IN THE SUPREME COURT OF FLORIDA

FLORIDA RISING, INC., ET AL.,

Appellants,

v.

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

Appellees.

_____

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.
Docket No. 20210015-EI
Order Nos.
PSC-2021-0446-EI and
PSC-2021-0446A-EI

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief. The LULAC Florida Educational Fund, Inc., better known as the League of United Latin American Citizens of Florida, is referred to as "LULAC." The Environmental Confederation of Southwest Florida, Inc., is referred to as "ECOSWF." Florida Power & Light Company is referred to as "FPL." The Florida Public Service Commission is referred to as the "Commission." Florida Statute references refer to the 2021 version of the statute, unless otherwise noted. The Record on Appeal is designated as R. _, the Supplemental Record is designated as SR. _, and the Confidential Record is designated as CR. _. Pages in the attached Appendix have been consecutively numbered and are referenced as Appx. _.

JURISDICTION

This is an appeal of a final order and amendatory order issued by the Commission approving a Settlement Agreement regarding a base rate case as being in the public-interest. This Court has mandatory jurisdiction because the final order relates to a public utility providing electric service. Art. V, § 3(b)(2), Fla. Const.

STATEMENT OF CASE AND FACTS

Florida Rising, Inc. ("Florida Rising"), ECOSWF, and LULAC (collectively, "Florida Rising appellants") bring this appeal of a Final Order and Amendatory Order by the Florida Public Service Commission approving a Settlement by FPL and other parties intended to resolve FPL's petition for a base rate increase. The Settlement, which includes the largest rate increase in Florida history, R. 34075, disproportionately burdens residential customers while charging more costs to the rate base than even contemplated in FPL's original petition.

On January 11, 2021, FPL filed a notice with the Commission that it intended to file a petition for a base rate increase. R. 70220. On February 22, 2021, Florida Rising appellants petitioned to intervene in the proceeding in opposition to the base rate increase. R. 70202. The Commission granted Florida Rising appellants' intervention on a provisional basis. R. 52114 (Florida Rising); R. 52119 (ECOSWF); R. 52123 (LULAC). On March 12, 2021, FPL filed its Petition for Base Rate Increase and Rate Unification. R. 70107. The evidentiary hearing was scheduled for August 16-27, 2021. R. 52393. Other parties granted intervention were the Office of Public Counsel ("OPC"), R. 70214, Walmart, Inc., R. 51142, the Florida Internet and Television Association, Inc., R. 46335, Daniel R. Larson and

Alexandria Larson, R. 52141, Federal Executive Agencies, R. 52152, the Florida Industrial Power Users Group ("FIPUG"), R. 52148, the Florida Retail Federation, R. 52144, Floridians Against Increase Rates, Inc. (provisional), R. 51271, the CLEO Institute, Inc. (provisional), R. 51254, the Southern Alliance for Clean Energy ("SACE"), R. 52132, and Vote Solar, R. 51275. On August 10, 2021, FPL, the Office of Public Counsel, the Florida Retail Federation, FIPUG, and SACE filed a joint motion for approval of a Settlement Agreement without consulting the Florida Rising appellants. R. 41296. This Settlement was later joined by Vote Solar and CLEO, R. 40965, and the Federal Executive Agencies, R. 38865.

The Settlement included all requested increases to the rate base from the as-filed rate case, plus billions more, particularly through a massive expansion of "SolarTogether"—a rate-based subscription program from which participants receive rising payments for "subscribing" to the rate-based solar arrays—and additional electric vehicle infrastructure. Appx. 51-55. The Settlement, while moderately decreasing near-term revenues to FPL (as compared to the as-filed rate case, not the prior status quo), saddles the residential class with a much greater share of the revenue burden. R. 34119; R. 33948-49. Indeed, despite residential customers making up the vast majority of FPL's energy sales, the Settlement awards

the vast majority of near-term "savings" to non-residential customers. R. 34117. No cost-of-service study was offered to support this settlement reallocation. R. 33948. The Settlement also introduces a new minimum bill for residential customers. R. 34128.

Following the Settlement, the evidentiary hearing on the as-filed rate case was consolidated with a new hearing on the Settlement and scheduled for September 20-22, 2021. R. 41053. On the as-filed rate case, 60 witnesses were presented. R. 43103-07. The Settlement was actively opposed by the Larsons, FAIR, and the Florida Rising appellants. *See, e.g.*, R. 7792, 7807, 7878. On the Settlement, FPL presented 5 witnesses, Florida Rising appellants presented 1 witness, and FAIR and Florida Rising appellants jointly presented 3 witnesses. R. 36692-93; 36647. On December 2, 2021, the Commission issued its Final Order approving the Settlement, Appx. 5, and on December 9, 2021, the Commission issued an Amendatory Order to that Final Order, R. 5223. FAIR filed a notice of appeal of this order on December 27, 2021. R. 3938. Florida Rising appellants filed a separate, direct appeal from the Commission's final order approving the Settlement on January 3, 2022. R. 1395. The two appeals were consolidated by this Court on March 1, 2022.

SUMMARY OF ARGUMENT

The Settlement approved by the Commission and now on appeal before this Court is unlike any other settlement ever considered by a utility commission. As compared to FPL's initial request, this "compromise" actually *adds* billions in new rate-based spending, guarantees FPL years of even higher profits, and crucially, leaves the residential public *worse* off than if FPL's original proposal had been approved in full. Given these facts, there is no competent and substantial evidence that the Settlement could be in the public interest, and the Final Order issued by the Commission makes no attempt at any fact-finding regarding these issues to justify its public interest finding. That the Settlement defers a small portion of costs for several years (while increasing the total expense) does not make it in the public interest. Nor does evidence of some initial savings, almost entirely for FPL's largest customers, constitute competent and substantial evidence to support the PSC's finding that the Settlement is in the public interest. Neither does approving one of the highest returns on equity (ROE) in the country (above Florida's other investor owned utilities (IOUs) and FPL's own prior rate)—during a long-term downward trend in utility ROEs—constitute a real compromise in the public interest. This is especially the case given the Settlement's inclusion of the Reserve Surplus

Amortization Mechanism (RSAM), which will allow FPL to siphon off ratepayer money that was collected to pay off existing assets and instead redeploy it to keep FPL's earnings at the top of its allowed ROE band. Under the Settlement, people born today will grow to adulthood and still be charged for long-retired units that never generated a single electron during their lifetimes. Residential rates will also be higher within a few years than if FPL's original proposal had been approved in full, as large commercial and industrial customers were able to cut themselves a sweetheart deal. This leaves residential customers to cover billions of dollars in subsidies to the largest commercial and industrial users and extra profits for FPL, thanks to rates that are unfair, unjust, unreasonable, and confer a large, undue preference for commercial and industrial customers and participants in FPL's SolarTogether program.

Throughout the 1,261 pages of its Final Order, the Commission made no findings of fact as to how the Settlement leads to fair, just, and reasonable rates, merely concluding as a matter of law, based on a couple of sentences containing sparse factual and legal analysis, that it does. While this may have once been acceptable, prior case law requiring great deference to the PSC's interpretation of section 366.06(1) in the context of a settlement (i.e., not requiring specific factual findings by the

Commission), has been overturned by Article V, section 21 of the Florida Constitution. To support a public interest finding under the constitutional amendment now, the Commission must show its work with specificity. It did not do so, nor could it have. Any argument that the Settlement is in the public interest is not supported by competent and substantial evidence, and the Final Order is accordingly due to be overturned.

STANDARD OF REVIEW

Conclusions of law of the Commission regarding statutory interpretation are subject to de novo review by this Court. Art. V, § 21, Fla. Const.; *Citizens v. Brown*, 269 So. 3d 498, 504 (Fla. 2019) (hereinafter *Citizens II*). Likewise, whether the Commission has acted within the authority granted to it by the Legislature is also subject to de novo review by this Court. *Sierra Club v. Brown*, 243 So. 3d 903, 907 (Fla. 2018). Neither a Commission order nor its factual findings will be upheld unless supported by competent, substantial evidence. *Id*. The Court must remand for further proceedings before the Commission if the fairness of the proceedings or correctness of the action may have been impaired by a material error in procedure. § 120.68(7)(c), Fla. Stat.; *Citizens of Fla. v. Mayo*, 333 So. 2d 1, 8 (Fla. 1976).

Determining whether a settlement is in the public interest is fundamentally a question of law. Indeed, this Court has previously indicated that the public interest standard, as it must be, is derived from section 366.01, Florida Statutes. *See Citizens of State v. Fla. Pub. Serv. Comm'n*, 146. So. 3d 1143, 1173 (Fla. 2014) (hereinafter *Citizens I*)); *see also Sierra Club*, 243 So. 3d at 910 ("The public interest . . . has been the declared legislative goal of chapter 366 since its inception in 1951."). The enactment of Article V, section 21, of the Florida Constitution, fundamentally changes how this Court must evaluate non-unanimous settlements on review from the Commission, by wiping away any deference to the Commission's legal conclusions defining the "public interest."

It is helpful to compare the law before and after the enactment of Article V, section 21. Previously, this Court treated the Commission's "interpretation of a statute that it is charged with enforcing" as "entitled to great deference," due to "be approved by this Court unless it [was] clearly erroneous." *BellSouth Telecommunications, Inv. v. Johnson*, 708 So. 2d. 594, 596 (Fla. 1996) (internal quotations and citations omitted); *see also Citizens I*, 146 So. 3d at 1149 (same). As a necessary corollary, this Court had held that "Commission orders come to th[e] Court clothed with a presumption of validity." *Johnson*, 708 So. 2d. at 596. Under this "great"

deference, the Court once concluded that "[t]he determination of what is in the public interest rests exclusively with the Commission." *Citizens I*, 146 So. 3d at 1173 (citing § 366.01, Fla. Stat.).

Under the ample deference of that era, this Court did not find it necessary that the Commission elaborate on its definition of the public interest test. *Sierra Club*, 243 So. 3d at 910 (upholding a Commission-approved settlement although "the Commission has not provided a clear recitation of its public interest standard."). While this Court was unable to "conclusively define the term" from Commission precedent, it found "a reasonable distillation of the Commission's public interest standard may be that it is a fact-dependent inquiry generally focused upon—but not limited to—the Commission's historical and statutory role." *Id.*

That deference is gone. Art. V, § 21, Fla. Const.; *Citizens II*, 269 So. 3d at 504. The Commission is an administrative agency. *City of Cape Coral v. GAC Utilities, Inc., of Florida*, 281 So. 2d 493, 496 (Fla. 1973) (the Public Service "Commission's powers, duties and authority," as a "mere creature[] of statute," "are those and only those that are conferred expressly or impliedly by statute of the State"); *In re Advisory Opinion to the Governor*, 223 So. 2d 35, 37 (Fla. 1969) ("Th[e Commission] has never been a constitutional body, but is simply a creature of the Legislature."). As

this Court has emphasized, "[t]he Legislature of Florida has never conferred upon the Public Service Commission any general authority to regulate public utilities." *City of Cape Coral*, 281 So. 2d at 496. The text of section 366.01, Florida Statutes, where the term "public interest" appears, remains identical to when *City of Cape Coral* was decided in 1973, having been unchanged since its enactment in 1951.[1]

The "public interest" standard, against which essentially all Commission actions are measured, is a statutory test. This Court cannot truly review the conclusion that the Settlement complies with Florida law—that is, serves the public interest—if that test remains undefined and left to Commission whim, despite a constitutional directive prohibiting judicial deference to agency interpretations of statute and legal conclusions. This Court's previous holdings that the Commission alone may determine what constitutes the public interest, and that the Commission need not define the public interest in rendering its decisions regarding the same—rendering Commission orders invoking the public interest essentially unreviewable—were necessarily overturned by the adoption of Article V, section 21 of the Florida Constitution. To the extent the Legislature could have intended the

[1] § 366.01, Fla. Stat. (1973), http://library.law.fsu.edu/Digital-Collections/FLStatutes/docs/1973/1973TXXVC366.pdf.

Commission to have unbridled discretion to determine the public interest, in light of the later Article V, section 21, such intent is irrelevant.[2]

To fulfill its de novo mandate, this Court must now determine the meaning of the statutory term "public interest." It is well-established that when the language of a statute is clear, but not expressly defined, it "must be given its plain and obvious meaning," which can be determined, in part, by using dictionary and commonly understood definitions. *Citizens II*, 269 So. 3d at 504. "Public" is defined as "of or relating to people in general,"[3] and "interest" is defined as "advantage, benefit."[4] Thus, "public interest" plainly means for the advantage and benefit of the people in general. *Accord* Section 9.3 of Applicant's Handbook, incorporated by reference into 40C-2.301(1)(a), F.A.C. (" '[P]ublic interest' means those rights and claims on behalf of people in general.").

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[2] Even if it was not irrelevant, the Legislature cannot punt to an administrative commission to determine the public interest without constraint. *Delta Truck Brokers v. King*, 142 So. 2d 273, 275-75 (Fla. 1962) ("The Legislature has not in any degree laid down a rule which defines, even generally, what constitutes 'the public interest.' . . . The respondent Commission, on the other hand, is granted the power to decide, in its own discretion, just what constitutes 'the public interest.' Such a delegation of power is violative of the organic law and must fall.").

[3] *Public*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/public (last accessed April 6, 2022).

[4] *Interest*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/interest (last accessed April 6, 2022).

Any definition of public interest, though, leaves the question, of for the advantage and benefit of the people in general *as compared to what*? *See, e.g.*, *In re Records of Dept. of Children & Fam. Servs.*, 873 So. 2d 506, 513 (Fla. 2d DCA 2004) (in weighing statutory public interest regarding disclosure of records regarding children in DCF care, public interest in evaluating DCF and the courts is balanced with interests of the children). The comparison must be to the non-settlement alternative, which Florida statutes, in this case, spell out: the Commission has a mandatory duty to make certain findings as found in sections 366.06(1) and 366.041(1), Florida Statutes, as discussed in Section I, *infra*. It is precisely the outcome of the findings mandated by those sections that must provide the point of comparison for any settlement. For example, if the Commission, pursuant to 366.06(1) and 366.041(1), found that the proper rate base were $1 billion with an ROE of 10%, but was presented a settlement with a rate base of $1.3 billion and an ROE of 11%, then absent other factors benefitting the public, that settlement would be contrary to the public interest. Without such a comparison, settlements presented to the Commission are considered in a vacuum, and the Commission believes it is required to accept even offensive elements of a settlement. *See* R. 7739-7742 (Chairman Clark: “There are a lot [of] things in [the Settlement] that I like.

There are some things in it that I don't like. . . . [T]he things I honestly just didn't like in the program: the expansion of SolarTogether and the EV program. We're continuing to subsidize these programs off the back of residential ratepayers. To me, that – that is a – a negative in there.").

ARGUMENT

I. The Commission's Final Order is Legally Insufficient Because it Fails to Make Required Factual Findings.

Florida law requires that

> [t]he 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*.

§ 366.06(1), Fla. Stat. (emphasis added). Additionally,

> [i]n fixing the just, reasonable, and compensatory rates, charges, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction . . . no public utility shall be denied a *reasonable* rate of return on its rate base in *any* order entered pursuant to such proceedings.

Section 366.041(1), Florida Statutes (emphasis added).

Before the adoption of Article V, section 21 of the Florida Constitution, several cases from this Court could have been argued to

stand for the proposition that sections 366.06(1) and 366.041(1), Florida Statutes, lose their plain meaning in the context of a settlement. *Sierra Club v. Brown* found that, given a non-unanimous settlement, section 366.06(1) did not require the Commission to determine the prudence of the challenged Peaker Project. 243 So. 3d 903, 914 (Fla. 2018). As acknowledged by the Court in *Sierra Club,* "[t]his issue involves the Commission interpreting section 366.06(1), Florida Statutes, which it is tasked with enforcing; therefore, its interpretation is entitled to great deference and will be approved by this Court unless it is clearly erroneous." 243 So. 3d at 908 (internal quotations omitted). The holding that "nothing in section 366.06 requires the Commission to lay out findings on prudence in reviewing a proposed settlement," *Sierra Club*, 243 So. 3d at 912, is not dispositive here. In fact, section 366.06(1) Florida Statutes is silent with regards to settlements—nothing in 366.06(1) suggests the section applies only *unless* there is a settlement. Because deference to the Commission's interpretation of 366.06(1), that the section is somehow waived during a settlement, has been abrogated, Art. V, § 21, Fla. Const., the words in the statute should be given their everyday meaning.

The Commission did not fulfill any of the section 366.06(1) or 366.041(1) fact-finding requirements in this proceeding or in the Final

Order, making no findings regarding the prudence of the rate base, as a whole or in part, no findings on whether the investments contemplated in the Settlement are used and useful in serving the public, and no findings on what a reasonable rate of return would be. While *Sierra Club* may stand for the proposition that individual prudence findings are not required for each investment, it cannot stand for the proposition that no prudence findings are required whatsoever, and that a settlement operates to waive the requirements of section 366.06(1). To the extent *Sierra Club* could have once been so read, it is due to be receded from to comport with the law following the adoption of Article V, section 21 of the Florida Constitution. Because the Court may no longer defer to the PSC's interpretation that a settlement waives the mandatory duties of sections 366.06(1) and 366.041(1), and, because that interpretation contradicts the plain meaning of the statutory language, any contrary holding of *Sierra Club* no longer applies.

Indeed, fulfilling the mandatory duties of section 366.06(1) and 366.041(1) is all the more important in the settlement context. How can the PSC decide that a settlement is in the public interest without comparing to some baseline the findings it is required to make under 366.06(1) and 366.041(1)? Only by comparing a settlement to such an alternative can a

public interest evaluation, properly defined, be executed. In contrast, the Commission's cursory review of the Settlement completely ignored 366.06(1) and 366.041(1) and made none of the requisite factual findings.

The sparse factual findings the Commission did make focus far more on FAIR's standing than whether the record supports the Commission's finding that the Settlement is in the public interest. Appx. 9-12. The Commission also spends 5 pages reciting some of the *major* components of the Settlement without analysis. Appx. 19-24. The fact-finding required by 366.06(1) and 366.041(1) is non-existent, meanwhile, the fact-finding to support a public interest finding consists of just six findings of fact, namely, that: 1) "FPL is providing excellent service . . . from a reliability standpoint;" 2) "former Gulf customers as well as FPL customers will experience a reliability and rate benefit from the consolidation of these utility systems;" 3) "the bills for all FPL customers will be among the lowest in the nation;" 4) the mechanisms in the settlement "giv[e] FPL the financial ability to operate and invest in its system;" 5) "[e]xpanding SoBRA projects and conducting EV pilot programs are part of evaluating and meeting the electric industry's changing environment as the effects of climate change become more pronounced;" and 6) the Settlement signatories "represent a broad section

of FPL's customer classes and a large majority of the parties in this case." Appx. 24-25.

Even if true, these findings would not support the conclusion that the Settlement is in the public interest for all the reasons detailed below. These findings are also inadequate to satisfy sections 366.06(1) and 366.041(1). Nowhere does the Commission find or analyze how the above findings support a public interest determination as opposed to the alternative of rejecting the Settlement. Nowhere does the Commission analyze how the components of the Settlement support a finding that the *Settlement itself* is in the public interest. Findings 1, 2, and 6 have nothing to do with the elements of the Settlement itself. Finding 3, which is a result of the Settlement, is plainly false when "bill" is given its ordinary meaning—as FPL itself admits. Compared to the 50 largest utilities around the nation, FPL already had the 13th *highest* average residential electric monthly bills *before* this rate increase (FPL uses a standardized, hypothetical 1,000 kWh bill to make its "average" bill comparison, in contrast to the markedly higher average real-world usage). Appx. 90; R. 33944. The exact meaning of finding 5 is hard to decipher and only touches on the SoBRA and EV aspects of the Settlement—to the extent that it generally means more solar and more EV chargers are a good thing, the Florida Rising appellants

agree, but that alone does not mean that those aspects of the Settlement are in the public interest given the problematic nature of the EV and SoBRA provisions. Finally, finding 4 is so broad as to be almost meaningless; it could be rephrased as "the Settlement allows FPL to make plenty of money." The Florida Rising appellants agree with the factual basis for this finding, but again cannot derive from it, nor the other factual findings, any support for the finding that the provisions of the Settlement are in the public interest, and to the extent such an argument is made, it is not supported by competent and substantial evidence.

Even more important than what the Final Order includes is what it omits. The Final Order fails to analyze how the Settlement comports with 366.06(1) and the 366.06(1) and 366.041(1) factors, including: whether the SolarTogether expansion is legal; whether the amount of rate base is prudent, in whole or in part; whether the EV infrastructure investments are "used and useful in serving the public;" whether the PSC properly calculated the rate base "less accrued depreciation" given RSAM; whether the extended amortization period serves the requirements of only including in rate base "such property used and useful in serving the public;" whether the allocation of revenue requirements between rate classes "consider[ed] the cost of providing service to the class;" whether the new minimum bill

"consider[ed] the cost of providing service to the class, as well as the rate history . . . the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures;" whether the ROE (and mechanisms propping it up), provides a "reasonable rate of return on its rate base;" or really, whether any or all of the components of the Settlement met the requirements of 366.06(1), and 366.041(1), Florida Statutes. If there had been such factual determinations, finding that the entire rate base was prudent and the ROE was reasonable, Florida Rising appellants would challenge such a finding as not supported by competent and substantial evidence. But since there are not, the Final Order is not sufficient and violates sections 366.06(1) and 366.041(1), Florida Statutes. The Commission offers no link between the sparse factual findings contained in the Final Order and the rates being imposed on customers. This alone is sufficient grounds for reversal. However, in the rest of this brief, Florida Rising appellants detail why such findings, if they had been made, would not be supported by competent and substantial evidence, and therefore, why the Settlement cannot be in the public interest.

Although "the Commission is not required by statute or case law to address each issue of disputed fact in its final order," the Commission must address *some* of them and at least the major elements of the Settlement to

explain "why the settlement agreement was in the public interest," *Citizens I*, 146 So. 3d at 1153, particularly given the recent elimination of deference for such legal conclusions, Art. V, § 21, Fla. Const. Since the Commission failed to do so, especially when all elements of the Settlement were challenged as being contrary to the public interest, the Commission has violated the requirements of section 120.569(2)(l), Florida Statutes (requiring inclusion of any factual findings and conclusions of law, separately stated, in final order), as well as 366.06(1) and 366.041(1), Florida Statutes.

II. The Settlement Expands SolarTogether, Unlawfully Increasing an Undue Preference for Participants.

The Commission's authority to approve any settlement as in the public interest is "conditioned by statute," such that the settlement itself cannot violate the law and must result in rates that are fair, just, and reasonable. *Sierra Club v. Brown*, 243 So. 3d 903, 909 (Fla. 2018); *see also* § 366.06, Fla. Stat.; *Mohme v. City of Cocoa*, 328 So. 2d 422, 426 (Fla. 1976); *Miami Bridge Co. v. Miami Beach Ry. Co.*, 152 Fla. 458, 475 (Fla. 1943). The law further provides that no utility shall give any undue preference or advantage to any person. § 366.03, Fla. Stat. The Commission's finding that the Stipulation comports with section 366.06 (and implicitly, 366.03), Florida Statutes, by establishing fair, just, and

reasonable rates without undue preference, is a matter of statutory interpretation and legal conclusion subject to de novo review. Art. V, § 21, Fla. Const.; *Citizens II*, 269 So. 3d 498, 504 (Fla. 2019). The Settlement expands SolarTogether to effect an over $2 billion transfer of wealth from non-participants (primarily residential customers) to participants (primarily the largest industrial and commercial customers), epitomizing an undue preference and advantage to participants. The Commission makes no findings specific to the SolarTogether[5] addition, a program for building rate-based utility-scale solar where "participants" receive payments in the form of bill credits paid for by the general body of ratepayers, including whether the additions to rate base are prudent and "actually used and useful in the public service," section 366.06(1), Florida Statutes, in contravention of section 120.569(2)(l), Florida Statutes. The SolarTogether additions here were added via the Settlement, and are an over $7 billion *addition*, yet the Commission did not find this extraordinary addition worthy of mentioning in the analysis of the Settlement or public interest test (just in reiterating the Settlement's elements). *See* Appx. 24-25; *cf Sierra Club*, 243 So. 3d at 906 (no specific prudence finding needed for few-hundred-million-dollar

[5] A similar program from Duke Energy Florida is currently under review in this Court. *LULAC v. Clark*, No. SC21-303 (Fla. filed Feb. 24, 2021).

project included in as-filed rate case). Any implicit finding that this program is in the public interest is not supported by competent and substantial evidence.

A. SolarTogether is the Epitome of Undue Preference.

Through the Settlement, FPL has more than doubled the cost of the SolarTogether program from $4 billion, Appx. 92 ("Nominal Total" for "Total FPL SolarTogether Costs"), to $11 billion, Appx. 75 ("Nominal Total" for "Total SolarTogether Costs"). The changes increase not only the total subscriptions, but also the value of the ratepayer-funded credits that the Settlement awards to participants. R. 33911-12. In the original program, the general body of customers were promised $112 million of Cumulative Present Value Revenue Requirement ("CPVRR")[6] benefits if SolarTogether was approved, Appx. 92 ("CPVRR" column, "Total Net RevReq's (fav) unfav" row), and were "only" supposed to pay $678 million in net payments to participants, Appx. 92 ("Nominal Total" column, "Participant Net Distribution (Payment)" Row). The Settlement shrinks the generalized "benefits" to $68 million for the original phase of the program, Appx. 76; R. 33913, while swelling net payments to participants to $928 million, Appx.

[6] "Present value" reflects the concept that $1 ten years from now is worth less than $1 today, and discounts that future $1 to an estimate of what it is worth at the present time.

76 (“Nominal Total” column, “Participant Net Distribution (Payment)” Row); R. 33915-16. In other words, in the short time since the Commission approved SolarTogether, the total savings meant to accrue over 30 years (now 35 years) have been nearly halved, and the payout to the participants (mainly large commercial and industrial users) in exchange for nothing meaningful has nearly doubled.

The incremental solar (more than the entire original program) that FPL added through the Settlement makes things worse for the general body of ratepayers. Combined, the original program plus the Settlement additions will yield a net payout of over *$2 billion* to participants ($356.6 million on a CPVRR basis). R. 33916-17; Appx. 75. The initial years are especially bad for the general body of customers; FPL’s own projections expect the program (and Settlement’s changes) to leave the general body of customers worse off in 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2030, and 2031. R. 33921; Appx. 75. Consider 2026, the next time FPL can seek a rate increase, when the costs of the solar panels themselves in the combined program are projected to be $158.6 million. R. 33918; Appx. 75. The general body of ratepayers is actually expected to pay $166.9 million that year—more than the costs of solar—thanks to additional

charges for $8.3 million in net credits to participants. R. 33918-19; Appx. 75.

In sum, the Settlement transfers over $2 billion in credits to primarily large commercial and industrial customers, paid for primarily by residential customers and small businesses. Under the Settlement, as of April 1, 2022, the credits paid to participants (although not the low-income participants), increase, heightening the undue preference for participants. *Compare* Appx. 61 *with* Appx. 62. When unjust windfalls occur, rates are unlawful and the Commission should be reversed. *Citizens of the State of Fla. v. Hawkins*, 364 So. 2d 723, 725 (Fla. 1978) (reversing Commission approval of accounting method that led to windfall to the utility in rate case). Because select customer participants receive a large subsidy (bill credits) funded by non-participating customers, not premised on a reasonable customer distinction, the rate structure for this program is unfair, unjust, and unduly discriminatory.

B. Program Allocations Show Undue Preference for Large Customers.

The fact that the SolarTogether program design favors one segment of FPL's customer base, who would now make billions of dollars from this program at the expense of the remaining customer base, demonstrates that SolarTogether, newly revised and made worse, is unjustly discriminatory

and not fair, reasonable, or just within the meaning of Section 366.06, Florida Statutes, and creates an undue preference for participants in violation of Section 366.03, Florida Statutes. The program's customer allocations, when compared with energy usage by FPL's overall customer base, demonstrate that this program was designed for large customers. The original SolarTogether reserved 75% of the program for large commercial and industrial customers, with the incremental addition reserving 60% of the addition for those large customers, while both small businesses and residential customers must split the remainder. R. 33933. These allocations do not reflect FPL's customer base. Excluding small businesses, residential customers on their own make up 63% of FPL's energy *sales*. R. 33933; Appx. 94. Yet, residential customers have to *share* just 25% of the original program, and 40% of the incremental expansion, with small businesses. The vast majority of the program is reserved for large commercial and industrial customers, proving for whom the program was designed. As further evidence of this, even though the expanded program adds 1,072.8 MW of additional space for large commercial and industrial customers, Appx. 94, those customer classes already had an outstanding 1,694 MW waitlist, which has long since had to close. R. 33934; Appx. 96.

C. SolarTogether Is Not Cost Effective With More Realistic Assumptions.

All of FPL's CPVRR projections from SolarTogether are based on nonsense scenarios that cannot reasonably occur. Most egregiously, SolarTogether assumes, for cost projection purposes, that the alternative to the program is no solar, ever—even though solar may be *the* most cost-effective generating resource (and prices are still falling). Therefore, FPL models the alternative as more gas infrastructure—while subjecting that gas infrastructure to ever-increasing (hypothetical) carbon taxes. R. 33922-27. FPL admitted on cross-examination that without the carbon costs—which have neither been enacted nor finalized in any state or federal legislation or rule—the net revenue requirement for the general body of ratepayers for SolarTogether would be a *cost* of $248.7 million (CPVRR). R. 33924. FPL also admitted that if these carbon emissions did not materialize, SolarTogether would be a net burden for the general body of ratepayers—even over the solar's entire 35-year life—yet the net $2 billion in credits to Participants would not be impacted. R. 33924. This issue would be very easy to avoid: by simply nixing the subscription charges and credits, the general body would avoid a net $356.6 million CPVRR payout to participants, Appx. 75 ("Participant Net Distribution(Payment)" CPVRR), which would more than make up for the

lack of carbon costs. Of course, in a truly fair comparison, of utility-scale solar with SolarTogether, versus the same solar without the program, there would be zero incremental emissions benefits, zero incremental gas transport benefits, and zero system net fuel benefits. Instead, all you would be left to see is that SolarTogether adds $2 billion in unnecessary, discriminatory costs that are not "used and useful," and that delaying installation of this solar until actually needed (because FPL has so over-built their generation system, it could be many years before additional solar installations are required to meet need) would further aid its cost-effectiveness. An additional reason to ignore the purported "benefits" from "avoided gas" in the SolarTogether is that even if the Settlement is approved, including the SolarTogether expansion, FPL refuses to make *any* commitment to not invest in gas infrastructure or turbines. R. 33929; R. 33671.

Another fundamental flaw in FPL's SolarTogether cost projections was the use of a 10.55% ROE, when testimony showed that, due to RSAM, an 11.7% ROE should have been used. R. 33931 (analysis used 10.55% ROE); R. 34121 (11.7% with RSAM). When using the more accurate 11.7% ROE, the program amounts to a net *cost* of $94.5 million CPVRR for the general body of ratepayers, even with carbon cost savings, even

though the program is expected to save an overall $216 million CPVRR, due to the unaltered $310 million in CPVRR transferred to participants, which is contrary to the public interest and constitutes an undue preference. R. 34122.

D. SolarTogether, Which Represents Billions More For FPL, Cannot Be in the Public Interest.

In addition to the over $2 billion paid, net, by primarily residential customers and small businesses to primarily large commercial and industrial customers, the SolarTogether extension in the Settlement (not including the original SolarTogether) also represents a projected return on equity (profit) for FPL of almost $2.2 billion under the outdated 10.55% ROE. R. 33932; R. 33707. Under the more realistic 11.7% ROE, FPL's projected return on equity from the extension exceeds $2.4 billion. R. 31457 (Row "Return on Equity," Column "Sum"). As a result of the additional rate base from SolarTogether and the payments to the participants, the 2026 bill impact from the SolarTogether changes in the Settlement is expected to be about $1.69 per 1,000 kWh (compared to base rate savings from the Settlement of $1.47 in 2025), R. 34125, leaving residential customers *worse-off* than if FPL's original proposal had been approved in full. Thus, the Settlement cannot be in the public interest and

no competent and substantial evidence exists to support a different conclusion.

III. The Commission's Finding that the Settlement is in the Public Interest Is Not Supported by Competent and Substantial Evidence Given That the Settlement Gave FPL Almost Everything from its As-filed Rate Case and Then Added New Provisions Contrary to Public Interest and Florida Law.

The Settlement, in including everything from FPL's original proposal in rate base—then adding billions more—violates the Commission's duty to "investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service." Section 366.06, Fla. Stat. Unlike the single peaker project challenged in *Sierra Club*, which itself had been included in the original, as-filed rate case, here the Florida Rising appellants challenge the whole gamut of FPL additions to rate base. And here, FPL's Settlement includes not only every challenged investment from the as-filed petition, but billions in further rate base that were never part of FPL's original proposal. A settlement should not be an opportunity for a regulated utility to sneak additional billions into rate base with no Commission analysis as to whether that extra spending is prudent or in the public interest. *Sierra Club* does not excuse the Commission from its mandatory statutory duty to precisely evaluate

proposed rate base additions, and even if it did, such a determination would not be supported by competent and substantial evidence.

A. No Competent and Substantial Evidence Was Offered to Support Transfer of Rate Burden to Residential Customers and Small Businesses from the Largest Commercial and Industrial Customers, Resulting in Undue Preference.

Section 366.06, Florida Statutes, provides that "[i]n 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 consumption and load characteristics of the various classes of customers." (emphasis added). In approving the Settlement's allocation of revenue requirements without any of the requisite fact-finding regarding cost of service, the Commission violated its statutory duty. Nor did FPL conduct a cost-of-service study to justify the Settlement's revenue allocations, as FPL's own Witness Cohen admitted. R. 33948. Instead, negotiation between invited signatories, not informed study, placed much more of the revenue burden onto residential customers than originally proposed by FPL.

In contrast, FPL's as-filed rate case, based on its own cost-of-service study, proposed that residential customers pay almost $100 million more (per year) than parity (i.e., their fair share based on the cost of serving their

class) in order to subsidize the rates for the largest commercial and industrial customers. *Compare* Appx. 64 (residential class deficiency of $396,789,000 at parity with full rate increase) *with* Appx. 65 (residential as-filed proposed rate increase $490,976,000).

The Settlement made things worse. FPL could not "calculate parity at settlement rates," as "there was not a full settlement cost-of-service available." R. 34240. Nothing about the Settlement suggests, nor could it, that the Settlement changed FPL's actual cost to serve the various classes of customers. Pursuant to the only reviewable cost-of-service study supported by FPL, residential customers in 2022 will be subsidizing the largest commercial and industrial customers by $286.5 million, growing to $295.2 million in 2023. R. 34118. Small businesses are in the same situation, with subsidies to the largest businesses of $31 million and $39.5 million in 2022 and 2023 respectively. *Id.* Over 4 years, those subsidies will transfer over $1 billion of wealth from residential customers (and more from small businesses) to the largest commercial and industrial users. R. 34117. Such a large transfer is not fair, just, and reasonable, constitutes an undue preference, and is contrary to the public interest.

Even though the vast majority of revenue comes from residential customers (representing the majority of customers), including the vast

majority of electricity sales, R. 33933, residential customers did not receive much of the "savings" from the Settlement. According to FPL's own data, in 2023, under the Settlement, the largest commercial and industrial customers save 12% to 20.5% as compared to FPL's as-filed case. R. 34119; R. 33948-49. By comparison, residential customers only save 1.9%, R. 34119; R. 33948-49, and, layering on the $32 million of revenue from the minimum bill, residential customers save only 1.3%. R. 33951 (total revenue of $5,551.8 million from residential customers 1.3% less than as-filed case).

These savings disappear when considering residential customers, as parity under an 11.5% ROE (as requested in the as-filed case) should have seen an increase of $396,789,000 in 2022, T. Vol. 13 at 2878 (Cohen), instead of the $410,769,000 increase from the Settlement that they are experiencing. Thus, FPL has made residential customers *worse off* under the Settlement's 10.6% ROE than they should have been under an 11.5% ROE. No competent and substantial evidence exists to support this inter-class allocation of revenue requirements, and no Commission finding, as required by 366.06(1), Florida Statutes, supports the resulting subsidies of over $1 billion from residential customers to the largest commercial and

industrial customers. Nothing here supports a finding that the Settlement is in the public interest.

B. Failing to Make Findings Regarding Prudence for Rate Base Violates 366.06(1), Florida Statutes, and No Competent, Substantial Evidence Shows Vastly Expanded Rate Base to be in Public Interest.

As discussed in section I, the Commission violated its statutory duties by failing to make any findings regarding the prudence of the rate base or whether it is in the public interest, but if it had, such a finding would not have been supported by competent, substantial evidence.

In 2010, FPL and Gulf had a combined jurisdictional rate base of $18.313 billion, roughly $1,883 per person. R. 32856 (FPL rate base $16,800,538,432); R. 33228 (Gulf - $1,512,206,226); R. 27841 (population). By 2025, under the Settlement, that rate base is expected to balloon to $68.349 billion,[7] almost *quadrupling* in a 16-year period against an only 20% increase in population, and equating to a rate base of $5,830 per person. R. 27872 (population). The Settlement embraced all of FPL's

[7] Pre-Settlement projected rate base of $66.314 billion, R. 33649, plus $1.865 billion (SolarTogether Expansion), R. 30978 (row "Total Rate Base, Average"), plus about $170 million (electric vehicle charging expansion), Appx. 53-55 (new investments from Settlement minus existing EVolution pilot program costs).

original proposed gas investments, amounting to about an additional 4.125 GW being added to rate base at a cost of $4.384 billion. Appx. 30; R. 32083-86. For the capital expenditures FPL sought approval of as part of the Settlement (but not including those, like SolarTogether, that were not in the as-filed case), including transmission and distribution projects discussed below, FPL projected $72.837 *billion* in pre-tax *return* on capital, SR. 29449 (excerpted in Appendix at 71 for viewing clarity), which equates to $60.842 *billion* after tax.[8] And that was with a 10.55% ROE, SR. 29441, and under the prior depreciation rates before the adoption of RSAM. *See, e.g.*, SR. 29445 (solar facilities with book life of 29.4 years adjusted to 35 years by RSAM) (excerpted in Appendix at 68 for viewing clarity). With a 10.6% ROE—functionally an 11.7% ROE—plus a longer depreciation period, FPL will accrue even higher profits from this spending. *See* R. 33854; R. 34132.

There was no competent, substantial evidence of the prudence of any of these projects. FPL uses a 0.1 loss of load probability ("LOLP") criterion, R. 27869, better stated as an expectation of not being able to meet all firm load due to lack of generation resources once every ten years. Gulf, as a

[8] Common equity is responsible for 83.5% of the 10.08% weighted pre-tax cost rate (8.42 divided by 10.08). 83.5% of $72.837 billion is $60.842 billion.

standalone system in 2021, already had an LOLP corresponding to an outage once every 171 years. Appx. 86.[9] FPL's own documents show that the addition of a 938 MW combustion turbine leads to an astounding 84.1% reserve margin in the Gulf service territory in 2022—that is, 84.1% *excess* generation available *over the highest* projected demand of the year. R. 24146. FPL never bothered to calculate the LOLP for Gulf in 2022 with or without the addition of that huge turbine. Appx. 85, 87. However, it is not difficult to deduce that the addition of such enormous generating resources on a system with an outage less than once every 171 years would reduce the LOLP even further.

Included among the capital costs FPL sought to recover as part of the rate case, and hence, part of the Settlement, is the $178 million cost of converting Plant Crist to gas. Appx. 83. Again, FPL neither provided nor ran any analysis on the need for this generation to meet any of its reliability criteria, deciding on its own instead that massive capital spending to enhance rate base was more important than ensuring such costs were prudently incurred. Appx. 88 (FPL admitting that it never ran and calculated—and in fact refused to—the reserve margin or LOLP criteria for any scenario where Crist was not converted to gas or was allowed to

[9] 1 divided by 0.005837 equals 171.3.

retire). No competent and substantial evidence was provided to support other extensive gas investments totaling over 4 GW of new gas, with the possible exception of Dania Beach Unit 7, which had received a need-determination.[10]

The sum of these excesses is a generation system so overbuilt that by 2023, the LOLP plummets to 0.000009—less than once every *100,000 years*. Appx. 86. In other words, given the amount of generation FPL expects to have in 2023, if conditions stayed constant, FPL would expect a single blackout between the year 2023 and the year 111,134 due to insufficient generation resources to meet all demand. This absurd figure proves the staggering degree of FPL's systematic overbuilding and overinflation of rate base. Nowhere does the Commission find that this amount of reliability is prudent, nor does it make any finding that having a rate base large enough to support this much excess generation is in the public interest.

No competent, substantial evidence supports the retirement of Plant Scherer either. With the $100 million consummation payment to JEA (plus FPL's ROE on that inexplicably rate-based payment), FPL does not expect

[10] R. 32084 (938 MW Gulf CT, 1,163 MW Dania Beach Unit 7); R. 30397 (924 MW Crist conversion); R. 35977 (approximately 100 MW Lansing Smith); R. 35985 (over 1,000 MW miscellaneous plant upgrades).

its customers to break-even from the retirement of Scherer until the end of the 2030s, Appx. 81 (bottom row "Cumulative CPVRR"). Worse, that was under the past ROE of 10.55%, R. 32168, without accounting for the extension of the amortization period, expected to add around $600 million in costs (along with the other projects subject to the increase in amortization period), R. 33907. Furthermore, this consummation payment does not have rate base qualities and should not have been allowed to have been included in rate base as part of the Settlement; that alone provides sufficient grounds to reverse the Commission's approval as the consummation payment does not "generat[e], transmi[t], or distribut[e]" electricity to customers, but is simply to pay-off JEA. *Citizens of State v. Graham*, 191 So. 3d 897, 901 (Fla. 2016) (quoting § 366.02(2), Fla. Stat.) (reversing Commission decision allowing FPL to recover costs associated with investments in shale gas reserves as beyond Commission's statutorily-limited authority to allow cost recovery only for the "generation, transmission, or distribution of electricity").

Not only is FPL's rate base for generation overinflated, so too is its rate base for transmission and distribution. By FPL's own recurring testimony, they have one of the most reliable transmission and distribution systems in the nation. Yet, FPL added $11.5 billion of extra transmission

and distribution rate base spending in 2019-2023 to this purportedly top-performing system. R. 35045. Simply put, FPL failed to provide any cost-benefit analysis, or make any showing as to why these costs being borne were reasonable and prudent, nor did the Commission make any such findings in its final order, nor otherwise address the prudence of these additional billions in rate base beyond finding—as no party contests—that FPL's system is reliable. But finding the system reliable—without acknowledging, let alone finding prudent, the gargantuan sums of additional "reliability" spending—cannot be a blank check to add generation and distribution to rate base ad infinitum. This aspect, on its own, provides reason enough to reverse the Final Order as insufficient, against the public interest, and unsupported by competent and substantial evidence.

Some of the best proof of FPL's exorbitant rate base expansion is FPL's treatment of the former Gulf testimony. FPL has so aggressively expanded the rate base therein, that if the rate structures for Gulf and FPL were not combined, FPL proposed to increase the energy charge alone for residential customers (not including fuel or any of the clauses) to 6.866 cents per kWh, an astounding 40.5% increase for former Gulf customers. Appx. 79. The general service demand rates would go up even more, by over 50%. *Id*. Overall, for 1,000 kWh of energy usage, residential bills

would have increased from $139.89 to $168.20, one of the highest in the nation. Appx. 67. Although FPL alleged that this spending was for service improvements, the record offers no evidence that Gulf Power had not been providing reliable and excellent power. In fact, during Gulf Power's last rate case, the Commission specifically found that the settlement in that case would "sustain quality customer service over the next several years." *In re: Petition for rate increase by Gulf Power Company*, Docket No. 160186-EI, Order No. PSC-17-0178-S-EI at 6, (Fla. P.S.C. May 16, 2017). Nothing was introduced in this proceeding to contradict that finding.

Not only did the Settlement include all of FPL's as-filed rate base, it also added billions to rate base from SolarTogether and EV chargers as part of the Settlement. There are no findings by the Commission as to why *more* rate base than originally proposed is prudent (and if there were, they could not be supported by competent, substantial evidence), nor how such rate base is in the public interest. Even if the public interest test was defined by a comparison to FPL's original proposal (which it neither is, nor should be), this additional rate base from the Settlement, plus everything from FPL's original proposal, makes the Settlement contrary to the public interest.

C. Additional Rate-Based Pilots, Mostly Absent from FPL's Original Proposal, Which Benefit Few and are Paid for By Everyone, are not in the Public Interest.

FPL's original filing would have added $56 million to rate base to build 1,000 EV charging stations under its "EVolution" pilot program, R. 32037, to which the Settlement adds an additional $170 million in rate-based costs, Appx. 53-55; R. 33890-91. In all, the Settlement cumulatively adds a quarter of a billion dollars for electric vehicle charges and infrastructure that do not generate or provide electricity to the general body of customers, and are unsupported by any cost-benefit analysis, contravening the requirement that all parts of the rate base be "prudently incurred" and "used and useful in serving the public." § 366.06(1), Fla. Stat.; R. 34134. There is no competent, substantial evidence that this addition is in the public interest.

Another example of additional rate base being snuck into the Settlement but never included in the as-filed case by FPL is the "Solar Power Facilities pilot" program, which allows FPL to install rate-based rooftop solar for non-residential customers. Appx. 55-56; Appx. 73-74. FPL never included any estimate on the additional amount to be added to rate base, but pledged to try to keep the program revenue neutral by estimating the capital costs for repayment from non-residential customers.

Appx. 73-74. Without a legally enforceable mechanism, assurance to keep revenue neutral to non-participants ring hollow and amount to a blank check to expand rate base into an inappropriate sector—one that already has a competitive private market. There is no reason to include such facilities in rate base; FPL has made no demonstration how such facilities will be "used and useful" for the general body of ratepayers, § 366.06(1), Fla. Stat., nor has the Commission made any such findings. In granting such blank checks the Commission abandons its proper regulatory role, and as the Commission has approved such a program without limits, the Final Order must be reversed.

The approval of the "hydrogen pilot" in rate base is due to be reversed for similar reasons. Among other defects, the pilot is: an unneeded $65 million inclusion in rate base; radically uneconomic and inefficient (wasting huge amounts of solar electricity to make small amounts of hydrogen instead of just sending the solar-generated electrons to the grid); used to justify other schemes and features of the Settlement that run counter to the public interest; and ultimately an attempt by FPL to use its monopoly power to extract R&D rents from captive rate payers to subsidize its possible entry into wholesale hydrogen sales, which does nothing to benefit its customers. R. 33851-53. This pilot is an exorbitant "solution" in search of a problem,

and does nothing to generate, transmit, or distribute electricity (it actually takes useable electricity and inefficiently converts it) in violation of the restrictions of the Commission's authority. *See Graham*, 191 So. 3d at 901. Not only is it contrary to the public interest and unsupported by competent, substantial evidence, but its approval violated restrictions on the Commission's authority.

D. The New Minimum Bill is Contrary to Public Interest and Not Supported by Competent and Substantial Evidence.

The new $25 minimum bill was also never included in FPL's as-filed case. FPL provided no evidence justifying this minimum bill with any kind of cost-of-service study or other methodology to show how it is fair, just, and reasonable, or justified by "the cost of providing service to the class . . .; [or] the consumption and load characteristics of the various classes of customers." § 366.06, Florida Statutes. Instead, the minimum bill forces low users of electricity, approximately 360,000 customers, disproportionately low-income, to subsidize higher users of electricity. R. 34129; R. 33955; R. 26594. This does not constitute competent and substantial evidence that the Settlement as a whole or minimum bill on its own is in the public interest.

E. Increasing the Amortization Period in Settlement Works Against Public Interest.

FPL makes things still worse for its residential customers by giving a short-term slight payoff to its largest customers by changing the amortization period for retired "assets," no longer in useful service and likely not prudently incurred in the first place (like the $100 million Scherer payment to JEA, on which FPL expects to earn its ROE, to allow FPL to continue to retire coal assets without a convincing showing that doing so is in the public interest) from ten-years to twenty-years. FPL calculated that extending this period increased the costs to ratepayers by approximately $600 million, R. 33907, flowing from ratepayers to FPL and its shareholders. This alone nearly wipes out the "savings" from the Settlement as compared to FPL's original proposal. Extending the amortization period also creates large intergenerational inequity, leaving customers to pay for retired assets for the next 20 years. In other words, people born today will become adults and still be paying for coal-fired and other power plants that did not generate a single kWh during their entire lifetimes—and for FPL's return on equity (profits) on those same units. *See* R. 2704. This fundamentally violates the principle of safeguarding generational equity and ensuring that rates reflect the costs of property "actually used and useful in the public service." § 366.06, Fla. Stat.

F. FPL's Settlement Adopts Revised Depreciation Parameters to Create an Artificial Reserve Surplus to Keep its Profits at Top of ROE, Contravening Florida Law and Public Interest.

Although the reasonableness of a similar mechanism as part of a settlement was addressed in the *Citizens I* case, important differences fundamentally distinguish the mechanism now at issue. In *Citizens I*, the depreciation surplus was genuine, not manufactured, and this Court was without the context of an extensive history of FPL simply using the device to ensure earnings at the highest end of its allowed ROE. *See* 146 So. 3d at 1170-71. Simply put, FPL is now creating an artificial reserve surplus by arbitrarily "extending" the lives of units. We know the "reserve" is artificial because FPL cynically offered two sharply competing balances for the supposed amount of the depreciation reserve—one a surplus, one a deficit—depending on whether or not it could employ that balance as it saw fit. As further explained below, FPL only supported using the new, extended service lives if it is allowed to use the resulting "surplus" to keep its ROE at the top of its range, but would otherwise oppose extending its plant lives, for example, if it had to return the surplus to customers via lower rates. At its essence, the mechanism is a slush fund, created from thin air by manipulating the remaining service lives of FPL assets to create an artificial surplus, which is then used to guarantee FPL profits at the very top

of its authorized ROE range. Unsurprisingly, the RSAM operates to the significant detriment of FPL's customers, who receive no additional value for this additional extraction of wealth.

The Commission's approval of the RSAM must be reversed because it violates the Commission's statutory obligation to set cost-based rates. Section 366.06, Florida Statutes, requires the Commission to investigate and determine the "actual legitimate costs" of the utility property, actually "used and useful in the public service" as well as the "net investment . . . honestly and prudently invested . . . less accrued depreciation." Therefore, there is no statutory basis for the Commission to approve the use of the accrued depreciation for ratemaking purposes as a separate account for FPL to draw down as it pleases to increase its profits, as sought under the Settlement, rather than being used to depreciate assets and *decrease* the rate base, as customers *have already paid* to do. *See also*, *Lindheimer v. Illinois Bell Tel. Co.*, 292 US 151, 168-69 (1934) (recognizing these principles in utility ratemaking).

However, even if the Commission otherwise had the legal authority to approve the RSAM, it operates decisively against the public interest. The RSAM is "funded" from the "theoretical reserve imbalance," which is calculated as the difference between FPL's actual, recorded running total of

depreciation activity ("book accumulated depreciation"), and FPL's estimation of accumulated depreciation at any given time ("theoretical reserve"). R. 36123-24. Changes in assets' expected service lives or salvage value can produce either a surplus or deficit theoretical reserve balance as compared to the book value over time. *Id.* It also means that FPL can create a "fresh study" with new assumptions, R. 33986, whenever expedient to reach a result, such as enabling the RSAM.

In this case, FPL's own witnesses simultaneously presented two dramatically different calculations of this hypothetical imbalance. FPL Witness Allis filed a Depreciation Study concluding in a *deficit* balance of $437 million, meaning that FPL has collected $437 million less than it should have at this time to cover depreciation costs. R. 36125-26; R. 24841.

However, FPL Witness Ferguson expressly asked Mr. Allis to "calculate several alternative parameters . . . in lieu of those presented in the 2021 Depreciation Study *to enable continued use of the RSAM*." R. 35675 (emphasis added). Witness Ferguson then presented the new depreciation reserve calculations based on "RSAM parameters," yielding a stark contrast: a *surplus* balance of $1.48 billion, meaning that FPL has collected $1.48 billion *more* than it currently should have to cover

depreciation costs. R. 24702. The gymnastics required to produce this new balance included extending the lives of: the St. Lucie nuclear plant by 20 years (33% increase); all combined cycle generating units by 10 years (25% increase); all solar units by 5 years (14% increase); for all transmission, distribution, and general assets, the values of the 2016 FPL Rate Settlement and the 2021 Depreciation Study were compared, and "whichever results in longer lives and/or higher net salvage" was adopted. R. 35675; R. 33854-55 (noting the flimsy justifications for each of these modifications). Ultimately, without these "cherry-picking adjustments," the RSAM would not be possible. R. 35373.

Adopting the RSAM leads to concrete, negative consequences for FPL's captive ratepayers, most obviously through its functional guarantee that FPL will earn at the absolute top of its ROE range. The Commission sets a mid-point ROE as the intended reasonable return for a utility, the value which utilities are expected to aim for, and a buffer range (typically 100 basis points above and below the midpoint). As this Court has long explained, the entire purpose of establishing a range *in addition* to the authorized midpoint is to recognize that a utility cannot practicably match an exact ROE over time, and is intended to provide just enough flexibility for natural fluctuations *around* the targeted value:

> By establishing a rate of return range . . . , the commission is acknowledging the economic reality that a company's rate of return will fluctuate in the course of a normal business cycle. Earnings in excess of the authorized rate of return could possibly be offset by lower earnings in later years.

Gulf Power Co. v. Wilson, 597 So. 2d 270, 273 (Fla. 1992) (quoting *United Tel. Co. of Fla. v. Mann*, 403 So. 2d 962, 967-68 (Fla. 1981)). Just as importantly, this Court has ruled that earning an ROE that falls within an authorized range does *not* automatically establish that the return is reasonable:

> *The existence of the range does not limit the commission's authority to adjust rates even though a public utility's rate of return may fall within the authorized range.* **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.

Id. (italics in original, bold added).

In this context, the RSAM—and particularly FPL's historical usage of the RSAM—makes a mockery of the mid-point and range system. As FPL's own filings show, since the first pilot of the RSAM, the company has consistently targeted and achieved the upper extreme of its authorized "range" with surgical precision and historic consistency. R. 32594, 32614, 32642, 32670, 32698, 32726, 32753, 32780, 32806, 32835, 32856. In fact,

during the 11 years that the Commission has permitted FPL to use this unlawful mechanism or its predecessor, the company has achieved its top of line ROE every single year except twice, including in 2017 when FPL "absorb[ed] the cost of Hurricane Irma" instead of using the established channel for storm cost recovery. R. 31986-89 (even in the two years that FPL did not max out its annual ROE, FPL still achieved an ROE of just 54 and 52 basis points, respectively, below the maximum—still well above its mid-point); R. 36459. In practice, under the Settlement's 59.6% equity ratio, the revenue requirement impact of an additional 100 basis points on equity is approximately $360 million burden in costs on ratepayers every year. R. 35403. This violates principles of cost-based rate-making.

In addition, the depreciation parameters used to extend the lives of various assets also risks increasing the remaining book value of plants that have become uneconomic, with the result that customers will either experience added costs for plants not used and useful, or that the outsize remaining book value will unreasonably postpone cost-effective retirement of uneconomic plants. R. 33854-55. The only appropriate use of any reserve imbalance surplus is to flow it back to customers "over a short period of time" using the remaining life technique as explained by OPC Witness McCullar. R. 35568-69; R. 26003-47.

It is not just intervenors that understand the true purpose and effect of RSAM—high profile investment and credit rating analysts have come to the same conclusion. Moody's has extolled FPL's "ability to earn roughly 100 bps above its authorized ROE . . . through the use of the [RSAM]," and, similarly, Witness Mac Mathuna concluded that a (confidential) Scotiabank review confirmed his (non-confidential) conclusion that the RSAM "greatly minimize[s] FPL's cost recovery risk and actively contribute[s] to FPL's earning at the top of the ROE range." CR. Attachment A at T. Vol. 11 at 2412-13.[11] Including the RSAM, again without any real analysis from the Commission, further weighs against the finding the Settlement in the public interest, and shows that such finding is not supported by competent and substantial evidence.

G. Other Mechanisms in the Settlement Exceed Commission's Approval Authority and Act Against the Public Interest.

The Commission may not raise rates unless and until it has 1) held a "public hearing," in order to 2) "determine the actual legitimate costs" of such utility property that is "actually used and useful in the public service," and 3) found as a result that the existing rates are "insufficient" to reasonably compensate the utility. § 366.06(1)-(2), Fla. Stat. Only then

[11] Quotes provided are not confidential.

may the Commission, "by order" fix new "fair and reasonable rates." § 366.07, Fla. Stat. Therefore, under Florida law, there is never a lawful basis for the Commission to pre-approve any rate increase.

Nevertheless, the Settlement sought cost recovery for a number of schemes that are: a) not based on actual costs, b) based on activities unrelated to generation, transmission, or distribution in violation of *Graham*, (recovery limited to only those activities, 191 So. 3d at 899, 901), c) pre-approved, or d) some combination of the above. Authorizing recovery for such schemes exceeded the Commission's authority as a matter of law, was contrary to the public interest, and was not supported by competent and substantial evidence.

The first scheme is the "incentive mechanism," Appx. 52-53, which allows FPL to "optimize" assets, by buying and selling off on the short-term market any and all FPL fuel sources, transportation capacity in its gas pipelines and storage facility, renewable energy credits (RECs) associated with its solar generation, and by making and economy sales and purchases of electricity in the southeast region and beyond—all while recovering any resulting expenses through the Fuel Clause. Appx. 52-53; R. 35718-28. The "incentive mechanism" is unlawful as it seeks recovery costs from activities unrelated to generation, transmission, or distribution of electricity,

and violates section 366.05, Florida Statutes, which both requires public utilities to keep separate accounts for sales of appliances and other merchandise and the resulting profits and requires the Commission not to consider profits or losses from such sales in rate-setting. To the extent *Citizens I* could be read to have approved a predecessor mechanism, that case was decided before the enactment of Article V, section 21 of the Florida Constitution, which wholly nullified the broad deference given by *Citizens I* and other earlier cases to the Commission's interpretation of its implementing statutes. Holdings grounded in that deference no longer govern the Commission.

The same principles apply in regard to FPL's proposal to monetize the sale of renewable energy credits, which are created by the addition of renewable generation assets that are paid for by the general body of customers, but that FPL nonetheless seeks to privatize the benefits of by selling off the credits. R. 34125-26. This plan violates cost-of-service and cost-causation principles, as it requires burdensome cross-subsidies from all ratepayers (as all are paying for the solar, and thus the renewable energy credits), with no guarantee of receiving any of the benefits. R. 34126-27. Such a program is not in the public interest and approving it violated the statutory authority of the Commission.

The Settlement includes a second unlawful incentive, this time in conjunction with the 1,788 MW of additional utility-scale solar proposed in FPL's as-filed petition. Specifically, the Settlement contains an installed cost "cap" of $1,250 per kW_{AC} (alternating current) for each additional project, but simultaneously proposes an "incentive" where, should FPL deliver any project below the "cap," it will charge ratepayers 25% of the difference between the actual installed cost and the $1,250/$kW_{AC}$ cap. Appx. 38-43. This incentive is as unlawful as it is absurd. First, to the extent that FPL is able to deliver new solar generation below a cost cap—that it itself has defined—it is unlawful to mark up the project cost by 25% of the difference. Moreover, there is "absolutely no incentive" for FPL to actually deliver new solar arrays below the cap given the Settlement's "outrageously high" equity returns on capital investments. R. 34128. While the company would rate base 25% of the difference between the cap and a lower installed cost, it comes out ahead if it can rate base 100% of the cost—all the way up to the cap. *See id.* ("[F]or every dollar of cost below the cap, the Company realizes a 25-cent incentive, but loses $1 worth of capex and associated return."). Ultimately, under the proposed solar construction incentive, customers lose either way; such a mechanism finds

no support in Florida law, is contrary to the public interest, and is not supported by competent, substantial evidence.

Third is FPL's Storm Cost Recovery Mechanism (SCRM), which allows FPL to charge customers up to $4 per 1,000 kWh on a monthly residential bill for costs incurred due to a named tropical storm, beginning 60 days after filing a petition for recovery with the Commission, subject only later to an actual hearing on costs and prudency. Appx. 36-37; R. 34380 (FPL's spending only later reviewed, "often many months after the restoration has been completed"). The SCRM's charge first, consider "actual legitimate costs" later approach violates sections 366.06 and 366.07, Florida Statutes, which mandate the Commission hold a public hearing and make such determinations regarding the sufficiency of current recovery structures *prior* to any authorization for new rate increases. Consequently, the SCRM and Settlement containing it violate Florida law and the Commission's authority to approve it.

Fourth is FPL's proposed expansion of the Solar Base Rate Adjustment (SoBRA) mechanism, which suffers many of the same defects as its accompanying schemes. SoBRA gives FPL discretion to increase base rates in 2024 and 2025 for new solar projects. Appx. 38-43. There are at least two reasons that the SoBRA mechanism exceeds the statutory

authority of the Commission. First, SoBRA seeks to bake in now authority for FPL to raise rates based on capital investments in solar generation that occur years later, in violation of section 366.06, Florida Statutes. In addition, to the extent that the SoBRA mechanism is intended to reflect an "interim" rate increase, under section 366.07, Florida Statutes, it once again fails to meet the requirements as proposed. An interim rate increase cannot be authorized unless and until a showing that a public utility is *currently* earning below its reasonable range of return. § 366.07, Fla. Stat. Therefore, there is no legal basis for the Commission to grant FPL dispensation to increase rates years in advance for new capital additions without a public evidentiary hearing to establish that FPL's current rate structure is insufficient to support a reasonable return on its reasonable investments. *Id.* Rule 25-6.0425, Florida Administrative Code, authorized by section 366.076, Florida Statutes, does not supply contrary authority, but supports the authority for approval of the 2023 subsequent year adjustment contained in the as-filed case and the Settlement. *See Citizens I*, 146 So. 3d at 1157 n.7 (recognizing authority from rule for subsequent year adjustment); *see also* R. 25-6.043(1)(a) (petition for "adjustment of rates must include" the minimum filing requirement schedules). FPL filed no minimum filing requirements for 2024 and 2025 to support an

adjustment of rates based on solar additions. As such, handing authority to FPL for subsequent adjustment of rates is without statutory or rule authority (nor does the Commission explain why such pre-approval, as opposed to the solar plants themselves, is in the public interest).

Fifth, and similarly, the Settlement also allows FPL to unilaterally change its rates if some future change in federal taxation should come to pass. Appx. 43-45. The Commission's approval of handing the authority to FPL to increase its rates on its customers violates the statutory limits and is contrary to the public interest.

H. "Compromise" ROE Does Not Support Public Interest Finding.

One of the few things FPL and the Commission can try to point to support a public interest finding is a lower ROE than FPL requested in its as-filed case (though still higher than before the rate case, and with RSAM, functioning higher than as requested in the as-filed case). However, the Settlement ROE of 10.6% is still an increase from before the rate case, at a time when ROEs are dropping across the country and in Florida. Coupled with FPL's extraordinarily high equity-to-debt ratio *and* the RSAM mechanism, no competent, substantial evidence supports such a high ROE, nor a finding that the Settlement ROE is so much in the public

interest as to counter-balance all of the Settlement's cynical mechanisms and extractive agreements.

The Settlement includes an unreasonable ROE mid-point of 10.6% and a range that tops out at 11.7% (with the option for FPL to further raise the cap to 11.8% at its discretion if an interest rate trigger is met). Appx. 30-31. The ROE is an outlier against a decades long downward trend for the average authorized utility ROE, culminating in last year's all-time low. R. 35250-51. From 2000 to 2020, average authorized electric utility ROE fell from 12.5% to 9.39%. *Id.* FPL's requested ROE would be the highest in the state, well above the settlement ROEs of 9.85% for Duke Energy Florida (approved) and 9.95% for Tampa Electric Company, (then pending, since approved), in rate cases from 2021. R. 34035. Moreover, industry press have emphasized that FPL's proposed 10.6% midpoint stands "significantly above" the average ROE awarded in 2021 (through August). R. 34037; R. 31901. Secondly, FPL enjoys creditworthiness ratings well above the average of its peers. R. 35235. There is simply no competent, substantial evidence that FPL somehow poses a heightened investment risk.

The equity ratio approved in the Settlement likewise has no justifiable basis in this record. Due to current interest rates, the cost of debt is

substantially cheaper—by about 21%—than equity. R. 1104. Therefore, for every incremental rise in the authorized equity ratio there is a corresponding increase in revenue requirement. R. 35260. Under FPL's originally proposed ROE, its equity ratio of 59.6% put customers on the hook for over half a billion dollars of excessive costs each year, as compared to the average U.S. utility capital structure consisting of 50% debt and equity each. R. 35587; R. 26110-11; R. 35256.

As with the proposed ROE, the 59.6% common equity ratio proposed by the Settlement stands out as markedly higher than not only every other vertically integrated, investor-owned utility in Florida, but across the country as well. R. 35622-23. For comparison, the Commission has just approved a 53.0% equity ratio for Duke Energy Florida, while Tampa Electric Company's settlement includes a 54.0% ratio. R. 34030. Over the last 15 years, from 2006-2020, the average common equity ratios authorized by state regulators for investor sources have ranged from 48.6% to 51.55%, with an average from the most recent five complete years (2016-2020—FPL's last settlement period) of 50.56%. *Id.*

Finally, because of the mutual interaction between a utility's authorized equity ratio and its ROE, each must be considered in relation to the other. A capital structure with a high equity ratio "can amplify the

overall impact of a relatively low ROE," while a structure with a lower equity ratio can "mitigate" the otherwise excessive impact of a high ROE. R. 35260. Put simply, FPL cannot have it both ways as it has done in the Settlement: a high equity ratio lowers risk and should be reflected in a lower ROE, while a high ROE lowers risk and should be reflected in a lower equity ratio. The Settlement is plainly against the public interest as its fundamental capital structure would produce unfair, unjust, and unreasonable rates, and there is no competent, substantial evidence to support a contrary finding (nor does the Commission make any such contrary findings).

CONCLUSION

The Settlement leaves residential customers worse off than if FPL's as-filed case had been approved in whole. The Commission, in its Final Order, gives no explanation of how the Settlement is in the public interest, nor even what the public interest is. Florida law demands more. For all these reasons, the Final Order is due to be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by electronic mail on this 6th day of April 2022, to the following:

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DATED this 6th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

I HEREBY certify that the foregoing is typed in Arial 14-point font and contains 12,902 words, not exceeding the word limit of 13,000 and therefore complies with the font requirements of Rule 9.045 and 9.210(a)(2), Florida Rules of Appellate Procedure.

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