

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of:

DOCKET NO. 20180046-EI

CONSIDERATION OF THE TAX
IMPACTS ASSOCIATED WITH TAX
CUTS AND JOBS ACT OF 2017
FOR FLORIDA POWER & LIGHT
COMPANY.

VOLUME 2
PAGES 75 through 147

PROCEEDINGS: HEARING

COMMISSIONERS
PARTICIPATING: COMMISSIONER JULIE I. BROWN
COMMISSIONER DONALD J. POLMANN
COMMISSIONER GARY F. CLARK
COMMISSIONER ANDREW GILES FAY

DATE: Tuesday, April 16, 2019

TIME: Commenced: 1:00 p.m.
Concluded: 2:45 p.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: DEBRA R. KRICK
Court Reporter

APPEARANCES: (As heretofore noted.)

PREMIER REPORTING
114 W. 5TH AVENUE
TALLAHASSEE, FLORIDA
(850) 894-0828

1 P R O C E E D I N G S

2 (Transcript follows in sequence from
3 Volume 2.)

4 COMMISSIONER BROWN: Thank you. Thank you so
5 much for being here today, everybody. It's nice to
6 see you all.

7 We are here on April 16th. The time is 1:01.
8 We are in the FPL tax docket, and I would like to
9 call this hearing to order.

10 And with that, staff, can you please read the
11 notice?

12 MS. BROWNLESS: Yes, ma'am.

13 By notice issued on March 19th, 2019, by the
14 Commission Clerk, this time and place has been set
15 for the Commission -- for the continuation of
16 hearing in Docket No. 20180046-EI.

17 The purpose of this hearing is to hear oral
18 argument so the Commission can take final action
19 regarding the tax impacts on Florida Power & Light
20 Company resulting from the passage of the Tax Cuts
21 and Jobs Act of 2017, and to take action on any
22 motions or other matters pending at the time of the
23 hearing.

24 COMMISSIONER BROWN: Thank you, Ms. Brownless.

25 At this time, we will go ahead and take

1 appearances starting with Florida Power & Light.

2 MR. LITCHFIELD: Thank you, Madam Chair.

3 Wade Litchfield, General Counsel for Florida
4 Power & Light. And I am privileged to be here
5 appearing on behalf of the company alongside Maria
6 Moncada and John Butler.

7 COMMISSIONER BROWN: Thank you.

8 FIPUG.

9 MR. MOYLE: Good morning, Jon Moyle on behalf
10 of --

11 COMMISSIONER BROWN: Afternoon.

12 MR. MOYLE: -- the Florida Industrial Power
13 Users Group, FIPUG. And I would also like to make
14 an appearance for Karen Putnal with our firm, and
15 also Ian Waldick, who is here, his first time at
16 the -- at the Commission, and he is also with our
17 firm and I would like to make an appearance for him
18 as well.

19 Thank you.

20 COMMISSIONER BROWN: Well, it's nice to have
21 you both here today.

22 FEA.

23 CAPTAIN FRIEDMAN: Good afternoon, Captain
24 Robert Friedman on behalf of the Federal Executive
25 Agencies.

1 COMMISSIONER BROWN: Thank you.

2 FRF.

3 MR. WRIGHT: Thank you, Madam Chairman.

4 Robert Scheffel Wright, Gardner Law Firm,
5 appearing on behalf of the Florida Retail
6 Federation. I would also like to enter an
7 appearance for my law partner, John T. LaVia, III.
8 Thank you.

9 COMMISSIONER BROWN: Thank you.
10 Office of Public Counsel.

11 MR. REHWINKEL: Good afternoon, Charles W.
12 Rehwinkel, Deputy Public Counsel. And I would like
13 to enter an appearance for J.R. Kelly, the Public
14 Counsel, and Patty Christensen and Thomas A. David
15 with the Office of Public Counsel --

16 COMMISSIONER BROWN: Thank you.

17 MR. REHWINKEL: -- on behalf of the customers.
18 Thank you.

19 COMMISSIONER BROWN: Thank you.
20 Commission staff.

21 MS. BROWNLESS: Suzanne Brownless on behalf of
22 Commission staff.

23 COMMISSIONER BROWN: All right.

24 MS. HELTON: And Mary Anne Helton. I am here
25 as your advisor, along with your General Counsel,

1 Keith Hetrick.

2 COMMISSIONER BROWN: Appreciate it.

3 All right. We will go into preliminary
4 matters at this time.

5 Ms. Brownless.

6 MS. BROWNLESS: This is the continuation of
7 the hearing held in this docket on February 5th,
8 2019, per Order No. PSC-2019-0050-PHO-EI, issued on
9 January 29th, 2019.

10 All parties are here today to present oral
11 argument on Issues No. 18 and 19, followed by
12 questions from the Commissioners.

13 Issue No. 18 is: Does the 2016 settlement
14 agreement allow FPL to credit the amortization
15 reserve with the tax savings resulting from the Tax
16 Cuts and Jobs Act of 2017?

17 Issue No. 19 is: How should the savings
18 associated with the Tax Cuts and Jobs Act of 2017
19 be treated?

20 After oral argument, the record in this docket
21 will be closed, the matter will be taken under
22 advisement and these issues will be taken up at the
23 May 14th, 2019, Agenda Conference.

24 COMMISSIONER BROWN: Great. Thank you.

25 Is everyone clear on the posture that we are

1 in? Okay.

2 Are there any other preliminary matters?

3 Seeing none, we are going to go ahead and go into
4 the oral arguments.

5 And so I just want to remind everyone that, at
6 this time, each side has 40 minutes. I have a
7 little timer here. I am pretty stringent with it,
8 but I will try to be a little bit more flexible
9 than I am usually, but 40 minutes, okay?

10 So we will start with Florida Power & Light,
11 followed by Office of Public Counsel, followed by
12 FEA, FRF and FIPUG, unless the parties have another
13 order that they would like to go.

14 MR. REHWINKEL: I just -- Madam Chairman, I
15 just wanted to make sure I understand the ground
16 rules, is FPL will go first, our side will go after
17 that, and we will be done. There is no rebuttal or
18 responsive argument, is that -- is that correct?

19 COMMISSIONER BROWN: Well, the -- I don't
20 think Florida Power & Light has asked for a period
21 of time for rebuttal of the minutes that they've
22 been allocated, but they are more than welcome to
23 ask for that if they reserve a period of time for
24 rebuttal. So I will --

25 MR. LITCHFIELD: Yeah, Madam Chair, I was

1 going to -- I was going to make sure that that, in
2 fact, was the case, because I intend not use all of
3 my 40 minutes on the front end and reserve some,
4 and would appreciate knowing how much clock I have
5 left when I finish.

6 COMMISSIONER BROWN: That's standard. And so
7 again, I will measure each of your time periods and
8 see what time period you all are ultimately a
9 little bit -- a little bit over, and then I will
10 give Florida Power & Light the same amount of time
11 that's left over, as well as whatever they have
12 left over.

13 MR. REHWINKEL: Okay. But is -- just to be
14 clear, and I am just asking to understand, is that
15 if this side uses 35 minutes, we are done
16 regardless?

17 COMMISSIONER BROWN: Yes.

18 MR. REHWINKEL: Okay. Thank you.

19 COMMISSIONER BROWN: And again, everybody had
20 40 minutes to begin with. I know the parties
21 stressed that they wanted a little bit more time.
22 I am more than willing to give just a little bit
23 more time, as I mentioned in the prehearing
24 conference. So -- but a little is just the
25 underlying measure.

1 MR. REHWINKEL: I think we are all positioned
2 to meet the deadline. And we greatly appreciate
3 your latitude in expanding the time to 40, so thank
4 you.

5 COMMISSIONER BROWN: You are welcome.

6 MR. LITCHFIELD: And a I am quite sure that if
7 I ask for more than 40 minutes, Ms. Moncada is
8 going to kick me in the ankle.

9 COMMISSIONER BROWN: All right. So with that,
10 Mr. Litchfield, you have the floor.

11 MR. LITCHFIELD: Thank you, Madam Chair.

12 Thank you for the time to present here today,
13 Commissioners. This is a significant issue, and it
14 has been fully briefed, and so I am obviously not
15 going to cover everything that we addressed in our
16 briefs. They are there for your reading leisure
17 and pleasure.

18 But I do want to start out with one very
19 straightforward point, and that is this, that the
20 structure of the settlement agreement that was
21 approved by this commission, ultimately upheld by
22 the Florida Supreme Court as being in the public
23 interest, is simple, it's straightforward and it's
24 well understood.

25 And just to lay out the highlights of that

1 agreement in terms of the structure, with very
2 limited and specific exceptions, FPL's base rates
3 are to remain unchanged, at least through the
4 minimum term, and with the possibility for an
5 extension thereafter, but at least through the
6 minimum term.

7 Consistent also with prior settlement
8 agreements of this nature involving FPL, a
9 mechanism was approved that, subject to certain
10 limitations, allows Florida Power & Light to
11 recover storm restoration costs through a surcharge
12 mechanism.

13 An earnings band was established, which is
14 typical in all of the deals that we have had before
15 this commission and approved. The range
16 established 9.6 to 11.6 return on equity. Only if
17 earnings fall above or below that range does any
18 signatory to the agreement have the right to seek
19 to adjust those base rates. That's clearly laid
20 out in Section 11 of the settlement agreement.

21 Also with past settlement agreements, in this
22 one as well, we incorporated, and you approved, a
23 flexible amortization tool. The amortization
24 reserve mechanism, also referred to in most of the
25 parties' briefs as the ARM, A-R-M. And that was

1 made available, established in order to help FPL
2 stay within that authorized range of earnings, plus
3 or minus 100 basis points.

4 It accomplishes this, and we are able to
5 accomplish this at the company by offsetting the
6 impact of unforeseen ups and downs in costs and
7 revenues from whatever source. And we do that by
8 offsetting those ups and downs against this
9 reserve.

10 The mechanism allows the company -- excuse me,
11 the agreement allows the company, through the ARM,
12 to book or reverse additional depreciation expense
13 that has the effect of increasing or decreasing the
14 company's depreciation, or earned rate return, in a
15 way that allows us to stay within that range of
16 earnings. It's a mechanism that is well known to
17 the Commission. It's been used extensively over
18 the last three settlement agreements. In fact,
19 from 2013 to 2017, FPL recorded a reversal in the
20 ARM in 26 different months, all of which were
21 reflected in the ESRs.

22 Section 12(c) of the agreement is pretty
23 particular, and I am going to quote just one phrase
24 from that at this point, and with regard to that
25 ARM, it says: The amounts to be amortized in each

1 year of the term are left to FPL's discretion
2 subject to the following conditions. And there are
3 three listed in 12(c).

4 The first one, we have to amortize at least
5 the amount of the reserve that was left over after
6 the prior settlement agreement. Now, this is about
7 a \$250 million amount that was left over from the
8 prior settlement, remained a positive in the
9 reserve and we were able to roll it over into this
10 agreement for its beneficial access.

11 Secondly, we have to -- FPL has to amortize at
12 least enough to keep us to the bottom of the range.
13 In other words, nobody wants a situation where the
14 company has reserve available to it, is
15 underearning, but then comes to the Commission and
16 asks for a base rate increase. No, we have to
17 amortize at least an amount sufficient to get us to
18 the bottom of the range.

19 Similarly, or conversely, we have to amortize
20 no more than would take us to the top of the range.
21 In other words, we can't amortize any more from the
22 reserve that would push us north of that range and,
23 therefore, out of the band.

24 So those are the three conditions. They are
25 simple. They are straightforward. They have been

1 essentially the same conditions in the last three
2 agreements. They are written in plain English.
3 There are no other limits, no distinctions or
4 limitations as to the reason for the use of the ARM
5 or for the source of the unforeseen changes in
6 costs or revenues.

7 Now, there are a couple of changes to this
8 agreement that I want to highlight, and they are
9 interesting, and they are relevant to the
10 discussion.

11 The first is, as we have over the past three
12 settlements -- leading up to this one, the prior
13 two settlements, we had both debited and credited
14 the reserve in order to stay within the range.
15 That had been a matter of course.

16 And so in this particular set of negotiations,
17 and you see this reflected in the agreement itself,
18 the parties asked for -- the other signatories
19 asked us, and we agreed, to provide a report in
20 December of each year that detailed the monthly
21 credits and debits to the reserve, to do that on a
22 monthly basis and also show it on an annual basis.
23 And we said, fine, of course. We will do that.
24 It's what we have been doing. Happy to document
25 it. And, in fact, we provided that report along

1 with our December 2016 earnings surveillance
2 report -- 2018 earnings surveillance report this
3 past year.

4 So the other change is also very significant,
5 also appears in the bottom end of that paragraph,
6 12(c), and it's this: We agreed with the parties
7 that, again, similar to at the end of the last
8 agreement, if there were surplus or reserve
9 remaining at the end of the minimum term, that if
10 we think, if we at FPL think it might be sufficient
11 to enable us not to come in and ask for an increase
12 in base rates at the end of the minimum term -- in
13 other words, that we could stay out for an
14 additional year and defer a base rate increase --
15 that we could continue to have access to that
16 remaining reserve amount, just like we were
17 operating under the agreement today, provided we
18 send notice to the Commission and all the parties
19 of our intent not to come in and seek higher
20 increased base rates the day after the minimum term
21 expires.

22 So pretty significant term. And, again,
23 underscores the importance of the reserve in terms
24 of positioning us to potentially stay out a year
25 longer.

1 So you might ask how is it that the company
2 can wind up with a positive balance at the end of a
3 minimum term, or for that matter at the end of in a
4 year.

5 It's pretty simple, really. We have more
6 sales than expected, maybe due to hotter than
7 average weather. We have lower O&M expenses, maybe
8 due to increased or improved productivity at the
9 company. We have lower costs of any nature. And
10 as I said, a combination of those factors resulted
11 in about \$250 million remaining in the reserve at
12 the expiration of the last settlement agreement,
13 which we rolled over into this agreement.

14 So Irma rolled through the state, and a lot of
15 people are still dealing with the effects of that
16 hurricane. We spent about \$1.3 billion in storm
17 restoration costs, all with a view to getting our
18 customers back on line as quickly and as safely as
19 possible.

20 We used the provisions of the settlement
21 agreement. It was an unforeseen expense. We used
22 the provisions of the settlement agreement to
23 effectively avoid having to request the Commission
24 to impose a surcharge on our customers. It would
25 have initially been \$4. We project it would

1 increase to \$5, but roughly, that level of charge
2 on a thousand kilowatt hour bill for about three
3 years.

4 We were able to avoid that entirely. We
5 treated as an increased expense, an unforeseen
6 increased expense, and we offset it -- to the
7 extent that we had sufficient reserve available, we
8 offset as much of that as we could using the
9 reserve. And we maintained ourselves within the
10 authorized range, and now we are able to, and have
11 begun to replenish the reserve as permitted, which
12 again will position us to defer base rates increase
13 by at least one year beyond the minimal term.

14 So these are three positives, right? A good
15 thing, a good thing and a good thing. I have got
16 checks beside all of them, and all of them are
17 either expressly provided for or clearly
18 contemplated by the current settlement agreement.

19 And so today, Commissioners, we are actually
20 booking additional depreciation expense, and this
21 is credited to the reserve, it's replenishing the
22 reserve. But this -- the effect of this in terms
23 of rate base is actually to lower rate base. We
24 are actually lowering plant in-service by
25 replenishing the reserve, or lowering rate base.

1 It's not -- these are not being dividended to
2 shareholders. Let me be clear about that. This is
3 on our books as a reserve. It is useful in all
4 respects under the terms of the settlement
5 agreement. And this is no different than any other
6 condition that has allowed us to replenish the
7 reserve during the term of any of the settlement
8 agreements.

9 And as I said, it's expected that we will be
10 in a position to, at the end of the minimum term,
11 defer the need for incremental or increased base
12 rates by at least one additional year. All
13 positives.

14 So this is the straightforward, transparent
15 explanation that we provided to the Commission, we
16 provided to investors and we provided to OPC. This
17 is not a complicated issue. It's not a complicated
18 use of the ARM. It is precisely what the ARM was
19 designed and approved to accomplish. What it was
20 built for, Commissioners.

21 Now, at the February 6th Agenda Conference,
22 there was not a single objection by any of the
23 signatories to the settlement agreement along the
24 lines of what you have read in the briefs or what
25 you may hear today. Not one.

1 This level of outrage that we perceive when we
2 read the briefs, and that we may hear today, really
3 was more than a year, almost a year in the making.
4 So far there really hasn't been an attempt by any
5 of the intervenors to explain why it took them so
6 long to decide to take these positions. We may
7 hear today, but so far not a word. It can't be
8 that they did not understand the accounting. There
9 have been no such allegations. It can't be that
10 there is new recently discovered information.
11 There have been no allegations of that. And I can
12 only conclude at some point somebody talked to
13 somebody, who talked to somebody else, and they
14 finally got together and they decided, you know,
15 what's the harm? Let's take a shot at this.
16 What's the downside?

17 Well, at that point, you have got to come up
18 with a theory. And, boy, they have worked -- they
19 have worked at coming up with theories. Any
20 theory. Let's declare the company to be in
21 violation the agreement. Well, let's have the
22 Commission read the agreement differently. Well,
23 let's say that the plain language of the meaning
24 means X, not Y. Let's talk about public policy or
25 public interest. So any number of theories, many

1 of which are internally inconsistent, incoherent
2 and simply a conflation of issues.

3 The last one that I thought was fascinating
4 was that there just not have been a meeting of the
5 minds. And yet when I pick up the settlement
6 agreement, I don't see the signature of the lawyer
7 who made that allegation on this document, so I am
8 pretty sure his mind was not involved in any of
9 this discussion or in the expression of the
10 parties' will in this settlement agreement.

11 So basically, Commissioners, their
12 positions -- and I say this respectfully, look,
13 they take positions on behalf of their clients, but
14 it's my job to really take those position as part
15 and analyze them. And my view is, right, that they
16 are contradictory. They are conflations. And they
17 reflect, in my view, the difficulty that they have
18 had in putting together a coherent, credible case
19 to support their position. One that, at the same
20 time, doesn't actually result in the signatories
21 violating Section 22 of the agreement. And I won't
22 read it to you. It's there for your referral. But
23 I think it has been challenging in that regard for
24 them to get there.

25 As I said, they initially argued that FPL had

1 breached the settlement agreement. They've argued
2 that their interpretation is correct on the plain
3 language of the settlement agreement. That's
4 replete throughout their briefs. But they've also
5 introduced a range of extrinsic evidence in the
6 form of testimony from FPL witnesses in proceedings
7 that the company's intent was, in fact, to use the
8 storm cost recovery mechanism in order to recover
9 storm costs, and that somehow this is going to
10 transform what is a permissive option into an
11 obligation to surcharge our customers.

12 So when we presented intervenors with what I
13 think are basic well-established principles of
14 contract interpretation or construction in support
15 of the settlement agreements plain language, they
16 dismiss these principles as inapplicable even
17 arcane.

18 Now, you know, I hadn't used arcane in a while
19 so I Googled it. And the first thing that pops up
20 on the Google search is: Understood by few,
21 mysterious or secret.

22 Well, I don't think there is anything -- I
23 think a lot of people, most people understand basic
24 principles of contract construction. I certainly
25 think this commission does. And I don't think they

1 are mysterious or secret as far as the Supreme
2 Court is concerned. These are basic principles in
3 play.

4 But they moved past that, and what they want
5 the Commission now to focus on is this notion of
6 official commission policy. And that by doing so,
7 I think they intend to convey that somehow the
8 actual words of the settlement agreement mean less,
9 that we are now into the realm of policy and it's a
10 little -- a little more vague.

11 But they take this position in spite of -- and
12 I will refer you to a Footnote 1 in Public
13 Counsel's reply brief, where they note that the
14 Commission expressly -- and I quote -- "expressly
15 adopts and incorporates the terms of the settlement
16 agreement." Expressly adopts and incorporates the
17 terms of the settlement agreement. Footnote 1, OPC
18 reply brief.

19 So, Commissioners, whether -- whether
20 intervenors are arguing about specific
21 interpretations of specific provisions of the
22 settlement agreement, or whether they are arguing
23 about specific interpretations of specific
24 provisions of the settlement agreement that was
25 expressly adopted and incorporated by the

1 Commission as its official policy, we are hard
2 pressed to see much of a distinction there.

3 At the end of the day, what they are asking
4 you to do, Commissioners, is to read into the
5 settlement agreement a mandatory use of the storm
6 cost recovery mechanism to recover storm costs.
7 And they also are asking you, at the end of the
8 day, to remove from the settlement agreement the
9 continued use of an access -- of the ARM and access
10 to the reserve. Without these two changes,
11 intervenors' arguments fail substantively. They
12 fail mathematically.

13 But regardless, Commissioners, of how the
14 intervenors are actually formulating their
15 arguments, they are really all trying to land in
16 the same destination, to have the settlement
17 agreement effectively rewritten, reformed, revised,
18 modified and, as I mentioned earlier, even
19 rescinded. I really don't think they care how that
20 occurs, just so long as FPL is told two things:

21 One, that we have to surcharge our customers
22 for storm costs. And that's even when we might be
23 earning at the top end of the range, and even when
24 such a case would result in termination of an
25 agreement that has been found as being in the

1 public interest.

2 And secondly, that despite the plain language
3 of this agreement, they want the Commission to
4 include that FPL no longer has the flexible and
5 discretionary use of the ARM to be able to debit
6 and credit the reserve as spelled out in the
7 agreement, and at FPL's discretion, in order to
8 fulfill the purpose of the agreement for us to stay
9 within the authorized range.

10 I want to address this second contention
11 first. Nowhere -- that is, that the ARM is simply
12 gone.

13 Nowhere in the plain language of the
14 settlement agreement does it state that the ARM
15 would be extinguished. Nowhere. There is not even
16 a close synonym to anything like that. You know, a
17 dramatic, and even Draconian outcome like that
18 certainly would have warranted expressed language.

19 Our -- Public Counsel's position is that once
20 we use the amount then available at the time, we
21 closed out not only the available dollars in the
22 reserve, but the actual mechanism itself. So
23 apparently leaving \$1 in the reserve would have
24 avoided this major problem. And that,
25 Commissioners, illustrates the absurdity of this

1 position.

2 Now, it is true that we have access through
3 the reserve to no more than the amount that exists
4 in the reserve at that time. That is absolutely
5 true. So if there is zero, we have -- we have the
6 ability to draw nothing from the reserve. If there
7 is a dollar, we have the ability to draw a dollar.
8 But that reserve gets replenished if, as I
9 mentioned earlier, revenues are higher than
10 projected, expenses are lower than projected, and
11 that reserve can move up, and then we have access
12 to the full amount that is in the reserve at that
13 time. For what purpose? The purpose of the
14 agreement, to help us stay within the 200 basis
15 point band. Simple as that.

16 So to address the contention that FPL has to
17 surcharge its customers for Irma storm restoration
18 cost, so I am going to do this based on the plain
19 language of the settlement agreement, on the
20 logical intent of the settlement agreement as well
21 as public policy and interest. I am going to cover
22 the water front, because that's effectively all of
23 the arguments that the intervenors combined are
24 making with respect to the storm cost recovery
25 mechanism.

1 First, as a matter of plain language. Again,
2 nowhere in Section 6 does it state that FPL must
3 use it. It is -- it is optional. It is -- it is
4 optional. Nowhere does it require us to use it.
5 Nothing precludes FPL from petitioning the
6 Commission. That's the language. Doesn't
7 translate in English or any language to, quote,
8 "FPL shall be required." It just does not
9 translate.

10 Section B of -- or subsection (b) of Section
11 6, in fact, makes clear the permissive nature of
12 storm recovery. If the storm is big enough, the
13 settlement agreement says, FPL may, open quote, may
14 petition for a larger than \$4 per thousand kWh
15 surcharge. That's the plain language,
16 Commissioners.

17 As to the intent -- as to the intent, it
18 really defies logic to believe that the parties who
19 were negotiating this agreement felt that they were
20 negotiating an obligation rather than a right.
21 When you read the language -- and by the way, where
22 meaning isn't otherwise plain and obvious -- and we
23 do think it is plain and obvious -- but where
24 meaning isn't already plain and obvious, language
25 still matters in order to discern intent --

1 COMMISSIONER BROWN: You are at 20 minutes.

2 MR. LITCHFIELD: Thank you.

3 Where one is drafting language to memorialize
4 an obligation, we typically expect to see lawyers
5 use words like must, shall and required. They do
6 not exist in the document.

7 And further, the fact that FPL's witnesses at
8 points indicated, yes, it is our intent to use the
9 storm cost recovery mechanism to recover storm
10 costs, that does not transform it into an
11 obligation.

12 Now, to policy. Commissioners, how can we
13 reasonably believe that it would have been the
14 Commission's policy that, notwithstanding the
15 absence of any other language to this effect in the
16 settlement agreement, or the order itself, that in
17 all cases, irrespective of the size of the storm,
18 irrespective of the fact that the company might be
19 earning at the top of its range due to, as I said,
20 hotter than normal weather, due to lower expenses,
21 that, in all such cases, we would be forced to put
22 a surcharge in place rather than absorb those costs
23 with the reserve if available, or to the extent
24 available, in order to remain within the range, and
25 in order to maintain the integrity of the agreement

1 and the agreement in place.

2 It is simply implausible to believe that that
3 would have been the Commission's policy. Policy,
4 after all, has to make some sense. That simply
5 doesn't make any sense.

6 To public interest. Public interest is
7 obviously an important concept in regulatory
8 discussion. Clearly important. But I want to be
9 careful about noting what the intervenors are
10 actually asking you to do, and I will start by
11 saying this:

12 Public interest, whatever it is, it isn't
13 this. You cannot use public interest as an active
14 independent screen through which a settlement
15 agreement and its provisions are given new terms or
16 new words or, conversely, to take and eliminate
17 terms and words from a settlement agreement.
18 That's not really a function of public interest.

19 When the Commission assessed the agreement,
20 you certainly looked at the individual elements and
21 provisions individually, but you signed off on and
22 approved the agreement as in the public interest on
23 the whole. That's the same way that the court
24 upheld it, was on the whole, taking into account
25 your review as well.

1 The signatories supported the agreement as
2 being in the public interest. Again, there might
3 have been some provisions that they were less fond
4 of, others that they were more fond of. Same thing
5 with regard to FPL, but as a whole, they supported
6 this as public -- as being in the public interest.

7 Even the non-signatories who are here today
8 who took no position did not oppose it on any
9 grounds, including public interest. And as I said,
10 the court upheld it. Yet, it's really in this last
11 broad realm of public interest that the intervenors
12 throw really the rest of their arguments.

13 They assert that the passage of the Tax Cut
14 and Jobs Act in December of '17 is a changed
15 circumstance that they believe justifies
16 redrafting, reopening, revisiting, reinterpreting,
17 modifying the settlement agreement, even
18 terminating it. They just cannot plausibly claim
19 that tax reform was completely unforeseen. It was
20 one of the hottest topics during the presidential
21 debate. One of the hottest topics. So it's just
22 implausible, Commissioners.

23 But even so, that change of circumstance, it
24 is a change in cost. That is precisely the type of
25 unforeseen circumstance, generically speaking, that

1 the ARM and the band are designed to, have
2 addressed and are expected to address going
3 forward. There is no distinction as to the source
4 of cost savings, or the source of incremental
5 revenues. In fact, those mechanisms are, frankly,
6 quite neutral with respect to the source of the
7 cost, even the magnitude of the costs, because you
8 have 200 basis points, right. And if the magnitude
9 is such that it pushes you above or below, well,
10 then there are rights clearly spelled out in the
11 agreement.

12 So they point to other settlement agreements
13 as a basis for the Commission to modify or
14 terminate our settlement agreement. And this also
15 is really not very availing.

16 We all know that what parties choose to focus
17 on in negotiating agreements is really a subject to
18 the dynamics of the agreement -- of that particular
19 situation itself. Every settlement agreement is
20 different. Every utility makes decisions based on
21 its own operating needs and conditions. Every
22 intervenor negotiates and makes his or her own
23 determination on the specifics based on that
24 particular utility's circumstances, where their
25 bills are, what their projections are, among many

1 other factors. And the gives and takes -- and this
2 is really critical -- the gives and takes in that
3 cypress of a setting are different, depending on
4 the terms that are negotiated and even on the terms
5 that aren't negotiated. This is simply an
6 after-the-fact attempt to try to insert, again, a
7 change in the settlement agreement that was drafted
8 differently.

9 In reviewing, as I said, the settlement
10 agreement, the Commission looked at it as a whole,
11 and the Commission should not approach it any
12 differently now.

13 Now, they will try to convert this also into a
14 public interest debate based on an assertion that
15 the rates are no longer fair, just and reasonable.
16 But, again, to do that, they have to manufacture a
17 result that depends on a rewrite of the settlement
18 agreement -- and this is key -- not based on -- in
19 other words, it's not based on the results of the
20 agreement, but their interpretation is based on
21 changes to the agreement. In other words, their
22 conclusion that rates are no longer fair, just and
23 reasonable is based on changes to the agreement,
24 not based on results of the agreement.

25 Consider the following, Commissioners, as

1 between now and the time the Commission approved
2 this settlement agreement as being in the public
3 interest.

4 Base rates remain unchanged, and continue to
5 be among the lowest in the state, well below the
6 national average. Nothing has changed there.

7 FPL's earned return is no different than it
8 would have been without the Tax Cut and Jobs Act.
9 That's key.

10 The only things that have changed are actually
11 positive for our customers. Customers have avoided
12 a nearly three-year surcharge for the recovery of
13 Irma costs. And the settlement agreement is likely
14 sustainable at least an additional year beyond the
15 minimum term with the same framework, the same
16 benefits, the same elements of public interest that
17 led this commission and ultimately the Supreme
18 Court to find it in the public interest in the
19 first place.

20 We believe that public interest, if that's the
21 standard applied, in any event, if that's the
22 ultimate measuring stick, certainly warrants
23 upholding this agreement. Nothing would indicate
24 that it ought to be contravened. Its purposes
25 continue to be fulfilled, and we respectfully

1 request that the Commissioner reject intervenors'
2 contentions and support FPL's positions on Issues
3 18 and 19 in this docket.

4 Thank you.

5 COMMISSIONER BROWN: Thank you, Mr.
6 Litchfield. You have 12 minutes 50 seconds
7 remaining.

8 All right. Mr. Rehwinkel, are you ready?

9 MR. REHWINKEL: I am.

10 COMMISSIONER BROWN: All right. You may
11 begin.

12 MR. REHWINKEL: Thank you, Commissioner, Madam
13 Chairman.

14 That was a good story. It is comprised of a
15 lot of speculation. The Public Counsel is not
16 asking that the 2016 stipulation or the 2016 order
17 be modified or terminated. It's not a reserve. It
18 is an amount that's important. And FPL seems to
19 tell this commission that they can tell you
20 anything at hearing under oath to get you to
21 approve a settlement and then do 180 degrees
22 opposite of that today. And that's the central
23 issue here.

24 And what they are doing -- let's talk about
25 Irma for a second. They are asking you to rate

1 base Irma and cause future generations of customers
2 to pay for that storm that your policy is storms
3 are paid for contemporaneously. That's the SCRM.
4 And that's what your order says, not the agreement,
5 the order.

6 Commissioners, we are here today to ask you to
7 decide this case based on your fundamental primary
8 statutory role and obligation to regulate Florida
9 Power & Light as a monopoly service provider under
10 the laws and orders governing monopoly public
11 utilities in Florida, and FPL specifically.

12 Why I do start with this predicate? Because
13 FPL is, for all intents and purposes, seeking a
14 backdoor base rate increase of at least
15 \$650 million, which will be the largest rate
16 increase in the history of this state.

17 You have before you, Commissioners, two
18 starkly divergent pathways. You can choose to
19 apply your own order embodying the stipulation
20 presented to you for approval and adoption as the
21 final outcome of a comprehensive rate case that
22 resolves several dockets after two full hearings.
23 This means you must apply that order consistent
24 with the evidence upon which you based it.

25 This other path is a dark one FPL has created

1 to divert you from seeing yourselves as their
2 regulator. Instead, the distraction they offer is
3 to have you play the role of a detached adjudicator
4 of contract law who is willing to turn over your
5 job of regulating to FPL as they see fit while
6 stiff forming you and the customers in getting a
7 record \$650 million backdoor base rate increase.

8 We submit there is only one choice, that of
9 your statutory job as FPL's regulator. The other
10 path is a false one, a mirage. It's a dead end.

11 As the Florida Supreme Court recently noted,
12 the provisions embodied in a stipulated resolution
13 of a comprehensive rate case are substantive
14 elements of your final order resolving those cases
15 in the public interest. They are your policies.

16 In this case more specifically, this storm
17 cost recovery mechanism, or SCRM as we've called
18 it, and the amortization reserve mechanism, or ARM,
19 were provisions included in the 2016 order, and
20 advocated by FPL in the rate case.

21 These provisions are your policies. They are
22 as much your policy as any provision in any
23 adjudicated rate case final order you have ever
24 issued. Likewise, these policies rest on the
25 bedrock of the evidence supporting them. This case

1 depends on these two policy provisions of your 2016
2 order and the evidence you relied upon when you
3 adopted them.

4 Although, they were part of a stipulation
5 presented to you for your approval and adoption,
6 the ARM and the SCRM policies are certainly not
7 parts of a contract between private parties. They
8 are material, substantive elements of a final rate
9 case order. And as with any rate case order,
10 construction and enforcement of them rests solely
11 with you, the Florida Public Service Commission.

12 You and only you have exclusive jurisdiction
13 over the customer rate affecting actions of FPL
14 regarding these mechanisms. You have the
15 obligation to actively supervise FPL's monopoly
16 provision of service. You have the obligation to
17 ensure the public interest is protected. You set
18 their rates and only you can grant rate increases.

19 Now, Commissioners, you have read and heard
20 plenty about the three basic facts, \$1.3 billion in
21 claimed Hurricane Irma damage, a \$1.25 billion
22 reserve amount, and \$650 million in annual customer
23 tax overpayments.

24 Your 2016 order mandates that FPL use the SCRM
25 for storms such as Irma, and we pointed it out in

1 our brief. In fact, FPL had contemporaneously used
2 the identical SCRM for the \$300 million Hurricane
3 Matthew. Simultaneously while preparing that
4 Matthew filing and during the 2016 hearing, FPL
5 passionately advocated for the continued use of the
6 SCRM, and they testified to you that they would use
7 it. You relied on that testimony in your public
8 interest determination. You ordered FPL to use
9 SCRM for subsequent storms like Hurricane Irma,
10 which hit a mere 10 months later.

11 Commissioners, lets look at some more of that
12 evidentiary bedrock I referenced.

13 FPL also testified at the hearing they would
14 use the \$1.25 billion reserve amount set aside in
15 order to manage issues affecting earnings over a
16 four-year period.

17 In your public interest determination, you
18 accepted these representations along with your
19 adoption of an expressed provision in the SCRM
20 policy that the reserve amount and the ARM were not
21 to be used to offset the very same storm costs you
22 ordered them to recover through the SCRM. And this
23 is in important, in this way, the earnings of FPL
24 were expressly insulated from hurricane restoration
25 cost impacts.

1 These facts relating to the SCRM and to the
2 ARM are critical and fundamental to the resolution
3 of this case. But the overwhelming fact is that
4 the 2017 tax law change created a \$650 million
5 annual windfall in the form of ongoing customer
6 overpayments. This amount is greater than any
7 single base rate increase you have ever granted.
8 Think about that. And FPL wants you to handle it
9 outside of your purview. They essentially want you
10 to informally give them the largest base rate
11 increase in the history of this state.

12 So let's look at some more evidence. It is a
13 fact that FPL's initial plan was to file for Irma
14 recovery in late December 2017 pursuant to the
15 SCRM. As you require, and like they did with
16 Matthew, at some point before the end of December,
17 those plans abruptly changed in the FPL SCRM
18 petition for Irma was never filed. Why?

19 Well, simply put, the \$650 million tax
20 overpayment windfall appeared on FPL's radar
21 screen. When this happened, FPL was confronted
22 with a problem. The coffers were full and
23 overflowing. Just one full year, I mean, one full
24 year into this four-year term, they had virtually
25 untouched the reserve amount. They were regularly

1 earning at the maximum of the authorized 11.6
2 percent ROE ceiling, and they had an earnings
3 neutral \$1.3 billion storm cost estimate that you
4 ordered them to recover using the SCRM
5 pass-through.

6 This same pass-through mechanism was routinely
7 touted to investors in SEC filings as unrelated to
8 earnings. This meant that their cup would rapidly
9 overflow, and their customers might ultimately
10 receive their overpaid taxes back in the form of a
11 rate reduction just like the customers of the other
12 three large investor-owned utilities had. FPL
13 decided that they could not let this happen.

14 They did the only thing a utility like them
15 could have done, to seize control of the customer
16 surplus for the benefit of their parent, NextEra.
17 They ignored your 2016 order requiring the SCRM to
18 be used, and instead, they dipped heavily and with
19 a steam shovel into the off limits reserve amount.
20 They took every penny of the \$1.148 billion amount
21 out to offset the vast majority of the Irma costs.
22 Cleverly, so they thought, this would make room to
23 stash the tax windfall.

24 COMMISSIONER BROWN: You are at 30 minutes.

25 MR. REHWINKEL: 30?

1 COMMISSIONER BROWN: Yeah. Keep talking.

2 MR. REHWINKEL: Oh, I am sorry.

3 All neat and tidy. All unlawful. All just
4 plain wrong. The public record indicates that they
5 never asked you for approval to do this in advance.

6 Having apparently decided in December 2017 to
7 ask for forgiveness, instead of permission, FPL now
8 comes to this commission in 2019 and asked you to
9 give your blessing to their version of the great
10 tax surplus highs of 2018.

11 As FPL's independent regulator, you must say
12 no and not be an accomplice to this scheme that is
13 so contrary to the public interest and the
14 fundamentals of monopoly regulation.

15 We ask you not to put misplaced contract law
16 blinders on. We ask you to enforce your 2016 order
17 to the greatest extent you can today. Tell FPL,
18 sorry, you squandered the rainy day set-aside
19 reserve amount that was designed to get the company
20 through the ups and downs of actual earnings
21 challenges over four years.

22 This specially created set-aside was expressly
23 not created to pay for storms. That is clear on
24 the face your 2016 order. And this means that once
25 it's gone, it's gone. The reserve amount was wiped

1 out for an elicited purpose, and it cannot now be
2 recreated.

3 Logically, Commissioners, if there is no
4 reserve amount, there is no ARM. And with no ARM,
5 there is no attic in which to stash the customers'
6 hijacked tax refund. The only lawful option for
7 you to do is to order FPL to record the
8 \$650 million annual credit to income without the
9 existence of the reserve amount and with the
10 resulting nonavailability of the ARM. And since
11 you have already held the tax windfall subject to
12 refund, the only thing left to do is to proceed to
13 a rate case, as requested by the joint petitioners
14 in Docket 20180224.

15 That is our case in high level terms.
16 However, before I close, I would like to emphasize
17 a few elements of our argument.

18 Virtually everything FPL has done with the
19 three fundamental elements we described is either
20 contrary to or unanticipated in what they told you
21 in 2016 when asking for your approval of the
22 settlement and the order when you established your
23 ARM and SCRM policies.

24 You told the Florida Supreme Court last year
25 that in approving and adopting the 2016 stipulation

1 as your order, you considered the entire record of
2 both hearings and all the evidence in making your
3 public interest decision. You cannot ignore this.
4 In making that public interest decision, you relied
5 on FPL's testimony and representations about what
6 it would do for storm cost recovery, and how it
7 would use the reserve amount. You cannot ignore
8 this.

9 There are no provisions of contract law that
10 override, supersede or otherwise change what you
11 told the Supreme Court that you relied upon when
12 you adopted these policies that regulate FPL's
13 rates as being fair, just and reasonable, and in
14 the public interest.

15 Keep in mind FPL's testimony that the reserve
16 amount was to address matters outside their
17 control. Keep in mind that FPL alone decided to
18 charge the storm cost to base O&M and earnings when
19 they both did not have to, and were actually
20 prohibited by order from doing so.

21 That \$1.3 billion charge to earnings was
22 100 percent within their control. And it
23 illustrates the fundamental problem with the
24 improvident use of the reserve amount to pay for
25 Hurricane Irma.

1 The final fundamental point of emphasis is
2 that the reserve amount is not something that FPL
3 can just create. It is not an established ongoing
4 account. It is an amount. Having unlawfully wiped
5 out the reserve amount with an unauthorized
6 artificially created and self-inflicted earnings
7 impact, they cannot willfully recreate it. It no
8 longer exists.

9 Therefore, we ask you to do the only lawful
10 thing you can do, order FPL to record the annual
11 \$650 million credit resulting from the TCJA to
12 income without the existence of the reserve amount.

13 Thank you.

14 COMMISSIONER BROWN: Thank you, Mr. Rehwinkel.

15 We will go to FEA.

16 CAPTAIN FRIEDMAN: Ma'am, just to clarify, FEA
17 is advocating the OPC position in this matter, so
18 we will be deferring our time.

19 COMMISSIONER BROWN: Thank you.

20 And now Retail Federation.

21 MR. WRIGHT: Thank you, Madam Chairman.

22 Good afternoon, Commissioners, and thank you
23 very much for the opportunity to address you on
24 this profoundly important issue on behalf of the
25 Florida Retail Federation and its members who are

1 FPL customers.

2 Start to start, I agree with and support the
3 Public Counsel's arguments, and my intention is, as
4 briefly as possible, although I will probably run
5 12 or 13 minutes, to add some details to clarify
6 and amplify the critical issues before you.

7 In summary, FPL unilaterally violated your
8 Order No. 2016-0560, and now they want to keep all
9 the tax act savings for themselves for as long as
10 they can.

11 FPL's rates are unfair, unjust and
12 unreasonable because they are based on costs that
13 are, according to FPL's stipulated number, \$649.6
14 million per year greater than FPL's current cost.
15 I am going to use 650 million from here on out.

16 This is not just greater than any rate
17 increase ever awarded to FPL or any other utility
18 in the history of Florida utility regulation. It
19 means that the total amount at issue here for FPL's
20 customers, given FPL's announced intention not to
21 have a rate case for an extra year, is at least,
22 depending on how you look at it, 1.95 billion if
23 you look at it as three-year's worth, 2019, '20 and
24 '21, but if you throw in the tax savings that began
25 on January 1, 2018, over which you took

1 jurisdiction as of February 6th, 2018, you are
2 looking at \$2.6 billion of money at issue here.

3 The fact that FPL's rates are far, far above
4 its costs is also borne out by FPL's own reported
5 earnings results for 2018. They show \$540,989,289
6 of earnings over and above what they needed to earn
7 an after tax rate of return of 11.6 percent.

8 This triggers our rights under the 2016
9 settlement, and under your order 201-6560, to
10 request the rate case, and we renew our request
11 that the Commission set a schedule for the reverse
12 make whole rate case that the Retail Federation and
13 the Public Counsel as signatories to the
14 settlement, now joined by the Florida Industrial
15 Power Users Group, have requested in docket
16 20180224.

17 The members of the Retail Federation and all
18 of FPL's customers represented by the customer
19 parties here are entitled to rates that are fair,
20 just and reasonable. Rates that are relatively low
21 does not make those rates fair, just and
22 reasonable. They have to be cost based. This is
23 just as rates that are relatively high, like those
24 that are charged by Florida Power & Light's sister
25 company, Gulf Power, does not make those rates

1 inherently unfair, unjust or unreasonable.

2 We are entitled not only to fair, just and
3 reasonable rates. We are entitled to have you
4 enforce Order No. 20160560. I will deal with that
5 more later.

6 The tax act, with some facts, reduced FPL's
7 tax rate by 40 percent, from 35 percent to
8 21 percent. Again, that reduced their revenue
9 requirements by \$650 million for 2018. And other
10 things equal, which they should be, FPL's revenue
11 requirement will be similarly less than FPL's rates
12 for 2019 and succeeding years.

13 FPL's 2000 -- end-of-year 2018 earnings
14 surveillance report shows that FPL, having paid off
15 its Irma costs in 2017, still had \$541 million
16 available over and above the amount necessary to
17 attain its maximum ROE of 11.6 percent after taxes.

18 By your order 2018-0104-PCO-EU, you took
19 jurisdiction over FPL's tax savings effective as of
20 February 2nd, 2018. I am not arguing, I think
21 maybe somebody else will, but I am not arguing for
22 a tax refund from 2018. That's a separate issue
23 from our argument here.

24 By your order approving the settlement, you
25 ordered that the SCRM will continue, quote, "and

1 that it," quote, "will be used to replace
2 incremental costs associated with any named
3 tropical storm, as well as to replenishing the
4 storm reserve to the level in effect as of
5 August 31, 2016," close quote.

6 Your language, "will be used." In other
7 words, your order required and requires FPL to use
8 the storm cost recovery mechanism, or SCRM, for the
9 recovery of its Irma costs, just as it did for its
10 Matthew costs under the prior settlement.

11 FPL concedes, as it must, that it did not use
12 the SCRM to recover its Irma costs. That really
13 should be the end of the analysis.

14 FPL violated your order. FPL never sought,
15 never obtained, never obtained your approval before
16 implementing its accounting strategy, and FPL never
17 consulted with the Florida Retail Federation before
18 it implemented its strategy.

19 FPL's earnings, \$541 million above 11.6 for
20 2018, have triggered the rights of the consumer
21 parties, the signatories, us speaker, Retail and
22 Public Counsel, to request, to demand a review of
23 FPL's rates. And that is exactly what we have done
24 in our joint petition for a rate case.

25 We are entitled to our rate case with rates to

1 be based on 2019 test year with revenues at a bare
2 minimum for the 2019 cost savings from the tax act
3 held subject to refund to the jurisdiction that you
4 asserted through your order 2018-0104 pending the
5 outcome of that case.

6 I want to talk about some of the points FPL
7 has argued. FPL talks about rate stability. Rate
8 stability. Rate stability. Good. Good. Good.
9 Good. Good. Yeah, Paul Harvey had a really good
10 phrase for that, the rest of the story.

11 The critical point regarding FPL's rate
12 stability claims is that those claims do not
13 represent the whole truth. Yes, it is true that
14 FPL's base rates didn't change in March '18, and
15 it's true that FPL did not impose a storm cost
16 recovery charge to recover its Irma costs, but this
17 is only half of the story.

18 As we urged you in our initial brief. Follow
19 the money. FPL is trying to keep all the money for
20 itself and its sole shareholder. Unique
21 opportunity touted by FPL at page six of its
22 initial brief was much more than an opportunity to
23 avoid a surcharge. It was a unique opportunity for
24 FPL to try to shelter the windfall tax cost savings
25 flowing from the Tax Cuts and Jobs Act of 2017 so

1 that FPL could keep all the money for itself for
2 much longer a time than would have been required to
3 fully offset the Irma costs.

4 What FPL really and truly wants is revenue
5 stability. That's the rest of the story here.
6 That's the exact counterpoise of rate stability.
7 They want revenue stability at excessive rates
8 yielding excessive earnings.

9 If you consider the period from 2018 through
10 2021, that is from the effective date of the tax
11 act until FPL's announced desired end of the
12 current nominal base rate moratorium, the excess
13 revenue requirements are on the order of 2.6
14 billion, four times \$650 million a year.

15 This is double FPL's claimed Irma restoration
16 costs. FPL could have achieved rate stability the
17 way that Tampa Electric and Duke Energy Florida did
18 by having a rough wash of tax savings and storm
19 cost recovery over the period of time needed to
20 amortize the storm costs. It was one year in Tampa
21 Electric's case. It was three years, and not quite
22 three years, in Duke's case. Probably around two
23 years for FPL, followed base rate reductions
24 reflecting the dramatically lower tax costs when
25 the storm costs were finally amortized.

1 But this was not good enough for Florida Power
2 & Light Company. Oh, no. They wanted to keep all
3 of the windfall tax savings for as long as
4 possible, without Commission review of all of its
5 costs in a general rate case, and without any
6 meaningful a priori regulatory check on what it
7 wanted to spend the extra money on.

8 When I was in law school, Commissioners, I had
9 the privilege to take appellate practice from
10 Justice Ben Overton, whom you may know wrote a lot
11 of PSC -- opinions on PSC appeals in his career on
12 the bench. And in this case, I think somebody
13 might ask the question, so what? What would happen
14 if you granted the customers requested relief?
15 Well, here is my answer to that:

16 First, keep the following in mind. FPL wants
17 to keep the windfall tax savings for itself,
18 \$650 million a year for four years. We want fair,
19 just and reasonable rates for 2019, and going
20 forward thereafter.

21 For 2017 and '18, FPL will be completely
22 whole. They paid off their storm costs. They
23 earned, I think, 11.08 in 2017. In 2018, after
24 paying off its Irma costs, in 2017, they not only
25 earned 11.6 percent, they had \$541 million left

1 over. This is shown by their own earnings
2 surveillance report. And by the way, this directly
3 addresses and refutes FPL's passing, but mistaken,
4 assertion in its reply brief at page 19 that we are
5 just cherrypicking --

6 COMMISSIONER BROWN: 15 minutes.

7 MR. WRIGHT: Pardon?

8 COMMISSIONER BROWN: 15 minutes.

9 MR. WRIGHT: Thank you -- by focusing on the
10 gross tax savings number.

11 The \$541 million is the net net savings -- net
12 net earnings number for FPL for 2018 per FPL's own
13 report, \$541 million. FPL got recovery of its Irma
14 costs, and earned its maximum ROE.

15 If grant our joint petition for the requested
16 reverse make whole rate case with at least the tax
17 savings for 2019 held subject to refund, pursuant
18 to your jurisdiction asserted by order 2018-0104,
19 you will make a decision at the conclusion of that
20 case as to what FPL's rates should have been for
21 2019 -- that's what we asked for, a 2019 test
22 year -- and grant a refund for customers for 2019,
23 and set new permanent rates going forward.

24 We had hoped and thought that those new
25 permanent rates would be effective 1/1/20, but the

1 time to accommodate that schedule has passed us by.
2 Maybe spring of 2020.

3 FPL may like -- will likely say they won't
4 have the use of the reserve going forward, to which
5 we would say, too bad. FPL unilaterally violated
6 your order. Your order says, they will use storm
7 cost recovery mechanism. They didn't. If you used
8 it, the earnings would be well in excess of the
9 threshold for us to trigger -- to trigger our right
10 to file a rate case, which is exactly what we've
11 done. They also violated the order in the
12 settlement by using the ARM in consideration of
13 paying off the storm costs.

14 Getting FPL's rights -- rates right to fair,
15 just and reasonable levels, is our statutory right,
16 and it's in the public interest, and we are
17 entitled to our requested rate case to get their
18 rates right.

19 With that rate case decided, the Commission
20 and FPL, begrudgingly, and FPL's other customers
21 will have the proper legally required determination
22 of fair, just and reasonable rates that FPL is to
23 charge going forward from January 1, 2019.

24 Just a couple points regarding remarks made by
25 Mr. Litchfield.

1 COMMISSIONER BROWN: Could you pull the mic a
2 little bit closer?

3 MR. WRIGHT: Certainly. I got a little throat
4 challenge going on today.

5 Mr. Litchfield suggested that we assert that
6 the settlement agreement means less than something
7 or other. I didn't catch quite all of that.
8 Here's what we do assert, your order means more
9 than a settlement agreement.

10 He asserts we are trying to read things into
11 the settlement agreement. Not true. We are asking
12 you to apply your order.

13 It is particularly noteworthy that Mr.
14 Litchfield wants to talk about contract law.
15 Contract law. Contract law. Settlement agreement.
16 Settlement agreement. Settlement agreement. They
17 don't mention the order in their briefs, and he
18 didn't mention it in his argument.

19 Your order requires them to use the SCRM.
20 Applying the SCRM, their earnings exceeded the
21 threshold that triggers our right to seek a general
22 review of rate -- FPL's rates, the general rate
23 case we requested in Docket 20180224. We renew our
24 request for that proceeding to get FPL's rates to
25 fair, just and reasonable levels.

1 Thank you very much.

2 COMMISSIONER BROWN: Thank you. Mr. Wright.

3 Okay, Mr. Moyle, you have 11 minutes and 19
4 seconds. Do you think you can make that?

5 MR. MOYLE: I will do my best, and I will
6 start the timer. And you were gracious with your
7 comments about maybe a slight margin, so hopefully
8 I won't -- I won't --

9 COMMISSIONER BROWN: Emphasize the slight.
10 All right. Welcome.

11 MR. MOYLE: Thank you, Madam Chairman. And
12 thank you all for -- today for this opportunity to
13 present argument. It's not something that occurs
14 regularly at the Commission, but as the prehearing
15 chair, I think it's a good forum for us to present
16 arguments and to conduct an oral argument.

17 FIPUG today finds itself in a bit of a
18 different position in that FIPUG did not sign the
19 settlement agreement in question. You have already
20 heard a lot about the settlement agreement and the
21 contract provisions. And I think at the outset, I
22 wanted to make that clear.

23 In a similar way, some of the arguments from
24 the utility almost sound as if as if the Commission
25 is somehow bound by the settlement, and is a party

1 to the settlement, and it's not. I mean, you all
2 are a statutory body that have an independent duty
3 to regulate in the public interest. And I think,
4 based on my understanding, that's, in essence, what
5 you are being asked to do, and to take into
6 consideration the Federal Tax Reform Act that was
7 passed in 2017, implemented in the beginning of
8 2018.

9 Today is not the first time that FIPUG has
10 appeared before you to talk about the federal tax
11 settlement. We've done that in a number of cases
12 in which you all have already acted and have flowed
13 back -- either flowed back or adopted plans to flow
14 back federal tax savings. And that was done in the
15 Gulf case. I believe that was first. Gulf is a
16 small utility. You all open dockets for all the
17 utilities and said, we want to understand what's
18 going on with the federal tax proceedings.

19 Counsel for FPL chastised, to my ears a little
20 bit, the fact the intervenors haven't brought this
21 up sooner. But this docket was opened at the same
22 time as the other dockets, and it's in
23 consideration of the tax impacts associated with
24 the Tax Cuts and Jobs Act of 2017 for Florida Power
25 & Light Company. I believe it was opened on the

1 same day as the other -- the other tax dockets. So
2 what you have before you today is, I believe,
3 consistent with what you did for the other
4 utilities.

5 And has been noted, Gulf Power flowed back
6 over 100 million to their customers. Tampa
7 Electric Company, after paying for some storm
8 costs, flowed back over 100 million, or is in the
9 process of flowing back over 100 million. Duke has
10 presented you with a plan and said, here's what we
11 would like to do. We would like to pay for some
12 storm costs, but when that's over, we would like to
13 flow back these dollars to the ratepayers.

14 And FPL is here today and is not asking for
15 any dollars to be flowed back to the ratepayers,
16 and they haven't presented a plan to do so. And
17 it's unclear whether they have a plan. I mean, I
18 think if they did, they probably would have
19 presented it to you.

20 But, Madam Chair, in the prior appearances
21 before you, FIPUG has said, here are the three key
22 components that we would ask be looked at and
23 considered in a tax reform matter: That you act --
24 that the action be taken promptly; that there be
25 transparency associated with the action, and that

1 there be certainty.

2 You have before you today an opportunity to
3 send a message and to take action promptly, maybe
4 with a capital P, because this has taken some time
5 compared to the others. But it would be, I think,
6 a strong signal that, yes, the results of Congress
7 acting in reducing FPL's tax burden by
8 40 percent -- I think it went from 35 to 21, and
9 it's a 40-percent reduction -- that that should be
10 something that the ratepayers should receive back.

11 I believe we are joined today in the room by
12 some members of AARP. They oftentimes dress in a
13 shirt that's the same color, and some of them are
14 here. And I asked, what's the dollar value of this
15 tax reduction, the federal tax reduction to the
16 average residential person. I was told it's \$125
17 per year. A significant amount of money.

18 And I think part of what is before you is, you
19 know, can you and should you take action to not
20 only provide them with \$125 per year, but Mr.
21 Wright's clients, and the retail -- Florida Retail
22 Federation would receive more than that, as would
23 industrial users, many of whom are members of the
24 Florida Industrial Power Users Group.

25 The question of transparency, is there

1 transparency with respect to what FPL is proposing
2 to do with the tax savings? And I think -- I think
3 that's a yes and no answer in my mind, because
4 they've said, well, we are going to take some of
5 this money and apply it to Irma costs. It's 1.3
6 billion. The annual is 650, or 750 based on the
7 stipulation. So that, you just do the simple math,
8 times two, that should satisfy '18 and '19. You
9 get those tax savings, you satisfy the Irma costs,
10 then what? You know, then what?

11 Duke said, let us pay off hurricane costs then
12 we are going to flow back the money. But there has
13 been no such of a similar pronouncement from FPL in
14 that regard. And to the contrary, we don't believe
15 that there is transparency. We believe that what
16 characterizes FPL's position is opaqueness.

17 And opaque, I also did a Google search of a
18 definition. And opaque is defined as not able to
19 be seen through. Not transparent. There are some
20 synonyms that include cloudy, blurred, hazy and
21 muddied.

22 COMMISSIONER BROWN: You have got four minutes
23 and 40 seconds.

24 MR. MOYLE: Thank you.

25 The last point is certainty that FIPUG has

1 advocated for. And as we sit here today, there is
2 not certainty as to what will happen going forward
3 with respect to these federal tax dollars.

4 And the legal points that FIPUG has made, we
5 filed briefs in this matter. But as I indicated,
6 we did not sign the agreement, and we are not bound
7 by an agreement that we did not sign. So we are
8 here asking you, in a slightly different position,
9 to assert jurisdiction and to take control of this
10 matter; to regulate and to hear the petition that
11 was jointly filed by the Office of Public Counsel
12 and the Retail Federation and FIPUG, and to act on
13 that petition, which we would say should include
14 some adjustments with respect to 2018.

15 And as you know, in a rate case, you look at
16 all of the puts and takes, and you make a judgment
17 as to what you believe are rates that are fair,
18 just and reasonable.

19 And you -- again, you are not bound by that
20 settlement agreement. You have an independent
21 obligation to regulate in the public interest. We
22 have argued in our brief that there are changed
23 circumstances.

24 I find it somewhat ironic that some people
25 would contend a hurricane is an unforeseen event.

1 In Florida, we have a lot of hurricanes. We have
2 been having them, you know, just about as long as
3 Florida has been around, but that federal tax
4 reform in predicting the actions of Congress is
5 foreseen. I am still thinking about that one.

6 But I think the point being is you are not
7 obligated contractually, and I would just read for
8 you a quote. This is from the GTE Florida decision
9 that you all issued, and it's in our briefs, but it
10 says, quote, "we do not possess the legal capacity
11 of a private party to enter into contracts covering
12 our statutory duties." This is a PSC order.

13 "Indeed, we cannot abrogate, by contract or
14 otherwise, our authority to assure that our mandate
15 from the Legislature is carried out. As a result,
16 we may not bind the Commission or forego action and
17 derogation of our statutory obligations.

18 Therefore --" there is some additional sentences in
19 there, dot, dot, dot, dot. And then it says,
20 "therefore, the parties cannot limit our
21 jurisdiction by way of a settlement agreement."

22 I thought I heard a suggestion that the
23 contract provisions are in effect limiting what you
24 can do with respect to your action. And I don't
25 think -- I don't think that's consistent with the

1 statement that you all have set forth. I don't
2 think it's consistent with statute. You have
3 independent obligations to regulate in the public
4 interest to make sure rates are fair, just and
5 reasonable. And we think that the petition that
6 FIPUG filed, along with others, present you an
7 opportunity to do that.

8 A couple of other points, and I know I got
9 about a minute left. There is no meeting of the
10 minds. FIPUG made that argument in its brief, not
11 because, you know, we were in -- had specialized
12 knowledge of that, but you don't have to look far
13 when you read the two briefs, you know, that OPC
14 says the red light -- the light was red, and FPL
15 says the light was green. I mean, there is no
16 meeting of the minds if you read their briefs. I
17 mean, it looks like they are, you know, in two
18 different worlds with respect to how they view the
19 agreement. And so there is good case law that says
20 if there is not a meeting of the minds, the
21 contract is not enforceable.

22 At the end of the day, we would ask that the
23 Commission assert jurisdiction, take this issue up.
24 It's in the public interest to look at this and
25 regulate and find out what level of tax savings

1 should be returned to the ratepayers; or, at a
2 minimum, ask for a plan so that people can know and
3 can plan as to when and if any of these tax savings
4 would be returned.

5 So with that, Madam Chair, I would end my
6 remarks. And if I could just take advantage of
7 your brief leniency to make a little bit of a
8 technical point for the record.

9 FPL asserted in their reply brief that FIPUG
10 had -- it said all the parties had agreed that the
11 only issue before you was a threshold issue of
12 whether the contract precluded you all from taking
13 action today.

14 As you know at the prehearing, we argued that
15 there should be additional issues considered about
16 what do with these savings and tax dollars, how
17 much each customer class should get back. So, you
18 know, I think that we have not said, oh, that's the
19 only issue that's before you. You have heard
20 arguments about a whole bunch of issues that are
21 before you. So I just wanted to make that point
22 clear for the record.

23 And thank you for your time.

24 COMMISSIONER BROWN: Thank you.

25 All right. Florida Power & Light, you have 13

1 minutes and 26 seconds.

2 MR. LITCHFIELD: Okay.

3 COMMISSIONER BROWN: Hold -- one second,
4 please.

5 I will just round down, if that's okay.

6 MR. LITCHFIELD: That's okay.

7 COMMISSIONER BROWN: All right.

8 MR. LITCHFIELD: Thank you, Madam Chair,
9 Commissioners.

10 Well, I guess we are closing out this
11 discussion today, and that's probably a good thing
12 for all of us. I will tell you, though, that a lot
13 of loaded language was used during my colleagues'
14 presentations, some very inflammatory terms. And I
15 really hope you are okay if I choose not to address
16 a lot of the language that was used and let our
17 briefs speak for themselves, let the Commission's
18 order speak for itself, let my initial comment
19 speak for itself. But there is at least one that I
20 guess I want to at least tee up, and that is this
21 notion that FPL is asking for base rate relief. I
22 mean, I have to say that that is just unbelievably
23 grossly mischaracterized in terms of what's at play
24 here.

25 Really, what you have heard -- and I want to

1 come back to Mr. Moyle's comments later about
2 public interest, because I think clearly think that
3 my comments were misunderstood as well in that
4 regard, and I can probably add some clarity to
5 that.

6 But with respect to, for example, Mr. Wright's
7 numbers. Again, as I said in my initial comments,
8 at the end of the day, that number that he
9 referenced to you, that 540 number, right, that is
10 the amount that's being credited to the reserve.
11 So really, his numbers and their entire case,
12 substantively and mathematically, depends upon
13 their being able to convince this commission
14 whether, as a matter of contract interpretation,
15 whether it's a matter of settlement agreement
16 interpretation, whether it's a matter of
17 enforcement of Commission policy or interpretation
18 of Commission policy that we can't, at FPL, do
19 anything other than recover storm costs through a
20 surcharge; that we can't access the reserve
21 mechanism for costs that just happen to have the
22 label of storm costs.

23 That is their entire case. Without that,
24 there is no -- there is no excess earnings. There
25 is no reason for an earnings review. There is no

1 reason for any of this discussion. It is simply an
2 initial determination on Issues 18 and 19 that this
3 case rises or falls, Commissioners.

4 And in that regard, I do want to point you to
5 a couple of things in OPC's briefs in that regard.
6 And I am not going to ask you to take the time to
7 turn here. I will give you adequate reference, but
8 I am in their initial brief.

9 Page 10, where they say, additionally Section
10 6 of the 2016 settlement and Section 5 of the 2012
11 settlement, they are basically saying that they are
12 essentially the same, and they are I essentially
13 the same.

14 Each separately provide for the SCRM, the
15 storm cost recovery mechanism, through which FPL
16 could -- underline that word could -- seek recovery
17 of extraordinary storm restoration costs through
18 rate surcharges that may be implemented soon after
19 a hurricane or tropical storm impacts FPL's system,
20 so on and so forth.

21 Also I would refer you to page 17 of their
22 brief, again same initial brief, referencing --
23 referencing the extrinsic evidence that they had
24 previously discussed in their brief. These acts
25 and representations by FPL conclusively demonstrate

1 that the SCRM was designed to allow -- allow --
2 underline the word allow, which is a good segue to
3 your order. Mr. Wright says we didn't address it
4 in our brief. I kind of think that we did. But be
5 that as it may, it's obviously your order. It's
6 what they are asking to you look at. It's what
7 they put at issue.

8 And again, on page three of your order, second
9 bullet from the bottom, your reference or
10 discussion with respect to the storm cost recovery
11 mechanism, read across the page, the current storm
12 damage cost recovery mechanism will continue, which
13 allows -- there is that pesky word allows again --
14 FPL to collect up to \$4 per thousand kWh.

15 And then if you continue down to the second to
16 the last line, all the way over to the right, you
17 will see the word may. So if costs exceed 800
18 million including restoration of the reserve, FPL
19 may petition to increase the charge beyond the \$4.

20 So I would point you to that. I would also,
21 and I guess picking up with Mr. Moyle's comments,
22 note that he seemed to want to suggest that I had
23 suggested that you are absolutely exclusively and
24 completely and entirely restricted to rules of
25 contract interpretation. That obviously isn't what

1 I said. It also doesn't mean that I think that
2 those principles are not applicable at all. I
3 think that they are applicable in the exercise of
4 your judgment, your reason, your determination,
5 your review of the settlement agreement.

6 Again, whether you are interpretating --
7 whether you are interpreting specific provisions of
8 the settlement agreement, or whether you are
9 interpreting specific provisions of the settlement
10 agreement that was expressly adopted and
11 incorporated as official Commission policy, you
12 are, in the first instance, reading the language.
13 And my point of view is simply that they cannot
14 suggest that public interest is now this mechanism
15 by which the Commission can come in and rewrite
16 agreement by adding a word here or striking a word
17 there.

18 Now, are you a party to the agreement? No.
19 Your Commission staff will tell you that, and they
20 will reminds you of that, and I agree with them.
21 You are not a party to the agreement. So
22 ultimately you are not bound, and we have never
23 said that.

24 What we are saying however, though, in looking
25 at public interest as a whole, you are looking at

1 the same standards that you looked at when you
2 initially approved the agreement.

3 And so I will turn back to the agreement at
4 this point -- excuse me, your order at this point,
5 and your decision, which starts appear on page
6 four. At least the caption -- subcaption is headed
7 as decision.

8 And so, among other things, the Commission
9 found that the settlement agreement will allow FPL
10 to maintain the financial integrity necessary to
11 make the capital investments over the next four
12 years required to sustain this level of service,
13 right? The commendable level of service that the
14 company currently provides, and we are proud to
15 provide, and pleased to provide, but that helps us
16 sustain that level of service.

17 Likewise, while providing rate stability and
18 predictability for it FPL's customers -- that's a
19 good. And I think we heard that counsel for Retail
20 Federation agrees that's a positive. All of that
21 is still true.

22 And then just further down the page, it's
23 important to note that the settlement agreement
24 constitutes a reduction in revenue requirement for
25 2017 of over 400 million from FPL's request. That

1 is -- that is a concession, a sizable concession
2 that the company made at that time. That's still
3 true. Those dollars are not reflected in our rates
4 today. It's something that we conceded.

5 So -- and then back to the specific elements
6 of the agreement, the ability to maintain our
7 earnings and performance within a pre-authorization
8 range, the mechanisms that were put in place by the
9 agreement to enable us to do that, all of that
10 remains as it was when you approved this agreement
11 as being in the public interest.

12 And so my point of view is that public
13 interest would absolutely continue to support this
14 agreement remaining in effect. That you ought not
15 to agree to reform, rewrite, revise the agreement
16 based on any standard as proposed to you by the
17 intervenors.

18 COMMISSIONER BROWN: Five minutes.

19 MR. LITCHFIELD: I think that the last thing I
20 will say, and I probably took this a little bit out
21 of order, but this meeting of the minds notion has
22 really fascinated me. It's really captured my
23 interest. And so Mr. Moyle said that, you know --
24 and he wasn't a signatory, and so he is just
25 pointing out what he perceives as a lack of the

1 meeting of the minds, and he said that there is
2 case law to that effect.

3 Well, sure, there is case law to that effect,
4 but there is also case law, and we cite it in our
5 brief that says, the mere allegation that two
6 parties have a dispute relative to contract does
7 not mean there was not a meeting of the minds. It
8 does not. If that were the standard, it would be
9 the first and last affirmative defense that every
10 lawyer raised in every contract dispute that's ever
11 filed in this country, we would never have
12 contracts upheld.

13 So I will leave it there, Commissioners.
14 Again, thank you for the time and your attention.
15 This is an important subject. We think at the end
16 of the day it's quite a clear issue, quite a
17 clearcut decision; but obviously, respectfully, you
18 are the regulator, and we rely upon our briefs and
19 argument today in support of our position.

20 Thank you.

21 COMMISSIONER BROWN: Thank you.

22 Commissioners, we are at 2:25. Why don't we
23 take a 10-minute break and then come back here at
24 2:35.

25 Thank you. We are in recess.

1 (Brief recess.)

2 COMMISSIONER BROWN: Okay. We are going back
3 on the record at this time.

4 We are continuing the hearing -- I mean,
5 pardon me -- the oral argument posture that we are
6 in here, and oral arguments have been concluded.

7 Just a reminder for folks. We've had initial
8 briefs. We've had reply briefs, 40 pages, 40
9 pages, and we have ample documentation in this
10 docket right now for us, and for the Commissioners
11 here to consider.

12 And so the juncture that we are at right now
13 is the commissioners are going to be allowed an
14 opportunity to ask questions of the parties, of
15 staff, on any matters on this tax docket.
16 Actually, pardon me, two issues. I will remind the
17 Commissioners, Issues 18 and 19, the oral argument
18 that we just heard, as well as the arguments that
19 were briefed in the reply brief.

20 So with that, I am going to open up the floor
21 for Commissioners here, if you have any questions
22 right now. If you don't, then what we will do is
23 we will go to concluding matters, but I will open
24 it up.

25 Commissioner Polmann.

1 COMMISSIONER POLMANN: Thank you, Madam Chair.

2 As you just mentioned, there is a good deal of
3 material here. Reviewing the settlement agreement
4 and the order, the initial briefs, the reply
5 briefs, and having the oral arguments here today, I
6 feel very well-informed. I think all the
7 information that I have is what I need. I don't
8 have any questions here today.

9 Madam Chair, Commissioner Brown, I want to
10 thank you for facilitating this format, as was
11 mentioned here today. I appreciate all of your
12 work as the prehearing officer too, so thank you
13 very much.

14 COMMISSIONER BROWN: Thank you, Commissioner
15 Polmann. I appreciate that.

16 Commissioners, any other questions?

17 Seeing none, okay, we are going to go to
18 concluding matters, now, staff.

19 Ms. Brownless, are there any other matters
20 that need to be addressed here today? If you could
21 put your microphone on, please.

22 MS. BROWNLESS: Oh, it's on, I am just -- I
23 will get closer.

24 At this time, we need to close the record.

25 COMMISSIONER BROWN: So ordered.

1 And then, staff, what else do we need to do
2 right now with regard to this docket?

3 MS. BROWNLESS: Well, at this time, you need
4 to take it under advisement, if that's what you
5 wish to do. And then we will all -- a staff
6 recommendation will be written and we will come
7 back at the May 14th, 2019, Agenda Conference.

8 COMMISSIONER BROWN: Okay. Thank you.

9 Do any of the parties have any other matters
10 that the Commission needs to be addressed right
11 now?

12 Mr. Rehwinkel?

13 MR. REHWINKEL: I just want to thank you,
14 Madam Chairman, for your facilitating this, and
15 thank the other Commissioners, and of course,
16 fellow counsel from FPL and the other parties. We
17 appreciated the process and the opportunity. And
18 this is -- this is why we like practicing before
19 the Commission.

20 Thank you.

21 COMMISSIONER BROWN: Oh, thanks, Mr.
22 Rehwinkel.

23 MR. WRIGHT: Just to echo Mr. Rehwinkel, I
24 will say what I said at the outset of my comments.
25 Thank you very, very much.

1 COMMISSIONER BROWN: Thank you.

2 Any of the parties have anything else to
3 address the Commission here before we adjourn?

4 Seeing none, we -- this -- seeing no matters,
5 we will adjourn this, and we will take this up at
6 May 14th.

7 Thank you so much. We are adjourned.

8 (Whereupon, proceedings concluded at 2:45
9 p.m.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, DEBRA KRICK, Court Reporter, do hereby
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IT IS FURTHER CERTIFIED that I
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DATED this 25th day of April, 2019.



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