IN THE SUPREME COURT OF FLORIDA

FLORIDIANS AGAINST INCREASED RATES, INC.,

Appellant,

v.

GARY F. CLARK, ETC., ET AL.,

Appellees.

Consolidated Cases
Supreme Court Case Nos.
SC21-1761
SC22-12

Lower Tribunal Nos.
PSC-2021-0446-S-EI and
PSC-2021-0446A-S-EI

FLORIDA RISING, INC., ET AL.,

Appellants,

v.

GARY F. CLARK, ETC., AL.,

Appellees.

_____/

INITIAL BRIEF ON THE MERITS OF FLORIDIANS AGAINST INCREASED RATES, INC.

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PRELIMINARY STATEMENT

In this Initial Brief, Appellant Floridians Against Increased Rates, Inc., is abbreviated "FAIR." The Florida Public Service Commission is abbreviated "PSC." The PSC's Order No. PSC-2021-0446-S-EI, Final Order Approving 2021 Stipulation and Settlement Agreement (R. 5245-6505, and its Amendatory Order No. PSC-2021-0446A-S-EI (R. 5223-25) are referred to collectively as the "Order on Appeal" or simply the "Order." Florida Power & Light Company, the petitioner in the proceedings below, is abbreviated "FPL." The Appellants in consolidated Case No. SC22-12, Florida Rising, Inc., the LULAC Florida Education Fund, Inc. (better known as the League of United Latin American Citizens of Florida, abbreviated "LULAC"), and the Environmental Confederation of Southwest Florida, are referred to collectively as "Florida Rising." As appropriate, the full names of other parties are abbreviated within the text of FAIR's Initial Brief.

The Stipulation and Settlement Agreement approved by the Order is referred to as the "2021 FPL Settlement." FPL and the intervenor parties who joined the 2021 FPL Settlement are referred

to as the "Settling Parties." The Office of Public Counsel is abbreviated "OPC."

The Florida Statutes are abbreviated "F.S.," and all references are to the 2021 edition thereof. The Florida Administrative Code is abbreviated "F.A.C." Citations to the Record on Appeal are in the form R. abcde (where abcde is the page number in the Record), sometimes accompanied, where appropriate, by identifying the testimony or document cited.

STATEMENT OF THE CASE AND FACTS

Floridians Against Increased Rates, Inc. ("FAIR"), a social welfare organization existing under Florida law, hereby appeals the PSC's Order approving a nonunanimous settlement agreement[1] (the "2021 FPL Settlement," defined and described more fully below) that has raised the rates paid by retail electric customers who receive electric service from FPL. Pursuant to Article V, Section 3(b)(2), of the Florida Constitution and Section 350.128(1), F.S., this is a direct appeal of the PSC's Order relating to the rates of an electric utility.

[1] In this context, a nonunanimous settlement is a settlement agreement that does not include all of the parties to the proceedings before the PSC. *See, e.g., Sierra Club v. Brown*, 243 So. 3d 903, 905 (Fla. 2018).

The issues presented by FAIR's appeal center on questions of law as to whether the PSC has the statutory authority to approve several critical provisions and components of the 2021 FPL Settlement. FAIR asserts that the PSC lacks, and lacked when it issued the Order on Appeal, the statutory authority to approve certain provisions of the 2021 FPL Settlement, and FAIR further asserts that the PSC's approval of the 2021 FPL Settlement constitutes a departure from the essential requirements of applicable law. Accordingly, FAIR respectfully asks this Court to reverse and remand that Order.

Basic Regulatory Framework and Principles: The Regulatory Compact. The fundamental principles of utility regulation in the U.S. are often called "the Regulatory Compact." This term refers to an unwritten set of principles under which, in practical terms: the public utility is granted a monopoly to provide service in a defined area; the utility commits to make necessary investments and to provide safe and reliable service to all customers desiring that service in its area, at fair, just, and reasonable rates; and where those rates ensure that the utility recovers its reasonable costs of providing service, including a fair and reasonable return on its investment, including a fair and

reasonable return on equity investment. Attachment A, Hearing Transcript, Vol. 11 at 2390-91, R. 48919-20 (Mac Mathuna Direct at 8-9); Att. A, Tr 2517-18, R. 49458-59 (Devlin Direct at 21-22).[2]

In this vein, among the key issues and factors in rate cases such as this are the rate of return on common equity ("ROE") and the "equity ratio" to be used in setting the utility's rates. *See*, *e.g.*, R. 43224-29, Order No. PSC-2021-0302-PHO-EI, Prehearing Order, at 126-31 (hereinafter "*PHO*"), where these issues are identified as issues to be decided in the FPL rate case below. The ROE is often referred to as the "fair and reasonable" return, Att. A, Tr 2387, R. 48916, or the "fair, just, and reasonable" rate of return. Att. A, Tr 2489, R. 49018 (Mac Mathuna Direct at 5, 107). The equity ratio

[2] This unusual citation format derives from the fact that Volume 11 of the hearing transcript, in which Mr. Devlin's and Mr. Mac Mathuna's direct testimony is found, was classified as confidential and, in the Record on Appeal, designated simply as Attachment A, which is one page having the number R. 34246. Thus, the citation given is to Attachment A, which is Volume 11 of the hearing transcript, and the pages of the transcript cited. For convenience, this brief also cites to the testimony as filed with the PSC on June 21, 2021, which is not confidential and which is in the Record on Appeal. Thus, hereafter, these citations will be in the format, Att. A, Tr (Transcript page no.), R. (Record page no. in the non-confidential version of the testimony filed with the PSC). All testimony thus cited was received into the record.

refers to the proportion of the utility's investment that is provided by common stockholders' equity.

FPL's Rate Increase Requests. The proceedings below were initiated on January 11, 2021, by a test year notification letter ("Test Year Letter") sent by FPL's president to Gary F. Clark, then the PSC's chairman. R. 70220-27. In the Test Year Letter, FPL stated that it serves more than half of Florida's population, R. 70220, and announced that it intended to seek rate increases in its base rates to take effect in January 2022, additional increases to take effect in January 2023, and additional increases to take effect at unspecified times in 2024 and 2025. R. 70221-22.

Pursuant to regular Commission procedure, FPL filed its Petition for Base Rate Increase and Rate Unification ("FPL's Petition"), which included the direct testimony and exhibits of twenty witnesses in support of its requested rate increases on March 12, 2021. R. 67256-70106. (FPL's witnesses are also listed at R. 43103-04, *PHO* at 5-6.) Included in its March 12 filing were several volumes of data and other information known as Minimum Filing Requirements ("MFRs"), including standalone information for FPL and Gulf Power Company in MFR format. R. 59102-67255. These MFRs are

specifically required by Rule 25-6.043, F.A.C., and, in this case, FPL submitted MFRs only for the years 2022 and 2023; no MFRs were submitted for 2024 or 2025. *Id.*; *see also* R. 70128, FPL's Pet. at 17. In FPL's Petition, FPL sought an increase of $1.108 billion per year to be effective in January 2022, and an additional increase of $607 million per to be effective in January 2023. R. 70113, FPL's Pet. at 2. FPL later submitted a Notice of Identified Adjustments (Exhibit LF-12) by which it changed the proposed amounts of these increases to $1.075 billion per year effective January 1, 2022 and to $605 million per year to be effective January 1, 2023. R. 43108, *PHO* at 10. FPL also sought approval of future rate increases (without specified values) associated with planned additional solar generating facilities, R. 70113, 70136-37, approval of a "four-year rate plan," R. 70124, and other provisions. *See generally* R. 70153-55, FPL's Pet. at 42-44.

Intervenor Parties. OPC's intervention was acknowledged on January 29, 2021. R. 5247, Order at 3. The following parties were granted intervention on the basis of associational standing: Florida Executive Agencies ("FEA"); Florida Industrial Power Users Group ("FIPUG"); Florida Internet & Television Association, Inc. ("FIT"); Florida Retail Federation ("FRF"); Southern Alliance for Clean Energy

("SACE"); and Vote Solar. R. 5247, Order at 3. Daniel R. Larson and Alexandria Larson (the "Larsons") were granted intervention on an individual standing basis. *Id.* CLEO Institute and Florida Rising, Inc., were granted intervention on an individual standing basis and provisional intervention on an associational standing basis. *Id.* The League of United Latin American Citizens of Florida ("LULAC"), the Environmental Confederation of Southwest Florida ("ECOSWF"), and FAIR were granted provisional intervention on an associational standing basis. *Id.* The parties whose intervention was granted provisionally were thereafter required to establish their standing by record evidence. *See* R. 51273, Order No. PSC-2021-0180-PCO-EI at 3, Order Provisionally Granting Floridians Against Increased Rates, Inc.'s Motion to Intervene (May 19, 2021). The PSC expressly voted on and granted FAIR's intervention by the Order on Appeal. R. 5249-52, Order at 5-8.

With respect to FAIR's standing, the PSC found that FAIR is a Florida not-for-profit membership organization whose specific purposes "include advancing the welfare of residential and business customers of investor-owned electric utilities by advocating against actions that 'are likely to result in electric rates being greater than

necessary to ensure the provision of safe and reliable electric service.'" R. 5250, Order at 6. The PSC also found that a significant number (82 percent) of FAIR's members were FPL customers and that FAIR's membership list was verified by FAIR's witness Nancy Watkins. *Id.* The PSC further found that the "rates paid by FAIR members who are FPL customers will be affected if the petition for an increase in base rates is granted or the settlement agreement is approved." *Id.* Having made these findings, the PSC held that FAIR satisfied all applicable requirements under Florida law, particularly under *Florida Home Builders v. Dep't of Labor & Economic Security*, 412 So. 2d 351, 353-54 (Fla. 1982), to establish its associational standing to represent its members. R. 5252, Order at 8.

An Order Establishing Procedure ("OEP") was issued on March 24, 2021, R. 52383-96; the OEP was subsequently amended, generally to change key procedural dates or clarify discovery procedures. *See, e.g., Fifth Order Revising OEP* at 2. R. 41054.

Pursuant to the OEP, several intervenor parties, including FAIR, filed direct testimony and exhibits on June 21, 2021, R. 47227-49483. The substantive positions relative to the issues raised by FAIR in this appeal that were supported by these intervenor parties'

evidence (testimony and exhibits)[3] are set forth in the Prehearing Order, R. 43116-39 (basic positions) and R. 43139-305 (positions on specific issues), and briefly summarized here.

1. OPC's positions (supported by its six expert witnesses) included: that FPL's request was excessive for 2022, without even considering FPL's additional requested increases for subsequent time periods, R. 45182 (OPC's Prehearing Statement at 4); that FPL's rates for 2022 should be decreased by $70.9 million per year, R. 45187; that FPL had requested two opposing sets of depreciation lives in order to create a "depreciation surplus to create the Reserve Surplus Amortization Mechanism (RSAM) that would allow FPL to manipulate its earnings up to the top of any range established" by the PSC, R. 45182; that FPL's requested ROE of 11 percent and requested equity ratio of 59.6 percent are "extravagant and excessive under current market conditions," R. 45219; that the appropriate values are an ROE of 8.75 percent and an equity

[3] Several parties, including Florida Rising, LULAC, ECOSWF, FAIR, and CLEO and Vote Solar jointly, also filed testimony in support of their standing.

ratio of 55.0 percent, *id.*; that the PSC does not have the statutory authority to approve the RSAM, R. 45189-90; and that the RSAM should be rejected along with FPL's "faux 4-year rate plan." R. 45187.

2. The FEA took positions that: the appropriate ROE for FPL is between 9.10 percent and 9.70 percent, with a midpoint of 9.40 percent, R. 43227-28, *PHO* at 129-30; and that the appropriate equity ratio for FPL is 53.5 percent, R. 43224-25, *PHO* at126-27.

3. FIPUG took positions that: in no event should an ROE greater than 10 percent be approved for FPL, R. 43228; that FPL's equity ratio should be no greater than 55 percent, R. 43225; that FPL's requested increases for 2023, 2024, and 2025 should be rejected because they are based on uncertain forecasts or are not needed, R. 43126; that "the Commission should greatly cut FPL's rate request after weighting the evidence presented," R. 43125; and that FPL's proposed four-year plan request should be rejected because it is "not authorized . . . and is based on speculative forecasts." R. 43126.

4. FRF took positions that: there is no need for any revenue increase for 2022, R. 43133; that the PSC's authority to authorize the requested multi-year rate plan is questionable, *id.*; that the appropriate ROE for FPL is 8.75 percent, R. 43227-28; and that the appropriate equity ratio for FPL is 55 percent, R. 43224-25.

5. FAIR and Florida Rising jointly filed the testimony and exhibits of three expert witnesses, including former Public Service Commissioner John Thomas Herndon (R. 26408), Timothy J. Devlin (who formerly served as the Executive Director of the PSC and also as the PSC's Director of Auditing and Financial Analysis, R. 26402), and Breandan Mac Mathuna. FAIR's positions included: that FPL should reduce its rates by approximately $120 million per year in 2022 because FPL did not need any increase to provide safe and reliable service to recover its legitimate costs to serve, and to earn a fair and reasonable rate of return, R. 43122; that the PSC does not have the authority to approve FPL's requested RSAM, R. 43142, and that the RSAM should be rejected, R. 43294; that the appropriate midpoint ROE for FPL is 8.56 percent, R. 43227;

and that the appropriate equity ratio for FPL is 55.4 percent. R. 43224.

6. Separately from FAIR, Florida Rising, LULAC, and ECOSWF took the basic position that "FPL's petition to increase rates should be denied in its entirety." R. 43134, *PHO* at 36.

All of the testimony and exhibits setting forth these parties' evidence opposing FPL's proposed rate increases were received into evidence without objection and without challenge or cross-examination by any party,[4] including no objections and no cross-examination by either FPL or the PSC or the PSC Staff. Most of the witnesses' testimonies were stipulated for admission into the record by all parties and the witnesses excused; this was ordered by Chairman Clark at R. 38380. FAIR's and Florida Rising's witnesses Herndon, Mac Mathuna, and Devlin appeared live to present their summaries, but their testimonies were admitted into the record without cross-examination when they appeared, at the following cites

[4] FPL had filed a motion for summary final order, asking the PSC to dismiss FAIR for lack of standing, R. 43424-783; however, that motion did not challenge the testimony of the witnesses jointly sponsored by FAIR and Florida Rising. FPL's motion was denied by the Order where the PSC determined that FAIR had satisfied applicable standing requirements. R. 5252, Order at 8.

in the Record: Mac Mathuna Direct, Att. A, Tr 2493; Devlin Direct, Att. A, Tr 2540; Herndon Direct, R. 34931; Mac Mathuna Supplemental Direct, R. 34046; Devlin Supplemental Direct, R. 34068; and Herndon Supplemental Direct, R. 34103. Their exhibits were also entered into the record: Mac Mathuna Direct Exhibits, Att. A, Tr 2494; Devlin Direct Exhibits, Att. A, Tr 2540; Herndon Direct Exhibits, R. 34464 (admitted as identified in the Comprehensive Exhibit List); Mac Mathuna Supp. Exhibits, R. 34047; Devlin Supp. Exhibit, R. 34068; and Herndon Supp. Exhibits, R. 34103.

Pursuant to the OEP, on July 14, 2021, FPL filed rebuttal testimony of fifteen witnesses addressing some of the intervenors' testimony and exhibits. R.45699-46190 Also on July 14, all parties filed their prehearing statements of issues and positions. R. 45179-45690.

The evidentiary hearing was scheduled to begin on August 16, 2021. R. 43101, *PHO* at 3. On August 10, 2021, FPL and certain other parties, including OPC, FIPUG, FRF, and SACE, filed the 2021 FPL Settlement and a joint motion for approval of that settlement. R. 41296-43098. Other parties, including FEA (R. 38865-70), Cleo Institute, and Vote Solar (R. 40965-81), subsequently joined the 2021

FPL Settlement but did not submit testimony in support of the 2021 FPL Settlement. The settlement was the product of negotiations, R. 33896, and those settlement negotiations were confidential. R. 33898 (FPL's general counsel stating that FPL has "signed obligations of non-disclosure among the parties who participated. And those obligations include not disclosing, in fact, whether discussions are even happening, how – the status of those discussions . . . .") The record clearly reflects that FAIR did not participate in the settlement negotiations. R. 33896-900 (In the hearing on September 20, 2021, after FPL's witness acknowledged that the settlement was the product of negotiations, FAIR's attorney was not permitted to even ask questions about the settlement negotiations.)

On August 12, 2021, the PSC issued a Fourth Order Revising Order Establishing Procedure, Order No. PSC-2021-0305-PCO-EI, which continued the hearing until Wednesday, August 18, 2021, due to Tropical Storm Fred. R. 41239-40. On August 20, 2021, the PSC issued a Fifth Order Revising Order Establishing Procedure, Order No. PSC-2021-0314-PCO-EI (*Fifth Order Revising OEP*), R. 41053-56. The *Fifth Order Revising OEP* established certain procedures for filing testimony and exhibits, discovery, the final hearing, briefing, and the

decision relating to the 2021 FPL Settlement, R. 41053; and procedures for addressing the newly submitted 2021 FPL Settlement. R. 41053. Pursuant to the *Fifth Order Revising OEP*, FPL filed testimony and exhibits in support of the 2021 FPL Settlement on August 26, R. 41053. No party other than FPL submitted or presented testimony or exhibits in support of the 2021 FPL Settlement. *See* Index of Record, R. 00009; *see also Second PHO, infra*, at 3-4, R. 36692-93. Also pursuant to the *Fifth Order Revising OEP*, on September 13, FAIR and Florida Rising filed testimony and exhibits in opposition to the 2021 FPL Settlement. R. 41053, R. 36733-38556.[5]

On September 16, 2021, the PSC issued its Second Prehearing Order, Order No. PSC-2021-0362-PHO-EI ("*Second PHO*"), which set forth the procedures for a two-part hearing scheduled for September 20-22, 2021, the first part addressing FPL's March 12 Petition for rate increases (Rate Case) and the second part addressing the motion for approval of the 2021 FPL Settlement. R. 36691. FPL was further afforded the opportunity to present live oral testimony in rebuttal to

[5] Although the Larsons did not file testimony, they actively opposed the 2021 FPL Settlement.

FAIR's and Florida Rising's opposing testimony at the hearing held on both FPL's Petition and on the 2021 FPL Settlement on September 20, 2021. R. 36693, *Second PHO* at 4. No party other than FPL submitted or presented testimony or exhibits in support of the 2021 FPL Settlement. R. 00009; R. 36692-93.

The intervenors who entered into the 2021 FPL Settlement with FPL did not withdraw their testimonies, which were received into evidence at the following cites: OPC, R. 35227-35467 and 35537-35656; FEA, R. 35080-35221; FIPUG, R. 34753-34895; and FRF, R. 34897-34930. Their exhibits were also stipulated and admitted into the record. R. 36379-80.

The parties filed post-hearing briefs on October 11, 2021, and the PSC voted on October 26, 2021, to approve the 2021 FPL Settlement. *See* Index of Record, R. 7792-8100 (briefs) and R. 7749-51 (Vote Sheet from 10/26/21 Commission conference). The PSC issued the Order on December 2, 2021, R. 5245, and issued an Amendatory Order (Order No. PSC-2021-0446A, to correct scrivener's errors) on December 9, 2021. R. 5223-26. FAIR timely appealed the Order by filing its Notice of Administrative Appeal on December 27, 2021. R. 3938-5208. Florida Rising also filed a notice

of appeal on January 3, 2022, and the Court consolidated the appeals for all purposes by order issued on March 1, 2022.

Terms of the 2021 FPL Settlement. As approved by the PSC and as relevant to this appeal, the 2021 FPL Settlement contains the following major provisions.

- The 2021 FPL Settlement has a minimum term of four years, from January 1, 2022 through December 31, 2025. R. 5259.
- Effective January 1, 2022, FPL is authorized to increase its base rates and service charges by $692 million per year. R. 5260.
- Effective January 1, 2023, FPL is authorized to increase its base rates and service charges by an additional $560 million per year. R. 5260.
- FPL's regulatory ROE is set at 10.6 percent. R. 5261, Order at 17, and all rates shall be set using that 10.6 percent ROE, R. 5270, Order at 26.[6] FPL's ROE may be as great as 11.7 percent without FPL being deemed to be over-earning; and under

[6] Although not expressly stated in the Order, it is clear that FPL intends to continue using an equity ratio of 59.6 percent. R. 70140, 70153, FPL's Petition at 29, 42; *see also* R. 33976 (FPL's witness Barrett stating that FPL's high equity ratio is part of FPL's consideration in a strong financial position).

certain capital market conditions, the ROE limit may be increased to 11.8 percent. R. 5261, 5270, Order at 17, 26.

- FPL is allowed to utilize a Reserve Surplus Amortization Mechanism ("RSAM") similar to a mechanism approved by the PSC in a previous FPL settlement.[7] R. 5261-62, 5287-88; Order at 17-18, 43-44.
- If permanent federal or state tax changes are enacted for any tax year from 2022 through the end of the term of the 2021 FPL Settlement, "the impacts of the tax changes on the base revenue requirement will be adjusted for retail customers . . . through a prospective adjustment to base rates" within 90 days from the tax becoming law or the effective date of the law (hereinafter the "Automatic Tax Rate Increase" provision). R. 5263, Order at 19.[8]

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[7] *In re: Petition for Rate Increase by Florida Power & Light*, Docket No. 20160021-EI, Order No. PSC-2016-0560-AS-EI at 3, (Fla. Pub. Serv. Comm'n, December 15, 2016), Order Approving Settlement Agreement. Hereinafter, the foregoing order is referred to as the "*2016 FPL Settlement Order,*" and the settlement agreement in that case is referred to as the "2016 FPL Settlement."

[8] The 2021 FPL Settlement includes numerous additional provisions that FAIR is not challenging in this appeal. These include but are not limited to: Solar Base Rate Adjustments; approval of cost recovery for numerous electric vehicle pilot programs; a four-year solar power

- Effective January 1, 2022, "unified FPL rates shall apply to all customers throughout the former FPL and Gulf service areas," R. 5264, 5272, Order at 20, 28, except that over the next five years, former Gulf customers will pay a "transition rider" (higher rate charge) and "former FPL customers will receive a transition credit" on their bills. *Id.*

The 2021 FPL Settlement is, by its express terms, an "all or nothing" deal that is "contingent on approval . . . in its entirety by the Commission without modification," R. 5299, Order at 55, such that if the Order is reversed, the 2021 FPL Settlement would be rendered null and void.

Statutory Framework. Regarding the issues addressed here, the PSC's governing statute, Chapter 366, F.S., provides in pertinent part as follows.

Section 366.06(1-2), F.S., provides as follows:

> **366.06 Rates; procedure for fixing and changing.—**
>
> (1) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes

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facilities pilot program for commercial and industrial customers; a "Green Hydrogen pilot project;" and others.

in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor. In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.

(2) Whenever the commission finds, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility for public utility service, or that the rules, regulations, or practices of any public utility affecting such rates, are unjust, unreasonable, unjustly discriminatory, or in violation of law; that such rates are insufficient to yield reasonable compensation for the services rendered; that such rates yield excessive compensation for services rendered; or that such service is inadequate or cannot be obtained, the commission shall order and hold a public hearing, giving notice to the public and to the public utility, and shall thereafter determine just and reasonable rates to be thereafter charged for such service and promulgate rules and regulations affecting equipment, facilities, and service to be thereafter installed, furnished, and used.

Section 366.07, F.S., provides as follows:

> **366.07 Rates; adjustment.—**
>
> Whenever the commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law, or any service is inadequate or cannot be obtained, the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts or service, to be imposed, observed, furnished or followed in the future.

Contemporaneous PSC Decisions. Key factors that determine a utility's allowable revenues and rates include the ROE and equity ratio approved by the regulatory body. In the same time frame in which the PSC approved the 2021 FPL Settlement, the PSC approved settlement agreements for Florida's two other large public utilities, Duke Energy Florida, LLC ("Duke") and Tampa Electric Company ("TECO"), that provide retail electric service pursuant to Chapter 366 and the PSC's regulation. On June 4, 2021, less than five months before the PSC voted to approve the 2021 FPL Settlement, the PSC

issued its order approving a settlement agreement ("2021 Duke Settlement") between Duke Energy Florida, LLC, OPC, FIPUG, White Springs Agricultural Chemicals, Inc., and Nucor Steel Florida, Inc., *In re: Petition for Limited Proceeding to Approve 2021 Settlement Agreement, Including General Base Rate Increases, by Duke Energy Florida, LLC*, Order No. PSC-2021-0202-AS-EI, June 4, 2021, Final Order Approving 2021 Settlement Agreement ("*Duke Settlement Order*"). In the *Duke Settlement Order*, the PSC approved an ROE of 9.85 percent and an equity ratio of 53.0 percent. *Id.* at 12-13.

On November 10, 2021, fifteen days after it voted to approve the 2021 FPL Settlement (and three weeks before the Order on Appeal would be issued), the PSC (having already voted on the matter) issued its order approving a settlement agreement ("2021 TECO Settlement") between TECO and all of the intervenor parties in TECO's then-pending rate case docket. *In re: Petition for Rate Increase by Tampa Electric Company*, Docket No. 20210034-EI, Order No. PSC-2021-0423-S-EI, Final Order Approving Stipulation and Settlement Agreement Between Tampa Electric Company and All Intervenors ("*TECO Settlement Order*"). In that order, the PSC approved an ROE of 9.95 percent and an equity ratio of 54.0 percent for TECO. *TECO*

Settlement Order at 11. Neither the *Duke Settlement Order* nor the *TECO Settlement Order* included an RSAM.

SUMMARY OF ARGUMENT

The Order on Appeal should be reversed because the PSC acted without necessary statutory authority with respect to its approvals in the 2021 FPL Settlement of the RSAM and the Automatic Tax Rate Increase provision. Following the Court's prior holdings, where there is a reasonable doubt as to the existence of a power being exercised, any further exercise of that power should be arrested. *United Tel. Co. v. Pub. Serv. Comm'n*, 496 So. 2d 116, 118 (Fla. 1986) ("*United Telephone*") (quoting *Radio Telecomm., Inc. v. Se. Tel. Co.*, 170 So. 2d 577, 582 (Fla. 1965)). Further, the Order should be reversed because the PSC's approvals of the RSAM and the Automatic Tax Rate Increase provisions directly violate the PSC's statutory authority.

While parties to a settlement agreement may agree to abide by certain terms, including certain rates, or agree not to challenge or attempt to change certain aspects of a utility's rates, PSC approval of any such provisions, terms, or rates must, in the first instance, be based on the PSC's express statutory authority to approve such

terms, provisions, or rates.[9] As this Court has held, "If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." *United Tel.*, 496 So. 2d at 118, *Radio Telecomm.*, 170 So. 2d at 582. Any provision that violates statutory law cannot be approved. Further, parties to a settlement agreement, or any other contract, can never confer jurisdiction or necessary statutory authority to the PSC by their agreement. *United Tel.,* 496 So. 2d at 118.

The PSC, FPL, and the other Settling Parties cannot simply validate provisions that have no statutory basis by including them in a settlement agreement; the PSC must have the authority to approve rates and accounting measures that impact customers, and with respect to the foregoing provisions of the 2021 FPL Settlement, the PSC has no such authority. Indeed, the RSAM and the Automatic Tax Rate Increase provisions are directly contrary to law.

[9] "As the threshold issue, this Court must first establish the grant of legislative authority to act since the [PSC] derives its power solely from the Legislature." *Sierra Club v. Brown*, 243 So. 3d 903, 908 (Fla. 2018) (citing *United Tel.*, 496 So. 2d at 118).

Moreover, the PSC departed from the essential requirements of law, including long-standing principles of utility regulatory law adopted by the United States Supreme Court in *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*"), and *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) ("*Bluefield*"), by approving rates that are facially inconsistent with the PSC's own contemporaneous decisions approving settlements covering the same subjects for Florida's two other large public utilities. This departure is already imposing excessive rates on FPL's customers, as measured against the rates that would have – and should have – resulted from the PSC applying the critical rate-determining values (ROE and equity ratio) to FPL consistent with the PSC's contemporaneous application of those ROE and equity ratio values applied to Florida's other large electric public utilities. If allowed to stand, the 2021 FPL Settlement will result in FPL's customers paying hundreds of millions of dollars per year, totaling in the billions of dollars, in excessive costs over the next four years. This is a gross miscarriage of justice – imposed on FPL's customers by the PSC's failure to act consistently with its own contemporaneous decisions – and the Court should reverse the Order accordingly.

STANDARD OF REVIEW

Issues I and II below involve a determination of whether the PSC exceeded its statutory authority. "As the threshold issue, this Court must first establish the grant of legislative authority to act since the Commission derives its power solely from the Legislature." *Sierra Club v. Brown*, 243 So. 3d 903, 908 (Fla. 2018) (citing *United Tel.*, 496 So. 2d at 118).

Whether the PSC has the authority to act is a question of law, which is subject to *de novo* review. *Citizens v. Graham*, 191 So. 3d 897, 900 (Fla. 2016). Moreover, "a question of statutory interpretation by an administrative agency" is subject to *de novo* review. *Citizens v. Brown*, 269 So. 3d 498, 504 (Fla. 2019). Pursuant to Article V, Section 21 of the Florida Constitution, the PSC's interpretations of its statutes are no longer entitled to any deference by a reviewing court, and the court must interpret such statutory provisions *de novo.*[10] *Id.*

[10] Moreover, predating the prohibition against granting deference to the PSC in Article V, Section 21 of the Florida Constitution, this Court has long recognized that deference cannot be accorded to the PSC when it exceeds its statutory authority. *Citizens v. Graham*, 191 So. 3d at 900.

Issue III involves a challenge to the fairness and reasonableness of the Order. Accordingly, the standard of review is whether the PSC departed from the essential requirements of law. *Sierra Club*, 243 So. 3d at 908.

ARGUMENT

I. THE PSC'S APPROVAL OF THE RESERVE SURPLUS AMORTIZATION MECHANISM ("RSAM") NOT ONLY EXCEEDED ITS STATUTORY AUTHORITY, BUT THAT APPROVAL ALSO DIRECTLY VIOLATES FLORIDA STATUTES.

In the Order on Appeal, the PSC approved the Reserve Surplus Amortization Mechanism ("RSAM"), which is based on an alternate depreciation study submitted by FPL and which would allow FPL to use a surplus balance of accumulated depreciation ("Reserve Surplus") to "maintain" (as characterized by FPL, R. 43114) or to "manipulate" (as characterized by OPC, R. 45182) FPL's earnings by either taking money (in accounting terms) from the Reserve Surplus to increase its earnings or by depositing money back into the surplus to avoid over-earning. R. 5288-89, Order at 44-45. The Order and the 2021 FPL Settlement provide that the Reserve Surplus "shall be $1.45 billion," including a carryover amount remaining at the end of 2021. R. 5262, 5288, Order at 18, 44.

A depreciation reserve surplus comes into existence when the utility has collected too much depreciation expense from its customers as of a given point in time. Att. A, Tr at 2506-07, Devlin Direct at 10-11; R. 49447-48. In technical terms, a depreciation reserve surplus exists when the amount of depreciation expense paid in by customers through their rates, commonly referred to as "accumulated reserve for depreciation" or "the book depreciation reserve," is greater than the "theoretical reserve," which is the amount of depreciation that would need to be collected over the remaining lives of the utility's assets based on the most accurate estimates of the assets' lives at the given point in time. Att. A, Tr 2506, R. 49447-48. (The term "accumulated reserve for depreciation" is equivalent to "accrued depreciation.")

The Reserve Surplus was created by FPL's customers over-paying depreciation expense over time through the rates that they paid to FPL. Att. A, Tr 2507, 2514, R. 49448, 49455.

Standard regulatory accounting for depreciation surplus balances, as applied in determining the utility's allowed revenue requirements and rates, returns the surplus to the utility's customers. R. 49448; *see also In re: Petition for Rate Increase by*

Florida Power & Light Company, Order No. 2010-0153-FOF-EI at 83 ("*2010 FPL Rate Order*"), where the PSC stated:

> We agree with FPL that current and future customers will receive the benefit of the existing reserve surplus through lower depreciation rates. If the reserve surplus is reduced, the depreciation reserve will increase, thereby, all things remaining equal, causing depreciation rates and future revenue requirements to naturally increase. At the present time, it can be argued that the current reserve surplus results in prospective depreciation rates that are artificially low. This is the beauty or the beast of the remaining life rate methodology. A surplus means that under present expectations more than enough has been recovered, so there is a smaller amount left to be recovered over the average remaining life. Conversely, the presence of a reserve deficit means that not enough has been recovered to date, so the depreciation rate must increase to make up the difference in the future.

(Footnote omitted.) (Emphasis supplied.)

Returning the depreciation surplus to customers is accomplished by amortizing the surplus balance over some period of time, which is usually determined depending on the amount of the surplus. Att. A, Tr 2507, R. 49448. The surplus may be amortized over the average remaining life of the assets or amortized over a shorter period in order to better match the return of the surplus value to the customers who created it. *Id.* The PSC has recognized the need for matching the return of the surplus to the customers who paid to

create it. *2010 FPL Rate Order* at 83, where the PSC stated the following:

> We agree with FPL witness Deason and OPC witness Pous that it is unlikely there would ever be a time when there is no reserve imbalance, simply because as time passes, more information is known and better estimates of life and salvage can be determined. However, that is not a reason to defer taking some action to correct reserve imbalances, where possible, either through reserve transfers or an amortization. The magnitude of the reserve imbalance should also dictate what action is taken. The matching principle argues for a quick correction of any surplus; the quicker the better so that the ratepayers who may have overpaid would have a chance of benefitting.

(Emphasis supplied.)

The Court should reverse the PSC's approval of the RSAM because: (1) the PSC has no specific statutory authority to approve the RSAM, which is unique to FPL in Florida and in the United States; (2) the RSAM violates Section 366.06(1), F.S., by allowing FPL to keep for itself customer-paid-for value that it is not otherwise allowed to recover in its rates; and (3) the RSAM will further violate Section 366.06(1), F.S., by virtually ensuring that FPL will earn returns greater than the recognized fair, just, and reasonable rate of return on the common equity component of its capital structure.

A. No Provision in Chapter 366, F.S., Authorizes the Reserve Surplus Amortization Mechanism.

"As the threshold issue, this Court must first establish the grant of legislative authority to act since the [PSC] derives its power solely from the Legislature." *Sierra Club*, 243 So. 3d at 908 (citing *United Tel.*, 496 So. 2d at 118). There is simply no provision in Chapter 366, F.S., that authorizes the PSC to approve the RSAM as provided in the 2021 FPL Settlement and in the Order on Appeal. In addition, "[i]f there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." *United Tel.*, 496 So. 2d at 118, *Radio Telecomm.*, 170 So. 2d at 582. Moreover, the PSC has no rule authorizing, defining, or applicable to any such mechanism.

B. No Other Utility Commission in the United States Has Approved an RSAM Like That Contained in the 2021 FPL Settlement.

No other state utility regulatory authority in the United States has approved a mechanism such as the RSAM. R. 34054. Nor has the Federal Energy Regulatory Commission approved such a mechanism. *Id.*, Att. A, Tr 2516, R. 49457. Furthermore, the PSC has not approved such a mechanism for any other Florida public utility. *Id.*

C. The RSAM Violates Section 366.06(1), F.S., By Allowing FPL to Keep the "Accrued Depreciation" Paid by FPL's Customers, Thus Depriving Customers of the Value That Those Customers Paid For.

More significantly, using accumulated depreciation reserves as FPL wants to do (by means of the PSC's blessing of the 2021 FPL Settlement) violates standard regulatory accounting principles and Florida law. Under standard regulatory accounting principles, the depreciation surplus is returned to customers. Att. A, Tr 2507, R. 49448; *see also 2010 FPL Rate Order* at 83.

The principle that customers are to receive the benefits of customer-paid-for depreciation reserves in determining their rates is codified in Section 366.06(1), F.S., which provides that after the PSC has investigated and determined "the actual legitimate costs of the property of each utility company, actually used and useful in the public service," the PSC

> shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, <u>less accrued depreciation</u>, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor.

(Emphasis supplied.)

Not only does the plain language of the statute require that accrued (accumulated) depreciation be deducted in determining rates,[11] allowing the RSAM contradicts this statute by allowing FPL to use the accumulated depreciation to enhance its earnings at the expense of its customers. In other words, the PSC would allow FPL to keep for itself and its sole shareholder,[12] the excess depreciation expense paid by FPL's customers to increase FPL's earnings. Att. A, Tr 2514-15, Tr 2517-18.

Stated differently, allowing FPL to keep the excess contributions of accumulated depreciation already paid in by FPL's customers to increase FPL's annual profits between 2022 and 2025 is contrary to Florida Statutes. Accrued or accumulated depreciation

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[11] "The plain meaning of the statute is always the starting point in statutory interpretation." *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007) (citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)). "When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *GTC, Inc.*, 967 So. 2d at 785 (quoting *Holly*, 450 So. 2d at 219).

[12] FPL's sole shareholder is NextEra Energy, Inc. Att. A, Tr at 2393, R. 48922 (Mac Mathuna Direct at 11, n. 6) (citing FPL's FERC Form 1, page 102).

must be deducted from the utility's investment in setting rates, and the PSC cannot allow FPL to keep back this customer-funded value – the Reserve Surplus - by accounting sleight-of-hand to increase FPL's profits.

Finally, the RSAM is unfair, unjust, and unreasonable to FPL's customers because, instead of returning the depreciation surplus to the customers whose overpayments created it, the RSAM allows FPL to unnecessarily and inequitably transfer up to $1.45 billion of ratepayer funds (the depreciation reserve surplus) to FPL and its sole shareholder. R. 34058-61. The depreciation reserve surplus was paid for by ratepayers via excessive payments for depreciation expense in the rates that they paid to FPL. Att. A, Tr 2518 (Devlin Direct at 22), R. 49459. Normally, a reserve surplus would accrue to the benefit of ratepayers through lower customer rates. *See 2010 FPL Rate Order* at 83. However, under the RSAM, the reserve surplus is expected to be used by FPL, as FPL has used it for the past four years, to earn ROEs at the top of its authorized range. R.26404. Hearing Exhibit 277, R. 26404, shows that FPL earned ROEs of 11.60 percent in 2018, 11.60 percent in 2019, 11.60 percent in 2020, and 11.60 percent on a year-to-date basis in 2021 until the time that Mr.

Devlin's testimony was filed. (In dollar terms, FPL used approximately $906 million of customer-funded depreciation surplus from 2017 until the end of 2021. (The Order, R. 5287, shows that the RSAM balance at the end of 2016 was approximately $1.25 billion, and that FPL estimated that the depreciation reserve surplus would be approximately $346 million at the end of 2021. Thus, from a starting value of $1.25 billion, FPL kept approximately $906 million; $1.25 billion minus $346 million equals $906 million.) By this highly predictable "taking" or keeping of customer-paid-for value, FPL will earn ROEs above what is necessary to maintain a reasonable rate of return and a strong financial condition. Att. A, Tr 2519, 2522, R. 49460, 49463. This is unfair, unjust, and unreasonable, and the Court should accordingly reverse the Order.

D. The RSAM As Approved By the PSC Further Violates Florida Statutes By Virtually Ensuring That FPL Will Earn Excessive, Unfair, Unjust, and Unreasonable Returns.

Further, record evidence demonstrates that FPL has used the RSAM in recent years, and can surely be expected to use it going forward, to earn returns greater than are fair, just and reasonable. R. 34058. Hearing Exhibit 277, R. 26404 shows that FPL used the RSAM to earn returns at the very maximum of its allowed range –

11.60 percent – from 2018 through the most current data available as of the time Mr. Devlin's testimony was filed in June 2021. Fair, just, and reasonable rates are predicated on rates being set at the midpoint ROE, which is, as recognized by the Commission, the "fair and reasonable" return allowed to regulated utilities. *See 2010 FPL Rate Order* at 132*; see also In Re: Petition of Florida Public Utilities Company for Rate Increase in Fernandina Beach Division*, 89 FPSC 11:398, 1989 WL 1640968 (Fla.P.S.C.) at 8 ("*Fla. Public Utilities Co.*") (PSC "set a midpoint of 12.85% for return on equity, which . . . will allow FPUC the opportunity to raise capital on a fair and reasonable basis and to maintain its financial integrity.") (Emphasis supplied.)

As agreed by the Settling Parties and then approved in the Order on Appeal, FPL will be allowed to use the RSAM – as FPL has used the same mechanism over the past four years – to undermine this fundamental principle of ratemaking law to earn at or nearly 110 basis points[13] above the fair and reasonable midpoint ROE approved

[13] The 2021 FPL Settlement sets the maximum of FPL's allowable ROE range at 11.7 percent, with a midpoint of 10.6 percent. R. 5261, 5270, Order at 17, 26. The difference between 11.7 percent and 10.6 percent is 110 basis points.

by the PSC simply by dipping into the Reserve Surplus, in the exact same way that FPL has used the same mechanism from 2017 into 2021. Hearing Exhibit 277, R. 26404, prepared by Mr. Devlin shows that FPL earned ROEs at the maximum of its authorized range, *i.e.*, 11.60 percent, from 2018 into 2021 (and an ROE of 11.08 percent in 2017). Hearing Exhibit 279, R.26406, shows that the excess earnings achieved by FPL as measured by the difference between the ROEs that FPL achieved vs. the midpoint ROE totaled just over $900 million from 2017 through 2020.

Regarding the dollar impact on FPL's customers, the Order shows that the balance of the Reserve Surplus at the end of 2016, *i.e.*, at the beginning of the previous settlement term, was $1.25 billion, and the Order further recites FPL's estimate that the balance at the end of 2021 would be $346 million. R. 5287, Order at 43. Simple arithmetic reveals that, assuming FPL's estimate is accurate, FPL would have used up $906 million of the customer-paid-for Reserve Surplus over the 2017-2021 term of the previous settlement. Additional record evidence, R. 31915 (Hearing Exhibit 497), shows that allowing FPL to use the RSAM to earn its maximum ROE under

the 2021 FPL Settlement would enable FPL to use up the entire $1.45 billion Reserve Surplus approved by the Order.

ROEs at the top of the range are unnecessary to fairly compensate a utility for its legitimate costs of capital, to maintain a utility's financial integrity, or to sustain excellent shareholder value. Att. A, Tr 2519, R. 49460. When the Commission determines a "fair, just, and reasonable" or "fair and reasonable" ROE for FPL or any utility, that ROE is the midpoint value for the utility's authorized range of returns. *See 2010 FPL Rate Order* at 132; *Fla. Public Utilities Co.* at 1989 WL 1640968 at 8. It follows inescapably that the rates based on the midpoint ROE are the utility's fair, just, and reasonable rates, and that provisions that effectively ensure that the utility, FPL here, will consistently earn returns greater than the fair, just, and reasonable midpoint ROE approved by the PSC for setting rates are unfair, unjust, and unreasonable. Att. A, Tr 2520-21, R. 49461-62. It is unfair to use the Reserve Surplus created by customers' overpayments of depreciation expense to increase a utility's earnings beyond the fair and reasonable midpoint ROE. Att. A, Tr 2521, R. 49462. In *Gulf Power Co. v. Wilson*, 597 So. 2d 270, 273 (Fla. 1992),

the Court recognized that returns at or near the ceiling of a utility's rate of return range could be unjust and unreasonable, stating:

> For example, if a public utility is consistently earning a rate of return at or near the ceiling of its authorized rate of return range, the commission may find that its rates are unjust and unreasonable even though the presumption lies with the utility that the rates are reasonable and just.

(quoting *United Tel. Co. v. Mann*, 403 So. 2d 962, 966 (Fla. 1981)).

Thus, the RSAM also violates Sections 366.06 and 366.07, F.S., because it will virtually ensure – as it has ensured from 2018 into 2021 – that FPL will earn returns that are facially excessive as compared to its fair, just, and reasonable rates based on its midpoint ROE.[14] Stated simply, the PSC cannot, in the first instance, approve

[14] This is a systemic defect in the RSAM, and the defect and statutory violation holds true with respect to <u>any</u> ROE that the PSC might determine to be the fair, just, and reasonable return. Setting or approving the fair and reasonable ROE at any level, be it 9 percent, 10 percent, or 10.6 percent, and then approving a mechanism that virtually ensures that the utility – FPL here - will earn a rate that is more than 10 percent greater than the established fair and reasonable return – is facially unfair, unjust, and unreasonable. As set forth and explained in Section III, *infra*, FAIR separately urges that the <u>specific</u> ROE approved in the 2021 FPL Settlement is unfair, unjust, and unreasonable because it is excessive as compared to that approved in the PSC's contemporaneous decisions for Florida's two other large investor-owned electric utilities and therefore violates the fundamental principles of utility rate law set forth by the U.S. Supreme Court in *Hope* and *Bluefield*. The RSAM violation of the statutes discussed here would exist even if the PSC had followed its

a particular ROE as being fair, just, and reasonable, and then, in the same document, approve a mechanism that ensures that the utility will earn returns significantly greater than the ROE already determined to be the fair, just, and reasonable return. The PSC's approval of the RSAM violates fundamental principles of ratemaking law by effectively guaranteeing that FPL will earn returns greater than the ROE rate that the parties to the 2021 FPL Settlement agreed is the fair and reasonable rate. Yet that is exactly what the PSC has done here.

Note, however, that FAIR does not argue, nor even suggest, that FPL can never earn above its midpoint ROE. If FPL can earn above its midpoint ROE through FPL-funded efficiency measures or entrepreneurship, that is entirely acceptable and consistent with the Regulatory Compact. R. 34059. It is one thing for FPL to earn by its own diligence a return greater than the midpoint ROE; however, it is significantly different indeed for it to be authorized to do so by using "accrued depreciation" – created by FPL's customers through over-

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contemporaneous decisions in the *Duke Settlement Order* and the *TECO Settlement Order* and approved an ROE comparable to those approved in those orders.

paying depreciation expense in their rates over time – to earn returns substantially greater than the PSC-determined fair, just, and reasonable rate. The rate of return agreed to by the Settling Parties is 10.6 percent, yet the RSAM will enable FPL to earn – indeed, the RSAM will virtually ensure that FPL will – earn up to 11.7 percent, as demonstrated by FPL's use of the RSAM from 2018 into 2021.

Not only is there no clear grant of authority for the RSAM, but it violates Florida law. The Court should reverse the Order on Appeal.

II. THE PSC EXCEEDED ITS STATUTORY AUTHORITY WHEN IT APPROVED THE AUTOMATIC TAX RATE INCREASE PROVISION OF THE 2021 FPL SETTLEMENT.

The 2021 FPL Settlement provides that if permanent federal or state tax changes are enacted effective for any tax year from 2022 through the term of the 2021 FPL Settlement, "the impacts of the tax changes on the base revenue requirement for retail customers will be adjusted . . . through a prospective adjustment to base rates." R. 5263, Order at 19. In other words, if tax rates are increased, FPL's customers will be required to pay more without regard to whether any rate increases are necessary to ensure that FPL's rates are fair, just, reasonable, and sufficient to enable FPL to provide safe and reliable

service and pay its bills. The PSC's Order approving such automatic rate adjustments (hereinafter, the "Automatic Tax Rate Increase" provision) for speculative, hypothetical future tax changes lacks any specific statutory authority, is contrary to the PSC's statutes governing changes in rates, is inconsistent with an earlier PSC decision refusing to even consider this issue in a pending rate case;[15] and is readily distinguishable from other types of future rate increases approved by the PSC and this Court.

A. Chapter 366, F.S., Contains No Specific Statutory Authority for Such an Automatic Rate Increase.

First, there is clearly no specific provision in the PSC's statutes that authorizes any Automatic Tax Rate Increase resulting from a potential future change in tax rates. The threshold issue in any analysis of the PSC's authority to act is to "establish the grant of legislative authority to act since the [PSC] derives its power solely from the Legislature." *Sierra Club*, 243 So. 3d at 908. There is simply no provision in Chapter 366, F.S., that authorizes the PSC to approve the Automatic Tax Rate Increase provision in the 2021 FPL Settlement

[15] *In re: Petition for Rate Increase by Gulf Power Company*, Docket No. 20160186-EI, Order No. PSC-2017-0099-PHO-EI, Prehearing Order at 107-08.

and in the Order. Further, "[i]f there is a reasonable doubt as to the lawful existence of a particular power . . . , the further exercise of the power should be arrested." *United Tel.*, 496 So. 2d at 118.

B. The Settlement Provision Authorizing Automatic Customer Rate Increases Based On Currently Unknown and Unknowable Possible Future Tax Rate Increases Is Contrary To Applicable Provisions of Chapter 366, F.S.

Sections 366.06(1) and 366.07 clearly provide that the PSC is to change rates only when it has conducted a hearing and determined that the rates to be changed are "unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law." § 366.06(1-2), Fla. Stat. The Automatic Tax Rate Increase provision is inconsistent with this provision because it would increase customer rates without a demonstration that FPL's rates, at the time, were unfair, unjust, unreasonable, or insufficient.

In enacting Sections 366.06 and 366.07, F.S., the Legislature cannot reasonably have intended to allow for automatic rate increases that would increase or decrease customers' rates without any proof that such rate changes were necessary to ensure that the utility's rates remain fair, just, reasonable, non-discriminatory, and neither insufficient nor excessive. On their face, such increases would

directly override the Legislature's specific provisions requiring the PSC to hold a public hearing and to determine that a utility's rates are unfair, unjust, unreasonable, insufficient, or otherwise in violation of law before it can approve changes.

The PSC's argument in the Order that FPL would have to file a petition and be subject to a proceeding in which the costs are litigated and determined, thereby giving opponents of such increases a point of entry, R. 5258-59, Order at 14-15, is illusory. All the PSC would do is litigate and determine the amount of costs; it would not determine whether any increase was necessary under the statute. Merely determining the amount of a tax increase and then allowing FPL to raise its rates by that amount does not satisfy the statutory requirements because the rate increase would be automatic without regard to whether such increase was necessary, at the time, to remedy a situation where FPL's rates were "unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law," as required by Section 366.07, F.S. *See also* Section 366.06(2), F.S. which provides as follows:

> (2) Whenever the commission finds, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility for public utility service,

> . . . are unjust, unreasonable, unjustly discriminatory, or in violation of law; that such rates are insufficient to yield reasonable compensation for the services rendered; that such rates yield excessive compensation for services rendered; or that such service is inadequate or cannot be obtained, the commission shall order and hold a public hearing, giving notice to the public and to the public utility, and shall thereafter determine just and reasonable rates to be thereafter charged for such service . . . .

(Emphasis supplied.) Neither the Order nor the 2021 FPL Settlement provides any assurance or protection against unnecessary rate increases (or decreases).

Again, parties to a settlement can agree among themselves not to challenge a given settlement provision; however, the PSC cannot lawfully authorize such automatic rate changes where they are not demonstrably necessary to ensure that the fundamental statutory requirements are met: specifically, (a) that rates be fair, just, and reasonable, and (b) that changes are necessary, as determined following a hearing, to remedy a situation where rates are "unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law." The Court should reverse the Order on this point as well.

C. As Previously Held by the PSC, the Issue of Approving Future Rate Increases To Address Potential Future Increases in Tax Rates Is Premature.

The PSC's approval of the Automatic Tax Rate Increase provision is premature and speculative and thus inconsistent with the PSC's prior decision refusing, in a pending public utility rate case, to even consider the issue of an automatic rate change to address potential future tax increases when asked by OPC to do so. *In re: Petition for Rate Increase by Gulf Power Company*, Docket No. 20160186-EI, Order No. PSC-2017-0099-PHO-EI, Prehearing Order at 107-08. Then as now, this issue is "premature and not ripe for consideration at this time." *Id.* at 108. Should federal tax changes occur in the future, the issue may be addressed at the appropriate time in a separate proceeding if applicable statutory criteria for such proceedings were met – *e.g.*, a demonstration that FPL's rates were insufficient or excessive because of the tax change.

The Prehearing Officer's determination in Order No. PSC-2017-0099-PHO-EI that the tax provision issue was premature is consistent with the statute because, at the time such an automatic increase might be implemented, it is impossible for the PSC to determine whether the rates being charged by the affected utility are

or are not unfair, unjust, unreasonable, excessive, or insufficient so as to require adjustment to reflect the hypothetical tax increase.

D. The Automatic Tax Rate Increase Provision Approved by the Order on Appeal Is Readily Distinguishable from Other Future Rate Increases Approved by the PSC and Upheld by the Court.

The Automatic Tax Rate Increase provision approved by the PSC's Order and the 2021 FPL Settlement are not within the scope of future rate increases or decreases previously approved by this Court or the PSC because any such tax changes are speculative, hypothetical, and neither known nor knowable. In contrast, the Generation Base Rate Adjustment ("GBRA") rate increases challenged on appeal by OPC but approved by the Court in *Citizens v. Pub. Serv. Comm'n,* 146 So. 3d 1143 (Fla. 2014) were knowable by virtue of the PSC's having previously approved the need for and cost of the power plants for which the GBRA rate increases were to be allowed. 146 So. 3d at 1164. The Automatic Tax Rate Increase is also in obvious contrast to the 2023 rate increase allowed by the current 2021 FPL Settlement, which provides for an additional step increase of $560 million per year in January 2023. While FAIR might disagree as to whether this increase is fair, just, or reasonable, this is the type of

known, specific step increase, stated as a specific, known dollar amount to be implemented at a specific point in time, contemplated by Section 366.076, F.S., and it is supported by evidence in the record as to its amount and the basis therefor. Neither can be said for the Automatic Tax Rate Increase provision. Therefore, the Court should reverse the Order with respect to this provision.

III. THE PSC'S APPROVAL OF THE 2021 FPL SETTLEMENT IS A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW BECAUSE IT RESULTS IN FPL'S CUSTOMERS BEING CHARGED UNFAIR, UNJUST, UNREASONABLE, AND EXCESSIVE RATES, AS MEASURED AGAINST THE PSC'S OWN CONTEMPORANEOUS DECISIONS APPROVING SETTLEMENTS FOR FLORIDA'S TWO OTHER LARGE ELECTRIC PUBLIC UTILITIES, THEREBY VIOLATING THE FUNDAMENTAL PRINCIPLES OF UTILITY RATE-SETTING LAW ESTABLISHED BY THE U.S. SUPREME COURT AS WELL AS THE PSC'S STATUTES.

The core principle of utility rate-setting law is that rates must be fair, just, reasonable, non-discriminatory, and sufficient to compensate the utility charging them but not excessive from the perspective of customers who must pay them. Indeed, these are the fundamental requirements of the PSC's rate regulation statutes. *See* §§ 366.06(1-2) & §366.07, Fla. Stat.

A. The Order Approving the 2021 FPL Settlement Violates Fundamental Principles of Utility Rate-setting Law Applied By the U.S. Supreme Court and Recognized By this Court.

The United States Supreme Court has further articulated the standards applicable to the returns that a regulated utility is to be allowed to earn through the rates charged to its customers. Recognizing that "the ratemaking process . . . , i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests," the Supreme Court stated that the return to the regulated utility's investors is to be "commensurate with returns on investments in other enterprises having corresponding risks." *Hope*, 320 U.S. at 603. This Court has recognized this critical balance in *United Tel. Co. v. Mayo*, 345 So. 2d 648, 653 (Fla. 1977), where the Court stated,

> The rate of return which public utility companies may be allowed to earn is a question of vital importance to both rate payers and investors. . . . That return cannot be set so low as to confiscate the property of the utility, nor can it be made so high as to provide greater than a reasonable rate of return, thereby prejudicing the consumer.

Thus, for rates to be fair, just, and reasonable, the returns afforded the utility pursuant to those rates must also be fair, just, and reasonable. The key elements determining a utility's returns are

the allowed rate of return on equity ("ROE") and the amount of the utility's capital that is provided by equity investments, measured as a percentage of the utility's capital structure known as the "equity ratio." Att. A, Tr 2394, R. 48923, Mac Mathuna Direct at 12. The ROE determines the return on the equity investment, and the equity ratio measures how much of the utility's capital structure earns that rate. The higher the ROE, the greater the utility's returns, and the higher the equity ratio, the greater the utility's returns. *Id.*

In *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923), often cited in the same sentence with *Hope*, the Supreme Court provided specificity as to the frame of reference within which, or in comparison to which, the proper return is to be evaluated:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties, but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

Id. at 692-93 (emphasis supplied).

Following *Bluefield*, the relevant frame of reference for evaluating the reasonableness – or unreasonableness – of rates of return cannot be more comparable than where the case presented involves a utility operating in the same business, in the same state, under the same legal and regulatory regime, and in the same time frame. To comport with the Supreme Court's holdings in *Hope* and *Bluefield*, returns must also be commensurate – if not "equal to" as stated by the U.S. Supreme Court – with those earned by enterprises in the same industry, operating under the same statutes and regulations, and in the same time frame. This is fundamental utility rate law, and the FPL case before the PSC below and now before this Court is that same case, on all fours under the *Bluefield* criteria with those in the *Duke Settlement Order* and the *TECO Settlement Order*. Here, however, the PSC departed from these principles in approving returns for FPL that greatly exceed those that the PSC itself approved in its contemporaneous decisions in the *Duke Settlement Order* and the *TECO Settlement Order*.

In contemporaneous decisions on the key determinants of utility returns – namely, ROE and the equity ratio – the PSC approved significantly lower values for Duke Energy Florida and Tampa

Electric Company than it approved in the 2021 FPL Settlement. The PSC's approval of the 2021 FPL Settlement is not only facially inconsistent with the PSC's decisions regarding these two Florida utilities, the PSC's approval of the 2021 FPL Settlement clearly violates the U.S. Supreme Court's holdings in *Hope* and *Bluefield*. In June 2021, less than five months before its decision on the 2021 FPL Settlement at issue here, the PSC issued its *Duke Settlement Order* approving a settlement agreement ("2021 Duke Settlement") between Duke Energy Florida, also a public utility subject to the PSC's regulation under Chapter 366, and OPC, FIPUG, White Springs Agricultural Chemicals, Inc., and Nucor Steel Florida, Inc. *Duke Settlement Order* at 2. In the *Duke Settlement Order*, the PSC approved an ROE of 9.85 percent and an equity ratio of 53.0 percent to be observed for Duke. *Duke Settlement Order* at 12-13.

The PSC voted on October 26, 2021 to approve the 2021 FPL Settlement. R. 7749-51 (Vote Sheet from 10/26/21 Commission conference). Just five days before that vote, on October 21, 2021, the PSC held a hearing and voted in a bench decision to approve the 2021 TECO Settlement. *TECO Settlement Order* at 3. In approving the 2021 TECO Settlement, the PSC approved an ROE of 9.95 percent and an

equity ratio of 54.0 percent to be observed for the utility. *TECO Settlement Order* at 3, 11.

In approving the 2021 FPL Settlement, the PSC strayed far afield from the principles set forth in *Hope* and *Bluefield* – and from the PSC's own contemporaneous decisions approving settlements for Florida's two other large electric public utilities – by approving rates based on return values that are so much greater than the PSC itself approved for Duke and TECO that it constitutes a departure from the essential requirements of law.[16] In stark contrast to the PSC's contemporaneous decisions approving the Duke Settlement and the TECO Settlement, in the 2021 FPL Settlement, the PSC approved an ROE of 10.6 percent, R. 5261, 5287, Order at 17, 26, and at least

[16] The Court will readily observe that FAIR is not asking the Court to re-weigh evidence: FAIR is asking the Court to reverse the PSC's Order because its action approving the 2021 FPL Settlement is facially inconsistent with the PSC's own contemporaneous actions on the exact same issues, in the exact same time frame, in two other rate cases involving Florida's two other large public utilities providing retail electric service. Thus, the Order violates the fundamental principles of *Hope* and *Bluefield*. It is this divergence from the principles set forth by the U.S. Supreme Court in *Hope* and *Bluefield*, as well as the vast divergence from the PSC's own contemporaneous decisions, which divergence would result in FPL's customers being overcharged by hundreds of millions of dollars per year, that constitutes a departure from the essential requirements of law.

implicitly approved FPL's proposal to continue using an equity ratio of 59.6 percent. R. 70140, 70153, FPL's Petition at 29, 42; *see also* R. 33976 (FPL's witness Barrett stating that FPL's high equity ratio is part of FPL's consideration in a strong financial position).

Lest the Court think that these differences are not significant, the Court will note that unchallenged record evidence shows that the difference between the total revenues that FPL would be allowed applying the ROE and equity ratio values that the PSC approved in the *Duke Settlement Order* – an ROE of 9.85 percent and an equity ratio of 53.0 percent – would result in FPL's allowed revenues in 2022 being $214,815,000 per year, R. 34040. This is approximately $477 million per year less than the $692 million per year that the PSC approved in the 2021 FPL Settlement. ($692 million minus $215 million equals $477 million.) Carried out over the four-year term of the 2021 FPL Settlement, applying the *Duke Settlement Order* values would result in FPL's customers paying approximately $1.9 billion less than approved by the PSC in the 2021 FPL Settlement. ($477 million per year times 4 years equals $1.908 billion.) Correspondingly, the difference between the total revenues that FPL would be allowed applying the ROE and equity ratio values that the

PSC approved in its *TECO Settlement Order* – an ROE of 9.95 percent and an equity ratio of 54.0 percent – would result in FPL's allowed revenues in 2022 being $286,852,000 per year. R. 34040. This is approximately $405 million per year less than the $692 million per year that the PSC approved in the 2021 FPL Settlement. ($692 million minus $287 million equals $405 million.) Over the four-year term of the 2021 FPL Settlement, applying the *TECO Settlement Order* values would result in FPL's customers paying approximately $1.6 billion less than the total approved by the PSC in the 2021 FPL Settlement.[17] ($405 million per year times 4 years equals $1.62 billion.) Thus, over the four-year term of the 2021 FPL Settlement, even applying the higher ROE and equity ratio values that the PSC approved in the

[17] The PSC's own contemporaneous decisions regarding ROE and equity ratio are obviously the most comparable to its decisions in the Order on Appeal. It is worth noting that, in the same time frame, albeit covering a broader geographic area, record evidence also shows that, if FPL's rates were to be based on the contemporaneous U.S. national average ROE and equity ratio values, FPL's rate increase for 2022 would be $40,783,000 per year, R. 34041. This is approximately $651 million per year less than that approved by the PSC. ($692 million minus $41 million equals $651 million.) Over the four-year term of the 2021 FPL Settlement, the difference paid by FPL's customers, were the U.S. average values applied, would be more than $2.6 billion. ($651 million per year times 4 years equals $2.604 billion.)

TECO Settlement Order, the PSC could have saved FPL's customers more than $1.6 billion as compared to what the PSC approved in the 2021 FPL Settlement – and acted consistently with its own contemporaneous decisions in the bargain.

The Court will note that the PSC could have suggested and encouraged FPL and the Settling Parties in this case to consider negotiating more consumer-friendly terms, just as it did in its consideration of the settlement in FPL's 2012 general rate case. In that case, *In re: Petition for Increase in Rates by Florida Power & Light Company*, Docket No. 20120015-EI, Order No. PSC-2013-0023-S-EI ("*2012 FPL Settlement Order*"), the PSC suggested and effectively "encouraged" the settling parties to revise their originally submitted settlement agreement. In the *2012 FPL Settlement Order*, the PSC stated the following:

> On December 13, 2012, we convened a Special Agenda Conference to consider the proposed Settlement Agreement filed by FPL, FIPUG, SFHHA, and FEA. At the Special Agenda we expressed our concerns with the proposed Settlement Agreement. We engaged in an extensive discussion of the benefits and detriments associated with the provisions of the proposed Settlement Agreement, and whether the agreement as filed was in the public interest. Upon completion of our discussion, all the parties (signatories and non-signatories) were given an opportunity to engage in further settlement negotiations.

> Upon reconvening the Special Agenda Conference, the signatories filed a revised Stipulation and Settlement and the non-signatories reiterated their continued objections to our consideration of the proposed or modified agreement.

2012 FPL Settlement Order at 2 (emphasis supplied).

Of course, the PSC could also have rejected the 2021 FPL Settlement as being contrary to the public interest; however, the PSC neither attempted to get the Settling Parties to improve the deal for FPL's customers nor rejected the 2021 FPL Settlement as urged by FAIR, Florida Rising, and other parties.

B. The Order Approving the 2021 FPL Settlement Violates Chapter 366, F.S., Because the Returns Approved Therein Are Unfair, Unjust, Unreasonable, and Excessive As Compared To the PSC's Contemporaneous Decisions in the Duke Settlement Order and the TECO Settlement Order.

The PSC's Order also violates Section 366.06(1), F.S., because the Order approves returns for FPL and also approves rates based on those returns that are unfair, unjust, unreasonable, and excessive. Both FPL's returns and the rates based thereon are unfair, unjust, unreasonable and excessive because they are facially excessive as compared to the PSC's contemporaneous decisions in the *Duke Settlement Order* and the *TECO Settlement Order*. The PSC's inconsistent decisions ignore the necessary balance recognized by

this Court in *Mann* and *Wilson*. FAIR simply asks for the fair, just, and reasonable result, namely that FPL's rates be set, consistent with *Bluefield*, to achieve returns comparable to those approved for utilities in the same business, in the same state, operating under the same statutes, and in the same time frame.

Thus, as a matter of Florida statutory law, as well as following the fundamental principles of utility regulatory law adopted by the U.S. Supreme Court, excessive returns under comparable regulation in the same time frame – and rates based thereon – cannot be fair, just, or reasonable.

The PSC's Order approving the 2021 FPL Settlement is a gross miscarriage of justice that violates *Hope* and *Bluefield*, departs from the essential requirements of law, and violates the express requirements of Florida Statutes, and therefore, the Court should reverse the Order.

CONCLUSION AND PRAYER FOR RELIEF

As explained above, the PSC has acted without requisite statutory authority and violated its governing statutes in approving the RSAM and the Automatic Tax Rate Increase provisions of the 2021 FPL Settlement. Following the Court's holdings in *United*

Telephone and other cases, the Court should reverse the Order on Appeal with respect to these actions.

Moreover, the PSC has departed from the essential requirements of law by approving returns and rates that are facially inconsistent with the PSC's own contemporaneous decisions on key factors that determine utility returns, and that thus determine rates, thereby violating the long-recognized fundamental regulatory principles adopted by the United States Supreme Court in *Hope* and *Bluefield*, as well as resulting in rates currently being charged to FPL's customers that are unfair, unjust, unreasonable, and excessive, in violation of the basic ratemaking provisions of Chapter 366, F.S. Accordingly, the Court should reverse the Order on Appeal because the PSC's approval of the rates in the 2021 FPL Settlement is facially inconsistent with the PSC's own actions on the same issues in the same time frame, and thus, pursuant to *Bluefield*, a departure from the essential requirements of law applicable to utility rate cases.

Accordingly, FAIR respectfully asks the Court to reverse the Order on Appeal and to remand the case to the PSC for proceedings consistent with applicable law and the Court's opinion.

Respectfully submitted this 6th day of April, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished by electronic mail through the Court's e-filing Portal on this 6th day of April, 2022, to the following:

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CERTIFICATE OF COMPLIANCE FOR COMPUTER-GENERATED BRIEF, FLA. R. APP. P. 9.045

I HEREBY CERTIFY that this brief was prepared using Bookman Old Style 14-point font and that it complies with the word count requirements (12,625 words) in the Florida Rules of Appellate Procedure.

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