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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Consideration of the tax impacts associated with Tax Cuts and Jobs Act of 2017 for Florida Power & Light Company	Docket No: 20180046-EI Filed: February 22, 2019

FLORIDA POWER & LIGHT COMPANY'S INITIAL BRIEF ON ISSUES 18 AND 19

Florida Power & Light Company ("FPL"), pursuant to the Public Service Commission's ("Commission") Order No. PSC-2019-0050-PHO-EI, hereby files its initial brief. As directed by the Commission, this brief is limited to Issues 18 and 19.

I. INTRODUCTION

Procedural Posture

At the hearing held in this docket on February 5, 2019, the pre-filed testimony and exhibits of FPL witness Scott Bores and Office of Public Counsel ("OPC") witness Ralph Smith were entered into the record and, by mutual agreement of the parties and approval of the Commission, the witnesses were excused without cross-examination. Tr. 9-10. Exhibits 1 through 22 were entered with no objection. Thereafter, the Commission considered stipulations reached by FPL and OPC on Issues 1 through 17 and 20 – set forth in Exhibit 22 – which comprise all issues pertaining to the calculation of tax savings resulting from the Tax Cuts and Jobs Act of 2017 ("Tax Act"). Tr. 50. The Florida Retail Federation ("FRF") and Federal Executive Agencies ("FEA") had no objection to the stipulations. Tr. 51-52. The Florida Industrial Power Users Group ("FIPUG") took no position. Tr. 52. The Commission unanimously approved the stipulations. Tr. 52.

The Commission recessed the hearing and, pursuant to Order No. PSC-2019-0050-PHO-EI, directed the parties to submit initial and reply briefs on Issues 18 and 19. Tr. 63. Issues 18 and 19 relate to the disposition of the tax savings. The positions on these issues set forth in

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OPC's and FRF's prehearing statements refer to arguments contained in their December 5, 2018 *Petition for Enforcement of 2016 Settlement and Permanent Base Rate Reductions Against Florida Power & Light Company*, which was filed in Docket 20180224-EI (the "Rate Petition"),[1] a filing in which FIPUG also joined. Accordingly, FPL addresses arguments made by the Intervenors in the Rate Petition that relate to Issues 18 and 19.

Factual Background

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

In 2016, after a long and contentious base rate proceeding and following extensive and detailed negotiations, the Company and three of the intervenors in that proceeding – OPC, FRF and the South Florida Hospital and Healthcare Association ("SFHHA") – executed a settlement agreement that established a framework for rate stability for a minimum term of four years (the "Settlement Agreement"[2] or "Agreement") while allowing FPL the opportunity to earn within an authorized range of return on equity ("ROE"). OPC, FRF, SFHHA and FPL (collectively, the "Signatories")[3] strongly supported the Settlement Agreement as being in the public interest and in the best interests of those they represent, both before this Commission and at the Florida Supreme Court. *See* Docket 160021-EI, Document No. 08770-2016, Intervenor Signatories Post-hearing Brief on the Settlement; Florida Supreme Court Case No. SC17-82, *Sierra Club v. Julie Immanuel Brown et al.*; *see also* Order No. 16-0560-AS-EI ("The Settlement Agreement will allow FPL to maintain the financial integrity necessary to make the capital investments over

[1] *See* PSC-2019-0050-PHO-EI, pp. 18-21.

[2] For citation purposes, "Settlement Agreement" will be abbreviated as "S.A."

[3] FIPUG took no position on the signatories' Motion To Approve the Settlement Agreement. The Federal Executive Agencies ("FEA"), although not a signatory, did not oppose the Settlement Agreement. Both FIPUG and FEA are beneficiaries of rate credits resulting from the Settlement.

the next four years required to sustain this level of service while providing rate stability and predictability for FPL's customers.").

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

The Amortization Reserve Mechanism is central to the Settlement Agreement

To help avoid exceeding either end of the authorized ROE range, the Settlement Agreement includes an amortization reserve mechanism ("ARM"). The ARM is what allows FPL to absorb fluctuations in the business, such as additional expenses or lower than expected sales while remaining within the authorized range. Likewise, the ARM allows FPL to absorb lower expenses or higher than expected sales while remaining within its authorized range. The Agreement established a "Reserve" account with an initial balance totaling $1.25 billion and authorizes FPL to "amortize *any* reserve amount" (emphasis added) during the term of the Settlement Agreement "with the amounts to be amortized in each year of the Term left to FPL's discretion, subject to the limitation to maintain FPL's earned ROE within the authorized range." S.A. ¶ 12(c).

The Settlement Agreement also allows FPL *to reverse* any amortization of the Reserve, again subject to the ROE obligation. S.A. ¶ 12(c) ("FPL shall file an attachment to its monthly surveillance report for December of each year during the Term that shows the amount of amortization *credit or debit* to the Reserve Amount on a monthly basis and year-end total basis

for that calendar year.") (emphasis added).[4] This flexibility afforded by the ARM has been essential in this and in prior FPL settlement agreements. Without this flexibility – the same flexibility FPL has had in prior agreements – FPL would not have entered into the Settlement Agreement.

In fact, the Settlement Agreement expressly contemplates that the flexibility of the ARM could extend FPL's ability to operate under the Agreement for at least one additional year beyond the Minimum Term. *Id*. ("FPL may not amortize any portion of the Reserve Amount past December 31, 2020 unless it provides notice to the Parties by no later than March 31, 2020 that it does not intend to seek a general base rate increase to be effective any earlier than January 1, 2022."). This provision accommodates the possibility that, through the *flexible* and *discretionary* use of the ARM *including reversals* of surplus, there would be a Reserve Amount sufficient to enable FPL to continue to operate under the Agreement beyond the Minimum Term.[5] Indeed, there was about $250 million of surplus in the account at the end of FPL's 2012 settlement agreement because of the ability to reverse surplus during the term of that prior agreement. *See* Exhibit 20 at Bates 64-65 (FPL Response to Staff's Third Set of Interrogatories No. 75, Att. 1, in Docket 160021-EI) (detailing the debits and credits made to depreciation reserve authorized by FPL's 2012 settlement agreement). However, there was no express ability to continue to use the ARM beyond the term of FPL's 2012 settlement agreement, thus

[4] *See also* Exh. 21 (Bates 69) (FPL explained in 2016 that, under the terms of the Settlement Agreement, "the Company may reverse any entries performed over the minimum term, provided its retail jurisdictional adjusted return on equity stays within the proposed return on equity range of 9.6%-11.6%. This is accomplished by evaluating FPL's return on equity on a monthly basis when preparing its earning surveillance report, which is based on a rolling monthly historical average.").

[5] At the same time that FPL is able to continue to access the ARM beyond the Minimum Term and operate under the Settlement Agreement, all customer benefits are maintained, including the rate credits being provided to large users that comprise the membership of FRF, FIPUG, SFHHA and FEA.

precluding the opportunity that the Signatories created – and the Commission approved – under this Settlement Agreement.

This Settlement Agreement includes in the starting balance for the ARM the surplus remaining from the 2012 settlement, which had been generated through the ability to reverse surplus during the term of that agreement. *See* S.A. 12(c) (authorizing FPL to amortize any amount that remained in surplus account at the end of the prior settlement term); *see also* Exhibit 19, FPL Response to Staff's First Set of Interrogatories No. 1 (noting that the Reserve includes the remaining dismantlement reserve and surplus depreciation balance from FPL's 2012 settlement agreement).[6]

As described below, FPL utilized and continues to use the ARM both to avoid an expensive storm surcharge and to realize the opportunity that had been expressly anticipated in the Settlement Agreement to extend its operation and the associated rate stability and other benefits for customers for at least one additional year beyond the Minimum Term.

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

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

[6] The Settlement Agreement also required FPL to "file an attachment to its monthly earnings surveillance report for December 2016 that shows the final amount of the 2012 'rollover' surplus that remained at the end of 2016." S.A. ¶ 12(c).

request, to recover such deficits and replenish the Storm Reserve through a surcharge to customers' electric bills. S.A. ¶ 6.

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

But for the flexible use of the ARM, FPL would have had to avail itself of the surcharge mechanism to recover the deficit and replenish the Storm Reserve. This would have resulted in a three-year surcharge beginning on March 1, 2018 and continuing through the end of 2020. The charge initially would have been set at $4.00 per month on a 1,000-kWh residential bill,

increasing to more than $5.00 per month in 2019 and continuing through 2020. Through the operation of the Settlement Agreement, however, FPL has managed its business in a way that avoids those charges and provides customers greater rate stability over a longer period.

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

Intervenors manufacture a post hoc interpretation of the Settlement Agreement

Almost a full year after detailed disclosure to and discussion with OPC, the Intervenors filed their Rate Petition, contending for the first time that the ARM provision contains latent restrictions that they discovered only after months of discussion amongst themselves in search for a theory. The argument they have cobbled together in support of their position is based on neither the plain language of, nor well-established practice and course of conduct under, the Agreement.

Intervenors claim that the ARM can actually be extinguished through the use of the full available balance, notwithstanding the utter absence of the term "extinguish" or any plausibly proximate synonym anywhere in the Settlement Agreement. Indeed, if it were ever the intent that such a central provision of the Agreement could be eliminated through its use, surely both FPL and the Intervenors would have required explicit language to that end. Most assuredly, FPL at all times would have left one dollar in the account to avoid such a draconian and absurd result

had this even been remotely considered as a possible position by Intervenors or any signatory to the Settlement Agreement.

Just as there can be no reasonable misinterpretation as to the express provisions of the Settlement Agreement that allow for the discretionary and flexible use of the ARM for purposes of maintaining the Settlement Agreement in effect through the Minimum Term and potentially beyond, there is no possible misinterpretation of the Intervenors' motives. A full year after the fact, and FPL having expensed the costs for Irma rather than recovering those costs through an incremental surcharge that clearly was available under the Settlement Agreement, Intervenors are unashamedly attempting to both pocket the savings from the avoided rate increases and at the same time alter the terms of a carefully negotiated and Commission-approved compromise when they perceive that it would work to their advantage. They strive to do so both by unilaterally *adding in* restrictions that were neither approved nor negotiated and *extracting out* the Agreement's foundational flexibility.[7]

II. ISSUES AND POSITIONS

ISSUE 18: Does the 2016 Settlement Agreement allow FPL to credit the Amortization Reserve with the tax savings resulting from the Tax Cuts and Jobs Act of 2017?

FPL: *Yes. The 2016 Settlement Agreement allows FPL to make both credit and debit entries to the Amortization Reserve, so long as it maintains its earned ROE within the authorized range. To the extent FPL's earnings, taking into account the impact of tax savings and all of the Company's other costs of doing business, allow FPL to make credit entries to the Amortization Reserve while remaining within the authorized ROE range, then FPL is permitted by the 2016 Settlement Agreement to do so.*

It is undisputed that "whether the 2016 Settlement Agreement allows FPL to replenish the Amortization Reserve with the tax savings resulting from the Tax Cuts and Jobs Act of 2017"

[7] In doing so, OPC and FRF are in direct contravention of their obligations to uphold the Settlement Agreement. S.A. ¶ 22 ("No Party to this Agreement will request, support, or seek to impose a change in the application of any provision hereof.").

is a question of law. The answer to that question turns on the interpretation of the 2016 Settlement Agreement.

A. The Plain Terms of the Settlement Agreement Allow FPL To Credit the Reserve for Expense Reductions or Revenue Increases, Regardless of Their Source

Settlement agreements are contractual in nature and, as such, are interpreted in accordance with principles of contract law. *Per Jonas Ingvar Gustafsson v. Aid Auto Brokers, Inc.*, 212 So. 3d 405, 408 (Fla. 4th DCA 2017) (citing *Barone v. Rogers*, 930 So. 2d 761, 763-64 (Fla. 4th DCA 2006)). When interpreting a contract, a tribunal should give effect to the plain and ordinary meaning of its terms. *Id*. (quoting *Golf Scoring Sys. Unlimited, Inc. v. Remedio*, 877 So. 2d 827, 829 (Fla. 4th DCA 2004)). An interpretation which "gives a reasonable meaning to all provisions of a contract is preferred to one which leaves a part useless or inexplicable." *Id*. (quoting *Premier Ins. Co. v. Adams*, 632 So.2d 1054, 1057 (Fla. 5th DCA 1994)).

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

FPL must operate within its authorized ROE through the Settlement term

The Settlement Agreement contains express, agreed upon provisions pursuant to which FPL must manage its business such that its earnings do not exceed or fall below the authorized ROE range. Specifically, the parties agreed that the Settlement Agreement shall govern for a minimum of four years and, throughout the term FPL's authorized ROE "shall be a range of 9.6% to 11.6%, and shall be used for all purposes." S.A. ¶¶ 1, 3. The Settlement Agreement

prohibits applications for base rate changes[8] unless "an FPL monthly earnings surveillance report stated on an FPSC actual, adjusted basis" FPL's ROE either (i) "falls below the bottom of [the] authorized range during the Minimum Term" or (ii) "exceeds the top of [the] authorized ROE range." S.A. ¶¶ 11(a), 11(b). As further described below, the ARM provides FPL the flexibility necessary to stay within the range.

The Settlement Agreement unambiguously allows FPL to use the ARM flexibly

The plain text of the Settlement Agreement establishes the flexibility of the ARM. As previously described, it provides that FPL may amortize "any" Reserve Amount (i.e., up to $1.25 billion), "with the amounts to be amortized in each year of the Term left to FPL's discretion." S.A. ¶ 12(c). The same section of the Settlement Agreement expressly acknowledges that any amortization may be reversed, meaning that the Reserve could be replenished. *Id*. (noting that FPL's monthly surveillance reports must show the "amount of amortization *credit or debit* to the Reserve Amount") (emphasis added). And there could have been no question about this at the time the settlement was reached, especially because a similar reserve authorized by FPL's 2012 settlement agreement had similarly been replenished. *See* Exhibit 20 at Bates 64-65. The signatories even agreed that, upon providing notice, the Reserve could be used beyond the minimum term if doing so would extend FPL's "stay out" for another year. *Id*. ("FPL may not amortize any portion of the Reserve Amount past December 31, 2020 unless it provides notice to the Parties by no later than March 31, 2020 that it does not intend to seek a general base rate increase to be effective any earlier than January 1, 2022."). Replenishment is permitted up to the original amount of the Reserve (up to $1.25 billion). *See* S.A. ¶ 12(c).

[8] Exceptions are made only for solar base rate adjustments and an adjustment for the first year revenue requirements associated with the Okeechobee Clean Energy Center, as specified in Paragraphs 9 and 10 of the Agreement. S.A. ¶¶ 9, 10.

Intervenors cannot add constraints on the use of the ARM that are not enumerated in the Settlement Agreement

Intervenors take the position that tax savings cannot be used to credit the Reserve. No such constraint on the use of the ARM appears in the Settlement Agreement. One cannot now be imposed through a *post hoc* interpretation. *Per Jonas*, 212 So. 3d at 408.

It is a "fundamental principle of contract construction [] that the expression of one thing is the exclusion of the other." S*print Corp. v. Telimagine, Inc*., 923 So. 2d 525, 527 (Fla. 2d DCA 2005). This maxim, known as *expressio unius est exclusio alterius*, means that when a contract or law describes a particular situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded. *See Gay v. Singletary*, 700 So. 2d 1220 (Fla. 1997); *City of Miami v. Valdez*, 847 So. 2d 1005 (Fla. 3d DCA 2003); *see also Telimagine*, 923 So. 2d at 527 (concluding that by specifically authorizing a claim for injunctive relief for unauthorized use of proprietary information, but for no other claims, the face of the agreement made clear that the parties did not contemplate injunctive relief under other circumstances). This principle "defeat[s] an argument that a particular item or matter is included by implication." *State v. Quetglas*, 901 So. 2d 360, 363 (Fla. 2d DCA 2005). It defeats Intervenors' strained interpretation here.

The limitations on FPL's use of the ARM are finite and they are express. Amortization of the Reserve is "subject to the following conditions:

(i) the amount that FPL may amortize during the Term shall not be less than the actual amount of depreciation reserve surplus remaining at the end of 2016;

(ii) for any surveillance reports submitted by FPL during the Minimum Term on which its ROE (measured on an FPSC actual, adjusted basis) would otherwise fall below 9.6%, FPL must amortize at least the amount of the available Reserve Amount necessary to maintain in each such 12-month period an ROE of at least 9.6% (measured on an FPSC actual, adjusted basis); and

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

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

Thus, FPL is free to access to the Reserve – by debits or credits – as it sees fit to ensure that its financial results remain within the constraints set by the enumerated earnings conditions. The Settlement Agreement makes no distinction between covering the costs incurred to replace a distribution pole in the regular course of business from those incurred to replace a pole due to a hurricane, or even from expenses associated with the purchase of everyday office supplies. Likewise, the Agreement does not define or in any way limit the types of revenue sources that can be used to credit the Reserve. Under the Settlement Agreement, the source of the costs and revenues is of no legal significance – either to the Intervenors, any other customer or to the Commission – so long as FPL uses the Reserve to manage its earnings within the authorized ROE range.

Simply put, the 2016 Settlement Agreement allows FPL to credit the Reserve with any revenue source or reduction in cost. Tax savings are not excluded under the Agreement and can be used as a source for such credits.

B. The ARM Cannot Be Extinguished Unilaterally

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

In their prehearing statement, OPC and FRF argue that "FPL exhausted and extinguished the Amortization Reserve and may not unilaterally re-establish it." *See* Order No. PSC-2019-0050-PHO-EI, pp. 18-19. In setting forth their positions, OPC and FRF refer the Commission to their Rate Petition. No fewer than eight times in that Petition, the Intervenors insist that "FPL extinguished the reserve and the ARM" when it "wrote off its Hurricane Irma restoration costs against the Reserve" and depleted it. Rate Pet'n ¶ 48, *also* ¶¶ 32, 34, 36, 37, 45(B), 45(D), and 45(F). Not once do the Intervenors provide any citation to the Settlement Agreement. None exists. The term "extinguish" does not appear in Paragraph 12 or anywhere else in the Settlement Agreement.

Nor can such a term properly be read into the Settlement Agreement. *See Harrington*, 54 So. 3d at 1002. A provision that terminates the essential mechanism that makes possible FPL's commitment to freeze rates for four years, if one existed, would be unquestionably material. It would not be implied or left unaddressed. This is particularly so because such interpretation would be contrary to the purposes of the Settlement: to maintain the Agreement in place by providing FPL flexibility to operate within its earnings band. *See Murley v. Wiedamann*, 25 So. 3d 27, 29 (Fla. 2d DCA 2009) ("In construing the language of a contract . . . the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose.").

The Intervenors' interpretation would lead to absurd results

The Intervenors' suggestion that the ARM is extinguished if the Reserve reaches a zero balance, even temporarily, is illogical. Under that theory, FPL could have kept the Settlement

Agreement intact by continued use of the Reserve through the term, if a single dollar – or even a penny – had remained in the account. A simple example illustrates the absurdity of any suggestion that the Settlement Agreement should be interpreted in a manner that extinguishes the ARM:

- A utility is governed by settlement agreement that contains an amortization mechanism, a reserve capped at $1,000, an authorized ROE range of 9.6% to 11.6%, and a two-year minimum "stay out" period.
- The utility's sales and the cost of service are identical between two 12-month periods with only one exception – an unexpected expense of $999 in the first 12-month period.
- Over the first 12-month period, the utility uses $999 of the surplus and reports earnings of 11%, which is within its authorized range.
- Over the second 12-month period, the utility unexpectedly has lower expenses by exactly $999 and reverses the amount of surplus used in the prior 12-month period, still earning 11%.
- In this example, the cap of $1,000 has limited the amount of surplus the utility can use, but because of the ability to reverse the use of surplus, that same $999 is available again for use in a subsequent period for the purpose of allowing the utility to remain within its authorized range and for the settlement to endure at least through its minimum term.
- Further demonstrating the value of the ARM and the settlement as a whole, the utility was able to operate under the agreement beyond the minimum term because sufficient amounts remained in the reserve for the utility to access the reserve.

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

Whether or not Intervenors would want utilities to leave one dollar of surplus to maintain an important ARM for future years, that is plainly not the outcome they bargained for in the Settlement Agreement. That Agreement expressly allows FPL to "debit or credit" the Reserve, subject only to the express limitations of Section 12(c), including that the Reserve not go above the original amount established in the agreement, and that the Reserve be used to keep FPL within the agreed-upon ROE ceiling and floor. S.A. ¶ 12(c).

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

Due presumably to the lack of textual support, the Rate Petition referenced in OPC's and FRF's prehearing statement also relies upon extrinsic evidence to support their interpretation of the ARM provision of the Settlement Agreement. The Intervenors' reliance on extrinsic evidence is misplaced for two reasons. First, it is well-settled that extrinsic evidence may be introduced to aid interpretation of a contract only when its terms are ambiguous. *Friedman v. Virginia Metal Products Corp*., 56 So. 2d 515, 517 (Fla. 1952). Second, even in such instances, the evidence may not be used to vary or change the terms of the contract, but rather only to

explain, clarify or elucidate the ambiguous language, the relation of the parties, and the circumstances surrounding them when they entered into the contract. *Id*.

As detailed above, the Settlement Agreement enumerates a finite set of conditions on FPL's use of the ARM. S.A. ¶12. The ARM is otherwise designed to be flexible and subject to debits and credits at FPL's discretion. No extinguishment term exists. No distinction is made between having one dollar in the account or reducing it temporarily to zero.

And, even if the Settlement Agreement were ambiguous – which it is not – the extrinsic evidence cited by the Intervenors does not support their interpretation of the Settlement Agreement. *See* Rate Pet'n. at 10-11. To the contrary, it supports FPL's approach. The testimony of Robert Barrett, for example, states that the ARM is "critical" to the Settlement Agreement. Without the ARM's flexibility, "base rates could not be held constant for such an extended period of time due to . . . factors affecting FPL's earnings that are largely beyond the Company's control." Exhibit 21 (Bates 0083) (Direct testimony of R. Barrett in Docket 160021-EI). In other words, Mr. Barrett was explaining that the flexibility provided by the ARM would enable FPL to ride through such variations. Neither storm restoration costs nor tax expense (both factors outside of FPL's control) were excluded from factors that affect FPL's earnings. The Reserve could be used to offset any category of cost and expense, and any source of revenue or reduced level of expense could be used to replenish the Reserve for the purposes of maintaining FPL's earnings within its authorized range and keeping customer rates stable.

Intervenors' reliance on Mr. Barrett's statement that the ARM that had been approved in 2012 would expire in the absence of another settlement (in 2016) is seriously flawed. Mr. Barrett simply recognized that creation and retention of the ARM requires Commission approval – not that the mechanism would vanish through a series of debits and credits. The ARM is

established within the Settlement Agreement and exists through at least the Minimum Term. *Pine Lumber Co. v. Crystal River Lumber Co*., 61 So. 576, 579 (Fla. 1913) ("when, by the express definite terms of a complete contract, any action taken or omitted under it does not appear to be a violation of it, and no fraud or other illegal or inequitable conduct is shown, *additional provisions will not be implied for the purpose of showing a violation*, when it otherwise does not appear, where the contract may be performed according to its terms.") (emphasis added). Intervenors have it exactly backward. The ARM only "expires" when the Settlement Agreement itself expires on its terms. A party's unilateral action cannot otherwise terminate the ARM.

C. Intervenors' *Post Hoc* Interpretation Lacks Good Faith

Intervenors tacitly admit they seek to change the terms of the Settlement Agreement

The Rate Petition referenced in OPC's and FRF's prehearing statements actually seeks to *modify* – not enforce – the terms of the Settlement Agreement. And the Intervenors are detectably brazen about it. In footnote 3 of the Rate Petition, they state:

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

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

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

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

In fact, OPC and FRF, as Signatories, expressly recognized at the time they entered the Settlement Agreement that the ARM:

> provides protection *to customers* by requiring that these funds be used to bring earning up to the bottom of the range in the event FPL's earnings fall below the 9.6% level. This ensures that if unexpected expenditures occur during the term of the agreement, the agreement will be maintained and not terminated early. Thus, this depreciation mechanism increases the base rate stability to customers in the context of this Settlement Agreement.

(emphasis added) (*See* Docket 160021-EI, Document No. 08770-2016, Intervenor Signatories Post-Hearing Brief on Settlement, at 7). There can be no doubt that if the newly elected government had passed tax legislation that imposed higher taxes on utilities, Intervenors would have expected FPL to use the ARM to manage its earnings under that tax regime and adhere to its commitment to "stay out" for at least the minimum term.

Nothing has changed since FPL communicated, and OPC agreed with, FPL's interpretation

The timing of Intervenors' apparent revelation of this contrived interpretation also calls into question their motivations. Over a year ago, OPC affirmatively agreed that FPL's treatment of the Irma costs and its use of the ARM were consistent with the terms of the Settlement Agreement. On January 22, 2018, FPL filed in Docket 20180013-PU a detailed response to OPC's *Petition To Establish a Generic Docket To Investigate and Adjust Rates for 2018 Tax Savings*, explaining its treatment. Shortly thereafter, FPL representatives engaged in an informal, non-privileged, face-to-face meeting with OPC to discuss the details of FPL's approach, at which time a senior OPC representative who was intimately familiar and actively engaged in the drafting and negotiations of the Settlement Agreement stated more than once that

he had read *and re-read* the Agreement, that he could not argue with FPL's approach and that FPL adhered to the four corners of the Agreement.

Later, at a duly noticed agenda conference held on February 6, 2018, FPL orally explained its approach to the Commission. OPC and FIPUG not only were present at that agenda conference, they addressed the Commission. No party suggested that FPL had acted contrary to the terms of the Settlement Agreement at the time of FPL's responsive filing, at the time of the agenda conference or at any time in the intervening calendar year. No new facts or change in language have emerged since then.

In short, the plain text of the Settlement Agreement permits FPL to credit the Reserve. It places no restriction on the source of funds that could be used for that purpose and does not call for the extinction of the ARM if the account balance reaches zero. The ARM is flexible. By its terms, the Settlement Agreement allows FPL to credit the Amortization Reserve with the tax savings resulting from the Tax Act.

ISSUE 19: How should the savings associated with the Tax Cuts and Jobs Act of 2017 be treated?

FPL: *In December 2017, FPL wrote off incremental Hurricane Irma costs that had been initially charged to the storm reserve to O&M expense and then amortized all of the Reserve Amount available at the time. The amortization offset most, but not all, of the incremental Irma costs, resulting in a one-time reduction in FPL's earnings for 2017. FPL expects that from 2018 through 2020, tax savings under the Tax Act will enable the Company to partially reverse the one-time amortization of all available Reserve Amount, while staying within the authorized ROE range. By combining expected tax savings with the flexible amortization of the Reserve Amount under the 2016 Settlement Agreement, FPL provided customers with a nearly immediate economic benefit by avoiding an interim storm charge due to Hurricane Irma entirely, and it will provide a future benefit by continuing to operate under the Settlement Agreement for at least one year beyond the Minimum Term. FPL's treatment of the savings associated with the Tax Act already has resulted in a direct benefit to customers. The benefit was experienced nearly immediately, its magnitude was significant, and it was made possible by the flexibility afforded by ARM in the Settlement Agreement. FPL should be authorized to use savings associated with the Tax Act to facilitate credits to the Reserve that will allow it to continue operating under the Agreement for at least one year beyond the Minimum Term.*

A. *Tax savings will help replenish the Reserve Amount used to offset storm costs*

In December 2017, FPL expensed as O&M the incremental Hurricane Irma restoration costs that had been initially charged to the storm reserve, and then amortized all of the Reserve Amount available at the time. That amortization offset most, but not all, of the incremental Irma Costs, resulting in a one-time reduction in FPL's earnings for 2017. FPL expects that from 2018 through 2020, tax savings will enable the Company to partially reverse the one-time amortization of all available Reserve Amount, while staying within the authorized ROE range. By combining expected tax savings with the flexible amortization of the Reserve Amount under the 2016 Settlement Agreement, FPL provided customers with a nearly immediate economic benefit by avoiding an interim storm charge due to Hurricane Irma entirely, and it has committed to provide

:7130308

a future benefit as well, by continuing to operate under the Settlement Agreement for at least one year beyond the Minimum Term.

The Commission should find that FPL was permitted to use tax savings to replenish the Reserve since the beginning of 2018 – in particular, from the date the Commission's jurisdiction attached to the tax savings. And it should allow FPL to continue using tax savings to replenish the Reserve so that it can stay out of a rate case for at least one year beyond the minimum term. Allowing FPL to do so will further promote rate stability for the benefit of customers.

B. Intervenors' Attempt To Lump FPL Together with Other Utilities Is Flawed

In their Rate Petition, Intervenors criticize FPL's approach because it differs from the settlements they reached with Duke, TECO and Gulf Power. But those utilities already were obligated by the terms of their rate settlements to refund tax savings to their customers. *See* Order Nos. PSC-2017-0451-AS-EU (Duke), PSC-2017-0456-S-EI (TECO) and PSC-17-0178-S-EI (Gulf). The terms of those rate settlements therefore included express provisions addressing that possibility, with those utilities having been able to determine what compromises they could and could not accept in anticipation of the application of the explicit tax reform mechanism.

Of course, that was not the case for FPL. No such provision exists in FPL's Settlement Agreement. The Signatories can be presumed to have taken into account that there was no such provision when they were negotiating with FPL over the Agreement's other terms. And, Intervenors cannot plausibly claim that they were unaware of the possibility that tax-law changes could have significant impacts on FPL's financial results during the Settlement Term. Certainly, there was ample and open discussion of the desire to implement some form of federal tax reform by many of the candidates running for the Presidency of the United States. Indeed, the Agreement was filed on October 6, 2016 – only one month before the result of the 2016

Presidential election was known and certainly well after the candidates had debated their positions and publicly stated their tax reform plans.

What Intervenors' assertions simply cannot overcome is the fact that FPL's Settlement Agreement is different than those they entered into with the other utilities. It contains no provision addressing tax savings but does contain the flexible ARM. This difference explains why, as Intervenors observe in their Rate Petition, FPL was the only utility that could implement the accounting treatment associated with Irma Restoration costs and the ARM without Commission pre-approval or consent from the co-signatories to the Settlement Agreement. Rate Pet'n. ¶ 28.

Intervenors ignore the fact that the essential terms of Duke's and TECO's rate settlement agreements continue to be honored even with the approved amendments allowing tax savings to be used initially to pay for storm costs. With the exception that a portion of the tax savings addressed in the Duke and TECO settlement agreements were flowed through to customers by avoiding a storm change rather than as a refund on their bill, **the terms of Duke's and TECO's rate settlement agreements remain intact.**[10] The Intervenors did not force upon those other utilities – and the utilities did not volunteer – any rate reduction or refund that had not been negotiated in advance when they executed their rate settlements. So too, FPL's Settlement Agreement should remain intact with no rate reductions or refunds that would upend the informed balance struck at the time the Signatories signed it. The Commission should not indulge the Intervenors' attempt to alter FPL's Settlement Agreement to include terms to which Signatories did not agree, and which would contravene both the language and the spirit of FPL's Settlement Agreement.

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[10] All signatories, including Duke and TECO, had to agree to the exact nature and scope of the agreements and any modifications.

Respectfully submitted this 22nd day of February 2019.

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CERTIFICATE OF SERVICE
Docket No. 20180046-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service on this 22nd day of February 2019 to the following:

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