a realistic scenario.

7 But if you were to initiate a proceeding say
8 now, what would end up happening is that you would end
9 up, you know, putting a certain amount of money
10 subject to refund that we would be collecting starting
11 now moving forward. And at the end of a rate
12 proceeding, if you determined based on your review of
13 what our revenue requirements were that we had, in
14 fact, been earning on that basis too much in that
15 period from now to the conclusion point of the
16 proceeding, then, you know, that money that we would
17 have collected subject to refund would end up
18 being refunded to customers.

19 But I think you can see from what I just
20 described that would be completely inconsistent with
21 the settlement that was just approved. We have a
22 settlement in place. We have rates that are
23 determined. We have a mechanism to keep our earnings
24 within the range that was approved by the Commission
25 in March, and then sort of reiterated by all of the

1 parties as being the agreed range in the settlement
2 agreement, and that mechanism will ensure that this
3 occurs.

4 If you initiate a rate proceeding now, you
5 are going to be in parallel re-reviewing FPL's rates
6 and the reasonableness of what we are collecting where
7 one of the principle motivations for having the rate
8 case settlement was to end a very lengthy, very
9 contentious, very time consuming, very distracting
10 series of rate proceedings. So that is our view of
11 what you would be doing if you were to initiate the
12 earnings review now.

13 The earnings review can't go back and get
14 money that was collected in the past. And as to
15 initiating a rate proceeding to determine whether our
16 rates are now appropriate just seems completely
17 inconsistent with the settlement agreement,
18 unnecessary, and the sort of thing that really frankly
19 will spook the investment community and is
20 counterproductive to the state's goal of being a
21 business friendly environment where people see
22 stability and the opportunity to make informed
23 investment decisions prospectively.

24 **CHAIRMAN GRAHAM:** Nice plug for the
25 Governor. I like that.

1 **MR. BUTLER:** Thank you. Thank you, Mr.
2 Chairman.

3 **CHAIRMAN GRAHAM:** I didn't mean to cut you
4 off. Was that everything?

5 **MR. BUTLER:** No. I had responded to your
6 question. Let me just briefly move to one other
7 point, and then I will be finished.

8 Staff has referred to several orders in its
9 recommendation where the Commission and utilities have
10 previously reached an agreement to some mechanism for
11 dealing with how earnings actually turn out under, you
12 know, the measure of earnings surveillance reports,
13 but in each of those instances they are agreements.
14 For example, the 1995 TECO decision that is referenced
15 in the staff recommendation, in that situation the
16 staff recommended initiating an earnings review
17 proceeding. Before there was a decision by the
18 Commission to either initiate it or not initiate it,
19 there was an agreement with the utility to put in
20 place a settlement in lieu of having a decision on
21 that staff recommendation for the earnings review.

22 That settlement involved these elements. It
23 was kind of interesting. They approved a higher ROE
24 for TECO than what TECO had before the earnings review
25 had been put into play by the staff recommendation.

1 It deferred any additional earnings above the top of
2 the new higher range to be disposed of later. It
3 didn't have any cash refunds, it simply said there
4 will be a mechanism. It was actually contemplated
5 that it would be tied to consideration of what revenue
6 requirements in a test year for a future rate
7 proceeding would be.

8 But as you can see, I mean, it is very
9 different than the idea of sort of imposing a cash
10 refund on the utility. There have been other
11 instances among those cases that are cited by staff
12 where there have been things such as agreements to
13 fund a storm reserve, or agreements to fund an
14 environmental reserve, basically taking money that,
15 you know, the parties have agreed to treat as
16 overearnings and instead of either having the utility
17 keep it or the utility refund it as cash to the
18 customers, you put it into some sort of reserve so
19 that in the future customers are going to have a lower
20 amount that they have to pay on. And that is
21 fundamentally what we agreed with Public Counsel and
22 all of the other major parties in our rate case to do
23 and what you approved in our settlement.

24 Now, if we have high earnings because of
25 extreme weather or whatever other reason it might be,

1 we are going to be reducing, you know, and possibly
2 reducing all the way down to zero the amount of the
3 depreciation reserve surplus credits that we amortize,
4 and in lieu of doing what we were ordered in March,
5 which was a straight 223 million per year of that, we
6 will take that amortization down as low as it needs to
7 go, including down to zero, if necessary, so that we
8 don't end up exceeding the top of the 11 percent
9 range.

10 When we reduce the amortization of those
11 credits, what that means is that it leaves
12 depreciation expense higher than it otherwise would
13 be. That means plant-in-service is lower. That means
14 the revenue requirements the next time we come to you
15 for a rate proceeding are going to be lower than they
16 otherwise would be. It is a direct benefit to
17 customers. It is what Mr. Beck referred to earlier.
18 In my mind it is directly analogous to the idea of
19 using any form of overearnings as a funding for a
20 storm reserve or an environmental reserve such as had
21 been approved in some of the earlier settlements of
22 potential overearnings proceedings with other
23 utilities.

24 But, again, you know, the principal point is
25 there is no case law in which the Commission has over

1 a utility's objection imposed a refund of cash
2 earnings from prior periods. Instead there are these
3 series of negotiated resolutions to proceedings of
4 that sort. That is what we view the settlement as
5 being. We told staff that back in September when they
6 asked us about initiating an overearnings proceeding
7 in the first place, and we think it is working exactly
8 as it is intended and to the benefit of customers.

9 And with that I will finish. Thank you.

10 **CHAIRMAN GRAHAM:** I have two questions. I
11 guess the first question, for Mr. Butler, if this
12 Item 10 were to go through, in your opinion, your
13 legal opinion, where would the overearnings case
14 start? Because it is always from a starting point
15 moving forward. Where would it start?

16 **MR. BUTLER:** If you initiated the
17 proceeding, it would start from the point of
18 initiation, as I was describing, trying to describe
19 earlier under the interim rate statute. You would
20 be able to put a portion of our revenues subject to
21 refund for a determination at some point
22 subsequently based on a prospective review of what
23 our earnings requirements were, whether some portion
24 of the money placed subject to refund should be
25 returned to customers.

1 Now, that evaluation would need to take into
2 account what our earnings were in the period starting
3 with when the rate proceeding is initiated moving
4 forward and a determination based on the final full
5 rate proceeding, what portion of those monies were
6 properly refunded, if any, to customers. That's how
7 the interim rate statute works; that's what you have
8 authority to do.

9 And, again, I will reiterate that that would
10 be a complete departure from the settlement which is
11 intended to be instead of having some sort of further
12 rate proceeding. But, if you did it, that is what
13 would happen.

14 **CHAIRMAN GRAHAM:** The second question is
15 for you, as well. The settlement agreement gives
16 you the flexibility to use future money to offset
17 current earnings or overearnings.

18 **MR. BUTLER:** It actually gives us the
19 ability to not use future money we were told to use
20 in the rate case order so that we don't end up
21 exceeding the 11 percent range. If we end up
22 getting cash revenues higher than expected because
23 of high sales, you know, extreme weather, that means
24 we don't need as much reserve surplus credits. So
25 instead of taking those credits, we basically leave

1 them in the bank, if you want to call it that, so
2 that they will serve to reduce revenue requirements
3 in the future.

4 See, the idea of the settlement, and it
5 really follows up to something that the Commission had
6 done in the rate proceeding, is that a portion
7 basically of our revenues that meet our revenue
8 requirements under the rate order are in the form of a
9 credit reversing this depreciation reserve surplus,
10 and the accounting entry, I mean, what it amount to it
11 is a negative expense, so it is as if it is revenues
12 and some portion of our revenues is in that amount of
13 a reversal of these reserve surplus credits.

14 If it turns out that we get more cash than
15 we expected because sales are higher than expected, we
16 don't need to use as many of those credits to end up
17 at that time place, and we basically just leave them
18 in the bank. When they are in the bank, the
19 accounting effect is reducing our rate base and,
20 therefore, reducing our revenue requirements the next
21 time that we would come back to a rate proceeding.

22 **CHAIRMAN GRAHAM:** This is a difficult one
23 to me, and I can't speak for the rest of the board,
24 but the overarching good of all of this is the
25 stipulated agreement. And the direction I want to

1 see this Commission go is more and more of those
2 stipulated agreements. So I find myself going more
3 towards making sure that everybody feels good and
4 comfortable about the agreement that we came to, and
5 not trying to have a second twist or a second pull
6 on that agreement. I can't speak for everybody
7 else, but let's see what they have to say.

8 Commissioner Brown.

9 **COMMISSIONER BROWN:** Thank you, Mr.
10 Chairman.

11 And actually to segue off that, I was going
12 to ask staff since the Office of Public Counsel has
13 agreed with the utility company that the settlement is
14 new and we need some ample time to make sure that the
15 provisions take effect, what is your take on OPC's
16 testimony here that it may be premature at this time?
17 Because I do find that a very compelling reason for
18 supporting the settlement agreement, that OPC is here
19 to support the provisions, particularly since they
20 have an opportunity under Section 6 to challenge, to
21 initiate an earnings review.

22 **MR. WILLIS:** Let me take a shot at that.
23 I believe Public Counsel's concern in this is that
24 this somehow is going to end up in a rate case
25 format where we'll be back where we were two years

1 ago dealing with the rate case. That's not staff's
2 understanding of this recommendation that we are
3 putting forth at all.

4 All we are dealing with here is nothing more
5 than the earnings under this period of time, if it
6 exceeds 11 percent. There is no intent that this is
7 going to end up in a rate change. There is no intent
8 that this is going to be looking at a prospective rate
9 change; it only deals with that time period.

10 As far as whether this is premature, I think
11 if you don't deal with it today the time period we're
12 talking about is gone, and that is totally up to the
13 Commission to decide whether you want to take that
14 risk or not.

15 This recommendation that we are putting
16 forth is -- you might even look at it like an
17 insurance policy. We want the settlement to work.
18 Staff wants the settlement to work. We think the
19 settlement can work. We think we have had some
20 abnormal weather. Hopefully next year it's not going
21 to be abnormal, and the settlement is going to work
22 just fine. Whether it will end up where the company
23 will be able to fall within what the settlement says
24 they can because they may not have any more
25 amortization they can back off for this year, since

1 they backed off everything, we don't know. We can't
2 sit here today and tell you that.

3 But we do know, and I probably ought to let
4 Ms. Crawford talk about this since she's our lawyer on
5 whether or not we will have an ability after this
6 point to come back and look at this time period, but
7 my opinion is you would not. It would be a lost
8 period.

9 **COMMISSIONER BROWN:** Thank you.

10 **MS. CRAWFORD:** Thank you, Commissioner.
11 Jennifer Crawford for legal staff.

12 I have to agree with Mr. Willis. Although I
13 have heard the concerns that have been expressed
14 today, I have to agree that this does not impinge on
15 the settlement. I'm very much in favor of the
16 settlement. I very much want to see it work. To me
17 this is, indeed, an insurance policy. It protects the
18 customers, it allows staff the time to investigate
19 whether we are in an overearnings situation or not.
20 There are a number of remedies available, if we are,
21 to address those overearnings for this period, should
22 it turn out that it doesn't normalize out during the
23 course of the year. That doesn't begin to touch the
24 ROE. And I don't think that has ever been the
25 anticipation of staff is that we are going to end up

1 in a full blown rate case.

2 I have to agree also that if we don't attach
3 jurisdiction over the funds, holding them subject to
4 refund, not making a recommendation regarding their
5 disposition at this time, of course, I think that
6 period is lost. FPL needs to get its books closed for
7 the year 2010, and we are at that point.

8 That being said, if the Commission has a
9 measure of comfort, given the comments that are made
10 today, that the settlement will indeed take care of
11 the earnings, I think it certainly has the discretion
12 to let that happen. Again, I would just emphasize in
13 an abundance of caution and wanting to make sure the
14 customers are given adequate consideration and care in
15 this process, we again would recommend, as we have in
16 our recommendation, that the Commission exercise its
17 jurisdiction over those funds at this time.

18 **CHAIRMAN GRAHAM:** Commissioner Brown, are
19 you done?

20 **COMMISSIONER BROWN:** Thank you.

21 **CHAIRMAN GRAHAM:** Commissioner Balbis.

22 **COMMISSIONER BALBIS:** Thank you, Mr.

23 Chair. I have a couple of questions for Mr. Willis.

24 You know, obviously with the somewhat
25 speculative or projection-based exercise in estimating

1 what our expenses and earnings will be, that's why the
2 ESRs are in place for us to, by definition, monitor
3 that. What are the methods currently in place right
4 now for us to deal with potential overearnings, if you
5 can briefly describe those one or two different
6 methods that we have in a typical case.

7 **MR. WILLIS:** Well, the Commission
8 basically has used two methods to deal with
9 overearnings. One is described -- well, they are
10 actually both are described in our recommendation,
11 but the one we prefer to use is to do a conference
12 with the company once these earnings are detected
13 and ask for an earnings cap letter. We have been
14 very successful at doing that. In fact, we will
15 have another company coming before you at the next
16 Agenda Conference as a result of an earnings cap
17 letter.

18 We have been very successful since, I guess,
19 the late 1970s doing these earning cap letters. And
20 the earnings cap letters basically have dealt with the
21 overearnings for a period of time where it looked like
22 they weren't going to -- the overearnings would not
23 continue forward, but were only for a period of time.
24 And in cases where it looked like they were going to
25 continue on, they dealt with a rate reduction to take

1 care of that.

2 The other method is to open up a formal
3 proceeding and put revenues subject to refund pursuant
4 to the interim statute if the Commission doesn't
5 believe we have proper authority to do what staff is
6 asking today. And in that case, just to let you know,
7 if we were to do that pursuant to our recommendation
8 here, we believe you could go back to the date that
9 this was to appear before the agenda conference, which
10 was October 12th, and take jurisdiction as of that
11 date on a prospective basis.

12 That is not what we are asking you to do.
13 We think because of the court case and our estoppel of
14 dealing with any FPL matters, that at that point the
15 court would allow us to go back to that date when this
16 would have been heard to go forward from that time
17 frame. That is not that we are really asking you to
18 do. If you are wanting to muddle up some financial
19 markets, as Mr. Butler said, I think that is how you
20 would do it by opening up that type of overearning
21 proceeding, and that is not what we are asking. We
22 are just asking you to follow forward with this
23 recommendation to give yourself sort of an insurance
24 policy that this settlement truly is going to work.

25 We are only looking at this bare time period

1 of 12 months. That's the time period, hopefully, that
2 the abnormal weather will cure itself, and hopefully
3 in the rest of 2011 there won't be a problem.

4 **COMMISSIONER BALBIS:** Thank you.

5 And in response to Staff Data Request Number
6 3, and I know you have read off some of the ROEs that
7 were filed for the different months, you also had a
8 column, and I don't know if the rest of the Commission
9 has this or not, but where it basically has as filed,
10 which I would assume is with no depreciation. So,
11 basically, the lowest ROE that the company could
12 achieve for that month, and those numbers that you
13 listed, some of those were in excess of the
14 11 percent, correct?

15 **MR. WILLIS:** That's correct.

16 **COMMISSIONER BALBIS:** Is there any other
17 modifications that the company can make to get those
18 below 11 percent, or even using the stipulation and
19 the components of the stipulation in dealing with
20 this, they have used everything at their disposal?

21 **MR. WILLIS:** Well, they have used
22 everything at their disposal as far as the
23 stipulation goes. The company could go forth and
24 spend more money. They could put money into more
25 tree trimming. There is a lot of means of bringing

1 the rate of return down if they truly believe that
2 was occurring. That is there on a prospective
3 basis.

4 Obviously you can't go back in time and
5 spend money, but the stipulation really talks about
6 the surplus itself, and how to deal with the surplus.
7 And that's what was reflected on what you saw, which
8 was basically a rate of return with no surplus
9 amortization taken versus the other column you
10 referred to which was where the order required that
11 they take a monthly amortization of that surplus which
12 raised the rate of return above 12 percent.

13 **COMMISSIONER BALBIS:** One last question,
14 Mr. Chair. Is there a point in time -- I know you
15 mentioned that when FPL closes its books that
16 possibly the opportunity to recover those potential
17 overearnings would be gone. Is there a point in
18 time in the next few months where maybe we'll have a
19 clearer picture so we can assess whether or not --
20 the ability of the stipulation to work? Basically,
21 a clear picture to know, okay, we are all
22 comfortable that it is going to be below the
23 11 percent as required by the stipulation?

24 **MR. WILLIS:** That's a tough one. Once you
25 get past the winter months you will be able to

1 assess the time period we are talking about. The
2 only problem with dealing with the 12-month period
3 we're talking about, your time for dealing with that
4 is probably today. I'm not sure we could go forward
5 at another agenda or a month from now and deal with
6 the same time period, because I believe at that
7 point the 2010 year would be closed and gone,
8 forgone for the Commission to act on.

9 As far as 2011, we will continue to monitor.
10 We will continue to monitor and see how that goes.
11 Hopefully, everything falls right within the
12 stipulation.

13 **COMMISSIONER BALBIS:** Okay. Thank you.

14 **CHAIRMAN GRAHAM:** Commissioner Edgar.

15 **COMMISSIONER EDGAR:** Thank you, Mr.
16 Chairman.

17 First, I think, if I may, a question to
18 staff and then to OPC. My first question to our staff
19 is you've mentioned somewhere during the course of
20 this discussion that there have been other instances
21 where companies have signed rate cap letters and that
22 the Commission has then proceeded along that course.
23 In the past, with any of those instances, have any of
24 those companies been subject to settlement agreements
25 or something else similar that puts down parameters

1 and requirements separate from the rate cap letter and
2 what would ensue?

3 **MR. WILLIS:** You're talking about whether
4 the settlement agreement was in place at the time?

5 **COMMISSIONER EDGAR:** Or something similar.

6 **MR. WILLIS:** Commissioner, I can't think
7 of one. I can't really think of one where that
8 happened. We have had rate cap letters result in
9 settlements, but I can't remember where a settlement
10 was in place where we ended up asking for a rate cap
11 letter.

12 **COMMISSIONER EDGAR:** So this is somewhat,
13 and I still am thinking it through as to whether
14 that is a meaningful point or not, but this is
15 somewhat of a unique situation from instances that
16 this Commission has dealt with in the past?

17 **MR. WILLIS:** I would agree with you there.

18 **COMMISSIONER EDGAR:** And then if I could
19 to Mr. Beck on behalf of OPC. Mr. Butler said some
20 moments, some minutes ago, I believe, that from the
21 perspective of the utility that if the staff -- if
22 the staff were directed to proceed as they have
23 recommended today, that that would be inconsistent
24 with the settlement agreement, duplicative with the
25 settlement agreement, and would also send a negative

1 signal to financial markets. From the perspective
2 of your office, do you agree with that statement or
3 those descriptors?

4 **MR. BECK:** To a certain extent,
5 Commissioner, I do. Let me explain why I'm here --

6 **COMMISSIONER EDGAR:** Please.

7 **MR. BECK:** -- because we are here agreeing
8 with the company.

9 **COMMISSIONER EDGAR:** Because I am a little
10 perplexed.

11 (Laughter.)

12 **MR. BECK:** The Commission's decision in
13 Florida Power and Light's rate case was very
14 proconsumer decision in our opinion, and the company
15 was very unhappy with the Commission at the time
16 that that decision was made. The Commission ordered
17 a 10 percent midpoint return on equity, and gave
18 them a very, very small fraction of what they asked
19 for in the case.

20 **COMMISSIONER EDGAR:** I was here.

21 **MR. BECK:** What we tried to accomplish in
22 the agreement was to take what we viewed as a very
23 proconsumer decision and keep those benefits for
24 just as long as we could, and I described that
25 earlier. No matter what interest rates do in the

1 coming time, you know, Florida Power and Light
2 cannot come in and try to increase their return on
3 equity. I bet they are frothing at the bit to do
4 so, but they bargained that right away, so the
5 customers don't face that for the next two years.

6 We also have the freeze on their base rates,
7 very, very important from all the customer parties
8 that we have that, that they can't file for another
9 two years. Now, why did Florida Power and Light agree
10 to that? You know, I don't know. You know, they only
11 know what it is, but I have an opinion, and I'm pretty
12 sure I'm right, that a significant part of that is
13 they wanted certainty in their dealings with us, with
14 the other consumer parties. And once the Commission
15 approved the agreement, they wanted that, too. I
16 think we got cold hard cash for that certainty, in my
17 mind. I couldn't quantify it, but I'm sure it was a
18 big ingredient of it.

19 So, you know, if you go forward with this,
20 it is rather extraordinary. I don't know of instances
21 where the Commission has tried to place money subject
22 to refund while there is an agreement in effect, and
23 the agreement has a comprehensive scheme that gives us
24 the rate certainty, it gives us the return on equity
25 certainty, extends those benefits, and I think the

1 company expects to have some certainty, too, from it.

2 We are concerned that the next time a
3 company is thinking of reaching an agreement that has
4 very proconsumer aspects from our mind, they need to
5 know that they have that agreement, and that the
6 people who sign it are going to be in support of it,
7 and that the Commission is going to support it.

8 We have a comprehensive scheme in the
9 agreement to control the return on equity. I think it
10 is working. From what we know, the return on equity
11 for calendar year 2010 will be under 11 percent, and
12 the depreciation surplus that would otherwise have
13 been used up or burned if the Commission's order had
14 stayed in effect would be there to benefit customers
15 in the future, and that is a lot of money. That is a
16 couple of hundred million dollars that was used by the
17 Commission to get rates where they are. We are going
18 to take that and keep it, and it will be available in
19 the future.

20 We think the agreement overall sets a good
21 scheme. It protects customers and it has given us
22 great benefits and we want to support that. So that
23 is why I am here.

24 **COMMISSIONER EDGAR:** If I may, Mr.
25 Chairman.

1 **CHAIRMAN GRAHAM:** Sure.

2 **COMMISSIONER EDGAR:** Mr. Chairman, thank
3 you.

4 And thank you, Mr. Beck, for that. That was
5 very helpful to me, and helped clear up some of the
6 confusion, I guess, that I was having. You know, you
7 have participated, I'm sure, in many, many, many
8 fruitful settlement discussions, and maybe some that
9 ultimately did not come to resolution over the years
10 personally, and, of course, from the perspective of
11 your office. I have said over the years numerous
12 times that as one Commissioner I welcome settlements.
13 And similar to what some of our colleagues have said
14 today, in the past believe that it is an important
15 tool that is before the parties, before your office,
16 before the Commission to be able to review and either
17 accept or not settlements and stipulations that come
18 before us.

19 I was very pleased individually to be able
20 to support the settlement agreement that came before
21 us very recently, and the rate stability and rate
22 certainty that it offers both to the utility and to
23 the consumers, and also for the regulatory work that
24 we do on a go-forward basis. We have some certainty,
25 too, as to what we are looking at as we look at other

1 issues, as well.

2 But I also believe and have heard
3 discussions in this room in the past that a settlement
4 agreement does not remove the oversight or
5 jurisdiction of this Commission. And I'm looking at
6 you, but I'm also speaking just to the room. And I
7 guess that is one thing that I am still -- and I think
8 we are getting close, but I still want to make sure
9 that there isn't some oversight responsibility or
10 protection to the consumers that this Commission has
11 that is somewhat separate from the role that your
12 office has, or other intervenors, and other signees,
13 and that there is not some protection to the customers
14 in the shorter time frame that would be lost without
15 this. And/or that there is not a harm to proceeding
16 in the manner that the staff is recommending. And I
17 know you have probably kind of answered that, but
18 would you do it one more time?

19 **MR. BECK:** Certainly. The Commission does
20 retain its regulatory oversight of the companies and
21 you exercise that in approving the agreement, as
22 well. But the agreement has points where the
23 parties can come in, where we can choose to come in
24 if they are overearning. We don't think that is
25 happening. We think that this year it is not going

1 to the happen. The agreement was designed to stop
2 that from happening. And I think it is working as
3 intended. So, you know, we are pleased with the
4 agreement. We think we are getting the benefits of
5 it; it's working as we thought.

6 **COMMISSIONER EDGAR:** And you believe that
7 if the Commission were to move forward, and I don't
8 mean to put words in your mouth, so this is a
9 question -- is it accurate that you believe that if
10 the Commission were to adopt the staff
11 recommendation, that we would be doing something
12 counter to the decision that we made approving the
13 settlement agreement?

14 **MR. BECK:** We think the better course is
15 to let the settlement agreement go forward and take
16 care of this because we think it is working.

17 **COMMISSIONER EDGAR:** Okay. Mr. Butler, do
18 you have anything additional?

19 **MR. BUTLER:** I would, once again, concur
20 with Mr. Beck. Twice in a day, that's getting
21 dangerous. But I guess what I can add and just
22 reiterate is that the settlement mechanism is
23 working. I mean, we filed our forecasted 2010
24 surveillance report that really reflects most of
25 what has happened in 2010. You know, we are within

1 the 9 to 11 percent range there. We do have the
2 flexibility -- one of the things, not to get into
3 too much of the accounting detail, but you may
4 remember in my very early remarks that I was noting
5 that the latter part of 2009 had some pretty extreme
6 weather in it. And as that rolls out of the
7 12-month rolling averages, we are seeing the return
8 on a nonweather adjusted basis coming down.

9 We are very confident for 2010 that we have
10 the flexibility with the mechanism that exists to
11 return final actual results for 2010 that are within
12 the 9 to 11 percent range, so we don't see any need
13 for it in 2010. As I mentioned earlier, I think 2011
14 and 2012 are actually going to be easier cases from
15 that perspective that we will probably have to take
16 some of the reserve surplus amortization, but we
17 certainly won't have an issue of exceeding the
18 11 percent upper end of the range.

19 I definitely concur with Mr. Beck's comment
20 about the kind of chilling effect to settlements. I
21 mean, settlements are what you do, you know, in lieu
22 of some sort of overearnings proceeding. Not having
23 an overearnings proceeding on top of that settlement
24 agreement. And I think it's a complicated point that
25 I may not have done a very good job of expressing

1 here, but the mechanism we have, the reduction in
2 these reserve surplus amortization credits that result
3 when we have higher earnings is exactly the sort of
4 mechanism that has been included in settlements of
5 overearnings proceedings. So where a lot of the
6 utilities that were brought before the Commission and
7 agreed to earnings cap letters, what they ended up
8 agreeing to do, which was to take the extra earnings
9 and put them into some sort of mechanism that would
10 later benefit customers in the form of lower rates.

11 We have got low rates. You know, we are the
12 lowest in the state. We are in the lowest quartile
13 for the country. As Mr. Beck probably points out, we
14 have an extremely low ROE relative to the range of
15 utilities through the country. We have very high
16 reliability. There is just not a problem here.
17 Nothing is broken that needs to be fixed, and we have
18 the mechanisms to make this work for the term of the
19 settlement and we very much appreciate your supporting
20 the settlement in that respect. Thank you.

21 **COMMISSIONER EDGAR:** All right, thank you
22 to our staff, of course, and Mr. Beck, and Mr.
23 Butler. And, Mr. Chairman, that was helpful for me.

24 **CHAIRMAN GRAHAM:** Thank you.

25 Commissioner Brisé.

1 **COMMISSIONER BRISÉ:** Thank you, Mr.
2 Chairman.

3 I just have one question for staff at this
4 point. The company has asserted that, in essence, we
5 can't retrospectively go for a refund moving forward,
6 and, in essence, that is outside of our authority. If
7 you can address that, and in what circumstance, if we
8 went forward, we would get to that point, and what
9 chances exist that we would then be found in court a
10 little bit further down the line. And the final
11 question down this line, is there a greater policy
12 issue that staff is trying to get to.

13 **MS. CRAWFORD:** I will tackle as much as I
14 can and then I will look to Mr. Willis to help
15 finish out anything I might have missed. The
16 general principle of retroactive ratemaking is that
17 new rates are not applied to past consumption. In
18 other words, the courts have interpreted retroactive
19 ratemaking to occur when an attempt is made to
20 recover either past losses, or underearnings, or
21 overearnings and prospective rates. And, again,
22 that is not what we are doing here.

23 We are not looking to change rates
24 prospectively based on past, what may be overearnings.
25 We are looking to take jurisdiction over funds that we

1 believe may be earned beyond the utility's maximum
2 authorized range. The range is 9 to 11 percent. It's
3 there to recognize that the utility is going to have
4 fluctuations below and above the midpoint, and what we
5 are seeing in these ESRs are amounts above the maximum
6 authorized range.

7 And as Mr. Willis had mentioned, there are a
8 number of ways to more informally address overearnings
9 when we don't necessarily see a problem with the
10 authorized range, although for various reasons there
11 may be overearnings, and that's the posture that we
12 are in. And it is very true that we do not have a
13 case on point that has gone to the point of having an
14 order where we have requested the Commission take that
15 jurisdiction where it has not been voluntarily given
16 by a utility. I believe that our general grant of
17 authority does give us that discretion. I think it's
18 an issue of fairness to the customers, and the courts
19 have said that fairness in utility ratemaking goes
20 both ways, both for the utility and the customer. And
21 I think what staff has put forward to you today is an
22 attempt to provide that balance.

23 Put the jurisdiction over those funds, hold
24 them subject to refund. We are not making a
25 recommendation regarding the disposition at this time.

1 We are certainly not making a recommendation regarding
2 changing ROE. And, again, we have every interest in
3 seeing the stipulation go forward and to succeed.

4 That being said, if we are at the point
5 where we are beginning to identify an overearnings
6 situation, let us take jurisdiction. Have the
7 Commission take jurisdiction over those funds. Give
8 staff the ability to go forward with that protection
9 in place, examine whether there are overearnings, and
10 what might be done about that.

11 So the long-winded way to answer, we haven't
12 taken this particular step, although I do firmly
13 believe it is well within the Commission's discretion
14 and jurisdiction to do so. That being said, I believe
15 you asked what are the chances this might end up in
16 court. I would suspect there is a fair chance. I
17 certainly don't want to speak for FPL, but I think
18 that is a real possibility if the Commission is to
19 accept staff's recommendation in this case.

20 That being said, I think there may be some
21 very good reasons to take that step, not the least of
22 which is to not unintentionally provide a disincentive
23 for other utilities to cooperate with staff when we do
24 identify overearnings possibilities.

25 We have had wonderful success in this

1 informal process with other utilities in getting the
2 earnings caps letters. It is working very well. It
3 has actually, I think, helped us not go into full
4 blown rate proceedings. It has allowed us to --
5 utilities in those situations to bring a proposed
6 settlement to the Commission on how to address those
7 overearnings. And so those are kind of my thoughts
8 and concerns in that regard. And have I answered your
9 questions or have I missed a piece? In the greater
10 policy, I suppose that would be it.

11 **CHAIRMAN GRAHAM:** Commissioner Balbis.

12 **COMMISSIONER BALBIS:** Thank you, Mr.
13 Chair.

14 I guess I would just like to start as far as
15 the stipulation is concerned, I am in support of that.
16 I mean, that is one of the -- I don't want to say few
17 items, but that is one of the items that I was able to
18 vote on and support, and I do think it is a great
19 agreement for all parties.

20 That being said, I have a question for Mr.
21 Butler. If your contention is that the stipulation
22 includes a provision to be able to deal with these
23 potential overearnings and have FPL to either use
24 depreciation or other methods to do it, and if your
25 latest correspondence indicates that your annual

1 forecasts -- and if I'm using the wrong terms, I
2 apologize -- but in your annual forecasts you feel
3 that you are going to be below the 11 percent, and
4 also how Mr. Willis pointed out that you also have the
5 opportunity to invest in activities that benefit the
6 ratepayer, i.e., tree trimming, et cetera, to then
7 spend more towards the benefit of the customer to,
8 again, stay under that 11 percent, what is the concern
9 if the Commission does agree with staff's
10 recommendation so that if all of those tools that are
11 in your tool chest don't work, that we have the
12 ability to not lose those funds that maybe can be
13 appropriated somewhere else.

14 **MR. BUTLER:** FPL's concern, Commissioner,
15 is primarily one of precedent and perception. We
16 have a settlement. The settlement does what I
17 described. I won't get back into all the details of
18 it, but it addresses the potential for high earnings
19 just as mechanisms that were approved in the
20 earnings cap letter negotiations that staff
21 described does.

22 The settlement is intended to work and stand
23 on its own feet. It is intended to resolve a lengthy
24 contentious proceeding, and it is intended to provide
25 stability, rate stability and regulatory stability

1 that, in our mind, and I think I can speak for a lot
2 of the investment community in looking at this, would
3 be considerably undermined by layering on top of it an
4 overearnings investigation.

5 Now, a Mr. Willis and Ms. Crawford just
6 acknowledged, you have not done this, imposed it on a
7 utility that has not agreed to a mechanism. Of
8 course, we think we already have agreed to a
9 mechanism, but if you imposed it on top of that
10 mechanism you would be doing something that is truly
11 departing down a new path. It would be a path that
12 shows, honestly, kind of a lack of trust in the
13 settlement mechanism that all the parties have agreed
14 to, and we think it sends totally the wrong signal.

15 I think that's mostly what it's about.
16 Because in one level you're right, we will control
17 earnings so that -- through the mechanisms provided by
18 the settlement agreement, so that we would not end up
19 having a reason for you or the staff to initiate the
20 overearnings refund determination. But we will be
21 doing so under what I think is perceived as a cloud of
22 this overearnings proceeding. And it is just not
23 sending the right signal, you know, in an era when we
24 feel that restoring Florida's reputation for
25 constructive regulation is really important. It's

1 just not sending the right signal. That is really the
2 fundamental thing that we have as a concern about it.
3 It chills future settlement negotiations, which I
4 think was Mr. Beck's point, and because it's
5 unnecessary it's also inappropriate.

6 **COMMISSIONER BALBIS:** Thank you.

7 And I guess as a follow up to that, on the
8 trust comment, and I appreciate that, and I understand
9 that, if the Commission decides to vote against staff
10 on this and not go with their recommendations, you
11 know, what I would hate to see is at the end the year,
12 you know, we kind of regroup and say, well, we used
13 all the tools at our disposal and we are at 11.25.
14 Sorry. You know, so it is kind of one of those -- I
15 guess I'm kind of making a point and not really asking
16 a question, but, you know, that's kind of -- I look at
17 the opposite side of it, as well.

18 So those are kind of the two issues we have
19 to deal with is that in a perfect world you would be
20 able to use the tools, you would be at the 11 percent,
21 and we wouldn't have an issue. But staff is seeing an
22 early indication that maybe those tools aren't
23 effective at this time or you haven't used all of them
24 yet. So if you'd like to respond to that you can.

25 **MR. BUTLER:** We will not end up in the

1 situation that you just described, I can assure you.
2 And what, staff, is seeing, inherently, looking at,
3 say, for example, in October 2010 earnings surveillance
4 report is a report that is showing the results of FPL's
5 operations for the months of November 2009 through
6 October 2010. The first, what, six months of that
7 wasn't even under the rate agreement. I mean, under
8 the rate decision. It was under a prior settlement
9 agreement that didn't even regulate ROE. It's looking
10 at the wrong periods.

11 The most recent thing we filed, what staff
12 should be looking at and what it has looked at it in
13 other earnings cap reviews is the sort of most current
14 forecasted surveillance results. For us the most
15 recent thing we filed for 2010 shows that we are
16 within the 9 to 11 percent range for 2010. We will be
17 for 2011 and 2012.

18 I appreciate your concern. It would be very
19 unfortunate for everybody to go the route that we are
20 requesting for you to go, and then for us to end up
21 with some above 11 percent return. But we have the
22 tools to keep that from happening, and we will keep
23 that from happening.

24 **CHAIRMAN GRAHAM:** Commissioner Edgar.

25 **COMMISSIONER EDGAR:** Thank you.

1 I have, I think, I won't completely commit,
2 but I think I just one more question, and then I will
3 be ready when the rest of the body is. I feel like
4 maybe I have been hearing on one point, if not more,
5 but one point two different answers, so I would like
6 to pose that to the three groups, our staff, OPC, and
7 the company that has talked with us on this item
8 today. Has there been, during the past months, a
9 definitive demonstration of overearnings? Have
10 overearnings occurred, and that is a fact, or we are
11 still, you know, gathering information, or one set of
12 numbers says one thing, another says another.

13 There may be various, but I feel like I have
14 heard FPL say there has not been, OPC say there has
15 not been, and our staff says that there has been. And
16 sometimes that is a matter of, you know, which
17 numbers -- when there is a difference, which numbers
18 you are looking at or which time frame you are looking
19 at. So I want to boil the question down as simply as
20 I possibly can that is not so simplified that it has
21 no meaning, which is has there been a definitive
22 demonstration of overearnings during the time period
23 that has been discussed before us?

24 **MR. WILLIS:** Commissioner Edgar, I'll
25 start first.

1 **COMMISSIONER EDGAR:** Please. Thank you.

2 **MR. WILLIS:** In staff's opinion there has.

3 The company is required on a monthly basis to file
4 an actual earnings surveillance report with the
5 Commission. They have done that. And in response
6 to a question earlier from the Commission, I read
7 off the actual, and these are actual rate of returns
8 that I read off earlier, starting in March with
9 11 percent, going through January with, you know,
10 actually June and July with 11.43, 11.68, 11.79,
11 11.34, ending in October with 11.16. As Mr. Butler
12 says, these are rolling 12-month averages with the
13 month ending in the one I described.

14 The last actual earnings surveillance report
15 we have is for the 12-month ended October of 2010. It
16 shows 11.16. It would be a 16 basis point
17 overearnings at that point for that year. For the
18 rest of the time period we are looking at, the rest of
19 2010, that would have to be all projected. The
20 company naturally has its own projections. They have
21 filed an earnings surveillance report that they
22 filed -- they finalized in December they had filed
23 earlier that says based on their best projections,
24 their best guess, they believe they will be at 11 or
25 under, which would not be under. That is their saying

1 they would not be overearning. Staff can't come to
2 you today and say in full faith we can say that is
3 true. We can't.

4 **COMMISSIONER EDGAR:** Does that work for
5 you, Mr. Butler?

6 **MR. BUTLER:** I think that's probably a
7 technically accurate statement. This is a point of
8 distinction that we would certainly draw. First of
9 all, the settlement agreement, what we are trying to
10 achieve is to be within the 9 to 11 percent range
11 each year, you know, on a calendar year basis for
12 the year in question. I'm sorry, the settlement
13 agreement basically applies to three years, 2010,
14 2011, and 2012. That's our commitment. We are
15 going to be there for 2010.

16 You know, I'm in a difficult position here
17 because due to public disclosure requirements and
18 securities law issues there are things that I can't
19 get into details about, but I will just reiterate once
20 again that we are very confident that for 2010, you
21 know, the settlement provides us with all the
22 ammunition we need that we will be within the 9 to
23 11 percent range for calendar year 2010. And for the
24 reasons I described earlier feel even the same
25 confidence I guess buttressed by the sort of natural

1 decline expected otherwise in earnings for 2011 and
2 2012 that we have the mechanism and we will use it for
3 that purpose. So that is our response that we know
4 there is not an overearnings situation now, and there
5 is not going to be one for that period of the
6 settlement agreement.

7 **COMMISSIONER EDGAR:** All right. And what
8 I think I'm hearing is not an inconsistency, so I
9 will leave it at that. Mr. Chairman, again, thank
10 you. And I'm ready to make a motion whenever we are
11 in that posture.

12 **CHAIRMAN GRAHAM:** Sounds good. We have
13 one other light on. Commissioner Brown.

14 **COMMISSIONER BROWN:** Just one last
15 question, and I think this is a question for staff.
16 I think, Ms. Crawford, I think you said this
17 earlier, or Mr. Butler said it, that the Commission
18 would not go back and surcharge customers if the
19 company was overearning under this analysis; is that
20 correct?

21 **MS. CRAWFORD:** That is correct. The
22 utility is in a unique position, however, to project
23 what its earnings are going to be. And since
24 Florida does allow a projected test year, it has
25 been our experience, especially with the larger more

1 sophisticated utilities that long before they are
2 actually overearning they have filed a test year
3 letter and they are coming in for a rate case.

4 The customers don't have a counterbalance to
5 that. We don't have a projection to tell us whether
6 they are going to be overearning or not. What we have
7 to rely on are the actual ESRs as they come in, and so
8 there is that regulatory lag that --

9 **COMMISSIONER BROWN:** Pardon me. Could OPC
10 technically step in in that role, though?

11 **MS. CRAWFORD:** I don't know how they would
12 have access to any sooner or projected information
13 than we already have access to.

14 **COMMISSIONER BROWN:** Okay. That's all.
15 Thanks.

16 **CHAIRMAN GRAHAM:** Commissioner Edgar.

17 **COMMISSIONER EDGAR:** Thank you, Mr.
18 Chairman. This happens to me often. Not always,
19 but often that I reviewed all the information, and
20 discussed with staff, and discussed with my direct
21 staff, and did my own thinking, and kind of thought
22 I knew where I was and then came into the room and
23 heard the discussion and questions from other
24 Commissioners and other answers, and answers that
25 were given to those questions, and kind of came down

1 to a different conclusion that I thought maybe I was
2 at. And this is one of those examples for me.

3 As I said, I believe strongly that the
4 Commission has the authority and the jurisdiction and,
5 indeed, perhaps even the obligation to enter into
6 earnings reviews to go forward with rate cap letters
7 in certain instances and that that is an important
8 statutory tool that we have in our regulatory and
9 oversight role. I also think that the situation that
10 we have is, as I think the discussion has brought out,
11 is unique from when that tool has been used in the
12 past by virtue of the fact that there is a settlement
13 agreement in place.

14 I applaud our staff for bringing this
15 recommendation before us for our consideration and
16 discussion and to bring out some of the aspects of it,
17 and in my mind this discussion has helped to elucidate
18 a little bit some of the provisions and the actual
19 workings of the settlement agreement. Every
20 settlement agreement it seems we all learn a little
21 bit more as we get into them, and I think this is one
22 example of that.

23 I also note that the settlement agreement
24 came before us as a Commission for action and received
25 a staff recommendation, and then we were not able to

1 take action for other reasons. But yet time marched
2 on, and business went on, and as additional
3 information came forward, the staff filed later this
4 recommendation before the Commission had taken any
5 action to approve or disapprove the settlement, and I
6 think it was exactly correct in my opinion for the
7 staff to not have presumed that the settlement
8 agreement would be approved and would be in effect
9 and, therefore, to continue to look at what was, is,
10 and perhaps could be the situations that the
11 Commission would be in.

12 So with all of that as background, I do
13 believe that the settlement provides, as we talked
14 about, certainty and stability. And by virtue of OPC
15 speaking, again, in favor of the agreement that they
16 entered into, and the action that the Commission took,
17 and the fact that any of the other intervenors to the
18 rate case and also the parties to the settlement are
19 not here speaking in favor of the staff
20 recommendation, I presume that they would agree with
21 the position that the utility and OPC has put forward.

22 So with that, Mr. Chairman, I would make a
23 motion that we do not approve the staff
24 recommendations on Issues 1, 2, or 3, and that that
25 would mean that we close the docket, which would be

1 Issue 3, and that we even perhaps consider directing
2 our staff to include in the final order language such
3 that this decision is not precedent setting for the
4 use of an earnings review or a rate cap letter and
5 other unique instances as we move forward.

6 **COMMISSIONER BALBIS:** A second for
7 purposes of discussion.

8 **CHAIRMAN GRAHAM:** It has been moved and
9 seconded.

10 Commissioner Brisé.

11 **COMMISSIONER BRISÉ:** Thank you, Mr.
12 Chairman.

13 And I, too, want to applaud staff for
14 bringing forward their recommendation. I do think
15 that with the disjointed schedule that we ended up
16 dealing with, I think this put this in a very weird
17 posture. And I think with the backdrop of the fact
18 that we have the settlement and stipulation agreement
19 that is voted and is beginning to work, I think I do
20 agree with OPC and the company that this may send the
21 wrong message at this time.

22 But I do agree that, as a Commission, we
23 have the full responsibility even as we are watching
24 the settlement work to continue to keep an eye out to
25 ensure that our consumers are protected. So,

1 therefore, today I think I will be voting against the
2 staff recommendation, but I do commend them on the
3 work that they have put forward on this item.

4 **CHAIRMAN GRAHAM:** Commissioner Brown
5 followed by Balbis.

6 **COMMISSIONER BROWN:** I would reiterate the
7 comments of my fellow Commissioners. I do feel that
8 that settlement agreement provides some protections.
9 Again, the fact that OPC is here advocating for it
10 sends a loud message that we need to give it time to
11 work itself out, and that we do have the protections
12 granted under Section 6, so I'm going to support
13 Commissioner Edgar's motion.

14 **CHAIRMAN GRAHAM:** Commissioner Balbis.

15 **COMMISSIONER BALBIS:** Thank you, Mr.
16 Chair.

17 Again, to reiterate what some of the other
18 Commissioners have mentioned, but I think, Mr. Butler,
19 your comments that you still have those tools and that
20 you fully expect that at the end of the year when the
21 dust settles that you will be below the 11 percent,
22 which obviously is important, is important to me, and
23 I think that, again, fortunately because of the
24 timing, I do want to commend staff for being vigilant
25 in reviewing this. And I think that because it is a

1 unique situation, I don't want the message to get out,
2 and it sounds like the Commission doesn't either, that
3 an earnings cap letter is still not a tool that can be
4 used and encouraged for other utilities to voluntarily
5 work with staff to address these issues, that because
6 of the stipulation that clearly addresses potential
7 overearnings, that we kind of find ourselves in this
8 unique position. And that's all the comments I have.
9 Thank you.

10 **CHAIRMAN GRAHAM:** Well, I'm not going
11 reiterate what the last four of you said, so all in
12 favor say aye.

13 (Vote taken.)

14 **CHAIRMAN GRAHAM:** Those opposed?

15 By your action you have approved the motion
16 which declines the staff recommendation on Item 10.

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

4

5 I, JANE FAUROT, RPR, Chief, Hearing Reporter
6 Services Section, FPSC Division of Commission Clerk, do
7 hereby certify that the foregoing proceeding was heard
8 at the time and place herein stated.

9 IT IS FURTHER CERTIFIED that I
10 stenographically reported the said proceedings; that
11 the same has been transcribed under my direct
12 supervision; and that this transcript constitutes a
13 true transcription of my notes of said proceedings.

14 I FURTHER CERTIFY that I am not a relative,
15 employee, attorney or counsel of any of the parties,
16 nor am I a relative or employee of any of the parties'
17 attorney or counsel connected with the action, nor am I
18 financially interested in the action.

19 DATED THIS 14th day of January, 2010.

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