Matilda Sanders

From: Roberts, Brenda [ROBERTS.BRENDA@leg.state.fl.us]

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To: Filings@psc.state.fl.us

Cc: Rehwinkel, Charles; Mcglothlin, Joseph; Noriega.Tarik; Merchant, Tricia; Brian Armstrong; Caroline Klancke; Gregory J. Fike; Jessica Cano (Jessica.Cano@fpl.com); John Moyle (jmoyle@moylelaw.com); John T. Butler (John.Butler@fpl.com); John T. LaVia (jlavia@gbwlegal.com); John W. Hendricks; Keino Young; Ken Hoffman (Ken.Hoffman@fpl.com); Kenneth L. Wiseman; Kenneth M. Rublin; Linda S. Quick; Maria J. Moncada; Mark F. Sundback; Martha Brown; Schef Wright (schef@gbwlegal.com); Thomas Saporito; Vickie Gordon Kaufman (vkaufman@moylelaw.com); Village of Pinecrest; Wade Litchfield; White, Karen; William C. Garner, Esq.

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Attachments: 120015 OPC's Post Hearing Brief-FINAL 11-30-12.sversion.docx

Electronic Filing

a. Person responsible for this electronic filing:

Joseph A. McGlothlin, Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
mcglothlin.joseph@leg.state.fl.us

b. Docket No. 120015-EI

In re: Petition for rate increase by Florida Power & Light Company.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 38 pages.

e. The document attached for electronic filing is Citizens' Post-Hearing Statement of Positions and Post-Hearing Brief (November Hearing).
(See attached file: 120015 OPC's Post Hearing Brief.FINAL 11-30-12.sversion.docx)

Thank you for your attention and cooperation to this request.

Brenda S. Roberts
Office of Public Counsel
Telephone: (850) 488-9330
Fax: (850) 488-4491

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in rates by Florida Power & Light Company.	DOCKET NO. 120015-EI FILED: November 30, 2012

CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF (NOVEMBER HEARING)

Pursuant to Order Nos. PSC-12-0617-PHO-EI and PSC-12-0617A-PHO-EI, the Citizens of the State of Florida, by and through the Office of Public Counsel, hereby submit their Post-Hearing Statement of Positions and Post-Hearing Brief.

PRELIMINARY STATEMENT

Florida Power & Light Company will be referred to as "FPL" or "Company." The Office of Public Counsel will be shortened to "OPC" or "the Public Counsel." OPC will refer to the Florida Retail Federation as "FRF," the Florida Industrial Power Users Group as "FIPUG," the Federal Executive Agencies as "FEA," and the South Florida Hospital and Health Care Association as "SFHHA." OPC will refer to the document attached to the "Joint Motion for Approval of Settlement Agreement" as "the August 15 document" or "the purported settlement."

EXECUTIVE SUMMARY OF ARGUMENT

For the following reasons, the Commission should reject the August 15 document and proceed to adjudicate the issues stemming from FPL's March 2012 petition.

The purported settlement is invalid without OPC's signature, support, or acquiescence. To approve it would effectively deny OPC the hearing to which it is entitled by law. Further, the August 15 document constitutes a new request that does not comply with the requirements of statutes and rules governing new petitions.

OPC renews and preserves the objections and legal arguments that it raised earlier in the proceeding.

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Contrary to the assertion that the purported settlement comprises a balanced package based on "give and take" negotiations, the August 15 document is replete with provisions that benefit FPL at customers' expense.

Visualize a balance scale, and ask yourself: If the Commission were to place the individual provisions of the August 15 document on the balance scale, which provisions would belong on the "FPL benefit" side of the scale, and which would counterbalance them with benefits to the general body of customers?

The 10.7% return on equity (ROE) and 59.62% equity ratio would constitute a windfall for investors. During the hearing on the August 15 document, OPC witness Kevin O'Donnell reminded the Commission that an extremely high equity ratio logically should be reflected in a lower ROE. The 10.7% ROE provision of the August 15 document would be the highest ROE awarded to a regulated utility to this point in 2012 (the average is 9.99%). Separately, the 59.62% equity ratio implicit in the August 15 document would be the highest equity ratio awarded in 2012 (the average is 51.35%). In the August hearing on FPL's March 2012 petition, the FEA advocated a 9.25% ROE, while SFHHA's position was 9.0% and FIPUG argued that FPL's ROE should be 10% or less. Clearly, the 10.7% ROE and 59.62% equity ratio represent a major, expensive concession to FPL from the intervenor signatories' point of view.[1] The Commission must place the ROE and equity ratio included in the August 15 document on FPL's side of the balance scale, and search for whatever FPL "gave" in what is purported to be an overall "give and take" negotiation in other parts of the document.

The "generation base rate adjustments" proposed for 2014 and 2016 would one-sidedly benefit FPL.[2] The "generation base rate adjustment" is a form of piecemeal ratemaking. The fundamental premise underlying the setting of base rates is that the rates that customers pay will remain constant as long as the utility's earned rate of return, which will fluctuate as the mix of overall investments, revenues, and expenses varies over time, stays within the fair and reasonable

[1] FIPUG witness Pollock acknowledged that an ROE of 10.7% would be "above average" when compared to decisions made since the 2010 rate case, but encouraged the Commission to regard ROE as one factor among several – implying that value for customers would have to be found elsewhere in the August 15 document. (TR 5437, 5440-5441)

[2] The generation base rate adjustments for 2014 and 2016 were not part of FPL's March 2012 petition. The increase associated with FPL's Cape Canaveral plant modernization project, scheduled to take effect when the plant enters service in June 2013, is part of the March 2012 petition. While OPC has challenged the amount of the increase, OPC has not objected to a "step increase" associated with the Cape Canaveral project that comes online during the 2013 projected test year.

range established by the Commission. The plant-specific increases sought by FPL in the August 15 document would alter this basic paradigm, to FPL's advantage. They would require customers' rates to increase dollar-for-dollar with the costs of a single investment, regardless of whether FPL could absorb some or all of the costs and remain within its authorized range without a base rate increase. No one can know today whether the cost increases associated with a future plant modernization project may be offset, fully or partially, by revenue increases, efficiencies or reduced costs elsewhere in FPL's operations. In the past, FPL has absorbed several power plants without the necessity of *any* increases. The generation base rate adjustments would improperly remove from FPL the burden of demonstrating that it requires a base rate increase given the totality of its operations. The certainty of the increases would also lower FPL's risk profile below that considered by the ROE witnesses during the August hearing, thereby rendering the 10.7% ROE of the package even more excessive.

FPL lamely argues that the increases would avoid "expensive" rate cases. Given FPL's typical rate case costs of about $4 million, FPL's 4.6 million customers, and the typical rate case amortization period of 4 years, the cost of a full base rate case amounts to about 2 cents per customer per *month*. In the scheme of things, rate cases are a bargain – especially when one considers the "return" that customers typically receive on their "investment" when utilities' excessive requests are pruned through the rate case process. FPL's attraction to the prospect of less frequent, less intensive scrutiny is understandable; however, it is not in customers' best interests. The windfall combination of a 10.7% ROE and a 59.62% equity ratio that reside in the tray on FPL's side of the balance scale must make room for the generation base rate adjustments proposed for 2014 and 2016.

The proposed amortization of $209 million of fossil dismantlement reserve would purely benefit FPL at customers' expense. FPL – which sought an *increase* in the annual accrual to the fossil dismantlement reserve in its last rate case, and intends to continue the present $18 million annual accrual (which would increase the reserve) – proposes to simultaneously amortize $209 million of that reserve (thereby reducing it) during the 4-year term of the August 15 document. The proposal to increase *and* decrease the reserve *at once* is more than simply inconsistent and illogical: it would stand the objective of capital cost accounting on its head. Whereas the objective of capital cost accounting is to serve the goal of intergenerational equity, the explicit, plainly stated purpose of the amortization proposed by FPL is to increase and enhance the

earnings that FPL reports to its investors. Stated more bluntly, the proposed amortization is a raid on the reserve, being made in full view, that FPL justifies solely by its desire to bolster its earnings. The 10.7% ROE, 59.62% equity ratio, and generation base rate adjustments of $236,043,000 in 2014 and $217,862,000 in 2016, all of which occupy space on FPL's side of the balance scale, must share their increasingly crowded quarters with the $209 million amortization of fossil dismantlement reserve, which one-sidedly benefits FPL.

The postponement of the depreciation and fossil dismantlement studies is designed to enable FPL to avoid reflecting the amortization of the $209 million of fossil dismantlement reserve in the calculation of base rates. It would benefit only FPL. The inconsistency between FPL's opposition to the Commission's decision to require it to amortize $894 million of depreciation reserve surplus in FPL's last rate case, on the one hand, and FPL's push for authority to amortize $209 million of fossil dismantlement reserve as part of the August 15 document, on the other hand, is glaring – but easily explained. In Docket No. 080677-EI, the decision to require the amortization of depreciation reserve surplus over 4 years resulted in a reduction to FPL's test year revenue requirement of $223 million, and a corresponding reduction in base rates. However, because FPL proposes the amortization of $209 million as part of an outside-the-March-petition package, the amortization would not be reflected in the revenue requirements on which rates would be based in this docket, and so would not reduce FPL's rates. In addition, by postponing the studies that are presently due in March 2013, FPL would terminate the amortization prior to its next rate case test year, thereby effectively avoiding *ever* having to reflect the annual amortization in the calculation of revenue requirements on which base rates are based.

Further, the postponement would ensure the absence of definitive information regarding the status of reserves, and therefore enable FPL to subordinate the goal of precision and accuracy in capital cost accounting to its desire for the ability to protect and increase its earnings during the term of the August 15 document. Since the avowed purpose of the proposed amortization is to enhance earnings, any such proposal should be accompanied by a commensurate benefit in the form of reduced rates. The postponement of the studies is designed to prevent that from occurring. Added to the weight of the components of the August 15 document that currently are residing on the crowded FPL side of the balance scale, the provision that would postpone the

depreciation and fossil dismantlement studies pulls the "FPL benefit" tray down further, while the "customer side" of the balance scale remains vacant and hoisted high in the air.

The expanded incentive program, labeled "asset optimization," would benefit FPL at customers' expense. Currently, the incentive program that FPL seeks to expand is limited to wholesale *sales.* All savings associated with power purchased at prices lower than FPL's cost of generating the power properly flow to customers. FPL's desire to claim a portion of these savings conflicts with its obligation to serve customers at the lowest reasonable cost. The superficial appeal of increasing the threshold beyond which incentives would be calculated must be placed in context with the $47 million which customers would have paid to FPL as "incentives" for power purchases between 2001 and the present if FPL's proposed "asset optimization" plan had been in place – with no change in FPL's behavior. Revealingly, FPL witness Forrest regards the basic protocol of "economic dispatch," through which FPL calls on its own resources in the order of ascending costs, as a theoretically potential source of "incentives." Mr. Forrest excluded economic dispatch (temporarily, at least) from the scope of the expanded platform of identified "savings" that would be subject to "incentive rewards" on the basis that it is a part of FPL's day-to-day operations, and also by the technical difficulty of quantifying the "savings" derived from economic dispatch. Efforts to buy power when it is available at prices cheaper than system generation should be part of a prudently managed utility's fundamental mission! The proposal to establish ongoing power purchases as a source of "incentives" would instantly benefit FPL, and cost its customers. It joins the already packed-to-overflowing "FPL benefit" tray of the balance scale, while the "customer benefit" side of the balance scale remains unoccupied.[3] The August 15 document requires customers to "give" so that FPL can "take."

The August 15 document would not result in fair, just, and reasonable rates – the criterion that is basic to the concept of the public interest.

Rates stemming from an excessively high ROE and an excessively high equity ratio would not be fair, just, and reasonable. Rates based on amortizations created – not to serve the goal of intergenerational equity but to provide a source of financial wherewithal that FPL can draw down to increase its earnings would not be fair, just, and reasonable. Rates that increase as

[3] The cost of the rate concessions with which FPL induced fractional customer intervenors to sign and support the August 15 document would be shifted to other customers. This is a weakness, not a benefit, of the August 15 document.

a result of paying FPL for shopping for power purchases that lower bills – something that it already does – would not be fair, just, and reasonable. Rates that increase dollar-for-dollar with the costs of a single plant item in the absence of an analysis of FPL's overall financial situation would not be fair, just, and reasonable. Rates that reflect shifts in revenue responsibility that served as inducements to certain customer associations to enter a purported settlement that one-sidedly benefits FPL would not be fair, just, and reasonable. Rates that are unfair, unjust, and unreasonable are not in the public interest.

It would not be in the public interest to reward FPL for contriving a false narrative to support the August 15 document.

FPL announced its decision to file a "clean case" in this docket, and then placed its "actual wants" in a separate, 11th hour "settlement package." FPL faced obstacles to its desired outcome in the form of sure resistance from OPC on the core components of its wish list – as well as its representation to the Florida Supreme Court in 2002 that OPC's signature is "vitally important" to a settlement agreement. FPL pursued a strategy of inducing a small group of 3 intervenor parties (representing at most a few hundred customer accounts out of FPL's 4.6 million total accounts) to agree to its extensive, outside-the-petition wish list by offering rate reductions that would be paid for by shifting the revenue responsibility to other customers. During this time, FPL excluded OPC from negotiations. FPL then claimed that OPC refused to engage in negotiations despite FPL's repeated entreaties for it to do so. Clearly, FPL hopes that its portrayal of the history of the August 15 document will persuade the Commission to view OPC as having forfeited its right to assert its role as a necessary party to a settlement agreement – at the same time that its claim diverts attention from the egregiously one-sided, self-serving nature of the August 15 document. However, FPL's depiction of events is a false narrative. The record reflects that OPC explicitly signaled its willingness to engage in negotiations early in the case. OPC was not invited to participate in settlement discussions between the time it sent its e-mail regarding possible settlement discussions on March 1, 2012 and July 15, 2012, when it was presented with an already signed "deal." OPC refused to execute, and now opposes, the lopsidedly utility-favoring document that emerged from FPL's meetings with the signatories – which took place without OPC's (and other consumer parties') knowledge. To approve the August 15 document would be to reward FPL's machinations, and to encourage other utilities to circumvent OPC's statutory role by engaging in similar gamesmanship. To reward such conduct

with a heavily and unjustifiably utility-favoring disposition of this rate case would be contrary to the public interest.

ISSUES AND POSITIONS

Issue 1: Are the generation base rate adjustments for the Canaveral Modernization Project, Riviera Beach Modernization Project, and Port Everglades Modernization Project, contained in paragraph 8 of the Stipulation and Settlement, in the public interest?

No. The in-service dates of the Riviera Beach and Port Everglades projects are well beyond the projected test year. More importantly, FPL seeks to add the full revenue requirements of the projects to base rates incrementally, without any obligation to demonstrate that its total earnings could not absorb all or part of the additional costs without increasing rates. (In the past, FPL has added several power plants to rate base without increasing customers' rates.) This proposal would allow FPL to increase base rates even if FPL is earning above its range when the projects are placed into service. FPL's argument that a generation base rate adjustment could not cause it to overearn is an exercise in misdirection. Base rates are intended to remain unchanged while the overall earned return varies within a reasonable range. FPL would instead raise its base rates to insulate its return from a single added cost. This "piecemeal" approach to ratemaking would inappropriately shift to the Commission and the utility's customers the burden of demonstrating the need for a change in rates from the utility.

ARGUMENT:

FPL's proposal to implement the generation base rate adjustments (GBRA) in the August 15 document should be rejected along with the rest of the August 15 document. OPC witness Donna Ramas quantified the total increase in base rates that would result from the August 15 document. She noted that, as proposed and modified through testimony, the following additional increases would occur as a result of the proposed GBRAs: (1) $165,289,000 in June 2013; (2) $236,043,000 in June 2014; and (3) $217,862,000 in June 2016. Thus, the GBRAs or base rate step increases would add $619,194,000 of base rate increases to the $378 million increase specifically identified in the August 15 document. The result is that base rates would be guaranteed to be at least $997,194,000, or effectively $1 billion higher than the current level by June 2016.[4]

Ms. Ramas highlighted the many shortcomings of the GBRA proposal. She noted that significant aspects of the GBRA step increases are antithetical to traditional ratemaking and

[4] This $997,194,000 in base rate increases excludes the additional $246 million of base rate increase that is projected to occur in 2013 as a result of the extended power uprates. (EXH 650) If the base rate increase associated with the extended power uprates is considered, the total amount of base rate increases between now and July 2016 would be almost $1.25 billion under FPL's proposal.

fairness. FPL and the signatories offered SFHHA witness Lane Kollen and FPL witness Robert Barrett as their GBRA-champion witnesses. Mr. Barrett predictably gave the company line – in the face of heavy baggage from the 2009 FPL rate case, during which he acknowledged many of the shortcomings that served as the basis for the Commission's unanimous rejection of the concept. Having delivered a comprehensive, scathing, and successful 2009 attack on the concept of a GBRA, Mr. Kollen offered 167 words of palpably faint "praise" for FPL's proposal in this case.

The Commission has definitively established that the piecemeal, one-way generation base rate adjustment ratemaking concept is inferior to existing rate case hearing ratemaking tools – FPL seeks, in essence, to recover the full cost of modernization projects for 2 combined cycle units[5]– projects that would ordinarily be added to rate base in the context of a rate case – through a one-way, piecemeal, automatic rate increase mechanism that does not allow for any consideration of the Company's earnings or any material offsets that might coincide with the in-service date of the units. Consider the emphatic and unequivocal language of the 2010 order from FPL's 2009 rate case, in which the Commission decisively rejected the generation base rate adjustment proposal:

> For the reasons explained in detail below, we do not approve FPL's request for a generation base rate adjustment (GBRA) mechanism that would authorize FPL to increase base rates for revenue requirements associated with new generating additions approved under the Power Plant Siting Act at the time they enter commercial service. The existing ratemaking procedure provided by Florida Statutes and our rules provides for a more rigorous and thorough review of the costs and earnings associated with new generating units. Section 366.06(2), F.S., provides that when approved rates charged by a utility do not provide reasonable compensation for electrical service, the utility may request that we hold a public hearing and determine reasonable rates to be charged by the utility. Section 366.071, F.S., provides expedited approval of interim rates until issuance of a final order for a rate change. Rule 25-0243, F.A.C., establishes the minimum filing requirements for utilities in a rate case. These procedures have been sufficient in the past for FPL and other regulated utilities wishing to recover capital expenditures when a new generating facility begins commercial service. We find that the GBRA shall expire as scheduled when new rates are established as delineated in this Order. [Order No. PSC-10-0153-FOF-EI, at 13.]

[5] The generation base rate adjustments for 2014 and 2016 were not part of FPL's March 2012 petition. The increase associated with FPL's Cape Canaveral plant modernization project, scheduled to take effect when the plant enters service in June 2013, is part of the March 2012 petition. While OPC has challenged the amount of the increase, OPC has not objected to a "step increase" associated with the Cape Canaveral project that is scheduled to come on line during the 2013 projected test year.

FPL and the minority-consumer signatories have offered nothing that changes the legal, policy, or factual status of the GBRA concept that was soundly rejected by the Commission in 2010. Despite some cosmetic repackaging and the shaky endorsement of a previously fierce opponent, the GBRA suffers from the same fundamental defects that led to its unequivocal rejection in 2010. The proposal is still a single issue, one-way ratemaking scheme that does not allow for offsets and is heavily skewed in favor of the Company.

OPC witness Ramas zeroed in on the true problem with FPL's "new" GBRAs. They are a clever effort to turn on its head (and to FPL's benefit and to the customers' detriment) the ratemaking approach that has worked beneficially for both the Company and its customers. As noted by Ms. Ramas, the proposed paradigm shift is this: instead of a situation in which total revenues and earnings absorb all costs while rates remain unchanged, FPL proposes that rates should go up to offset the specific costs of a particular investment. (TR 6054) As discussed below, this guarantees that FPL will increase base rates by the full revenue requirements of the plants, even if it could continue to earn within the 200 basis point ROE range (equaling about $320 million in revenue requirements) established by the Commission without the increase. Depending upon where FPL's impossible-to-know earnings are in 2014 and 2016, the $236 million and $218 million Riviera and Port Everglades revenue requirements could theoretically be completely absorbed by FPL without any change in customer rates. In 2009, FPL witness Barrett also agreed that this could happen. Order No. PSC-10-0153-FOF-EI, at 14.

Traditionally, base rates are set after the Commission evaluates a representative test year, with the understanding that the levels of investment, expenses, and revenues will vary from those assumed once the rates are placed into effect. Ms. Ramas pointed out that this is why the Commission establishes a range, such that a return achieved by the established rates within that range is by definition fair and reasonable. If the utility incurs an increase (or decrease) in expense, its earnings may decrease (or increase); however, if the earned ROE remains within the established range, this fluctuation would not warrant a change in the rates that customers pay. (TR 6054) This point is crucial, because it has been established that during the period from 1985-2005 FPL placed several power plants (approximately one third of its generating fleet at the time) into service without increasing rates: its earnings were sufficient to absorb the additional costs. (Order No. PSC-10-0153-FOF-EI, at 14; EXH 486, 493, 650, Bates No. 3036-3037; TR 5769-5771, 6185) Indisputably, the existing ROE range – worth about $320 million –

is sufficient to absorb the entire cost of any individual modernization project, depending upon where the achieved earnings are at the time of a new plant's in-service date.

Ms. Ramas testified that generation plants are not added to the system in a vacuum, with all other components of the base revenue requirements calculation remaining unchanged. Between the 2013 test year that was considered in the base rate case and the dates the modernization projects will be placed into service, other aspects of FPL's operations and cost structure will change. The number of customers served by FPL presumably will increase, and the level of sales will increase. The existing plant that is factored into the 2013 test year will continue to be depreciated, reducing the net rate base impact of the existing plant in service. In addition, it is probable that some costs will increase and others may be offset by cost savings, productivities, and efficiencies – such as the annual cost savings associated with the smart meter implementation of $12.9 million and $27.6 million that FPL projects for 2014 and 2015, respectively. (Notably, SFHHA witness Kollen identified gross savings of $42 million by 2014-2015, with savings continuing thereafter.) (TR 5671) Moreover, plant will be added and plant retirements will occur over time. (TR 6045)

As a diversionary tactic, Mr. Barrett's description of the GBRA as "mid-point seeking" is clever. However, Mr. Barrett's description is specious. The ultimate issue in any rate case is whether the utility's rates should be increased (or decreased) to levels that enable the utility to cover its legitimate costs of providing safe and reliable service while earning a reasonable return on its investment, FPL's GBRA proposal conflicts with this fundamental premise by seeking a guarantee that a specific increment to its investment in plant will not cause its earnings to decline, even if FPL could remain within the established range of reasonableness without an increase. (TR 6054)

In 2009, Mr. Kollen provided a withering criticism of the generation base rate adjustment that was exactly on point. At that time – when he was not supporting a rate concession for his client – he characterized it as "a radical change in the Commission's ratemaking process." (EXH 716 at pp. 4, 9) He also called it a "single issue and one-way base rate increase mechanism that fails to consider cost reductions that the Company may achieve in other areas." (EXH 716, pp. 5, 10) In 2009, Mr. Kollen observed that the GBRA would not reflect cost reductions due to the continued depreciation on or retirement of existing production plant investment. He described how this would allow the Company to retain the savings resulting from ongoing recoveries of

existing plant investment through depreciation from ratepayers, the cost-free capital resulting from ongoing accelerated tax depreciation, increases in revenues due to customer and usage growth, and capital expenditure and expense cost reductions. The impact of this aspect of the piecemeal ratemaking would increase as the period between comprehensive base rate proceedings grows longer. (EXH 716 at pp. 10-11) On these points, the 2009 Mr. Kollen is 100% in accord with witness Ramas.

In 2012, however, Mr. Kollen offers superficial, faint praise for the generation base rate adjustments. Despite apparently not having had much of a role in negotiating the inclusion of the 3 generation base rate adjustments[6] in the August 15 document, now Mr. Kollen professes his support for the generation base rate adjustments on 4 underwhelming grounds. Illustrative of the desperate lengths to which the customer signatories have gone to promote the August 15 document is the primary rationale that Mr. Kollen offered to support the GBRAs:

> The first reason is that the Company cannot claw back the reduction from its request through a subsequent base rate increase over the next 4 years. (TR 5650)

Incredibly, Mr. Kollen has touted – as his feature justification for the GBRAs – a laughable "sleeves-out-of the-vest benefit." The only way that Mr. Kollen's featured post-hoc justification for the GBRA can be rationalized as a "benefit," would be for one to assume that 100% of FPL's $516.5 million rate hike request is fully justified. Mr. Kollen testified that he had never seen a Florida utility receive 100% of its requested rate increase. (TR 5670) He also testified that his client's revenue requirements recommendation – which he supported – was a negative ($99 million). (TR 5649) OPC and FRF, as well as signatory FIPUG, supported a rate reduction of $253 million, as compared to the $516.5 million increase contained in FPL's March 2012 petition. Under these facts, it is absurd to assume that generation base rate adjustments would protect customers from FPL receiving 100% of its request or "clawing back" to that overstated level.

Agreeing with a point that Mr. Kollen made in the 2009 FPL rate case, OPC witness Ramas testified that if FPL determines that it may have a revenue deficiency when the projects are closer to being placed into service, the Company would have the opportunity to file a base

[6] Mr. Kollen testified that he was consulted on the proposed settlement after Mr. Pollock was engaged, which was prior to July 2. (TR 5448, 5668) One could deduce that Mr. Kollen – the 2009 detractor of and 2012 champion of the GBRA – played no role in its conceptualization or rationale development.

rate increase request. Such a full rate case proceeding would factor in all of the components of the base rate calculations, and would not be limited to the impacts associated with the modernization projects. This would provide a full matching of the revenue requirement calculations, and all the changes impacting FPL's revenue requirements could be considered to ensure that the resulting rates are cost based. (TR 6006-6007) Ms. Ramas' testimony is in accord with both the position that Mr. Kollen expressed in 2009 and the Commission's Order in FPL's last rate case. Order No. PSC-10-0153-EI, at pp. 15-16

Computational Problems with FPL's Generation Base Rate Adjustments – In 2009, Mr. Kollen identified what he called "computational" problems with the GBRA proposed by FPL. In 2012, he made no effort to distance himself from these criticisms as they apply to the GBRAs of the August 15 document. (TR 5688-5692) For example, in 2009, Mr. Kollen criticized the GBRA by testifying:

> The Commission should not allow the use (or misuse) of a GBRA to provide the Company with excessive revenues. First, the proposed rate of return is overstated due to an excessive common equity ratio of 55.80%. A reasonable capital structure consists of 50.0% common equity and 50.0% debt for rating agency reporting purposes and 53.46% common equity and 46.54% debt for ratemaking purposes, according to SFHHA witness Mr. Richard Baudino's testimony in this proceeding.[7]
>
> EXH 716 at 12

In this case, Mr. Kollen did not dispute that the same problem exists in the 2013, 2014, and 2016 GBRAs which he said he is now supporting. (TR 5690)

In 2009, SFHHA witness Kollen further noted that the proposed modernization project revenue requirements were overstated due to the Company's use of the so-called "incremental" cost of debt rather than the weighted average cost of debt outstanding, and that the proposed rate of return was overstated due to the failure to include low-cost short-term debt in the capital structure. (EXH 716 at pp. 12-14) Mr. Kollen agreed that this defect persists in the repackaged GBRAs of the August 15 document. (TR 5690-5691) OPC witness Ramas made a similar observation. She testified that FPL's approach is improper, both in the context of a step increase

[7] Tellingly, Mr. Baudino is nowhere to be seen in this phase. However, his objections to the ROE (he testified that it should be 9.0%) and the bloated equity ratio are still part of the record and are similar to the adjustments that OPC recommends in this phase through the testimony of witnesses Ramas and O'Donnell and the record of the hearing on the March 2012 petition.

and a GBRA. She noted that the increases contemplated for the Riviera and Port Everglades Modernization projects are based on the amounts presented in the need determination filings for those projects, revised to reflect the capital structure contained in FPL's MFRs for the Canaveral Modernization Project (39.031% long-term debt and 60.696% common equity) and an ROE of 10.7%. These errors would affect the Riviera and Port Everglades GBRAs in the same degree. She recommended that any modernization project revenue requirement should be properly based on FPL's overall capital structure, including deferred taxes and customer deposits. (TR 6047) In addition to this mismatch of capital structures – which could cause the GBRA to actually increase FPL's earnings above the mid-point (TR 6077-6078) – witness Ramas noted that no evidence has been provided by FPL with regard to its overall operating and capital budgets for 2014, 2015, or 2016, or for its projected revenue requirements for that period. (TR 6044)

Conclusion

In conclusion, FPL and the revenue shift-induced customer signatories have utterly failed to demonstrate that the revenues FPL will collect during 2014, 2015, and 2016 will not be sufficient to partially or fully offset the costs of the modernization projects without the application of a GBRA. The unrebutted testimony is that these modernization projects will ***not*** be added in a vacuum without any other changes in FPL's costs and cost structures occurring after the 2013 test year. The generation base rate adjustments are tantamount to single-issue ratemaking, resulting in additional base rate increases of $619 million between June 2013 and June 2016 that would ignore the other components of the revenue requirement calculations and FPL's overall cost structure. Given that the cost of a rate case (roughly $4 million), when amortized over 4 years and spread over 4.6 million customers, amounts to about 2 cents per customer per month, the "savings" rationale offered by FPL is feeble indeed. As OPC witness Ramas eloquently put it, the goal should not be administrative ease or to reduce the burden on FPL, the intervenors representing the customers served by FPL, Commission staff, or the Commissioners themselves. Instead, the goal (and indeed the obligation of the Commission) is to ensure that rates are fair, reasonable, and justified. Only then can rates be in the public interest.

Issue 2: Is the provision contained in paragraph 10(b) of the Stipulation and Settlement, which allows the amortization of a portion of FPL's Fossil Dismantlement Reserve during the Term, in the public interest?

No. The proper objective of the accounting for capital cost is to serve intergenerational equity by ensuring that each generation of customers bears its appropriate share of costs. The provision authorizing FPL to amortize $209 million of fossil dismantlement reserve is wholly unrelated to that objective. It is specifically intended – not to accomplish intergenerational fairness – but to increase and enhance FPL's earnings. It is structured – not to aid in establishing fair and reasonable rates – but to avoid providing customers with a commensurate reduction in base rates. Moreover, the provision is dependent – not on a supporting study of the status of the current expectation and related collection of dismantlement costs – but on the proposed postponement of such a study. The provision is skewed to benefit only FPL, as the amortization that produces increased earnings will also increase future rate base, without having provided customers any corresponding monetary benefit. Rates based on this provision would not be fair, just, and reasonable. Accordingly, the provision is not in the public interest, either individually or as part of the August 15 document.

Issue 3: Is the provision contained in paragraph 11 of the Stipulation and Settlement, which relieves FPL of the requirement to file any depreciation or dismantlement study during the Term, in the public interest?

No. The purpose of the required depreciation and dismantlement studies is to gauge whether a utility is collecting the appropriate amount of capital costs from customers over time. By contrast, the transparent objective of the proposed postponement is to ensure that the amortization of fossil dismantlement reserve sought by FPL, which is intended to enhance FPL's earnings, is not contradicted by such a study. The proposed amortization would increase future rate base. Acting to authorize the amortization without first requiring a study would be inimical to the establishment of fair, just, and reasonable rates. In addition, FPL proposes that such studies occur after the 4-year period. The proposed timing of the next studies would enable FPL to avoid reflecting the amortization in its customers' rates now and in its next base rate proceeding. Rates that do not reflect the reduction in revenue requirements occasioned by an amortization of reserve designed to increase earnings would not be fair, just, or reasonable. For these reasons, the provision is not in the public interest.

COMBINED ARGUMENT ON ISSUES 2 AND 3:

In Docket No. 080677-EI, FPL resisted OPC's effort to require FPL to amortize its depreciation reserve surplus. (TR 6012, 6022) In the instant case, FPL continued to snipe at the Commission's decision to require it to return $894 million of reserve surplus over 4 years. (TR 1146) By contrast, FPL built into the August 15 document a provision that would authorize it to amortize $209 million of fossil dismantlement reserve over 4 years.

The apparent inconsistency in FPL's positions is explained, not by a reversal of position, but by "consistently" pure pecuniary interests. In Docket No. 080677-EI, the Commission reduced FPL's revenue requirement by $223 million, representing the amortization that FPL would recognize during the 2013 test year – and that would serve to offset (reduce) test year depreciation expense. In the instant case, FPL has structured its amortization proposal in a manner that would enable it to avoid having to reduce its rates. Because FPL has built its amortization proposal into a proposed settlement package that is "outside" the MFRs of its March 2012 petition, the amortization does not show up as a reduction to the amount of depreciation expense calculated for the 2013 test year.

There are other significant aspects to the contrast, all of which favor FPL. As OPC witness Jacob Pous explained, the purpose of the Commission's decision to require FPL to amortize its huge depreciation reserve surplus was to achieve intergenerational equity through adherence to the principle of requiring customers of each generation to bear its appropriate portion of the costs of the plant that serves that generation (the "matching principle"). The objective was to return money to customers who had paid more than their share of capital costs over time; the impact on FPL's earnings was a by-product of that objective. Here, the purpose of the proposed amortization would be to enhance and protect FPL's earnings during the 4-year term of the August 15 document. (TR 6011) The impact on customers would be a by-product of FPL's earnings enhancement mechanism. (TR 6011) This complete reversal of objective and impact led OPC witness Pous to observe that the provision relating to FPL's amortization of $209 million of fossil dismantlement reserve for the purpose of managing its earnings would turn the objective of capital cost accounting on its head. (TR 6005-6006, 6011, 6020)

In Docket No. 080677-EI, the Commission received detailed depreciation studies and conducted relevant proceedings before determining the status of the depreciation reserve. The purpose of the studies was to ensure that the Commission was basing its decision on sound information. In this case, FPL has coupled to its amortization request a proposal to postpone the fossil dismantlement and depreciation studies (due in March 2013) until after the end of the 4-year term of the August 15 document. The purpose of the postponement would be to ensure there is no factual basis that would contradict or undermine the amortization being used to increase earnings. (TR 6010-6011) Also, if FPL were to prepare its next base rate proceeding during the last year of the 4-year term of the August 15 document and base its request on a

projected test year, the amortization would not affect depreciation expense in the next case, either. (TR 6011-6012) Accordingly, the combination of placing the proposed amortization in a separate settlement proposal and postponing the next studies would enable FPL to avoid having to reduce rates by the amount of the amortization altogether. (TR 6012) While FPL's reported earnings would increase as a result of the amortization, customers would "receive" only a paper accounting entry on FPL's books.

FPL witness Barrett asserted that the provision relating to amortization of fossil dismantlement reserve is necessary to enable FPL to accept the risk associated with the limitations that the August 15 document would place on its ability to adjust rates. (TR 5757-5758) Elsewhere in his testimony, Mr. Barrett characterized the August 15 document as a "rate freeze." (TR 5751, 5756, 5758, 5760) The purported settlement proposes one of the strangest "rate freezes" in the history of regulated industries. It would authorize an increase of $378 million in January 2013. It would authorize an increase of $165,289,000 in June 2013. It would authorize an increase of $236,043,000 in 2014 –whether or not FPL requires the full amount to remain within its authorized range of return. It would authorize an increase of $217,862,000 in 2016 – whether or not FPL requires the full amount to remain within its authorized range of return. It would authorize FPL to increase base rates by $246 million in 2013 as it completes the expensive uprates to its nuclear power plants. The purported settlement would authorize FPL to seek a base rate increase if its earned ROE drops below 9.7%. This "floor" is higher than the *midpoint* of the ROE values proposed by not only OPC, but also FEA, *and* SFHHA. (Prehearing Order No. PSC-12-0428-PHO-EI, at pp. 80-81) Further, the proposed range for the fair return consists of 100 basis points on either side of 10.7%. For FPL, this translates into a range of about $320 million in revenues. Given the breadth of this range and the numerous increases that the August 15 document would authorize (or, in the case of nuclear uprates, not exclude), it is clear that FPL would not be exposed to the type of "risk" that would warrant the ability to amortize $209 million of fossil dismantlement reserve.

During the hearing, Commissioner Balbis inquired about FPL's intentions with respect to the provision authorizing the amortization. Basically, he asked FPL witness Barrett whether FPL intends to employ the amortization to keep its earned return at or near the top of the range. (TR 5802) Mr. Barrett was evasive. He "assured" the Commissioner only that FPL would not use the amortization to earn *above* the ceiling of 11.7%! (TR 5802-5803) That "assurance" is hardly

comfort to the customers who (1) would see no reduction in the rates they pay during the amortization period and (2) would see FPL's rate base increase as a consequence of FPL's focus on maximizing its earnings.

An amortization is entirely appropriate when it is needed to correct an established imbalance and thereby achieve intergenerational equity. Such corrections are most effectively accomplished when the amortization serves to lower revenue requirements and rates during a base rate proceeding. The resulting impact on rate base is, under those circumstances, an appropriate and needed consequence that effectuates the equitable adjustments. In this case, however, the purpose of the amortization is to enhance earnings. The pattern that followed FPL's last rate case certainly suggests that FPL would try to maintain those earnings at the top end of the range. As Mr. Pous testified, where the purpose of the amortization is to increase earnings, a corresponding and commensurate reduction in rates should take on heightened importance. However, FPL has structured the proposal in such a way that the "trade-off" for customers would take the form of a paper accounting entry, with no benefit in lowered rates. (TR 6017)

In support of the proposal to postpone the depreciation and fossil dismantlement studies that are scheduled to be submitted in March 2013, FPL witness Barrett offered the view that another large depreciation reserve surplus would be unlikely. OPC witness Pous pointed out that, in FPL's last depreciation docket, the difference between FPL's position and that of OPC regarding the size of FPL's depreciation reserve surplus was about $1 billion. (TR 6015) Mr. Pous also observed that the useful life that FPL assigns to its many combined cycle units is, in his opinion, artificially short. In addition, as FPL repowers existing units, it increases the service lives of those units dramatically. Mr. Pous predicted that the next depreciation analysis will disclose the existence of another large depreciation reserve surplus. Accordingly, contrary to Mr. Barrett's testimony, the prospect of little or no imbalance is unlikely, and FPL's rationale for postponing the study is unpersuasive.

Conclusion

In sum, the provision within the August 15 document that would authorize FPL to amortize $209 million of fossil dismantlement reserve is unsupported by evidence, would distort

the proper objective of capital cost accounting, and would, in Mr. Pous' words, unfairly enrich FPL at customers' expense. (TR 6006, 6020)

<u>Issue 4</u>: Is the provision contained in paragraph 12 of the Stipulation and Settlement, which creates the "Incentive Mechanism," including the gain sharing thresholds established between customers and FPL, in the public interest?

*No. While much of the proposal is unfathomably vague and unacceptably open-ended, clearly FPL would include the "savings" from short-term power *purchases* when calculating eligible gains. The inclusion of power purchases in the proposed incentive program is inappropriate, because buying power when it is available at prices lower than FPL's cost of generating it is part of FPL's fundamental obligation to provide service at the lowest reasonable cost. Had FPL's proposal to include savings from power *purchases* in the incentive program been in effect from 2001 to the present, customers would have paid FPL an additional $47.65 million – f or actions it would have undertaken anyway.

Further, the higher incentives of the proposed expansion could encourage FPL to pursue such margins throughout its operations to the detriment of service received by its native load customers, through complex, difficult-to-police transactions.

If the proposed modifications to the current wholesale incentive mechanism are to be considered at all, it would be better to consider them in a generic proceeding rather than in an expedited proceeding on a company-specific proposal.*

ARGUMENT:

As part of its August 15 document, FPL has proposed expanding the current gains on non-separated wholesale power sales to include a number of additional transactions. FPL refers to the proposal as the "Asset Optimization Program." (TR 5888) This expanded incentive mechanism would include short-term purchase power purchase savings within those eligible for incentive payments. (TR 5891) Currently, 100% of the gains from short-term power purchases flow to customers. (TR 5895)

The additional transactions are outlined in Paragraph 12 of the August 15 document. These include, but by its terms are not limited to: 1) natural gas storage; 2) delivered city-gate natural gas sales; 3) production (upstream area natural gas sales); 4) capacity releases of natural gas transportation; 5) selling idle, third party electric transmission capacity; and 6) outsourcing the asset management function to a third party in the form of an asset management agreement. (TR 5891)

The expanded incentive mechanism would also change the thresholds at which FPL would begin to qualify for incentive payments from these types of transactions. Under the

current incentive mechanism, only non-separated wholesale power sales are used to establish the threshold for sharing of savings between the ratepayers and FPL. (TR 5890) In Order No. PSC-00-1744-PAA-EI, issued on September 26, 2000, the Commission allowed the Company to retain 20% of the gains related to the short-term power sales above a 3-year rolling average. Order at pp. 2, 13-14. Under the current mechanism, ratepayers are credited with the 100% of the savings from these wholesale power sales below the threshold and 80% of the savings from the sales above the threshold. Order at p. 2. Under the proposed expanded incentive mechanism, FPL proposed a fixed threshold. (TR 5895) Under Paragraph 12(a)(i), the ratepayers would receive 100% of the first $36 million, which is the "new" threshold. (TR 5891; EXH 701) The next $10 million above this threshold would also go to the customers. (TR 5891) Thereafter, between $46 million and $75 million, FPL would retain 70% of the incremental gains; between $75 million and $100 million, FPL would retain 60% of the incremental gains; and above $100 million, FPL would retain 50% of the incremental gains.

In addition to the changes in the thresholds, the August 15 document would authorize FPL to recover the increased O&M costs associated with the expanded incentive program. (TR 5892) Moreover, under the expanded mechanism, FPL could engage in new types of asset optimization transactions, and then seek the Commission's approval of their eligibility for incentives in the review process. (TR 5895; EXH 701)

FPL's proposed changes in the current mechanism heavily favor FPL and its shareholders at the potential expense of ratepayers. As OPC witness James Daniel described, the proposed expanded mechanism is vague and lacks sufficient justification regarding the benefits to ratepayers. (TR 5897) The following problems should lead the Commission to reject this one-sided document.

Inclusion of Purchased Power – As FPL witness Forrest acknowledged, in the near term the biggest impact on incentive calculations would come from purchased power. (TR 5637) The proposed expanded mechanism would allow FPL to benefit directly from the "savings" from purchased power, where it has not in the past. (TR 5897; EXH 685) Further, FPL wants to add this additional benefit without taking on any additional risk. (TR 5618)

Mr. Forrest acknowledged that the proposed incentive mechanism would not change the practices of the employees that use the economic dispatch model. (TR 5618-5619) However, he claimed that by hiring an additional body, FPL may be able to consider additional opportunities

outside its service territory. (TR 5620) Mr. Forrest even implied that FPL could have included the "optimization" of its own generation portfolio through its economic dispatch hierarchy within the category of "savings" that would generate incentive dollars for FPL. While the witness referred to economic dispatch as part of FPL's day-to-day operations, it appears that the technical difficulties that would be associated with quantifying the "gains" from economic dispatch played a larger part in his decision to exclude that fundamental activity from the expanded incentive opportunities. (TR 5545) OPC witness Daniel noted that in his 38 years of experience in electric regulation, he has never seen a utility with the audacity to claim that implementing the concept of economic dispatch should be a source of bonuses. (TR 5895) Mr. Forrest's characterization of economic dispatch as a theoretically available source of incentive dollar opportunities provides insight into FPL's view of its obligations to customers relative to profit-making opportunities. It should serve as a caution to the Commission's consideration of FPL's proposed expansion of the currently limited incentive program.

Mr. Daniel stated that short-term power purchases should be part of a utility's normal practice under the same rationale that governs its fundamental economic dispatch process and objective, and that the savings from purchased power should not be included in an incentive mechanism. (TR 5895) When pressed by Commissioner Balbis to explain why expanding the mechanism to include purchased power would be in the public interest, FPL witness Forrest suggested that it was appropriate to include both power purchases and sales because the same people engage in these activities that reduce fuel costs on a daily basis. (TR 5627) However, Mr. Forrest did not suggest that these employees would be doing anything different in purchasing power today than they have in the past. (TR 5624-5625) Significantly, the Commission stated in Order No. PSC-00-1744-PAA-EI, "[i]n establishing an appropriate incentive structure, we believe that the incentive should not be designed to encourage behavior that is already occurring." Id. at p. 9. Based on this principle, FPL should not be allowed to expand the current incentive mechanism to include already existing purchased power transactions and activities.

As OPC witness Daniel's Exhibit 685 demonstrates, based on historical data the proposed expanded mechanism would have shifted $47.3 million from ratepayers to FPL and its shareholders. (TR 5899; EXH 685) The reason for this shift would have been based – not on any change in FPL's behavior – but on the inclusion of purchased power and the new thresholds.

(EXH 685) As witness Daniel noted, an increase in profits for FPL should be based on the utility taking on extra responsibility or risk that actually results in a corresponding increase in system efficiency and the reduction of rates or fuel costs for ratepayers. (TR 5897)

Other problems with the incentive mechanism – As noted above, FPL proposes to expand the incentive mechanism to include the following transactions in addition to purchase power: 1) natural gas storage; 2) delivered city-gate natural gas sales; 3) production (upstream area natural gas sales; 4) capacity releases of natural gas transportation; 5) selling idle, third party electric transmission capacity; and 6) outsourcing the asset management function to a third party in the form of an asset management agreement. (TR 5891) OPC witness Daniel noted that of the additional transactions that FPL seeks to include in the expanded mechanism, the Company currently contracts only for the sale of idle electric transmission capacity and the sale of natural gas in production areas. (TR 5902) Mr. Daniel also noted that FPL has limited experience in contracting for the proposed asset optimization transactions because the market conditions needed for its pursuits have not developed. He stated that FPL has not been successful in its search to procure the necessary expertise. (TR 5901) In addition, he concluded that, considering FPL's dearth of expertise in the implementation of these transactions and its inability to locate third-party expertise, it would be premature to approve the program. (TR 5902)

OPC witness Daniel also noted that incentives to enter into off-system contracts could lead FPL to enter transactions that could undermine reliability, to the detriment of native load customers. (TR 5901) FPL witness Forrest professed to be indignant over witness Daniel's suggestion that the proposed program might pose a potential reliability issue. (TR 6201) However, during cross-examination, Mr. Forrest acknowledged that if transportation and transmission facilities are sold in off-system transactions, those facilities could not be used to serve native load customers. (TR 5574) While he contended that these facilities would be contracted away only when not needed (TR 5574), witness Forrest conceded that FPL has not engaged in the gas market or most forms of the asset optimization measures described in the August 15 document. (TR 5577, 6208)

In addition, OPC witness Daniel pointed out that FPL has provided no evidence that increasing the incentive above 20% for FPL shareholders will actually increase the volume, or the value, of off-system sales. (TR 5902) He further noted that FPL has not provided sufficient evidence to conclude that the proposed incentives are required for FPL to implement the

wholesale market transactions. (TR 5902) FPL witness Forrest conceded that there is no rule or statute that would prohibit FPL from engaging in the types of transactions that it is proposing. (TR 5575-5576) Despite the lack of prohibition, FPL has not sought to engage in these types of transactions without an "incentive."

There is also a dearth of evidence regarding the potential monetary benefits that ratepayers may realize if the additional transactions are implemented. Witness Daniel pointed out that the market conditions for the proposed asset optimization transactions do not exist at present. (TR 5901) However, witness Forrest acknowledged that there will be additional O&M expenses associated with setting up the expanded incentive mechanism. (TR 5612) He estimated that the incremental cost of adding 3 people would be in the range of $500,000. (TR 5613) Therefore, the expanded mechanism would cost the ratepayers an additional $47 million due to the inclusion of purchased power within a sharing mechanism, plus $500,000 in annual O&M cost, without any guarantee of additional savings.

In addition, there is no guarantee that higher cost units would not be used to provide power to native load customers. (TR 5614) Witness Forrest acknowledged that if customer demand was greater than FPL's ability to supply the need, FPL would have to go out into the wholesale market to purchase power, even though he claimed that such instances would be rare. (TR 5570-5571) While Mr. Forrest stated that these transactions and costs would be subject to the same review as the hedging program (TR 5614), witness Daniel noted that this approach would place the Commission in the undesirable position of reconstructing and verifying transactions with limited information as to whether these transactions constituted the most prudent use of ratepayer-funded resources. (TR 5906) Mr. Daniel further testified that reproducing the complex dispatching and market operations associated with current wholesale transactions is resource intensive. (TR 5906) Witness Forrest confirmed that FPL uses a variety of models (GenTrader and Economy A) to conduct its day-to-day wholesale transactions. (TR 5606) He also acknowledged that there is some monetary risk associated with the additional optimization transactions. (TR 5614)

Finally, witness Daniel pointed out that, given the nature of the proposed expanded mechanism, other utilities may seek similar changes. (TR 5907) He noted that a generic proceeding rather than this expedited company-specific rate case stipulation would be a better vehicle with which to consider this type of change. (TR 5907) In addition, he testified that if

this type of expansion was to be considered, a technical proceeding would allow the other affected utilities and parties to address the costs, risks, and public interest concerns sufficiently. (TR 5907-5908) Witness Forrest acknowledged that this expansion could have been sought in the rate case or in the fuel docket. (TR 5622-5623) He confirmed that the hedging program was approved through a rulemaking proceeding. (TR 5621) The current incentive mechanism was approved in the generic fuel docket. See, Order No. PSC-00-1744-PAA-EI.

Conclusion

The proposed expanded incentive mechanism would be a bad deal for ratepayers. Currently, ratepayers receive 100% of the benefits from purchased power. As witness Daniel's comparison demonstrates, over time ratepayers would have received $47 million less in benefits than under the current mechanism. (EXH 685) There is no evidence that any of the other types of proposed transactions will result in gains; however, it is certain that they will result in additional costs. Rather than assume the risk of developing the market and demonstrating the benefit of these new types of transactions for ratepayers, FPL wants customers to assume all the risk, including increased costs and potential reliability issues. The Commission should reject this provision as not in the public interest.

Issue 5: Is the Settlement Agreement in the public interest?

No. The provisions, individually and collectively, would not result in rates that meet the fair, just, and reasonable criteria of Chapter 366, Florida Statutes. The August 15 document is entirely asymmetric. The exorbitant ROE and equity ratio would produce unreasonably high rates, while the $378 million increase unrealistically assumes that FPL would prevail on 100% of pending challenges to rate base and O&M levels. The proposal to enhance earnings by amortizing fossil dismantlement reserve while postponing the next dismantlement study would distort the objective of accounting for capital costs, and deny customers any commensurate monetary benefits. The proposed generation base rate increases would replace the appropriate focus on overall return with piecemeal ratemaking, subordinate the objective of level rates to FPL's desire for earnings protection, and require sacrifices of future oversight. The proposed expansion of wholesale incentives to include economy power purchases would require customers to pay FPL for what it is already doing. Further, to reward FPL's duplicity in creating the false narrative of OPC's unwillingness to negotiate would not be in the public interest.

ARGUMENT:

A high equity ratio lowers overall investment risk and should translate to a commensurately lower ROE. The August 15 document would marry the highest ROE authorized

in 2012 to the highest equity ratio authorized in 2012. The resulting windfall to investors would not be in the public interest – FPL witness Moray Dewhurst and FIPUG witness Jeffry Pollock offered testimony in support of the 10.7% ROE that is part of the August 15 document.[8] Mr. Dewhurst did not purport to have conducted a study of FPL's cost of equity capital. Instead, he referred vaguely to unnamed "investors" who told him that an ROE of 10.7% is "in the ballpark." (TR 5872-5873) In support of the proposed ROE of 10.7%, Mr. Dewhurst cited 2 documents prepared by Barclays and another by Atlantic Equities. Through the Barclays documents, Mr. Dewhurst continued to sound FPL's persistent theme that "Wall Street was disappointed by the Commission's decision in the last case, and is watching closely to see if it has returned to normalcy." (EXH 720 – Barclays) This mantra was discredited during the August 2012 hearing. Soon after the 2010 decision, Moody's reported that the 10% ROE that the Commission authorized in Docket No. 080677-EI was consistent with contemporaneous decisions throughout the country. In April 2012, Moody's opined that FPL's authorized ROE of 10% was "still adequate." (EXH 574 and EXH 636) Moreover, FPL's earnings and stock price have performed well under the rates that the Commission established in FPL's last rate case.[9]

In his report, the broker with Atlantic Equities reiterated his "overweight" recommendation, which signifies his view that the stock of FPL's parent – the only way that an equity investor can own FPL – is a good buy. (TR 5841-5842; EXH 720 – Atlantic Equities) The broker also described NextEra Energy as having "below average" business risk and as a prodigious generator of cash flow. (EXH 720 – Atlantic Equities)[10]

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[8] FEA witness Gorman, who testified during the August 2012 hearing that the appropriate ROE for FPL is 9.25%, did not testify in support of the 10.7% ROE in the August 15 document of which FEA is a signatory. SFHHA witness Baudino, who testified during the August 2012 hearing that the appropriate ROE for FPL is 9.0%, did not testify in support of the 10.7% ROE in the August 15 document of which SFHHA is a signatory. Signatory FIPUG witness Pollock testified solely on cost of service and rate design issues during the August 2012 hearing.

[9] Each Barclays document contains this disclosure: "Barclays Capital Inc. and/or one of its affiliates does and seeks to do business with companies covered in its research reports. As a result, investors should be aware that the firm may have a conflict of interest that could affect the objectivity of this report." OPC believes that the message informing the reader of Barclays' lack of objectivity, when translated, means "if we say something supportive of FPL, it is likely that we have a vested business interest in doing so."

[10] When questioned about the Atlantic Equities document, Mr. Dewhurst mentioned that it addressed NextEra Energy's combined operations. However, it was Mr. Dewhurst who attached the document as an exhibit to his testimony in FPL's rate case.

Mr. Dewhurst attempted to glom onto the ROE values that the Commission authorized for Gulf Power Company in February 2012 and for Progress Energy Florida in March 2012.[11] OPC witness O'Donnell pointed out that the cost of capital has declined since the Commission awarded 10.25% to Gulf Power, and that Gulf Power's equity ratio was only 46.26%. He also observed that the 10.7% ROE authorized for PEF is contingent on PEF's success in returning its crippled Crystal River 3 nuclear reactor to service by 2016, and that the settlement package – of which a base 10.5% ROE was a part – also included a substantial refund obligation by PEF. Mr. O'Donnell reminded the Commission that in 2010 it determined that FPL's cost of equity was 50 basis points lower than PEF's in decisions that were made less than 2 weeks apart. (TR 5961-5962)

Mr. O'Donnell also responded to the vague and speculative description of inflationary risks and rising interest rates with which Mr. Dewhurst attempted to support an ROE of 10.7%. Mr. O'Donnell testified that the Federal Reserve has announced a new program of "quantitative easing" that is designed to implement its policy of low interest rates through 2015. (TR 5964)

Mr. Pollock did not purport to have performed a specific analysis of FPL's risk. Instead, he compiled a list of ROE decisions that were made throughout the country from the time of FPL's last rate case to the present. Three observations arise from his compilation. First, such comparisons do not establish a basis for *setting* an ROE for an individual company; they only provide a means for a "sanity check" of the reasonableness of the ROE that the regulator derives based upon its analysis of the petitioning utility. (OPC witness O'Donnell reminded the Commission that, during the August 2012 hearing, Dr. Woolridge testified that, based on his analysis, FPL's cost of equity is 8.5%-9.0%, depending on the Commission's choice of equity ratios.) Next, Mr. Pollock made no attempt to correlate the ROE values of his compilation with the utilities' respective equity ratios. As reiterated by Mr. O'Donnell, a higher equity ratio lowers a utility's risk and thereby lowers the utility's required ROE. (TR 5967-5968) Lastly, when the Commission engaged in such a reasonableness check in the Gulf Power case (early 2012), it reviewed only decisions that had been made in 2011. Noting that the Commission had appropriately focused on contemporaneous decisions in the Gulf Power rate case, and also observing that interest rates declined during the 3-year period encompassed by Mr. Pollock's

[11] One wonders how determinedly FPL would insist on being awarded the same ROE that another utility received in a past case if interest rates had since risen as dramatically as they have fallen over the past several years.

compilation, Mr. O'Donnell provided a data base of ROE *and* equity ratio decisions made by regulators throughout the United States in 2012 to date. He determined that the average ROE authorized in 2012 was 9.99%, and the average equity ratio was 51.35%. He also determined that the 10.7% ROE of the August 15 document would be the *highest* ROE of any authorized in 2012, and the 59.62% equity ratio that is implicit in the August 15 document would be the *highest* equity ratio authorized in 2012. (EXH 688 and EXH 689). With a "highest of 2012" equity ratio of 59.62% and a "below average" business risk, FPL logically should have a below-average cost of equity.

Mr. Pollock stated in testimony that the 10.7% ROE should enable FPL to maintain an "A" bond rating. Here, Mr. Pollock's role as a partisan advocate for the August 15 document is especially apparent. He did not provide an analysis of bond rating agencies' rating parameters, as OPC witness Dan Lawton did during the August 2012 hearing. Moreover, Mr. Pollock did not attempt to ascertain whether FPL could maintain an "A" rating with an ROE *lower* than 10.7%, as any balanced approach that takes customers' interests into account would do. In fact, during FPL's last rate case, Mr. Pollock's direct testimony featured a chart designed to demonstrate that FPL's extremely high equity ratio was not essential to its "A" rating, because other utilities with equity ratios in the vicinity of 50% were able to maintain an "A" rating. (EXH 708, Page 29) Mr. Pollock made no similar effort in the recent hearing with respect to either ROE or equity ratio.

Having ignored the impact of FPL's 59.62% equity ratio (which skewed his review toward FPL's interest), and having cast his "reasonableness test" net across a time frame that included interest rates materially higher than those of today's capital markets (which also skewed his review toward FPL's interest), Mr. Pollock was nonetheless compelled to acknowledge that, based even on his tilted perspective, the 10.7% ROE of the August 15 document is "above average." He called on the Commission to regard the ROE value as only one component of an overall package. (TR 5437, 5440-5441) This portion of his testimony appears to acknowledge that the purported settlement would not be in the public interest *unless* other provisions can generate sufficient customer benefits to offset, and therefore justify, an unduly high ROE.

Unreasonable and unrealistic $378 million increase in revenues — In addition to the impact of the inordinate 10.7% ROE, the $378 million increase associated with the purported settlement implicitly assumes that, of the tens of millions of dollars of adjustments to rate base

and expenses that OPC and other parties (including FIPUG, SFHHA, and FEA) have identified and supported in evidence and argument, the adjustments ultimately adopted by the Commission would total *zero*. This assumption is unreasonable and untenable on its face. There was no "give" by FPL in the derivation of the size of the increase.

Unreasonable and prejudicial (to customers) piecemeal ratemaking, in the form of base rate increases in 2014 and 2016 of $236,043,000 and $217,862,000, respectively – The "generation base rate adjustments" that are proposed for 2014 and 2016 (increases that would occur beyond the projected test year and that were not requested in FPL's March 2012 petition) would ensure that FPL would receive more revenues during 2013-2016 under the "compromise" of the August 15 document than it would be authorized to receive under FPL's March 2012 petition during the same period – even if the Commission were to agree to FPL's originally requested 11.5% ROE *and* to adopt FPL's positions on all other disputed issues! The "generation base rate adjustments" are a form of "piecemeal ratemaking." This means that FPL seeks authority to tack the entire revenue requirements associated with a future asset onto base rates when it enters service, without any consideration at that time of whether the utility's earnings may be sufficient to absorb the asset into rate base with either no increase or a smaller rate increase. This proposal favors FPL at the expense of customers. There is nothing in this provision that would counterbalance the 10.7% ROE or other utility-favoring provisions.

Amortization of dismantlement reserve for the express purpose of enhancing FPL's earnings — The objective of capital recovery accounting is to collect plant costs in a way that, based on the analysis of available information, will allow the recovery of capital costs over the life of the capital asset and is fair to both the company and to each generation of customers. The amortization of a reserve imbalance is intended to eliminate significant levels of intergenerational inequity, and any impact of such an adjustment on earnings is a by-product of the pursuit of that objective. The purpose of the provision in the August 15 document that would enable FPL to amortize $209 million of dismantlement reserve is to enhance FPL's earnings. The impact on customers would be a by-product of the earnings enhancement mechanism, and the document would *require* (through the postponement of studies mandated by Commission rule) that supporting information be *unavailable*. Thus, the August 15 document would stand the purpose of capital recovery accounting on its head. Further: if a utility is authorized to amortize a reserve surplus to enhance its earnings, customers should receive a corresponding benefit in the

form of a commensurate reduction in base rates. Tellingly, FPL has timed the introduction of this proposal in a way that is designed to avoid having to reflect an annual amortization in the calculation of revenue requirements in the test year of a base rate proceeding. This provision is designed and intended to benefit FPL. It does nothing to counterbalance the 10.7% ROE or other utility-favoring paragraphs of the August 15 document.

The "asset optimization" provision would expand the existing, narrowly defined wholesale incentive program into inappropriate areas with inadequate safeguards for customers — Regulated utilities have an obligation to provide reliable and economical service. One of the primary tools that a utility employs to adhere to this standard is to meet the demand on its system by calling on its resources in the ascending order of their costs. This concept of "economic dispatch" is fundamental – yet FPL witness Forrest audaciously views it as a potential source of incentive dollars! Purchasing power when it is available at a price lower than the utility's cost of generating it is part of the economic dispatch rationale. By proposing to include savings from power *purchases* in an expanded incentive program, FPL is seeking "bonuses" for activities in which it is already engaged. The incentives that customers would pay for the current power purchase program would constitute a hurdle to receiving any benefits from FPL's aggressive proposal. This provision tilts benefits toward FPL, not its customers.

The purported settlement of the August 15 document bears no resemblance to the public interest — The concept of a settlement involves a compromise that provides benefits to all of the interests represented in the case. The bottom line of any settlement presented to the Commission must be fair and reasonable terms that translate into fair, just, and reasonable rates. The August 15 document provides for an ROE that is excessive in view of capital markets and FPL's risk profile; an unvetted increase in base rate revenues that would give FPL a "pass" on the myriad of adjustments to rate base and expenses that OPC and other parties advocated during the case; future base rate increases that would occur far beyond the projected test year, and that would not be mitigated by strong earnings, no matter how high; amortization of dismantlement reserve that would increase FPL's earnings, but would not reduce customers' rates; and an expansion of the existing wholesale sales incentive mechanism that would "reward" FPL for adhering to the most fundamental of economic obligations, and perversely incentivize FPL to seek off-system opportunities at the expense of retail customers. These egregious terms, individually and collectively, would produce rates that would be unfair, unreasonable, and unjust, and would not

be offset by any countervailing benefits to customers. The Commission should see the Joint Motion For Approval for what it is – a "joint" Christmas wish list.

The purported settlement is not supported by Mr. Pollock's flawed "incremental infrastructure" exercise — In his effort to support the August 15 document, FIPUG witness Pollock submitted an exhibit intended to demonstrate that the $378 million increase that would take effect in January 2013 would suffice only to compensate FPL for the increment of infrastructure that it has placed into service since its last rate case. (TR 5412) Mr. Pollock defined "infrastructure" as the physical, concrete-and-steel plant with which FPL provides service to its customers, and further defined the word in terms of the categories of costs that are specific to such items of physical plant. (TR 5412, 5443, 5455-5456; EXH 704) His exhibit purported to demonstrate that the "revenue deficiency" (i.e., revenue requirements) associated with FPL's "incremental infrastructure" is close to the value of the $378 million base rate increase.

Of the many flaws in his proposition and the exhibit that he offered in support of it, Mr. Pollock's conceptual shortcoming is paramount. Just as the "generation base rate adjustment" would be a form of piecemeal ratemaking that would ignore the larger picture of FPL's overall operations, Mr. Pollock's premise is a form of "piecemeal justification" that suffers from the same defect. Viewing FPL's operations from the arbitrary and narrow perspective of "incremental infrastructure" would obscure the fact that the $378 million increase would award FPL an excessive ROE on its entire proposed rate base *and* effectively resolve every one of the dozens of litigated adjustments pending before the Commission in the proceeding on FPL's March 2012 petition in FPL's favor. (TR 5413) In addition, Mr. Pollock's effort to isolate FPL's "incremental infrastructure" and his assertion that FPL would be accepting the risk of managing its increased O&M expense overlook the $195 million of "incremental annual revenues" that FPL has grown since its last rate case. (TR 5470)

Beyond the fundamental conceptual shortcoming, Mr. Pollock's exhibit – even after a series of corrections – is seriously flawed. First, Mr. Pollock applied – not incremental infrastructure, as he defined it – but FPL's entire rate base to his calculations of incremental revenue requirements. In defense of this choice, he said that rate base is largely driven by new infrastructure. (TR 5424) However, of the increase in FPL's rate base since the Commission issued its order in FPL's last rate case, changes in working capital amounted to more than $1

billion. Working capital is not "infrastructure," as Mr. Pollock defined it for purposes of his analysis. (TR 5460) Neither, for that matter, is property held for future use, which increased significantly in the MFRs that FPL filed in March 2012.

One of the corrections that Mr. Pollock made to the "incremental infrastructure" exhibit was to remove the $821.3 million investment in the Cape Canaveral Modernization project from "incremental infrastructure," as it is the subject of a separately proposed base rate request. Mr. Pollock also eliminated a $114.8 million line item representing the return of a portion of the $191 million of remaining, unamortized depreciation reserve surplus to customers during the term of the purported settlement.[12] Despite the magnitude of these corrections, the "revenue deficiency" that Mr. Pollock calculated differed from the first version of his exhibit by only $14.2 million. In other words, it still purported to demonstrate that the level of revenue requirements of incremental infrastructure were close to the $378 million increase provided in the August 15 document. This curiosity led OPC witness Ramas to analyze the exhibit.[13] She observed that, when Mr. Pollock subtracted the test year depreciation expense that the Commission approved in the final order in FPL's last rate case from the corresponding amount of depreciation expense that FPL included in its MFRs in the instant case, he used values that reflected the amortization of depreciation reserve surplus. Embedded in the 2010 rate case order value were $223 million of "credits" to depreciation expense. Embedded in the MFRs were $191 million of similar "credits." In his corrected exhibit, Mr. Pollock eliminated the separate line item of $114.8 million because he believed that the $191 million of remaining depreciation reserve surplus had been "returned to customers" in the step in which he subtracted the 2010 test year depreciation from the 2012 MFR depreciation. (TR 5416; EXH 704) In her supplemental testimony on the subject, Ms. Ramas demonstrated that Mr. Pollock was mistaken.

Ms. Ramas explained that an increase or decrease in depreciation expense, which represents the recovery of capital investment, is an indication of a change in infrastructure; however, a comparison of the amount of amortization of reserve surplus included in the 2010

[12] Mr. Pollock chose to assume that the $191 million would be amortized over 18 months. Had he assumed a 1-year amortization, his calculated revenue deficiency would not have closely approximated the $378 million base rate increase. Mr. Pollock acknowledged that the assumption of an amortization period was a "tool" that he employed in his analysis. (TR 5466)

[13] Mr. Pollock provided the corrected exhibit as an errata that he attached to his rebuttal testimony. By stipulation, Ms. Ramas submitted supplemental direct testimony on the correction, to which FPL witness Robert Barrett responded in supplemental rebuttal. (TR 5731-5732)

order with the amount of amortization included in FPL's 2013 test year is just that – the calculation of a differential that is meaningless, and irrelevant to FPL's obligation to return the unamortized depreciation reserve surplus to customers. To underscore her point, Ms. Ramas observed that, because the "credit" or amortization in the 2013 amount ($191 million) was *smaller* than the amount of amortization reflected in the Commission's order ($223 million), the result of subtracting the 2010 amount from the 2013 MFR amount effectively *increased* depreciation expense, when we know that the application of the credit works to *decrease* depreciation expense. This counterintuitive result should have alerted Mr. Pollock to the nature of his error. (TR 6059-6060)

Ms. Ramas' point can be explained through the following illustration. Assume that a customer owes a department store $2500. Assume that, by virtue of returns and exchanges, at the end of 2011 the same customer had a store credit of $500 that has the practical effect of offsetting the $2500 account balance. Further, assume that at the end of 2012, as a result of another exchange transaction, the store credit is now $400, and the customer's account still shows a balance owed of $2500. If we subtract the initial $500 store credit from the remaining 2012 store credit of $400, the result is -$100, but this is a meaningless calculation. The remaining store credit of $400 has not yet been applied to the customer's benefit.

In short, when Mr. Pollock entered the $114.8 million line item on Exhibit 679 (JP-15) to represent the return of depreciation reserve surplus to customers, he was methodologically arbitrary and selective as to the amortization period and amount, but conceptually correct in his recognition of the need to address the unamortized surplus. By erroneously removing the line item completely, he subsequently introduced an error of magnitude similar to that of the error that he simultaneously *corrected* (that being the removal of the investment in the Cape Canaveral Modernization project). The two errors cancelled each other out, such that Mr. Pollock's calculated revenue deficiency remained in the vicinity of the $378 million base rate increase contemplated by the August 15 document.

In Exhibit 713, Ms. Ramas corrected Mr. Pollock's Exhibit 704 (JP-21). For clarity, she backed out the amortization that had been embedded in Mr. Pollock's depreciation amounts and expressed the pure depreciation expense values and the amortization values separately. She then reflected the return of the remaining depreciation reserve surplus to customers. Her correction reduced his "revenue deficiency" to $148 million (assuming a 1-year amortization) or $224.2

million (applying the 18-month amortization assumption of Mr. Pollock's Exhibit 679 (JP-15)). Ms. Ramas' exhibit did *not* address the erroneous use of a rate base value that overstated "incremental infrastructure" by hundreds of millions of dollars. Had she done so, the fallacies of Mr. Pollock's exercise would have been even more conspicuous.

In his supplemental rebuttal, Mr. Barrett claimed simply that Ms. Ramas had "inexplicably" applied the depreciation reserve surplus. He sponsored an exhibit in which he basically reversed her correcting entry. However, it was Mr. Barrett, not Ms. Ramas, who was vague, unsupported, and "inexplicable" on the subject. OPC invites the Commission to compare the step-by-step explanation that Ms. Ramas included in her testimony to Mr. Barrett's brief, conclusory claim. Ms. Ramas provided the logic and rationale that underlies her adjustment to Mr. Pollock's exhibit. Mr. Barrett made no effort to demonstrate an error in her logic. Her adjustment is supported; his effort to reverse that adjustment is not. (TR 6058-6061; EXH 725)

The purported settlement agreement, which was executed on behalf of only an extremely small number of FPL's 4.6 million customers, is invalid in view of OPC's non-participation and active opposition to it.

FPL hopes to marginalize and/or circumvent OPC's role in the ratemaking scheme. Accordingly, the legal arguments and objections that OPC has raised during the course of the proceeding have implications for the "public interest" issue, as well as the legal basis for denying the Joint Motion for Approval pending before the Commission. OPC will summarize and preserve those legal arguments here.

In the case of *Citizens v. Mayo,* 333 So.2d 1 (Fla. 1976) (hereinafter *Citizens v. Mayo*), the Florida Supreme Court stated:

> Whatever public format the Commission chooses to provide, however, special conditions pertain in cases where public counsel has intervened. *This is a consequence of the statutory nexus between the file and suspend procedures and the role prescribed for public counsel in rate regulation.* Public counsel was authorized to represent the citizens of the State of Florida in rate proceedings of this type. *That office was created with the realization that the citizens of the state cannot adequately represent themselves in utility matters, and that the rate-setting function of the Commission is best performed when those who will pay utility rates are represented in an adversary proceeding by counsel at least as skilled as counsel for the utility company.* The office of public counsel was created by the same enactment which brought the utilities accelerated rate relief. Under these circumstances, the Commission cannot schedule a 'public

> hearing' and preclude public counsel, the public's advocate, from acting to protect the public's interest.
> *Citizens v. Mayo, supra,* at pages 6-7 (emphasis supplied)

In *Citizens v. Mayo,* the Court ruled that the Commission cannot conduct a hearing without allowing OPC's full participation. It follows logically that, where OPC intervenes as a matter of statutory right and contests the petitioning utility's rate request, the Commission cannot approve a purported settlement agreement in which OPC has not participated and to which OPC actively objects.

In fact, in this case the Commission is poised to repeat the mistake it made in *Citizens v. Mayo* in a broader and more egregious form, in that it would impact the very statutory framework for the public's representation in *all* general rate proceedings. In *Citizens v. Mayo,* the Commission scheduled a hearing, but denied OPC's ability to participate meaningfully — thereby thwarting OPC from exercising the role that the Florida Legislature assigned to it. The Commission's consideration of the purported settlement agreement in this case would have a strikingly similar effect, except that in the instant case the Commission actually conducted a hearing in which OPC actively participated before pursuing a course that would effectively deprive OPC of a hearing after all.

In *Citizens v. Mayo,* the Florida Supreme Court said that "special conditions pertain" when OPC intervenes in a Commission docket. The essential thrust of the purported settlement agreement in this case, and of the arguments that FPL and other signatories have advanced (explicitly and implicitly) in support of it, is that special conditions do *not* pertain when OPC intervenes in a Commission docket. (TR 5056) In FPL's (very recent) view, OPC is a party whose opposition to a proposed settlement and whose demands that the Commission rule on the merits of specific issues that OPC raised and litigated in the proceedings can be ignored by the Commission. If the Commission were to approve the purported settlement agreement over OPC's active opposition, it would necessarily signal that it regards OPC's objection to *any* proposed settlement in *any* docket as being of no consequence. The effect would be to marginalize OPC's participation, not only in the instant case, but in all future proceedings in which it intervenes, as the petitioning utility could bypass OPC's opposition through the expedient of offering a revenue concession (or another inducement) to a willing intervenor (and shifting that revenue responsibility to others). It is hard to imagine a more radical departure from

the holding in *Citizens v. Mayo, supra,* or one that would more directly undermine the general ratemaking procedure established by statute and Commission rule. Such an outcome would not be in the public interest.

The purported settlement is effectively a new petition. The purported settlement includes, among other things, provisions for significant, automatic increases in base rates that would coincide with the in-service dates of generating units in 2014 and 2016. FPL did not request these 2014 and 2016 rate increases in its March 2012 petition; nor were these addressed in FPL's March 2012 MFRs. Such a new request, once properly accompanied and supported by the required MFRs and proposed tariffs, triggers statutorily mandated review periods (eight months prior to the time the utility can implement the proposed rates subject to refund[14]; twelve months within which to make a final decision). Section 366.06(3), F.S. The proposed GBRAs within the purported settlement agreement, as well as the other provisions that exceed the scope of FPL's March 2012 petition and would affect rates, are governed by Section 366.06(1), F.S., and Rules 25-6.140 and 25-6.043, F.A.C. Section 366.06(1), F.S., provides:

> All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service."

The "rules and regulations prescribed" for petitions seeking general base rate increases include Commission Rule 25-6.140, F.A.C., Test Year Notification, and Rule 25-6.043, F.A.C., Investor-Owned Electric Utility Minimum Filing Requirements (MFRs). The Joint Motion for Approval of the purported settlement is effectively a petition for changes in FPL's general base rates. However, FPL has failed to file a Test Year Notification letter as required by Rule 25-6.140, F.A.C., and has not submitted any MFRs, testimony, or exhibits purporting to show that

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[14] On November 21, 2012 (after the close of the record), FPL filed a document entitled Notice of Intent to Implement Rates Pursuant to "File and Suspend" Provision. The Public Counsel has not had an opportunity to fully analyze this pleading. Ironically, the pleading suggests – upon a cursory reading – that the File and Suspend law applies to the August 15 document (what it refers to as the "Settlement Rates") and cites to the FERC and United States Court of Appeals for the 5th Circuit Case of *Transwestern Pipeline Co.*, 36 FERC P 61, 175, at p. 61, 338 (1986), *aff'd, Transwestern Pipeline Co v. FERC,* 820 F.2d 733 (5th Cir. 1987) (Note, Florida is in the 11th Circuit) for the proposition that so-called settlement rates can be implemented under the file and suspend framework. Whether this "bootstrapping" concept has any merit, the Public Counsel reserves its rights to brief and object to this document as circumstances warrant outside of this Brief and does not waive any rights to do so based on this footnote.

FPL would *need* a base rate increase in either 2014 or 2016. If and when FPL were to follow those requirements, the proceeding that the Commission would conduct on the "new petition" would be governed by Chapters 366 and 120, F.S.

To reward FPL for its diversionary tactic of portraying OPC as unwilling to negotiate would not be in the public interest. As FPL's own policy expert acknowledged, there is no duty to settle or any corollary right to have or force a settlement. (TR 5249, 5271; EXH 726) However, the record establishes that, in the early part of this case, the Public Counsel expressed a willingness to negotiate and even suggested a non-disclosure agreement to facilitate negotiations. FPL has pursued a strategy of portraying the Public Counsel as refusing to engage in negotiations. To the contrary, the testimony at hearing supports the Public Counsel's assertion that he was purposely *excluded* from the negotiations between March 1 and July 15, 2012 – the date on which he was informed by FPL and another party of an already executed deal. (TR 6305-6307, 6312) The Public Counsel rejects any suggestion or innuendo that on July 15, 2012 he was shown anything other than an executed agreement between FPL and a party. He further rejects categorically that he was offered any knowledge of, or the opportunity to participate in, any ongoing settlement talks prior to July 15, 2012. There is no evidence in the record indicating that the Public Counsel (or FRF for that matter) has ever, when given a *bona fide* opportunity, refused to participate or failed to participate constructively in negotiations toward settling rate cases (TR 6311-12, 6314) It is unreasonable – and false – to argue otherwise.

The public interest would not be served by a purported settlement in which representatives of only a minute fraction of customers participated. – In the case of *South Florida Hospital and Healthcare Association v. Jaber* 887 So.2d 1210 (Fla. 2004) ("*SFHHA*"), the Florida Supreme Court took note of the fact that the SFHHA had notice of, and the opportunity to participate in, negotiations.

The Commission's answer brief in the *South Florida* case, which was included as an exhibit to the September 27, 2012 hearing in this Docket (Answer Briefs attached following TR 5169), represented to the Court that the Commission staff served notice of and oversaw very public negotiation sessions, and that the signatories represented all the interests of FPL's customers (including those of SFHHA members). Commission Answer Brief at 5. By stark contrast, in the instant case a very small minority of intervening customers negotiated a purported "settlement" based on secret negotiations (TR 6305-6307, 6312) of which the Public

Counsel had no notice or opportunity to participate. It would not be in the public interest to approve an arrangement in which a tiny fraction of customers effectively imposed a burdensome liability (in the form of substantial rate increases) on other customers while "bargaining" for significant concessions that would be paid for by the unrepresented customers. In addition to patently poor public policy, such an outcome would be inconsistent with *SFHHA,* which based its affirmation of the Commission's order on actual notice of negotiations and broad customer representation (through OPC) within those negotiations.

The August 15 document should be rejected as matter of policy because it would create an incentive for rate case filings to be manipulated and for sham settlements to be brought before the Commission – Any approval or affirmation of the August 15 document would create the potential for a utility to file a "plain vanilla" case and to negotiate with limited intervenors to exchange revenue shifting concessions for the utility's wish list. Putting aside the issue of whether a settlement that does not include OPC is invalid, as OPC contends, a serious public policy issue is raised if the ratemaking provisions of Chapter 366, F.S., are bypassed through a presumption that a settlement with any willing signatories should be entitled to consideration – and even deference. Public confidence in the ratemaking process would be severely undermined, and the viability of the Commission's ongoing role as the surrogate for competition would be called into question.

CONCLUSION

For legal, substantive, and policy reasons, the Commission should reject the August 15 document and adjudicate the issues that were the subjects of the August hearing on FPL's March 2012 petition.

Respectfully submitted,

J.R. Kelly
Public Counsel

s/ Joseph A. McGlothlin
Joseph A. McGlothlin
Charles J. Rehwinkel
Patricia A. Christensen
Office of Public Counsel
c/o The Florida Legislature
11 1 West Madison Street, Room 812
Tallahassee, Florida 32399-1400
(850) 488-9330
Attorneys for Florida's Citizens

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF (NOVEMBER HEARING)** has been furnished by U.S. Mail and/or electronic mail on this 30th day of November, 2012, to the following:

Caroline Klancke
Keino Young
Florida Public Service Commission
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

John T. Butler
R. Wade Litchfield
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420

William C. Garner
Brian P. Armstrong
Nabors, Goblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, FL 32308

Vickie Gordon Kaufman
Jon C. Moyle
c/o Moyle Law Firm
118 North Gadsden Street
Tallahassee, FL 32301

Kenneth L. Wiseman
Mark F. Sundback
J. Peter Ripley
Andrews Kurth LLP
1350 I Street, NW, Suite 1100
Washington, DC 20005

Linda S. Quick
South Florida Hospital and Healthcare Association
6030 Hollywood Blvd.,
Suit3 140
Hollywood FL 33024

Karen White
Federal Executive Agencies
c/o AFLOA/JACL-ULFSC
139 Barnes Drive, Suite 1
Tyndall Air Force Base, FL 32403

Robert Scheffel Wright
John T. LaVia
Gardner Law Firm
1300 Thomaswood Drive
Tallahassee, FL 32308

John W. Hendricks
367 S. Shore Drive
Sarasota, FL 34234

Gregory J. Fike, Lt Col, USAF
Chief, Utility Litigation FSC
AFLOA/JACL (ULT)
139 Barnes Drive
Tyndall AFB, FL 32403-5319

Thomas Saporito
6701 Mallards Cove Rd., Apt. 28H
Jupiter, FL 33458

Ken Hoffman
Florida Power & Light Company
215 S. Monroe St., Suite 810
Tallahassee, FL 32301-1859

s/ Joseph A. McGlothlin
Joseph A. McGlothlin
Associate Public Counsel