BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Petition for rate increase by Florida Power & Light Company.	DOCKET NO. 20210015-EI FILED: October 11, 2021

CITIZENS' SETTLEMENT POST-HEARING BRIEF

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to the Order Establishing Procedure in this docket, Order No. PSC-2021-0116-PCO-EI, issued March 24, 2021, and modifying Order No. PSC-2021-0314-PCO-EI issued August 20, 2021, hereby submit this Post Hearing Brief.

STATEMENT OF BASIC POSITION

On August 10, 2021, OPC and Florida Power and Light (FPL) along with the other original signatories filed a Joint Motion for Approval of Settlement with the Stipulation and Settlement Agreement (Settlement) attached which resolves all of the issues in the base rate case, Docket No. 20210015-EI. FPL filed its petition, Minimum Filing Requirements (MFRs), Testimony and Exhibits on March 12, 2021. The Company proposed a four year rate plan. FPL asked to establish base rates that would allow them to earn an additional $1,108 million starting January 1, 2022, which was later updated to $1,075 million. TR 50, Order No. PSC-2021-0302-EI, issued August 10, 2021, in Docket 20210015-EI, *In Re: Petition for Rate Increase by Florida Power & Light*, at p. 10 (Prehearing Order). The Company also petitioned the Commission to allow them to earn an extra $607 million starting January 1, 2023, later updated to $605 million. TR 51, Prehearing Order at p. 10. FPL asked for approximately $140 million per year for Solar Base Rate Adjustments (SOBRAs) in 2024 and 2025. TR 51, 1007. This additional revenue was based on FPL's request for an 11% Return on Equity (ROE) with a 50 basis point adder and its current 59.6% equity. TR

2251, 2287-2295. The Company's four year plan also included additional conditions including a Reserve Amortization Surplus Mechanism (RSAM), a Storm Cost Recovery Mechanism (SCRM), a tax adjustment mechanism, and accelerated amortization of unprotected Excess Accumulated Deferred Income Tax (EADIT) from the 2017 tax act. TR 2252-2253. FPL also asked to consolidate the base rates of FPL and Gulf using a five year transition credit. TR 1002-1007.

OPC conducted extensive discovery to elucidate the costs associated with the Company's requests and has filed witnesses pre-filed testimonies and exhibits in this docket. As a result of OPC's review including OPC expert witnesses testimonies, the conducting of and reviewing of the extensive discovery in this docket, and reviewing all other testimonies filed in this docket, OPC believes that the proposed Settlement filed in this docket is in the best interest of all of FPL's customers.

First, the Settlement reduces FPL's overall request by $1,667 million over the settlement period. FPL's requested ROE was 11% with a 50 basis point adder with a range of 10.5% to 12.5%. TR 48-49. Under the Settlement, FPL's request was reduced to 10.6% with a 9.7%-11.7% range. H.E. 483 at p. 3. The Parties to the stipulation agreed that FPL would be allowed a modest 20 basis points increase to 10.8% with a range of 9.8% to 11.8%, only if the US 30 year Treasury Bond Yield Rate increases for 6 consecutive months by 50 basis point. H.E. 483 at pp. 3-4. Along with this element, the Parties agreed to continue the RSAM with a $200 million limitation on its use in the first year and a 50%-50% split to the storm reserve and to offset capital recovery assets with any excess funds over the depreciation set amount. H.E. 483 at p. 20-23. OPC believes that the RSAM will help maintain the four year - potentially five year - stay out provision, thereby stabilizing base rates for FPL's ratepayers over this timeframe. H.E. 483 at pp. 3, 23.

Many of these provisions are the same types of provisions that were in the 2016 Settlement that the Commission approved including the RSAM, SCRM, stay-out provision, the limitation on additional base rate increases provision, asset optimization mechanism and SOBRAs. H.E. 483. The Settlement also includes some new provisions including a tax provision which will pass through any tax changes including decreases, additional Solar Together megawatts, and several pilot programs related to hydrogen gas production and use, solar installation, and electric vehicles. H.E. 483.

The Settlement also provides for consolidation of FPL and Gulf rates using a transition rider over five years. H.E. 483 at p 2. The rates developed under this Settlement based on the negotiated cost service comply with the Commission's long standing policy that no rate or revenue class receives (nor shall receive) an increase greater than 1.5 times the system average percentage increase in total and no class receives (nor shall receive) a decrease in rates. H.E. 483 at pp. 6-7. Parity is when the Rate of Return (ROR) generated by a rate class is the same as the overall FPL ROR or system average ROR. Under the Settlement rates, all the major rate classes are moving closer to parity. H.E. 470.

OPC believes that the Settlement when taken as a whole is in the public interest. Many of the elements of the Settlement are specifically beneficial to FPL's ratepayers including the overall reduction in the revenue requirement, a four year stay-out provision, additional solar projects, and a five year transition period for FPL and Gulf base rate consolidation. Because of these features, as well others contained in this Settlement, OPC believes that this Commission should approve this Settlement as being in the public interest resulting in fair, just, and reasonable rates.

POSITIONS AND ARGUMENT ON DISPUTED ISSUES

ISSUE 1: Does the Commission have the statutory authority to grant FPL's requested storm cost recovery mechanism as part of the Stipulation and Settlement Agreement?

OPC: Yes, the Commission has the statutory authority to grant a SCRM as part of a Settlement per Section 120.57(4), Fla. Stat., "informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Nothing in precedent or the language of the statute suggests that the general rule, where the legal system favors settlements, does not also apply in rate-setting cases. *Sierra Club v. Brown*, 243 So.3d 903, 909 (Fla. 2018).

ARGUMENT: FPL and a group of Intervenors, including OPC who is the statutory representative of all FPL's customers, have entered into a non-unanimous Settlement which resolves all pending issues in the base rate case and includes a SCRM provision. In this case, the Commission held public hearings on both the base rate case and the non-unanimous Settlement on September 20, 2021.

Under Florida law, parties whose substantial interests are affected by an agency's actions and who raise issues of material dispute are guaranteed due process. Sections 120.569 and 120.57(1), Florida Statutes, require that an agency like the Commission which is subject to the Florida Administrative Procedure Act must afford an opportunity for parties to respond, to present evidence and argument, and to conduct cross-examination before it enters findings of fact and conclusions of law. In addition, before the Commission sets rates, it must comply with the provisions of Chapter 366, Florida Statutes. Chapter 366 provides, among other things, that actions pursuant to the file-and-suspend ratemaking provisions must provide for a public hearing. Sections 366.06(2) and 366.07, Florida Statutes. Failure to comply with these statutory provisions would subject the Commission's

order to remand on appeal. Sections 120.68(7)(a) and 120.68(7)(b), Florida Statutes.

However, parties have the authority to agree to forego their rights afforded under the statutory scheme. Moreover, the Citizens contend that stipulation is the appropriate way for a party to negotiate away the rights that these statutory provisions create and protect. While the Commission may approve a settlement wherein parties forego these statutory rights, it does not necessarily have the authority to require the parties to forego these rights.

Per Section 120.57(4), Florida Statutes, "[u]nless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Quoting the *Citizen I*, the Court stated that "[t]he legal system favors the settlement of disputes by mutual agreement between contending parties' and '[t]his general rule applies with equal force in utility service agreements.' Nothing in our precedent or the language of the statute suggests that this general rule does not also apply in rate-setting cases." See, *Sierra Club v. Brown*, 243 So.3d 903, 909 (Fla. 2018), quoting *Citizens of State v. Fla. Pub. Serv. Comm'n* (*Citizens I*), 146 So.3d 1143, 1155 (Fla. 2014).

The Court in *Sierra Club*, noted that the standard used by the Commission in a rate case would be different if the Commission was making the determinations in the base rate case. For example, the Commission would apply a prudence standard of review for Peaker Projects in a base rate case in evaluating these projects on an individual issue basis in the absence of a settlement agreement. *Id.* at pp. 908-909. The Court stated that "[w]hen presented with a settlement

agreement, however, the Commission's review shifts to the public interest standard: whether the agreement- as a whole - resolved all the issues, 'established rates that were just, reasonable, and fair and the agreement is in the public interest." *Id.* at p. 909.

Thus, the standard used by the Commission in a rate case to determine the appropriateness of a specific cost is different than if Commission is making an evaluation of a settlement agreement. See, *Sierra Club* at pp. 908-909. When the Commission makes its evaluation of settlements, it does so in the context of evaluating the agreement as a whole, not on an individual issue basis, and determines if the established rates are just, reasonable, and fair and the agreement is in the public interest. See, *Sierra Club* at pp. 908-909. Whereas, decisions made by the Commission on individual issues in a rate case absent a settlement are governed by prior Commission and case law precedent on those issues. Moreover, the Commission does not make the same type of evaluation of the specific elements of a settlement because the specific elements are subject to the give-and-take of negotiation between the Parties that do not lend themselves to such evaluation. OPC has agreed to the terms of this Settlement in the context of a give-and-take global compromise. As a general matter, each party agreed to accept individual provisions, which it would otherwise contest because each party believed the value it received through its participation in the entire stipulation more than offset the concessions it made in individual terms.

Specifically, the Settlement Parties agreed to a Storm Cost Recovery Mechanism – SCRM - provision establishing certain procedural and substantive

storm cost-related terms, to be effective for a finite period of time. The terms to which the Parties have agreed to enable FPL, among other things, to begin collecting storm-related costs within 60 days of filing a petition, and to do so without reference to its ability to absorb costs within its earnings, regardless of the magnitude of its earnings levels. H.E. 483 pp. 9-10. The Settlement also allows FPL to begin collecting a charge based on an amount up to $4 per 1,000 KWh on a monthly residential bill for a named tropical storm beginning 60 days after filing a petition for recovery with the Commission. H.E. 483 at pp. 9-10. This interim recovery period will last up to 12 months. If costs related to named storms exceed $800 million in any one year, the Company can ask the Commission to increase the $4 per 1,000 KWh in a subsequent year or years as determined by the Commission. H.E. 483 pp. 9-10. The Settlement also allows FPL to replenish the storm reserve to the then-current level but in no event less than $150 million. H.E. 483 pp. 9-10.

This SCRM provision has been approved as part of FPL's last three settlements, of which OPC was a party to the 2016 Settlement. TR 2295, Order No. PSC-16-0560-AS-EI, issued December 15, 2016, in Docket Nos. 160021-EI, 160061-EI, 160062-EI, and Docket No. 160088-EI (2016 Settlement Order). The SCRM was first agreed to by stipulation in a 2010 settlement between Progress Energy Florida (now Duke Energy Florida), OPC, and other intervenors and subsequently approved by the Commission. See, Order No. PSC-10-0398-S-EI, issued June 18, 2010 in Docket No. 20090079-EI, In re: Petition for Increase in Rates by Progress Energy Florida, Inc., et. al. (2010 Duke Settlement Order). Thereafter, the mechanism was adopted by FPL in its settlement with the same

Duke intervenor parties including OPC plus the SFHHA and approved by the Commission in Order No. PSC-11-0089-S-EI in Docket Nos. 08677-EI, and 090130-EI. The SCRM was adopted in virtually identical verbiage in the 2012 agreement adopted by the Commission in Order No. PSC-13-0023-S-EI, issued January 14, 2013, in Docket No. 120015-EI (2012 Settlement Order). Thus, as in prior FPL settlements, the Commission should approve the SCRM as an element of this Settlement, that when reviewed as a whole Settlement is in the public interest, and results in rates that are fair, just, and reasonable.

ISSUE 2: **Does the Commission have the statutory authority to approve FPL's requested Reserve Surplus Amortization Mechanism (RSAM) as part of the Stipulation and Settlement Agreement?**

OPC: Yes, the Commission has the statutory authority to grant a RSAM as part of a Settlement per Section 120.57(4), Fla. Stat., "informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Nothing in precedent or the language of the statute suggests that the general rule, where the legal system favors settlements, does not also apply in rate-setting cases. *Sierra Club v. Brown*, 243 So.3d 903, 908-909 (Fla. 2018).

AGRUMENT: As discussed above, FPL and a group of Intervenors, including OPC who is the statutory representative of all FPL's customers, have entered into a non-unanimous Settlement which resolves all pending issues in the base rate case and contains a RSAM provision. In this case, the Commission held public hearings on both the base rate case and the non-unanimous Settlement on September 20, 2021.

As noted in the previous Issue, under Chapter 120, Florida Statutes, parties whose substantial interest are affected by an agency's actions are guaranteed due process including an opportunity for parties to respond, to present evidence and argument, and to conduct cross-examination before it enters findings of fact and

conclusions of law. See, Sections 120.569 and 120.57(1), Florida Statutes. Moreover, before setting rates pursuant to the file-and-suspend ratemaking provisions, the Commission must provide for a public hearing. See, Sections 366.06(2) and 366.07, Florida Statutes. Failure to comply with these statutory provisions would subject the Commission's order to remand on appeal. Sections 120.68(7)(a) and 120.68(7)(b), Florida Statutes.

The Parties have the authority to agree to forego these rights afforded under the statutory scheme. Moreover, the Citizens contend that stipulation is the appropriate way for a party to negotiate away the rights that these statutory provisions create and protect. While the Commission may approve a settlement wherein parties forego these statutory rights, it does not necessarily have the authority to require the parties to forego these rights.

Per Section 120.57(4), Fla. Stat., "[u]nless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Quoting the *Citizen I*, the Court stated that "[t]he legal system favors the settlement of disputes by mutual agreement between contending parties' and '[t]his general rule applies with equal force in utility service agreements.' Nothing in our precedent or the language of the statute suggests that this general rule does not also apply in rate-setting cases." See, *Sierra Club* at p. 909.

The Court in *Sierra Club*, noted that the standard used by the Commission in a rate case would be different if the Commission was making the determinations in the base rate case. For example, the Commission would apply a prudence standard of review for Peaker Projects in a base rate case if evaluating on an

individual issue basis absent a settlement agreement. *Id.* at pp. 908-909. The Court stated that "[w]hen presented with a settlement agreement, however, the Commission's review shifts to the public interest standard: whether the agreement-as a whole-resolved all the issues, 'established rates that were just, reasonable, and fair and the agreement is in the public interest." *Id.* at p. 909.

Thus, the standard used by the Commission in a rate case to determine the appropriateness of a specific cost is different than if Commission is making an evaluation of a settlement agreement. See, *Sierra Club* at pp. 908-909. When the Commission makes its evaluation of settlements, it does so in the context of evaluating the agreement as a whole, not on an individual issue basis, and determines if the established rates are just, reasonable, and fair and the agreement is in the public interest. Whereas, decisions made by the Commission on individual issues in a rate case absent a settlement are governed by prior Commission and case law precedent on those issues. Moreover, the Commission does not make the same type of evaluation of the specific elements of a settlement because the specific elements are subject to the give-and-take of negotiation between the Parties that do not lend themselves to such evaluation. OPC has agreed to the terms of this Settlement in the context of a give-and-take global compromise. As a general matter, each party agreed to accept individual provisions, which it would otherwise contest because each party believed the value it received through its participation in the entire stipulation more than offset the concessions it made in individual terms.

In this Settlement, the Parties have specifically agreed to continue the Reserve Surplus Amortization Mechanism - RSAM. H.E. 483 at pp. 20-23. Under the Settlement, FPL is allowed to manage its earnings using the $1.45 billion depreciation balance remaining at the end of 2021- i.e. reserve surplus. The Commission has approved the RSAM – the operation of which has evolved over the past several settlements. See, Order No. PSC-11-0089-S-EI, issued February 1, 2011, in Dockets Nos. 080677-EI, and 090130-EI (2010 Settlement Order), 2012 Settlement Order, and 2016 Settlement Order. The Settlement limits the use of the RSAM requiring that credits and debits be used to ensure earnings do not exceed the top of the authorized range and to maintain earning at least to the bottom of the authorized range. H.E. 483 at p. 20-22.

The RSAM has also some additional provisions that benefit customers. First, in the first year of the RSAM, FPL is limited to using only $200 million by the end of 2022. Second, any excess depreciation reserve amount above the $346 million at the end of 2021 will be booked 50% to offset capital recovery regulatory assets and 50% to increase the storm reserve as an unfunded amount. H.E. at pp. 20-21. Third, if during the term of the Settlement the reserve amount reaches $1.45 billion and the Company still has excess funds, then these excess funds will be booked 50% to offset capital recovery regulatory assets and 50% to increase the storm reserve as an unfunded amount. H.E. at pp. 20-21.

RSAM-type of provisions (which have evolved over time) have been part of FPL's last three settlements, of which OPC was a party to the 2010 and 2016 Settlements. TR 2298, See, 2010 Settlement Order, 2012 Settlement Order, and

2016 Settlement Order. This Commission has approved the RSAM-type provisions as part of prior global settlements that were the subject of give-and-take of the negotiating parties. See, 2010 Settlement Order, 2012 Settlement Order, and 2016 Settlement Order. Thus, as in prior FPL settlements, the Commission should approve the RSAM as an element of this Settlement, that when reviewed as a whole Settlement is in the public interest, and results in rates that are fair, just, and reasonable.

ISSUE 3: **Does the Commission have the statutory authority to approve FPL's requested Solar Base Rate Adjustment mechanism for 2024 and 2025 as part of the Stipulation and Settlement Agreement?**

OPC: Yes, the Commission has the statutory authority to grant a SOBRA as part of a Settlement per Section 120.57(4), Fla. Stat., "informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Nothing in precedent or the language of the statute suggests that the general rule, where the legal system favors settlements, does not also apply in rate-setting cases. *Sierra Club v. Brown*, 243 So.3d 903, 908-909 (Fla. 2018).

AGRUMENT: As discussed in the prior issues, FPL and OPC and a group of Intervenors have entered into a non-unanimous Settlement which resolves all pending issues in the base rate case and contains SOBRAs. In this case, the Commission held public hearings on both the base rate case and the non-unanimous Settlement on September 20, 2021.

As discuss previously, parties whose substantial interest are affected are entitled to a public hearing before the Commission sets rates. See, Sections 120.569 and 120.57(1) and Sections 366.06(2) and 366.07, Florida Statutes. However, parties can negotiate away these rights. Per Section 120.57(4), Fla. Stat., "[u]nless precluded by law, informal disposition may be made of any proceeding by

stipulation, agreed settlement, or consent order." Quoting the *Citizen I*, the Court stated that "[t]he legal system favors the settlement of disputes by mutual agreement between contending parties' and '[t]his general rule applies with equal force in utility service agreements.' Nothing in our precedent or the language of the statute suggests that this general rule does not also apply in rate-setting cases." See, *Sierra Club* at p. 909.

The Court in *Sierra Club*, noted that the standard used by the Commission in a rate case would be different if the Commission was making the determinations in the base rate case. For example, the Commission would apply a prudence standard of review for Peaker Projects in a base rate case if evaluating on an individual issue basis absent a settlement agreement. *Id.* at pp. 908-909. The Court stated that "[w]hen presented with a settlement agreement, however, the Commission's review shifts to the public interest standard: whether the agreement-as a whole-resolved all the issues, 'established rates that were just, reasonable, and fair and the agreement is in the public interest." *Id.* at p. 909.

OPC has agreed to the terms of this Settlement in the context of a give-and-take global compromise. In general, each party agreed to accept individual provisions, which it would otherwise contest because each party believed the value it received through its participation in the entire stipulation more than offset the concessions it made in individual terms.

In this Settlement, the Settling Parties have agreed to continue the Solar Base Rate Adjustment (SOBRAs). H.E. 483 at pp. 11-16. Under this Settlement, the SOBRAs operate essentially the same as they have in past settlements where

the Commission has approved them. See, 2012 Settlement Order and 2016 Settlement Order. Like prior settlements that have been approved by this Commission, the Company is allowed to add additional megawatts of solar through the SOBRAs during the term of Settlement so long as the solar comes in under a cost cap – in this case up to 894 MW for each year 2024 and 2025 so long as it is under $1,250 per kilowatt alternating current (kWac).

This SOBRA also has some additional provisions that benefit customers. First, this SOBRA provides an incentive for the Company to come under the cost cap and split the savings with customers. H.E. 483 at p. 14-15. Second, this SOBRA has a provision that allows for solar plus battery storage so long as it is cost effective. H.E. 483 at p. 13.

This SOBRA-type provision was part of FPL's prior 2016 Settlement, of which OPC was a party. See, 2016 Settlement Order. This Commission has approved the SOBRA, and similar type of Generation Base Rate Adjustment (GBRA) mechanism as part of prior global settlements that were the subject of give-and-take of the negotiating Parties. See, 2010 Settlement Order and 2016 Settlement Order. Thus, as in prior FPL settlements, the Commission should approve the SOBRAs as an element of this Settlement, that when reviewed as a whole Settlement is in the public interest, and results in rates that are fair, just, and reasonable.

<u>ISSUE 4</u>: Does the Commission have the statutory authority to adjust FPL's authorized return on equity based on FPL's performance as part of the Stipulation and Settlement Agreement?

OPC: Since the Settlement submitted for approval does not contain language for a performance adder or enhancement in the ROE, OPC declines to opine on it.

ARGUMENT: As discussed in the prior issues, FPL and OPC and a group of Intervenors have entered into a non-unanimous Settlement which resolves all pending issues in the base rate case. In this case, the Commission held public hearings on both the base rate case and the non-unanimous Settlement on September 20, 2021.

FPL's requested ROE was 11% with a 50 basis point performance adder and a range of 10.5% to 12.5%. TR 48-49. Paragraph 3 (a) of the Settlement states: "FPL's authorized rate of return on common equity ("ROE") shall be a range of 9.7% to 11.7% and shall be used for all purposes. All rates, including those established in clause proceedings during the Term, shall be set using a 10.6% ROE." H.E. 483 at p. 3. The Settlement provision addressing the ROE does not contain any language on a performance adder or enhancement to the ROE for performance. OPC agreed to the terms of this Settlement in the context of a give-and-take global compromise, in which each party agreed to accept individual provisions, which it would otherwise contest because each party believed the value it received through its participation in the entire stipulation more than offset the concessions it made in individual terms. Since the Settlement submitted for approval does not contain language for a performance adder or enhancement in the ROE, OPC declines to opine on it.

ISSUE 5: Does the Commission have the statutory authority to include non-electric transactions in an asset optimization incentive mechanism as part of the Stipulation and Settlement Agreement?

OPC: Yes, the Commission has the statutory authority to grant this asset optimization incentive program as part of a Settlement per Section 120.57(4), Fla. Stat.,

"informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Nothing in precedent or the language of the statute suggests that the general rule, where the legal system favors settlements, does not also apply in rate-setting cases. *Sierra Club v. Brown*, 243 So.3d 903, 908-909 (Fla. 2018).

AGRUMENT: As discussed in the prior issues, FPL and OPC and a group of Intervenors have entered into a non-unanimous Settlement which resolves all pending issues in the base rate case and contains a provision to continue and expand FPL's current asset optimization program. In this case, the Commission held public hearings on both the base rate case and the non-unanimous Settlement on September 20, 2021.

As discuss previously, parties whose substantial interest are affected are entitled to a public hearing before the Commission sets rates. See, Sections 120.569 and 120.57(1) and Sections 366.06(2) and 366.07, Florida Statutes. However, parties can negotiate away these rights. Per Section 120.57(4), Fla. Stat., "[u]nless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Quoting the *Citizen I*, the Court stated that "[t]he legal system favors the settlement of disputes by mutual agreement between contending parties' and '[t]his general rule applies with equal force in utility service agreements.' Nothing in our precedent or the language of the statute suggests that this general rule does not also apply in rate-setting cases." See, *Sierra Club* at p. 909.

The Court in *Sierra Club*, noted that the standard used by the Commission in a rate case would be different if the Commission was making the determinations in the base rate case. For example, the Commission would apply a prudence

standard of review for Peaker Projects in a base rate case if evaluating on an individual issue basis absent a settlement agreement. *Id.* at pp. 908-909. The Court stated that "[w]hen presented with a settlement agreement, however, the Commission's review shifts to the public interest standard: whether the agreement-as a whole-resolved all the issues, 'established rates that were just, reasonable, and fair and the agreement is in the public interest." *Id.* at p. 909.

OPC has agreed to the terms of this Settlement in the context of a give-and-take global compromise. In general, each party agreed to accept individual provisions, which it would otherwise contest because each party believed the value it received through its participation in the entire stipulation more than offset the concessions it made in individual terms.

In this Settlement, the Settling Parties have agreed to continue the asset optimization program. H.E. 483 at pp. 25-26. Under the Settlement, the asset optimization program will continue to operate essentially the same as it has in past settlements where the Commission has approved it. See, 2012 Settlement Order and 2016 Settlement Order. Like prior settlements that have been approved by this Commission, the Company is allowed to engage in wholesale power purchases and sales, including other forms of asset optimization subject to sharing thresholds and variable power plant O&M sharing limits. H.E. at p. 483 at pp. 25-26, See, 2016 Settlement Order at pp. 20-21.

This asset optimization program also has some additional provisions that benefit customers. First, this asset optimization allows for optimization of all fuel sources. H.E. 483 at p. 25. Second, the sharing thresholds for the asset optimization

have been changed from four levels to three levels and updates the variable O&M rate to be applied. H.E. 483 at p. 25.

This asset optimization-type provision was part of FPL's prior 2016 Settlement, of which OPC was a party. See, 2016 Settlement Order. This Commission has approved the asset optimization program as part of prior global settlements that were the subject of give- and-take of the negotiating Parties. See, 2012 Settlement Order and 2016 Settlement Order. Thus, as in prior FPL settlements, the Commission should approve the asset optimization program as an element of this Settlement, that when reviewed as a whole Settlement is in the public interest, and results in rates that are fair, just, and reasonable.

Issue 5(a): Does the commission have the authority to approve FPL's requested proposal for a federal corporate income tax adjustment that addresses a change in tax if any occurs during or after the pendency of this proceeding as part of the Stipulation and Settlement Agreement?

OPC: Yes, the Commission has the statutory authority to grant a tax adjustment provision as part of a Settlement per Section 120.57(4), Fla. Stat., "informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Nothing in precedent or the language of the statute suggests that the general rule, where the legal system favors settlements, does not also apply in rate-setting cases. *Sierra Club v. Brown*, 243 So.3d 903, 908-909 (Fla. 2018).

AGRUMENT: As discussed in the prior issues, FPL and OPC and a group of Intervenors have entered into a non-unanimous Settlement which resolves all pending issues in the base rate case and contains a provision to adjust federal or state taxes if there is any permanent tax change in the rates during the term of the Settlement. In this case, the Commission held public hearings on both the base rate case and the non-unanimous Settlement on September 20, 2021.

As discuss previously, parties whose substantial interest are affected are entitled to a public hearing before the Commission sets rates. See, Sections 120.569 and 120.57(1) and Sections 366.06(2) and 366.07, Florida Statutes. However, parties can negotiate away these rights. Per Section 120.57(4), Fla. Stat., "[u]nless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Quoting the *Citizen I*, the Court stated that "[t]he legal system favors the settlement of disputes by mutual agreement between contending parties' and '[t]his general rule applies with equal force in utility service agreements.' Nothing in our precedent or the language of the statute suggests that this general rule does not also apply in rate-setting cases." See, *Sierra Club* at p. 909.

The Court in *Sierra Club*, noted that the standard used by the Commission in a rate case would be different if the Commission was making the determinations in the base rate case. For example, the Commission would apply a prudence standard of review for Peaker Projects in a base rate case if evaluating on an individual issue basis absent a settlement agreement. *Id.* at pp. 908-909. The Court stated that "[w]hen presented with a settlement agreement, however, the Commission's review shifts to the public interest standard: whether the agreement-as a whole-resolved all the issues, 'established rates that were just, reasonable, and fair and the agreement is in the public interest." *Id.* at p. 909.

OPC has agreed to the terms of this Settlement in the context of a give-and-take global compromise. In general, each party agreed to accept individual provisions, which it would otherwise contest because each party believed the value

it received through its participation in the entire stipulation more than offset the concessions it made in individual terms.

In this Settlement, the Settling Parties have agreed to adjust federal or state taxes if there is any permanent tax change in the rates during the term of the Settlement. H.E. 483 at p. 16-18. This tax provision was not part of FPL's prior 2016 Settlement, but was part of the last Duke and TECO base rate settlements of which OPC was a party. See, 2016 Settlement Order, Order No. PSC-2017-0451-AS-EU, issued November 20, 2017, in Docket No. 20170183-EI, In re: Application for limited proceeding to approve 2017 second revised and restated settlement agreement, including certain rate adjustments, by Duke Energy Florida, L.L.C., et. al., (2017 Duke Order), Order No. PSC-2017-0456-S-EI, issued November 27, 2017, in Docket No. 20170210-EI, In re: Petition for limited proceeding to approve 2017 amended and restated stipulation and settlement agreement, by Tampa Electric Company, et. al. (2017 TECO Order). This Commission has approved the tax adjustment provisions as part of prior global settlements that were the subject of give-and-take of the negotiating Parties. See, 2017 Duke Order, 2017 TECO Order. Thus, as in prior settlements, the Commission should approve the tax provision as an element of this Settlement, that when review as a whole Settlement is in the public interest, and results in rates that are fair, just, and reasonable.

ISSUE 6: Does the Commission have the statutory authority to grant FPL's requested four-year plan as part of the Stipulation and Settlement Agreement?

OPC: Yes, the Commission has the statutory authority to grant a four year term as part of a Settlement per Section 120.57(4), Fla. Stat., "informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Nothing in precedent or the language of the statute suggests that the general rule, where the

legal system favors settlements, does not also apply in rate-setting cases. *Sierra Club v. Brown*, 243 So.3d 903, 908-909 (Fla. 2018).

AGRUMENT: As discussed in the prior issues, FPL and OPC and a group of Intervenors have entered into a non-unanimous Settlement which resolves all pending issues in the base rate case and contains a provision to set the term of the Settlement for a four year period. In this case, the Commission held public hearings on both the base rate case and the non-unanimous Settlement on September 20, 2021.

As discuss previously, parties whose substantial interest are affected are entitled to a public hearing before the Commission sets rates. See, Sections 120.569 and 120.57(1) and Sections 366.06(2) and 366.07, Florida Statutes. However, parties can negotiate away these rights. Per Section 120.57(4), Fla. Stat., "[u]nless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Quoting the *Citizen I*, the Court stated that "[t]he legal system favors the settlement of disputes by mutual agreement between contending parties' and '[t]his general rule applies with equal force in utility service agreements.' Nothing in our precedent or the language of the statute suggests that this general rule does not also apply in rate-setting cases." See, *Sierra Club* at p. 909.

The Court in *Sierra Club*, noted that the standard used by the Commission in a rate case would be different if the Commission was making the determinations in the base rate case. For example, the Commission would apply a prudence standard of review for Peaker Projects in a base rate case if evaluating on an individual issue basis absent a settlement agreement. *Id.* at pp. 908-909. The Court

stated that "[w]hen presented with a settlement agreement, however, the Commission's review shifts to the public interest standard: whether the agreement-as a whole-resolved all the issues, 'established rates that were just, reasonable, and fair and the agreement is in the public interest." *Id.* at p. 909.

OPC has agreed to the terms of this Settlement in the context of a give-and-take global compromise. In general, each party agreed to accept individual provisions, which it would otherwise contest because each party believed the value it received through its participation in the entire stipulation more than offset the concessions it made in individual terms.

A provision to set the term of the Settlement for a specific number of years is a standard feature of these types of settlement agreements. In FPL's last three settlements, of which OPC was a party to the 2010 and 2016 Settlements, the settlements have spanned multiple years. See, 2010 Settlement Order, 2012 Settlement Order, and 2016 Settlement Order. Moreover, this Commission has approved a four year term for 2016 Settlement as part of that global settlement which was the subject of give-and-take of the negotiating Parties. See, 2016 Settlement Order. Thus, as in prior FPL settlements, the Commission should approve the agreed to Term of this Settlement, that when reviewed as a whole Settlement is in the public interest, and results in rates that are fair, just, and reasonable.

ISSUE 9: Has Floridians Against Increased Rates, Inc. demonstrated individual and/or associational standing to intervene in this proceeding as part of the Stipulation and Settlement Agreement?

OPC: No position.

Issue A: Should the Stipulation and Settlement Agreement filed August 9, 2021 be approved?

OPC: Yes, the Commission should approve the Settlement because when taken as a whole, the Settlement results in rates that are fair, just, and reasonable and thus is in the public interest.

ARGUMENT: As discussed in the prior issues, the Commission held public hearings on both the base rate case and the non-unanimous Settlement on September 20, 2021. As discuss previously, parties whose substantial interest are affected are entitled to a public hearing before the Commission sets rates. See, Sections 120.569 and 120.57(1) and Sections 366.06(2) and 366.07, Florida Statutes. However, parties can negotiate away these rights. Per Section 120.57(4), Fla. Stat., "[u]nless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." Quoting the *Citizen I*, the Court stated that "[t]he legal system favors the settlement of disputes by mutual agreement between contending parties' and '[t]his general rule applies with equal force in utility service agreements.' Nothing in our precedent or the language of the statute suggests that this general rule does not also apply in rate-setting cases." See, *Sierra Club* at p. 909.

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As discussed in OPC's Basics Position, on August 10, 2021, OPC and FPL, and other original signatories filed a Joint Motion and Settlement which resolves all of the issues in the base rate case, Docket No. 20210015-EI. FPL's filed March 12, 2021 Petition proposed a four year rate plan. FPL asked to establish base rates that would allow them to earn an additional $1,108 million starting January 1, 2022, which was later updated to $1,075 million. TR 50, Prehearing Order at p. 10. The Company also petitioned the Commission to allow them to earn an extra $607 million starting January 1, 2023, later updated to $605 million. TR 51, Prehearing Order at p. 10. FPL asked for approximately $140 million per year for SOBRAs in 2024 and 2025. TR 51, 1007. This additional revenue was based on FPL's request for an 11% ROE with a 50 basis point adder and its current 59.6% equity. TR 2251, 2287-2295. The Company's four year plan also included additional conditions including a RSAM, SCRM, a tax adjustment mechanism, and accelerated amortization of unprotected EADIT from the 2017 tax act. TR 2252-2253. FPL

also asked to consolidate the base rates of FPL and Gulf using a five year transition credit. TR 1002-1007.

OPC conducted extensive discovery to elucidate the costs associated with the Company's requests and has filed witnesses pre-filed testimonies and exhibits in this docket. As a result of OPC's review including OPC expert witnesses testimonies, the conducting of and reviewing of the extensive discovery in this docket, and reviewing all other testimonies filed in this docket, OPC believes that the proposed Settlement filed in this docket is in the best interest of all of FPL's customers.

First, the Settlement reduces FPL's overall request by $1,667 million over the settlement period. FPL's requested ROE was 11% with a 50 basis point adder with a range of 10.5% to 12.5%. TR 48-49. Under the Settlement, FPL's request was reduced to 10.6% with a 9.7%-11.7% range. H.E. 483 at p. 3. The Parties to the Settlement agreed that FPL would be allowed a modest 20 basis point increase to 10.8% with a range of 9.8% to 11.8%, only if the US 30 year Treasury Bond Yield Rate increases for 6 consecutive months by 50 basis points. H.E. 483 at pp. 3-4. Along with this element, the Parties agreed to continue the RSAM with a $200 million limitation on use in the first year and a 50%-50% split to the storm reserve and to offset capital recovery assets with any excess funds over the depreciation reserve surplus set amount. H.E. 483 at p. 20-23. OPC believes that the RSAM will help maintain the four year - potentially five year - stay out provision, thereby stabilizing base rates for FPL's ratepayer over this timeframe. H.E. 483 at pp. 3, 23.

Many of these provisions are the same types of provisions that were in the 2016 settlement that the Commission approved including the RSAM, SCRM, stay-out provision, the limitation on additional base rate increases provision, asset optimization mechanism and SOBRAs. H.E. 483. The Settlement also includes some new provisions including a tax provision which will pass through any tax changes including decreases, additional Solar Together megawatts, and several pilot programs related to hydrogen gas production and use, solar installation, and electric vehicles. H.E. 483.

The Settlement also provides for consolidation of FPL and Gulf rates using a transition rider over five years. H.E. 483 at p 2. The rates developed under this Settlement based on the negotiated cost service comply with the Commission's long standing policy that no rate or revenue class receives (nor shall receive) an increase greater than 1.5 times the system average percentage increase in total and no class receives (nor shall receive) a decrease in rates. H.E. 483 at pp. 6-7. Parity is when the ROR generated by a rate class is the same as the overall FPL ROR or system average ROR. Under the Settlement rates, all the major rate classes are moving closer to parity. H.E. 470.

OPC believes that the Settlement when taken as a whole is in the public interest. Many of the elements of the Settlement are specifically beneficial to FPL's ratepayers including the overall reduction in the revenue requirement, a four year stay-out provision, additional solar projects, and a five year transition period for FPL and Gulf base rate consolidation. Because of these features, as well others contained in the Settlement, OPC believes that this Commission should approve

this Settlement as being in the public interest resulting in fair, just, and reasonable rates.

Dated this 11th day of October, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE
Docket No. 20210015-EI

I HEREBY CERTIFY that a true and correct copy of the Office of Public Counsel's Post-Hearing Brief has been furnished by electronic mail on this 11th day of October 2021, to the following:

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