BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by Florida Power & Light Company for Rate Unification and for Base Rate Increase	))))	FILED: OCTOBER 11, 2021 DOCKET NO. 20210015-EI

FLORIDIANS AGAINST INCREASED RATES, INC.'S POST-HEARING BRIEF

Floridians Against Increased Rates, Inc. ("FAIR"), pursuant to the Second Prehearing Order, Order No. 2021-0362-PHO-EI issued on September 16, 2021 and instructions given at the conclusion of the hearing in this docket, hereby respectfully submits its Post-Hearing Brief. Consistent with FAIR's commitment to the public interest and the best interests of its several hundred members who are FPL customers, FAIR first tackles the issue of most importance to customers, namely, whether to approve the proposed Settlement Agreement that would first give FPL nearly $5 Billion of customers' money over the next four years and then, through the RSAM, deprive customers of the value, probably approaching an additional $1.4 Billion, that customers' payments would create. Discussions of the legal issues relating to the Commission's authority to take various actions (Issues 1-6, including Issue 5(a)) and FAIR's standing (Issue 9) follow.

SUMMARY

No matter how it's sliced or explained, 4.8 BILLION DOLLARS is still 4.8 BILLION DOLLARS. In this case, through the proposed Settlement Agreement, FPL is

trying to get 4.8 BILLION DOLLARS of its customers' money that it doesn't need. FPL claims that it needs this extraordinary amount of its customers' money to make investments, but the evidence shows that FPL can make all of its investments and pay all of its interest expense, O&M expense, and depreciation expense and still earn a REASONABLE return on a REASONABLE amount of equity capital with NO RATE INCREASE IN 2022. At a minimum, removing the $692 million per year increase from the proposed Settlement deal would save FPL's customers nearly $2.8 Billion over the next four years; further analysis developed below indicates that FPL does not need all of the second-year Settlement deal amount of $560 million a year. Moreover, FPL does not need the RSAM, at least not as proposed, to earn a reasonable return on whatever amount of the equity the Commission determines to be appropriate. FPL's claims that the opponents of the Settlement Agreement are "cherry-picking" by focusing on these major earnings drivers in criticism of the Settlement, but the real truth is that FPL wants to uproot the entire cherry tree and keep all of the cherries for itself and its parent company. This case is about FPL's earnings; the Settlement Agreement would provide FPL far more than it needs to do its job of providing safe and reliable service, and taking 4.8 BILLION DOLLARS out of the pockets, wallets, and checkbooks of Florida's citizens and businesses over the next four years is contrary to the public interest.

Accordingly, the PSC should – FAIR believes that, in the public interest, the PSC ***must*** – reject the Settlement, or alternatively, following precedent established in 2012, the Commission should demand that the Settlement deal must be modified substantially

in favor of FPL's customers in order to win the Commission's approval. A reasonable starting point – albeit still an outcome that exceeds FPL's legitimate needs – would be to delete the $692 million per year increase for 2022 through 2025, set the Settlement deal increase for 2023 (which would carry forward through 2025) at the value of $457.2 million per year recommended by the Public Counsel's witness, and cap FPL's ability to use the RSAM at the midpoint ROE approved by the PSC, thus ensuring that FPL would earn the "fair and reasonable" return approved by the PSC while preserving a tremendous amount – probably exceeding $1 billion – of customer-paid-for value for the customers who will pay to create it.

Contrary to FPL's specious and misplaced attempts to silence the voices of its customers who are FAIR's members, the record evidence in this case demonstrates that FAIR satisfies all applicable standing requirements of Florida law. Each of FAIR's members specifically stated their support for FAIR's purposes of "advocating by all lawful means for the lowest possible electric rates that are consistent with my utility providing safe and reliable electric service, and [] opposing by all lawful means utility proposals for rates and rate increases that are greater than necessary for my utility to provide safe and reliable service." EXH 289, 290 Each of FAIR's members further specifically requested and authorized FAIR to "represent my interests in having the lowest possible rates for my electric service that are consistent with my utility providing safe and reliable service." Id. In proceedings before the Florida PSC like this rate case, FAIR is doing exactly that: advocating for and presenting evidence in support of the

fundamental regulatory policy that a regulated utility's rates should be as low as possible while ensuring that the utility has the necessary resources to provide safe and reliable service. The record demonstrates that FAIR has members who are FPL customers and whose substantial interests will be determined by the PSC's decisions in this case, that FAIR's actions opposing FPL's proposed rate increases are within its authority, and that the relief sought – lower rates for all customers – is appropriate for FAIR to obtain on behalf of its members because that relief will apply to all members. Accordingly, the Commission must affirm its initial decision granting FAIR's standing to intervene in May 2021 in its final order in this case.

PRELIMINARY STATEMENT

As used herein, the following abbreviated terms or acronyms have the meanings given below.

PSC, Florida PSC, or Commission – the Florida Public Service Commission

FAIR – Floridians' Against Increased Rates, Inc.

FPL – Florida Power & Light Company

NEE – NextEra Energy, Inc.

OPC – the Office of Public Counsel

FEA – Federal Executive Agencies

FIPUG – Florida Industrial Power Users Group

SACE – the Southern Alliance for Clean Energy

Settling Parties – FPL, OPC, FEA, FIPUG, Vote Solar, the CLEO Institute, and SACE

Larsons – Daniel and Alexandria Larson

Florida Rising – Florida Rising, Inc.

LULAC – League of United Latin American Citizens of Florida

ECOSWF – Environmental Confederation of Southwest Florida

"Settlement Agreement,", "Settlement," or "Settlement deal" refers to the proposed Stipulation and Settlement Agreement dated August 9, 2021 and included as Exhibit 483 in the record of this docket.

Orders are cited in the form Order No. PSC-YEAR-####-XX-YY, where the hash tags signify the specific order number and the suffixes XX and YY are those applicable to the type of order and the industry designation. Citations to the hearing transcript are in the form TR abc, where abc is the page number in the continuous numeration of the transcript. Exhibits are cited in the form EXH xyz, page number, where xyz is the number assigned to the exhibit either in the Comprehensive Exhibit List or at the hearing, and the page number is the number within the cited exhibit.

STATEMENT OF THE CASE AND FACTS

FPL initiated this general rate case by petition ("Petition") and supporting documents filed on March 12, 2021. Through its Petition, FPL seeks the largest rate increases in the history of Florida utility regulation. TR 1813, EXH 282. The original requests made through FPL's Petition would have cost FPL's customers more than $6.25 Billion over the four-year period from 2022-2025. TR 1820.

The rate increases provided in the proposed Settlement deal would likewise be the largest rate increases in Florida history. TR 2646. Together, the increases provided in the Settlement deal would cost FPL's customers approximately $4.868 Billion over the same 2022-2025 period. TR 2648

Against a backdrop of much lower returns on equity ("ROE") approved by other state utility regulatory authorities, including the Florida PSC, in 2020 and 2021, the Settlement deal would nominally provide FPL with an ROE of 10.60 percent. EXH 483 The average ROE approved by other U.S. state utility regulatory authorities, either by approval of a settlement or by a litigated decision, in 2021 was 9.47 percent. TR 2657 The Florida PSC recently approved an ROE for Duke Energy Florida of 9.85 percent. In re: Petition for Limited Proceeding to Approve 2021 Settlement Agreement, Including General Base Rate Increases, by Duke Energy Florida LLC, Order No. 2021-0202-AS-EI at 3 (June 4, 2021); see also Order No. 2021-0202A-AS-EI at 7 (June 28, 2021) (collectively, the "Duke Settlement Order"). The Settlement deal would also allow FPL to earn up to a maximum ROE of 11.70 percent, EXH 483; this is significant because FPL has consistently earned at the top of its authorized ROE range (currently 11.60 percent) for the last three years (FPL's Earnings Surveillance Reports, EXH 616, EXH 617) under a settlement agreement (the "2016 Settlement") approved by the PSC through Order No. 2016-0560-AS-EI.

Against a similar backdrop of much lower equity ratios (the percentage of investor-supplied capital from common equity investors) approved by other state utility

regulatory authorities, including the Florida PSC, in 2020 and 2021, the Settlement deal would evaluate FPL's returns and allow FPL's rates to be set on the basis of an equity ratio of 59.6 percent. EXH 483 The average financial equity ratio approved by other U.S. state utility regulatory authorities, either by approval of a settlement or by a litigated decision, in 2021 was 51.62 percent. TR 2611. The Florida PSC recently approved a financial equity ratio for Duke Energy Florida of 53.0 percent. Order No. 2021-0202A-AS-EI at 7 (June 28, 2021).

In a non-settled general rate case, the Commission is called on to decide many – often more than 100 – separate issues relating to the utility's sales, operations, expenses, financial structure, and rates. See, e.g., Order No. 2021-0302-PHO-EI at 208, the Prehearing Order in this docket, which reflects a list of 138 issues to be decided. In a case where two ore more parties propose to resolve the case by a settlement, the issues are whether the proposed settlement is in the public interest, resolves all issues, and results in fair, just, and reasonable rates. Sierra Club v. Brown, 243 So. 3d 903, 909 (Fla. 2018).

SUMMARY OF ARGUMENT

The proposed Settlement Agreement is contrary to the public interest because it would unfairly, unjustly, unreasonably, and unnecessarily transfer billions of dollars of customers' money to FPL, not only through the direct rate increases allowed by the Settlement deal but also through the proposed RSAM, which would transfer customer-

paid-for value – likely approaching an additional $1.4 Billion – from FPL's customers to FPL and its parent, NextEra Energy, giving FPL and NextEra excessive earnings over the next four years and depriving customers of the value they create in the next FPL rate case. The Settlement deal is contrary to the public interest because it results in excessive rates and earnings for FPL and because those rates are unfair, unjust, and unreasonable to FPL's customers. The Settlement deal is contrary to the broader public interest because it would take these same billions of dollars out of the pockets, wallets, and checkbooks of individual Floridians and Florida businesses, thereby hurting the Florida economy.

Because the Settlement Agreement is demonstrably contrary to the public interest, it must be rejected as presented to the Commission. As an alternative, consistent with Commission precedent, the Commission could demand that FPL and the other Settling Parties renegotiate and modify the Settlement deal to be truly in the public interest and truly fair, just, and reasonable for FPL's customers in order to win Commission approval.

Legal Issues 1-6 listed in the Prehearing Order should all be decided in the negative.

Finally, regarding FAIR's standing (Issue 9 in the Prehearing Order), FAIR satisfies all applicable standing requirements of the Florida Administrative Procedure Act and applicable Florida case law, and accordingly, the Commission must determine that FAIR has standing to participate as a full party in this docket. FPL's arguments to the contrary are misplaced and based on law that has never been recognized in Florida, and FPL's arguments should be rejected.

I. The Settlement Agreement is Contrary to the Public Interest, and Accordingly, the Commission Must Reject the Settlement Deal As Proposed.

The public interest means the public welfare generally, including considerations of the overall health of the Florida economy and the welfare of all Florida citizens. TR 2649-50.[1] The principal criteria for the PSC to approve or reject a proposed settlement agreement is whether, taken as a whole, the proposed agreement resolves all issues, establishes rates that are fair, just, and reasonable, and is in the public interest. Sierra Club v. Brown, 243 So. 3d 903, 909 (Fla. 2018); see also Citizens of the State of Florida v. Florida Public Service Commission, 146 So. 3d 1143, 1164 (Fla. 2014).

The Settlement deal proposed in this docket is contrary to the public interest in multiple ways: (1) it would impose rates that are unfair, unjust, and unreasonable on FPL's customers because they exceed the amounts that FPL needs to fulfill its duty or goal of providing safe and reliable service at the lowest possible cost, TR 2651; (2) it would harm Floridians, Florida businesses, and the Florida economy as a whole by transferring billions of dollars of purchasing power out of the pockets, wallets, and checking accounts of Florida citizens and businesses and into the coffers of FPL and NEE, TR 2646, 2659; and (3) through the proposed Reserve Surplus Amortization Mechanism, or RSAM, it would transfer additional amounts – likely approaching $1.4 billion, of customer-paid-for value to FPL and NEE, depriving customers of the value

[1] See also publicly available definitions of "public interest" at https://en.wikipedia.org/wiki/Public_interest ("the welfare or well-being of the general public" and society) and at https://www.dictionary.com/browse/public-interest (the welfare or well-being of the general public; commonwealth).

that their payments create in a future rate case or cases. TR 2628, TR 2665-66.

A. The Public Interest.

As stated by the PSC's former Executive Director, Tim Devlin, the "public interest" can be defined as the general welfare or well-being of the public, or society as a whole. TR 2627 With respect to regulated utilities that provide necessary services (such as electricity or potable water), the public interest is served and promoted where the utility provides safe and reliable service at rates, and under terms and conditions, that are fair, just, and reasonable. TR 2627 For any regulatory decision to be in the public interest, it must provide for fair, just, and reasonable rates and, like the fundamental principles embodied in the Regulatory Compact, must provide for fair treatment of both the utility and the utility's customers. TR 2627-28

Former Commissioner Tom Herndon testified that the "public interest" means the public welfare generally, and this includes considerations of the overall health of the Florida economy and the welfare of all Florida citizens. With respect to a specific utility such as FPL, now including Gulf Power Company, that serves more than half of Florida's electric customers, this means at least the welfare of all of the people served and directly affected by the utility's service. This includes considerations of the economic impacts of a utility's rates and rate increase requests on individuals, households, and businesses. The PSC must consider the overall impacts on the Florida economy and on all customers in making its decisions on rate increases, whether pursuant to a rate increase petition or pursuant to a settlement agreement. TR 2649-50

Mr. Herndon went on to testify that, in present-day, real-world circumstances, the PSC must recognize that many Floridians, Florida households, and Florida businesses are still struggling toward recovery from the impacts of the COVID-19 pandemic. Florida and Floridians are suffering even more from the pandemic than they were when FPL filed its original rate petition in March. Given the continuing impacts of the COVID-19 pandemic on Florida, the Commission must consider the impacts that the Settlement Agreement would impose on all Floridians through the massive transfer of spending power and wealth from FPL's customers to FPL and its sole shareholder, NextEra Energy. TR 2650

B. The Settlement Agreement Is Contrary to the Public Interest Because It Would Unnecessarily Transfer Extraordinary Amounts of Purchasing Power – Billions of Dollars – from FPL's Customers to FPL and Its Parent Company, Thereby Injuring Millions of Individual Floridians and Florida Businesses, and the Florida Economy as a Whole.

The harm to the public interest of Floridians and the Florida economy that the Settlement deal would cause is the imposition of unfair, unjust, and unreasonable rates on more than half of all the electric customers in Florida, and the directly resulting harm to the Florida economy of ***unnecessarily*** depriving those Floridians and Florida businesses, who would be forced to pay those billions of dollars in excessive rates, of purchasing power that would be transferred through the Settlement deal to FPL and its parent, NextEra Energy. This unnecessary, unfair, unjust, and unreasonable transfer of purchasing power from FPL's customers to FPL and NEE would result first, from excessive rates, driven by excessive earnings flowing from those rates to FPL, and

second, from the – probably unlawful[2] – deprivation of customer-paid-for value through the proposed Reserve Surplus Amortization Mechanism, or RSAM, that would enrich FPL and NEE and deprive customers of the value that they create through overpaying depreciation expense in a future FPL rate case or cases. FPL's arguments to the contrary are misleading and self-serving. In the public interest, the Commission must reject the Settlement deal as filed.

1. FPL Wants to Keep the Whole Cherry Tree. FAIR will address FPL's "cherry-picking" argument – its assertion that the opponents of the Settlement deal are improperly focusing on FPL's earnings – at the outset. FAIR does indeed attack the major earnings drivers in the Settlement deal because the values proposed – an ROE of 10.60 percent, most likely leading to an achieved ROE of 11.70 percent, and an equity ratio of 59.6 percent – are excessive by recognized, widely and publicly known standards, including decisions of other U.S. regulatory authorities over the past two years, and including the Florida PSC's own decision approving a settlement for Duke Energy Florida earlier this year. The Commission must recognize that the criteria for approving a settlement specifically include whether it results in fair, just, and reasonable rates (Sierra Club v. Brown at 909), but the Settlement proposed in this case would result in excessive earnings that FPL would earn through unfair, unjust, and unreasonable rates. Thus, FAIR properly attacks the excessive earnings that the Settlement deal would give FPL because

[2] Please note that, by addressing the substantive issue of the RSAM in its Brief, FAIR does not concede that approval of the RSAM is lawful in any event. The lack of lawful statutory authority for the RSAM is discussed in Section II below.

those excessive earnings are unnecessary, because it is those earnings that would take money out of Floridians' pockets and checking accounts, because it is those excessive earnings that would hurt the Florida economy by taking billions of dollars of purchasing power out of Floridians' pockets, and because, using the commonly recognized maxim, "that's where the money is."

Neither FAIR nor the other opponents of the Settlement are "cherry-picking" – FAIR and the other opponents are asking for simple economic justice in the statutorily required form of fair, just, and reasonable rates. In truth, FPL wants to uproot the whole cherry tree and take the tree, with ***all*** of the cherries, back to Juno Beach.

2. FPL's Rates and Revenues Under the Settlement Agreement Would Be Unfair, Unjust, Unreasonable, and Excessive, and Therefore Contrary to the Public Interest. Record evidence – in fact, the preponderance of the record evidence - in this case shows that, objectively, FPL does not need anything like the amount of its customers' money that it requested in its original Petition or the slightly lower amount of its customers' money that it now hopes to take from its customers through the Settlement Agreement. FPL does not need anything like the $4.868 Billion of additional base revenues that the Settlement deal would take from FPL's customers. This is amply demonstrated by simple adjustments to reasonable values of the ROE and equity ratio used to evaluate and set FPL's rates and revenue requirements: both are excessive when compared to widely known decisions of other state utility regulatory bodies, and even when compared to the Florida PSC's decision in June of this year, when it approved much lower ROE and

equity ratio values for Duke Energy Florida, which has a noticeably greater risk profile than FPL. Mac Mathuna Supplemental Testimony at 14-15

Excessive Revenues and Rates Are Unfair, Unjust, and Unreasonable. Record evidence in this case shows that FPL does not need any of the $692 million per year of customers' money that the Settlement Agreement would transfer to FPL in 2022, 2023, 2024, and 2025, just as FPL did not need any of the $1.108 Billion per year of its customers' money that it sought through its requested 2022 rate increase that would have carried forward throughout the entire period 2022-2025. FPL can recover all of its reasonable and prudent costs, including interest expense, depreciation expense, and O&M costs, make all of its planned 2022 investments, and earn a reasonable return on a reasonable amount of common equity in its capital structure with no increase at all in 2022. Smith Direct at 23, Mac Mathuna Direct at 107. Thus, it was and is FPL's desire for earnings that drove its original Petition and that is now driving its requested revenues and rates in the Settlement deal. Its earnings are, of course, driven by its proposed rate of return on common equity ("ROE") – 11.50 percent in its original Petition and 10.60 percent in the Settlement Agreement – and its financial equity ratio of 59.60 percent. Again, this is "where the money is" – in these critical earnings drivers.

In fact, the Public Counsel's evidence, through its witness Ralph Smith, shows that FPL should be required to reduce its rates by approximately $70 million per year effective on January 1, 2022. Smith Direct at 23 FAIR's witness Breandan Mac Mathuna similarly testified that, only adjusting the ROE and equity ratio, FPL should reduce its

rates by approximately $121 million per year in 2022, and that FPL could still cover all of its costs. Mac Mathuna Direct at 107

Through its witnesses' testimony, Smith Direct at 71, and its positions set forth in its prehearing statement, the Public Counsel, like FAIR, opposes any rate increase for 2023. However, the OPC's witness Ralph Smith did testify that, if a subsequent year rate increase were to be allowed, then the appropriate amount would be $457.2 million per year in 2023. Exhibit RCS-3, Smith Direct at 70 Even allowing for this 2023 increase, the Settlement Agreement would still be contrary to the public interest of Florida and Floridians because, if approved, it will unnecessarily transfer unreasonable amounts of purchasing power – more than $3 billion – from the pockets and pocketbooks of hard-working Floridians and businesses to FPL and NextEra over the next four years. Herndon Supplemental Testimony at 9. This will hurt the Florida economy and is particularly egregious given that our state is still suffering greatly from the COVID-19 pandemic.

This $3 Billion estimate is based on a comparison of the additional base rate revenues that the Settlement Agreement would give FPL to a generous estimate of what FPL might otherwise be able to justify for the years 2023 through 2025. The revenue increases set forth in the Settlement Agreement would yield total additional base rate payments to be made by Florida citizens and businesses to FPL of approximately $4.868 billion over the 2022-2025 period covered by the Settlement Agreement. (This is the simple sum of four times the 2022 increase of $692 million per year, plus three times the

2023 increase of $560 million per year, plus two times the approximate 2024 SOBRA rate increase of $140 million per year, plus the 2025 SOBRA increase of approximately $140 million per year. (The 2022 and 2023 base rate increase values are taken directly from page 5 of the Settlement Agreement. The SOBRA values were taken from FPL president Silagy's letter to Chairman Clark dated January 11, 2021, page 3.) EXH 493 Allowing for the $457 million per year increase in 2023 calculated by witness Smith would give FPL and for the 2024 and 2025 SOBRA increases would give FPL approximately $1.791 Billion over the 2022-2025 period; this is ore than $3 Billion less than the $4.868 Billion that the Settlement deal would take from FPL's customers.

Perhaps the worst aspect of the Settlement Agreement is that most, if not all, of these increases are not necessary for FPL to fulfill its obligation to provide safe and reliable service at the lowest possible cost. FPL can and should provide service in 2022 with rates no greater than its current rates. The Public Counsel's witnesses support an overall rate reduction for FPL's customers of approximately $70 million per year in 2022, and FAIR's witnesses support a similar reduction of at least $121 million per year in 2022. While the Federal Executive Agencies take no position on the ultimate revenue increase, their witness, Michael Gorman, supports an ROE of 9.40 percent and an equity ratio of 53.5 percent, which together would produce revenue requirement results similar to those advocated by the Public Counsel's witnesses and FAIR's witnesses.

The ROE In the Settlement Agreement Is Excessive. The preponderance of the record evidence in this proceeding supports a finding that an ROE on the order of 8.50 to

9.55 percent could be considered fair and reasonable. The lowest ROE recommended in testimony is actually the 8.50 percent recommended by the Public Counsel's witness, Randall Woolridge, if FPL is allowed its proposed financial equity ratio of 59.6 percent; with the equity ratio of 55.0 percent recommended by the Public Counsel's witness Kevin O'Donnell, Professor Woolridge's recommended ROE is 8.75 percent. FAIR's witness Breandan Mac Mathuna, utilizing a two-step constant growth Discounted Cash Flow analysis, recommends similar values to those advocated by the Public Counsel's experts: an ROE of 8.56 percent and an equity ratio of 55.4 percent, which was specifically calculated to ensure FPL's financial integrity relative to a particular Moody's downgrade criterion. Mac Mathuna Direct at 32/ Michael Gorman, the witness for the Federal Executive Agencies, recommended an ROE of 9.40 percent and an equity ratio of 53.5 percent. The Commission will note well that neither the Public Counsel nor the FEA submitted any expert testimony that would support the ROE of 10.60 percent in the Settlement deal.

Significantly, Mr. Mac Mathuna's testimony and exhibits show that FPL is significantly less risky that other utilities; investors perceive bond ratings as a good indication of risk. Mac Mathuna Direct at 48

Not surprisingly, FPL's witness James Coyne is the distant outlier among the ROE witnesses, advocating for an ROE of 11.0 percent. In this context, it is worth noting that 100 basis points on ROE represents about $360 million per year in revenue requirements. Thus, comparing Mr. Coyne's 11.0 percent to the national average of roughly 9.5 percent

produces a result of about $500 million a year, or $2 Billion over four years, in excess earnings for his client.

Data in Coyne's exhibits shows that his risk premium results are effectively contradicted by observed comparisons between achieved ROEs and the 30-year Treasury bond rate. The Risk Premium result used by Mr. Coyne is 9.88%. MAC MATHUNA DIRECT at 76, Coyne at 65. The Commission should compare the value used by Mr. Coyne with the values reported in his Exhibit JMC-15, which show the observed risk premiums for vertically integrated electric utilities from 1992 through the second quarter of 2021: since 2007, those values generally fell in the 6 percent to 7 percent range; only once, in 2020, did the risk premium exceed 8 percent. Mr. Coyne's results are not credible when compared to his own real world data.

It further bears noting that the ROE proposed in the Settlement Agreement is 310 basis points – 3.1 full percentage points – greater than the ROE of 7.5 percent included in Morningstar' DCF analyses used to determine its fair value estimate for NextEra Energy's stock price. TR 2608

The Equity Ratio In the Settlement Agreement Is Excessive. The national average financial equity ratio approved (reported values) by all U.S. state utility regulatory commissions from January through August 2021 is 51.62 percent. TR 2611 The Florida PSC recently approved a higher equity ratio of 53.0 percent in the Duke Settlement Order. The witnesses for customers in this case recommend equity ratios no greater than 55.4 percent (FAIR's witness Mac Mathuna); OPC's witness O'Donnell recommends

55.0 percent, and the FEA's witness Gorman recommends 53.5 percent. Again, FPL is the outlier – obviously in its self-interest of boosting its earnings – at 59.6 percent. The U.S. average for January through August 2021 is 51.62 percent. TR 2611

The Combined Impacts of These Excessive ROE and Equity Ratio Values Result in Rates That Are Unfair, Unjust, Unreasonable, and Contrary to the Public Interest. As explained above, simply applying reasonable ROE and equity ratio values, supported by record evidence, in determining FPL's revenue requirements and rates indicates that FPL should reduce its rates in 2022; this holds true whether the reference point is FPL's original request of $1.108 Billion per year in 2022 or the Settlement deal value of $692 million per year in 2022. Other readily available data – including decisions of other state regulatory commissions and of the Florida PSC itself – show how excessive FPL's requests are. The combined effect of applying the ROE (9.85 percent) and equity ratio (53.0 percent) values approved by the Florida PSC for Duke Energy Florida would be to reduce FPL's 2022 increase to $214.8 million per year and its 2023 increase to $550.9 million per year. TR 2611. Similarly, the impacts of applying the ROE (9.95 percent) and equity ratio (54.0 percent) agreed to by Tampa Electric Company in its pending settlement proposal in PSC Docket No. 20210034-EI would be to reduce FPL's 2022 increase to $286.9 million and its 2023 increase to $555.2 million. Id.

Further, the observed U.S. average values reported by S&P Capital IQ Pro for the period January through August 2021 are an ROE of 9.47 percent and a financial equity ratio of 51.62 percent. TR 2611 Applying these values to FPL would produce a 2022

revenue/rate increase of $40.8 million and a 2023 increase of $539.6 million.

The ROE and equity ratio under the Settlement Agreement would provide FPL with far more than investors' required returns, based on market-based data, and consequently, customers' rates and FPL's earnings would be higher than necessary for FPL to provide safe and reliable service, recover all of its reasonable and prudent costs, and maintain financial integrity. TR 2612-23

These objective facts clearly demonstrate that the Settlement deal revenue increases are unfair, unjust, unreasonable, and excessive, and they are therefore contrary to the public interest.

Conclusion. The increases in FPL's revenue requirements and rates under the proposed Settlement deal are excessive and contrary to the public interest. Specifically, considering this factor alone, the Settlement Agreement is contrary to the public interest of Florida and Floridians because, if approved, it will unnecessarily transfer unreasonable amounts of purchasing power – more than $3 billion – from the pockets and pocketbooks of hard-working Floridians and businesses to FPL and NextEra over the next four years. This will hurt the Florida economy and is particularly egregious given that our state is still suffering greatly from the COVID-19 pandemic. Additional evidence shows that, if the Commission were to track the decisions of other state utility regulators or follow its own precedent for Duke Energy Florida, any allowed increases would be much less than those under the Settlement deal. The Commission should reject the Settlement Agreement as filed.

3. The RSAM is Contrary to the Public Interest and Unfair to FPL's Current and Future Customers.[3] For any regulatory decision to be in the public interest, it must provide for fair, just, and reasonable rates[4] and, consistent with the fundamental principles embodied in the Regulatory Compact, it must provide for fair treatment of both the utility and the utility's customers. TR 2624. By these widely accepted standards, the proposed Settlement Agreement is contrary to the public interest and the Commission should reject it. The Settlement Agreement is contrary to the public interest because, in addition to the excessive rates described above, the Reserve Surplus Amortization Mechanism ("RSAM") included in the Settlement deal would deprive FPL's customers of up to $1.45 Billion in depreciation reserve surplus ("Reserve Surplus") that those customers created by transferring the Reserve Surplus to FPL (and its sole shareholder, NextEra Energy) for FPL's and NEE's earnings rather than preserving the value for the customers who paid to create it. Since the customers created the Reserve Surplus, it should be available to offset FPL's rate base for the benefit of the customers who paid for it in FPL's next rate case. The transfer of the customer-created Reserve Surplus to FPL

[3] For emphasis and avoidance of any doubt, FAIR again asks the Commission to please note that, by addressing the RSAM issue substantively in its Brief, FAIR does not concede that approval of the RSAM is lawful in any event. The lack of lawful statutory authority for the RSAM is discussed in Section II below.

[4] Fair, just, and reasonable rates are rates that cover a utility's reasonable and prudent operating and maintenance expenses and provide the utility with the opportunity to earn a reasonable return on its reasonable and prudent investments that are used and useful in providing safe, adequate and reliable service to the utility's customers. This is essentially the basic statement of fundamental regulatory rate-making policy. The reasonable return in this context is the amount or rate necessary to attract sufficient capital for the utility to make and support its necessary investments - it is not anything greater than that rate. Devlin, TR 2627-28

and NextEra is contrary to the public interest, contrary to the individual interests of FPL's residential and business customers, and contrary to the public interest of the Florida economy. Additionally, no RSAM or similar scheme has been approved and used by any other regulated utility or regulatory authority in the U.S.

The Settlement Agreement is contrary to the public interest because it will result in rates that are unfair, unjust, and unreasonable. The proposed Settlement Agreement will result in a massive transfer of purchasing power (of up to $1.45 billion) ***out of customers' pockets*** **and in*to FPL's and NextEra Energy's pockets.*** It is a virtual certainty that FPL will, given the opportunity, use the RSAM to earn above its midpoint ROE, probably to earn at the very top of its authorized earnings range, just as it has for the past several years. EXH 277 With respect to the earnings range, it is worth noting that, under the proposed Settlement Agreement, the maximum of the range would be 110 basis points above the midpoint, rather than the usual 100 points. TR 2596-97 As shown on EXH 497 (Exhibit TJD-6), the difference in potential earnings between the midpoint ROE and the maximum ROE over the proposed four-year settlement term is $1.565 Billion, well in excess of the $1.45 Billion Reserve Surplus. Given FPL's history of targeting earnings at the maximum ROE, it is highly probable that FPL will, if allowed, use the Reserve Surplus to achieve the maximum ROE during the proposed four-year rate term. Although it is permissible for FPL to earn at the top of its authorized range or maximum ROE, it should not be allowed to earn above the midpoint by using customer-funded depreciation credits to do so.

The Settlement Agreement would also cause customer rates to be unfair, unjust, and unreasonable in the longer run, i.e., following FPL's next rate case, because the value created by FPL's customers over-paying depreciation expense would have been used up to support higher than necessary earnings. Taking money – likely more than a billion dollars of real purchasing power – out of the pockets of Florida customers is contrary to the public interest in the most basic terms, and it is especially offensive while Florida remains in deep suffering and economic struggles due to the COVID-19 pandemic.

FPL's proposed Reserve Surplus Amortization Mechanism, which FPL abbreviates as "RSAM," is unnecessary, not cost-based, and unfair to FPL's current and future customers. FPL has used, and continues to use, a virtually identical RSAM mechanism to charge rates and to earn returns that are, on their face, much greater than the "fair and reasonable"[5] return on equity approved by the PSC. If approved, it would allow FPL to collect excessive depreciation expense amounts through its rates from 2022 through 2025 (or for any period in which it is allowed) and would almost certainly allow FPL to earn above the midpoint of its authorized ROE range (whatever midpoint ROE

[5] The Florida PSC recognizes that the midpoint ROE is the "fair and reasonable" return for a utility to receive on its equity investment. In its 2010 order determining FPL's rates and returns in Docket No. 20080677-EI, the PSC stated the following: "At an equity ratio of approximately 59 percent on a Commission-adjusted basis and approximately 56 percent on an S&P-adjusted basis, we find that an authorized ROE of 10.00 allows FPL the opportunity to earn a ***fair and reasonable return*** for the provision of regulated service." In re: Petition for Increase in Rates by Florida Power & Light Company, Order No. 2010-0153-FOF-EI at 132 (March 17, 2010) (emphasis supplied). See also, Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679 (1923) ("Bluefield"); Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944) ("Hope").

value may be approved). This has been the norm for FPL under the nearly identical mechanism contained in the 2016 Settlement. See In re: Petition for Rate Increase by Florida Power & Light Company, Order No. PSC-2016-0560-AS-EI at 3, Docket No. 20160021-EI (December 15, 2016). For the past three years, FPL has earned at the absolute maximum of its authorized ROE range, i.e., at 11.60 percent, even though the PSC approved a ***midpoint*** ROE value of 10.60 percent as being fair, just, and reasonable. EXH 617 (FPL's Earnings Surveillance Reports) This has resulted in customers over-paying versus the fair, just, and reasonable rate of return by hundreds of millions of dollars, and there can be no doubt that FPL intends to achieve the same results with its RSAM in the future, if it is approved.

The Commission should reject the RSAM outright, but if it is allowed in any form, then it is critical – in order to ensure that the rates that FPL charges its customers are fair, just, and reasonable as required by Florida law and fundamental regulatory policy – that FPL only be allowed to use any surplus amounts to achieve an ROE no greater than the ***midpoint*** of its authorized range. This is undeniably fair to FPL, because it will ensure that FPL earns the "fair and reasonable" ROE approved by the PSC (whatever value is actually approved). Further, this would provide FPL extraordinarily strong protection of its financial integrity while ensuring that its risk of under-earning is virtually zero, and it would result in customer rates that are fair, just, and reasonable, consistent with the PSC's determination of whatever ROE it ultimately approves. TR 2630-31.

Depreciation and Depreciation Reserves. PSC Rule 25-6.0436, Florida

Administrative Code, defines the methods and procedures used in calculating depreciation rates. Electric utilities are required to file a depreciation study every four years which involves the calculation of depreciation rates for all categories of plant investment. Depreciation expense is a cost that is typically calculated for each group of assets (e.g., power plants by type, transmission poles, transmission and distribution conductor, transformers, meters, and so on) based on the assets' book value divided by the assets' useful life in years. Depreciation expenses, along with other operating and maintenance ("O&M") costs, are used in the determination of revenue requirements and consequently, customer rates.

In regulatory utility accounting, the depreciation reserve represents the accumulation of depreciation expense, year by year, less the gross investment associated with plant retirements. A depreciation reserve surplus is the difference between the book depreciation reserve, commonly known as "accumulated reserve for depreciation," and the calculated theoretical reserve. The calculated theoretical reserve is the reserve that represents a more accurate reflection of the remaining plant service lives. The calculated theoretical reserve is made using updated estimates of various components of depreciation expense, including the asset's useful life and any expected net salvage value at the end of its life. Devlin Direct at 23.

A depreciation surplus occurs, or comes into existence, when the theoretical reserve is less than the booked reserve. Stated differently, a depreciation surplus comes into existence when the utility has collected too much depreciation expense up to a given

point in time. This can occur when an asset's life is extended as a result of some upgrade, or simply through the recognition that the asset's remaining life at a given point in time is greater than was previously estimated. Devlin Direct at 8.

Standard regulatory accounting for depreciation surplus balances, as applied in determining the utility's revenue requirements and rates, returns the surplus to the utility's customers. This is accomplished by amortizing the surplus balance over some period of time, which is usually determined depending on the amount of the surplus. It may simply be amortized over the average remaining life of the assets or amortized over an accelerated period (fewer years) in order to better match the "return" of the surplus to the customers who created it. As the PSC has recognized, such accelerated amortization will reduce or avoid "intergenerational inequity," which is the term used to refer to a mis-matching of flowing or crediting back a depreciation surplus to future customers who didn't pay to create it, thus being unfair or inequitable to the previous customers who did pay to create it. This is true regardless of which of the methods or schedules discussed above is chosen: whether over a short period of time, such as four years, or a longer period of time, such as twenty years, the surplus should ***always*** be returned to the utility's customers. Devlin Direct at 9.

FPL's Proposed RSAM. FPL first proposes that it be allowed to pick different depreciation parameters – mainly different asset lives – for certain major assets in calculating depreciation expense, dependent on whether its RSAM proposal is approved. If the RSAM is not approved, FPL wants to use the depreciation rates established in the

depreciation study completed by Ned W. Allis of Gannett Fleming, Inc. On the other hand, if the Commission approves the RSAM, FPL wants to apply what it calls "RSAM depreciation adjustments" to the same assets, which would result in a lower theoretical depreciation reserve and thus in a greater surplus than if the results of Witness Allis's 2021 depreciation study were used. This suggestion by FPL that it should be allowed to pick its depreciation rates is fallacious: the depreciation status of assets is what it is, their lives are what they are, and depreciation expense should be calculated accordingly. The depreciation parameters and rates that FPL proposes to use for RSAM purposes are reasonable and most appropriate for determining FPL's depreciation expense, regardless whether the Commission approves an RSAM, and the existence of any depreciation Reserve Surplus.

FPL's Use of the RSAM. There is every reason to believe that FPL will use the Reserve Surplus through its proposed RSAM to increase its ROE to the top of the range. The settlement agreement approved in FPL's 2016 rate case operates almost identically to that proposed by FPL in this case. The PSC's order approving that settlement became effective on January 1, 2017. If history is an indicator of FPL's future intentions, then it appears that FPL will use the RSAM to increase its earnings to the top or near the top of its ROE range. As shown on EXH 277 (Exhibit TJD-2), FPL achieved an ROE at the top of the authorized range three of the four years since its last authorized midpoint of 10.55 percent was established by the Commission in the 2016 Settlement. In the first three months 2021, FPL booked approximately $316 million in depreciation credits solely to

achieve an ROE of 11.6 percent in each of those months. As of April 1, 2021, there was approximately $577 million in the Reserve Surplus accounts which can be used in the remaining months of 2021 to increase its FPL's ROE to the top of the approved ROE range. FAIR's witness Devlin cited further evidence of FPL's intentions with regard to its ROE: at page 113 of witness Barrett's deposition, he stated that in each year from 2018 through 2020, FPL set and achieved an ROE of 11.6 percent. FPL has set its target ROE for 2021 at 11.6 percent as well, and under the Settlement Agreement, it is entirely reasonable to expect that FPL will set its ROE goal at 11.70 percent, i.e., the maximum of the range allowed under the Settlement deal.

In practical terms, FPL wants to use the surplus, through its proposed RSAM, to "manage" its ROE to be at or near the maximum of its authorized ROE range. FPL has demonstrated this accounting treatment over the past four years by using a significant portion of the surplus to make its ROE hit the top or near the top of its allowed return. If its ROE in any given month is calculated to exceed the top of the ROE range, then FPL uses the reserve surplus to avoid over-earning. This accounting manipulation allows FPL to use the RSAM as a "slush fund" to avoid triggering an earnings investigation or inquiry, e.g., through a "show cause" order issued by the Commission. Devlin Direct at 11.

Under FPL's RSAM plan, it can use up to $200 million of the Reserve Surplus to support its earnings in 2022, and it can amortize any amount it wants during the 2023 through 2025 timeframe even if it is earning an ROE above the midpoint. It is the

midpoint ROE that is used to define fair, just and reasonable rates that will afford FPL the opportunity to earn that fair, just and reasonable ROE as established by the Commission. FPL does not need to earn more than the mid-point of the authorized ROE to remain financially healthy and viable. The record evidence shows that if FPL is allowed to use the Reserve Surplus to achieve the top of the proposed ROE range in the Settlement deal, it would – but for the absolute limit of $1.45 billion – be able to use up to $1.565 Billion. In other words, FPL can potentially use up the entire Reserve Surplus for its benefit and the benefit of its sole shareholder, NEE. However much it uses will be taken away from FPL's customers, resulting in those customers paying higher rates following any future rate cases.

Impacts on FPL's Customers. If FPL is allowed to use the Reserve Surplus for the purpose of managing its ROE, FPL's rate base at the time of its next rate case, likely based on a 2026 test year, will be greater by up to $1.45 Billion, EXH 497, the result of FPL using the Reserve Surplus via the RSAM to earn up to 110 basis points above the ***midpoint*** of its ROE range. The direct result of this is that FPL's customers' rates from 2022 to 2025 will have been excessive. In addition, FPL's customers will no longer have the benefit of the amortized credits associated with the reserve surplus that their payments create. FPL's customers paid for the $1.45 billion surplus, but they will have been deprived of the value their payments created because the credits will have been transferred to FPL and then to earnings which would eventually accrue to NextEra. TR 2625

The rates proposed by FPL in this case are higher than necessary due to the way FPL has used its current RSAM. If FPL had earned a fair and reasonable midpoint ROE during the previous settlement period (2017 through 2020) revenue requirements in this proceeding would be approximately $901 million less than proposed. EXH 279

The Reserve Surplus is a result of overstated depreciation expense in prior years. Changed circumstances can lead to deficient or excessive depreciation rates and the resultant depreciation reserve deficit or surplus. In this case, we are dealing with a significant reserve surplus – a reserve surplus resulting from past excessive depreciation expenses which were paid for by ratepayers. To the extent FPL uses the Reserve Surplus to increase earnings above that which is necessary to maintain a strong financial position, it is needlessly enriching shareholders to the detriment of ratepayers. Exhibit 279 shows the effect ($900,784,157) of the difference between the midpoint ROE and the top of the range ROE over the four-year timeframe outlined in the 2016 Settlement. To the extent this amount is due to RSAM, and most if not all of it is, it translates into FPL having overcharged ratepayers by that amount.

The RSAM Is Inconsistent with the Regulatory Compact. The regulatory framework under which utilities and the Commission operate is the long-established practice, or set of principles, commonly referred to as the "Regulatory Compact." Under this practice, a regulated electric utility is granted the exclusive right to serve a designated territory and to enjoy a monopoly status. In Florida, territorial agreements and PSC territorial orders, if necessary, are used to define such areas. In exchange for

this legal monopoly status, the utility agrees to provide utility service to all customers in its service area at fair, just and reasonable rates. TR 2628 Fair, just and reasonable rates are predicated on the reasonable and prudent costs of the utility including a fair rate of return on equity. In Florida, the ***midpoint*** ROE is used in determining the utility's allowed revenue requirements and in calculating rates that are fair, just, and reasonable. TR 2628

Contrary to these basic principles, FPL's proposed RSAM would provide FPL with significant control over its earnings levels for the next four years by using excess depreciation reserves paid for by FPL's customers, who have overpaid depreciation expense.

Conclusion: Reject the Settlement Agreement or Condition Its Approval on an RSAM that Can be Used Only to Achieve the ***Midpoint*** ROE. The PSC should reject the Settlement Agreement, as submitted, because it is contrary to the public interest and, in at least some respects, to applicable law. If, contrary to the facts and fundamental fairness in ratemaking, as well as to the law, any RSAM or similar mechanism were to be approved in this case, it is critical – in order to ensure that the rates that FPL charges its customers are fair, just, and reasonable as required by Florida law and fundamental regulatory policy – that FPL only be allowed to use any customer-provided Reserve Surplus amounts to achieve an ROE no greater than the ***midpoint*** of its authorized range. TR 2635-36 FPL cannot credibly or legitimately claim that earning the ***midpoint*** ROE, especially with the RSAM available to ensure that it does, is unfair to FPL or its

shareholder. Allowing FPL to use the RSAM to earn the ***midpoint*** ROE would provide FPL extraordinarily strong protection of its financial integrity while ensuring that its risk of under-earning is virtually zero, and it would result in customer rates that are fair, just, and reasonable, consistent with the PSC's determination of whatever ROE it ultimately approves. TR 2636 Additionally, limiting the use of the RSAM to the ***midpoint*** ROE, will still accommodate FPL's agreement to a four-year stay-out provision. TR 2636 To this point, FPL's rates can be stable– and fair, just, and reasonable – both for FPL's benefit and for the benefit of its customers if rates are set using the ***midpoint*** ROE.

4. The Settlement Agreement Is Contrary to the Public Interest Because It Will Harm the Florida Economy As Well As Individual Floridians and Florida Businesses. FPL's captive customer base now includes more than half of all the electric customers in Florida. In light of this fact, it is obvious that the impact on more than half of Florida's electric customers will impact the Florida economy as a whole. Taking $4.848 Billion of purchasing power out of the pockets, wallets, and checkbooks of Floridians and Florida businesses will obviously suppress economic activity. It is particularly egregious to even consider taking this amount of purchasing power away from Floridians when the state is still struggling to emerge from the COVID-19 pandemic.

5. FPL's Arguments Are Self-Serving and Misleading. FPL's arguments are self-serving and misleading; as demonstrated thoroughly in the extensive testimony of the Public Counsel's and FAIR's witnesses, FPL simply does not need anything like $4.868 Billion of its customers' money over the next four years to provide safe and reliable

service. FPL's assertion that "rate stability" somehow justifies it is misplaced: the price that customers would pay is simply excessive. Herndon Supplemental Testimony at 23 Regarding its claim that not having the RSAM would disincentivize FPL from pursuing cost savings, its witness in the hearing testified that FPL would, of course, seek additional savings where available, and argued that the absence of the RSAM could change the way FPL manages the business, not that its absence would change FPL's incentive to save money (which would, of course, accrue to FPL between rate cases in any event). Finally, FPL's assertion that rates would be higher without the RSAM depends entirely on its assumption that it would otherwise be allowed to use its proposed different, non-RSAM depreciation rates; it is clear, and FPL acknowledged, that the Commission can order whatever depreciation rates it deems appropriate based on the evidence.

C. Prayer for Relief: The PSC Should Reject the Settlement Agreement as Submitted. In the Alternative, the PSC Should Demand Modification of the Settlement Agreement in the Public Interest.

As demonstrated above, the proposed Settlement deal is contrary to the public interest because it would unnecessarily take billions of dollars of customers' money out of their pockets, wallets, and checking accounts and give their money, as excessive earnings, to FPL and NEE through unfair, unjust, and unreasonable rates that would be imposed from 2022 through 2025. The Settlement deal would further transfer additional amounts – likely more than $1 billion – of customer-paid-for value to FPL and NEE through the RSAM, thereby depriving FPL's customers of the value that their payments create in future FPL rate case or cases. Accordingly, to protect the public interest, the

Commission must reject the Settlement Agreement as proposed. Alternatively, at a minimum and consistent with directly applicable (albeit not binding) Commission precedent, the Commission might demand that FPL and the other Settling Parties agree to modifications to the Settlement deal in order to win the Commission's approval.

Precedent. The Florida PSC has established precedent for encouraging parties to a proposed settlement to modify such a settlement in order to achieve a result more in line with the public interest. In re: Petition for Increase in Rates by Florida Power & Light Company, Docket No. 20120015-EI, Order No. PSC-2013-0153-S-EI (January 14, 2013) ("2013 Settlement Order"). In that earlier FPL rate case, FPL and some other parties had requested PSC approval of a non-unanimous settlement, but the Commission had concerns with the settlement as proposed. The Commission described the situation and its handling of it as follows:

> ***At the Special Agenda Conference, we expressed our concerns*** with the proposed Settlement Agreement. We engaged in an extensive discussion of the benefits and detriments associated with provisions of the proposed Settlement Agreement, and whether the agreement as filed was in the public interest. Upon completion of our discussion, all parties were given an opportunity to engage in further settlement negotiations. Upon reconvening the Special Agenda Conference, the signatories filed a revised Stipulation and Settlement and the non-signatories reiterated their continued objections to our consideration of the proposed and modified agreements. ***The modified agreement incorporates changes based on our extensive discussion***.

2013 Settlement Order at 5. (Emphasis supplied.) The Commission went on to approve the revised Stipulation and Settlement. Id. at 8. It is clear that the Commission's expression of its concerns regarding the terms of the proposed settlement in that case led

to the modifications ultimately approved.

What a Fairer Deal Might Look Like. The Commission must not mistake the following discussion for agreement that the terms suggested hereinbelow are necessarily appropriate or that they reflect settlement terms, rates, and revenues that are truly in the public interest. However, FAIR offers the following based on evidence in the record that would at least be less onerous on FPL's customers and less harmful to the Florida economy and the public interest:

- Limit FPL's ROE to the ROE of 9.85 percent that was agreed to by Duke Energy Florida and by the Public Counsel (and other parties, including FIPUG,[6] one of the Settling Parties in this docket), and that the Florida PSC approved in June 2021;
- Limit FPL's financial equity ratio to the equity ratio of 53.0 percent that was agreed to by Duke Energy Florida and by the Public Counsel (and other parties), and that the Florida PSC also approved in June 2021; and
- Limit the use of any RSAM to only an amount sufficient for FPL to earn at the "fair and reasonable" ***midpoint*** ROE approved by the PSC, e.g., the 9.85 percent ROE agreed to by Duke Energy Florida and by the Public Counsel (and other parties) and approved by the Florida PSC in June.

In summary, these terms agreed to by Duke Energy Florida and by the Public Counsel, and approved by the Commission, would impose much lower revenue demands

[6] Order No. PSC-2021-0202-AS-EI at 2.

and rates on FPL's customers while still allowing FPL to recover all of its reasonable and prudent costs and do its job of providing safe and reliable service. These terms would thus also take less customer money out of the Florida economy to enrich FPL and NEE and would also preserve the customer-paid-for depreciation reserve surplus value for the benefit of FPL's customers in a future rate case. Applying the above values that the Commission approved for Duke Energy Florida in June of this year would reduce the 2022 revenue and rate increase to $214.8 million per year and the 2023 rate increase to $550.9 million per year. TR 2611. Together, these reductions would save FPL's customers approximately $1.9 Billion from the $4.868 billion that the Settlement deal would otherwise take from them. (Four years of the difference between $692 million per year and $214.8 million per year plus three years of the difference between $560 million and $550.9 million per year equals approximately $1.93 Billion.) Additionally, limiting FPL's ability to use the RSAM to the ***midpoint*** ROE of 9.85 percent approved for Duke Energy Florida will almost certainly preserve customer-paid-for value of $1.45 billion that would, following standard regulatory accounting, then be applied to reduce FPL's rate base in its next rate case. With these lower rates, FAIR would suggest that the Commission at least consider realigning the allocation of cost responsibility to ensure an equitable allocation across all customer classes.

II. Legal Issues Relating to the Commission's Statutory Authority.

Pursuant to the Second Prehearing Order, Order No. PSC-2021-0362-PHO-EI, this

section of FAIR's Brief addresses the specifically identified legal issues, Numbers 1 through 6, including Issue 5(a).

The threshold issue in analyzing the legal issues presented in this case is whether the Commission has a clear grant of legislative authority to take the proposed actions. This was framed and stated succinctly by the Florida Supreme Court in United Telephone Co. of Florida v. Public Service Commission, 496 So. 2d 116, 118 (Fla. 1986), as follows:

> We note preliminarily that "orders of the Commission come before this Court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." *General Telephone Co. v. Carter,* 115 So. 2d 554, 556 (Fla. 1959) (footnote omitted). *See also Citizens v. Public Service Commission,* 448 So. 2d 1024, 1026 (Fla. 1984).
>
> Such deference, however, cannot be accorded when the commission exceeds its authority. At the threshold, we must establish the grant of legislative authority to act since the commission derives its power solely from the legislature. *See Florida Bridge Co. v. Bevis,* 363 So. 2d 799, 802 (Fla. 1978). As we said in *Radio Telephone Communications, Inc. v. Southeastern Telephone Co.,* 170 So. 2d 577, 582 (Fla. 1965):
>
> > [O]f course, the orders of the Florida Commission come to this court with a presumption of regularity, Sec. 364.20, Fla. Stat., F.S.A. But we cannot apply such presumption to support the exercise of jurisdiction where none has been granted by the Legislature. If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested.

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

FAIR'S POSITION: *No.*

Analysis and Discussion

The Commission has the authority under the file-and-suspend law to allow a tariff to be implemented subject to a full evidentiary hearing. Citizens of the State of Florida v. Wilson, 567 So. 2d 889, 891 (Fla. 1990). FPL proposes to continue the Storm Cost Recovery Mechanism ("SCRM") that would allow it to begin collecting a charge from customers up to $4 per 1,000 kilowatt-hours ("kWh") on a monthly residential bill for costs incurred due to a named tropical storm beginning 60 days after filing a petition for recovery with the Commission. This interim recovery period would last up to 12 months. If costs related to named storms exceed $800 million in any one year, FPL could ask the Commission to increase the $4 per 1,000 kWh. It can also ask to increase its storm reserve to $150 million.

Under the SCRM in the 2016 Settlement between the parties, the parties agreed not to object to a tariff filing up to $4 per 1,000 kWh for named storms on an interim basis subject to a full evidentiary hearing on the cost; in other words, the settling parties in that case simply waived their rights to a hearing. Unlike the facts there, FPL's SCRM proposal does not pass statutory muster. First, as written, it asks the Commission to preapprove rates to recover storm costs up to $4 per 1,000 kWh. Sections 366.06 and 366.07, Florida Statutes, provide for rate changes only "after public hearing" where the Commission has investigated and determined "the actual legitimate costs" related to proposed rates and found that rates are insufficient; following such hearing and determination, the Commission "by order" can then "fix the fair and reasonable rates." There is no statutory basis for pre-approval of a rate increase by the Commission.

Further, the "Interim Statute," Section 366.071, Florida Statutes, provides no authority for the SCRM as proposed. The Interim Statute provides only for interim rates based on a showing that the utility is earning outside its range of reasonableness. which was waived by the parties in settlement. While the parties to a settlement can waive their rights, the Commission cannot waive this statutory provision, even if the Interim Statute were applicable under a storm circumstance. For clarity, the Commission cannot approve the SCRM in advance because such action would plainly fail to satisfy the threshold requirements of the Interim Statute (as well as the requirements of Sections 366.06 and 366.07, Florida Statutes).

The parties to a settlement can bind themselves not to take certain actions, e.g., not to seek rate changes or demand a hearing on certain rate proposals that may come before the Commission during the term of a settlement, but the Commission cannot waive its statutory obligations. With respect to the SCRM, there is no statutory basis for pre-approval of rate increases, and the Interim Statute can only be invoked where the utility is earning outside its authorized range of a reasonable return on investment. Accordingly, there is no statutory basis to pre-approve the rate increases that would be authorized by the SCRM. Moreover, in United Telephone, the Florida Supreme Court also made clear that parties to a contract – and the Settlement Agreement in this case is indeed a contract between and among the Settling Parties – "can never confer jurisdiction." Id. at 118. Thus, without a clear grant of legislative authority to approve such a mechanism, and with the clear statement by the Court that the Settling Parties cannot confer jurisdiction to do

so, the Commission must reject this proposed term of the Settlement deal in this case.

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

FAIR'S POSITION: *No.*

Analysis and Discussion

The Commission does not have the ability to establish non-cost-based rates. Recording debits or credits to accumulated depreciation reserve unrelated to recording depreciation to achieve a certain ROE is not only contrary to the definition of USOA Account 108, previous U.S. Supreme Court decisions have found that the accumulated depreciation reserves "represent the consumption of capital, on a cost basis" and caution against using depreciation "to the extent, subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in service rendered, and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility experts a return." See Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 168-69 (1934).

Further, this concept is codified in Florida Statutes. Section 366.06(1), Florida Statutes, provides that after the Commission has investigated and determined "the actual legitimate costs of the property of each utility company, actually used and useful in the public service," only the net investment of the honestly and prudently invested actual legitimate costs used and useful, less accrued depreciation, shall be used for

ratemaking purposes. Not only is there no statutory basis for the Commission to include the accrued (or accumulated) depreciation for ratemaking purposes, allowing the RSAM would contradict this statute by allowing FPL to use the accumulated depreciation, which by statute is to be excluded from ratemaking. The RSAM would increase the amount of money FPL is allowed to keep from the established rates during the 4-year term, which would thus be used for ratemaking purposes in violation of the statute.

Moreover, the RSAM would effectively result in any of the Depreciation Reserve Surplus amount used being collected from future customers through higher rate base in any future rate case (resulting from the unlawful use of the accrued depreciation). Therefore, allowing FPL to keep the excess contributions of accumulated depreciation already made by FPL's customers to increase profits is contrary to Supreme Court case law and Florida Statutes.

The RSAM also violates the intent of Florida Statutes. Approval of FPL's proposed RSAM would undermine and violate at least the intent of Section 366.05, Florida Statutes, which states that "the Commission shall have the power to prescribe fair, just and reasonable rates and charges." This is also the foundational principle of regulatory ratemaking policy and the Regulatory Compact. Fair, just and reasonable rates are predicated on rates being set at the midpoint ROE, which is, as recognized by the Commission, the "fair and reasonable" return allowed to regulated utilities. See Order No. 2010-0153-FOF-EI at 132. As proposed by FPL, its RSAM can be used – and FPL has used the same mechanism over the past four years – to undermine the statute's intent

by using the RSAM to earn at or nearly 100 basis points above the fair and reasonable midpoint ROE by simply dipping into the Reserve Surplus.

ROEs at the top of the range are unnecessary to fairly compensate the utility for its legitimate costs of capital, to maintain the utility's financial integrity, or to sustain excellent shareholder value. When the Commission determines a ***midpoint*** ROE for FPL or any utility, that ***midpoint*** value is, by definition, the fair, just and reasonable ROE. It is unfair to use the ratepayer-supported Reserve Surplus to increase earnings beyond what is necessary to maintain a strong financial position for FPL. To this point, see also, Gulf Power Co. v. Wilson, 597 So. 2d 270, 273 (Fla. 1992), where the Court stated the following: "For example, if a public utility is consistently earning a rate of return at or near the ceiling of its authorized rate of return range, the commission may find that its rates are unjust and unreasonable even though the presumption lies with the utility that the rates are reasonable and just."

Note, however, that neither FAIR nor FAIR's witness Timothy Devlin are arguing or suggesting that FPL can never earn above its midpoint ROE. If FPL can earn above its midpoint ROE through FPL-funded efficiency measures, that is entirely acceptable and consistent with the Regulatory Compact. Devlin Supplemental Testimony at 13. It is the use of the customer-paid-for Reserve Surplus through the RSAM to exceed the fair and reasonable ***midpoint*** ROE to which FAIR objects.

Not only is there no clear grant of authority for the RSAM, but it would violate Florida law, and accordingly, the Commission cannot approve the RSAM.

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

FAIR'S POSITION: *No.*

Analysis and Discussion

The Commission lacks the statutory authority to approve the SOBRAs for implementation in 2024 and 2025 for at least two reasons. First, there is no basis to determine that FPL's rates in 2024 or 2025 would be insufficient so as to justify any additional rate increases, assuming that the SOBRA investments were made. Second, while the Commission "may adopt rules for the determination of rates in full revenue requirement proceedings which rules provide for adjustments of rates based on revenues and costs during the period new rates are to be in effect and for incremental adjustments in rates for subsequent periods," the Commission has adopted no such rules. See Section 366.076, Florida Statutes. Moreover, Section 366.071, Florida Statutes, the Interim Statute, provides that interim rates can only be implemented pursuant to a demonstration that the public utility is earning outside its range of reasonableness of its rate of return. Thus, the Commission could grant an interim rate increase only after a showing that the Company is earning outside the range of reasonableness. FPL's Solar Basis Rate Adjustment proposal would not require the necessary demonstration that they are earning outside the range of reasonableness, thus cannot be approved.

There is no clear grant of authority for the Commission to approve future SOBRAs without full compliance with the statutes cited above, and thus the Commission lacks the authority to approve the SOBRAs either through its general rate case decisions or, following the Florida Supreme Court's clear holding that parties cannot confer jurisdiction by contract, through any settlement agreement among parties. See United Telephone, 496 So. 2d at 118.

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

FAIR'S POSITION: *No.*

Analysis and Discussion

The Commission lacks the statutory authority to adjust FPL's authorized return on equity based on its past performance.[7] Moreover, any such action would facially violate the Regulatory Compact and the widely accepted and applied ratemaking principles of Hope and Bluefield. Sections 366.06 and 366.07, F.S., provide for rate changes only "after public hearing" where the Commission has investigated and determined "the actual legitimate costs" of providing service relative to proposed rates and has found that rates are insufficient; upon such finding, the Commission can then "by order" "fix the fair and reasonable rates." There is no statutory basis for the Commission to adjust the

[7] FAIR's discussion here leaves aside the fact, discussed above, that the proposed "performance incentive" will be baked into FPL's rates until they are changed in the future, and thus the proposed "incentive" does not incentivize FPL to do anything at all for that period.

authorized return on equity for performance except under Section 366.82(9), F.S. Section 366.82(9), F.S., provides that the Commission is authorized to allow an investor-owned electric utility an additional return on equity of up to 50 basis points for exceeding 20 percent of its annual load-growth through energy efficiency and conservation measures. FPL's request for additional 50 basis points is not based on exceeding 20% of their annual load-growth through energy efficiency and conservation measures. FPL has not sought its adder on the basis of Section 366.82(9), Florida Statutes.

Moreover, any rate of return or ROE must be fair and reasonable both to the public utility – FPL here – and the utility's customers. The core principles and standards used to measure an appropriate rate of return are set forth in the landmark decisions in Bluefield[8] and Hope.[9] In these decisions, the Supreme Court established standards for regulatory determinations of allowable rates of return on common equity capital. These standards recognize that ratemaking involves a balancing of investor and consumer interests and that the equity investor's interest is served if the return to the equity owner is comparable to the returns on investments in other enterprises having similar risks. To be fair and reasonable to both FPL and its customers, which is to say, to be consistent with the Regulatory Compact, the ROE must be the rate that an objective market would produce based on FPL's risks as compared to the risks of similar companies. FPL's proposed "performance incentive" is clearly over and above the "fair and reasonable" return that

[8] Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679 (1923) ("Bluefield").

[9] Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944) ("Hope").

the Commission must determine, whether in voting on specific issues in a full rate case context or in a settlement agreement, and therefore violates these fundamental principles of utility rate of return regulation.

Thus, not only is there no clear legislative grant of authority for the proposed "performance incentive," contrary to the clear grant for such an ROE adder pursuant to Section 366.82(9), Florida Statutes, but the proposed "incentive" would plainly violate the Regulatory Compact and the applicable precedents of the U.S. Supreme Court. The Commission lacks the authority to approve the proposed "performance incentive" and must accordingly reject and deny this proposal.

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

FAIR'S POSITION: *No.*

Analysis and Discussion

Not only does the Commission lack any clear grant of authority under Chapter 366 to allow this proposal, but it would also directly contradict Florida Statutes by including non-electric costs and revenues in determining rates paid by public utility customers. In the first instance, common sense would tell any interested party, utility, or regulator that allowing non-electric costs and revenues to be included in determining rates for the customers of public utilities providing electric service is at best inappropriate, if not outright unlawful. As to the latter point, under Section 366.05(2), Florida Statutes,

"Every public utility . . ., which in addition to the production, transmission, delivery or furnishing of heat, light, or power also sells appliances or other merchandise shall keep separate and individual accounts for the sale and profit deriving from such sales. No profit or loss shall be taken into consideration by the commission from the sale of such items in arriving at any rate to be charged for service by any public utility." This can only be read reasonably to prohibit the inclusion of the sale of non-electric goods or services from being taken into consideration "in arriving at any rate to be charged" by a Florida public utility. Facially, FPL's proposal violates the statute; at a minimum, there is no clear statutory grant of authority for the Commission to approve it in any context, and the Commission should accordingly reject and deny it.

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

FAIR'S POSITION: *No.*

Analysis and Discussion

FPL's request for a tax adjustment for a speculative future tax change is premature and thus prohibited based on the Commission's decision in Order No. PSC-2017-0099-PHO-EI as the Commission ruled in identical circumstances in 2017 when speculation was rampant about possible statutory tax rate changes in the absence of passed legislation. As the Commission stated then, and as it stands now, the issue is premature and not ripe for consideration at this time. Should federal tax changes occur in

the future, the issue may be addressed at the appropriate time in a separate proceeding if applicable statutory criteria for such proceedings – e.g., a demonstration that FPL's rates were insufficient or excessive because of the tax change – were met.

There is clearly no grant of authority in Chapter 366 for this proposal, and there is no evidence in the record of this docket to support approval of some hypothetical, unknown future tax change. Moreover, while the parties might agree not to oppose such a filing in the future, the Commission cannot approve it in advance and the parties cannot confer jurisdiction for such action by the Settlement Agreement. Further, the Commission has no rules that might, conceivably, allow it to consider such a proposal pursuant to Section 366.076, Florida Statutes. Finally, there can be no relief under the Interim Statute without a demonstration that rates are, at the time relief is sought, either insufficient or excessive. The Commission must reject or deny this proposal.

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

FAIR'S POSITION: *No.*

Analysis and Discussion

Under Section 366.06(2), when the Commission finds, upon its own motion or request made by another, that a public utility's rates are insufficient to yield reasonable compensation for the services rendered or that such rates yield excessive compensation for services rendered, the Commission shall order and hold a public hearing to determine

the just and reasonable rates to be charged. Thus, while parties to a settlement may waive certain rights to seek a rate change for a period of time under certain circumstances, which waiver of rights the Commission can approve in an order, the Commission cannot waive its own statutory obligations to hold a public hearing on proposed rate changes, if requested.

FPL's four-year plan clearly includes requests for approval of various measures that would result in rate changes in the future – e.g., the SOBRAs in 2024 and 2025 and the speculative tax change proposal discussed above. Given that these proposals are part of the plan, and further considering that the Settlement Agreement is an "all or nothing" deal, EXH 483, the Commission lacks the statutory authority to approve the four-year plan for the same reasons that it lacks the authority to approve its individual components as discussed above.

III. FAIR Has Demonstrated Associational Standing Because FAIR Satisfies All Applicable Requirements for Associational Standing Under Florida Law.

FAIR satisfies all requirements of Florida standing law, including those set forth in Agrico[10] and Florida Home Builders.[11] In granting intervention to FAIR,[12] the

[10] Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982).

[11] Florida Home Builders Ass'n v. Dep't of Labor and Employment Security, 412 So. 2d 351, 353-54 (Fla. 1982).

[12] Order No. PSC-2021-0180-PCO-EI, Order Provisionally Granting Floridians Against Increased Rates, Inc.'s Motion to Intervene (Fla. Pub. Serv/ Comm'n, May 19, 2021) (hereinafter, "FAIR Intervention Order").

Commission recognized that "FAIR meets the three-prong associational standing test established in Florida Home Builders," and explained exactly how FAIR meets these criteria. FAIR Intervention Order at 2-3. Consistent with the Commission's requirement that FAIR had the burden of proof to establish its standing, FAIR presented the testimony and exhibits of Nancy H. Watkins and John Thomas "Tom" Herndon, now in the record evidence of this proceeding. FPL has not adduced any evidence of its own, even though of course it could have done so. Since FPL did not introduce any evidence of its own regarding FAIR's standing (e.g., no challenge to the status of FAIR's members as FPL customers, no challenge to the authority of FAIR to represent its members pursuant to its articles of incorporation, and no claim that customers' interests are not sufficiently immediate and within the scope of this case pursuant to the Agrico criteria), FAIR must assume that FPL will pursue the same or similar arguments that FPL advanced in its motion for summary final order (hereinafter, "FPL's Motion") filed in this case on August 4, 2021. In summary, FPL's arguments are misplaced and have no basis in Florida law applicable to standing in administrative proceedings, and FPL's arguments are misleading, sometimes false, attempts to distract the Commission from the real issues in this case. Ultimately, the issue of FAIR's standing is simple: FAIR satisfies all applicable standing requirements under Agrico and Florida Home Builders, and the Commission should affirm FAIR's standing in the final order in this case.

A. FAIR Satisfies All Standing Requirements of Applicable Florida Law.

FAIR satisfies all applicable standing requirements of Chapter 120, Florida Statutes, and applicable case law including Agrico and Florida Home Builders.

Background. FAIR is a Florida not-for-profit corporation. EXHS 283, 287 articles FAIR was incorporated on March 16, 2021. FAIR's purposes as an organization are to advance the welfare of the State of Florida, all Florida citizens and businesses generally, and all customers of electric utilities whose rates are set by the PSC, by advocating for governmental policies and actions that will lead to retail electric rates that are as low as possible while ensuring safe and reliable electric service, and by advocating against and opposing any governmental policies and actions that are likely to result in electric rates being greater than necessary. EXH 283, Watkins Exhibit NHW-2 at 1-2.) FAIR's purposes and activities are thus contemplated to include general rate cases and the fully panoply of other governmental policies and actions that impact electric rates. FAIR's Board of Directors consists of Michael R. Hightower, who served for 16 years on the Board of JEA, including 4 years as the chairman of the JEA Board, as well as service on the Florida Public Service Commission Nominating Council and on the Florida Energy Study Commission; John Thomas "Tom" Herndon, whose public service in Florida includes four years as a Commissioner on the Florida PSC, six years as the Executive Director of the Florida State Board of Administration, which manages Florida's pension funds and certain other funds, and service as the Director of the Office of Planning and Budget and as Chief of Staff to two Florida Governors (TR 1808); and

Frederick M. Bryant, who served as the general counsel of the Florida Municipal Power Agency for 40 years.

Shortly after it was incorporated, FAIR developed a membership application and began recruiting members, at first using a paper or "pdf" form of the application (EXH 289), and later using a nearly identical application form that can be accessed electronically. EXH 618; Watkins Exhibit No. NHW-5. In joining FAIR, a member makes the representations, request, and authorization set forth in FAIR's membership application as follows:

> **I hereby request to become a member of Floridians Against Increased Rates, Inc. (FAIR).** I confirm that I am a customer of the Florida electric utility identified below. I support FAIR's purposes of (a) advocating by all lawful means for the lowest possible electric rates that are consistent with my utility providing safe and reliable electric service, and (b) opposing by all lawful means utility proposals for rates and rate increases that are greater than necessary for my utility to provide safe and reliable service. I request and authorize FAIR to represent my interests in having the lowest possible rates for my electric service that are consistent with my utility providing safe and reliable service. I understand that no payment of dues is required for my membership in FAIR. I consent to FAIR's collection and use of my personal information provided below for the purposes associated with my membership as described in my application.

Id.

FAIR Satisfies All Standing Requirements of Applicable Florida Law. The requirements for standing as an intervenor under Chapter 120 are clear and well-settled: the intervenor must demonstrate that it will suffer a sufficiently immediate injury in fact that is of the type the proceeding is designed to protect. Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997); Agrico Chemical Co. v. Dep't of Environmental Regulation, 406

So. 2d 478 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982). To establish standing as an association representing its members' substantial interests, an association such as FAIR must demonstrate three things: that a substantial number of its members would be substantially affected by the agency's decisions; that intervention by the association is within the association's general scope of interest and activity; and that the relief requested is of a type appropriate for an association to obtain on behalf of its members. Florida Home Builders Ass'n v. Dep't of Labor and Employment Security, 412 So. 2d 351, 353-54 (Fla. 1982).

The Commission recognized that FAIR satisfies all of the foregoing standing criteria in the FAIR Intervention Order, subject to FPL's being allowed to conduct discovery and to present testimony and evidence challenging FAIR's standing. FPL has presented no testimony or evidence of its own. The testimony and exhibits of FAIR's witnesses demonstrate that FAIR satisfies all applicable standing criteria. FAIR's standing should be confirmed.

FAIR has more than 500 members who are FPL customers, Watkins, TR 1840, EXH 288, and whose substantial interests in fair electric rates are subject to determination in this case. The impacts of rate increases are immediate injuries to those affected, and these injuries are exactly the type of injury against which this general rate case proceeding is designed to protect. These facts satisfy the basic requirements of the Agrico standing tests. FAIR's members who are FPL customers represent approximately

80 percent of FAIR's total membership, thus satisfying the "substantial number" criterion of Florida Home Builders.

FAIR's purposes as an organization are to advance the welfare of the State of Florida, all Florida citizens and businesses generally, and all customers of electric utilities whose rates are set by the PSC, by advocating for governmental policies and actions that will lead to retail electric rates that are as low as possible while ensuring safe and reliable electric service, and by advocating against and opposing any governmental policies and actions that are likely to result in electric rates being greater than necessary. EXH 283, 289. This demonstrates that FAIR's participation in this case is squarely within its scope of authority. To the same point, the Commission will also note that each of FAIR's members specifically requested and authorized FAIR to represent their interests in having the lowest possible electric rates that are consistent with their utility providing safe and reliable service. EXH 289 Finally, the Commission has long recognized that seeking lower electric rates is the type of relief that is appropriate for an association (e.g., FIPUG or the FRF) to obtain on behalf of its members who are customers of the utility whose rates are at issue.

In summary, FAIR satisfies all applicable requirements of Florida law to establish its associational standing to represent its members as a full party in this case.

FAIR treated all those who applied for membership as full members as of the date on which their applications were received. On this basis, as of May 3, 2021, FAIR had

16 members who had joined by submitting their applications in pdf format. NHW ERRATA On behalf of those 16 members as of May 3, FAIR moved to intervene on May 4, 2021. FAIR continued to receive some pdf applications and later activated its website. As of June 15, FAIR had 513 members, of whom approximately 80 percent were FPL customers. TR 1843 As of July 25, FAIR had more than 770 members, of whom approximately 615 (approximately 80 percent) were FPL customers, with customers of the other four Florida investor-owned utilities making up the other 150-plus members of FAIR. EXH 618 (Exhibit 1 to Nancy Watkins deposition) Notwithstanding the fact that FAIR considered all of those on the roster to have been members as of the date on which they submitted their signed membership applications, on July 27, by written action in lieu of meeting, EXH 618 (Errata to deposition of Nancy Watkins), the FAIR Board took the formal, ministerial action of admitting and electing those persons who had applied as of July 25 to membership.

Consistent with the FAIR Intervention Order, FAIR participated actively in this proceeding and filed, on June 21, 2021, the testimonies and exhibits of three experts, including former Commissioner Herndon; Timothy J. Devlin, who served the PSC as Director of Auditing and Financial Analysis, Director of Economic Regulation, and as the Executive Director of the PSC Staff; and Breandan Mac Mathuna, an experienced witness and analyst on cost of capital issues. FAIR also submitted the testimony of Nancy H. Watkins, which addressed the status of FAIR's members as of June 15, 2021.

B. FPL's Legal Arguments are Specious and Misplaced.

Notwithstanding FPL's attempts to rewrite Florida standing law, FAIR satisfies all applicable requirements of Chapter 120, Agrico, and Florida Home Builders. Notwithstanding FPL's baseless conclusory allegations regarding FAIR's purposes and activities, FAIR's actions are controlled by FAIR's Board of Directors, EXH 619, in the service of FAIR's members – that is, in this case, striving to protect the substantial interests of its members who are FPL's customers. Notwithstanding FPL's spurious efforts to mislead the Commission by touting irrelevant facts, e.g., that FAIR has no office, no direct employees, and no telephone number, FAIR has everything it needs to diligently and effectively represents the interests of its members who are FPL customers: a highly qualified, experienced, and dedicated board of directors with decades of service to the citizens of Florida on electric utility matters and a team of highly qualified experts addressing key issues in this case.

FPL's "Not a Trade Organization" Argument. FPL attempted to characterize Florida Home Builders as applying only to trade or professional organizations, but that argument is misplaced. Standing in administrative proceedings has clearly been extended by Florida courts to other types of organizations than the strict "trade or professional" organization scope that FPL attempts to freight in. NAACP v. Florida Board of Regents, 863 So. 2d 294 (Fla. 2003); Booker Creek Preservation, Inc., v. Dep't of Env'l Regulation, 415 So. 2d 781 (Fla. 1st DCA, 1982). In fact, in this docket, the Commission has granted standing to an "ad hoc association," the Florida Industrial Power Users Group, which, like FAIR, seeks "reliable service at the lowest rates possible." Order No.

PSC-2021-0133-PCO-EI, Order Granting Florida Industrial Power Users Group's Petition to Intervene at 1, 2 (Fla. Pub. Serv. Comm'n, April 16, 2021). Florida administrative law clearly recognizes that associational standing is appropriate for organizations other than strictly trade or professional organizations. Similarly, FPL's argument that "FAIR does not represent a specialized segment of the community like a trade or professional association" is meritless and misplaced. In this proceeding, FAIR represents the substantial interests of its members who are FPL customers; thus, the segment that FAIR represents directly are those customers who subscribe to FAIR's policy goals – safe and reliable electric service at the lowest possible cost – and who have specifically asked and authorized FAIR to represent them and their interests.

FPL's "No Official Members" Argument. FPL's "no official members" argument is based on inapposite principles not applicable here. The centerpiece of FPL's legal argument is a decision in a civil lawsuit, wherein the case was dismissed because the plaintiff (a trustee of a mortgage holder) initiated a civil lawsuit to foreclose on a mortgage without having established standing as the owner or holder of the mortgage. LaFrance v. US Bank National Association, Inc., 141 So. 3d 754, 755 (Fla. 4th DCA 2014). In clear distinction to the facts in LaFrance, FAIR did not initiate this proceeding – this docket was initiated by FPL's petition seeking more than $6 billion of its customers' money over the next four years. FAIR properly moved to intervene and was properly granted intervention by the FAIR Intervention Order, subject to FPL's right to

challenge standing in the hearing process and also subject to FAIR's being assigned and afforded the burden of proving its standing at hearing.

FAIR could only prove its standing, and the Commission can only make a determination on FAIR's standing, based on the record evidence developed at the hearing, which FAIR has accomplished. Aside from the fact that FAIR regarded all those who submitted applications as being members as of the dates when their applications were received, EXH 618 Errata to deposition of Nancy Watkins, FAIR has, since July 27, 2021, had members that even FPL's technically tortured argument would have to concede. FAIR had standing to represent its members' interests nearly two months before the hearing in this docket under any theory. FPL's argument is meritless and must be rejected.

FPL's Arguments for Additional Membership Criteria Have No Basis in Florida Law and Should be Rejected. FPL has directed a great deal of effort at trying to establish criteria for membership based on federal cases that have never been applied or followed in Florida, and which are therefore irrelevant to the actual standing criteria followed in Florida law. See Gettman v. Drug Enforcement Admin., 290 F.3d 430 (D..C. Cir. 2002); Fund Democracy LLC v. SEC, 278 F.3d 21, 26 (D.C. Cir. 2002); American Legal Found. v. FCC, 808 F.2d 84 (D.C. Cir. 1987); Washington Legal Found. v. Leavitt, 477 F.Supp.2d 202 (D.D.C. 2007). In the FAIR Intervention Order, the Commission clearly stated that "it appears that FAIR meets the three-prong associational standing test established in Florida Home Builders," and went on to explain exactly how FAIR meets

these criteria. FAIR Intervention Order at 2-3. These are the applicable standing criteria under Florida law, and FAIR meets them all. FPL is trying to create new criteria, and accordingly, the Commission should follow established Florida law, as consistently followed in its own orders, and affirm the standing of FAIR and its members in this docket.

Among other things, FPL has argued – as though this were somehow relevant – that FAIR is not an actual operating entity or business of any type, specifically because FAIR has no office, no employees, no telephone number, and no email address. Aside from conveniently overlooking the fact that FAIR is a Florida corporation, and thus obviously a registered business entity in the records of the Florida Department of State, FPL has argued that FAIR is not an association because its members do not vote for the directors, and that FAIR cannot represent its members' interests because FAIR does not know how much they pay in electric bills. FPL's arguments are specious – they may sound significant to FPL, but they abjectly fail to recognize the over-arching, longstanding experience and competence of FAIR's Board in promoting exactly the interests that its members have asked FAIR to protect. What FPL ignores are the facts that:

1. Each of FAIR's members specifically requested and authorized FAIR to represent their interests in obtaining and ensuring, by all lawful means, the lowest possible electric rates consistent with safe and reliable service. FAIR's membership application, EXH 290

2. FAIR's Board of Directors consists of three recognized, respected, and qualified persons (EXH 287) who have, individually and collectively, broad, deep, and temporally long experience with Florida electric utility matters. Collectively, FAIR's Directors have literally decades of experience serving the citizens of the State of Florida with regard to electric utility matters.

3. FAIR has engaged highly competent expert witnesses to represent its members' interests in the lowest possible rates consistent with safe and reliable service, including a former PSC Commissioner, Tom Herndon; and Timothy J. Devlin, a 35-year employee of the Commission who served in responsible positions in accounting, finance, and economic regulation, and whose service culminated in service as the Executive Director of the entire PSC Staff; and Breandan Mac Mathuna, an experienced witness on cost of capital issues.

In summary, FAIR has everything it needs to represent its members' interests: the members' express request and authorization to do so, a highly qualified and dedicated Board of Directors to direct FAIR's activities, and highly qualified experts to present testimony and exhibits in support of the lowest possible rates consistent with safe and reliable service. It simply does not matter whether a former PSC Commissioner, or a former chairman of the JEA Board, or a former general counsel of the Florida Municipal Power Agency are FPL customers: these persons know Florida electric utilities, and they know what it means to seek, in support of FAIR's members' interests, the lowest possible rates that are consistent with safe and reliable service. Nor does it matter whether FAIR

has an office, or a telephone, or direct employees – FAIR has what it needs to represent its members' interests, and FAIR does exactly that. FPL's arguments are at best specious, and as discussed below, some are outright baseless. The Commission should affirm FAIR's standing to represent its members in this case.

C. The Commission Should Disregard FPL's Misplaced Attempts to Distract the Commission from the Real Issues In This Case.

FPL's extensive attempts to cast aspersions on FAIR's intentions are no more than name-calling distractions, veritable red herrings, irrelevant to FAIR's standing under applicable Florida law, and unsupported by any evidence whatsoever. Besides touting minor aspects of FAIR's membership and operational structure (e.g., no office and no telephone), FPL spewed out conclusory allegations that are wholly unsupported by any factual evidence. For example, FPL has asserted that FAIR "is not the functional equivalent of a traditional association, because it is structured in such a way that it represents the control group of the corporation and their undisclosed third-party funders, not the members." However, FPL offered not a scintilla of evidence in support of this allegation, which has no basis in anything other than FPL's wishful thinking.

FPL referred to FAIR as being "funded by secretive third parties, not by its members." FPL's counsel, in opening statements, engaged in outright name-calling – calling FAIR a "dark money group." FPL further attempted to assert that FAIR represents the interests of its donors where it argues that FAIR "is a shell organization that is run and financed by a group of individuals who are not affected by FPL's rate

petition." While it is true that none of FAIR's Board of Directors are FPL customers, this also is irrelevant to FAIR's standing and to whether FAIR is acting to protect its members' interests. FPL's allegation that FAIR represents the interests of its donors is patently false. It does not matter who funds the activities, what matters is who decides how funds are spent and how those funds are in fact spent. Here, it is undisputed that those decisions are made by FAIR's Board of Directors, period. EXH 619. FAIR's Directors have decades of service to the citizens of the State of Florida – not to the shareholders of any public utility or its parent. Further, the testimonies and exhibits of FAIR's witnesses in support of the lowest possible FPL rates consistent with safe and reliable services speak for themselves.

Similarly, FPL's conclusory allegation that FAIR "is structured in such a way that it represents the control group of the corporation and their undisclosed third-funders, not the members," is unsupported by any evidence other than FPL's wishful thinking. FAIR's Board of Directors represents its members; FAIR's expert witnesses, engaged by FAIR, presented their testimony and exhibits in support of the interests of FAIR's members who are FPL customers in having their rates be the lowest possible while supporting safe and reliable service, which is completely consistent with FAIR's corporate purposes and completely consistent with FAIR's members' expectations as set forth on the membership applications that they signed.

Among the numerous irrelevant fact-lets touted by FPL in attempting to criticize FAIR and mislead the Commission are these: FAIR was incorporated after FPL filed its

petition seeking approval to take more than $6 billion of its customers' money over the 2022-2025 period; FAIR's Board members are not FPL customers; FAIR has no office, no telephone number, no direct employees, and no email address; and that funding for FAIR's activities comes from undisclosed third parties. These are all specious attempts to distract the Commission from the real issues relative to FAIR's standing: FAIR does not need an office, direct employees, or telephone to represent its members' interests. It does not matter whether FAIR's Board members are FPL customers, as long as they are knowledgeable of utility rates and act in the best interests of FAIR's members. And it does not matter where FAIR's funding comes from, as long as it is used lawfully and consistently with FAIR's articles of incorporation and with FAIR's commitments to its members in accordance with their expectations. Finally, in response to FPL's conclusory allegation that FAIR's members have no substantive rights in the organization, FAIR observes that its members have the right to be represented in accordance with the expectations set forth in their membership applications: that FAIR will work by all lawful means to seek the lowest possible rates consistent with their utility providing safe and reliable service.

The critical fact is this: FAIR is obviously doing a good enough job at representing the interests of its FPL customer-members that FPL has devoted tremendous amounts of time and effort in its failed efforts to keep FAIR's witnesses from testifying in this case. This is a powerful indication that FAIR is doing a good job of representing its members' interests, which is what FAIR exists to do.

D. Conclusion and Relief Requested.

FAIR satisfies all applicable requirements of Florida standing law and is fully prepared to prove its burden in the hearing. The Commission properly recognized this in the FAIR Intervention Order, and the Commission should affirm FAIR's standing to represent FAIR's members as a full party in this docket.

FPL's main legal argument is specious and misplaced. As readily distinguished from the facts in LaFrance, FAIR did not initiate this proceeding, FPL initiated it with its petition for rate increases. As an intervenor, FAIR takes the case as it finds it, but FAIR most certainly did not initiate this case. Moreover, FAIR has been granted the opportunity – and assigned the burden of proof – to prove its standing at the hearing in this case, which, as demonstrated herein, FAIR will do. The Commission can only make a decision based on record evidence, and that evidence does not exist until the hearing is held.

FPL's "no official members" argument is at best irrelevant. FAIR considered all of its members to be members as of the time that their membership applications were received, EXH 618, Errata to deposition of Nancy Watkins, and even relative to FPL's technically tortured argument, FAIR had at least 770 members as of July 27, 2021, EXH 618, Errata to deposition of Nancy Watkins.

FPL's attempts to distract the Commission with irrelevant facts and assertions are no more than specious red herrings, with no evidentiary support whatsoever that is relevant to FAIR's standing. FPL could, for example, have attempted to present evidence

that FAIR does not satisfy one or more of the recognized standing criteria under Agrico or Florida Home Builders, but FPL furnished no such evidence. Rather, FPL has hung, and presumably will continue to hang, its hat on distractions and tortured theories that have never been followed in Florida law.

The Commission should affirm FAIR's standing to represent its members who are FPL customers as a full party in this case.

ISSUE 9: Has Floridians Against Increased Rates, Inc. demonstrated individual and/or associational standing to intervene in this proceeding?

FAIR: *Yes. FAIR and FAIR's members satisfy all applicable standing criteria under Chapter 120, Florida Statutes, and under applicable case law, including Agrico and Florida Home Builders. FPL has produced no evidence of its own to contradict the fact that FAIR and its members satisfy all applicable standing requirements, and its anticipated arguments are misplaced. The Commission should affirm its initial grant of standing to FAIR to represent its more than 500 members who are FPL customers in this docket.*

FINAL CONCLUSIONS AND RELIEF REQUESTED

Settlement Agreement. The evidence in this case demonstrates that FPL does not need any rate increase at all in 2022 in order to provide safe and reliable service, recover all of its reasonable and prudent costs including O&M costs, depreciation expense, and interest expense, and earn a reasonable rate of return on a reasonable amount of common equity capital in its capital structure. Accordingly, the 2022 rate increases - $692 million per year – proposed in the Settlement Agreement, which would carry forward through

2023, 2024, and 2025, are excessive and would result in FPL's rates being unfair, unjust, and unreasonable. Such rates are contrary to the public interest because they would unnecessarily take nearly $3 Billion out of the pockets and checking accounts of Floridians and Florida businesses, transferring this vast amount of purchasing power to FPL and NEE, thereby injuring the Florida economy. Such excessive rates are also contrary to the specific criterion regarding rates recognized by the Florida Supreme Court in Sierra Club v. Brown, i.e., that rates resulting from any settlement agreement must be fair, just, and reasonable. Moreover, FPL's proposed RSAM would unfairly, unjustly, and unreasonably deprive customers of value – likely approaching an additional $1.4 Billion – that they paid to create; this unfair additional transfer of value and (future) purchasing power to FPL and NEE is also contrary to the public interest, as well as contrary to Florida law.

Accordingly, the Commission must reject the Settlement Agreement dated August 9, 2021 as proposed to the Commission. If the Commission wishes to seek a compromise resolution of this case that truly promotes the public interest, based on the settlement vehicle, then the Commission might consider following its precedent (again, non-binding) from the resolution of the 2012 FPL rate case by suggesting, or even demanding, that FPL and the other Settling Parties must, in order to win Commission approval of any settlement, make the terms thereof fairer to FPL's customers. FAIR submits that, based on the evidence, the following outcomes could possibly be considered reasonable:

- Limit FPL's ROE to the ROE of 9.85 percent that was agreed to by Duke Energy Florida and by the Public Counsel, and that the Florida PSC approved in June 2021;
- Limit FPL's financial equity ratio for ratemaking purposes to the equity ratio of 53.0 percent that was agreed to by Duke Energy Florida and by the Public Counsel, and that the PSC also approved in June 2021; and
- Limit the use of any RSAM to only an amount sufficient for FPL to earn at the "fair and reasonable" ***midpoint*** ROE approved by the PSC, e.g., the 9.85 percent ROE agreed to by Duke and the Public Counsel and approved by the PSC in June.

Legal Issues. FPL's requests for PSC approval of several provisions – the Storm Cost Recovery Mechanism, the RSAM, the 2024 and 2025 SOBRAs, the "performance incentive," the inclusion of non-electric costs and revenues in the asset optimization program, the future tax change adjustment, and the four-year plan – all lack the clear grant of statutory authority required under Florida law. United Telephone, 496 So.2d 118. Some plainly violate applicable statutes. Finally, while parties can agree by a contract to waive their rights to contest certain matters in future proceedings, the Commission cannot waive its statutory requirements, and the parties to the Settlement Agreement cannot confer jurisdiction by their agreement. Id. Accordingly, all of FPL's proposals must be rejected and denied.

FAIR's Standing. FAIR has satisfied all requirements of Florida law applicable to standing to participate as a full party in cases before the PSC. FPL's arguments to the contrary are misplaced and have no basis in Florida law. The Commission should affirm its decision to grant FAIR's standing in the FAIR Intervention Order.

Respectfully submitted this 11th day of October, 2021.

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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 11th day of October, 2021, to the following:

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