BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Consideration of the tax impacts associated with Tax Cuts and Jobs Act of 2017 for Florida Power & Light Company	Docket No: 20180046-EI
In re: Petition for Enforcement of 2016 Settlement and Permanent Base Rate Reductions Against Florida Power & Light Company	Docket No. 20180224-EI Filed: December 21, 2018

FLORIDA POWER & LIGHT COMPANY'S RESPONSE TO JOINT PETITION FOR ENFORCEMENT OF 2016 SETTLEMENT AND PERMANENT BASE RATE REDUCTIONS AGAINST FLORIDA POWER & LIGHT COMPANY

Florida Power & Light Company hereby files its response in opposition to the Joint Petition for Enforcement of 2016 Settlement and Permanent Rate Reductions by the Office of Public Counsel ("OPC"), Florida Retail Federation ("FRF") and the Florida Industrial Power Users Group ("FIPUG") (collectively, the "Petitioners").

I. INTRODUCTION

FPL, OPC and FRF agree to settle FPL's 2016 rate case

Petitioners' filing is a tremendous disappointment.

In 2016, after a long and contentious proceeding that addressed FPL's base rates, the Company and two of the Petitioners – OPC and FRF – following good faith negotiations, executed a settlement agreement that established a framework for rate stability for a minimum term of four years (the "Settlement Agreement"[1] or "Agreement") while allowing FPL the opportunity to earn a reasonable return on equity ("ROE").[2] The signatories[3] to the Settlement

[1] For citation purposes, "Settlement Agreement" will be abbreviated as "S.A." and Petition will be abbreviated as "Pet."

[2] FIPUG elected not to sign the Settlement Agreement. As a non-signatory, FIPUG is not subject to the same contractual obligations as FRF and OPC, and while its members, along with other customers of the same rate classes, are the beneficiaries of key provisions of the Settlement Agreement that provide meaningful value through a series of rate credits, FIPUG is not contractually constrained from petitioning for a rate reduction or an overearnings investigation.

Agreement strongly supported it as being in the public interest and in the best interests of those they represent, both before this Commission and at the Florida Supreme Court. *See* Docket 160021-EI, Document No. 08770-2016, Intervenor Signatories Post-hearing Brief on the Settlement; Florida Supreme Court Case No. SC17-82, *Sierra Club v. Julie Imanuel Brown et al*.; *see also* Order No. 16-0560-AS-EI ("The Settlement Agreement will allow FPL to maintain the financial integrity necessary to make the capital investments over the next four years required to sustain this level of service while providing rate stability and predictability for FPL's customers.").

The structure of the Settlement Agreement is simple. With the exception of specific provisions for increases in base rates as solar power plants and the Okeechobee Clean Energy Center are brought on line, the Agreement provides that FPL's base rates are to remain unchanged at least through December 2020 (the "Minimum Term"). Only if FPL's earnings fall above or below its authorized ROE range, would any party to the Settlement Agreement have the right to seek relief. S.A. ¶ 11.

As a predicate, however, even a non-signatory must demonstrate that the utility is earning outside the range of reasonableness on its approved rate of return. This means that FIPUG must demonstrate that FPL is earning in excess of its authorized range. *In Re: Complaint by Miami-Dade County for Order Requiring Florida City Gas to Show Cause Why Tariff Rate Should Not Be Reduced & for the Comm'n to Conduct A Rate Proceeding, Overearnings Proceeding, or Other Appropriate Proceeding Regarding Florida City Gas' Acquisition Adjustment*, Docket No. 100315-GU, Order No. PSC-10-0619-FOF-GU (Oct. 10, 2010). But to do so, FIPUG's position, like that of the other petitioners, rests on showing that FPL is operating outside the terms of the Settlement Agreement. Accordingly, FIPUG's burden is effectively the same as that shouldered by OPC and FRF.

[3] The South Florida Hospital and Healthcare Association ("SFHHA") also is a signatory to the Settlement Agreement. It did not join the Petition to dismantle the Settlement. The Federal Executive Agencies ("FEA"), although not a signatory, did not oppose the Settlement Agreement, is the beneficiary of rate credits resulting from the Settlement. FEA likewise did not join the Petition.

The Amortization Reserve Mechanism is central to the Settlement Agreement

To help avoid exceeding either end of the authorized ROE range, the Settlement Agreement includes an amortization reserve mechanism ("ARM"). The ARM is what allows FPL to absorb additional expenses or lower than expected sales while remaining within the authorized range. Likewise, the ARM allows FPL to absorb lower expenses or higher than expected sales while remaining within its authorized range. The Agreement established a "Reserve" account with an initial balance totaling $1.25 billion and authorizes FPL to "amortize *any* reserve amount" (emphasis supplied) during the term of the Settlement Agreement "with the amounts to be amortized in each year of the Term left to FPL's discretion, subject to the obligation to maintain FPL's earned ROE within the authorized range." The use of this mechanism, consistent with the way it has been used in prior settlements, is flexible. The Settlement Agreement also allows FPL to reverse any amortization of the Reserve, again subject to the ROE obligation. S.A. ¶ 12(c) ("FPL shall file an attachment to its monthly surveillance report for December of each year during the Term that shows the amount of amortization *credit or debit* to the Reserve Amount on a monthly basis and year-end total basis for that calendar year."). This is the flexibility that has been essential to this mechanism in this and in prior agreements. Without this flexibility, FPL would not have entered into the Settlement Agreement.

The Settlement Agreement expressly contemplates that the flexibility of the ARM could extend FPL's ability to operate under the Agreement for at least one additional year. *Id*. ("FPL may not amortize any portion of the Reserve Amount past December 31, 2020 unless it provides notice to the Parties by no later than March 31, 2020 that it does not intend to seek a general base rate increase to be effective any earlier than January 1, 2022."). This provision accommodates the possibility that, through the *flexible* and *discretionary* use of the ARM including reversals of

surplus, there would be a Reserve Amount sufficient to enable FPL to continue to operate under the term of the Agreement beyond the Minimum Term.[4] Indeed, there was about $250 million of surplus in the account at the end of FPL's prior settlement agreement because of the ability to reverse surplus during the term of that prior agreement. However, there was no express ability to continue to use the mechanism beyond the term of the prior agreement, thus precluding the opportunity that exists under this Settlement Agreement. Nevertheless, this Settlement Agreement did make use of the remaining surplus by including it in the ARM, requiring FPL to "file an attachment to its monthly earnings surveillance report for December 2016 that shows the final amount of the 2012 'rollover' surplus that remained at the end of 2016." S.A. ¶ 12(c).

As articulated in its petition in Docket 20180046-EI, and discussed below, FPL's use of the ARM has realized the possibility of extending rate stability for at least one additional year beyond the Minimum Term at the same time that FPL continues to remain within the authorized range of earnings.

FPL effectively and appropriately used the ARM to avoid nearly $1.3 billion of Hurricane Irma-related surcharges

In September 2017, FPL's service territory was significantly impacted by Hurricane Irma. FPL executed the fastest, most massive restoration in U.S. history, resulting in about $1.3 billion of incremental costs. FPL is authorized by Commission Rule 25-6.0143 to charge these incremental costs to the Storm Reserve (Account 228.1) rather than treat them as a current expense. FPL did so initially, leaving the Storm Reserve in a substantial deficit position. The Storm Mechanism set forth in the Settlement Agreement authorizes FPL, upon request, to recover such deficits and replenish the Storm Reserve through a surcharge to customers' electric bills. S.A. ¶ 6.

[4] At the same time, all customer benefits are maintained, including the rate credits being provided to large users that comprise the membership of FRF, FIPUG, SFHHA and FEA.

The Tax Cuts and Jobs Act of 2018 ("Tax Act") went into effect on January 1, 2018. Among other things, the Tax Act reduced the federal corporate tax rate from 35% to 21%. The savings that will be realized by the reduced tax rate in conjunction with the flexibility of the Settlement Agreement's ARM provided FPL a unique opportunity to avoid collecting a significant surcharge from customers. After paying the amounts due and on its own initiative, FPL charged the Hurricane Irma restoration costs as an expense in 2017 and reversed the earlier charges made to the Storm Reserve. FPL, using the discretion afforded under the Settlement Agreement, offset most of the Hurricane Irma restoration expense by amortizing the full amount of the Reserve then available. Since July 2018, FPL has used savings resulting from the Tax Act to begin replenishing the Reserve through recording debits (i.e., additional expense), as permitted under Paragraph 12(c) of the Settlement Agreement. FPL will continue to utilize the ARM, recording debits or credits each period as required, to stay within the authorized ROE range, throughout the Minimum Term. By taking these steps, FPL is positioning itself to defer its next general base rate increase for at least one additional year beyond the end of the Minimum Term, a possibility expressly contemplated in the Agreement and endorsed by the signatories.

Had FPL instead availed itself of the surcharge mechanism to recover the deficit and replenish the Storm Reserve, it would have petitioned to implement a three-year surcharge beginning on March 1, 2018 and continuing through the end of 2020, which would have translated initially to $4.00 per month on a 1,000-kWh residential bill, increasing to more than $5.00 per month in 2019 and continuing through 2020. Consistent with the terms of the Settlement Agreement, however, FPL has managed its business in a manner that avoids these charges and provides customers greater rate stability over a longer period.

In January of 2018, through public filings and public statements, FPL fully disclosed its approach to tax savings and Hurricane Irma cost recovery to the Commission, to investors and the public at large. Going further, FPL executives personally met with OPC to review the accounting details of FPL's methodology, and, at that time, OPC expressed its concurrence with FPL's approach under the terms of the Settlement Agreement. OPC and other intervenors thereafter took similar steps with Tampa Electric Company and Duke Energy Florida to avoid storm surcharges for millions of Floridians.

Petitioners manufacture a post hoc interpretation of the Settlement Agreement

Now, almost a full year after detailed disclosure to OPC, the Petitioners contend for the first time that the ARM and the Storm Cost Recovery Mechanism contain latent restrictions, evidently known only to them and presumably only discovered after months of deep thought and discussion amongst themselves, having read and re-read the agreement countless times, debating its provisions and various theories upon which they might contend that FPL was operating outside of the parameters of the Agreement. They have managed to pull together and submitted a view that is based on neither the plain language of, nor well-established practice under, the Agreement.

Core to petitioners' position is the claim the ARM can actually be extinguished through the use of the full available balance, notwithstanding the utter absence of the term "extinguish" or any moderately proximate synonym anywhere in the Agreement. Indeed, if it were ever the intent that such a central provision of the Settlement Agreement could be eliminated through its use, surely Petitioners would have wanted explicit language to that end. Most assuredly, FPL at all times would have left one dollar in the account to avoid such a draconian result had this even been remotely considered as a possible position by Petitioners or any signatory to the Settlement Agreement.

In the same way there can be no reasonable misinterpretation as to the express provisions of the Settlement Agreement that allow for the discretionary and flexible use of the ARM for purposes of maintaining the Settlement Agreement in effect through the Minimum Term and potentially beyond, there is no possible misinterpretation of the Petitioners' motives. A full year after the fact, and FPL having expensed the costs for Irma rather than recovering those costs through an incremental surcharge that clearly was available under the Settlement Agreement, Petitioners are unashamedly attempting to alter the terms of a carefully negotiated and Commission-approved compromise when they perceive that it would work to their advantage. They strive to do so both by *writing in* restrictions that were neither approved nor negotiated and *extracting out* the Agreement's foundational flexibility. In doing so, OPC and FRF are in direct contravention of their obligations to uphold the Settlement Agreement. S.A. ¶ 22 ("No Party to this Agreement will request, support, or seek to impose a change in the application of any provision hereof.").

According to Petitioners, when FPL recorded all of the remaining balance in the Reserve, it extinguished both the Reserve and the ARM. Petitioners allege that the supposed unavailability of the ARM coupled with FPL's annual savings tax resulting from the Tax Act has caused FPL to exceed its maximum authorized ROE, if its earnings were restated to exclude the debit amortization to the Reserve that FPL is currently recording.[5] On this basis, Petitioners request that the Commission initiate a review of FPL's base rates, order FPL to refund tax savings and establish new base rates to include a lower equity ratio and allowed ROE.

[5] Petitioners also contend that "FPL has materially misstated its earnings in its Earnings Surveillance Reports." Pet. ¶ 33. This contention is false, particularly offensive and was made with no good faith basis.

Before any factual earnings or rate review can proceed, the Commission must determine, as a matter of law, whether FPL's use of the Reserve and ARM comports with the terms of the Settlement Agreement. As described below, Petitioners urge an interpretation of the Settlement Agreement that is credulity-challenged, unsupported and even contradicted by its plain language and is antithetical to its purpose of maintaining rate stability. The Commission should reject Petitioners' thinly-veiled attempt to rewrite a carefully negotiated compromise by modifying essential terms and introducing new terms that were never negotiated by the Parties and were not part of the Commission's approval.

II. ARGUMENT

As described above, the Settlement Agreement remains in place through at least the Minimum Term subject only to new base rates being approved by the Commission pursuant to a legitimate challenge that FPL is earning outside of its authorized ROE range. The Petitioners therefore assert, as they must, that FPL is over earning. To reach this conclusion, Petitioners claim that (i) the ARM is "extinguished" if the Reserve balance reaches zero, and (ii) FPL cannot use the Reserve to cover storm-related costs. ***These limitations and restrictions appear nowhere in the Settlement Agreement***. Petitioners' interpretation of the Settlement Agreement is baseless.

Settlement agreements are contractual in nature and, as such, are interpreted in accordance with principles of contract law. *Per Jonas Ingvar Gustafsson v. Aid Auto Brokers, Inc.*, 212 So. 3d 405, 408 (Fla. 4th DCA 2017) (citing *Barone v. Rogers*, 930 So. 2d 761, 763-64 (Fla. 4th DCA 2006)). When interpreting a contract, a court should give effect to the plain and ordinary meaning of its terms. *Id*. (quoting *Golf Scoring Sys. Unlimited, Inc. v. Remedio*, 877 So. 2d 827, 829 (Fla. 4th DCA 2004). An interpretation which "gives a reasonable meaning to

all provisions of a contract is preferred to one which leaves a part useless or inexplicable." *Id*. (quoting *Premier Ins. Co. v. Adams*, 632 So.2d 1054, 1057 (Fla. 5th DCA 1994)).

An unambiguous contract must be enforced as written. "Where a settlement agreement's terms are clear and unambiguous, the parties' intent must be gleaned from the four corners of the document." *Harrington v. Citizens Prop. Ins. Corp.*, 54 So. 3d 999, 1002 (Fla. 4th DCA 2010) (citations and internal quotation omitted). A tribunal "may not rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Id*.

A. Petitioners Attempt To Re-Write the Amortization Reserve Mechanism Provision

The Settlement Agreement unambiguously allows FPL to use the ARM flexibly, subject only to enumerated conditions

The plain text of the Settlement Agreement establishes the flexibility of the ARM. As previously described, it provides that FPL may amortize any Reserve Amount (i.e., up to $1.25 billion), "with the amounts to be amortized in each year of the Term left to FPL's discretion." SA ¶ 12(c). The Settlement Agreement expressly acknowledges that any amortization may be reversed, meaning that the Reserve could be replenished. *Id*. (noting that FPL's monthly surveillance reports must show the "amount of amortization *credit or debit* to the Reserve Amount") (emphasis added). The signatories even agreed that, upon providing notice, the Reserve could be used beyond the minimum term if doing so would extend FPL's "stay out" for another year. *Id*. ("FPL may not amortize any portion of the Reserve Amount past December 31, 2020 unless it provides notice to the Parties by no later than March 31, 2020 that it does not intend to seek a general base rate increase to be effective any earlier than January 1, 2022."). The Joint Petitioners acknowledge this.

The only limitations on FPL's use of the ARM are expressly enumerated in the Agreement. FPL's amortization of the Reserve is "subject to the following conditions:

> (i) the amount that FPL may amortize during the Term shall not be less than the actual amount of depreciation reserve surplus remaining at the end of 2016;
>
> (ii) for any surveillance reports submitted by FPL during the Minimum Term on which its ROE (measured on an FPSC actual, adjusted basis) would otherwise fall below 9.6%, FPL must amortize at least the amount of the available Reserve Amount necessary to maintain in each such 12-month period an ROE of at least 9.6% (measured on an FPSC actual, adjusted basis); and
>
> (iii) FPL may not amortize the Reserve Amount in an amount that results in FPL achieving an ROE greater than 11.6% (measured on an FPSC actual, adjusted basis) in any such 12-month period as measured by surveillance reports submitted by FPL. FPL shall not satisfy the requirement of Paragraph 11 that its actual adjusted earned return on equity must fall below 9.6% on a monthly surveillance report before it may initiate a petition to increase base rates during the Minimum Term unless FPL first uses any of the Reserve Amount that remains available for the purpose of increasing its earned ROE to at least 9.6% for the period in question."

S.A. ¶ 12. These restrictions are comprehensive and exhaustive. Nowhere does the Settlement Agreement indicate the application of further restrictions, such as through the phrase "includes but is not limited to" or any other expansive language. The parties negotiated no further exclusion, and the Commission did not impose any additional limitations.

Yet Petitioners allege "the Reserve and the ARM were not intended under the 2016 Settlement to be utilized to offset the costs resulting from a major storm such as Hurricane Irma." No such constraint on the use of the ARM appears in the Settlement Agreement. One cannot now be imposed through a post hoc interpretation. *Per Jonas*, 212 So. 3d at 408.

It is a "fundamental principle of contract construction [] that the expression of one thing is the exclusion of the other." *Sprint Corp. v. Telimagine, Inc.*, 923 So. 2d 525, 527 (Fla. 2d DCA 2005). This maxim, known as *expressio unius est exclusio alterius*, means that when a contract or law describes a particular situation where something should apply, an inference must

be drawn that what is not included by specific reference was intended to be omitted or excluded. *See Gay v. Singletary*, 700 So. 2d 1220 (Fla. 1997); *City of Miami v. Valdez*, 847 So. 2d 1005 (Fla. 3d DCA 2003); *see also Telimagine*, 923 So. 2d at 527 (concluding that by specifically authorizing a claim for injunctive relief for unauthorized disclosure or use of proprietary information, but for no other claims, the face of the agreement made clear that the parties did not contemplate injunctive relief under other circumstances). This principle "defeat[s] an argument that a particular item or matter is included by implication." *State v. Quetglas*, 901 So. 2d 360, 363 (Fla. 2d DCA 2005). It defeats Petitioners' strained interpretation here.

Aside from the enumerated earnings conditions, FPL's ability and right to access to the Reserve is indiscriminate. The Settlement Agreement makes no distinction between covering the costs incurred to replace a distribution pole in the regular course of business from those incurred to replace a pole due to a hurricane, or even from expenses associated with the purchase of everyday office supplies. The type of cost or expense incurred should not be of any significance – either to the Joint Petitioners, any customer or to the Commission – so long as FPL uses the Reserve to manage its earnings within the authorized ROE range.

The Settlement Agreement does not provide that the ARM will be extinguished, either by using it to offset storm restoration costs or by temporarily reducing the Reserve balance to zero

No fewer than eight times in their filing, Petitioners insist that "FPL extinguished the reserve and the ARM" when it "wrote off its Hurricane Irma restoration costs against the Reserve" and depleted it. S.A. ¶ 48, *also* ¶¶ 32, 34, 36, 37, 45(B), 45(D), and 45(F). Not once do the Petitioners provide any citation to the Settlement Agreement. None exists. Nor can one be properly read into the Agreement. A provision that terminates the essential mechanism that makes possible FPL's commitment to freeze rates for four years is unquestionably material. It would not be implied or left unaddressed. This is particularly so because such interpretation

would be contrary to the purposes of the Settlement: to maintain the Agreement in place by providing FPL flexibility to operate within its earnings band.[6] *See Murley v. Wiedamann*, 25 So. 3d 27, 29 (Fla. 2d DCA 2009)) ("In construing the language of a contract . . . the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose.").

The Joint Petitioners' Interpretation Would Lead To Absurd Results

The Joint Petitioners' suggestion the ARM extinguishes if the Reserve reaches a zero balance, even temporarily, is illogical. Under Petitioners' theory, FPL could have kept the Settlement Agreement intact by continued use of the Reserve through the term, if a single dollar – or even a penny – had remained in the account. A simple example illustrates the absurdity of Petitioners' suggestion that the Settlement Agreement should be interpreted in a manner that extinguishes the ARM:

- A utility is governed by settlement agreement that contains an amortization mechanism, a reserve capped at $1,000, an authorized ROE range of 9.6% to 11.6%, and a two-year minimum "stay out" period.
- The utility's sales and the cost of service are identical between two 12-month periods with only one exception – an unexpected expense of $999 in the first 12-month period.

[6] *See* Docket 160021-EI, Document No. 08770-2016, Intervenor Signatories Post-Hearing Brief on Settlement, at 7 ("Witness Brosch also complained about the depreciation mechanism in the Settlement Agreement. While the Settlement Agreement provides for the discretionary use of the depreciation surplus amounts by FPL to manage its earnings, this depreciation mechanism more importantly provides protection to customers by requiring that these funds be used to bring earning up to the bottom of the range in the event FPL's earnings fall below the 9.6% level. This ensures that if unexpected expenditures occur during the term of the agreement, the agreement will be maintained and not terminated early. Thus, this depreciation mechanism increases the base rate stability to customers in the context of this Settlement Agreement.").

- Over the first 12-month period, the utility uses $999 of the surplus and reports earnings of 11%, which is within its authorized range.
- Over the second 12-month period, the utility unexpectedly has lower expenses by exactly $999 and reverses the amount of surplus used in the prior 12-month period, still earning 11%.
- In this example, the cap of $1000 has limited the amount of surplus the utility can use, but because of the ability to reverse the use of surplus, that same $999 is available again for use in a subsequent period for the purpose of allowing the utility to remain within its authorized range and for the settlement to endure at least through its minimum term.
- Further demonstrating the value of the ARM and the settlement as a whole, the utility was able to operate under the agreement beyond the minimum term because sufficient amounts remained in the reserve for the utility to access the reserve.

Petitioners would modify this hypothetical to assume that if the full $1000 had been used in one period, the mechanism would be thereby "extinguished." One dollar should not be the difference between the early termination or continued success of a multi-year settlement agreement, whether in a hypothetical scenario with a $1,000 cap or under FPL's actual settlement with a $1.25 billion cap. Such a result would be patently absurd. Accordingly, Petitioner's interpretation should be rejected. See *Triple E Dev. Co. v. Floridagold Citrus Corp.*, 51 So. 2d 435, 438 (Fla. 1951) ("if one interpretation would lead to an absurd conclusion, then such interpretation should be abandoned and the one adopted which would accord with reason and probability").

Petitioners' extrinsic evidence does not warrant a different interpretation of the ARM provision.

The testimony of Robert Barrett excerpted by the Joint Petitioners does not support their interpretation of the Settlement Agreement. *See* Pet. at 10-11. To the contrary, it supports FPL's approach. Mr. Barrett states that the ARM is "critical" to the Settlement Agreement. Without the ARM's flexibility, "base rates could not be held constant for such an extended period of time due to . . . factors affecting FPL's earnings that are largely beyond the Company's control." Neither storm restoration costs nor tax expense (both factors outside of FPL's control) were excluded from such factors. The Reserve could be used to offset any category of cost and expense, and any source of revenue or reduced level of expense could be used to replenish the Reserve.

Moreover, Petitioners' reliance on Mr. Barrett's statement that the ARM that had been approved in 2012 would expire in the absence of another settlement (in 2016) is seriously misplaced. Mr. Barrett simply recognized that creation and retention of the ARM requires Commission approval – not that the mechanism would vanish through a series of debits and credits. The ARM is established within the Settlement Agreement and exists through at least the Minimum Term. *Pine Lumber Co. v. Crystal River Lumber Co*., 61 So. 576, 579 (Fla. 1913) ("when, by the express definite terms of a complete contract, any action taken or omitted under it does not appear to be a violation of it, and no fraud or other illegal or inequitable conduct is shown, *additional provisions will not be implied for the purpose of showing a violation*, when it otherwise does not appear, where the contract may be performed according to its terms."). Petitioners have it exactly backward. The ARM only "expires" when the Settlement Agreement itself expires on its terms. A party's unilateral action cannot cause the ARM to expire.

B. Petitioners Seek To Rewrite the Storm Recovery Cost Mechanism

Petitioners, untethered to the actual terms of the Settlement Agreement, managed to develop an argument with respect to the Storm Mechanism that is even less viable than their fabricated restriction on the ARM. According to Petitioners, FPL *must* use the Storm Mechanism to recover costs incurred due to major storms. Petition ¶ 25.

FPL agrees that the Storm Mechanism authorizes FPL to impose a surcharge to recover storm restoration costs. But nothing in the agreement *requires* FPL to do so. The language is express, clear and unambiguous. It states:

> *Nothing in this Agreement shall preclude FPL* from petitioning the Commission to seek recovery of costs associated with any storms without the application of any form of earnings test or measure and irrespective of previous or current base rate earnings or the remaining unamortized Reserve Amount as defined in Paragraph 12.

S.A. ¶ 6(a) (emphasis added). The ordinary meaning of those terms is permissive. FPL can use the Storm Mechanism if it elects to do so. *Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999) ("the words used by the parties must be given their plain and ordinary meaning") (citing *Rupp Hotel Operating Co. v. Donn*, 29 So. 2d 441 (1947)). The provision does not, however, include any words indicating exclusivity, obligation, requirement or prohibition. As such, FPL was free to elect to charge the Hurricane Irma restoration costs as an expense in 2017 pursuant to Commission Rule 25-6.0143(1)(h). Petitioners did not – and cannot – point to any words in the Settlement Agreement that suggest FPL is barred from exercising that right.

Tellingly, Petitioners never actually quote any language from the Storm Mechanism provision for support. They resort instead to pages of irrelevant deposition excerpts. The reason is simple. The plain terms directly contravene their argument. The Commission should reject Petitioners' invitation to err by disregarding the express terms of the Settlement Agreement.

If more were needed, the same language used in the Storm Mechanism provision is found in multiple Settlement Agreement provisions that underscore the permissive nature of the words "[n]othing shall preclude." For example, Paragraph 5 states:

> *Nothing in this Agreement shall preclude* FPL from requesting the Commission to approve the recovery of costs that are recoverable through base rates under the nuclear cost recovery statute, Section 366.93, Florida Statutes, and Commission Rule 26-6.0423, F.A.C. *Nothing in this Agreement prohibits parties* from participating without limitation in nuclear cost recovery proceedings and proceedings related thereto and opposing FPL's requests.

(emphases added).

Certainly Petitioners would not insist that, based on this provision, FPL would violate the Settlement Agreement by electing not to request nuclear cost recovery. This is evidenced by the fact that no complaints were lodged when FPL did not seek nuclear cost recovery in 2017 or 2018. Likewise, while the signatories to the Agreement would be free to oppose any nuclear cost recovery request, FPL would not consider those parties to be in breach if they chose not to participate in the proceeding.[7]

Finally, the deposition and testimony of FPL witness Dewhurst quoted at length by the Petitioners do not change the conclusion. Mr. Dewhurst conveyed the Company's intent to use the Storm Mechanism, and everything he stated was accurate. FPL has used the Storm

[7] The same analysis applies to Paragraph 7, which states that "*Nothing shall preclude* the Company from requesting Commission approval for recovery of costs (a) that are of a type which traditionally, historically and ordinarily would be, have been, or are presently recovered through cost recovery clauses or surcharges, or (b) that are incremental costs not currently recovered in base rates which the Legislature or Commission determines are clause recoverable subsequent to the approval of this Agreement." Again, Petitioners have taken no steps to ensure FPL seeks incremental clause recovery given that it has sought such recovery in the past. *See also* ¶¶ 9(e), 10(h), 11(a) and 23 (all containing similar permissive language).

Mechanism in the past,[8] and it might find itself in the unfortunate position of needing to use it in the future. But, in the case of Irma-related restoration costs, FPL elected not to exercise the option to use it and instead chose an approach that allowed FPL to avoid imposing a significant surcharge on customers. Neither the quoted testimony nor FPL's prior use changes the optional nature of the Storm Mechanism expressed by its plain terms. *Knabb v. Reconstruction Fin. Corp*., 197 So. 707, 715 (Fla. 1940) ("no rule of substantive law is better settled than that which declares that extrinsic or parol evidence is inadmissible to contradict, subtract from, add to, or vary a valid written instrument").

C. The Petition was not Filed in Good Faith

Petitioners Tacitly Admit They Want To Change the Terms of the Settlement Agreement

Contrary to their cleverly titled pleading, Petitioners don't seek to enforce the Settlement Agreement. They want to *modify* it. And they're detectably brazen about it. In footnote 3 of the Petition, they state:

> It is worth noting that the testimony filed in October 2016 preceded the outcome of the 2016 U.S. Presidential Election, and the resulting $736.8 million in FPL's annual tax savings; as such, the happenstance of that tax savings windfall was obviously not factored into the negotiation or outcome of the 2016 Settlement or the 2016 Order.

Pet. at 10, n. 3. In other words, Petitioners wish they had a "do-over" because they did not correctly predict the outcome of the 2016 election.[9] The Commission should act consistently with Florida law and reject Petitioners' unlawful request for relief. *Topper v. Alcazar Operating*

[8] As noted in the Petition, the Storm Mechanism FPL to recover Hurricane Matthew restoration costs was governed by the Company's 2012 Settlement Agreement. The language was virtually identical.

[9] By analogy, FPL committed to a cost cap for its SoBRA projects only to later be faced with an import tariff on solar panels. FPL took measures to reduce the impact of the unanticipated tariffs so that it could continue to satisfy the SoBRA requirements established in the Settlement Agreement.

Co., 35 So. 2d 392, 394 (Fla. 1948) ("courts are not authorized to write contracts for litigants and supply material terms or provisions omitted by the parties.").

At best, Petitioners entirely overlook the purpose of the ARM, which was to address changes in revenues and revenue requirements that were unforeseen or outside of the parties' control. *See* Pet. at 10.[10] There can be no doubt that if the newly elected government had passed tax legislation that imposed higher taxes on utilities, Petitioners would have expected FPL to use the ARM to manage its earnings under that tax regime and adhere to its commitment to "stay out" for at least the minimum term. At worst, Petitioners acknowledge the purpose of the ARM and recognize the plain meaning of the terms that govern FPL's use of it, but now attempt to achieve through so-called "interpretation" the outcome they would have preferred.

Regrettably, Petitioners appear to fall under the "at worst" scenario. Nearly eleven months ago, OPC affirmatively agreed that FPL's treatment of the Irma costs and its use of the ARM were consistent with the terms of the Settlement Agreement. On January 22, 2018, FPL filed in Docket 20180013-PU a detailed response to OPC's *Petition To Establish a Generic Docket To Investigate and Adjust Rates for 2018 Tax Savings*, again explaining its treatment. Shortly thereafter, FPL representatives engaged in a face-to-face meeting with OPC for a detailed discussion of FPLs approach, at which time a senior OPC representative who was intimately familiar and actively engaged in the drafting and negotiations of the Settlement Agreement stated more than once that he had read and re-read the Agreement, that he could not argue with FPL's approach and that FPL adhered to the four corners of the Agreement.

Later, at a duly noticed agenda conference held on February 6, 2018, FPL orally explained its approach to the Commission. OPC and FIPUG not only were present at that

[10] Petitioners quote FPL witness Barrett's testimony stating that the ARM will help address "factors affecting FPL's earnings that largely are beyond the Company's control."

agenda conference, they addressed the Commission. No party suggested that FPL had acted contrary to the terms of the Settlement Agreement at the time of FPL's responsive filing, at the time of the agenda conference or at any time in the intervening ten months.

Nothing has changed since then. Nowhere do Petitioners point to any facts that were previously unknown to them. The only novel matter is Petitioners' contrived "interpretation" of the Settlement Agreement, which apparently took more than ten months to cobble together.

Petitioners have previously admitted that FPL's approach to Irma storm costs and tax savings serves the public interest

Shortly following the face-to-face meeting between FPL and OPC, Petitioners reached agreements with Duke Energy Florida ("Duke") and Tampa Electric Company ("TECO"), which allowed those utilities to fund their storm costs through tax savings. Through these agreements, Petitioners implicitly acknowledge that FPL's approach was also in the public interest.

Petitioners' vainly attempt to distinguish between the settlements it reached with Duke, TECO and Gulf Power and the approach taken by FPL. Those utilities already were obligated by the terms of their rate settlements to refund tax savings to their customers. *See* Order Nos. PSC-2017-0451-AS-EU (Duke), PSC-2017-0456-S-EI (TECO) and PSC-17-0178-S-EI (Gulf). The terms of those rate settlements therefore would have included the express provision for that possibility, with those utilities having been able to determine what compromises they would and would not accept in anticipation of the application of the explicit tax reform mechanism. Of course, that was not the case for FPL. The provision does not exist in FPL's agreement and the other terms of the negotiated agreement can be presumed to have taken into account that there was no such provision, even though at the time of these negotiations there certainly was ample and open discussion of the desire to implement some form of federal tax reform by many of the candidates running for the Presidency of the United States.

What Petitioners' assertions simply cannot overcome is the fact that FPL's Settlement Agreement is different. It contains no provision addressing tax savings but does contain the flexible ARM. This difference explains why, as Petitioners observe, FPL was able to implement the accounting treatment associated with Irma Restoration costs and the ARM without Commission pre-approval or consent from the co-signatories to the Settlement Agreement. Pet. ¶ 28. Petitioners' superficial attempt to contrast the Duke and TECO approaches and their reference to pre-approval and "consultation" suggest they are more disappointed with FPL not having sought their blessing than they are concerned with the substantive outcome of FPL's accounting treatment.

In conclusion, Petitioners' advocate an interpretation of the Settlement Agreement for which there is simply nothing that comes close to exhibiting a good faith basis. It lacks textual support and in some cases is directly contravened by the express terms of the Settlement Agreement. The timing of the Petition also indicates a lack of good faith, with Petitioners' having waited nearly a year after being fully apprised of FPL's approach, after FPL has already expensed all of its Irma restoration costs, and after having agreed that substantially similar approaches taken by other utilities were in the public interest. The Petition is specious, legally and factually baseless, and should not be granted.

WHEREFORE, FPL respectfully requests that the Commission enter an order denying the Joint Petition, finding that the Settlement Agreement allows FPL to use the Reserve and the

ARM to offset storm costs, declining to initiate a reverse-make whole rate case and providing any other relief the Commission deems appropriate.

Respectfully submitted this 21st day of December 2018.

R. Wade Litchfield
Vice President and General Counsel
John T. Butler
john.butler@fpl.com
Maria J. Moncada
Senior Attorney
maria.moncada@fpl.com
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
Telephone: (561) 304-5795
Facsimile: (561) 691-7135

By: *s/ R. Wade Litchfield*
R. Wade Litchfield
Authorized House Counsel

CERTIFICATE OF SERVICE
Docket No. 20180046-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service on this 21st day of December 2018 to the following:

Suzanne Brownless
Jennifer Crawford
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
sbrownle@psc.state.fl.us
jcrawfor@psc.state.fl.us

Jon C. Moyle, Jr., Esq.
Karen A. Putnal
Moyle Law Firm, P.A.
118 North Gadsden Street
Tallahassee, FL 32301
jmoyle@moylelaw.com
kputnal@moylelaw.com
Attorneys for Florida Industrial Power Users Group

Maj. A. Unsicker
Capt. L. Zieman
T. Jernigan/E. Payton
TSgt. R. Moore
139 Barnes Drive, Suite 1
Tyndall AFB FL 32403
(850) 283-6347
andrew.unsicker@us.af.mil
lanny.zieman.1@us.af.mil
thomas.jernigan.3@us.af.mil
ebony.payton.ctr@us.af.mil
ryan.moore.5@us.af.mil
Attorneys for Federal Executive Agencies

J. R. Kelly
Patricia Ann Christensen
Charles Rehwinkel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison St., Room 812
Tallahassee, FL 32399-1400
kelly.jr@leg.state.fl.us
christensen.patty@leg.state.fl.us
rehwinkel.charles@leg.state.fl.us

Gardner Law Firm (18)
Robert Scheffel Wright/John T. LaVia
1300 Thomaswood Drive
Tallahassee FL 32308
(850) 385-0070
(850) 385-5416
jlavia@gbwlegal.com
schef@gbwlegal.com
Attorneys for Florida Retail Federation

By: *s/ Maria J. Moncada*
Maria J. Moncada
Florida Bar No. 0773301