FILED 12/28/2018
DOCUMENT NO. 07708-2018
FPSC - COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Enforcement of 2016 Settlement and Permanent Base Rate Reductions Against Florida Power & Light Company	DOCKET NO. 20180224-EI FILED: December 28, 2018

OPC'S AND FRF'S RESPONSE TO FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO JOINT PETITION

The Citizens of the State of Florida, represented by the Office of Public Counsel ("Citizens" or "OPC"), and the Florida Retail Federation ("FRF") (collectively the "Customers" herein),[1] by and through undersigned counsel and pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby respectfully respond to the improper pleading styled "Florida Power & Light Company's Response to Joint Petition for Enforcement of 2016 Settlement and Permanent Base Rate Reductions Against Florida Power & Light Company" (hereinafter "FPL's Response"), filed in this docket on Friday, December 21, 2018. [2]

In summary, FPL's Response is legally improper and the Commission should simply disregard it. The Commission should also ignore FPL's numerous misleading and erroneous assertions in its Response. Finally, regarding the underlying gravamen of the Customers' Joint Petition, which is the right of FPL's customers to be charged fair, just, and reasonable rates that reflect the dramatic, windfall tax cost savings being realized by FPL as a result of the Tax Cuts

[1] The Florida Industrial Power Users Group ("FIPUG"), a co-petitioner with OPC and the FRF on the Joint Petition, has on December 27, 2018, filed a motion for extension of time to respond to FPL's Response, and thus is not a party to this Response of OPC and the FRF.

[2] Although FPL avoided calling its Response a "motion," it is clear on the face of FPL's Response that it is, in fact, exactly that: a motion requesting an order denying the Joint Petition. FPL's Response at 20. Rule 28-106.204(1), F.A.C., provides that "All requests for relief shall be by motion." Rule 28-106.204(1), F.A.C., further provides that parties may file a response in opposition to a motion within seven days of service of the motion. Because FPL's Response includes an express request for an order, it is in legal substance a "motion," and accordingly OPC and FRF are entitled to file this response. Since FPL's Response was served on Friday, December 21, OPC's and FRF's response is timely filed.

and Jobs Act of 2017 ("Tax Act" or "TCJA"), the Commission must recognize that it has full jurisdiction and legal authority, pursuant to directly applicable opinions of the Florida Supreme Court, to revisit the 2016 Order on its own motion in order to ensure that FPL's retail customers are charged only the fair, just, and reasonable rates for FPL to provide service, in light of the dramatic windfall reductions in its income tax costs. OPC and FRF are separately filing a request for oral argument on these pleadings.

FPL'S RESPONSE IS LEGALLY IMPROPER AND SHOULD BE DISREGARDED.

FPL's Response is improper and the Commission should therefore simply ignore it. The Uniform Rules of Procedure provide for two species of responsive pleadings to petitions: answers pursuant to Rule 28-106.203, F.A.C., and dispositive motions, such as a motion to dismiss pursuant to Rule 28-106.204, F.A.C. FPL's Response is neither. If FPL had filed an answer, it should have been structured differently and should have directly addressed the allegations in the Joint Petition. Instead, FPL spent its entire 'response' misrepresenting facts and circumstances related to the 2016 Settlement Agreement. FPL included no cognizable grounds for dismissal, e.g., lack of jurisdiction, standing, or failure to state a claim upon which relief can be granted. Had FPL filed an answer, the entire procedural posture of the case would be different. In summary, FPL's Response is unauthorized and should simply be disregarded.

If FPL's Response is deemed to be a motion to dismiss, then the allegations in the Customers' Joint Petition are entitled to all of the presumptions properly accorded to any pleading against which a party seeks dismissal. The well-settled standard of review for motions to dismiss is that, in disposing of a motion to dismiss, the question to the tribunal is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In considering a motion to dismiss, the Commission is

confined to an examination of the pleading and any attached documents. See Posigan v. American Reliance Ins. Co., 549 So. 2d 751, 754 (Fla. 3d DCA 1989). In this instance, of course, FPL has offered no cognizable or justiciable grounds for dismissal, such as lack of jurisdiction, lack of standing, or failure to state a claim upon which relief can be granted. For clarity, OPC and FRF state affirmatively that the standard analysis applicable to motions to dismiss would lead clearly and unequivocally to the conclusion that, with all factual allegations taken as true, as they must be, the Joint Petition states a claim upon which the Commission has full authority and jurisdiction to grant the Joint Petitioners' request for lower rates reflecting FPL's dramatic tax cost savings.

FPL'S RESPONSE INCLUDES NUMEROUS MISLEADING AND ERRONEOUS STATEMENTS AND ARGUMENTS.

FPL's Response includes numerous misleading and erroneous statements and arguments that warrant response here.

A. FPL Has Mischaracterized the Burden that FIPUG or Any Other Non-Signatory to the 2016 Settlement Would Bear in Seeking Lower Rates.

In footnote 2 of FPL's Response, FPL states that any FPL customer or any party representing FPL customers seeking lower rates to reflect FPL's dramatically lower tax costs would have to demonstrate that FPL is earning outside its approved range of rates of return. This is inaccurate. All ratemaking is prospective. FIPUG and any other non-signatory FPL customer have the same rights to petition for lower rates that any customer would have if there were no settlement agreement in place. The 2016 Settlement has no binding effect on any such customer or customer party. Of course, any party not otherwise precluded from filing a petition or complaint to seek lower rates may also petition for reductions based on other factors, e.g., a lower rate of return on equity ("ROE") or a lower equity ratio.

B. FPL's Claim to Have Implemented Its Accounting Strategy to Benefit Its Customers is Disingenuous At Best.

FPL claims that it used the Reserve and ARM "to avoid nearly $1.3 billion of Hurricane Irma-related surcharges." This is misleading because it attempts to convey the notion that customers were or are better off as a result of FPL's accounting strategy, and further misleading because it is incomplete in addressing customers' rates over the longer term. While it is technically true that FPL could have implemented storm cost surcharges to recover its Irma costs, it is also true that FPL could have sought to cover its Irma restoration costs using the same, straightforward amortize-storm-costs-with-tax-savings approach used by Duke Energy Florida and Tampa Electric Company and approved by the Commission with the concurrence of many customer parties, including OPC and the FRF. The Duke-Tampa Electric approach would have kept FPL's rates unchanged, just as FPL's strategy did; the critical difference, however, is that both Tampa Electric and Duke agreed to implement permanent base rate reductions once the amortization of their Irma restoration costs was complete, whereas FPL is simply trying to keep all the money for itself and NextEra Energy, as permanently as it can, i.e., through 2020 or 2021. (See FPL's references to its ability to extend the 2016 Settlement at pages 2 and 3 of FPL's Response.)

To put FPL's tax savings in perspective relative to its rate of return, the amount of tax savings that FPL concedes is at issue is more than 1.5 times the entire range of FPL's authorized rates of return. FPL's ROE range is 9.6% to 11.6%. As testified by Lane Kollen in his affidavit that accompanied the Joint Petition, 100 basis points translates to approximately $223 million per year in revenue requirements. Both FPL and the Citizens now agree that the total income tax savings, including flowback of excess accumulated deferred income taxes, resulting from the Tax Act is approximately $736.8 Million per year. The entire range of FPL's authorized earnings is only $446 Million per year, so the amount at issue solely attributable to the Tax Act cost savings is approximately 1.65 times FPL's authorized earnings range. The Commission – and the

public – should not be fooled by FPL's incomplete characterization of its strategy of paying off its Irma costs with the Reserve. FPL could have accomplished the same result for customer rates and given customers the benefit of the Tax Act cost savings by committing to permanent base rate reductions once the Irma costs were amortized.

C. FPL's Statements Regarding OPC's Views on FPL's Plans to Use the Reserve to Pay Off Hurricane Irma Restoration Costs are Misleading and Irrelevant.

OPC strongly objects to FPL's use of confidential settlement discussions in its Response. Without waiving this objection, OPC and the FRF[3] respond as follows.

Without revealing specific content that would violate any privilege or confidentiality appurtenant to negotiations, the OPC categorically rejects any notion that — in the context of what it understood to be privileged and confidential negotiations — it gave what would have been *ex post facto* and irrelevant "concurrence" to FPL's use of $737 million in annual Tax Savings to re-establish the ARM that was improvidently extinguished to pay for the Hurricane Irma damages. OPC was never asked for its opinion or concurrence prior to FPL booking the storm costs in and wiping out the reserve in late December 2017.

D. FPL's Claims to be "Disappointed" in the Customers' Filing the Joint Petition Apply With Equal or Greater Force to the Customers' Disappointment in FPL's Efforts to Keep All the Tax Savings for Itself and NextEra Energy, Inc.

Responding to FPL's characterizations of the Customers' Joint Petition, the Customers have the same opinion of FPL's positions as FPL claims to have of the Joint Petition: where FPL asserts that it is disappointed in the Customers' filing of the Joint Petition, the Customers are equally disappointed in FPL, which has claimed pridefully for years to be interested in keeping its customers' rates low, for now trying to keep more than $700 million per year of windfall cash flow that should rightfully be flowed back to FPL's customers.

[3] The FRF was neither privy to nor apprised of any of the communications described here until informed thereof by OPC personnel much later in 2018.

Of course, FPL's "disappointment" – or outright anger – at the Joint Petitioners' efforts to make FPL disgorge much or all of its windfall tax savings for the benefit of retail customers is understandable. By the same token, the Customers – at least OPC and the FRF – are disappointed in FPL's efforts to keep all the tax savings money for itself. FPL has for years, when it could, touted its rates as being the lowest in Florida. Even though that is no longer true,[4] FPL still claims to be interested in keeping rates low, e.g., as evidenced by its claim to have acted to "avoid nearly $1.3 billion of Hurricane Irma-related surcharges." Of course, FPL never told anyone – not the Commission, not OPC, not the FRF, not the general public – before the fact that the effective price of FPL's strategy would be that FPL would expect to keep all the excess tax savings after its Irma restoration costs[5] were paid off.

If FPL cared about lowering customer rates, it could have and should have proactively moved to give customers the benefit of the Tax Act cost savings. The amounts are significant: a reduction in revenue requirements of $736.8 Million per year would translate into average retail rate reductions of more than $6 per 1,000 kWh. Alas, FPL chose not to do so. The Customers are justifiably disappointed in FPL's efforts to keep all the money for itself and its shareholder.

---

[4] FPL's residential rates will not even be the lowest among Florida IOUs as of January 1, 2019.

[5] That is, whatever amount the Commission might ultimately determine to have been reasonable and prudent. Although FPL's plans on this point are unclear, on its face, it appears that FPL may have intended to avoid any scrutiny of its Hurricane Irma restoration costs by just paying them off from the Reserve. The Commission will note well that, unlike Florida's other IOUs, FPL did not file any petition seeking approval of its Irma restoration costs until after the Commission opened a docket to address those costs.

THE COMMISSION HAS FULL JURISDICTION, POWER, AND AUTHORITY TO REDUCE FPL'S RATES TO REFLECT THE $736.8 MILLION PER YEAR OF TAX ACT SAVINGS AND OTHER FACTORS.

The gravamen of the Joint Petition filed by OPC, FRF, and FIPUG is the Joint Petitioners claim that FPL's rates are unfair, unjust, and unreasonable, due in significant part to the dramatic windfall income tax cost savings realized by FPL as a result of the Tax Cuts and Jobs Act of 2017. Accordingly, the Commission should move deliberately to ensure that the rates charged to all of FPL's retail customers are fair, just, and reasonable. The Commission took the first step in this direction when it took jurisdiction over the tax savings by Order No. PSC-2018-0104-PCO-PU, on February 6, 2018. The general rate case requested in the Petition by the Joint Petitioners is necessary to ensure that the final result is fair, just, and reasonable rates for all FPL retail customers.

While OPC and the FRF[6] are not asking the Commission to revisit the 2016 Order, the Commission must recognize that it has full jurisdiction and legal authority, pursuant to directly applicable opinions of the Florida Supreme Court, to revisit the 2016 Order on its own motion in order to ensure that FPL's retail customers are charged only the fair, just, and reasonable rates for FPL to provide service, in light of the dramatic change in circumstances resulting from the windfall reductions in its income tax costs. Although the doctrine of "decisional finality," also referred to as "administrative finality," "provides that there must be a 'terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein,'" Gulf Coast Electric Co-op, Inc., v.

[6] This discussion leaves aside the legal opportunity for FIPUG or any other FPL customer, or party representing FPL customers, to file a petition seeking general rate relief based on the application of current facts to FPL's costs of providing service prospectively, e.g., beginning in January 2020. Rather, this discussion focuses only on the Commission's power to set FPL's fair, just, and reasonable rates, notwithstanding the 2016 Settlement approved in the 2016 Order, because of the dramatic change in circumstances occasioned by the Tax Act.

Johnson, 727 So. 2d 259, 265 (1999), (citing Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679, 681 (1979)), the Florida Supreme Court has clearly stated that, "Once a decision has become final for these purposes, it may be modified if there is a significant change in circumstances or a great public interest is served by the modification." Id.

Here, the changes wrought by the Tax Act are not just significant, they are dramatic. The amount of the tax savings realized by FPL as a result of the Tax Act is approximately $736.8 Million per year, which is approximately 1.65 times the total range of FPL's authorized earnings - $446 Million – between the minimum and maximum of the range approved in the 2016 Settlement and 2016 Order. By any reasonable and objective standard, this is a significant change in circumstances. Pursuant to the Court's opinions, the Commission has the clear authority to act to ensure fair, just, and reasonable rates for FPL's customers that will reflect this dramatic change in circumstances.

CONCLUSION

FPL acted without Commission approval when it wrote off its Hurricane Irma restoration costs against the Reserve. Unlike other Florida public utilities, including Duke Energy Florida, Tampa Electric Company, and Gulf Power Company, FPL is apparently attempting to keep all of the tax savings for the benefit of its sole shareholder, NextEra Energy, Inc., and not to reduce its retail rates to provide the benefits of those tax cost savings to its retail customers. The Joint Petition simply and lawfully asks the Commission to ensure that FPL's rates are fair, just, and reasonable by requiring FPL to promptly flow back the Tax Act cost savings to its customers.

FPL's Response is improper: it is neither an answer authorized by Rule 28-106-203, F.A.C., nor a motion to dismiss authorized by Rule 28-106-204, F.A.C. (It is, in legal substance, a "motion," and thus this response by OPC and FRF is authorized by Rule 28-106.204(1), F.A.C.) Moreover, many of FPL's arguments and statements are misleading or erroneous, and the

Commission should not countenance FPL's claims and assertions. The Commission should let the Joint Petition proceed in due course. The Commission must also recognize that it has the full legal authority, jurisdiction, and power to act on its own motion to set fair, just, and reasonable rates for FPL prospectively based on FPL's dramatically reduced tax costs and other factors, notwithstanding the 2016 Order.

WHEREFORE, the Citizens of the State of Florida, by and through their Public Counsel, and the Florida Retail Federation, as representatives of all of FPL's retail customers, respectfully suggest that the Commission should simply disregard FPL's Response as the improper pleading that it is. Additionally, as requested in the Joint Petition filed on December 5, the Joint Petitioners respectfully renew their request that the Commission set the issue of FPL's fair, just, and reasonable rates, including refunds and permanent base rate reductions resulting from the Tax Act, for hearing in due course.

Respectfully submitted this 28th day of December, 2018.

OFFICE OF PUBLIC COUNSEL

By: *s/ J.R. Kelly*______________________

J. R. Kelly, Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400

Attorneys for the Citizens of the State of Florida

FLORIDA RETAIL FEDERATION

By: *s/ Robert Scheffel Wright*

Robert Scheffel Wright
schef@gbwlegal.com
John T. LaVia, III
jlavia@gbwlegal.com
Gardner, Bist, Bowden, Bush, Dee, LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308
Telephone (850) 385-0070
Facsimile (850) 385-5416

Attorneys for the Florida Retail Federation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 28th day of December, 2018, to the following:

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

Kenneth Hoffman
Florida Power & Light Company
215 South Monroe Street, Suite 810
Tallahassee, Florida 32301
ken.hoffman@fpl.com

Kevin I.C. Donaldson
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408
john.butler@fpl.com
kevin.donaldson@fpl.com

Jon C. Moyle, Jr.
Karen Putnal
Moyle Law Firm, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
jmoyle@moylelaw.com
kputnal@moylelaw.com

/s/Tad David
Thomas A. (Tad) David
Associate Public Counsel