

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Consideration of the tax impacts  
associated with Tax Cuts and Jobs Act of 2017  
for Florida Power & Light Company.

DOCKET NO. 20180046-EI  
ORDER NO. PSC-2019-0050-PHO-EI  
ISSUED: January 29, 2019

PREHEARING ORDER

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code (F.A.C.), a Prehearing Conference was held on January 23, 2019, in Tallahassee, Florida, before Commissioner Julie I. Brown, as Prehearing Officer.

APPEARANCES:

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On behalf of Florida Power & Light Company (FPL)

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On behalf of the Florida Industrial Power Users Group (FIPUG)

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On behalf of the Florida Retail Federation (FRF)

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Florida Public Service Commission General Counsel

## **PREHEARING ORDER**

### **I. CASE BACKGROUND**

This docket was opened by the Florida Public Service Commission (Commission) on February 21, 2018, to consider the tax impacts affecting Florida Power & Light Company (FPL) as a result of the passage of the Tax Cuts and Jobs Act of 2017 (TCJA). The Commission is scheduled to hold an administrative hearing in this docket on February 5-8, 2019, in which the issues listed in this Prehearing Order will be addressed.

### **II. CONDUCT OF PROCEEDINGS**

Pursuant to Rule 28-106.211, F.A.C., this Prehearing Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

### **III. JURISDICTION**

This Commission is vested with jurisdiction over the subject matter by the provisions of Chapter 366, Florida Statutes (F.S.). This hearing will be governed by said Chapter and Chapters 25-6, 25-22, and 28-106, F.A.C., as well as any other applicable provisions of law.

### **IV. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION**

Information for which proprietary confidential business information status is requested pursuant to Section 366.093, F.S., and Rule 25-22.006, F.A.C., shall be treated by the Commission as confidential. The information shall be exempt from Section 119.07(1), F.S., pending a formal ruling on such request by the Commission or pending return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in this proceeding, it shall be returned to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of this proceeding, it shall be returned to the person providing the information within the time period set forth in Section

366.093, F.S. The Commission may determine that continued possession of the information is necessary for the Commission to conduct its business.

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 366.093, F.S., to protect proprietary confidential business information from disclosure outside the proceeding. Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 366.093, F.S., at the hearing shall adhere to the following:

- (1) When confidential information is used in the hearing that has not been filed as prefiled testimony or prefiled exhibits, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents and with the confidential information highlighted. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- (2) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the court reporter shall be retained in the Office of Commission Clerk's confidential files. If such material is admitted into the evidentiary record at hearing and is not otherwise subject to a request for confidential classification filed with the Commission, the source of the information must file a request for confidential classification of the information within 21 days of the conclusion of the hearing, as set forth in Rule 25-22.006(8)(b), F.A.C., if continued confidentiality of the information is to be maintained.

## **V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES**

Testimony of all witnesses to be sponsored by the parties has been prefiled and will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to timely and appropriate objections. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to three minutes.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and Staff have had the opportunity to cross-examine the witness, the

exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

The parties shall avoid duplicative or repetitious cross-examination. Further, friendly cross-examination will not be allowed. Cross-examination shall be limited to witnesses whose testimony is adverse to the party desiring to cross-examine. Any party conducting what appears to be a friendly cross-examination of a witness should be prepared to indicate why that witness's direct testimony is adverse to its interests.

## **VI. ORDER OF WITNESSES**

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
Scott R. Bores	FPL	1-8, 10, 12-15
Ralph Smith	OPC	1-17
<u>Rebuttal</u>		
Scott R. Bores	FPL	9, 11, 16, 17

## **VII. BASIC POSITIONS**

**FPL:** FPL's forecasted annual jurisdictional adjusted base revenue requirement decrease due to the enactment of the Tax Act for the tax year 2018, accounting for OPC witness Smith's recommendations, is \$772.3 million. To calculate the Tax Act's impact on "protected" excess deferred income taxes, FPL used the Average Rate Assumption Method ("ARAM") thereby turning around the savings to customers over the remaining book depreciable life of the underlying assets. For "unprotected" excess deferred income taxes, FPL proposed to utilize two methodologies: ARAM for the property related unprotected excess deferred income taxes and the Reverse South Georgia Method ("RSGM") for the non-property related unprotected excess deferred income taxes. FPL has no objection to OPC witness Smith's proposed approach to utilize 10-year straight-line amortization and to cap amortization at ten years for property-related and non-property related unprotected excess deferred taxes, respectively, if adopted by the

Commission. The impact of witness Smith's recommendations is reflected in FPL's Statement of Issues and Positions.

The Commission should not direct FPL to seek a PLR. Pursuant to the IRC, salvage must be turned around using ARAM to avoid a normalization violation. FPL does not have the ability within the PowerPlan tax application to isolate the cost of removal component of negative net salvage. Therefore, cost of removal must be turned-around using ARAM to avoid a normalization violation whether it is classified as protected or unprotected. Obtaining a PLR would have no practical import because FPL could not implement a different approach.

Finally, FPL is properly using the savings resulting from the Tax Act to replenish the Amortization Reserve established in its 2016 Settlement Agreement. Pursuant to the 2016 Settlement Agreement, FPL is permitted to make both credit and debit entries to the Amortization Reserve, so long as it maintains its earned return on equity within the authorized range. This flexible mechanism is fundamental to FPL's ability to avoid imposing a storm cost recovery surcharge for Hurricane Irma and to "stay out" of another rate case for a minimum of four years, thereby maintaining rate stability for at least that period. FPL's customers were immediately and directly benefitted by FPL's avoiding that surcharge. Nothing in the 2016 Settlement Agreement provides that the Amortization Reserve is extinguished when the balance reaches zero. To read such a condition on the use of the Amortization would be contrary to Florida law and would lead to absurd results that are contrary to the purpose of the 2016 Settlement Agreement.

**OPC:** The Tax Cuts and Jobs Act (TCJA) was enacted in 2017 which significantly reduced the corporate tax rate from 35% to 21%. On February 21, 2018, the Commission established this docket to consider the tax impact of the TCJA with respect to Florida Power and Light Company (FPL). FPL proposed a 2018 FPSC adjusted revenue requirement reduction of \$648.8 million comprised of the following: (1) a \$528.7 million reduction in base rate revenue requirements due to the lower federal income tax; (2) a \$154.9 million reduction from the excess accumulated deferred income taxes (EADIT) amortization; (3) a \$26.0 million increase related to the loss of the manufacturer's deduction; (4) a \$10.3 million increase due to higher sources of investor capital associated with lower bonus tax depreciation; and (5) a \$16.5 million increase related to higher sources of investor capital due to less accumulated deferred income taxes (ADIT) related to depreciation timing differences on plant going into service in 2018.

In this docket, FPL is requesting the Commission determine that: (1) FPL's proposes treatment of the tax impacts of the Tax Act are consistent with applicable accounting guidance; and (2) FPL's proposed treatment of the "unprotected" EADIT as reasonable and appropriate. In its petition, FPL did not request approval for, but rather, outlined its expected use of the tax savings in 2018-2020 to partially reverse the one-time amortization of all available Reserve

Amounts. Two issues remain in dispute regarding the treatment of the customer's tax savings. First, OPC recommends that the "unprotected" EADIT amortization period be no more than 10 years, resulting in an increase of \$52 million additional EADIT amortization to FPL's identified total net TCJA revenue requirement reduction amount of \$684.8 million with the depreciation impacts included in FPL's calculations for crediting the depreciation reserve in 2018 and the tax gross up for the \$52 million increase. OPC is recommending an annual jurisdictional adjusted base revenue requirement reduction in the amount of \$772 million with the depreciation reserve impacts or \$649.6 million without the depreciation reserve impacts. The \$649.6 million figure is subject to verification by OPC witness Smith, and OPC reserves its right to change its position. Otherwise, FPL's quantification of the TCJA impact does not appear to be unreasonable for purposes of estimating the one-time annual revenue requirement reduction and the EADIT adjustments related to the TCJA.

Second, OPC asserts that the customer's tax saving should be flowed back to customers. OPC, the Florida Retail Federation (FRF), and the Florida Industrial Power Users Group (FIPUG) filed a the Joint Petition for Enforcement of 2016 Settlement and Permanent Base Rate Reductions Against Florida Power & Light Company<sup>1</sup>, in Docket No. 20180224-EI, to address the disposition of the tax savings benefits associated with the TCJA. Since the TCJA was enacted after the negotiation and approval of the 2016 Settlement Agreement in FPL's last base rate case, the TCJA was not contemplated as part of the 2016 Settlement Agreement. Although the order has become final as to the Settlement Agreement, the Florida Supreme Court clearly stated that "[o]nce a decision has become final for these purposes [administrative finality], it may be modified if there is a significant change in circumstances or a great public interest is served by the modification." Gulf Coast Electric Co-op, Inc., v. Johnson, 727 So.2d 259, 265 (1999), (citing Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679, 681 (1979)). The 2017 tax change which reduced corporate tax rates by 14% is a significant event, over which the Commission maintains jurisdiction. Further, the Florida Supreme Court in Reedy Creek Co. v. Fla. Public Serv. Comm., 418 So. 2d. 249, 254 (1982), stated that "a change in a tax law should no [sic] result in a 'windfall' to a utility, but in a refund to the customer who paid the revenue that translated into the tax savings." Due to this significant change in the tax rate, the amount of the tax benefit should be determined in this docket and the disposition of these tax benefits can and should ultimately be determined by the Commission in Docket No. 20180224-EI.

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<sup>1</sup> In the Joint Petition, the Customers assert that (1) FPL is overearning and that the Settlement Agreement provides for a general base rate case when a company is overearning, (2) the Amortization Reserve has been extinguished and cannot be re-established unilaterally, and (3) the tax savings benefits - presently estimated to be approximately \$649.6 million per year in reduced revenue requirements - should be flowed back to customers through the base rate case.

**FEA:** FEA's experts estimate that FPL is presently realizing tax savings as a result of the Tax Cuts Jobs Act. This benefit should be passed along to FPL's customers, to include FEA. FEA argues that it should receive rate reductions on their bills from FPL. In summary, with fair and transparent recognition of the cost savings FPL is realizing as a result of the TCJA, FPL is overearning.

**FIPUG:** FIPUG seeks a full and fair distribution of dollars to FIPUG members and other Florida Power & Light Company (FPL) customers resulting from the federal Tax Cuts and Jobs Act of 2017. This distribution should be done efficiently, transparently, accurately, and without delay. Stated differently, this change in law reduced FPL's federal corporate tax by 40%. All other Florida investor-owned utilities have made provision to flow back to customers federal tax savings realized from the tax rate decrease, and the Commission should act now and order FPL to similarly pass along these tax savings to its customers.

**FRF:** The Tax Cuts and Jobs Act of 2017 (TCJA) significantly reduced the corporate tax rate applicable to FPL from 35 percent to 21 percent. On February 6, 2018, the Commission asserted jurisdiction over FPL's tax savings by its Order No. PSC-2018-0104-PCO-PU. On February 21, 2018, the Commission established this docket to consider the tax impact of the TCJA with respect to FPL. In this docket, FPL is requesting the Commission to determine that: (1) FPL's proposed treatment of the tax impacts of the Tax Act is consistent with applicable accounting guidance; and (2) FPL's proposed treatment of the "unprotected" EADIT is reasonable and appropriate. In its petition, FPL did not request approval for, but rather, outlined its expected use of the tax savings in 2018-2020 to partially reverse the one-time amortization of all available Reserve Amounts (i.e., the amounts formerly in the Amortization Reserve created by the 2016 Settlement Agreement in Docket No. 20160021-EI).

There is a dispute between FPL and the Consumer Parties, i.e., the FRF, OPC, and FIPUG, as to whether FPL is, or is not, allowed to credit the tax cost savings that FPL is realizing as a result of the TCJA to the Reserve: FPL asserts that it *is allowed* to do so, and the Consumer Parties assert that FPL *is not allowed* to do so.

Subject to this pending dispute, and further subject to final review and verification by the Citizens' witness Ralph Smith (who received revised estimates on January 24), the parties appear to agree that the annual revenue requirement impact of federal income tax savings resulting from the TCJA, if FPL *is allowed* to apply those savings as a credit to the Reserve, is \$772.3 Million per year, including the flowback of Excess Accumulated Deferred Income Taxes, and that the annual revenue requirement impact of the TCJA tax savings, if FPL *is not allowed* to apply those savings as a credit to the Reserve, also including the flowback of EADITs, is \$649.6 Million per year.

The Florida Retail Federation asserts that the Commission, having taken jurisdiction over these dramatic, windfall tax savings, should act to ensure that these savings are flowed back to customers promptly. To that end and purpose, the FRF, joined by OPC and the Florida Industrial Power Users Group (“FIPUG”), filed their Joint Petition for Enforcement of 2016 Settlement and Permanent Base Rate Reductions Against Florida Power & Light Company<sup>2</sup>, initiating Docket No. 20180224-EI, to address the disposition of the tax savings benefits associated with the TCJA. The *amount* of the tax benefit should be determined in this docket and the *disposition* of these tax benefits can and should ultimately be determined by the Commission in Docket No. 20180224-EI.

**STAFF:** Staff’s positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff’s final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

### **VIII. ISSUES AND POSITIONS**

**ISSUE 1:** What is the forecasted tax expense for the tax year 2018 at a 21 percent federal corporate tax rate?

#### **POSITIONS:**

**FPL:** FPL’s forecasted tax expense for the tax year 2018 at a 21 percent federal corporate tax rate is \$430.6 million. FPL’s position incorporates OPC witness Smith’s recommendation. (Bores)

**OPC:** The Citizens have identified no errors in FPL’s forecasted tax expense for the tax year 2018 at a 21 percent corporate tax rate with the impact of the credits to the amortization reserve and without the impact of the credits to the amortization reserve. However, the amount of the forecasted tax expense for 2018 at 21% without the impact of the credits to the amortization reserve is subject to verification by OPC witness Smith and OPC reserves its right to change its position.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

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<sup>2</sup> In the Joint Petition, the Customers assert that (1) FPL is overearning and that the Settlement Agreement provides for a general base rate case when a company is overearning, (2) the Amortization Reserve has been extinguished and cannot be recreated unilaterally, and (3) the tax savings benefits – presently estimated to be approximately \$649.6 million per year in reduced revenue requirements – should be flowed back to customers through the base rate case.

**FRF:** Subject to final review and verification of the estimated impacts by Citizens' witness Ralph Smith (with reservation of FRF's right to modify its position based on Witness Smith's review), who received revised estimates on January 24, FPL's forecasted federal income tax expense for the tax year 2018 at a 21 percent federal corporate tax rate is \$523.6 million per year.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 2:** **What is the forecasted tax expense for the tax year 2018 at a 35 percent federal corporate tax rate?**

**POSITIONS:**

**FPL:** FPL's forecasted tax expense for the tax year 2018 at a 35 percent federal corporate tax rate is \$1,029.1 million. (Bores)

**OPC:** The Citizens have identified no errors in FPL's forecasted tax expense for the tax year 2018 at a 35 percent corporate tax rate.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** FPL's forecasted federal income tax expense for the tax year 2018 at a 35 percent federal corporate tax rate is \$1,029.1 million (or \$1.0291 billion) per year.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 3:** **What is the forecasted NOI for the tax year 2018 at a 21 percent federal corporate tax rate?**

**POSITIONS:**

**FPL:** FPL's forecasted NOI for the tax year 2018 at a 21 percent federal corporate tax rate is \$2,406.2 million. FPL's position incorporates OPC witness Smith's recommendation. (Bores)

**OPC:** The Citizens have identified no errors in FPL's forecasted NOI for the tax year 2018 at a 21 percent corporate tax rate with the impact of the credits to the amortization reserve and without the impact of the credits to the amortization reserve. However, the amount of the forecasted NOI for 2018 at 21% without the impact of the credits to the amortization reserve is subject to verification by OPC witness Smith and OPC reserves its right to change its position.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Subject to final review and verification of revised estimates by Citizens' witness Smith (with reservation of FRF's right to modify its position based on Witness Smith's review), the FRF agrees with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 4:** **What is the forecasted NOI for the tax year 2018 at a 35 percent federal corporate tax rate?**

**POSITIONS:**

**FPL:** FPL's forecasted NOI for the tax year 2018 at a 35 percent federal corporate tax rate is \$2,175.4 million. (Bores)

**OPC:** The Citizens have identified no errors in FPL's forecasted NOI for the tax year 2018 at a 35 percent corporate tax rate.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 5:** **What is the forecasted capital structure for the tax year 2018 at a 21 percent federal corporate tax rate?**

**POSITIONS:**

**FPL:** FPL's forecasted capital structure for the tax year 2018 at a 21 percent federal corporate tax rate is \$36,142.2 million. FPL's position incorporates OPC witness Smith's recommendation. (Bores)

**OPC:** The Citizens have identified no errors in FPL's forecasted capital structure for the tax year 2018 at a 21 percent corporate tax rate with the impact of the credits to the amortization reserve and without the impact of the credits to the amortization reserve. However, the amount of the forecasted capital structure for the tax year 2018 at 21% without the impact of the credits to the amortization reserve is

subject to verification by OPC witness Smith and OPC reserves its right to change its position.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Subject to final review and verification of revised estimates by Citizens' witness Smith (with reservation of FRF's right to modify its position based on Witness Smith's review), the FRF agrees with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 6: What is the forecasted capital structure for the tax year 2018 at a 35 percent federal corporate tax rate?**

**POSITIONS:**

**FPL:** FPL's forecasted capital structure for the tax year 2018 at a 35 percent federal corporate tax rate is \$36,317.7 million. (Bores)

**OPC:** The Citizens have identified no errors in FPL's forecasted capital structure for the tax year 2018 at a 35 percent corporate tax rate.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 7: What is the forecasted jurisdictional adjusted base revenue requirement for the tax year 2018 using a 21 percent federal corporate tax rate?**

**POSITIONS:**

**FPL:** FPL's forecasted jurisdictional adjusted base revenue requirement for the tax year 2018 using a 21 percent federal corporate tax rate is \$5,842.8 million. FPL's position incorporates OPC witness Smith's recommendation. (Bores)

**OPC:** The Citizens have identified no errors in the forecasted jurisdictional adjusted base revenue requirement for FPL for the tax year 2018 using a 21 percent

corporate tax rate with the impact of the credits to the amortization reserve and without the impact of the credits to the amortization reserve. However, the amount of the forecasted jurisdictional adjusted base revenue requirement for the tax year 2018 at 21% without the impact of the credits to the amortization reserve is subject to verification by OPC witness Smith and OPC reserves its right to change its position.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Subject to final review and verification of revised estimates by Citizens' witness Smith (with reservation of FRF's right to modify its position based on Witness Smith's review), the FRF agrees with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 8:** **What is the forecasted jurisdictional adjusted revenue requirement for the tax year 2018 using a 35 percent federal corporate tax rate?**

**POSITIONS:**

**FPL:** FPL's forecasted jurisdictional adjusted base revenue requirement for the tax year 2018 using a 35 percent federal corporate tax rate is \$6,615.2 million. (Bores)

**OPC:** The Citizens have identified no errors in the forecasted revenue requirement for FPL for the tax year 2018 using a 35 percent corporate tax rate.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 9:**     **What is the annual jurisdictional adjusted base revenue requirement increase/decrease due to the enactment of the Tax Cuts and Jobs Act of 2017 for the tax year 2018?**

**POSITIONS:**

**FPL:**           FPL’s forecasted annual jurisdictional adjusted base revenue requirement decrease due to the enactment of the Tax Cuts and Jobs Act of 2017 for the tax year 2018 is \$772.3 million. This figure incorporates OPC witness Smith’s recommendation and represents a change of \$87.5 million from the \$684.8 million presented in witness Bores’s direct testimony. The change is comprised of three items. First, accelerating the amortization of unprotected excess deferred income taxes by \$52 million annually as proposed by OPC witness Smith would lead to a revenue requirement decrease of \$68 million. Secondly, the accelerated amortization would lead to a reversal of surplus depreciation previously taken, reducing rate base and causing a reduction of \$22 million in revenue requirements due to lower income tax expense. Finally, as noted by witness Bores in his rebuttal testimony, there would be a \$2.5 million increase in revenue requirements due to the increase of investor sources of capital as a result of the accelerated amortization of unprotected excess deferred income taxes. (Bores)

**OPC:**           OPC recommends the “unprotected” EADIT amortization period be no more than 10 years, resulting in an increase of \$52 million additional EADIT amortization plus a gross up for taxes, to FPL’s identified total net TCJA revenue requirement reduction amount of \$684.8 million with the depreciation impacts included in FPL’s calculations for crediting the depreciation reserve in 2018. As a result, the appropriate annual jurisdictional adjusted base revenue requirement reduction is \$772 million with the depreciation reserve impacts or \$649.6 million without the depreciation reserve impacts. However, the \$649.6 million amount is subject to verification by OPC witness Smith, and OPC reserves its right to change its position.

**FEA:**           FEA adopts the position of Office of Public Counsel.

**FIPUG:**        Adopt the position of Office of Public Counsel.

**FRF:**           Agree with OPC.

**STAFF:**        No position at this time pending evidence adduced at hearing.

**ISSUE 10:** Were “protected excess deferred taxes” for 2018 using a 21 percent federal corporate tax rate appropriately calculated?

**POSITIONS:**

**FPL:** Yes. FPL utilized ARAM to turn around the protected excess deferred income taxes over the remaining book depreciable life of the underlying assets. FPL’s position is consistent with OPC’s witness Smith’s recommendation. (Bores)

**OPC:** OPC agrees that it is appropriate to use to use the Average Rate Assumption Method (ARAM) for the “protected” excess ADIT. FPL’s quantification of the TCJA impact do not appear to be unreasonable for purposes of estimating the one-time annual revenue requirement reduction and EADIT related to the TCJA.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 11:** Were “unprotected excess deferred taxes” for 2018 using a 21 percent federal corporate tax rate appropriately calculated?

**POSITIONS:**

**FPL:** FPL proposed to utilize two methodologies for the amortization of unprotected excess deferred taxes: ARAM for the property related unprotected excess deferred income taxes and RSGM for the non-property related unprotected excess deferred income taxes. FPL has no objection to OPC witness Smith’s proposed approach to utilize 10-year straight-line amortization and to cap amortization at ten years for property-related and non-property related unprotected excess deferred taxes, respectively, if adopted by the Commission. (Bores)

**OPC:** No. The “unprotected” EADIT for 2018 should be amortized over a period of no more than 10 years since it is not subject to IRS normalization requirements. Further, the shorter 10-year maximum amortization period reduces intergenerational inequity by returning the money to the customers who paid the higher tax rates rather than stretching the timeframe into the future for the benefit of customers who may never have paid for the “excess” ADIT. Based on OPC’s recommendation for a 10-year amortization period, the “unprotected” EADIT should be increased by \$52 million for a total of \$204.9 million for “protected” and “unprotected” EADITs.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 12: Were Accumulated Deferred Income Taxes (ADIT) for 2018 appropriately calculated?**

**POSITIONS:**

**FPL:** Yes. FPL's position incorporates OPC witness Smith's recommendation. (Bores)

**OPC:** No. OPC recommends a 10-year amortization period for the "unprotected" EADIT. This results in an increase of \$52 million for a total of \$204.9 million for "protected" and "unprotected" EADIT.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 13: Are classifications of the excess ADIT between "protected" and "unprotected" appropriate?**

**POSITIONS:**

**FPL:** Yes. (Bores)

**OPC:** No. FPL's property-related EADIT contains a net asset of approximately \$20 million for cost-of-removal. OPC believes that the EADIT related to cost of removal/negative net salvage is "unprotected." FPL appears to treat cost of removal/negative net salvage as "protected."

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 14: How should unprotected excess ADITs be flowed back to FPL customers?**

**POSITIONS:**

**FPL:** FPL proposes to turn around unprotected excess deferred income taxes for the benefit of customers via base rates, over the turnaround periods as approved by the Commission, regardless of whether they relate to base rate or adjustment clause assets. (Bores)

**OPC:** The “unprotected” EADITs should be flowed back to FPL customers over no more than 10 years. OPC is recommending a total annual jurisdictional adjusted base revenue requirement reduction in the amount of \$772 million with the depreciation reserve impacts or \$649.6 million without the depreciation reserve impacts. However, the \$649.6 million amount is subject to verification by OPC witness Smith and OPC reserves its right to change its position.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 15: How should protected excess ADITs be flowed back to FPL customers?**

**POSITIONS:**

**FPL:** FPL proposes to turn around protected excess deferred income taxes for the benefit of customers via base revenue requirements, over the turnaround periods specified by the normalization requirements, regardless of whether they relate to base or adjustment clause assets. (Bores)

**OPC:** The “protected” EADITs should be flowed back to FPL customers utilizing ARAM. Based on the use of ARAM and other OPC adjustments, OPC is recommending a total annual jurisdictional adjusted base revenue requirement reduction in the amount of \$772 million with the depreciation reserve impacts or \$649.6 million without the depreciation reserve impacts. However, the \$649.6

million amount is subject to verification by OPC witness Smith and OPC reserves its right to change its position.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 16:** **Should FPL seek a private letter ruling from the IRS regarding its classification of the excess ADIT relating to cost of removal/negative net salvage as “protected”?**

**POSITIONS:**

**FPL:** No. FPL should not seek a PLR because the Company does not have the ability within PowerPlan to isolate the cost of removal component of negative net salvage. Salvage must be turned around using ARAM to avoid a normalization violation. Therefore, because cost of removal is an inseparable component of net negative salvage in PowerPlan, its impact must be turned-around using ARAM to avoid a normalization violation regardless of whether cost of removal classified is protected or unprotected in isolation. Without the ability to treat cost of removal using a different methodology, obtaining a PLR would offer no practical distinction or opportunity for FPL to implement an alternate approach. (Bores)

**OPC:** No Position.

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 17:** If FPL seeks a private letter ruling and the IRS rules therein (or issues other relevant guidance) that the excess ADIT relating to cost of removal/negative net salvage is to be treated as “unprotected”, what process should be followed for the reclassification?

**POSITIONS:**

**FPL:** FPL does not have the ability within the PowerPlan financial system to segregate the cost of removal portion of excess deferred income taxes from those of salvage. As a result, FPL cannot separately track the cost of removal rate from the salvage rate. Therefore, regardless of the classification, FPL will need to turn-around the excess using ARAM. (Bores)

**OPC:** Pending clarification of the appropriate classification of EADIT for cost of removal/negative net salvage, FPL should amortize the related EADIT using the ARAM if the classification ruled by the IRS indicates this is “protected.”

**FEA:** FEA adopts the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

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

**POSITIONS:**

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

**OPC:** No. The amortization reserve was created for a particular purpose by mutual agreement of all parties and once extinguished by FPL, it cannot be unilaterally recreated by FPL to avoid returning tax savings that lawfully belong to its customers. FPL extinguished the amortization reserve in December 2017 to pay for the cost of Hurricane Irma as summarized in the petition filed in Docket No.

20180224-EI. The proper disposition of FPL's tax savings determined in this docket should be disposed of pursuant to a full and lawful process regarding all the issues raised in that petition and must be done in that docket. Nevertheless, given sufficient time Citizens will be prepared to provide oral argument on this specific issue at a future time established after briefing is allowed to more fully address the relationship between the amortization reserve and this docket.

**FEA:** FEA adopts the position of Public Counsel.

**FIPUG:** No.

**FRF:** No. FPL exhausted and extinguished the Amortization Reserve and may not unilaterally re-establish it. The FRF, OPC, and FIPUG filed their Joint Petition for Enforcement of 2016 Settlement and Permanent Base Rate Reductions Against Florida Power & Light Company, which initiated Docket No. 20180224-EI, to address the disposition of the tax cost savings benefits flowing from the TCJA and the extinguishment of the Amortization Reserve due to FPL's one-time offset of Hurricane Irma storm restoration costs. In the Joint Petition, the Customers assert that (1) the Settlement Agreement provides for a general base rate case when the Company is overearning, (2) the Amortization Reserve has been extinguished and cannot be recreated unilaterally, and (3) the tax savings benefits which are presently estimated, subject to final review and verification, to be approximately \$649.6 million per year in reduced revenue requirements should be flowed back to customers through base rate reductions following the requested general base rate case. Accordingly, the issue of whether FPL should be allowed to apply its customers' tax cost savings benefits as credits to the Reserve, should be determined by the Commission in Docket No. 20180224-EI.

**STAFF:** No position at this time pending evidence adduced at hearing.

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

**POSITIONS:**

**FPL:** In December 2017, FPL wrote off incremental Hurricane Irma Costs that had been initially charged to the storm reserve to O&M expense and then amortized all of the Reserve Amount available at the time. The amortization offset most, but not all, of the incremental Irma Costs, resulting in a one-time reduction in FPL's earnings for 2017. FPL expects that from 2018 through 2020, tax savings under the Tax Act will enable the Company to partially reverse the one-time amortization of all available Reserve Amount, while staying within the authorized ROE range. By combining expected tax savings with the flexible amortization of the Reserve Amount under the 2016 Settlement Agreement, FPL provided

customers with a nearly immediate economic benefit by avoiding an interim storm charge due to Hurricane Irma entirely.

**OPC:** The Tax Cuts and Jobs Act of 2017 (TCJA) significantly reduced the corporate tax rate from 35% to 21%, which for FPL is an annual revenue requirement reduction of approximately \$772 million with the depreciation reserve impacts, or \$649.6 million without the depreciation reserve impacts. However, the \$649.6 million amount is subject to verification by OPC witness Smith and OPC reserves its right to change its position. This benefit should be passed on to customers who expect to receive the excess taxes previously paid in their rates returned to them. OPC, the Florida Retail Federation (FRF), and the Florida Industrial Power Users Group (FIPUG) filed a the Joint Petition for Enforcement of 2016 Settlement and Permanent Base Rate Reductions Against Florida Power & Light Company<sup>3</sup>, in Docket No. 20180224-EI, to address the disposition of the tax savings benefits associated with the TCJA. Since the TCJA was enacted after the negotiation and approval of the 2016 Settlement Agreement in FPL's last base rate case, the TCJA could not have been contemplated as a part of, or even affecting, the 2016 Settlement Agreement. Although the 2016 Settlement Agreement was adopted by an order as final, the Florida Supreme Court clearly stated that “[o]nce a decision has become final for these purposes [administrative finality], it may be modified if there is a significant change in circumstances or a great public interest is served by the modification.” Gulf Coast Electric Co-op, Inc., v. Johnson, 727 So.2d 259, 265(1999), (citing Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679, 681 (1979)). The 2017 tax change which reduced corporate tax rates by 14 percentage points is a significant event (which reflects a 40% reduction in FPL's corporate tax rate) over which the Commission maintains jurisdiction. Further, the Florida Supreme Court in Reedy Creek Co. v. Fla. Public Serv. Comm., 418 So. 2d. 249, 254(1982), stated that “a change in a tax law should no [sic] result in a ‘windfall’ to a utility, but in a refund to the customer who paid the revenue that translated into the tax savings.” Due to the unique circumstances presented by the 2016 Settlement Agreement, especially as those unique circumstances are magnified by this significant change in the tax rate, the amount of the tax benefit should be determined in this docket and the disposition of these tax benefits can and should be determined by the Commission in Docket No. 20180224-EI.

**FEA:** FEA adopts the position of Public Counsel.

**FIPUG:** The tax savings should be flowed back to FIPUG members and other FPL customers as soon as possible.

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<sup>3</sup> In the Joint Petition, the Customers assert that (1) FPL is overearning and that the Settlement Agreement provides for a general base rate case when a company is overearning, (2) the Amortization Reserve has been extinguished and cannot be re-established unilaterally, and (3) the tax savings benefits should be flowed back to customers through the base rate case.

**FRF:** The Tax Cuts and Jobs Act of 2017 (“TCJA”) significantly reduced the corporate tax rate applicable to FPL from 35% to 21%, resulting in dramatic reductions in FPL’s income tax costs and equally dramatic reductions in FPL’s required revenue requirements - by approximately \$649.6 million per year (subject to final review and verification), which should be passed on to customers immediately. The *amount* of the tax savings benefit – presently estimated, subject to final review and verification, to be \$649.6 million per year in reduced revenue requirements – should be determined in this docket and the *disposition* of these tax cost reduction benefits can and should be determined by the Commission in Docket No. 20180224-EI.

**STAFF:** No position at this time pending evidence adduced at hearing.

**ISSUE 20: Should this docket be closed?**

**POSITIONS:**

**FPL:** Yes. Upon issuance of an order confirming FPL’s proposed treatment of the tax impacts of the Tax Act is consistent with applicable accounting guidance and approving the proposed treatment of unprotected excess deferred income taxes as reasonable and appropriate, this docket should be closed.

**OPC:** No position.

**FEA:** Adopt the position of Office of Public Counsel.

**FIPUG:** Adopt the position of Office of Public Counsel.

**FRF:** Agree with OPC.

**STAFF:** No position at this time pending evidence adduced at hearing.

**IX. EXHIBIT LIST**

<u>Witness</u>	<u>Proffered By</u>		<u>Description</u>
	<u>Direct</u>		
Scott R. Bores	FPL	SRB-1	FPL’s 2018 Forecasted Earnings Surveillance Report

<u>Witness</u>	<u>Proffered By</u>		<u>Description</u>
Scott R. Bores	FPL	SRB-2	FPL's Pro Forma 2018 FESR Excluding the Impacts of the Tax Act
Scott R. Bores	FPL	SRB-3	Differences in Rate Base
Scott R. Bores	FPL	SRB-4	Differences in Net Operating Income
Scott R. Bores	FPL	SRB-5	Differences in Capital Structure
Scott R. Bores	FPL	SRB-6	Forecast Change in 2018 FPSC Adjusted Revenue Requirement
Ralph C. Smith	OPC	RCS-1	Qualifications for Ralph Smith
Ralph C. Smith	OPC	RCS-2	Turnaround of Excess Deferred Taxes
Ralph C. Smith	OPC	RCS-3	Turnaround of Excess Deferred Taxes

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

**X. PROPOSED STIPULATIONS**

There are no stipulations at this time.

**XI. PENDING MOTIONS**

None.

**XII. PENDING CONFIDENTIALITY MATTERS**

There are no pending confidentiality matters.

**XIII. POST-HEARING PROCEDURES**

If no bench decision is made at the conclusion of the February 5, 2019 hearing, each party shall file a post-hearing statement of issues and positions on the cost issues (Issues 1-17). A summary of each position, set off with asterisks, shall be included in that statement. If a

party's position has not changed since the issuance of this Prehearing Order, the post-hearing statement may simply restate the prehearing position. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, F.A.C., a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and briefs, shall together total no more than 40 pages each and shall be filed at the same time.

#### **XIV. RULINGS**

(1) Both FRF and FIPUG objected to a witness being considered an expert witness unless the witness states the subject matter area(s) in which he or she claims expertise, and voir dire, if requested, is permitted. Section VI.A(8) of Order No. PSC-2018-0209-PCO-EI (OEP), issued on April 25, 2018, requires that a party identify each witness the party wishes to voir dire and specify the portions of the witness' testimony to which it objects. Since neither FIPUG nor FRF complied with the OEP by naming witnesses whose expertise it wishes to challenge or identify any witness' testimony to which it objects, neither FRF nor FIPUG shall be allowed to voir dire or challenge the expertise of any witness at the administrative hearing.

(2) Three contested issues were raised in this docket:

Issue A: What is the rate decrease for each customer class resulting from the Tax Cuts and Jobs Act of 2017, if any, and, if so, when will those rate decreases become effective?

Issue B: How should FPL treat the savings associated with the Tax Cuts and Jobs Act of 2017?

Issue C: Does the 2016 Settlement Agreement allow FPL to replenish the Amortization Reserve with the tax savings resulting from the Tax Cuts and Jobs Act of 2017?<sup>4</sup>

FIPUG argued that Issue A was necessary and distinct from Issue B since it asked specifically when, and what type of, base rate reductions associated with the tax savings from the TCJA would be made. However, Issue B is more neutral wording and addresses the same point, which is what treatment should be given to the tax savings associated with the TCJA. Since FIPUG can fully address its position in Issue B, Issue A will be stricken and Issue B will be included, as follows: **How should the savings associated with the Tax Cuts and Jobs Act of 2017 be treated?**

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<sup>4</sup> At the prehearing conference on January 23, 2019, both Issues B and C were reworded with the agreement of all parties. The reworded versions of Issues B and C are used in Section VIII of this Prehearing Order. However, Issue B has been renumbered as Issue 19 and Issue C has been renumbered as Issue 18 in Section VIII of this Prehearing Order.

With regard to Issue C, which is a legal issue that must be resolved in order to answer Issue B, all parties agreed to the following language: **Does the 2016 Settlement Agreement allow FPL to credit the Amortization Reserve with the tax savings resulting from the Tax Cuts and Jobs Act of 2017?**

FRF and OPC noted the fact that interpretation of the 2016 FPL Rate Case Settlement's language regarding the Amortization Reserve is at issue in both Docket No. 20180224-EI and this docket and expressed concern that their actions in this docket may limit their ability to litigate issues in Docket No. 20180224-EI. Although, as reworded, Issue C addresses the narrow issue of whether FPL's proposed treatment of the tax savings is permitted by the 2016 FPL Rate Case Settlement. For that reason, resolution of that issue in this docket should not limit the parties' ability to fully litigate all collateral matters raised in Docket No. 20180224-EI.

However, given unique circumstances raised by OPC and FRF, and to ensure that all parties get a full and fair opportunity to litigate Issues B and C, the following procedure will be followed with regard to these issues:

- The February 5, 2019 hearing will afford parties an opportunity to present an opening statement addressing the cost issues (Issue Nos. 1-17) that shall not exceed 5 minutes per party.
- Stipulations, if any, the comprehensive exhibit list, and witness testimony will be entered into the record after opening statements. At that time, the hearing will be continued until April 16, 2019, to allow the parties an opportunity to brief Issues B and C.
- Initial Briefs on Issues B and C shall be due by 5 p.m. on February 22, 2019. Reply Briefs on Issues B and C shall be due by 5 p.m. on March 8, 2019. Initial Briefs and Reply Briefs shall be limited to 40 pages each. A summary of each position, set off with asterisks, shall be included in the briefs. If a party's position has not changed since the issuance of this Prehearing Order, the briefs may simply restate the prehearing position. If a party fails to file an Initial Brief on Issues B and C, that party shall have waived Issues B and C and the right to present oral argument on those issues.
- When the hearing is continued on April 16, 2019, the parties will be given time (to be announced at the conclusion of the February 5, 2019 hearing) to present oral arguments on Issues B and C, followed by questions from the Commissioners. Thereafter, the hearing record will then be closed at which time a bench vote can be taken or the matter taken under advisement. If no bench vote is taken, Commission staff will prepare a recommendation on these issues that will be taken up at the May 14, 2019 Agenda Conference.

It is therefore,

ORDERED by Commissioner Julie I. Brown, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Julie I. Brown, as Prehearing Officer, this 29th day of January, 2019.



JULIE I. BROWN  
Commissioner and Prehearing Officer  
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code.

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Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.