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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Consideration of the tax impacts associated with Tax Cuts and Jobs Act of 2016 for Florida Power & Light Company.	DOCKET NO. 20180046-EI FILED: March 8, 2019

CITIZENS' REPLY BRIEF ON ISSUES 18 AND 19

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to the Orders Establishing Procedure in this docket, Order No. PSC-2018-0209-PCO-EI, issued April 25, 2018, Order No. PSC-2018-0278-PCO-EI issued June 01, 2018, and Order No. PSC-2019-0050-PHO-EI issued January 29, 2019, hereby submit this Reply Brief.

PRELIMINARY STATEMENT

Above all else, this case is about fairness and how to fairly, justly, and reasonably treat an unexpected, mammoth $650 million annual windfall of customer tax overpayments. The Commission has a statutory obligation to set fair, just, and reasonable cost-based rates and to enforce the policies of its 2016 Order.[1] This case is not about the misplaced application of private contract interpretation and enforcement. The case is also about the integrity of the Commission's cost-based regulation of electric utilities ***in the public interest***. No utility is above the law. No utility is allowed to regulate itself or to evade the Commission's active supervision of its service inside its monopoly service territory. FPL's blatant disregard of the Commission's policies and the 2016 Settlement Order should be rejected and the Commission must initiate a rate case in Docket No. 20170224-EI, with the resulting $540 million in TCJA tax savings-fueled overearnings

[1] The defined terms in the Initial Brief are continued in this brief and will not be restated here. The 2016 Order expressly adopts and incorporates the 2016 Settlement. The arguments of the Citizens in their Initial Brief are carried forward, adopted, and incorporated herein by reference. To the extent that FPL interjects hearsay or extra-record "evidence" into the record, the Citizens object to the Commission considering or relying on such information.

as the triggering event. (*See* Appendix, Exhibit 8, Attachment 1 to FPL's Rate of Return Surveillance Report for December 2018.)

SUMMARY OF ARGUMENT IN REPLY

The OPC categorically rejects FPL's Initial Brief as an artificial characterization of the 2016 Order. Further, the OPC reaffirms the evidence-based analysis of the ARM and SCRM policies set forth in our Initial Brief. The Commission must interpret and follow its own order as it was intended to operate and was approved as being in the public interest. This means it must rely on the sworn evidence offered to it by FPL as inducement to the Commission to adopt the policies contained in the 2016 Order. It should reject FPL's inapposite, contorted, and self-serving *post hoc* rationalization of the order provisions described in its brief. Contract law has no place or use in this case.

The use of the SCRM policy was mandatory. FPL said under oath it would use the SCRM for storm recovery. It represented in a legal pleading it would use the SCRM for storm recovery. The Commission believed FPL and ordered the Company to use the SCRM for storm recovery. Notwithstanding the Commission's directive, FPL did not use the SCRM for Hurricane Irma storm recovery and that failure alone violated the 2016 Order. Likewise, the set aside that was created with the ARM policy by the same order was expressly barred from being used as a source for payment for storm recovery. Rather, at hearing FPL swore to the Commission that the Reserve Amount would be used only for items caused by risks affecting FPL's earnings. Under the mandatory SCRM policy, storm cost recovery was not earnings-affecting. Earnings and the effect of storm cost recovery on the Company's earnings were clearly divorced from each other, while the ARM's sole purpose was to manage issues affecting earnings. Nevertheless, FPL did not live up to its commitment, ignored the regulator, and used the customer-provided Reserve Amount to

pay for storm recovery.

FPL's actions to avoid the required process for storm recovery as well as ignoring the established and intended purposes of the Reserve Amount (which Issue 18 imprecisely labels as the "Amortization Reserve")[2] were undertaken solely to seize control of the customers' income tax overpayments in a way that FPL hopes will insure its customers will never see a return of their $650 million in annual overcharges. The Commission is undoubtedly aware that FPL had indicated it was intending to file an SCRM petition in the December 27-29, 2017, timeframe, contemporaneous with Duke and Tampa Electric who had similar SCRM policy provisions in their comprehensive settlement orders. Those companies filed their SCRM petitions on December 28, 2017. FPL never showed up at the clerk's office. The logical implication from the change of plans was that the signing of the TCJA on December 22, 2017, gave FPL a very narrow window within which to circumvent the policies, mandates, and prohibitions of the 2016 Order and seize the tax savings for itself. FPL apparently originally intended to follow the Commission's order and policies but abruptly changed its mind when it devised the self-help strategy of helping itself to the enticing and irresistible pot of $650 million in tax overpayments belonging to its customers.

ARGUMENT IN REPLY

This is not a case that is governed by arcane contract interpretation in case law. The 2016 Order is not a contract. It is a Commission rate-setting order based on a settlement that was initially crafted by parties to the 2016 rate case (and three associated dockets) as a full resolution of those

[2] Despite the OPC's concurrence in the wording of Issue 18, the issue language cannot establish a substantive modification of the nature of the Reserve Amount or the Florida Supreme Court's ruling that Commission orders adopting rate case settlements are incorporated in the orders and thus become the agency's official policy. The true standard is not what the "settlement" allows but what the ***entire*** 2016 Order allows with respect to the defined term of "Reserve Amount." When the OPC uses the term "Reserve Amount," it intends to address the same concept as the term "amortization reserve" used in the issue wording.

cases. This settlement was adopted in whole by the Commission as its order and policy after two evidentiary hearings and the consideration of the evidence adduced at those hearings.

FPL broadly claims its unauthorized action in raiding the remaining 92% of the Reserve Amount meant that its customers did not have to pay for the Hurricane Irma damages. This claim is absurd. First, the Reserve Amount was specifically set aside for the purpose of navigating the ups and down of earning risks over a four-year period. Further, as FPL well knows, its customers did in fact pay for the storm and FPL is actually trying to saddle future customers with the costs of a 2017 storm when Commission policy requires those costs to be recovered via a contemporaneous surcharge. The Commission should not overlook the impacts on intergenerational cost shifts like the one FPL is attempting. FPL also fails to mention that the source of the payment for Hurricane Irma costs was an amount carved out of a reserve of customer-provided funds representing past and future payment of depreciation expenses. The Reserve Amount FPL extinguished was a subset of that reserve which represents estimated customer ***overpayment*** of those depreciation expenses. Having illicitly raided that special use set aside, FPL now proposes to force its customers to replace the Reserve Amount with additional customer funds representing an ***overpaymen***t of federal corporate income taxes that FPL is collecting in its current rates and will continue to collect but will never have to pay to the U.S. Treasury. This is wrong and the Commission should exercise its regulatory authority to stop it.

The OPC asks the Commission to enforce the 2016 Order pursuant to the plain language and the intent expressed through approved and implemented orders. The Citizens urge the Commission to focus its attention on the fundamental error that was made when FPL deviated from its own Commission-approved course of conduct and violated the 2016 Order and policies by not utilizing the SCRM to contemporaneously recover storm costs. Without this initial

violation, FPL would instead be before this Commission with an intact Reserve Amount, a temporary surcharge in place, and actual earnings would likely be above 11.6% since the Reserve Amount would almost certainly be at its maximum level.[3] Overearnings would be the inevitable outcome. FPL's unauthorized scheme is clearly designed to avoid this result with the added benefit of avoiding the Commission's oversight of an annual revenue requirement windfall that is greater than any single annual rate increase ever awarded by the Commission.

1. The 2016 Settlement and the 2016 Order are a single comprehensive rate making policy determination of the Florida Public Service Commission; they are not a contract.

FPL seeks to convince the Commission that the 2016 Settlement ought to be treated as a private contract between parties and that principles of contract construction should be used to twist the document to validate the path that FPL unilaterally chose to take. This approach has no merit. FPL seeks to divert the Commission's focus from the sworn statements it made to induce the Commission to adopt—in the public interest—the policies that are at the heart of this case.

When the Commission adopted the 2016 Settlement and incorporated it by reference into the 2016 Order, the provisions of the 2016 Settlement became the policy of the 2016 Order. The Florida Supreme Court has made this crystal clear. In rejecting a contention made by the Commission that a similar settlement between the OPC and Florida Public Utilities Company was a private contract that the Commission was not obligated to enforce, the Court stated that "the Commission's Order incorporated by reference the entire settlement agreement and thereby adopted its terms as its policy." *Citizens of Fla. v. Graham,* 213 So. 3d 703, 706 (Fla. 2017).

The concept that "parole evidence" or "extrinsic evidence" should be disregarded has no

[3] If a negotiated, temporary tax savings offset were to have been put in place, the recovery would have been completed by the end of 2019 and overearnings would require rates to be reduced pursuant to the Petition in Docket No. 20180224-EI. This did not occur.

place in this present analysis.[4] The Commission is construing and applying its own order and policies. Accordingly, the Commission may only consider, and ***must*** give full weight to, the testimony upon which it relied to incorporate the 2016 Settlement into the 2016 Order and the policies therein. The Commission cannot now ignore the sworn, competent, substantial evidence it received in two evidentiary proceedings, evidence that it told the Florida Supreme Court it relied on to make the public interest determination and that the Court pointed to in affirming the 2016 Order. *Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018).[5] If, in 2019, the Commission abandons the fundamental building blocks of its 2016 public interest finding, it could seriously undermine the credibility of the very hearings the Court relied upon in its opinion. This could further place the current Commission in the precarious position of having provided the Court a completely different rationale in support of its public interest finding back in 2018 when *Sierra Club* was argued and decided.

2. <u>The Reserve Amount is not an "account;" but instead is a discrete allowance that was set aside for a specific purpose and then disappeared once it was used up for an unauthorized purpose</u>.

[4] OPC strenuously objects to FPL's efforts (Initial Brief at 18-19, for example) to resort to extra-record, after-the-fact allegations about the nature of certain conversations that OPC notes actually occurred in early February 2018. First, the language that appears to be quoted from a private, privileged conversation environment with no visible means of audio recording is not a part of the evidentiary record. Second, the representation by FPL omits that the conversation that the "excerpt" comes from occurred after the accounting and public announcement was made and final on January 16.Third, FPL does not state the full context of the conversation or demonstrate how it or anyone else could have relied on the incomplete *post hoc* statement. Fourth, the OPC will not breach its ethical and contractual obligations to dignify this red herring with the complete context of the conversation from which it is misleadingly excerpted. OPC categorically rejects that we were ever asked to opine on FPL's fully implemented course of action or put on notice that anyone was relying on snippets of such privileged conversations that were part of a long-term confidential process.

[5] In upholding the 2016 Order, the Court stated that "the Commission was not required to address the prudence of the Peaker Project because it was properly reviewing the settlement agreement—as a whole—under its public interest standard. Similar to the order in *Citizens I*, the Final Order in *Sierra Club* discussed the major elements of the settlement agreement and explained why it was in the public interest." *Sierra Club* 243 So. 3d at 914.

In its Initial Brief, FPL subtly attempts to insert the word "account" into the 2016 Order. *See* FPL Initial Brief at page 3, "The Agreement established a "Reserve" ***account*** with an initial balance totaling $1.25 billion. . . " (Emphasis added.) While this insertion may seem innocuous, it is a crucial and fundamental error. There was no "account" established in the order. The word "account" does not appear in the ARM policy context in the 2016 Settlement or the 2016 Order. The use of the quotation marks around the term "Reserve" juxtaposed to the word **account—** without quotes—reveals this apparently purposeful subterfuge. Without the concept of an account, FPL's argument that the tax overpayments can be stuffed into a reservoir for its own use crumbles. The real "Reserve Amount" was a specially identified set aside of customer-provided dollars to be used for a specific purpose. It was not established ***by the 2016 Order*** as an evergreen account on the balance sheet. An "amount" that is granted for a specific purpose exists only as long as it has not been amortized to zero. While an ***account*** can have a debit balance, no such concept of a negative amount exists with a specially created "amount" or set aside. The 2016 Order authorizes amortization of the ***amount***, not of a zero or negative number.

The citation in FPL's Initial Brief at 3-4 about debits and credits provides no support for its argument. The very allowance that FPL squandered on the storm naturally was expected to fluctuate up and down. Debits and credits to the level of the Reserve Amount were contemplated and the cited language is a recordkeeping and disclosure proviso, not a substantive grant of authority. The cited passage was the first time the ARM policy had such a recordkeeping and reporting requirement and was negotiated by the parties and adopted by the Commission in 2016. The Commission is well aware of the fluctuating nature of the policy operation and also of the faithful implementation and stewardship of that amount by Duke, Gulf Power and FPL prior to

2017.[6] If FPL unilaterally created a subaccount or ledger to keep track of the allowance it was given to manage its business for the four-year period in aid of performing its recordkeeping and reporting duties, that internal action does not change the nature of the amount that was specifically approved by the Commission order.

FPL further claims that the amortization amount cannot be extinguished. This argument simply ignores the fact that customer funds were segregated from the portion of the depreciation reserve that represents the customers' overpayments of depreciation expense. Regardless of the verb that is used (extinguished, used up, wiped out, eliminated, spent, etc.), the Reserve Amount was ***gone*** after FPL made a $1.149 billion debit and zeroed it out in December 2017.[7] The Reserve Amount was specifically established from customer overpayments of depreciation expense as a type of set aside that could be used by FPL to manage its business through fluctuations in earnings. This is what FPL told the Commission it would be used for. It was further specifically walled off from being used as an offset to storm costs. FPL's diversionary contract arguments in effect mean that it believes it can mislead the Commission in sworn testimony about the intended purpose of the Reserve Amount so long as it falls back on some sterile contract interpretation that bears no resemblance to the testimony the Company gave in 2016.

FPL's hope is that the Commission does not notice it is being misled. It hopes the

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[6] *In re*: Petition for increase in rates by Progress Energy Florida, Inc., Docket No. 090079-EI, Order No. PSC-2010-0398-S-EI (F.P.S.C., June 18, 2010); *In re*: Petition for limited proceeding to approve stipulation and settlement agreement by Progress Energy Florida, Inc., Docket No. 120022-EI, Order No. PSC-2012-0104-FOF-EI (F.P.S.C., 2012); *In re*: Petition for rate increase by Gulf Power Company, Docket No. 130140-EI, Order No. PSC-2013-0670-S-EI (F.P.S.C., Dec. 19, 2013); *In re* Petition for Increase in Rates by Florida Power & Light Company, Docket No. 20080677-EI, Order No. PSC-2011-0089-S-EI (F.P.S.C., Feb. 1, 2011); *In re* Petition for Increase in Rates by Florida Power & Light Co., Docket No. 20120015-EI, Order No. PSC-2013-0023-S-EI (F.P.S.C., Jan. 14, 2013).

[7] It is irrefutable that had the original amount of $1.25 billion been available at that time, it too would have been zeroed out since $1.25 billion is less than $1.321 billion.

Commission prioritizes what bills look like in the short-term over discharging its obligation to establish fair, just, and reasonable, cost-based rates over the long-term. Or better yet, FPL hopes the Commission is willing to look the other way while it regulates itself even as other utilities follow the policies established in the settlement orders that apply to them. FPL hopes to lead the Commission to the fiction that the 2016 Settlement is simply a private contract, separate and distinct from the 2016 Order incorporating it, and that arcane contract interpretation rationalizes a process that was not contemplated by the parties or the Commission when the rate case was settled in the public interest.

CONCLUSION

$650 million of annual surplus representing overpaid taxes is not something that can be swept under FPL's rug (and into NextEra's coffers) by this Commission. By a byzantine and unauthorized scheme, FPL has positioned itself to seize these dollars for itself. Without asking for permission or for a waiver, FPL ignored the required policy and violated the 2016 Order by resorting to crafting its own hybrid, front-end cost recovery policy using a source of Hurricane Irma cost recovery payment that was specifically prohibited in the 2016 Order. In doing so, FPL abused the limited and highly specific nature of the upfront recovery process embodied in the SCRM by seizing $1.149 billion of customer funds to give itself immediate recovery of most of the cost of Hurricane Irma. What FPL was actually doing was clearing out the Reserve Amount under its mistaken assumption that the Reserve Amount and the ARM would be a convenient vehicle to store the TCJA savings for its exclusive future use. FPL was not authorized to do this by the 2016 Order. That order makes no provision for this type of self-help. The house of cards collapses once the improper and unauthorized bypass of the SCRM is established. While FPL could potentially be subject to sanction for violating the Commission's order on a massive scale,

the point here is that the damage has been done and the public statements about a $1.149 million transaction cannot be undone. Having forced customers to pay for Hurricane Irma damages using the depreciation surplus Reserve Amount, FPL should not be further rewarded for this misdeed with an annual $650 million bonus. The tax savings are yielding $540 million in excess profit above the already generous 11.6% ROE ceiling. This excessive profit— by definition—means that FPL's rates are not cost-based and are excessive, unreasonable, and unlawful. Therefore, the Commission should order that the tax savings be recorded as a credit to income, without transfer to a depreciation reserve account and take up the Petition filed in Docket 20180224-EI.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Citizen's Initial Brief has been furnished by electronic mail on this 8th day of March, 2019, to the following:

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