**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| 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<br><br>DATED: March 8, 2019 |

**THE FLORIDA RETAIL FEDERATION'S REPLY BRIEF REGARDING TAX SAVINGS ISSUES**

The Florida Retail Federation ("FRF"), pursuant to the Prehearing Order in this docket, Order No. PSC-2019-0050-PHO-EI, issued January 29, 2019, hereby submits its Reply Brief on the issues designated in the Prehearing Order relating to Florida Power & Light Company's ("FPL" or "Company") obligation to apply the savings realized as a result of the Tax Cuts and Jobs Act of 2017 ("Tax Act" or "TCJA") for the benefit of its customers (whether through refunds or rate reductions) instead of keeping those savings to maximize its earnings and replenish the Reserve Amount created by the 2016 Settlement Agreement approved by Order No. PSC-2016-0560-AS-EI. The FRF's Reply Brief adopts the Statement of the Case and Facts presented in the FRF's Initial Brief. As used in this Reply Brief, capitalized terms, e.g., the 2016 Settlement Order, the 2016 Settlement, the Reserve, FRF, OPC, FIPUG, and FPL, have the same meanings assigned to them in the Initial Brief. The FRF's Reply Brief proceeds with a revised statement of the FRF's positions on Issues B and C, Summary of Argument, Argument, and Conclusion.

## STATEMENT OF POSITIONS ON DESIGNATED ISSUES

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

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

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

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

FRF: *The federal income tax savings realized by FPL as a result of the TCJA should be treated as what they are – a dramatic windfall reduction in FPL's cost of providing service, with the corresponding recognition of the increase in FPL's earnings resulting from this dramatic cost decrease. Treated correctly in this manner, FPL's earnings exceeded the 11.6 percent ROE ceiling provided in the 2016 Settlement by more than $540 million in 2018, thereby triggering the rights of the FRF and OPC to seek base rate reductions pursuant to the 2016 Settlement, and the FRF and OPC, joined by FIPUG, have thus sought such reductions in the Joint Petition Docket. The Commission should proceed with the general rate case requested in the Joint Petition. Only by the principled examination of FPL's costs and

> revenues through the requested rate case proceedings will the Commission be able to ensure that FPL's rates are fair, just, and reasonable, as required by the standard that the Commission applied in approving the 2016 Settlement.*

## SUMMARY OF ARGUMENT

FPL unilaterally violated the Commission's 2016 Settlement Order by refusing to use the Storm Cost Recovery Mechanism ("SCRM") to recover its Hurricane Irma restoration costs. Had FPL followed the Order, its Irma restoration costs would have been recovered on an earnings-neutral basis as expressly provided by the 2016 Settlement. With its Irma costs thus covered on the earnings-neutral basis provided by the 2016 Settlement, proper accounting – in accord with the 2016 Settlement and the 2016 Settlement Order – would have resulted in FPL's base rates producing dramatic over-earnings beginning on January 1, 2018, when the TCJA took effect. FPL's over-earnings for 2018 alone can be reliably estimated at $540,949,289, per FPL's December 2018 Earnings Surveillance Report.

The FRF, OPC, and all of FPL's customers are entitled to have the Commission enforce the 2016 Settlement Order as written, and thus entitled to have the Commission impose use of the SCRM on FPL to recover its Hurricane Irma costs, or, given the current state of affairs wherein FPL has ignored and refused to comply with the 2016 Settlement Order for more than a year, to impose results on FPL that are substantively equivalent to those that would have obtained had FPL complied in the first place. Using the SCRM would have resulted in FPL over-earning by $540 million in 2018, which clearly pulls the trigger in Section 11(b) of the 2016 Settlement that allows the FRF and OPC to petition for

a general rate case, which is exactly what these Consumer Parties, joined by FIPUG, have done in their Joint Petition filed in Docket No. 20180224-EI.

FPL's allegations (at page 8 of its Initial Brief) that the Consumer Parties are attempting to "pocket the savings" from avoided Storm Surcharges pursuant to the SCRM and "alter the terms" of the 2016 Settlement are misplaced. Neither the FRF nor OPC are attempting to be unjustly enriched by either the TCJA or by requiring FPL to follow the 2016 Settlement as the Commission stated it is to apply in the 2016 Settlement Order, i.e., that the SCRM "will be used to replace incremental costs associated with [any] named tropical storm as well as to replenish the storm reserve to the level in effect as of August 31, 2016." 2016 Settlement Order at 3. The FRF simply asks the Commission to enforce the 2016 Settlement Order as written, and thus to require FPL to use the SCRM to recover its Irma restoration costs (or to impose substantively equivalent results on FPL). With FPL's Irma costs recovered as expressly provided by the 2016 Settlement Order, i.e., without considering "the remaining unamortized Reserve Amount as defined in Paragraph 12" of the 2016 Settlement, FPL's earnings exceeded and are exceeding the "trigger" threshold in Section 11(b) of the 2016 Settlement, and the FRF and OPC, now joined by FIPUG, are entitled by the express terms of Section 11(b) of the 2016 Settlement to petition for their requested review of FPL's base rates because of FPL's over-earnings. The FRF has not sought any terms to be added to the 2016 Settlement, because none are required.

Several of FPL's other allegations and arguments are misplaced, misleading, or fallacious, and the FRF responds to them as well in this Reply Brief.

## ARGUMENT

FPL unilaterally violated the express terms of the 2016 Settlement Order by refusing to use the Storm Cost Recovery Mechanism provided in the 2016 Settlement to recover its Hurricane Irma restoration costs. The Commission's Order must control the disposition of the issues presented here; however, even if reviewed from a contract standpoint, the Commission's express understanding of the meaning of the 2016 Settlement, upon which its approval was based, must likewise control. The 2016 Settlement Order and the 2016 Settlement require FPL to use the earnings-neutral treatment of its Irma costs provided by the SCRM, and when those costs are properly accounted for – on the required earnings-neutral basis – FPL has been overearning since January 1, 2018, with total overearnings exceeding $540 million in 2018 alone. The Commission must act promptly to ensure that customers receive the benefit of this treatment, including the base rate reductions that will naturally flow from proper recognition of the $649.6 million per year in TCJA savings being realized by FPL. The disposition of the TCJA savings, over which the Commission asserted jurisdiction as of February 6, 2018, will be partially addressed – for the period beginning January 1, 2019 – by the general reverse-make-whole rate case with a 2019 test year requested by the Joint Petition; disposition of the 2018 savings must be determined by the Commission pursuant to its jurisdiction asserted by Order No. 2018-0104.

The FRF addresses several assertions in FPL's Initial Brief, including its assertions: that the FRF and OPC are trying to "pocket the savings" from the TCJA and trying to add terms to the 2016 Settlement (neither assertion is true) and its pitch that "rate stability" justifies its keeping all of the TCJA savings for itself, and clarifies other points regarding

(a) the potential extension of the 2016 Settlement touted by FPL, (b) the fact that FPL never consulted with or even reached out to the FRF regarding its plans to violate the 2016 Settlement Order, and (c) FPL's claim that it would not have entered into the 2016 Settlement if it thought its ability to use the Reserve was limited.

## I. THE COMMISSION'S 2016 SETTLEMENT ORDER MUST CONTROL THE DETERMINATION OF THE ISSUES IN THESE PROCEEDINGS. MOREOVER, EVEN IF REVIEWED FROM A CONTRACT PERSPECTIVE, THE COMMISSION'S EXPRESSLY AND SPECIFICALLY ARTICULATED MEANING OF THE 2016 SETTLEMENT – THAT THE SCRM "WILL BE USED" TO RECOVER STORM COSTS SUCH AS THOSE INCURRED IN RESTORING SERVICE FOLLOWING HURRICANE IRMA – MUST ALSO CONTROL.

The Commission's 2016 Settlement Order, which plainly mandates that the SCRM "will be used" for hurricane cost recovery, controls the disposition of the issues in these proceedings. Moreover, even if reviewed as a contract, the Commission's expressly articulated understanding of the 2016 Settlement – that the SCRM "will be used" for hurricane cost recovery – likewise controls and dictates the same result. Further, this interpretation is consistent with the language of the 2016 Settlement itself, and definitively confirmed by FPL's Commission-approved course of conduct following the substantively identical SCRM provisions of the 2012 Settlement for recovery of its Hurricane Matthew restoration costs. Finally, interpreting the 2016 Settlement in the public interest, i.e., following the same standard that the Commission applied in approving the 2016 Settlement in the first place, requires the same result: FPL must use the SCRM for recovery of its Hurricane Irma restoration costs, and the overearnings resulting from the TCJA

trigger the FRF's and OPC's (and FIPUG's) request for a review of FPL's base rates (i.e., a reverse-make-whole general rate case) pursuant to Section 11(b) of the 2016 Settlement, and this requested rate case will enable the Commission to put customers and FPL where they would have been if FPL had not unilaterally violated the 2016 Settlement Order.

A. The Commission's 2016 Settlement Order Controls the Issues Presented Here.

The 2016 Settlement Order provides that the SCRM "will be used to replace incremental costs associated with [any] named tropical storm as well as to replenish the storm reserve to the level in effect as of August 31, 2016." 2016 Settlement Order at 3. The FRF, OPC and all of FPL's customers represented by the FRF and OPC are entitled to rely on the Commission's orders. See generally, Peoples Gas Sys., Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966) (The doctrine of administrative finality "assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency [the PSC] as being final and dispositive of the rights and issues involved therein.") FPL's assertion, at page 9 of its Initial Brief, that the determination of the issues presented here "turns on the Agreement" is simply incorrect.[1] The Commission's 2016 Settlement Order is unambiguous and controls.

The Commission's language in its Order – that the SCRM "will be used" to recover storm restoration costs – is unequivocal and unambiguous. The word "will" denotes that the subject action is mandatory. Banks v. State, 2019 WL 421322, 44 Fla. L. Weekly D357

[1] In its Initial Brief, FPL essentially ignores the 2016 Settlement Order, referencing it only in passing.

(Fla. 1st DCA, Feb. 4, 2019); see also Hewitt v. Helms, 459 U.S. 460, 471 (1983) (describing "shall," "will," and "must" as "language of an unmistakably mandatory character."), receded from on other grounds by Sandin v. Connor, 515 U.S. 472, 483 (1995). Thus, the 2016 Settlement Order makes clear that the sole mechanism available for recovery of storm costs is the SCRM. If FPL thought that the Commission's language – that the SCRM "will be used" for storm cost recovery – was incorrect, then FPL should have moved for reconsideration of the 2016 Settlement Order when it was issued. FPL did not do so, and the obviously correct inference is that FPL fully understood that it must use the SCRM for storm cost recovery.

B. If Reviewed from a Contract Standpoint, It Is Obviously the Commission's Understanding Upon Which the Commission Based Its Approval of the 2016 Settlement That Must Control.

Regarding FPL's argument that the 2016 Settlement should be viewed as a contract, in the context of the Commission's determination of the meaning of the 2016 Settlement, it is obviously the Commission's understanding of the document, upon which the Commission based its decision to approve it in the 2016 Settlement Order, that must control. The Commission's language is clear and unambiguous: the SCRM "will be used" by FPL to recover storm restoration costs. FPL's arguments regarding the allegedly permissive nature of the Reserve and ARM miss the point: FPL is required to use the SCRM, and its failure to do so was a willful, unilateral violation of the 2016 Settlement Order and the 2016 Settlement itself.

Further, FPL incorrectly asserts that FRF and OPC rely on "extrinsic evidence." FPL Initial Brief at 15. The evidence alleged by FPL to be "extrinsic" is in fact the

competent, substantial evidence considered by the Commission in determining that the 2016 Settlement is in the public interest. The 2016 Settlement Order discussed the evidence upon which it relied in approving he 2016 Settlement as follows:

> On October 27, 2016, a second administrative hearing was held to take supplemental testimony on the terms and conditions of the Settlement Agreement that had not previously been addressed in the prior hearing. At the second hearing, the testimony of 5 witnesses was heard and 6 exhibits were admitted into evidence. Post hearing briefs or comments were filed on November 10, 2016 . . . .
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> Having carefully reviewed all briefs filed and evidence presented, we find that taken as a whole the settlement provides a reasonable resolution of all the issues raised in the consolidated dockets. We find, therefore, that the Settlement Agreement establishes rates that are fair, just, and reasonable and is in the public interest.

2016 Settlement Order at 2, 4-5.

C. The Requirement That FPL Use the SCRM to Recover Its Hurricane Irma Restoration Costs Is Consistent with the Language of the 2016 Settlement Itself.

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

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

Taken together, these two sections make clear that FPL is not to use the Reserve, and that the other parties to the 2016 Settlement cannot force FPL to use the Reserve, to address earnings impacts and issues that might otherwise result from a storm event.[2] FPL, however, has done exactly that, by paying off the Hurricane Irma storm costs with the Reserve. And, in its view of the world, FPL now gets to use the Reserve to keep the TCJA savings by disguising the dramatic windfall cost savings flowing from the TCJA as a reserve balance instead of the bonus earnings that they actually represent. FPL's scheme is contrary to the Commission's expressly articulated explanation of how the 2016 Settlement would work, as well as contrary to the FRF's and OPC's understanding and expectations. Based on these provisions, and also on FPL's representations to the Commission and on FPL's Commission-approved course of conduct, the parties reasonably expected FPL to use the Storm Cost Recovery Mechanism to recover Hurricane Irma restoration costs pursuant to Section 6 of the 2016 Settlement without reference or recourse to, and without the use of, the Reserve.

D. The 2016 Settlement Order's Requirement That FPL Use the SCRM Is Confirmed by FPL's Commission-Approved Course of Conduct Under the Substantively Identical Provisions of the 2012 Settlement in Recovering Its Hurricane Matthew Restoration Costs.

When Hurricane Matthew struck Florida in 2016, resulting in FPL incurring approximately $317 million of restoration costs, there was an approximate $250 million

[2] Given that the express limitation on consideration of the Reserve applies to any "proceeding," and that this language was approved by the 2016 Settlement Order, this provision also appears to prohibit the Commission from considering the level of the Reserve in "any proceeding" relating to FPL's recovery of Hurricane Irma restoration costs.

credit balance in the "theoretical depreciation reserve" balance under the 2012 Settlement.[3] When FPL sustained the impacts and restoration costs associated with Hurricane Matthew, FPL demonstrated and confirmed its intent, expectations, and understanding with respect to its use of the SCRM pursuant to the 2012 Settlement, which contains SCRM provisions that are substantively identical to those in the 2016 Settlement approved by the 2016 Settlement Order.[4] FPL petitioned the Commission and obtained the Commission's approval to use the SCRM to recover its Hurricane Matthew restoration costs from March

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[3] In re: Petition for Increase in Rates by Florida Power & Light Company, Docket No. 20120015-EI, Order No. PSC-2013-0023-S-EI, Order Approving Revised Stipulation and Settlement (F.P.S.C., Jan. 14. 2013).

[4] The provisions of both settlements are presented here. Section 6(c) of the 2016 Settlement provides as follows:

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

The corresponding Section 5(c) of the 2012 Settlement provides as follows:

> (c) The Parties expressly agree that any proceeding to recover costs associated with any storm shall not be a vehicle for a "rate case" type inquiry concerning the expenses, investment, or financial results of operations of the Company and shall not apply any form of earnings test or measure or consider previous or current base rate earnings or level of theoretical depreciation reserve.

The substantive provisions of these two sections are identical, the only difference being the 2012 Settlement's use of the phrase "level of theoretical depreciation reserve" and the 2016 Settlement's use of the phrase "Reserve Amount," which mean the same thing.

2017 through February 2018 via a surcharge without regard to earnings or any availability of the "theoretical depreciation reserve" as it was called in the 2012 Settlement. See In re: Petition for Limited Proceeding for Recovery of Incremental Storm Restoration Costs Related to Hurricane Matthew by Florida Power & Light Co., Docket No. 20160251-EI, Order No. 2018-0359-FOF-EI at 2-3 (F.P.S.C., July 24, 2018). The FRF participated as a party in Docket No. 20160251-EI and therein observed first-hand that FPL used the substantively identical SCRM provisions to recover its Hurricane Matthew restoration costs. In the 2016 Settlement Order, the Commission clearly stated that "The current storm damage cost recovery mechanism will continue . . . " and that the charges "will be used" for storm cost recovery under the 2016 Settlement Order. 2016 Settlement Order at 3 (emphasis supplied).

## II. FPL'S ASSERTIONS THAT THE FRF AND OPC WANT TO "POCKET THE SAVINGS" FROM AVOIDED STORM SURCHARGES AND "ALTER THE TERMS" OF THE 2016 SETTLEMENT ARE MISPLACED.

FPL asserts that the Intervenors – FRF and OPC – are "attempting to both pocket the savings from the avoided rate increases and at the same time alter the terms of" the 2016 Settlement. Initial Brief at 8. Both assertions are false.

### A. The FRF and OPC Are Not Seeking to be Unjustly Enriched by "Pocketing the Savings" from Avoiding Storm Surcharges for FPL's Irma Restoration Costs.

The FRF is not seeking to "pocket the savings" from not having to pay storm surcharges for FPL's Irma restoration costs. The FRF simply seeks the Commission's enforcement of the 2016 Settlement Order as written and as explained by the Commission

therein, i.e., that FPL must use the SCRM for recovery of its Hurricane Irma costs and live with the earnings consequences of the Order's express requirement. The Commission must also recognize that it was FPL, not the FRF and not OPC, who willfully and unilaterally violated the 2016 Settlement Order, and that FPL never bothered to even ask for the Commission's approval of its scheme.

FPL again beats the drum of the "flexibility" of the Reserve. While its use of the Reserve has some flexibility, to be sure, that flexibility does not extend to overriding the express provisions of the 2016 Settlement Order that require that the SCRM "will be used" to recover storm costs. FPL again misses the point: it is not the flexibility of the Reserve that is at issue here: it is the 2016 Settlement Order's requirement that the SCRM "will be used" by FPL to recover storm restoration costs that is determinative of the issues here. FPL willfully and unilaterally violated the 2016 Settlement Order in an effort to keep all of the TCJA savings for itself. The clear terms of the 2016 Settlement Order required FPL to use the SCRM to recover its Hurricane Irma restoration costs; FPL refused to do so, and the Commission should therefore require it to do so now (or impose the substantive equivalent on FPL), which results in dramatic overearnings for 2018 – more than $540 million – deriving from the windfall federal income tax cost reductions flowing from the TCJA. This in turns triggers the FRF's and OPC's rights under Section 11(b) of the 2016 Settlement to file their Joint Petition (joined by non-signatory FIPUG) seeking their requested review of FPL's base rates.

B. The FRF Is Not Seeking to "Alter the Terms" of the 2016 Settlement.

Contrary to FPL's claims, the FRF is not seeking to "alter the terms" of the 2016 Settlement. Rather, as explained herein, the FRF asks the Commission to apply the 2016 Settlement Order and follow the 2016 Settlement as written and as expressly explained by the Commission in the 2016 Settlement Order: the terms of the Settlement, as explained by the Commission in that Order, require that the SCRM "will be used" to recover storm costs. The FRF and OPC simply seek enforcement of this express provision of the 2016 Settlement Order: there is no suggestion of adding terms or altering the 2016 Settlement here. With proper accounting to correct for FPL's unilateral violation of the 2016 Settlement Order, FPL has been overearning since January 1, 2018, when the TCJA became effective; FPL's total overearnings are reliably estimated at $540,949,289 for 2018 – the amount by which FPL's earnings based on its refusal to apply the 2016 Settlement Order's SCRM provisions and FPL's consequential misapplication of the Reserve exceeded the 11.6 percent ROE ceiling in the 2016 Settlement. This has triggered the right of the FRF and OPC to file their Joint Petition (joined by FIPUG) requesting base rate reductions to ensure rates that are fair, just, and reasonable with full recognition of the $649.6 million per year of federal income tax cost savings that FPL realized in 2018 and is continuing to realize today. Again, the FRF and OPC simply seek enforcement of the 2016 Settlement Order to correct FPL's unilateral violation of that Order. There is no suggestion of any added term or alteration of terms here, either, because none is necessary.

In short, FPL's assertion that the FRF and OPC are attempting to add or alter the Settlement's terms is false. In a "case of the pot lecturing the kettle on cleanliness,"[5] it is FPL who is unilaterally violating the 2016 Settlement Order by attempting to subtract the SCRM provisions from the 2016 Settlement as clearly explained by the Commission in the 2016 Settlement Order.[6]

## III. THE 2016 SETTLEMENT WAS AND IS A TWO-WAY STREET: FPL'S ASSERTION THAT IT WOULD NOT HAVE ENTERED INTO THE 2016 SETTLEMENT IF IT HAD UNDERSTOOD THERE TO BE RESTRICTIONS ON ITS ABILITY TO USE THE RESERVE MAY BE TRUE; HOWEVER, IT IS EQUALLY TRUE THAT, IF THE CONSUMER PARTIES HAD NOT HAD THE TWO-WAY PROTECTION OF THE SCRM TO ENSURE EARNINGS-NEUTRAL TREATMENT OF STORM RESTORATION COSTS, THE CONSUMER PARTIES MAY WELL NOT HAVE ENTERED INTO THE 2016 SETTLEMENT, EITHER.

At page 4 of its Initial Brief, FPL asserts that without the flexibility to use the Reserve to manage its earnings, "FPL would not have entered into the Settlement Agreement." To the same effect, at page 16 of its Initial Brief, FPL claims that "The Reserve could be used to offset any category of cost and expense, and any source of revenue or reduced level of expense could be used to replenish the Reserve for the purposes

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[5] Dorothy L. Sayers, Clouds of Witness, in Three for Lord Peter Wimsey at 201, Harper & Row (1923).

[6] In doing so, FPL is in direct contravention of its obligation to uphold the 2016 Settlement. See 2016 Settlement at Section 22(c) ("No Party to this Agreement will request, support or seek to impose a change to the application of any provision hereof.)

of maintaining FPL's earnings within its authorized range and keeping customer rates stable."

These specious assertions miss the point and distract from the real issue at hand, which is FPL's unilateral violation of the 2016 Settlement Order and the 2016 Settlement by refusing to use the SCRM to recover its Irma restoration costs. This is not about a restriction on FPL's ability to use the Reserve to manage its earnings: it is about the requirement of the 2016 Settlement Order that the SCRM "will be used" to recover FPL's Irma restoration costs.

FPL's assertions simply ignore the express requirement of the 2016 Settlement Order, and the Commission's expressly articulated understanding of the 2016 Settlement that, even if reviewed as a contract, the SCRM "will be used" to recover storm restoration costs. Thus, the Reserve can properly be used to address increases or decreases in expenses for poles, conductors, transformers, power plants, and labor costs, but it cannot be used for storm restoration costs. Stated differently, this issue is not about a restriction on FPL's ability to use the Reserve to manage its earnings: it is about the requirement of the 2016 Settlement Order that the SCRM "will be used" to recover FPL's Hurricane Irma restoration costs.

In addition to being specifically and expressly consistent with the 2016 Settlement Order and the Commission's explanation of how the SCRM would work under that Order, mandatory use of the SCRM is the corresponding aspect of the 2016 Settlement's provision that no proceeding for storm cost recovery can include consideration of the Reserve to be

used to finance storm restoration cost recovery, as stated in Section 6(c) of the 2016 Settlement.

FPL has insisted that the SCRM provide for earnings-neutral treatment of storm costs, and this is exactly what the FRF understood. Section 6(c) of the 2016 Settlement provides as follows:

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

(Emphasis supplied.)

Where the 2016 Settlement prohibits a signatory[7] from arguing that FPL must use the Reserve to pay off or offset storm restoration costs, FPL cannot now be heard to argue that it can do what others cannot. FPL wants to ignore the 2016 Settlement Order's mandatory and express requirement to use the earnings-neutral SCRM treatment of its Irma restoration costs in order to keep all the TCJA savings for itself. FPL's scheme violates the 2016 Settlement Order and cannot be allowed.

In other words, when it suits FPL, FPL wants to use the SCRM to shelter its earnings from any analysis of storm costs and storm surcharge revenues – no earnings test or rate case type inquiry, and no consideration of any remaining Reserve Amount per Section 6(c) of the 2016 Settlement – but FPL inconsistently wants to ignore the SCRM, and violate the

[7] As noted above, this provision approved in the 2016 Settlement Order likely also prohibits the Commission from considering any Reserve balance in any proceeding relating to FPL's recovery of storm restoration costs.

2016 Settlement Order, when doing so would shelter its dramatic earnings increase deriving from the TCJA savings. In addition to violating the 2016 Settlement and the 2016 Settlement Order, FPL's scheme is patently inconsistent and cannot be allowed. And again, of course, FPL never sought or obtained the Commission's approval for its scheme.

## IV. FPL'S REPETITIVE CLAIMS TOUTING "RATE STABILITY" ARE MISLEADING AND INCOMPLETE: FPL STUDIOUSLY IGNORES FPL'S REAL MOTIVE, WHICH IS TO MAINTAIN "REVENUE STABILITY" FOR FPL AT THE TOP OF ITS ROE RANGE BY MAINTAINING ITS CURRENT BASE RATES AT UNFAIR, UNJUST, AND UNREASONABLE LEVELS.

In its Initial Brief, FPL touts the benefit of "rate stability" over and over and over and over again. See FPL's Initial Brief at 2, 3, 5, 7, 16, 18, and 21. While it is true that FPL's base rates did not change in March 2018, and that FPL did not impose a storm surcharge to recover Hurricane Irma costs, this is only half of the story. As the FRF noted in its Initial Brief, in this context it is critical that the Commission "follow the money" that FPL is attempting to keep for itself and its sole shareholder. The "unique opportunity" touted by FPL at page 6 of its Initial Brief was much more than an opportunity to avoid a storm surcharge: it was a unique opportunity for FPL to try to shelter the windfall tax cost savings flowing from the TCJA so that FPL could keep all the money for itself and NextEra, for much longer than the time that would have been required to fully offset its Irma storm costs.

A. Rate Stability for Customers Equals Revenue Stability – at Excessive, Unfair, Unjust, and Unreasonable Rates – for FPL.

The "rest of the story" has at least two chapters: The first is that the direct consequence of FPL's much-vaunted "rate stability" is "revenue stability" for FPL, at rates that were based on federal income taxes that were $649.6 million per year greater when FPL's current base rates were set than they are now. In other words, the "stable" rates that FPL wants to maintain are vastly out of line with FPL's costs.

The "fair, just, and reasonable rates" established by the 2016 Settlement and approved as "fair, just, and reasonable" in the 2016 Settlement Order were based on, and included, federal income tax costs for FPL calculated using a 35 percent federal corporate income tax rate. The $649.6 million per year reduction in FPL's income tax costs is nearly 1.5 times FPL's entire earnings range of 9.6% to 11.6% (roughly $446 million per year) allowed under the 2016 Settlement. This $649.6 million per year cost reduction also represents nearly 10 percent of FPL's total 2018 adjusted base revenues ($6.823 billion), and nearly 6 percent of FPL's total 2018 jurisdictional revenues, including all clause revenues, which were $11.148 billion for 2018 (December 2018 ESR, Schedule 2, page 2). Again, taking as true the Commission's determination that the rates approved by the 2016 Settlement Order were "fair, just, and reasonable," it is facially obvious that FPL's current rates, predicated on those dramatically greater income tax costs, are neither fair, nor just, nor reasonable. Interpreting the 2016 Settlement Order and the 2016 Settlement in the public interest, the Commission must enforce the Order as written and ensure that FPL's customers pay only fair, just, and reasonable rates. This can best be accomplished by the

principled examination of FPL's base rates requested by the FRF, OPC, and FIPUG in their Joint Petition.

B. FPL's Reference to "Similar Treatment" Applied by Tampa Electric Company and Duke Energy Florida to Use TCJA Savings to Avoid Storm Surcharges Is Misleading and Incomplete.

A second chapter of the "rest of the story" flows from FPL's misleading and incomplete characterization of the FRF's, OPC's, and other consumer parties' agreements with Tampa Electric Company and Duke Energy Florida with regard to storm cost recovery using TCJA savings. At page 7 of its Initial Brief, FPL states that "OPC and other intervenors thereafter took similar steps with Tampa Electric Company ("TECO") and Duke Energy Florida ("Duke") to use tax savings to avoid storm surcharges for millions of Floridians." FPL's claim regarding similar treatment for the storm restoration costs incurred by TECO and Duke is grossly misleading because, like FPL's touting of "rate stability," it ignores the rest of the story.

Where OPC and other intervenors, including the FRF, did indeed agree with TECO and Duke for the use of tax savings to offset the need for storm surcharges, there is a vast and dramatic difference, conveniently and completely ignored by FPL, between those agreements with TECO and Duke as compared to FPL's scheme. In the first instance, TECO and Duke met with all parties to their prior settlements to negotiate the new agreements providing for use of TCJA savings to functionally pay off, or offset, those utilities' storm costs. FPL did not. More significantly, both TECO and Duke sought and obtained the Commission's approval for using TCJA savings for that purpose. Again, FPL did not. The most significant substantive difference, though, is that both TECO and Duke

agreed that, once their storm costs were fully offset by the TCJA savings, they would immediately reduce base rates correspondingly. TECO's base rates have already been thus reduced effective as of January 2019. In re: Consideration of the Tax Impacts Associated with Tax Cuts and Jobs Act of 2017 for Tampa Electric Company, Docket No. 20180045-EI, Order No. PSC-2018-0457-FOF-EI at 2-3 (tax savings used to offset TECO's 2015-2017 storm restoration costs followed by permanent base rate reductions to reflect TCJA savings effective with the first billing cycle of January 2019). Duke's similar agreement to reduce its base rates has also been approved by the Commission. In re: Application for Limited Proceeding for Recovery of Incremental Storm Restoration Costs Related to Hurricanes Irma and Nate, by Duke Energy Florida, LLC, Docket No. 20170272-EI, Order No. PSC-2018-0103-PCO-EI at 3. ("Once the final approved actual storm recovery amount has been recovered, or offset, DEF shall reduce base rates in the manner prescribed in the 2017 Settlement.") FPL has not agreed to any base rate reductions to reflect its lower federal income tax costs, under any circumstances.

FPL's assertion regarding "similar treatment" is misleading and incomplete: If adopted by FPL, the Duke-TECO approach would have kept FPL's rates unchanged, followed by permanent base rate reductions once the amortization of its Hurricane Irma restoration costs was complete, yet FPL is simply trying to keep all the TCJA savings – i.e., all the money – for itself and NextEra for as long as possible, i.e., through 2020 or 2021 (or longer).

## V. THE 2016 SETTLEMENT ALLOWS FPL TO CONTINUE TO USE THE RESERVE BEYOND THE MINIMUM TERM IF FPL NOTIFIES THE PARTIES THAT IT WILL NOT SEEK INCREASED BASE RATES TO BE EFFECTIVE IN 2021. AS A POINT OF CLARIFICATION, THIS "EXTENSION" OF FPL'S ABILITY TO USE THE RESERVE DOES NOT IN ANY WAY LIMIT THE CONSUMER PARTIES' ABILITY TO PETITION FOR NEW BASE RATES TO BE EFFECTIVE AS OF JANUARY 1, 2021.

FPL attempts to make much of its claim that flexible use of the Reserve or ARM will provide rate stability for customers for a longer period of time. For example, at page 4 of its Initial Brief, FPL says that "the flexibility of the ARM could extend FPL's ability to operate under the Agreement for at least one additional year beyond the Minimum Term." The FRF wishes to clarify that FPL's ability to use the Reserve beyond the Minimum Term, in accord with the conditions set forth in the 2016 Settlement, is only that. The 2016 Settlement does not grant FPL any right to extend the 2016 Settlement itself, nor does it limit the FRF's or OPC's or any other signatory's rights to seek base rate reductions to be effective upon the end of the Minimum Term, i.e., for new rates to be effective on January 1, 2021, immediately following the expiration of the Minimum Term. See Section 12(c) of the 2016 Settlement.

## VI. AS A POINT OF CLARIFICATION, FPL NEVER CONSULTED WITH THE FRF REGARDING ITS PLANS TO USE THE RESERVE TO WRITE OFF ITS HURRICANE IRMA COSTS.

FPL alleges in its Initial Brief that, in January 2018, "FPL executives personally met with OPC to review the accounting details of FPL's approach. At that time, OPC expressed its concurrence with FPL's approach under the terms of the Settlement

Agreement." OPC will answer for itself with respect to this allegation; however, the FRF wishes to clarify this point: FPL never discussed its plan with the FRF before FPL made the accounting entries to implement its scheme, or before either the FPL Tax Docket or the FPL Irma Storm Docket were opened.

## VII. FPL'S ASSERTION THAT THE FRF AND OPC SHOULD HAVE KNOWN ABOUT THE POSSIBILITY OF FEDERAL TAX LEGISLATION IS SPECIOUS AND IRRELEVANT.

FPL asserts, at page 21 of its Initial Brief, that the FRF and OPC should have known about the possibility of federal income tax reform legislation. This specious argument is utterly irrelevant here. First, the Commission did not address possible tax reform in the 2016 Settlement Order, and thus possible tax reform is completely outside the scope of that Order. Second, FPL does not claim that the parties to the 2016 Settlement discussed the possibility of tax reform legislation, because no such discussions occurred. Finally, if FPL now claims that it knew about it and contemplated its present course of action – trying to keep all the TCJA savings for itself – when it negotiated the 2016 Settlement with the signatories, then the signatories would likely assert lack of good faith, and possibly fraud in the inducement to enter the 2016 Settlement. (For clarity, the FRF does not believe that FPL considered the possibility of windfall tax savings in negotiating the 2016 Settlement, but this disproves FPL's argument that the FRF and OPC should have known about it.)

## CONCLUSION

As explained above, FPL willfully and unilaterally violated the express and mandatory terms of the Commission's 2016 Settlement Order by refusing to use the SCRM to recover its Hurricane Irma restoration costs. The Commission should enforce the Order and require FPL to use the SCRM for its Irma costs or, considering that FPL has now violated the Order for more than a year, impose substantively equivalent results on FPL. FPL's arguments largely miss the point: where FPL argues for the flexibility of the Reserve, it completely misses the point that the 2016 Settlement Order requires it to use the SCRM. With proper accounting in compliance with the 2016 Settlement Order, FPL has been overearning since January 2018, and the Commission must enforce the Order as the Commission explained its meaning therein. The ultimate correct path is to grant the Joint Petition filed by the FRF, OPC, and FIPUG for the principled review of FPL's base rates – a general rate case – to ensure that FPL's rates are fair, just, and reasonable with full recognition of the $649.6 million per year of TCJA savings that FPL continues to realize.

Respectfully submitted this 8th day of March, 2019.

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic mail on this 8th day of March, 2019, to the following:

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