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 DATED: February 22, 2019

THE FLORIDA RETAIL FEDERATION'S INITIAL BRIEF REGARDING TAX SAVINGS ISSUES

The Florida Retail Federation ("FRF"), pursuant to the Prehearing Order in this docket, Order No. PSC-2019-0050-PHO-EI, issued January 29, 2019, hereby submits its Initial Brief on the issues designated in the Prehearing Order relating to Florida Power & Light Company's ("FPL" or "Company") obligation to apply the savings realized as a result of the Tax Cuts and Jobs Act of 2017 ("Tax Act" or "TCJA") for the benefit of its customers (whether through refunds or rate reductions) instead of keeping those savings to maximize its earnings and replenish the Reserve Amount[1] created by the 2016 Settlement Agreement ("2016 Settlement") approved by Order No. PSC-2016-0560-AS-EI.[2] The

[1] The Reserve Amount was predicated on the agreement of the signatory parties to the 2016 Settlement based on the remaining amount of a similar reserve account established by a settlement in Docket No. 20120015-EI, In re: Petition for Increase in Rates by Florida Power & Light Co., Order No. 2013-0023-S-EI (F.P.S.C., Jan. 14, 2013), see 2016 Settlement Order at 3, 8, plus an additional $1 billion based on the parties' agreements as to certain depreciation rates and parameters and as to a theoretical depreciation reserve surplus. The resulting total amount was approximately $1.25 billion. Although sometimes referred to as the Amortization Reserve or the Reserve Amount, and the mechanism by which credits or debits were made to the account is referred to as the Amortization Reserve Mechanism or the "ARM," for convenience, it is referred to simply as the "Reserve" in the FRF's Initial Brief.

[2] In re: Petition for Rate Increase by Florida Power & Light Co., Docket No. 20160021-EI, Order No. 2016-0560-AS-EI (F.P.S.C., Dec. 15, 2016) ("2016 Settlement Order").

FRF's Initial Brief proceeds with a brief overview summary statement followed by the Statement of the Case and Facts, Statement of Positions on Designated Issues, Summary of Argument, Argument, and Conclusion.

SUMMARY

A common maxim applied to regulatory financial analysis is the simple phrase, "Follow the money." In this instance, FPL has realized dramatic windfall tax cost savings of $649.6 million per year as a result of the Tax Cuts & Jobs Act of 2017, and these savings have further resulted in FPL's earnings exceeding the ceiling provided in the 2016 Settlement Agreement by $540 million in 2018 alone. As applied to the issues to be addressed here, following the money reveals that FPL wants to keep these unexpected windfall savings for itself and its sole shareholder, NextEra Energy, Inc. ("NextEra"); thus far, FPL has succeeded in keeping these windfall cost savings by means of its accounting scheme of stuffing them into the Reserve created by the 2016 Settlement. However, when evaluated by the same standard that the Commission applied when it approved the 2016 Settlement Agreement, "that the Settlement Agreement establishes rates that are fair, just, and reasonable and is in the public interest,"[3] which is the same standard applied by the Florida Supreme Court in approving the Commission's order approving the 2016 Settlement on appeal,[4] the Commission should not allow FPL to keep all of the TCJA

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[3] 2016 Settlement Order at 5.

[4] Sierra Club v. Brown, 243 So. 3d 903, 909 (Fla. 2018) ("When presented with a settlement agreement, however, the Commission's review shifts to the public interest standard: whether the agreement – as a whole – resolved all the issues, 'established rates that were just, reasonable, and fair, and that the agreement is in the public interest.'" (quoting

savings for itself and its sole shareholder, NextEra. FPL's current rates are based on costs that were $649.6 million per year greater when they were established than they are now, and those rates are obviously no longer fair, just, or reasonable. Moreover, it is at best disingenuous for FPL to assert that allowing it and NextEra to keep all the TCJA savings is in the public interest: FPL's Customers are paying too much for their electric service, $540 million too much in 2018 alone, and it is not in the public interest to prolong this inequity. The proper resolution of the issues presented here is for the Commission to conduct the general rate case requested by the FRF, the Citizens, and FIPUG in Docket No. 20180224-EI, and through those proceedings to conduct a principled examination of FPL's costs and revenues to ensure that FPL's rates are, in fact, "fair, just, and reasonable and [] in the public interest," in accordance with the Commission's and the Court's standards applicable to settlement agreements, and which the Court has expressly recognized as "the ultimate measuring stick to guide the PSC in its decisions." Sierra Club, 243 So. 3d at 909.

STATEMENT OF THE CASE AND FACTS

This Initial Brief addresses two issues raised in Docket No. 20180046-EI, referred to herein as the "FPL Tax Docket." These issues were raised relatively late in the process, not long before the prehearing conference. The issues, as identified in the Prehearing Order, are: Issue C, a "legal issue" addressing the question whether the 2016 Settlement

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Citizens of the State of Florida v. Fla. Pub. Serv. Comm'n, 146 So. 3d 1143, 1164 (Fla. 2014)); see also Gulf Coast Elec. Co-op., Inc. v. Johnson, 727 So. 2d 259, 262 (Fla. 1999) ("[I]n the final analysis, the public interest is the ultimate measuring stick to guide the PSC in its decisions."))

Agreement ("2016 Settlement") approved by the Commission in the 2016 Settlement Order, and thus the Order itself, allow FPL to use the federal income tax cost savings resulting from the TCJA ("TCJA savings") to replenish the Reserve created by the 2016 Settlement; and Issue B, a mixed issue of fact, law, and policy, addressing how the TCJA savings realized by FPL are to be treated. Prehearing Order No. 2019-0050-PHO-EI at 23-24. The parties to the 2016 Settlement are FPL, the FRF, the Citizens (OPC), and the South Florida Hospital and Healthcare Association ("SFHHA"). The FRF and the Citizens have intervened in this FPL Tax Docket, the SFHHA has not. The issues herein implicate two other pending dockets: Docket No. 20180049-EI, In re: Evaluation of Storm Restoration Costs for Florida Power & Light Company Related to Hurricane Irma ("FPL Irma Storm Docket"), and Docket No. 20180224-EI, In re: Joint Petition for Rate Reductions or Alternative Reverse Make-Whole Rate Case Against Florida Power & Light Company, by Office of Public Counsel, Florida Industrial Power Users Group, and Florida Retail Federation ("Joint Petition Docket").[5] The petitioning parties therein are referred to in this Initial Brief by their usual abbreviations, namely, "OPC" or "Citizens," "FIPUG," and "FRF." Unless specified otherwise, the petitioners in the Joint Petition Docket are generally referred to herein as the "Customer Parties."

[5] For the record, the FRF believes that these issues would more appropriately be addressed in the Joint Petition Docket, and the FRF stated during the prehearing conference in this FPL Tax Docket that addressing these issues in this docket should not in any way affect the FRF's ability to fully address the issues raised in the Joint Petition Docket in that proceeding. Both the Citizens and FIPUG joined in this position. Prehearing Conference Transcript at 42-44.

The disputed issues addressed here are whether, as urged by FPL, FPL can use the TCJA savings to replenish the Reserve, which FPL fully depleted in December 2017 to effectively pay off its Hurricane Irma restoration costs, or whether, as urged by the Customer Parties, FPL must treat the TCJA savings as an offset to FPL's earnings and return on equity ("ROE") and thereby allow some or all of those savings to be applied for the direct benefit of FPL's customers. A brief history of the events leading to the instant disputes follows here.

Prior Settlements, Storm Cost Recovery Provisions, and Amortization Reserves. The Reserve and related issues raised here, including provisions relating to storm cost recovery by FPL through what is commonly referred to as the "Storm Cost Recovery Mechanism" or "SCRM," trace some of their history to two earlier settlement agreements, one approved in 2011[6] and the other the settlement mentioned above in Docket No. 20120015-EI, approved by Order No. PSC-2013-0023-S-EI. Both of these earlier settlements included specific provisions that provided for FPL to seek recovery of significant storm restoration costs via the SCRM mentioned above. The settlement in Docket No. 20120015-EI also created a Reserve based on a theoretical depreciation reserve surplus and provided for FPL to use it to manage earnings fluctuations in its business operations.

[6] Docket No. 20080677-EI, In Re: Petition for Increase in Rates by Florida Power& Light Company, Order No. PSC-2011-0089-S-EI, Order Approving Proposed Stipulation and Settlement (F.P.S.C., Feb. 1, 2011).

The 2016 Settlement Agreement and the 2016 Settlement Order. The 2016 Settlement agreed to by FPL, OPC, the FRF, and the SFHHA included the same Reserve provisions and the same SCRM provisions as the 2012 settlement. As related to the disputed issues here, the 2016 Settlement Order included the Commission's statements that "The current storm damage cost recovery mechanism will continue" in effect, and that the storm charge mechanism thus approved "will be used to replace incremental costs associated with the named storm as well as to replenish the storm reserve to the level in effect as of August 31, 2016." 2016 Settlement Order at 3. In the Prehearing Order in the 2016 FPL rate case docket, i.e., the docket in which the 2016 Settlement Order was issued, FPL clearly stated its intentions with respect to the SCRM; FPL's position in the Prehearing Order provided here in its entirety:

> **Storm Recovery**
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> FPL proposes to continue to recover prudently incurred storm costs under the framework prescribed by the 2012 Rate Settlement. Specifically, if FPL incurs storm costs related to a named tropical storm, the Company may begin collecting up to $4 per 1,000 kWh (roughly $400 million annually) beginning 60 days after filing a petition for recovery with the FPSC. If costs to FPL related to named storms exceed $800 million in any one year, the Company also can request that the Commission increase the $4 per 1,000 kWh charge accordingly.

In re: Petition for Rate Increase by Florida Power & Light Co., Docket No. 20160021-EI, Order No. PSC-2016-0341-PHO-EI at 23 (emphasis supplied).

Hurricane Matthew. When Hurricane Matthew resulted in the Company incurring approximately $317 million of restoration costs in 2016, there was an approximate $250 million credit balance in the Reserve. When FPL sustained the impacts and restoration

costs associated with Hurricane Matthew, FPL demonstrated its intent, expectations, and understanding with respect to its use of the SCRM. FPL utilized the SCRM and recovered its Matthew restoration costs from March 2017 through February 2018 via a surcharge without regard to earnings or any availability of the Reserve. See In re: Petition for Limited Proceeding for Recovery of Incremental Storm Restoration Costs Related to Hurricane Matthew by Florida Power & Light Co., Docket No. 20160251-EI, Order No. 2018-0359-FOF-EI at 2-3 (F.P.S.C., July 24, 2018).

Hurricane Irma. Hurricane Irma impacted FPL's system on September 10 and 11, 2017. FPL claims to have spent $1.321 billion on storm restoration costs for Irma. FPL Irma Storm Docket, Testimony of Manuel B. Miranda at 25. FPL's petition for approval of its Irma restoration costs remains pending in the ongoing FPL Irma Storm Docket,[7] in which the Citizens' witness, Helmuth Schultz, has recommended disallowances of approximately $486 million. Testimony of Helmuth W. Schultz at 24.

FPL paid its Irma-related storm restoration costs from available funds and initially followed the 2016 Settlement Order, consistent with its and the Citizens' and FRF's

[7] Other Florida utilities' Hurricane Irma experiences and responses are relevant to the issues addressed in this Initial Brief. Duke Energy Florida ("DEF") claims to have spent $513 million restoring service following the impacts of Hurricane Irma and Hurricane Nate on its system in 2017. Docket No. 20170272-EI, In re: Application for Limited Proceeding for Recovery of Incremental Storm Restoration Costs Related to Hurricanes Irma and Nate, by Duke Energy Florida, LLC, Duke's Petition at 1 (PSC Document No. 10933-2017, Dec. 28, 2017). Tampa Electric Company claims to have spent $102.7 million on storm restoration costs in 2015, 2016, and 2017, the bulk of those costs due to Hurricane Irma in 2017. Docket No. 20170271-EI, In re: Petition for Recovery of Costs Associated with Named Tropical Systems During the 2015, 2016, and 2017 Hurricane Seasons and Replenishment of Storm Reserve Subject to Final True-up, Tampa Electric Company, Tampa Electric's Amended Petition at 1 (PSC Document No. 00787-2018, Jan. 30, 2018).

expectations, by charging its Hurricane Irma restoration costs to the storm reserve. FPL's Tax Petition at 3-4. Then, however, without first seeking or obtaining Commission approval (and without first consulting with either OPC or the FRF), FPL "wr[ote] off the incremental Irma Costs that had been initially charged to the storm reserve to operation and maintenance expense in 2017 and then amortize[ed] all of the Reserve Amount available at the time" Id. at 4.

The Tax Cuts and Jobs Act of 2017. The Tax Cuts and Jobs Act of 2017 was enacted in December 2017, with the critical impact of reducing the federal corporate income tax rates applicable to FPL and other Florida and U.S. investor-owned utilities from 35 percent to 21 percent. Naturally, this 40 percent decrease in the tax rate resulted in correspondingly dramatic reductions in federal income tax expense for FPL: FPL and OPC, joined by the FRF and with the agreement of the Federal Executive Agencies, have stipulated that without taking account of credits to the Reserve, i.e., consistent with the position of the Citizens, FRF, and FIPUG (and the Federal Executive Agencies, a party to the FPL Tax Docket), the TCJA savings are $649.6 million per year for 2018. With the credits to the Reserve for which FPL seeks approval, the same parties have stipulated that FPL's TCJA savings are $772.3 million for 2018.[8]

The TCJA was not, and could not have been, contemplated by any of the parties to the 2016 Settlement when that agreement was negotiated, executed, and presented to the Commission for approval on October 6, 2016 (2016 Settlement Order at 2). Similarly, and

[8] Stipulations on Issue Nos. 1-17 and 20, FPSC Document No. 00432-2019 at 2, filed January 29, 2019; Hearing Exhibit No. 22 in the FPL Tax Docket.

significantly, the TCJA was not, and could not have been, contemplated by the Commission when it approved the 2016 Settlement and issued the 2016 Settlement Order. Of course, throughout these events, the Commission clearly had before it FPL's express declaration of its expectations, understanding, and intent regarding the use of the SCRM, as FPL expressly set forth in Order No. 2016-0341-PHO-EI.

Importantly, the "fair, just, and reasonable rates" established by the 2016 Settlement were based on, and included, federal income tax costs for FPL calculated using a 35 percent federal corporate income tax rate. FPL's retail electric rates established by the 2016 Settlement never contemplated that the amount of FPL's federal income tax costs would be reduced by $649.6 million per year.

The FPL Tax Docket, FPL Storm Docket, and Related Proceedings. The Commission asserted and attached (with FPL's concurrence) jurisdiction over FPL's tax savings as of February 6, 2018, by its Order No. PSC-2018-0104-PCO-EU, issued on February 26, 2018.[9] The Commission opened Docket No. 20180046-EI to address FPL's tax savings on February 21, 2018. FPL filed its petition on May 31, 2018. Before the PSC opened the FPL Tax Docket, FPL announced to the world that it had made the accounting entries to reverse its initial charges of Hurricane Irma restoration costs to its storm reserve and to write off the remaining amount of the Reserve against its expenses for 2017, resulting in the Reserve balance being at zero as of December 31, 2017. Before

[9] In re: Petition to Establish a Generic Docket to Investigate and Adjust Rates for 2018 Tax Savings, by Office of Public Counsel, Docket No. 20180013-PU, Order Establishing Effective Dates, Order No. PSC-2018-0104-PCO-PU at 3-4, 5, 7.

implementing its accounting strategy, FPL neither sought nor obtained Commission approval for its actions or accounting entries. Before it implemented that strategy, FPL never consulted with either the OPC or the FRF, who were signatories to the 2016 Settlement.

The Commission opened the FPL Irma Storm Docket on February 22, 2018, but FPL did not file its petition in that proceeding until August 31, 2018. As noted above, that docket remains open with the prudence of substantial amounts of FPL's claimed Irma restoration costs in dispute.

FPL's Revenues and Earnings. In February 2018, FPL filed with the Commission its final Earnings Surveillance Report for 2017 ("2017 ESR"). That 2017 ESR was based on FPL having paid all of its Irma restoration costs and having implemented the accounting strategy at issue here, including the fact that, per FPL's accounting, the Reserve had a balance of zero at the end of 2017. 2017 ESR at page 26, Attachment 1. FPL's earnings reflected these accounting measures and still showed an ROE of 11.08 percent. 2017 ESR at 1-2.

In February 2019, FPL filed with the Commission its final ESR for 2018. That ESR shows that FPL, even having paid off all of its Irma costs and having paid all of its other claimed costs, achieved the maximum, or ceiling, ROE allowed under the 2016 Settlement of 11.6 percent, 2018 ESR at 2, and that FPL had revenues left over of more than $540 million, which it has accounted for by booking to the Reserve. 2018 ESR at 1. (Such treatment is, of course, disputed by the FRF, OPC, and FIPUG.)

The Joint Petition for Rate Reductions and Reverse Make-Whole Rate Case. On December 5, 2018, the Citizens, through their Office of Public Counsel, the FRF, and FIPUG initiated the Joint Petition Docket, asserting, among other things, that FPL has violated the 2016 Settlement Order and breached the 2016 Settlement Agreement in contravention of the parties' reasonable expectations thereunder, for the purpose of unlawfully keeping all of the TCJA savings for itself and for the benefit of its parent, NextEra. As noted above, the FRF believes that the issues addressed in this Initial Brief should be addressed in the Joint Petition Docket, which remains pending, and the FRF does not waive any rights to pursue its legal claims in that docket.

STATEMENT OF POSITIONS ON DESIGNATED ISSUES

Pursuant to the Prehearing Order, the FRF's positions on the issues to be addressed in the parties' briefs are as follows:

Issue C: **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?**

FRF: *No. The Commission must interpret and construe the 2016 Settlement using the same standard that it applied in reviewing it for approval in 2016, and that the Florida Supreme Court applied in reviewing the 2016 Settlement when it was appealed: the Commission's decisions must result in "rates that are fair, just, and reasonable" and in an application of the 2016 Settlement to the issues presented here that "is in the public interest." FPL's efforts to use the Reserve as a "slush fund" where it can disguise the windfall tax cost reductions and resulting excessive earnings as just another reserve balance not subject to earnings review have resulted and will continue to result in FPL's rates being unfair, unjust, and unreasonable, because FPL's costs are dramatically, and unexpectedly, less than the rates in effect when the 2016 Settlement was negotiated and approved. The suggestion that FPL should be allowed to keep all of the TCJA savings

for itself and its parent, NextEra, is patently and egregiously contrary to the public interest.*

Issue B: **How should the savings associated with the Tax Cuts and Jobs Act of 2017 be treated?**

FRF: *The federal income tax savings realized by FPL as a result of the TCJA should be treated as what they are – a dramatic windfall reduction in FPL's cost of providing service, with the corresponding recognition of the increase in FPL's earnings resulting from this dramatic cost decrease. Treated appropriately in this manner, FPL's earnings exceeded the 11.6 percent ROE ceiling provided in the 2016 Settlement by more than $540 million, thereby triggering the rights of the FRF and the Citizens to seek base rate reductions pursuant to the 2016 Settlement, and the FRF and the Citizens, joined by FIPUG, have thus sought such reductions in the Joint Petition Docket. The Commission should proceed with the general rate case requested in the Joint Petition. Only by the principled examination of FPL's costs and revenues through these proceedings will the Commission be able to ensure that FPL's rates are fair, just, and reasonable, as required by the standard that the Commission applied in approving the 2016 Settlement.*

SUMMARY OF ARGUMENT

The issues presented here must be evaluated using the same standard by which the Commission evaluated the 2016 Settlement, which is the same standard that the Florida Supreme Court applied in upholding the 2016 Settlement Order: whether the rates resulting from the Commission's decisions here "are fair, just, and reasonable," and whether the Commission's construction of the 2016 Settlement "is in the public interest." Sierra Club, 243 So. 3d at 909. Stated bluntly, FPL hopes to use the Reserve created by the parties' agreement in the 2016 Settlement as a "slush fund" to keep all of the TCJA savings for itself and its parent, NextEra. Allowing this to occur will – on its face – result in rates that are neither fair, nor just, nor reasonable: they will be excessive by at least $540 million per

year, the amount by which FPL's rates produced revenues in excess of the 11.6 percent ROE ceiling in the 2016 Settlement in 2018.[10] The suggestion that allowing FPL to succeed in its stratagem is "in the public interest" is disingenuous, even patently absurd: allowing a utility to keep all of the TCJA savings for itself is contrary to common sense, contrary to principles of fair, just, and reasonable cost-based ratemaking, contrary to the reasonable expectations of the Customer Parties to the 2016 Settlement, contrary to the treatment afforded by the Commission for TCJA savings for the other four Florida investor-owned public electric utilities, and contrary to the treatment of TCJA tax cost savings by nearly all other public utility regulatory bodies in the United States. In short, allowing FPL to keep all of the TCJA tax savings for itself is contrary to any reasonable or objective public interest standard, and the Commission must not allow this to occur.

FPL's efforts to keep all the TCJA savings for itself are not only contrary to the public interest, those efforts breach the implied covenant of good faith and fair dealing that exists in every Florida contract; fair dealing and good faith, especially by a utility that pridefully touts its relatively low rates, requires that the utility agree to a principled sharing of the benefits resulting from the unexpected windfall tax savings flowing from the TCJA. The principled analysis of how much of the TCJA savings should be kept by FPL, if any, and how much should be flowed through to FPL's customers in the form of lower base rates, if any, can and should be achieved through the general rate case requested by the

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[10] FPL's December 2018 Earnings Surveillance Report shows an ROE of 11.60 percent (at page 2) and that FPL booked $540,949,289 to the Reserve in 2018, after the balance was zero as of December 31, 2017 (FPL's December 2017 Earnings Surveillance Report, page 26, Attachment 1).

FRF, the Citizens, and FIPUG in the Joint Petition Docket. Only such a principled examination of all of FPL's costs and revenues can produce "rates that are fair, just, and reasonable and [] in the public interest" (or perhaps a new, fair settlement agreement that satisfies this standard), consistent with the Commission's precedents and the Florida Supreme Court's opinions affirming them. See Sierra Club, 243 So. 3d at 909.

ARGUMENT

I. APPLYING THE SAME STANDARD THAT THE COMMISSION APPLIED IN APPROVING THE 2016 SETTLEMENT – THAT IT MUST PRODUCE "RATES THAT ARE FAIR, JUST, AND REASONABLE AND [] IN THE PUBLIC INTEREST" – THE COMMISSION CANNOT ALLOW FPL TO USE THE RESERVE AS A "SLUSH FUND" TO KEEP $649.6 MILLION PER YEAR OF TAX COST SAVINGS FLOWING FROM THE UNEXPECTED TAX CUTS AND JOBS ACT OF 2017.

A. The Standard for Approving Settlement Agreements Is Whether Such Settlements Result in "Rates That Are Fair, Just, and Reasonable and [] In the Public Interest."

In approving the 2016 Settlement, the Commission applied a simple and straightforward standard: "We find, therefore, that the Settlement Agreement establishes rates that are fair, just, and reasonable and is in the public interest." 2016 Settlement Order at 5. The Florida Supreme Court recognized and approved this standard in the ensuing appeal of the 2016 Settlement Order:

> When presented with a settlement agreement, however, the Commission's review shifts to the public interest standard: whether the agreement – as a whole – resolved all the issues, 'established rates that were just, reasonable, and fair, and that the agreement is in the public interest.'"

Sierra Club, 243 So. 3d at 909 (Fla. 2018) (quoting Citizens, 146 So. 3d at 1164); see also Gulf Coast Elec. Co-op. v. Johnson, 727 So. 2d 259, 262 (Fla. 1999) ("[I]n the final

analysis, the public interest is the ultimate measuring stick to guide the PSC in its decisions.")

B. The Commission Should Apply the Same Standard in Construing the 2016 Settlement and Deciding the Issues Presented Here.

The Commission should – the FRF believes and urges that the Commission must – apply the same standard in construing the 2016 Settlement and deciding the issues presented here. No other standard makes sense, particularly in light of the Court's statement in Gulf Coast Elec. Co-op., cited in Sierra Club ,"[I]n the final analysis, the public interest is the ultimate measuring stick to guide the PSC in its decisions." Gulf Coast Elec. Co-op., 727 So. 2d at 262.

C. Allowing FPL to Keep All of the TCJA Savings for Itself and NextEra Will Result in Rates That Are Overwhelmingly Unfair, Unjust, and Unreasonable.

FPL's base rates that existed in the fall of 2016, when the 2016 Settlement was negotiated and approved by the Commission, were determined by the Commission to be "fair, just, and reasonable," 2016 Settlement Order at 5, and that determination was necessarily predicated on the costs that existed at that time. FPL agrees and has stipulated that its costs of providing electric service are less than the costs upon which its existing base rates were approved: in 2018, FPL's revenue requirement was $649.6 million less than it would have been had the TCJA not been enacted. (Stipulation on Issue 9, contained in Stipulation on Issues 1-17 & 20, filed in the FPL Tax Docket and approved by the Commission on February 6, 2019.)

This reduction in costs is nearly 1.5 times FPL's entire earnings range of 9.6% to 11.6% allowed under the 2016 Settlement. Based on historical capitalization and earnings

relationships, 100 basis points translates to approximately $223 million per year. FPL's earnings range is 200 basis points, or $446 million per year, and dividing $649.6 million by $446 million yields the multiple of roughly 1.45 times the entire earnings range. Assessing the magnitude of the cost difference from that upon which the "fair, just, and reasonable rates" were approved just 2 years earlier with a different yardstick, this $649.6 million per year cost reduction represents nearly 10 percent of FPL's total 2018 adjusted base revenues, $6.823 billion (December 2018 ESR, Schedule 2, page 2); $649.6 million divided by $6.823 billion = 9.5%. Viewed by a related yardstick, the $649.6 million per year cost reduction represents nearly 6 percent of FPL's total 2018 jurisdictional revenues, including all clause revenues, which were $11.148 billion for 2018 (December 2018 ESR, Schedule 2, page 2); $649.6 million divided by $11.148 billion = 5.8%.

Finally, FPL's December 2018 Earnings Surveillance Report demonstrates that its current base rates generated more than $540 million of revenues in excess of the amount of revenues needed for FPL to earn at the ceiling of its ROE range. Page 1 of the December ESR shows that FPL booked $540,949,289 to the Reserve in 2018, and page 2 of the December ESR shows that FPL achieved an ROE of 11.60 percent on an FPSC-adjusted basis for 2018. It follows clearly that the $540.9 million was excess over and above what FPL needed to achieve the ceiling of FPL's authorized range.

No matter how these hard-dollar facts are viewed, they demonstrate, starkly and unequivocally, that FPL's costs are dramatically less than those upon which the rates approved in the 2016 Settlement were determined to be fair, just, and reasonable; those

rates cannot now be deemed to be fair, just, or reasonable because they are so far out of line with FPL's actual costs.

FPL's existing base rates are excessive, unfair, unjust, and unreasonable, and applying the public interest standards that the Commission applied in approving the 2016 Settlement, the Commission cannot allow FPL to keep these excessive revenues.

D. Allowing FPL to Keep All of the TCJA Savings for Itself and NextEra Is Contrary to the Public Interest.

FPL believes that it can keep all of the TCJA savings for itself and NextEra, even where its rates produce revenues that are clearly excessive relative to FPL's costs and relative to FPL's need to earn the generous return – 11.6 percent, after income taxes – allowed under the 2016 Settlement.

Since the Commission's approval standard in the 2016 Settlement Order mentions both the requirement that it resulted in fair, just, and reasonable rates, and the requirement that it must be in the public interest, the following addresses the public standard by itself.

In the first instance, viewed simply as a matter of common sense, FPL's argument that it should be allowed to keep some $650 million per year of windfall cost savings, instead of flowing back these dramatic cost savings to the individuals and business customers who pay FPL's retail rates, is absurd. FPL has all the money it needs to cover all of its costs and to earn a generous return, after taxes; for it to argue that, when its costs have been reduced by $649.6 million per year and when its revenues would, on their face, cause FPL to exceed the ceiling of its authorized ROE range by $540 million per year, violates any reasonable or objective standard of what is in the "public" interest. Clearly, it

is in the best interests of the "public" – FPL's individual and business customers – for them to have these dramatic tax cost savings returned to them in the form of lower electric rates, given that FPL already has enough revenues generated by its existing rates to earn the maximum of its ROE range with $540 million a year left over.

Analysis of the Florida Supreme Court's opinions on this issue leads to the same result. The Florida Supreme Court recognizes that public interest standard set forth in Section 366.01, Florida Statutes, and applied by the Commission is not clearly defined, and "the Commission has not provided a clear recitation of its public interest standard." Sierra Club, 243 So. 3d at 910. However, as noted by the Court,

> [M]uch of [the Commission's] focus regarding the public interest centers on costs, effect on ratepayers, and ensuring reliability of service. *See, e.g.*, *In re: Petition for Rate Increase by Gulf Power Co.*, 2017 WL 2212158, at *6–7. This convention coincides with the purpose of the Commission. *See* §§ 366.04, 366.05, Fla. Stat. (2017); *City of St. Petersburg v. Carter*, 39 So. 2d 804, 806 (Fla. 1949); *Peoples Gas Sys., Inc. v. City Gas Co.*, 167 So. 2d 577, 583 (Fla. 3d DCA 1964). Likewise, a statutory prescription of factors for the Commission to consider buttresses this interpretation:
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> > In fixing fair, just, and reasonable rates for each customer class, the [C]ommission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.
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> § 366.06(1), Fla. Stat.; *see also* § 366.041, Fla. Stat. (2017).

Id. at 910-11.

Consistent with the Court's discussion, the standard applied by the Commission in the 2016 Settlement Order - "We find, therefore, that the Settlement Agreement establishes rates that are fair, just, and reasonable and is in the public interest" - emphasizes the critical

importance of rates being fair, just, and reasonable, and those rates must necessarily be thus evaluated relative to FPL's costs. FPL's existing rates are far out of line with its costs, and its rates are thus unfair, unjust, and unreasonable. Accordingly, in the public interest, the Commission must not allow FPL to keep all of the TCJA savings for itself and NextEra.

II. FPL VIOLATED THE COMMISSION'S 2016 SETTLEMENT ORDER AND BREACHED THE SETTLEMENT AGREEMENT BY PAYING OFF ITS HURRICANE IRMA STORM RESTORATION COSTS WITH THE AMORTIZATION RESERVE.

When FPL reversed course and attempted to seize its "opportunity" to keep all of the TCJA savings for itself by paying off its Hurricane Irma restoration costs with the Reserve, FPL violated the 2016 Settlement Order and the Settlement Agreement, and further violated the covenant of good faith and fair dealing in every Florida contract. Accordingly, the Commission must not allow FPL to keep all of the TCJA savings for itself and NextEra Energy.

A. FPL Violated the 2016 Settlement Order by Using the Reserve to Pay Off Its Hurricane Irma Storm Restoration Costs.

The 2016 Settlement Order plainly sets forth the Commission's understanding and interpretation of the Storm Cost Recovery Mechanism provisions of the 2016 Settlement:

- The current storm damage cost recovery mechanism will continue which allows FPL to collect up to a $4 per 1,000 kWh charge beginning 60 days after filing a cost recovery petition and tariff based on a 12 month recovery period if costs do not exceed $800 million. This charge will be used to replace incremental costs associated with the named storm as well as to replenish the storm reserve to the level in effect as of August 31, 2016. If costs exceed $800 million, including restoration of the reserve, FPL may petition to increase the charge beyond $4 per 1,000 kWh.

2016 Settlement Order at 3 (emphasis supplied). The Commission's declarative statement makes clear its requirement, per the 2016 Settlement Order, that FPL must continue to use the storm cost recovery mechanism already in effect. FPL initially complied with the 2016 Settlement Order by charging its Hurricane Irma restoration costs to the storm reserve. FPL's Tax Petition at 3-4. However, FPL then violated the 2016 Settlement Order when it "wr[ote] off the incremental Irma Costs that had been initially charged to the storm reserve to operation and maintenance expense in 2017 and then amortize[ed] all of the Reserve Amount available at the time," id. at 4, thus embarking down its current path of trying to keep all of the TCJA savings for itself and NextEra.

The Commission must also note that its express statement in the 2016 Settlement Order of its understanding of the use of the storm cost recovery provisions of the 2016 Settlement is wholly consistent with (and quite probably based on) FPL's expressly stated position regarding the storm cost recovery mechanism set forth in FPL's statement of basic position in the prehearing order preceding the rate case hearing in Docket No. 20160021-EI, in which the 2016 Settlement was approved. FPL's position is set forth here in its entirety.

> **Storm Recovery**
>
> FPL proposes to continue to recover prudently incurred storm costs under the framework prescribed by the 2012 Rate Settlement. Specifically, if FPL incurs storm costs related to a named tropical storm, the Company may begin collecting up to $4 per 1,000 kWh (roughly $400 million annually) beginning 60 days after filing a petition for recovery with the FPSC. If costs to FPL related to named storms exceed $800 million in any one year, the Company also can request that the Commission increase the $4 per 1,000 kWh charge accordingly.

In re: Petition for Rate Increase by Florida Power & Light Co., Docket No. 20160021-EI, Order No. PSC-2016-0341-PHO-EI at 23 (emphasis supplied). This can leave no doubt as to either FPL's intent to continue to use the storm cost recovery mechanism already in place or the Commission's understanding, which is reflected in the mandatory language of the 2016 Settlement Order.

B. FPL Breached the Purpose of the Agreement, Contrary to the Parties' Reasonable Expectations, by Using the Reserve to Pay Off Its Hurricane Irma Storm Restoration Costs.

The reasonable expectations of the parties to the 2016 Settlement (at least those of OPC, the FRF, and FPL) were the same as the Commission's interpretation of the 2016 Settlement as stated in the 2016 Settlement Order: that FPL would use the SCRM to recover storm restoration costs.

Section 12 of the 2016 Settlement addresses the Reserve. Section 6 of the 2016 Settlement addresses the use a Storm Cost Recovery Mechanism to recover costs. Of particular relevance to the issues here, Section 6(c) of the 2016 Settlement provides as follows:

> (c) Any proceeding to recover costs associated with any storm shall not be a vehicle for a "rate case" type inquiry concerning the expenses, investment, or financial results of operations of the Company and shall not apply any form of earnings test or measure or consider previous or current base rate earnings or the remaining unamortized Reserve Amount as defined in Paragraph 12.

Taken together, these two sections make clear that FPL is not to use the Reserve, and that the other parties to the Settlement cannot force FPL to use the Reserve, to deal with earnings impacts and issues that might otherwise result from a storm event. FPL,

however, has done exactly that, by paying off the Hurricane Irma storm costs with the Reserve. And, in its view of the world, FPL now gets to use the Reserve to keep the TCJA savings by disguising the dramatic windfall cost savings flowing from the TCJA as a reserve balance instead of the bonus earnings that they actually represent. This ploy is contrary to the parties' reasonable expectations of how the 2016 Settlement would work. Obviously, the parties to the 2016 Settlement never contemplated the TCJA or any other event that would reduce FPL's costs by nearly 6 percent of its annual revenues, or by an amount roughly 1.5 times its entire earnings range.[11] Based on these provisions, and also on FPL's representations to the Commission and on FPL's course of dealing, the parties reasonably expected FPL to use the Storm Cost Recovery Mechanism pursuant to Section 6 without reference or recourse to, and without the use of, the Reserve.

C. When FPL Violated the 2016 Settlement Order and the Parties' Reasonable Expectations Under the 2016 Settlement, FPL Also Breached the Covenant of Good Faith and Fair Dealing That Exists In Every Contract Under Florida Law.

FPL acted contrary to the public interest by undertaking its accounting scheme in an effort to use the Reserve as a "slush fund" to keep all of the TCJA savings for itself and NextEra by continuing to charge base rates that were based on much greater costs than FPL now incurs. As explained above, FPL's actions violated the 2016 Settlement Order when it initially charged its Irma costs to the storm reserve, consistent with that Order, but then reversed course and implemented its accounting plan to use the Reserve instead. FPL's

[11] Similarly, the 2016 Settlement Order does not mention the TCJA or make any reference to the treatment of further, unknown tax savings.

actions also breached the 2016 Settlement by violating the Parties' reasonable expectations under the 2016 Settlement. Applying contract law principles, the 2016 Settlement includes the covenant of good faith and fair dealing, which is in every Florida contract. Meruelo v. Mark Andrews of Palm Beach, Ltd., 12 So. 3d 247, 251 (Fla. 4th DCA 2009). The purpose of the covenant "is to protect the reasonable expectations of the contract parties." Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 896 So. 2d 787, 791 (Fla. 2d DCA 2005). The FRF believes that the covenant of good faith applies with particular force to public utilities, such as FPL, by application of the statutory public interest standard under Section 366.01, Florida Statutes, and because of the unique position that public utilities hold as providers of a necessity – electric service – to the consuming public.

FPL breached this covenant as well. The Citizens' and FRF's reasonable expectations were and are like the Commission's, that FPL would use the Storm Cost Recovery Mechanism to recover storm costs, including those incurred following Hurricane Irma. And, based on FPL's position set forth in the Prehearing Order in Docket No. 20160021-EI, it was clearly FPL's expectation as well that FPL would do so, and that FPL would use the Reserve and the ARM to manage ordinary fluctuations in its costs and revenues, and that FPL would conduct itself in good faith, in accord with the Commission's fundamental principle for approving the 2016 Settlement in the first place, namely that it resulted in fair, just, and reasonable rates and was therefore in the public interest. The parties did not reasonably expect, and could not have reasonably contemplated, that FPL would attempt to use the absence of a specific provision in the 2016 Settlement addressing

an unforeseeable event – the TCJA of 2017 – to continue charging base rates that were based on costs that are $649.6 million per year greater than the costs that FPL now incurs.

It is emphatically not good faith for FPL to attempt to maintain excessive rates and thereby to keep all of the TCJA savings for itself and its sole shareholder.

Good faith by FPL would have been to follow its oft-touted commitment to lower customer rates by seeking a way to recover its Hurricane Irma restoration costs and give customers a fair, just, and reasonable share of the TCJA savings. For example, FPL could have straightforwardly sought to recover 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. Docket No. 20170272-EI, Order No. PSC-2018-0103-PCO-EI at 1-3 (Duke to apply TCJA savings to offset Duke's Hurricane Irma storm costs until fully recovered, then to reduce base rates); Docket No. 20180045-EI, Order No. PSC-2018-0457-FOF-EI at 2-3 (tax savings used to offset Tampa Electric's Hurricane Irma storm costs followed by permanent base rate reductions to reflect TCJA savings). 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[12] once the amortization of their Irma restoration costs was complete, whereas FPL is simply trying to keep all the money for itself and NextEra for as long as possible, i.e., through 2020 or 2021.

[12] Tampa Electric's base rate reductions reflecting its reduced tax costs are already in effect, resulting in its rates now being lower than FPL's.

(See FPL's references to its ability to extend the 2016 Settlement at pages 2 and 3 of FPL's Response to Joint Petition for Enforcement of 2016 Settlement and Permanent Base Rate Reductions Against Florida Power & Light Company, filed December 21, 2018, in the Joint Petition Docket, FPSC Doc. No. 07661-2018.)

D. FPL's Characterizations of its Actions Are At Best Misleading, Disingenuous, and Incomplete.

FPL claims that it used the Reserve and ARM "to avoid nearly $1.3 billion of Hurricane Irma-related surcharges." FPL's Response to Joint Petition, FPSC Document No. 07661-2018 at 4 (filed Dec. 21, 2018). 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 FPL was required to use the SCRM, and thus it is technically true that FPL could have implemented storm cost surcharges to recover the full amount of its Hurricane Irma costs over two years, it is also true that FPL could have straightforwardly sought to recover its Irma restoration costs using the same, straightforward amortize-storm-costs-with-tax-savings approach used by Duke Energy Florida and Tampa Electric Company described above. With this approach, there would have been no immediate change in customers' rates due to FPL's Hurricane Irma costs, and base rate decreases to reflect the TCJA savings could have followed as they have for Tampa Electric and will for Duke.

FPL further asserts that it "concluded that it had the opportunity" to use the TCJA savings and the Reserve "in order to avoid an interim storm charge due to Hurricane Irma

entirely." FPL's Tax Petition at 5. FPL in fact saw an opportunity: to retain all the TCJA savings for itself by spinning its scheme as a good deal because customers would not have to pay a storm charge for Hurricane Irma. FPL, however, never told the Commission, and never told customers what the ultimate cost would be – i.e., that FPL and NextEra would try to keep all the TCJA savings.

III. THE PUBLIC INTEREST REQUIRES A COMPREHENSIVE AND PRINCIPLED EXAMINATION OF ALL OF FPL'S COSTS AND REVENUES TO ENSURE THAT FPL'S "RATES ARE FAIR, JUST, AND REASONABLE" AND THAT THE COMMISSION'S DECISIONS HERE ARE "IN THE PUBLIC INTEREST."

The only way to ensure that FPL's rates are fair, just, and reasonable, and in the public interest, consistent with the Commission's statutes, the Commission's standards for approving settlement agreements, and the Florida Supreme Court's pronouncements regarding the Commission's decisions and standards is for the Commission to conduct a comprehensive and principled examination of FPL's costs and revenues and set rates accordingly. This will ensure that FPL and NextEra get to keep a fair, just, and reasonable amount of the TCJA savings, and will also ensure that FPL's customers pay rates that fairly, justly, and reasonably reflect FPL's windfall tax cost savings from the TCJA. This is the result required by the Commission's standards, by applicable statutes, and by the Florida Supreme Court's precedents. Note well that the FRF does <u>not</u> assert that a necessary result of this inquiry is the disgorgement of <u>all</u> of the TCJA savings by FPL in favor of its customers. The FRF asks for a comprehensive and principled examination of all of FPL's costs and revenues, with "rates that are fair, just, and reasonable" to be set based upon that

examination: it is at least possible that the ultimate base rate reductions flowing from such examination will be less than the full $649.6 million per year of TCJA savings realized by FPL in 2018, and the FRF is fully prepared for such an outcome. (It is also possible that the requested examination could result in even greater base rate reductions; however, such an outcome would depend on a host of other factors to be addressed in the requested rate case.)

The plain, stipulated facts remain: FPL's costs were reduced by $649.6 million per year in 2018 as a result of the TCJA. Stipulated Position on Issue 9 in the FPL Tax Docket. FPL's existing base rates were based on costs that were thus approximately $650 million per year greater than they are now, and those rates were determined to be "fair, just, and reasonable" by the Commission based on those dramatically greater costs. FPL's current rates cannot now be fair, just, or reasonable, when FPL's underlying costs are $650 million per year less than when those rates were approved, and where this dramatic cost reduction (the TCJA savings) represents a nearly 6 percent reduction in FPL's total revenues and, viewed differently, a reduction in FPL's costs that is nearly 1.5 times its entire authorized earnings range.

Moreover, FPL's revenues in 2018 exceeded the amount necessary for FPL to report earnings with an 11.6 percent ROE by more than $540 million. December 2018 Earnings Surveillance Report at 1. FPL has thus far only been able to avoid the ordinary consequences of such overearnings, i.e., a general rate case, by attempting to disguise and "shelter" these revenues as "replenishment" of the Reserve. The Commission's standards, the Commission's statutes, the 2016 Settlement Order, and the 2016 Settlement itself

require that FPL not be allowed to continue its violations of the 2016 Settlement Order by refusing to use the Storm Cost Recovery Mechanism to recover its Irma restoration costs as the 2016 Settlement Order requires and in the manner FPL told the Commission it would. FPL's actions are contrary to the Commission's orders, contrary to the Parties' reasonable expectations based on FPL's own express representations set forth in Commission Order No. 2016-0341, and contrary to the public interest.

The only rational way to achieve the same standards that the Commission applied in approving the 2016 Settlement is to enforce the 2016 Settlement Order and hold FPL to its word. The Commission should order the general rate case sought by the Joint Petition of the Citizens, the FRF, and FIPUG to proceed. The principled examination required in that proceeding will ensure that both FPL and the Customer Parties are ultimately treated fairly and in the public interest.

CONCLUSION

In resolving the issues raised here, the Commission must apply the same standards by which it approved the 2016 Settlement Agreement, to ensure that the application of the 2016 Settlement Order here "establishes rates that are fair, just, and reasonable" and that "it is in the public interest."

FPL's existing base rates are neither fair, nor just, nor reasonable, because they were established on the basis of federal income tax costs that were dramatically greater than FPL's tax costs are today. To be fair, just, and reasonable, FPL's rates must reflect its current, and dramatically lower federal tax costs. FPL violated the 2016 Settlement Order

by attempting to use the Reserve to "shelter" its excessive revenues from proper treatment under the 2016 Settlement – indeed, FPL's actual 2018 revenues were more than $540 million in excess of the amount needed for FPL to earn the maximum ROE – 11.6 percent, after taxes – allowed under the Settlement, but FPL wants to use the Reserve as a "slush fund" in which it can hide these excessive earnings.

The only rational way for the Commission to ensure that it, in exercising its jurisdiction and statutory mandates, achieves a result that "establishes fair, just, and reasonable rates" and "is in the public interest" is to conduct the comprehensive and principled examination of FPL's costs and revenue requested by the Florida Retail Federation, the Citizens of the State of Florida, and the Florida Industrial Power Users Group in their Joint Petition.

Respectfully submitted this 22nd day of February, 2019.

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CERTIFICATE OF SERVICE

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

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