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IN THE SUPREME COURT OF FLORIDA

FLORIDIANS AGAINST INCREASED RATES, INC.,

Appellant,

v.

GARY F. CLARK, 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, ET AL.,

Appellees.

_____/

REPLY BRIEF OF APPELLANT FLORIDIANS AGAINST INCREASED RATES, INC.

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PRELIMINARY STATEMENT

In this Reply Brief, FAIR uses the same abbreviations used in its Initial Brief. Additional abbreviations are as set forth herein.

SUMMARY OF ARGUMENT

Contrary to the numerous arguments advanced by the PSC and FPL ("Appellees"), the PSC lacks the statutory authority to approve either the RSAM or the Automatic Tax Adjustment Provision ("ATAP") in the 2021 Settlement. The Appellees' arguments include incorrect characterization of the standard of review applicable to FAIR's appeal, proposed statutory interpretations that would render the applicable statutes meaningless, improper and misleading efforts to characterize prior opinions of this Court as having determined the issues raised by FAIR, factual allegations that are irrelevant to the clear legal issue of the PSC's statutory authority, and mischaracterizing and misstating FAIR's arguments. Notably, the PSC's conclusion that the Court should affirm the Order because FAIR has "failed to meet [its] heavy burden of overcoming the presumption of correctness that attaches to Commission orders," PSC Brief 90, completely ignores the Court's many statements of the

correct standard of review applicable to questions of statutory authority – that at the threshold, the Court must determine the PSC's statutory authority to take any action, and that review of statutory provisions presents a question of law subject to *de novo* review, *United Tel. Co. v. Pub Serv. Comm'n*, 496 So. 2d 116, 118 (Fla.1986), as well as Article V, Section 21 of the Florida Constitution. Applying the correct standard of review, the Court should determine that the PSC lacks the statutory authority to approve the RSAM and the ATAP and reverse the PSC's Order as to those provisions.

The PSC has also departed from the essential requirements of law by approving crucial terms of the 2021 FPL Settlement that are facially and materially inconsistent with the PSC's contemporaneous practices – not simply its prior practices – in violation of Section 120.68(7)(e), Fla. Stat. Accordingly, the Court should reverse the PSC's Order on this basis as well.

ARGUMENT

I. THE APPELLEES' ARGUMENTS FAIL TO ESTABLISH THAT THE PSC HAS THE STATUTORY AUTHORITY TO APPROVE THE RSAM OR TO DEMONSTRATE THAT THE RSAM IS LAWFUL UNDER APPLICABLE STATUTES.

Each of FAIR's asserted grounds for reversal of the RSAM provision of the 2021 FPL Settlement presents a case of first impression to the Court that raises questions of statutory authority and statutory interpretation, and accordingly, these questions must be reviewed *de novo*. Moreover, the plain meaning of the applicable statute compels reversal, and the Appellees' other arguments are misplaced, misleading, and irrelevant. The Court should reverse the PSC's Order.

A. Contrary to the PSC's and FPL's Attempts to Apply Different Standards of Review, the Threshold Determination of Whether the PSC Has Statutory Authority To Approve the RSAM Provision Must Be Reviewed *De Novo*.

FAIR appeals the PSC's approval of the RSAM on the ground that the PSC lacks the statutory authority to approve this mechanism that would allow FPL to use customer-paid-for accrued depreciation for its own earnings, and further, on the ground that the RSAM violates the express language of Section 366.06(2), Fla. Stat. *See*

FAIR Initial Brief 23, 30-31. Accordingly, the Court's review is *de novo*, and the Court should reject the Appellees' arguments for a more deferential standard of review. While both Appellees acknowledge that this Court reviews the PSC's statutory interpretations *de novo*, PSC Brief 28, FPL Brief 20, neither the PSC nor FPL acknowledge that, as the threshold issue, the Court must first establish the grant of legislative authority for the PSC to approve the RSAM.[1] *United Tel.*, 496 So. 2d at 118; *Sierra Club v. Brown*, 243 So. 3d 903, 908 (Fla. 2018); *Citizens v. Graham*, 191 So. 3d 897, 900 (Fla. 2016). Instead, the PSC and FPL attempt to persuade this Court that a more deferential standard of review should be applied.

The PSC would have the Court review FAIR's appeal based on a grossly incomplete and legally outdated standard of review: as framed by the PSC, the Court should affirm because FAIR has "failed to meet [its] heavy burden of overcoming the presumption of correctness that attaches to Commission orders." PSC Brief 90. The PSC completely ignores the Court's consistently repeated application of the correct standard of review applicable to questions of statutory authority as

[1] Neither of the Appellees even cites or references *United Tel.* in its respective Answer Brief.

well as Article V, Section 21 of the Florida Constitution. As the Court has "repeatedly stated,"

> [A]lthough "orders of the Commission come before this Court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made," "[s]uch deference . . . cannot be accorded when the commission exceeds its authority. At the threshold, we must establish the grant of legislative authority to act since the [C]ommission derives its power solely from the legislature." . . . 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 at 900 (citations omitted); *see also Sierra Club*, 243 So. 3d at 908 ("As the threshold issue, we must first establish the grant of legislative authority to act since the Commission derives its power solely from the Legislature.") (citing *United Tel.*, 496 So. 2d at 118). "Therefore, 'whether the PSC has the authority to act is a question of law, which is subject to de novo review.'" *Sierra Club*, 243 So. 3d at 908, (citing *Citizens v. Graham*, 191 So. 3d at 900; § 120.68(7)(d), Fla. Stat. (2017)). Finally, as of 2018, pursuant to Article V, Section 21 of the Florida Constitution, the PSC's interpretation of its statutes by a reviewing court is not entitled to any deference. *Citizens v. Brown*, 269 So. 3d 498, 504 (Fla. 2019).

FPL would have the Court review based on its assertions that the review of settlement agreements is "fact-dependent"[2] and based on a "public interest test."[3] FPL Brief 21-22. Like the PSC, FPL asks the Court to apply the incorrect standard of review. While the standard of review of a settlement agreement approved by the PSC is generally, if an appellate challenge is based on the PSC's factual determinations, whether it resolves all issues in the case and is in the public interest, that standard is not applicable to the threshold

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[2] FPL raises several red herrings based on its views of the facts, *e.g.*, that it will use more than 90 percent of the RSAM dollars to achieve the midpoint of its authorized return range, FPL Brief 40; that the RSAM will enable it to avoid other rate increases that it claims it would seek, FPL Brief 40; that the RSAM helps FPL manage business fluctuations, FPL Brief 40-41; that the rates under the 2021 FPL Settlement are less than FPL originally requested, FPL Brief 73; and that the 2021 FPL Settlement was supported by other parties, FPL Brief 71-72. While these might be relevant arguments if FAIR's appeal were based on a challenge under the public interest test, FPL's arguments are wholly irrelevant to the issue whether the PSC has the statutory authority to approve an RSAM.

[3] FPL also asserts that FAIR's argument depends on "second guessing" the PSC's resolution of ratemaking in which the PSC has "wide discretion and unquestioned expertise." FPL Brief 33. Yet again, FPL attempts to have the Court ignore the question of the PSC's statutory authority, which is the "threshold issue" to be addressed by the Court and with respect to which the PSC is owed no deference and has no inherent expertise. FAIR's issues on appeal are questions of statutory authority, not issues addressing whether a certain rate established by the PSC is appropriate.

question here. FAIR has properly raised the issue whether the PSC has the statutory authority to approve two specific provisions in the 2021 Settlement, the RSAM and the ATAP discussed in Section II below.

Moreover, Appellees' argument that the PSC's Order approving the RSAM should be affirmed because it is not specifically prohibited by the statutes, PSC Brief 35, FPL Brief 30, is misleading and fallacious for the obvious reason that it ignores this Court's repeated statements that:

> As the threshold issue, we must first establish the grant of legislative authority to act since the Commission derives its power solely from the Legislature.

Sierra Club, 243 So. 3d at 908 (citing *United Tel.*, 496 So. 2d at 118); *see also Citizens v. Graham*, 191 So. 3d at 900 (citing *United Tel.*, 496 So. 2d at 118).

Establishing the requisite grant of legislative authority requires an affirmative statutory provision enacted by the legislature. The Appellees' argument that the absence of such a provision gives the PSC the authority to act has no basis in logic or law.

Neither FPL nor the PSC argue that any provisions of Chapter 366, Fla. Stat., establish an express grant of statutory authority for

the RSAM, and the statute is clear on its face that it contains no such express authority. The analysis is, or should, therefore be at an end. The Court should reverse the PSC's Order.

B. The Plain Meaning of Section 366.06(1) Requires Reversal Because FPL's Interpretation Would Render the Statute Meaningless.

"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).

> When the language of the 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.

Id. (citations omitted.) Further, "when a court interprets a statute, 'it must give full effect to all statutory provisions. Courts should avoid readings that would render part of a statute meaningless.'" *Bennett v. St. Vincent's Med. Ctr.*, 71 So. 3d 828, 838 (Fla. 2011) (quoting *Gomez v. Vill. of Pinecrest*, 41 So. 3d 180, 185 (Fla. 2010)).

The relevant provisions of Section 366.06(1) are as follows:

> 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, ...

(Emphasis supplied.) The Legislature clearly expressed the mandatory treatment of "accrued depreciation" "for ratemaking purposes" by its use of the verb "shall" in this statute. *Neal v. Bryant*, 149 So. 2d 529, 532 (Fla. 1962) (stating that in its normal usage "shall" has a mandatory connotation).

The statute provides that the utility is allowed to earn a return on its investment that is used and useful in providing public service, and specifically that the amount upon which the utility is allowed to earn a return – *i.e.*, the amount that "shall be used for ratemaking purposes" by the PSC – is the utility's honest and prudent investment "less accrued depreciation."[4] In other words, the PSC cannot allow a

[4] Black's Law Dictionary defines "accumulated depreciation" as the "total depreciation currently recorded on an asset" and states that "accumulated depreciation" is "[a]lso termed accrued depreciation." *Black's Law Dictionary*, 11th ed. at 555. Thus accrued depreciation and accumulated depreciation are synonymous. Moreover, the term applies equally whether the amount of accumulated or accrued depreciation is a surplus or a deficit. Following the statute, a surplus will reduce the amount that the PSC is to use "for ratemaking purposes," while a deficit (being a negative value subtracted from the starting amount of investment) will result in an increase in the

public utility to earn a return on its accrued (or accumulated) depreciation, which must, per the statute, be deducted from the utility's investment in determining the amount of the utility's investment that "shall be used for ratemaking purposes" by the PSC.

While the PSC fails to even address the interpretation of this language – "less accrued depreciation" – in its Answer Brief, FPL attempts to read this critical language out of the statute in two ways. First, FPL attempts to equate the statutory language – "less accrued depreciation" – with its preferred, but misleading, phrasing "must account for." FPL Brief 31. This is simple sophistry: "less" means "less"[5] and thus the amount in question must be subtracted from the original amount. It does not mean that the public utility can, by accounting legerdemain, use this customer-paid-for accrued depreciation to manage, maintain, or support the utility's earnings:

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amount to be used "for ratemaking purposes." FPL's argument that the statute does not address a depreciation surplus is incorrect: the statute makes no distinction where it requires that the accrued depreciation, whether a surplus or a deficit, shall be subtracted from the utility's investment that is to be used "for ratemaking purposes."

[5] It is well-settled that a court may not add words to a statute when the language is clear. *In re: A.W.*, 816 So. 2d 1261, 1263 (Fla. 2d DCA 2002) (citing *Overstreet v. State*, 629 So. 2d 125, 126 (Fla. 1993)).

that is equivalent to allowing the utility to use it for ratemaking purposes in violation of the statute. FPL's argument that it simply means "account for" would mislead the Court into FPL's position that all the PSC has to do is consider "accrued depreciation" and then do what it deems best. The statute, however, straightforwardly and unequivocally requires that the "accrued depreciation" be subtracted from FPL's investment for ratemaking purposes. Allowing FPL to use the RSAM to maintain, manage, or support its earnings would render the Legislature's language – "less accrued depreciation" – meaningless and contravene the plain meaning of the statute.

Second, FPL argues that the statute does not even address or require any specific treatment for a depreciation surplus. *See* FPL Brief 31-32. Contrary to FPL's misleading argument, the statute plainly and clearly requires that any "accrued depreciation," regardless whether it constitutes a surplus or a deficit, must be subtracted from the utility's investment in determining the amounts that "shall be used for ratemaking purposes" by the PSC. Section 366.06(1) makes no distinction between "accrued depreciation" and "surplus depreciation" (or a depreciation deficit); the statute clearly

mandates the subtraction of the "accrued depreciation," whatever it is.

To allow FPL to use its accrued depreciation to maintain, manage, or support its earnings, once that amount has, following the statute, been properly removed from its investment "for ratemaking purposes" therefore violates the statute: allowing FPL to use the accrued depreciation to increase its earnings would render the statute meaningless.

This Court has expressly recognized exactly this principle, where it stated:

> Because noncontributed [utility-funded] property is purchased with the funds of the utility or its investors, recognition of depreciation of such property as an operating expense is necessary to maintain the integrity of the investment. As the depreciation of such property is charged as an operating expense, a corresponding amount is deducted from the rate base so that the investors will not earn a rate of return on the amount of their investment that has already been returned to them through the recognition of depreciation as an operating expense.

Tamaron Homeowners Ass'n, Inc. v. Tamaron Utils., Inc., 460 So. 2d 347, 352 (Fla. 1984). Allowing FPL to use the accrued depreciation that has "already been returned" to FPL and its shareholder, to increase its earnings is no different than allowing FPL to earn a rate

of return on that accrued depreciation. This would render the statute meaningless, and the Court should reverse the PSC's Order.

FPL also misstates and mischaracterizes FAIR's argument, where FPL states that FAIR argues that the statute dictates a "single, specific" treatment of accrued depreciation. *See* FPL Brief 32. FAIR recognizes that the PSC has discretion in determining how to return an accrued depreciation surplus to customers, as the PSC stated in its 2010 FPL Rate Case Order, but the two crucial points are (1) that the surplus must be returned to customers as quickly as possible,[6] and (2) that the surplus cannot be used by the utility to enhance its

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[6] *See 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:

> 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.

Moreover, FPL's attempted criticism of FAIR's reliance on the *2010 FPL Rate Order* because the PSC subsequently approved a settlement that included a mechanism like the RSAM is misplaced and irrelevant. *See* FPL Brief 39, n. 13. This argument is wrong because the *2010 FPL Rate Order* remains a final order of the PSC that was never amended, never withdrawn, and never reversed on appeal. Like the RSAM provisions in the settlements addressed in *Citizens v. Pub. Serv. Comm'n*, 146 So. 3d 1143 (Fla. 2014) *"Citizens I"* and *Sierra Club*, the statutory authority of the PSC to approve an RSAM-type mechanism was not addressed in the earlier proceedings.

earnings. *Tamaron*, 460 So. 2d at 352. FAIR's argument is that, pursuant to the statute, FPL cannot use the surplus to enhance, manage, maintain, or otherwise support its earnings.

FPL further argues that allowing it to use the RSAM – *i.e.*, the customer-paid-for accrued depreciation surplus – now is the equivalent of returning the RSAM to customers because, FPL claims, it would avoid other rate increases in the future. *See* FPL Brief 34. This argument fails for multiple reasons. First, and most importantly, if, as FAIR asserts, the PSC lacks the statutory authority to approve the RSAM, then whether the RSAM would avoid future rate increases is wholly irrelevant: neither the PSC nor FPL can lawfully approve or use the RSAM for any purpose. Second, FPL will use the RSAM to manage, maintain, or enhance its earnings, and it makes no difference whether it uses the customer-paid-for RSAM dollars to manage its ROE to the midpoint of its authorized range (FPL Brief 40) or to achieve above-midpoint returns as it did from 2017 into 2021. R 26404. The statute plainly does not allow FPL to use the "accrued depreciation" for ratemaking purposes or to enhance its returns. The Court should reverse the PSC's Order.

C. The RSAM is Not Within the PSC's General Ratemaking Authority.

The Appellees argue that the PSC somehow has the authority to approve the RSAM because it is within the PSC's "broad ratemaking authority," PSC Brief 25, because the power to set rates "carries with it by implication everything necessary to carry out" the rate-setting power, PSC Brief 31, and because the PSC has "considerable discretion . . . in the rate-making process." FPL Brief 24-25. These arguments are misplaced because they are facially inconsistent with the standard repeatedly applied by this Court, that, "As the threshold issue, we must first establish the grant of legislative authority to act since the Commission derives its power solely from the Legislature." *Sierra Club*, 243 So. 3d at 908.

The PSC argues, without even citing the statute at issue here, that it has the power to do "by implication everything necessary to carry out the power" otherwise granted by the statutes (citing *Deltona Corp. v. Pub. Serv. Comm'n*, 220 So. 2d 905, 907 (Fla. 1969)), and thus that "an accounting mechanism" like the RSAM is "within the Commission's power to consider and approve." PSC Brief 31. This argument fails for several reasons: First and most importantly, this

concept cannot be applied to override specific statutory provisions; such an interpretation would violate this Court's repeated statements that the Court must first establish the grant of legislative authority for the PSC to act. Second, the PSC's reliance on *Deltona* is misplaced. In *Deltona*, the issue was whether the PSC had the authority to require a utility to obtain a certificate of public convenience and necessity and to penalize the utility for failing to obtain that certificate. The Court held that where the statute at issue had transferred "all the power and duties of the board of county commissioners of Volusia [C]ounty . . . to the Florida public utilities commission," even though the power to issue the certificate required by the PSC was not explicitly enumerated in the statute, "[c]onsidering the history of the subject matter of the statute . . . [the statute] necessarily conferred on the Florida Public Service Commission the power to require" the utility to obtain the certificate of public convenience and necessity. *Deltona*, 220 So. 2d at 908. Third, the PSC offers no explanation as to how the RSAM accounting mechanism is necessary for setting FPL's rates in this case, instead offering the conclusory gloss that it is the "type[] of thing that the PSC routinely considers and decides in the ratemaking process and [is]

thus within the Commission's power to consider and approve." PSC Brief 31. Again, the PSC provides no explanation and no justification for overriding the plain language of the statute, and no citation to any grant of legislative authority for the PSC to allow FPL to use "accrued depreciation" to manage or maintain its earnings.

Finally, FPL's reliance on *City of Miami v. Pub. Serv. Comm'n*, 208 So. 2d 249 (Fla. 1968), is misplaced. FPL argues that *City of Miami* stands for the proposition that the PSC has "considerable discretion" in setting rates. While this is true as far as it goes, *City of Miami* simply does not support FPL's argument that the "considerable discretion" in the ratemaking process recognized in that case somehow extends to enable the PSC to override the express statutory requirement that the PSC "shall" use the utility's investment "less accrued depreciation" "for ratemaking purposes." The issue in *City of Miami* was whether the PSC erred in its decision as to the calculation of the rate base values to be used in setting the subject utilities' rates, specifically, whether it was proper to use a year-end rate base value instead of an annual average value. Significantly, the statute in question did not address the time period for which the rate base values were to be calculated; the PSC decided

to use the year-end rate base values, and the City of Miami, as appellant, disagreed. Since there was no specific statutory provision addressing the issue, there is simply nothing in *City of Miami* to even suggest that the PSC's discretion extends to allowing the PSC to depart from the specific requirement of Section 366.06(1) that accrued depreciation must be subtracted from the utility's investment for ratemaking purposes, *i.e.*, in setting rates.

The Appellees' reliance on the "broad discretion" that the PSC has with respect to many aspects of ratemaking simply does not extend to overriding the plain language of Section 366.06(1) applicable to the treatment of "accrued depreciation" "for ratemaking purposes." The statute applicable to this case is clear and unambiguous: "less accrued depreciation" is not subject to any discretionary interpretation or application (as there was in *City of Miami* with respect to determining what test year to use where the statute was silent on the point). Moreover, *City of Miami* was decided before *United Tel. Co.*, before the Court's decisions in *Sierra Club* and *Citizens v. Graham*, and before Article V, Section 21 was adopted into the Florida Constitution. The Court should reverse the PSC's Order.

D. Appellees' Argument That the RSAM Should be Affirmed Here Because It Was Included In Prior Settlement Agreements That Were Affirmed On Appeal Is Misplaced, Misleading, and Irrelevant to the Issues Raised by FAIR.

The Appellees attempt to persuade the Court that because similar provisions were included in earlier settlement agreements that were appealed and affirmed by this Court, albeit on other grounds, this Court has approved such provisions. Any such suggestion is simply untrue.

The PSC asserts that "the Commission has a long history of considering and approving these types of mechanisms, which this Court has reviewed and affirmed in the past." PSC Brief 25. The PSC's assertion, PSC Brief 31-32, that the "Court has considered and upheld a number of previous Commission decisions approving settlement agreements containing other mechanisms that are not explicitly mentioned in chapter 366, Florida Statutes," and that these approvals constitute the Court's recognition of the "Commission's inherent ratemaking authority . . . to consider and approve these types of mechanisms in settlement agreements" is both misplaced and irrelevant to the statutory authority issue presented by FAIR's appeal. To the contrary, the issue whether the PSC has the statutory

authority to approve an RSAM or any similar mechanism was never previously presented to this Court. In fact, this statutory authority issue was neither presented to the PSC nor decided by the PSC in the proceedings that led to this Court's opinions approving settlement agreements in *Citizens I* and *Sierra Club*.

The prior settlements were reviewed by the Court, on different issues and pursuant to different standards of review, *e.g.*, the public interest test and whether non-unanimous settlements can be valid without the Public Counsel's participation therein. *See Citizens I*, 146 So. 3d at 1149-50; *Sierra Club*, 243 So. 3d at 909. The fact that an RSAM or similar mechanism was included in earlier PSC settlement orders is wholly irrelevant to the statutory authority issue presented by FAIR in this appeal. The issue whether there is statutory authority for an RSAM or similar mechanism was not even mentioned by the Court in *obiter dicta*.

Moreover, because parties can never confer jurisdiction by contract, the PSC cannot approve anything for which it lacks statutory authority under the guise that it is part of a settlement agreement. *United Tel.*, 496 So. 2d at 118. The Court should reverse the PSC's Order.

II. THE APPELLEES' ARGUMENTS FAIL TO ESTABLISH THAT THE PSC HAS THE NECESSARY STATUTORY AUTHORITY TO APPROVE THE AUTOMATIC TAX ADJUSTMENT PROVISION.

It is clear – and neither the PSC nor FPL disputes – that Chapter 366, Fla. Stat., contains no express statutory authority to approve an Automatic Tax Adjustment[7] mechanism. Like the RSAM addressed above, this is also a case of first impression subject to the same *de novo* review as to whether the PSC has the requisite statutory authority as in *United Tel.* and *Citizens v. Graham*, and the PSC's interpretation of its statutes is entitled to no deference. Art. V, § 21, Fla. Const. The plain meaning of the applicable statutes requires reversal, and the PSC's proffered "point of entry" fails to afford customers the protections provided by those statutes.

[7] FAIR addressed this provision as the Automatic Tax Increase Provision in its Initial Brief; in this Reply Brief, FAIR refers to the provision as the Automatic Tax Adjustment Provision ("ATAP"), in that, if approved, the provision would apply both to increase customer rates if tax rates were to increase and to reduce customer rates if tax rates were to decrease. This makes no difference to FAIR's analysis demonstrating that the PSC lacks the statutory authority to approve it.

A. The Applicable Statutes Confer No Authority on the PSC to Approve the ATAP, and Therefore, the Court Should Reverse the PSC's Order.

The statutes relevant to this issue are as follows. Section 366.06(2), Fla. Stat. provides in pertinent part:

> (2) Whenever the commission finds . . . 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 . . . , the commission shall order and hold a public hearing . . . and shall thereafter determine just and reasonable rates to be thereafter charged for such service . . . .

To the same effect, Section 366.07, Fla. Stat. provides:

> Whenever the commission . . . shall find the rates . . . charged or collected by any public utility for any service . . . are unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law, . . . the commission shall determine and by order fix the fair and reasonable rates . . . .

These statutes include no specific authority for the ATAP. Following *United Tel.* and *Radio Tel. Comm., Inc. v. Se. Tel. Co.* 170 So. 2d 577 (Fla. 1964), the analysis is over. There is no statutory authority for this mechanism, and the Court should reverse the PSC's Order on this issue as well.

Moreover, considering the plethora of special charges and cost recovery clauses approved by the Legislature that authorize special rates to be implemented when certain utility costs change,[8] there is significantly more than a "reasonable doubt as to the lawful existence" of any statutory authority for the ATAP, and following *United Tel.* and *Radio Tel. Comm.,* the Court should reverse the PSC's Order to arrest the further exercise of this unauthorized cost recovery mechanism.[9] Given the Legislature's extensive experience in enacting many specific cost recovery clauses for the recovery of specific costs, it is unreasonable to argue that the Legislature

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[8] *See*, *e.g.*, § 366.82(7), Fla. Stat. (authorizing the PSC to approve energy conservation "plans and programs for cost recovery"); § 366.8255, Fla. Stat. (authorizing cost recovery for environmental programs and measures); § 366.8260, Fla. Stat. (authorizing charges for storm cost recovery); § 366.93, Fla. Stat. (authorizing cost recovery for the siting, design, licensing, and construction of nuclear and integrated gasification combined cycle power plants); § 366.95, Fla. Stat. (authorizing "nuclear asset-recovery charges" for certain nuclear generating asset retirement or abandonment costs); and § 366.96(7), Fla. Stat. (authorizing cost recovery for approved expenses incurred in connection with utilities' storm protection plans through the "storm protection plan cost recovery clause").

[9] *United Tel.*, 496 So. 2d at 118; *Radio Tel. Comm.*, 170 So. 2d at 582. ("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.")

intended to approve the *carte blanche* recovery of unknown and uncertain future changes in tax rates. The Court should reverse the PSC's Order.

B. The ATAP is Facially Inconsistent with the Plain Meaning of Chapter 366, Fla. Stat.

The ATAP is inconsistent with the plain meaning of the applicable statutes. The logic of the statutes is clear: before the PSC can change a utility's rates, the PSC must hold a hearing (on its own motion or upon request) and must determine that the existing rates are "unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law."[10] § 366.07, Fla. Stat.; *see also* § 366.06(2), Fla. Stat. Nothing in the PSC's Order or the 2021 FPL Settlement recognizes the Legislature's clear directive that, before approving any change in rates, the applicable statutes require the PSC to determine that any such

[10] FAIR's use of the phrase "only when" in its Initial Brief is a straightforward application of all of the words in these statutes. The statutes specify that the PSC is to change rates "whenever" the PSC has held a hearing and determined that a public utility's rates must be changed for one or more of the specific reasons set forth by the Legislature in these statutes. *See GTC, Inc.*, 967 So. 2d at 785 ("The clear meaning of the statute is always the starting point in statutory interpretation.").

change is necessary in order to remedy one or more of the legislatively specified conditions set forth in the statutes. The Court should reverse the PSC's Order.

C. The Appellees' Reliance on General Statutory Authority to Approve Future Rate Increases is Misplaced.

The Appellees' argument that the PSC's statutory authority pursuant to Section 366.076, Fla. Stat., to approve future rate increases is sufficient to establish the power to approve automatic rate changes if tax rates change is misplaced. While Section 366.076 provides that, in general rate cases, the PSC can approve future rate increases, FAIR submits that this statute cannot reasonably be interpreted as the Legislature having intended to approve, *carte blanche*, such unknown and uncertain rate increases or decreases.

Approving "incremental adjustments in rates" (§ 366.076(2), Fla. Stat.) means what it says: approving incremental adjustments in rates. It does not mean approving future cost recovery clauses or mechanisms that would allow unknown or uncertain rate increases to be imposed on the customers of Florida's public utilities.[11]

[11] While the Legislature might enact a statute providing for rate increases or decreases to be implemented when tax rates change, whether this is a good idea is up to the Florida Legislature, not the

Moreover, contrary to the PSC's characterization that it can adjust rates any time "even when" the utility is earning within its authorized return range, PSC Brief 32, this provision cannot reasonably be read to mean that the Legislature intended it to be applied to give utilities more money where they are already earning within their authorized rate of return range.

D. The Point of Entry "Promised" by the PSC is Illusory.

The PSC argues that customers will have an additional point of entry to challenge any increase pursuant to the ATAP if and when any tax law change occurs and FPL seeks additional revenues on that basis. PSC Brief 39-40. The PSC's argument is flawed in several ways. First, if the PSC lacks the statutory authority to approve the ATAP as FAIR contends, then a future point of entry is irrelevant. Second, the proffered point of entry is illusory because the review "promised" by the PSC is not guaranteed to include the specific review required by Sections 366.06(2) and 366.07. Those sections require that, before rates can be changed, the PSC must not only hold a hearing but also make a determination that the rates to be changed

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PSC. *See Citizens v. Graham*, 191 So. 3d at 902.

are "unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law." § 366.07, Fla. Stat.

Section 366.076, Fla. Stat., cannot reasonably be read to override the express requirements of Sections 366.06(2) and 366.07 that, to justify a change in rates, the rates being changed must be found to be "unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law." However, in its Answer Brief, the PSC has effectively telegraphed its intent, by declaring that it "has broad authority to adjust rates at any time – even when a utility is earning within its authorized rate of return – in order to ensure that rates are reasonable, provided the adjusted rates are based on competent, substantial evidence in the record." PSC Brief 32. In the PSC's Order, the sentence preceding the PSC's assertion that it "has broad authority to adjust rates at any time" states:

> To deny the utility a rate increase when it is earning less than its allowed rate of return is a constitutional taking.

(Footnote omitted.) FAIR agrees with this fundamental principle of public utility ratemaking, *i.e.*, that denying a utility a reasonable

return is confiscatory. FAIR asserts that the obverse is also true: that giving a utility more of its customers' money through a rate increase when the utility is already earning within its authorized return range, which has necessarily been determined by the PSC to be fair and reasonable, is unfair to the utility's customers in the same way that denying the utility a rate increase when it is earning less than its allowed rate of return is unfair to the utility.

On behalf of its members and consistent with its corporate purposes, FAIR is concerned that the PSC will substitute a "reasonableness" test for the specific requirements of Sections 366.06(2) and 366.07, and that the PSC will assert that the evidence of a tax increase is sufficient evidence to implement the provisions of the 2021 FPL Settlement approved by the PSC's Order, notwithstanding the threshold determinations required by those statutes and regardless whether FPL is earning a fair and reasonable return without the requested ATAP increase.

To explain FAIR's concern, giving FPL more revenues – *i.e.*, more of its customers' money – even when FPL is earning within the authorized range would violate these statutes because any such increase (or decrease) could not be said to be insufficient or excessive

when FPL was earning within its authorized range, and rates could not legitimately be said to be unjust or unfair so long as FPL was earning within its range. However, the PSC strongly suggests that it can increase FPL's rates even under these conditions, as long as FPL is still, after the potential increase, earning within its range. FAIR's argument is simply that such increases would violate the requirements of Sections 366.06(2) and 366.07.

III. THE PSC DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY MAKING A DECISION THAT IS FACIALLY, DIRECTLY, AND MATERIALLY INCONSISTENT WITH ITS CONTEMPORANEOUS DECISIONS ON EXACTLY THE SAME ISSUES ARISING UNDER THE SAME STATUTES.

FAIR agrees that the appropriate standard of review applicable to the departure from the essential requirements of law asserted by FAIR is that set forth in Section 120.68(7)(e), Fla. Stat., *i.e.*, whether the PSC's exercise of discretion in approving the ROE and equity ratio provisions in the 2021 FPL Settlement is inconsistent with the PSC's prior practice. In this instance, the PSC's decision was not merely inconsistent with its prior practice regarding these issues, it was inconsistent with its contemporaneous decisions. Further, the PSC ignores crucial provisions of the U.S. Supreme Court's decision in

Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679 (1923), and FPL's argument that "customers pay bills not ROEs" is both irrelevant and incorrect.

A. The PSC's Decision is Inconsistent with Its Contemporaneous Decisions.

As explained in FAIR's Initial Brief, the values for ROE and equity ratio approved by the PSC in the 2021 FPL Settlement, are significantly greater than the values approved for Duke Energy Florida ("Duke") in June 2021, less than five months before it approved the 2021 FPL Settlement, and the values approved for Tampa Electric Company ("TECO") in a PSC vote made five days before the date of its vote on the 2021 FPL Settlement. FAIR Brief 52. Thus, the decisions from which the PSC varied were not merely "prior" decisions, they were contemporaneous. *Bluefield* stands for the proposition that

> 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.

Bluefield, 262 U.S. at 692-93 (emphasis supplied.) In the framework set forth in *Bluefield*, there can be no more comparable basis for evaluating decisions than the decision of the same agency, operating under the same statutes, in the same state, in the same time frame. The PSC's approval of the 2021 FPL Settlement is facially inconsistent with its contemporaneous decisions.[12] The Court should reverse the PSC's Order.

[12] Moreover, in the Order on Appeal, the PSC did not explain its decision to vary from its contemporaneous decisions regarding the ROE and equity ratio values approved for Duke or TECO. The only references to either Duke or TECO in the PSC's Order were in two footnotes: n. 41, Order at 15 (describing the point of entry for customers to litigate proposed rate changes arising from tax law changes); and n. 45, Order at 20 (string cite of PSC orders where PSC adopted the public interest test for reviewing settlement agreements). FAIR presented the facial inconsistency of the ROE and equity ratio values in the 2021 FPL Settlement, as compared to the corresponding values in the approved Duke settlement and in the then-pending TECO settlement, to the PSC in the proceedings below. R. 7820 (FPL values), R. 7825 (Duke and TECO values) (FAIR PSC Brief at 14, 19.) FAIR's brief below was filed before the PSC's vote on the TECO settlement. Now, having been confronted with these facial inconsistencies from these contemporaneous settlements in FAIR's Initial Brief, the PSC has offered an *ex post* explanation of its decision. PSC Brief 50.

B. FPL's "Customers Pay Bills Not ROEs" Argument Is Irrelevant and Incorrect.

FPL argues that "Customers do not pay ROE, they pay bills." FPL Brief 89. This argument is both irrelevant and misleading. Every base rate includes a return on the capital components of that base rate, and thus every base rate includes the utility's return on equity capital, *i.e.*, its ROE, as well as the utility's cost of debt capital. The utility's capital costs, including the ROE, are part of customers' bills, and therefore, if the ROE component is excessive, then customers' rates and bills will be excessive. FPL's argument is misleading and incorrect, and the Court should reverse the PSC's Order.

CONCLUSION

Contrary to the arguments advanced by the Appellees, the PSC lacks the statutory authority to approve either the RSAM or the ATAP in the 2021 FPL Settlement. Applying the correct standard of review, the Court should reverse the PSC's Order on these issues.

The PSC has also departed from the essential requirements of law by approving crucial terms of the 2021 FPL Settlement that are facially and materially inconsistent with the PSC's contemporaneous practices – not simply its prior practices – in violation of Section

120.68(7)(e). Accordingly, the Court should reverse the PSC's Order on this basis as well.

Respectfully submitted this 6th day of September, 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 September, 2022, to the following:

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

I HEREBY CERTIFY, pursuant to Rule 9.045(e), Fla. R. App. P., that this Reply Brief complies with the font requirements of Rule 9.045(b), Fla. R. App. P.; was prepared using Bookman Old Style 14-point font; and complies with this Court's order dated July 27, 2022, which expanded the word limit of Rule 9.210(a)(2)(B), Fla. R. App. P., to 7,000 words, and contains 6,967 words.

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