



Letter of Comment No: 5  
File Reference: 1203-UTU

December 16, 2004

Mr. Donald Thomas  
Project Manager  
Financial Accounting Standards Board  
401 Merritt 7  
P.O. Box 5116  
Norwalk, Connecticut 06856-5116

**Re: Proposed interpretation of FASB Statement 109, *Accounting for Income Taxes* - "Uncertain Tax Positions"**

Dear Mr. Thomas:

FPL Group, Inc. (FPL Group or the Company) is a public utility holding company. The Company's operations are primarily conducted through Florida Power & Light Company (FPL), one of the largest investor-owned electric utility companies in the nation, serving about half the population of Florida. The Company also owns and operates independent power facilities through its non-rate regulated power generation subsidiary, FPL Energy, LLC.

The Company understands that the Financial Accounting Standards Board (FASB) intends to issue an Exposure Draft of a proposed interpretation of FASB Statement No. 109 (FAS 109), *Accounting for Income Taxes* regarding *Uncertain Tax Positions*. The FASB has stated that this proposal is intended to eliminate diversity in practice in recognizing tax benefits that are not explicitly authorized under tax law. We are requesting that the FASB re-consider issuing this proposal based on the fact that existing accounting principles are adequate and the proposed guidance for recognition of tax benefits is opposed to existing accounting principles and could result in materially misleading financial statements. Instead, we believe that the FASB should issue guidance that clarifies that tax benefit uncertainties should be accounted for under the loss contingency provisions of Statements on Financial Accounting Standards, No. 5 - *Accounting for Contingencies* (FAS 5).

In accordance with paragraph 8(a) of FAS 109, a current tax liability or asset is recognized for the estimated taxes payable or refundable on tax returns in the current year. Since tax benefit positions included in tax returns result in a current tax refund or reduction in otherwise payable taxes, there is no issue about whether an asset has been realized under definitions established in FASB, Statements of Financial Accounting Concepts, Statement No. 6 - *Elements of Financial Statements*. Accordingly, where there is uncertainty about the ultimate resolution of a tax matter for which a benefit has been realized, the issue is not whether an asset should be recognized (or a liability reduced), but whether a liability should be recorded under the provisions of FAS 5.

The potential deficiency that might result from a post-filing audit process is listed as an example of a loss contingency in paragraph 4(f) of FAS 5 as "actual or possible claims

and assessments". Paragraph 39 of FAS 5 specifically uses litigation of an income tax matter as an example to illustrate the appropriate amount to accrue for litigation, claims and assessments. Under FAS 5, a loss contingency reserve is recorded only if it is probable that the tax position will be disallowed on audit and the amount of such liability can be reasonably estimated. Additionally, paragraph 38 of FAS 5 indicates that the company must make a judgment about whether an unasserted claim will be raised in assessing the probability that a loss or impairment of an asset will occur. The current proposal is expected to eliminate this judgment and require the company assessment to be made without regard to whether or not the income tax issue is expected to be raised. The FASB proposal to require a probable level of confidence before reflecting a tax benefit in an entity's financial statements is not supported by existing authoritative literature and would result in inconsistent accounting standards for reporting loss contingencies.

Further, the proposal as it is currently being contemplated would result in companies recording tax liabilities that the company never expects to pay. For example, suppose a company takes a position on a tax matter that is subject to interpretation, but for which the company believes it is more likely than not that the company's position would prevail in audit. The Company's position results in a lower tax liability than might be interpreted by the taxing authority. The current proposal would require, in the absence of the ability to assert that the company's position is *probable* of prevailing, that the company record the higher liability. In the context of interpreting tax law, we believe it will often be very difficult to assert that any particular outcome is probable of occurring. Accordingly, the FASB proposal will result in companies including in their financial statements liabilities that they do not expect to pay, making those financial statements misleading to users.

In addition to the concerns raised above, there are significant questions around the practical implementation of the FASB proposal and what constitutes a tax benefit. The preparation of an income tax return for a large company includes numerous matters requiring interpretation each year. Would the FASB proposal require a "probable assertion" for each of these items where the company's position results in a more favorable tax consequence than the "worst case" scenario? In the absence of the ability to make a probable assertion, would the company be required to calculate and record its tax liabilities on a worst case basis? Also, it is unclear whether the FASB proposal would apply only to positions taken in a filed tax return, or could the proposal be interpreted to apply to matters outside the filed tax returns. For example, suppose a company believes it is not required to file an income tax return in a particular jurisdiction. If there is any uncertainty about the company's conclusion, must that company consider that a different view could be taken and record income taxes payable to that jurisdiction? While it is unlikely that the outcomes illustrated above are consistent with the FASB's intentions, the scope of the proposal must be clearly defined before a change in the accounting rules is made.

While the Company has additional concerns regarding the disclosure requirements of this proposal which are not enumerated here, we thought it was important to timely communicate our views regarding the recognition provisions of the proposal before the FASB issues the Exposure Draft.

In conclusion, the Company believes that existing accounting principles governing the accounting for income taxes are adequate and that the FASB should issue guidance that clarifies that uncertainties surrounding tax benefits that are not explicitly authorized under tax law should be accounted for under the loss contingency provisions of FAS 5.

Thank you for your consideration of this very important issue.

Sincerely,

K. MICHAEL DAVIS  
K. Michael Davis  
Controller and Chief Accounting Officer