BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Petition by Florida Power & Light Company for Approval of FPL SolarTogether Program and Tariff.	DOCKET NO. 20190061-EI FILED: January 30, 2020

CITIZENS' POST HEARING BRIEF

The Citizens of the State of Florida, through the Office of Public Counsel, ("OPC"), and pursuant to Order No. PSC-2020-0017-PHO-EI, hereby submit this Post-hearing Brief.

STATEMENT OF POSITION

* The SolarTogether program ("the program") violates Florida laws because it subjects some customers to unreasonable disadvantage. A utility's imposition of prejudicial rates on customers is prohibited by Florida law. The program forces non-participants to unilaterally take on certain risks and a multiple decades-long wait for non-guaranteed "benefits" in order to subsidize participants whose tangible financial benefits are immediately paid and virtually guaranteed; therefore, without risk. The program also unlawfully expands rate base to the benefit of Company shareholders' profits at customers' cost. Finally, the SolarTogether program violates the 2016 Settlement between FPL and Intervenors, approved in Order No.PSC-2016-0560-AS-EI, which froze base rates and prohibits indirect increases to base rates. FPL and its allies' repetitive characterizations of the program as "innovative," "novel," and "unique" are just another way of saying the program is "contrary to law and precedent," and "unreasonably prejudicial" to 98% of FPL's customers for the benefit of a chosen few and the FPL monopoly's shareholders. The program unfortunately violates all basic principles regarding the fair division of financial responsibilities between customers and the privately-held utility company which enjoys captive customers in its service area. *

Proposed Findings of Fact

- Under the program, non-participants' bills immediately increase (TR 184-185), whereas participants' charges are gradually offset by a bill credit. (TR 13, 525-526)

- Under the projections FPL asks the Commission to accept, non-participants will not receive a payback, if at all, until a minimum of 26 years, whereas participants would receive a payback in 8 years. (TR 114)
- Under the program, participants can advertise themselves as 100% renewable "on day one." (TR 690).
- In order for participants to pay 100% of the cost of the facilities, they would have to pay $9.23 per kilowatt per month; however, the program only requires participants to pay $6.73 per kilowatt per month. (TR 142)
- Participants' financial benefits under the program are essentially guaranteed. (TR 118-120, 348, 350)
- Among the benefits FPL claims the non-participants would receive are *currently non-existent carbon cost* savings. (TR 271). FPL has conceded it projects there will be no carbon costs for at least the first 6 years of the project, if ever. In the forecasting scenario FPL asks the Commission to accept, FPL's consultant assumed there will not be any carbon-compliance costs until at least 2026. (TR 271-272)
- Among the benefits FPL claims the non-participants would receive is cleaner air. (TR 676, line 22 "lower emissions"; 166). However, FPL has not stated it will retire any of its current emissions-producing generation facilities as a result of the program.
- The evasion of compliance with the Power Plant Siting Act ("PPSA") was a factor in FPL's decision to size all 20 plants at 74.5 MW. (TR 106, lines12-15)
- In the analysis presented by FPL, the utility did not compare all resource alternatives, but rather compared only two alternatives (SolarTogether vs No SolarTogether). (EX 61 at 84; EX 31 at JE-6; TR 529, 563, 577)

ISSUE 1: Is FPL's proposed SolarTogether Rider tariff an appropriate mechanism to seek approval for the construction of 1,490 MW of new solar generation facilities?

OPC: The SolarTogether Rider tariff is not the appropriate mechanism for approval of 1,490 MW of generation facilities. The utility has presented this capacity as an unbreakable block which must be either approved as a whole or denied as a whole, with no other alternative. (TR 110, 156) When the facilities are considered as a 1,490 MW whole, as FPL requests, the subject generation facilities are subject to the Power Plant Siting Act, Fla. Stat. §§ 403.501-403.518 because the PPSA governs the approval of solar generation facilities of 75 MW or more. Fla. Stat. 403.506(1). Therefore, the addition of 1,490 MW in generation facilities in this docket should be subjected to a need determination proceeding pursuant to the PPSA.

At the same time that FPL presented the 1,490 MW of generation facilities to the Commission as a single unbreakable unit, the utility made a strategic decision to split the 1,490 MW generation enterprise into 20 "projects" or plants of exactly the same size – 74.5 MW[1] – in an attempt to evade regulation under the PPSA. (TR 105; 106, lines 12-15) Indulging this manipulation of the regulatory structure would elevate form over substance and subvert the purposes of the statute and resource planning and grid oversight policies. Fla. Stat. §§ 366.04(2)(c) and (5), 366.05(7) and (8), 403.519. FPL seeks to have it both ways in this docket in order to exploit the statutes and rules to fit its own ends rather than comply with the regulations it is obligated to follow in exchange for the grant of a monopoly.

FPL's claim that it is not attempting to change the definition of "need" is misleading – the utility apparently rationalizes that it is not trying to change the definition of need as the term is used in the PPSA, but only because it thinks the determination of need aspect of the PPSA does not apply to this case. (EX 61 at 85-87; TR 105-106, 312, 406-407) FPL and its allies are in fact proposing to change the definition of "need" in every applicable regulatory context, including the long history and usage of the term in PSC precedent. (TR 151, 157, 312, 359, 542, 600-601)[2] The concept of need is a well-recognized term of art in the resource planning context. (TR 258) To introduce its "new" need interpretation, FPL conflates cherry-picked principles from the PPSA with principles from other statutes.[3] (Deason at 470-471; Ex. 61 86-87) Nonetheless, it is clear the

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[1] FPL alternately claims this program really consists of either 20 separate 74.5 MW plants (TR 105), *or* five distinct projects of roughly 223.5 MW each (TR 111).

[2] "…I think we have introduced a -- a desire from customers …in addition to reliability needs, there is a – a **new factor** that we are trying to address in the request to the Commission …" (TR 312)(emphasis added).

[3] In response to a question about FPL requesting an advance prudence review in this case without a need determination, FPL witness Valle adamantly stated, "[w]e are presenting, though, a need here" (TR 135). Then, borrowing from the Florida Renewable Energy Policy statute, Valle also suggested that, in addition to customer desire as the new "need," economic need, fuel diversity and improved environmental conditions also justify approval of the SolarTogether plan. More examples of the multiple different iterations of "need" asserted by FPL: TR 45 (significant desire/customer demand); TR 47 (customer's internal policy decision to become 100% renewable

utility is asking the Commission to undertake an activist role and radically change established policy because FPL seeks to establish a non-statutory concept of need based on customer desire or interest, rather than on the currently recognized definition of need in terms of resource reliability. (TR at 100, line 1-5; TR 123, lines 13-18) FPL further urges the Commission to adopt a broader, unprecedented conception of need based on not merely customer preference, but also on unquantified social and alleged economic need – "opportunities to make a difference" (TR 12), allegedly lower emissions, and *temporary* jobs associated with construction of the solar plants. (TR 666) Though FPL made clear its primary position is the subject facilities can be thought of as "needed" in the sense that a very small percentage of its 5 million its customers want to be served by renewable sources and have demanded solar plants, the Company also made a belated attempt on rebuttal to address resource reliability. Nonetheless, the evidence clearly demonstrates that the proposed facilities are not needed in the true statutory sense regarding capacity need for reliability. (TR 543-545)

FPL presented the Commission with the bizarre request to be regulated in some kind of dual simultaneous parallel universes. At the same time and with a straight face, FPL (1) admitted that evading the PPSA was a factor in its decision to size the 20 plants at 74.5 MW each, while (2) concurrently presenting SolarTogether as one 1,490 MW unbreakable block for prudence approval. (TR 106) Thus, the program was specifically crafted based on this strategy of, on the one hand denying any attempt to change established policies regarding need, and yet on the other hand asking the Commission to adopt several "novel" and "innovative" ways to broaden the concept of "need" as a term of art, while cherry-picking the very PPSA that purportedly does not apply. EX 61 at 85-87.

FPL admitted that evading the PPSA was a factor in its decision to size the 20 plants at 74.5 MW each while also presenting SolarTogether as one 1,490 MW unbreakable block. (TR 106) Thus, the program was specifically crafted based on this strategy of, on the one hand denying any attempt to change established policies regarding need, and yet on the other hand asking the Commission to adopt several "novel" and "innovative" ways to broaden the concept of "need" as

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as a "need"); TR 88 (customer demand as "need,"); TR 99 (reliability need and economic benefit); TR 100 (customer desire or interest as "new concept of need"); EX 61 at 78-79, 85-87; Sim testimony TR 257-258; FPL cites its ten year site plan (TYSP) as providing the plan for the lowest rates for the general body of customers. FPL's Response to Staff's Interrogatory No. 193.

a term of art.

Public utilities have a statutory duty to provide reasonably sufficient, adequate and efficient electric service. Fla. Stat. § 366.03. FPL admitted SolarTogether is not a least cost plan, and that it had not provided the Commission with an economic analysis of what it alleged was simply an acceleration of its ten-year site plan ("TYSP"). (TR 135-136; Deason Depo. p. 84). Still, FPL seeks a finding of prudence for \$1.8 billion in generation assets without a need determination for either the 1,490 MW whole or any individual 74.5 MW block, on the basis that its customers want these particular solar assets. (TR 113). Moreover, FPL presented SolarTogether as an all or nothing choice to the Commission, in that the utility repeatedly stated it does not want the facilities approved if the program is not also approved in the exact form FPL demands. (TR 156). There is no evidence in the record that a single fossil fuel burning plant, nuclear plant, or combustion turbine currently emitting carbon and other waste in FPL's territory will be shut down – even at the urging of a small segment of FPL's customer base or non-customer advocates – as a result of the addition of the proposed SolarTogether facilities. (TR 103 - FPL will not close down any nuclear plants, even if customers want nuclear plants closed). Nonetheless, FPL and its allies want 98% of FPL's customers to pay for the SolarTogether special interest project or window dressing so that 1.5% of FPL's customers can advertise "from day one" that they obtain their energy from 100% renewable sources and meet their nation-wide, private sustainability goals, even though the overall carbon profile in FPL's territory will not materially change and Florida's vulnerability to what SACE describes as the climate crisis (TR 29) has not materially changed. (TR 104, 153, 157)

To be clear, Citizens are in favor of solar and *bona fide* plans to improve Florida's environmental condition; however, Citizens do not favor forcing the vast majority of customers to fund vanity projects and take on all risks of those projects which primarily benefit only a few participants. To the extent a small fraction of customers want to bolster their advertising profile, Citizens submit it is most appropriate for those customers themselves to fund the basis for that advertising. Moreover, if FPL truly believes in the SolarTogether program, it is free to offer the program to participants who would pay the costs and receive the benefits. Under that scenario, the solar facilities would not be placed in rate base which places all the risks on the non-participants or general body of ratepayers who may or may not see any benefits some 26 years into the future. Instead, FPL does not want to share in the risks, but wants to guarantee it receives a return or profit on this investment.

The current proposal is called "Phase 1" which certainly implies that, if approved, FPL will obviously seek additional similar solar generation projects in the future. (Petition at 3, para. 6) FPL claims that if it decides to propose a Phase 2, the Company will separately petition the Commission for approval of that phase (TR 115); however, the precedent set in the instant docket will render petitions for future phases mere formalities; i.e., the die will be cast. Today's participants might be tomorrow's non-participants under subsequent Phases, (TR 122, lines 6-11), and those non-participant customers may have a different view about the fairness of the allocations of risks, costs, and benefits than they do now.

FPL claims the SolarTogether program is voluntary; however, where non-participants must subsidize participants, it turns the non-participants into involuntary components of the program. The logic FPL invites the Commission to adopt with SolarTogether is not unlike a situation where every person in Florida would be forced to buy their own state lottery ticket with a speculative chance of winning (despite some not actually choosing to play or participate in the lottery) and also forced to pay a ticket premium so that 1,000 specially designated Floridians received scratch-off tickets that were guaranteed to pay them $1,000 each on the theory that "everyone" benefits from having a lottery. Approval of this SolarTogether program could send the citizens of Florida down a slippery slope whereby all generation (FPL's and the other IOUs') would be added to ratebase on a giant gamble and the Commission would be rapidly receding from the more fundamentally grounded principles of true reliability need.

Whether evaluated under the PPSA or other relevant statutes related to the regulation of electric generation, an interpretation of regulatory governance which rests on approving a project based upon certain customers' desires rather than on empirical measures directly related to ensuring the grid provides adequate electricity to the public at the lowest reasonable cost will set a precedent which calls the entire electric regulatory structure and the regulatory compact into question. Taken to its logical end, where a customer preference for a certain type of generation determines policy-making, there is no particular need for a Public Service Commission – the job could be done by simple polling. The Commission is a creature of statute, and thus lacks the authority to establish a new policy untethered to a statute or legislative grant of authority to broaden the grounds on which massive generation resources are approved.

ISSUE 2: Does FPL's proposed SolarTogether Rider tariff give any undue or unreasonable preference or advantage to any person or locality or subject the same to any undue or unreasonable prejudice or disadvantage in any respect, contrary to Section 366.03, Florida Statutes?

OPC: In this docket, one group of customers are subjected to unreasonably different levels of costs, risks, projected savings amounts, and projected savings timeframes. FPL glosses over the fact that non-participants are treated in distinctly different, prejudicial ways by relying on generalities which focus heavily on projections based toward the end of the 30 year life of the program, when the truth is that the impacts during the early years are more certain than the benefit projections (or guesses) made for later years, i.e., the 26 year range. *Cf.*, *In re: Petition for Determination of Need*, Order No. 2018-0150-FOF-EI at 4 (forecast errors tend to increase with the time horizon). FPL sugarcoats the inconvenient facts in its case by suggesting that, *by the end*, the entire general body of customers, including the 4.9 million non-participating customers, is projected to receive net benefits from the program; however, the devil is in the details:

- From day one, participants are guaranteed to receive a **set** of bill credits and bill surcharges that are pre-scheduled in amount for the 30 year life of the program.
- The participants' pre-scheduled bill credits would very quickly exceed the pre-scheduled bill surcharges, such that participants would receive a net benefit or "payback" within **8 years** (TR 114, 689)
- Non-participants "would see an **immediate bill increase**" as a direct result of participants' bill credits being **recovered from non-participants** through the Fuel Clause. (TR 148, 139)
- Non-participants are only projected to see some sort of payback or net savings **26 years**[4] after SolarTogether goes into service, *if ever*. (TR at 114, 115-116, 118-119) Therefore, nonparticipants might get a net benefit sometime at the end of the 30 year life of the project, *or they might actually receive a net loss*. (TR 528, 546)
- Participants are essentially **guaranteed** their payback. (TR 118, 119)
- Non-participants are less likely than participants to receive a payback or to receive a tangible bill benefit from the program. (TR 530)

[4] 26 or 24 years are comparable payback periods, depending upon the starting measuring point. (TR 119)

Florida law requires that rates and charges demanded by public utilities must be "fair." Fla. Stat. § 366.03. The law further prohibits public utilities from giving "any undue or unreasonable preference or advantage to any person or locality," or subjecting them to "any undue or unreasonable prejudice or disadvantage in any respect." *Id*. As demonstrated above in the disparate and speculative charges and terms to which non-participant customers would be subjected, the SolarTogether program fails to comply with the law which prohibits unreasonable preferences or disadvantages for any customer as compared to another.

Projected Benefits

FPL claims its entire general body of ratepayers would benefit from the SolarTogether program when the reality is that one set of customers within the general body, the participants in the program, would receive a net benefit from the program much sooner than the remaining set of customers within the general body – the non-participants. Furthermore, the participants would be essentially guaranteed a swift payback while the non-participants would be forced to make a gamble – for which they did not sign up – in hopes of possibly seeing a billing benefit *two decades or more later than the other customers*, if at all. In essence, FPL is asking non-participants to commit to carrying the costs of a $1.8 billion project for the next 30 years in the hopes of "possibly" receiving a net benefit of $112 million some 26 years in the future. The question to ask is whether a reasonable person would make that investment.

For purposes of evaluating its compliance with the Florida Statutes which prohibit a utility from granting undue preferences to any customer, FPL's references to potential benefits projected for the general body of ratepayers are not the most relevant because the groups of customers being treated differently in this docket are participants and non-participants. The general body includes both sets of customers together; thus, FPL's references to the general body serve only to muddy the facts, especially since approximately 97% of FPL's retail sales to its general body of customers are to the non-participants in the program and only 3% to the participants in the program. The testimony of FPL's witnesses is clear that the likelihood of obtaining certain benefits is much higher for participants than non-participants and the timeline to payback is dramatically longer for non-participants.

FPL's calculations of the benefits projected for non-participants includes non-existent carbon cost savings and potential future deferral of a carbon burning generation project. Under these calculations, non-participants have illusory benefits "assigned" to them, and thus factored into the quantification of benefits these customers *might* receive in 26 years. By that token, it would be reasonable that the participants who wish to advertise themselves as being 100% sustainable or powered 100% by renewable energy on day one of the program should have that benefit advertising quantified and factored into the benefits they will receive under the program.

Under SolarTogether, the participant group gets tangible, direct, personal benefits in the form of bill credits net of bill surcharges that are essentially guaranteed to provide a net benefit to that customer group within 8 years; however, the non-participants receive different, indirect, partly unquantified, speculative, local societal "benefits" in the form of fuel diversity and unspecified jobs,[5] while their electric bills increase with only the possibility of receiving a net savings in 26 years. (TR at 676) No matter how you try to spin it, the bottom line is that the bulk of the non-participants' benefits are speculative and projected materialize, if at all, at an indeterminate time decades into the future. At the same time, non-participants' bills increase immediately if the program is approved in its current form. All the while, it should be noted that FPL is guaranteed a return or profit on the plant for the program that it is requesting be included in rate base that, when combined with the O&M and administrative expenses for the program, will contribute $1.8 billion to base rates on a cumulative present value revenue requirement basis. (TR 336 and EX 36, SRB-2)

The nonparticipants' prospect of receiving some sort of positive bill impact at year 26 or so after bearing most of the risks for that entire time is objectively not enough to make this program fair, or the allocation of risks and benefits reasonable.

<u>Costs/Risks</u>

FPL splits hairs and misapprehends the law when it claims the program does not place "undue" risk on the "general body." (TR 676) As explained above, the general body includes both participants and non-participants, so discussing the two groups together only masks the unlawful preference, prevents meaningful comparison of the two groups, and fails to address the critical point: that the level of risk is vastly dissimilar for each group. Participants are not the ones

[5] The number and type of jobs are not clear; possibly a solar facility creates temporary construction jobs, but may not require the same on-site employment level post-construction.

who bear the bulk of the risk, and in fact, they bear essentially no risk, while non-participants bear the bulk of the risk. That is just one of several elements of prejudice built into the program.

FPL's claim that participants pay more than 100% of the program's construction costs while "sharing" benefits with non-participants who supposedly contribute nothing (TR 13, 15, 154-155) is misleading, and is simply not true unless the data is manipulated in such a way that an apples to oranges comparison inflates the amount participants pay in comparison to the amount non-participants pay. Nonetheless, while FPL sometimes claims non-participants pay nothing, at other times the Company concedes the non-participants do pay, yet attempts to downplay the significance by calling it a "minor" bill impact. (TR 184, 185, 155) The testimony at hearing was vague on the meaning of FPL's claim that non-participants would pay a "minor" bill impact in the "early" years, but could possibly start to see benefits in the "back end" years – if the commodity risk they involuntarily take on goes away due to luck. (TR 155, 186)[6] What is more likely is that the reasonable non-participant customer would not knowingly commit today to become a guarantor for the success of the $1.8 billion investment if they are also told that in 26 years, they ***might*** start getting paid back, especially where the non-participants' payments provide another set of customers with immediate credits and an 8-year payback.

The forecasted total cost of the program is $1.8 billion; however, the subscription revenues from the bill surcharges collected from participants under the program amount to only $1.3 billion. (TR 155) FPL claims this recovers 104.5% of the program's revenue requirement. However, this is not the case. (TR 142, 155). The entire cost of the program, which could be higher than the forecasted $1.8 billion amount, would be incorporated into base rates as the entire net plant for the program would be placed into rate base. As a result, the general body of customers would ultimately be responsible for the forecasted $1.8 billion including any cost overruns associated with it – not program participants. What is collected from program participants through bill surcharges under the program is a fixed $1.3 billion contribution to the actual cost of the program. That fixed contribution was calculated by FPL as 104.5% of the <u>forecasted</u> $1.8 billion cost of the program less 104.5% of the <u>forecasted</u> base rate savings from the program[7]. (TR 336-338) It is far

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[6] Commissioner question: "… how many years is that beginning the early years of the program? What is that? Five years? Ten years? Fifteen years?" (TR 186); *see also*, TR 155: "It is true that in some of the early years, the differential and the revenue requirements are paid for by the general body. … [t]hey've earned benefits by the end of the program."

[7] $1.315 billion = 104.5% x $1.259 billion = 104.5% x $1.804 billion – 104.5% x 0.545 billion

less than the forecasted $1.8 billion cost of the program because the $1.3 billion amount is assigning 104.5% forecasted $545 million in base rate savings of the program to participants whether or not that forecasted base rate savings ever materializes. As a result, to the extent the forecasted base rates savings do not materialize at 104.5% of the forecasted $545 million amount, the general body of customer would be required to make up the difference.

When asked a question about non-participants' costs, FPL's program architect instead responded by talking about the general body of ratepayers, and claimed "the general body is paying none of the cost over the life of the program." (TR 154-155) This is a misleading characterization. In fact, the solar facility costs are being placed in rate base. As a result, while the general body of customers is ultimately responsible for the cost of the projects, the allocation of risk for this program within the general body is roughly 97% to non-participants and 3% to participants. Therefore, if there are project cost overruns, administrative cost overruns or shortfalls in the forecasted savings, the responsibility for those overruns and shortfalls is allocated roughly 97% to non-participants and 3% to participants. FPL based its projections on the mid-case CPVRR analysis (TR 348-349); however, the Company is also making a 30 year projection, and the PSC has recognized that the farther into the future a utility attempts to project data, the less reliable and accurate the data becomes. *Cf.*, Order No. 2018-0150-FOF-EI, at 4 *supra*; *In re: Petition for Increase in Rates by FPL*, Order No. PSC-2010-0153-FOF-EI at 11-12 (projections are subject to more variability and uncertainty as the forecast horizon extends further into the future). If FPL truly believes in this program and its projections, why doesn't the Company simply offer it to participants – who would pay the costs and receive the benefits – and not seek to place the $1.8 billion projects in rate base? The answer is simple: FPL does not want any risk and it wants a guaranteed return and profit from this investment, while at the same time "hoping" the non-participants will receive some benefit from this $1.8 billion investment some 26 years in the future.

The "cost causers" or "cost allocation" principle has been recognized by the PSC, the Florida Legislature, and the Florida Supreme Court." *E.g.*, *In Re: FPL Turkey Point Units 6&7*, 2018 Fla. Div. Adm. Hear. LEXIS 987, *144-145, 466-467. These principles ensure that entities or customers that demand and benefit from extraordinary costs will bear those costs. *See Id.*; Fla. Stat § 366.03. The SolarTogether program does not contain elements that would justify deviation from this precedent.

Inversion of Regulatory Terminology

FPL and its consultants concocted new names for standard regulatory concepts in an effort to somehow transform the fatal defects of the SolarTogether program into advantages. Nonetheless, changing names or labels cannot change the hard, inescapable facts underlying FPL's prejudicial program design:

- FPL claims the fuel charges non-participants pay to directly fund participants' bill credits should not be called "subsidies" but instead an "assignment of benefits." (TR 188)

- FPL suggests that the $137 million in bill credit benefits received by participants should, instead, be called "incentive payments." (TR 278)

- FPL claims the participants, whom by FPL's own admission demanded this special program, are not "cost causers" but rather "benefit facilitators." (TR 15; EX 61 at 79)

- Instead of the statutory phrase "most cost effective," FPL encourages the Commission to adopt its new, non-statutory term, "best cost planning." [8] (*Id*. at 81)

- FPL urges the Commission to label SolarTogether a "net benefit creator," (TR 188) despite the fact that it relies on the operation of subsidies and that the benefits to one group of customers is far less likely to ever be "created" than the benefits built into the program for a separate group of customers.

- FPL is attempting to change the Commission's decades-old bedrock policy of true reliability-based "need" to a reimagined version of need that is really a desire, wish or demand. (TR 100)

Changing the names of well-known and recognizable regulatory accounting principles does not change the facts of how the charges and credits function in this case: the program is designed to unlawfully shift the costs of a special program to one group of customers who are not in the

[8] FPL's consultant testified that he made up the term for this case – he did not find the concept in Florida PSC precedent, or in precedent in any other state. (EX 61 at 80-81)

program (non-participants) for the benefit of another group of customers who are in the program (the cost causers or participants) – that is how a subsidy works. (TR 541, 557). One group of customers raised their hands and affirmatively demanded to **participate** in a special "voluntary" program, while one group of customers did not or could not do so, and as such are **non-participants**. This program does not involve a base load plant, and no base load plants are being taken off-line or retired as a direct result of the program. There is no system-wide impact great enough to justify making non-participants pay so that participants can have a special program and public relations project all in one, with the attendant benefits and without the financial risks, which are borne by the non-participants on their behalf. FPL's act of coining "newspeak" terminology to mask these effects is not sound regulatory policy, nor is it helpful to the development of a thoughtful and beneficial foundation for future good faith solar proposals by other utilities.

Another element of disparate treatment built into the SolarTogether program is that participants' bills will contain line items to show the charges and corresponding bill credits they receive pursuant to the program. (TR 684) However, the record does not indicate non-participants will have the same level of transparency, in terms of a line item to show them how much they are involuntarily contributing to the program by funding the net credits[9] paid to participants. The evidence indicates the proposed tariff does not require the customers' bills to explicitly disclose or show the information to non-participants. (TR at 684) Rather, the testimony is that the charges to non-participants will be hidden, without explanation, inside the Fuel charge (TR 170-171).

<u>Unduly Preferential by Design</u>

FPL reverse-engineered the program structure to ensure that participating customers obtain a 7 year simple payback. (TR 687-89; 310-311 " …shooting for a seven-year simple payback for the participants…")[10] Achieving the 7-year simple payback for participants comes at the expense of non-participants. (TR 530, 564) Therefore, FPL arbitrarily proposed rates by first deciding the terms of the program (costs/credits/payback date) for one set of customers, then adjusting the numbers for non-participants to pay whatever is necessary to keep the participants' terms at the pre-determined level. By design, a select few participants' desires have determined the level of gamble to which the non-participants (97% of FPL's customers) are subjected. In other words,

[9] Program bill credits less program bill surcharges.
[10] FPL's witness discussed his work finding the "sweet spot" payback period for participants (TR 687-689).

the program was specifically crafted to unduly benefit one group of customers to the detriment of another, which violates the plain terms of Fla. Stat. § 366.03.[11]

ISSUE 3: Should the Commission allow recovery of all costs and expenses associated with FPL's proposed SolarTogether Program in the manner proposed by FPL?

OPC: * Regardless of the ultimate decision on the SolarTogether Program, the Commission should affirmatively reject FPL's efforts to bulk up rate base by subverting the dollar threshold of Rule 25-6.0141, F.A.C. through the use of an unauthorized bundling of discrete construction projects. *

The OPC submits that the Commission should reject FPL's efforts to increase rate base and depreciable plant in service in this case and others by the use of a self-serving, internal company-interpretation of a Commission rule. The AFUDC rule was designed to provide certainty and protect customers from a utility's imposition of excessive accrual of carrying costs on future generations of customers. The OPC firmly maintains its position that the SolarTogether facilities should not be added to rate base as a result of this case. The Commission does not need to allow the facilities to go into rate base in order to make its ruling on FPL's bundling practice. As a result of the discovery in this docket, it became apparent to the public and the Commission for the first time that FPL has been applying – and intends to apply in the future – the concept of bundling disparate work activities that are historically and traditionally evaluated individually in order to add carrying costs to rate base. The Commission should step in and put an end to this practice, regardless of the ultimate decision on the program, tariff, need or prudence of the facilities.

The basis for the OPC's objection is that FPL is distorting the intent of the Commission's AFUDC rule, Rule 25-6.0141, F.A.C., ("the AFUDC Rule") in order to aggregate construction activities that were clearly expected – for eligibility purposes – to be located on a single, discrete site or location. The Commission never intended for utilities to have the discretion to internally make up their own definition of what constitutes a "project" in order to add costs for future

[11] It is worth noting that today's participant beneficiaries, who would be in receipt of undue preferences, will be tomorrows gored oxen, when additional phases of SolarTogether are added and they become the non-participants. (TR 121-122)

generations to pay. FPL is essentially suggesting AFUDC accrual is a proper reward to the utility for maximizing customer value in the way they structured the Engineering, Construction and Procurement (EPC) contract. Maximizing customer value by minimizing cost should be a normal course of business for any utility company. The Commission should reject FPL's apparent effort to tie the two unrelated concepts. The AFUDC rule was never intended to be a bargaining chip or incentive regarding whether FPL or any utility was going to take steps to minimize customer costs in the form of internal project management or contracting efficiencies. It was intended to be an objective bright line to determine what construction was to be included in Construction Work in Progress ("CWIP") while carrying costs were accounted for in operations, and what construction projects were adequately significant and long term, such that the carrying cost was truly part of the asset's actual cost. A utility has the fiduciary obligation to its customers to undertake those efficiencies without regard to whether the regulator is going to let them apply a carrying cost to the balances added to rate base. It is untenable to assert that there is a connection between the way FPL manages its business and the accrual of AFUDC. At some point, the slippery slope of bundling would allow a company to aggregate similar construction projects under certain management hierarchy and unilaterally begin accruing AFUDC on minor construction projects that neither meet the activity duration minimum or the dollar value threshold.

Historically, the Commission did not allow CWIP to be included in rate base. Instead, the assets were only included in rate base when the construction activities were completed and the project was added to plant-in-service and benefitting customers. In the 1970's when large nuclear projects were placing stress on the overall financial condition of utilities, the Commission applied a financial integrity test to determine how much CWIP to include in rate base. See, e.g., Order No. 6794, July 22, 1975; 1975, 1975 Fla. LEXIS 270. This change in policy required the Commission to develop a rule to determine when AFUDC would be added to construction activities intended for future plant-in-service and when carrying costs would be reflected in costs that would ultimately be added to rate base.

The AFUDC Rule was not intended to create opportunities to creatively stitch far-flung construction activities together to boost rate base. It appears from the testimony and evidence that the Commission was unaware FPL had developed, and was implementing, this approach to inflating rate base. It is also appears to be the case that FPL was alone among Florida investorowned utilities in bundling geographically separate and isolated construction projects together and calling them one "project" solely for the sake of building rate base. TR 376-377.

While it is true that the Commission's AFUDC Rule does not define the term "project," it is also true that the agency would have had no need to do so, given that no utility had ever attempted to twist the plain meaning of the word project to artificially add dollars to plant accounts. Florida utilities have been satisfied that the Commission provided a reasonable size threshold (0.05% of existing plant-in service balance) on a projected construction activity and a reasonably generous construction duration (greater than one year) without having to resort to "bundling" in order to stuff more dollars into plant accounts.

FPL, which has the burden of proof to demonstrate the prudence of the costs for which it seeks recovery, failed to demonstrate that the Commission's AFUDC Rule allows or even contemplates "bundling." Traditionally, a conventional construction project relative to a utility's rate base (indicated as plant-in-service) would undoubtedly be a large power plant or perhaps a transmission line. Were FPL to have submitted the SolarTogether facilities for a need determination under the PPSA, in accord with its submittal in this docket as a single 1,490 MW resource, the total project cost of $1.8 billion would still not have qualified for AFUDC, since the project was intentionally sized in 20 geographically distinct locations (TR 105, 359) such that no individual site's construction project would come close to reaching the minimum dollar threshold for inclusion of AFUDC (TR 364-366), and each was constructed on separate sites (TR 359), with separate tasks and work orders (TR 383-384), and in all likelihood individual and independent risks at the unique sites. Instead, the fact that the company broke up the program into 20 separate sites to avoid the PPSA illustrates the absurdity of the claim that FPL can selectively package sites hundreds of miles apart for purposes of imposing current period financing costs on future customers. FPL's regulatory policy expert describes the individual 74.5 MW sites as "projects" when defending the decision to evade the PPSA requirements while simultaneously asking the Commission to pick out the FPL-favored aspects of the law to support the Program. (EX. 61 at 86-87.)

The AFUDC rule has two fundamental criteria – a dollar value (0.05% of plant) threshold and a duration threshold (greater than one year). (TR 361-362). No utility should be allowed unfettered ability to render these criteria irrelevant by bundling. The act of bundling renders the dollar value threshold meaningless. The threshold was clearly intended to ensure that smaller projects would not be eligible for AFUDC. Instead, smaller projects would be included in the 13-month average CWIP balance. Their carrying costs would be reflected in net operating income like any component of rate base. Recovery of those aggregated minor construction projects is accomplished through measurement of achieved earnings within the 200 basis point range of reasonableness; this is effectively the financial integrity test that the Commission now applies to all rate base in the aggregate. Ostensibly, as a trade-off underlying the AFUDC Rule adoption, only large, long term construction projects like power plants, transmission lines, and major pollution control equipment at a single power plant complex will be excluded from CWIP, and instead will be given AFUDC treatment. In both cases, the carrying costs are given recognition, but only the AFUDC element is added to depreciable plant-in-service balances and paid for by future generations of customers. FPL's bundling proposal upsets this balance between costs that could be permanently included in ratebase and those costs which would be temporarily carried on the balance sheet between rate cases and considered in current operating income. FPL's approach creates a level of arbitrariness that was not contemplated in the Commission's adoption of the AFUDC Rule.

Regarding the specifics of the SolarTogether bundling, the evidence offered by FPL further reveals the arbitrary and inconsistent, result-motivated bundling. FPL initially proposed that the Commission allow AFUDC to be added to rate base for the entire 20 projects included in the Program. TR 363-365. This approach was revised to only apply to 6 of the 20 projects. Id. These 6 projects were clearly bundled in groups of three because one or two on their own or combined would not meet the $243.4 million threshold. When bundled and recast as a single three-site "project," the individual projects just barely exceed the threshold, and FPL rewarded itself with an extra layer of costs by applying 12-18 months of the AFUDC rate to the construction costs.

By packaging the individual projects in minimums of three in order to meet the threshold, FPL is exposing the practice as completely result driven. It is true that in the fall of 2019 the remaining 14 projects were ultimately deemed to not meet even the internal company criteria to bundle. FPL could not rely on the single contract criterion integral to the initial bundling efforts. Whether it was (a) an effort to reduce project costs and improve the cost-effectiveness of the program on a cumulative present value revenue requirement ("CPVRR") basis (and thus improve the sharing percentage) or (b) FPL had simply painted itself into a corner, the bundling tactic was dropped for 14 sites because the single contract criterion FPL unilaterally had internally established could not be met. TR 364-365.

FPL admitted that it has been inflating its rate base by using this practice from the time it began building other 74.5 MW solar centers in 2016 through 2020 (i.e., the ones that were either authorized or approved in the 2016 Settlement Agreement). TR 374. FPL never publicly revealed this practice, nor did its outside auditor do so. TR 378-379. Witness Bores admitted that costs from the bundled AFUDC exist in the surveillance report results but are not segregated. TR 379. He testified that the practice was embedded in the electronic spreadsheet workpapers and calculations supporting the 2017-2020 SoBRAs. TR 374-375. What is significant is what he did not say. He failed to testify that this bundling practice was explained in testimony or was obvious to the Commission or its staff. TR 377. It is apparent from the Prehearing Orders in those dockets that it was not an issue that was raised or that it could have been raised under the very narrow set of issues the Commission allowed under the stipulated cost recovery test. See, Order No. PSC-2017-0399-PHO-EI at 12-16; Order No. PSC-2018-0520-PHO-EI at 12-17; and Order No. PSC-2019-0466-PHO-at 11-13. Regardless, it is clear that the Commission has never been presented with the question of whether this bundling practice applied unilaterally by FPL is lawful under the AFUDC Rule.

It was clear from the testimony that FPL appears to be alone among Florida utilities in evading the 0.05% threshold by this aggregation. Mr. Bores affirmatively stated that Gulf Power has not used the aggregation tactic, and he has personal knowledge of Gulf Power's practice since NextEra bought Gulf Power. TR 376-377. Mr. Bores also indicated in his response to cross-examination that he had no evidence that the other IOUs were using a bundling practice. TR 375-376.

FPL further provided evidence that it is internally applying the practice inconsistently and selectively. In 2016, an effort to increase efficiency at 26 combustion turbines (CTs) throughout FPL's territory was folded into a single contract with General Electric (GE). TR 380-381; EX 70. Although the upgrades were performed under a single contract (with what appeared to be a common liquidated damages provision) under which FPL prepaid $400 million out of $418 million, separate work orders were maintained and each activity at the 26 individual sites was begun and ended in 60 day increments over a 4 year period. No two installation projects were started and stopped on the same days. EX 70; TR 389-391.

In the SolarTogether situation, Mr. Bores agreed that the same beginning and ending date was a significant factor. TR 382; EXH 69. However, in the case of the CT upgrades, each individual CT upgrade project was conducted seriatim, or sequentially, with separate work orders and 26 distinct 60 day work periods with unique completion dates and, consequently, 26 separate ending dates for accrual of AFUDC on each one. TR 389-391; EX 70. Despite the stark contrast between the CT activities and the first two aggregations of SolarTogether projects, FPL still internally rationalized that it could apply AFUDC to both sets of far flung, individual construction activities. FPL now expects the Commission to accept their "work-around" that evades the limitations ingrained in the AFUDC rule.

The two sets of vastly different facts illustrate that FPL's practice is arbitrary and self-serving. The Commission should reject FPL's accounting sleight of hand along with the Program. Given that FPL has quietly used its "internal" aggregation practice without Commission approval over the past four years, it is important that this practice should be rejected now, once and for all. The Commission should only consider this practice, if at all, in the context of a rulemaking proceeding. FPL asserts that there is no definition of what constitutes a "project." While this may be technically true, FPL's self-serving and arbitrary internal practice is contrary to the spirit of the AFUDC Rule and eviscerates one of the key elements of the Rule. In essence, FPL has developed a gimmick to effectively eliminate the dollar value threshold and render it meaningless. If the Commission intends to allow bundling for AFUDC accrual, then it – not FPL – should decide the circumstances that will apply uniformly for all utilities and under all circumstances.

ISSUE 4: Should the Commission approve FPL's proposed SolarTogether Program and associated tariff, Rate Schedule STR, which is the same tariff attached as Attachment I to the Settlement Agreement filed October 9, 2019?

OPC: No. OPC adopts its discussion in Issues 1, 2 and 3 above.

ISSUE 5: Should this docket be closed?

OPC: After the Petition is denied, the docket should be closed.

Dated this 30th day of January, 2020.

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CERTIFICATE OF SERVICE
Docket No. 20190061-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 30th day of January 2020, to the following:

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