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IN THE SUPREME COURT OF FLORIDA

FLORIDA RISING, INC., ET AL.,

Appellants,

v.

FLORIDA PUBLIC SERVICE COMMISSION, ET AL.,

Appellees.

______________________________________/

Supreme Court Case No. SC2024-0485

Lower Tribunal No. Docket No. 20210015-EI

Order Nos. PSC-2024-0078-FOF-EI PSC-2021-0446-EI and PSC-2021-0446A-EI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

JURISDICTION 1

STATEMENT OF CASE AND FACTS 2

SUMMARY OF ARGUMENT 6

STANDARD OF REVIEW 8

ARGUMENT 8

I. SolarTogether Creates Discriminatory Rates in Violation of Florida Law. 8

A. Legality of SolarTogether Was Not Previously Addressed by this Court in *FAIR*. 9

B. SolarTogether is the Epitome of Undue Preferences in Violation of Section 366.03, Florida Statutes. 10

C. Customer-class allocations of SolarTogether also Show Disproportionate Benefits to Largest Customers. 24

D. SolarTogether Also Against Public Interest. 25

II. All Other Major Features of the Settlement Agreement Still Work Against the Public Interest. 26

A. The approved ROE, equity ratio, and RSAM produce unjust rates, which are aggravated by interactions between these components that the commission erroneously refused to consider. 27

B. Other Mechanisms Increase FPL's Profits Without Competent and Substantial Evidence that They are in the Public Interest. 39

C. Other Elements Work Against the Public Interest. 49

III. FPL's Abysmal FEECA Performance Remains Unaddressed by the Commission's Final Supplemental Order. 53

CONCLUSION 54
CERTIFICATE OF SERVICE 56
CERTIFICATE OF COMPLIANCE 59

TABLE OF AUTHORITIES

Cases

Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.,
262 U.S. 679 (1923) 28, 31, 38

Citizens of the State of Fla. v. Hawkins,
364 So. 2d 723 (Fla. 1978) 23

Citizens v. Brown,
269 So. 3d 498 (Fla. 2019) 8

City of New Smyrna Beach v. Fish,
384 So. 2d 1727 (Fla. 1980) 23

Ex parte Baron Servs., Inc.,
874 So. 2d 545 (Ala. 2003) 29

Fed. Power Comm'n v. Hope Nat. Gas Co.
320 U.S. 591 (1944) 28, 31, 38

Fla. Power Corp. v. Mayo,
203 So.2d 614 (Fla. 1967) 22

Floridians Against Increase Rates v. Clark,
371 So. 3d 905 (Fla. 2023) .... *passim*

Gulf Power Co. v. Wilson,
597 So. 2d 270 (Fla. 1992) 37, 38

Ponderosa Tel. Co. v. Cal. Pub. Utilities Comm'n,
36 Cal. App. 5th 999 (Cal. App. 5th 2019) 29

Shawnee Telecom Res., Inc. v. Brown,
354 S.W.3d 542 (Ky. 2011) 29

Sierra Club v. Brown,
243 So. 3d 903 (Fla. 2018) 8

Tsuji v. Fleet,
366 So. 3d 1020 (Fla. 2023)..10

Florida Constitution

Art. V, § 21, Fla. Const..8

Art. V, § 3(b)(2), Fla. Const..1

Florida Statutes

§ 366.03, Fla. Stat..9, 12

§ 366.06, Fla. Stat..23, 48, 51

§ 366.10, Fla. Stat..1

Ch. 26545, § 3, Laws of Fla. (1951)..11

Florida Public Service Commission Orders

In re: Petition for a limited proceeding to approve clean energy connection program and tarriff and stipulation, by Duke Energy Florida, LLC, Order No. PSC-2020-0059A-S-EI at 7 (Sept. 23, 2022)..22

In re: Petition for approval of FPL SolarTogether program and tariff, by Florida Power & Light Co., Order No. PSC-2020-0084-S-EI at 4 (Fla. Pub. Serv. Comm'n, Mar. 20, 2020)..15

Other Authorities

Noah Webster, *Webster's New Twentieth Century Dictionary of the English Language Unabridged* at 1995 (Jean L. McKechnie et al. eds., 2d ed. 1956) 11

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." References to Florida Statutes refer to the 2021 version of the statute, unless otherwise noted. The Record on Appeal is designated as R. _. Pages in the attached Appendix have been consecutively numbered and are referenced as Appx. _.

JURISDICTION

This is an appeal of a supplemental final order 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.; § 366.10, Fla. Stat.

STATEMENT OF CASE AND FACTS

Florida Rising, Inc. ("Florida Rising"), ECOSWF, and LULAC (collectively, "Florida Rising appellants") bring this appeal of a Supplemental Final Order by the Florida Public Service Commission, rendered as a result of this Court's decision in *Floridians Against Increase Rates v. Clark* ("*FAIR*"), 371 So. 3d 905 (Fla. 2023), 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. 45234, also more than doubles the size of SolarTogether and increases the credits paid to participants.

On January 11, 2021, FPL filed a notice with the Commission that it intended to file a petition for a base rate increase. R. 290810. On February 22, 2021, Florida Rising appellants petitioned to intervene in the proceeding in opposition to the base rate increase. R. 290792. The Commission granted Florida Rising appellants' intervention on a provisional basis. R. 262994 (Florida Rising); R. 262999 (ECOSWF); R. 263003 (LULAC). On March 12, 2021, FPL filed its Petition for Base Rate Increase and Rate Unification. R. 290697. The evidentiary hearing was scheduled for August 16-27, 2021. R. 271512. Other parties granted intervention were the Office of Public Counsel ("OPC"), R. 290804, Walmart, Inc., R.

75723, the Florida Internet and Television Association, Inc., R. 58657, Daniel R. Larson and Alexandria Larson, R. 263021, Federal Executive Agencies, R. 263032, the Florida Industrial Power Users Group ("FIPUG"), R. 263028, the Florida Retail Federation, R. 263024, Floridians Against Increase Rates, Inc. (provisional), R. 75861, the CLEO Institute, Inc. (provisional), R. 75844, the Southern Alliance for Clean Energy ("SACE"), R. 263012, and Vote Solar, R. 75865. 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. 52697. This Settlement was later joined by Vote Solar and CLEO, R. 52366, and the Federal Executive Agencies, R. 50255.

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. 91-95. 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. 45278; R. 45107-08. 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. 45276. No cost-of-service study was offered to support this settlement reallocation. R. 45107. The Settlement also introduces a new minimum bill for residential customers. R. 45287.

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. 52454. On the as-filed rate case, 60 witnesses were presented. R. 54504-08. The Settlement was actively opposed by the Larsons, FAIR, and the Florida Rising appellants. *See, e.g.*, R. 9887, 9902, 9973. On the Settlement, FPL presented 5 witnesses, Florida Rising appellants presented 1 witness, and FAIR and Florida Rising appellants jointly presented 3 witnesses. R. 48062-63; 48014. On December 2, 2021, the Commission issued its Final Order approving the Settlement, R. 7340, and on December 9, 2021, the Commission issued an Amendatory Order to that Final Order, R. 7318. FAIR filed a notice of appeal of this order on December 27, 2021. R. 6032. Florida Rising appellants filed a separate, direct appeal from the

Commission's final order approving the Settlement on January 3, 2022. R. 2218. The two appeals were consolidated by this Court on March 1, 2022.

On September 28, 2023, after full-briefing and oral argument, this Court ruled that the Commission's decision did not adequately explain its decision and remanded the case back to the Commission. *FAIR*, 371 So. 3d at 914. On February 7, 2024, Florida Rising appellants moved to re-open the record to include information regarding FPL's performance under the Florida Energy Efficiency and Conservation Act. R. 735. On Tuesday, March 5, 2024, the Florida Public Service Commission considered what action to take, and although there was some debate,[1] the Commission unanimously voted to issue a Supplemental Final Order and deny the motions to reopen the record. R. 601. On March 25, 2024, the Commission issued its Supplemental Final Order, making additional

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[1] Commissioner Graham: "So basically what the Florida Supreme Court just said that we didn't write enough? . . . Can we weigh the order the next time to see if it weights [sic] enough? . . . And so this is against everything I have been pushing for since I have been here about things being more streamlined and more efficient, huh?" R. 596-97. Commissioner Passidomo: "I think what the Court is asking us is to just thoroughly – more thoroughly explain our rationales for, in the settlement case, why we believe it was in the public interest." R. 601. Commissioner Fay: "[T]he Court has asked us to do this, and so I think it's really important that we put it forward. So I recognize we can't always be as efficient, but they [the Court] serve as our primary jurisdiction for these issues, and we have a lot of respect for them. So we will send this order to them and see where it goes." R. 602.

findings of fact as directed by this Court in *FAIR* and denying the motion to reopen the record. Appx. 7, 15. Florida Rising appellants filed a notice of appeal on April 2, 2024. R. 380.

SUMMARY OF ARGUMENT

The Settlement more than doubles the size of SolarTogether, while increasing the credits to participants in the original program, resulting in the transfer of billions of dollars from the general body of ratepayers (mainly residential customers) to a few select participants, mainly the largest commercial and industrial customers. The only thing separating participants from the general body is that they figuratively raise their hand and say they want to participate and thus receive these bill credits paid for by everyone else. In return, the general body, after accounting for the administrative costs to administer the program for participants, receives nothing except additional costs and attendant higher electric bills. If select ratepayers raising their hand to say they want special treatment and payment from everyone else does not constitute discriminatory rates and an undue preference or advantage to any person—then nothing does. SolarTogether violates Florida's statutory requirements for rate-setting, and as such, the Commission's approval of the program through the Settlement is due to be vacated.

Although the Commission now makes additional findings of fact to justify its decision to approve the Settlement, it still fails to address how those elements interact with each other to create a Settlement that is against the public interest. Although the Commission independently evaluates and finds that FPL's record-setting return on equity is justified, that FPL's found-nowhere-else equity-to-debt ratio is fine, and that the Reserve Surplus Amortization Mechanism ("RSAM"), which essentially guarantees that FPL, using ratepayer funds, earns at the top of its allowed band, the Commission makes no findings as to how a record return on equity is in the public interest *in the context* of FPL also having an RSAM and its unique equity-to-debt ratio. When every mechanism helps ensure that FPL maximizes its profits at ratepayer expense, the interaction between the mechanisms and its capital structure must also be examined. No competent, substantial evidence exists to justify the main provisions of the Settlement when seen in the context of the other mechanisms of the Settlement. Since the Settlement, when viewed as a whole, is against the public interest, the Settlement is due to be vacated.

Despite the opportunity to comply with this Court's *FAIR* decision directing the Commission to consider FPL's energy-efficiency performance when considering the Settlement, the Commission declined, even though

there is no evidence in the record regarding FPL's energy-efficiency performance, and the evidence that FPL has pointed to (regarding energy-sales forecasting) is not an adequate substitute.

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). 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*.

ARGUMENT

I. SolarTogether Creates Discriminatory Rates in Violation of Florida Law.

SolarTogether creates a rate structure where select participants, whose only mark of difference from the general body of ratepayers is that they raise their hand to participate, receive billions of dollars of bill credits (net) from the general body of ratepayers, while the general body receives nothing in return. This kind of structure—select ratepayers receiving favorable rate treatment with no basis in the cost of serving those

customers—is the epitome of discriminatory rates and undue preference in violation of section 366.03, Florida Statutes.

A. Legality of SolarTogether Was Not Previously Addressed by this Court in *FAIR*.

The Commission, in its Supplemental Final Order, finds that this Court "did not question our statutory authority to consider the various tools and accounting approaches" from the Settlement, and concludes that "the Court found our stated bases for jurisdiction to be sufficient," finding that the "only issue the Court remanded to is whether the 2021 Settlement should be approved as being in the public interest." Appx. 10-11. FPL has already made similar arguments to this Court. *See* Appellee Florida Power & Light Company's Unopposed Motion to Expedite Review at 3 ("This Court rejected all arguments that the Commission lacked statutory authority to approve the programs addressed in the 2021 Settlement Agreement," citing footnote 2 from the *FAIR* decision). This Court made no such finding regarding the Commission's statutory authority regarding SolarTogether in the *FAIR* decision, *FAIR*, 371 So. 3d at 907 n.2 (not addressing Commission legal authority to approve SolarTogether), and specifically called on the Commission to discuss whether SolarTogether violates section 366.03, Florida Statutes, *id.* at 914 n.14 ("One such disagreement [to be addressed by the Commission on remand] is whether the

SolarTogether program is unduly preferential to program participants in violation of section 366.03. Whatever the Commission ultimately decides with respect to whether the settlement agreement establishes rates that are fair, just, and reasonable, an assessment of the SolarTogether program would seem indispensable to a reasonable resolution of the issues raised by the settlement agreement, and whether it is in the public interest.”). As such, this Court has not previously decided that the Commission has the authority to approve SolarTogether under section 366.03, Florida Statutes, and any assertion to the contrary is a misreading of this Court’s decision in *FAIR*.

B. SolarTogether is the Epitome of Undue Preferences in Violation of Section 366.03, Florida Statutes.

As this Court has said, “[w]hen we construe statutes, our first (and often only) step is to ask what the Legislature actually said in the statute, based upon the common meaning of the words used when the statute was enacted. To derive this common meaning, we must be mindful of the fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.” *Tsuji v. Fleet*, 366 So. 3d 1020, 1025 (Fla. 2023) (internal citations and quotations omitted).

Section 366.03, Florida Statutes, and its key mandate, that "[n]o public utility shall make or give any undue or unreasonable preference or advantage to any person or locality," originated in 1951. Ch. 26545, § 3, Laws of Fla. (1951). The definition of "undue," beyond "not due," includes "not just" and "improper; not appropriate or suitable." Noah Webster, *Webster's New Twentieth Century Dictionary of the English Language Unabridged* at 1995 (Jean L. McKechnie et al. eds., 2d ed. 1956). "Preference," beyond meaning "being preferred," is defined as "a giving of priority or advantage to one person . . . over others." *Id.* at 1419. "Advantage" means "benefit; gain; profit," or "any state, condition, or circumstance specially favorable to success, prosperity, interest, etc." *Id.* at 28. Regardless of the choice of definition, favoring specific customers over others in terms of rates, when there is nothing about those favored customers that justify such treatment, is an undue or unreasonable preference or advantage to those preferred customers.

No matter how you look at SolarTogether, as a whole as the Commission urges in its Supplemental Final Order, with total CPVRR benefits of $648 million, Appx. 27, or by year, it shows that the program is the epitome of undue preferences by allowing select ratepayers (disproportionately the largest customers) to sign-up for bill credits (money)

paid for by the general body of ratepayers, in exchange for nothing that benefits the general body. If this kind of payment arrangement does not constitute an "undue or unreasonable preference or advantage to any person," § 366.03, Fla. Stat., then nothing does.

Through the Settlement, FPL has more than doubled the cost of the SolarTogether program from $4 billion, Appx. 110 ("Nominal Total" for "Total FPL SolarTogether Costs"), to $11 billion, Appx. 111 ("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. 45070-71. In the original program, the general body of customers were promised $112 million of Cumulative Present Value Revenue Requirement ("CPVRR")[2] benefits if SolarTogether was approved, Appx. 110 ("CPVRR" column, "Total Net RevReq's (fav) unfav" row) and were "only" supposed to pay $678 million in net payments to participants, Appx. 110 ("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. 112; R. 45072, while swelling net payments to participants to $928

[2] "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.

million, Appx. 112 (“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. 44775-16; Appx. 111. The initial years are especially bad for the general body of customers; FPL’s own projections expect the program and the attendant solar power plants (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. 45080; Appx. 111. 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 (which includes the cost of $2.5 million to administer the SolarTogether program for participants). R. 45077; Appx. 111. 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. 45077-78; Appx. 111.

Looking at the program as a whole, as the Commission urges, shows that the rate-based solar (paid for by the general body of ratepayers), provides a present-value payment of $356.6 million ($2.027 billion nominal) to participants from the general body of ratepayers. Appx. 111; *In re: Petition for approval of FPL SolarTogether program and tariff, by Florida Power & Light Co.*, Order No. PSC-2020-0084-S-EI at 4 (Fla. Pub. Serv. Comm'n, Mar. 20, 2020) (credits funded through the fuel clause). A check for $356.6 million to select participants from the general body is an undue preference. Notably, the Commission in its Supplemental Final Order does not claim that the solar itself is paid for by the participants, because it can make no such claim. The general body of ratepayers pays for the solar. The fact that the Commission projects the general body will still benefit from the solar is of no moment.[3]

[3] As discussed later, the only way the general body will receive these benefits is if high carbon taxes are imminently mandated by the State or federal government and go into effect by 2026. No competent, substantial evidence was introduced to sustain this finding implicitly made by the Commission in its adoption of FPL's CPVRR analysis.

Arguments have previously been made that these billions of dollars of payments to participants are justified because they help pay for the solar. Looking at the program as a whole (being paid a net of billions of dollars regardless of the cost-effectiveness of the solar) or year-by-year shows the truth. Looking at the expansion of SolarTogether (the program, not the solar plants), it is seen that in every year of the program, the program's existence (credits, subscription fees, and administrative costs) cost the general body of ratepayers on net, and the participants never provide any benefit to the general body. The last line in the tables below takes a look at the life of the program on a present value basis. Table 1 looks at just the new portion of SolarTogether and its solar power plants that are envisioned under the expansion authorized under the Settlement. Table 2 looks at just the pre-existing SolarTogether program with the expanded credits to participants that were authorized under the Settlement. Table 3 is a combined look of the entirety of the SolarTogether program together (including the new portion authorized under the Settlement and the pre-existing portion with expanded credits to participants under the Settlement). In each case, the third column, using subtraction, calculates the costs to the general body of ratepayers of having participants in the program, i.e., the net bill credit payments to participants plus their administrative costs.

Table 1 – Costs of SolarTogether Solar Expansion with and without Participants, in millions of dollars, Appx. 113.

Year	Costs (Savings) (nominal value) without SolarTogether Participants[4]	Costs (Savings) (nominal value) with SolarTogether Participants[5]	Difference (cost to general body of ratepayers) (nominal value)
2021	$0.6	$0.6	$0 (no participation expected yet)
2022	$3.6	$5.2	$1.6 (no participation expected yet, although administrative costs incurred for program)
2023	$48	$50.9	$2.9
2024	$114.2	$116.9	$2.7
2025	$160.4	$163.3	$2.9
2026	$108.6	$111.9	$3.3
2027	$75.4	$80.3	$4.9
2028	$88.7	$94.6	$5.9
2029	($30.8)	($23.6)	$7.2
2030	$79.5	$88.5	$9.0
2031	$58.5	$69.3	$11.8
2032	($12.7)	$0.3	$13.0
2033-2064	($6,188.4)	($5,108)	$1,080.4
CPVRR	($446.8)	($223.8)	$223

[4] From row "Net Revenue Requirements (fav) unfav" minus the row "Program Administrative Costs" to administer the program for participants.
[5] From row "Total Net RevReq's (fav) unfav."

Table 2 – Costs of SolarTogether Original Program with Change in Credits from Settlement, in millions of dollars, Appx. 112.[6]

Year	Costs (Savings) (nominal value) without SolarTogether Participants[7]	Costs (Savings) (nominal value) with SolarTogether Participants[8]	Difference (cost to general body of ratepayers) (nominal value)
2023	$71.0	$71.3	$0.3
2024	$66.0	$70.5	$4.5
2025	$55.4	$61.5	$5.1
2026	$47.5	$55.0	$7.5
2027	($17.5)	($8.5)	$9.0
2028	($162.0)	($151.1)	$10.9
2029	($91.1)	($79.0)	$12.1
2030	($11.1)	$2.5	$13.6
2031	($54.7)	($39.3)	$15.4
2032	($52.2)	($34.9)	$17.3
2033-2064	($3,142.8)	($2,279)	$863.8
CPVRR	($234.8)	($68)	$166.8

[6] Table starts in 2023, as that is the first year the new credits from Settlement are fully in effect. *See* Appx. 115 (showing increased SolarTogether bill credits from Settlement take effect April 1, 2022); Appx. 114 (previous SolarTogether credit levels).
[7] From row "Net Revenue Requirements (fav) unfav" minus the row "Program Administrative Costs" to administer the program for participants.
[8] From row "Total Net RevReq's (fav) unfav."

Table 3 – Costs of SolarTogether Expansion and SolarTogether Original Program with Expanded Credits, in millions of dollars, Appx. 111.

Year	Costs (Savings) (nominal value) without SolarTogether Participants[9]	Costs (Savings) (nominal value) with SolarTogether Participants[10]	Difference (cost to general body of ratepayers) (nominal value)
2023	$119.0	$122.2	$3.2
2024	$180.2	$187.4	$7.2
2025	$215.7	$224.7	$9.0
2026	$156.1	$166.9	$10.8
2027	$57.9	$71.8	$13.9
2028	($73.4)	($56.5)	$16.9
2029	($121.9)	($102.6)	$19.3
2030	$68.4	$91.0	$22.6
2031	$3.9	$29.9	$26.0
2032	($64.9)	($34.7)	$30.2
2033-2064	($9,331)	($7,387)	$1,944
CPVRR	($681.6)	($291.7)	$389.9

Thus, whether looking at the program as a whole or year-by-year, there is no avoiding the truth—SolarTogether participants cost the general body of ratepayers billions of dollars (hundreds of millions of dollars on a present value basis) with no benefit, ever, to the general body of ratepayers from those participants (as opposed to the solar power plants themselves, paid for by the general body of ratepayers).

[9] From row "Net Revenue Requirements (fav) unfav" minus the row "Program Administrative Costs" to administer the program for participants.
[10] From row "Total Net RevReq's (fav) unfav."

Despite all of the costs imposed on the general body of ratepayers by participants, the Commission finds the program to be in the public interest based on the projected benefits of the solar power plants. Although not explicitly stated by the Commission, $540.4 million CPVRR ($3.5 billion nominal) of the $648.3 million CPVRR of the "savings" customers should be experiencing as a result of SolarTogether (although that includes the guaranteed credits to participants) is from imminent hypothetical carbon taxes starting to go into effect in 2026. R. 45082 (emissions savings from carbon cost); Appx. 116 (assumed carbon costs); Appx. 111 (projected emissions cost savings from avoided carbon costs for SolarTogether). The Commission also finds that "the allocation of 55 percent of these projected benefits to participants and 45 percent to the general body of customers to be in the public interest," Appx. 27, but notably fails to say *why* such a breakdown is fair, when the general body of customers pays for 100% of the costs of the solar at issue when considering the administrative costs of the program as well.[11]

[11] In some of the earliest years, the participants do pay more than they receive, but when considering the administrative costs of the program to have participants, and that the participants do not even defray those administrative costs, as demonstrated in tables 1 through 3, they do not as participants contribute to the solar power plants at issue.

The Supplemental Final Order dismisses the arguments regarding unduly discriminatory rates by finding that "[b]ecause SolarTogether fairly distributes generation and benefits among ratepayers, we reject Florida Rising's argument that the program is unduly discriminatory." Appx. 27. But, given that the general body of ratepayers is worse-off every year (and over the entirety of the program) because of participants being paid by the general body, *how* is it a fair distribution of benefits? Even assuming that the CPVRR calculations of benefits are accurate and that carbon taxes are imminently about to be passed and imposed on Florida utilities by 2026[12] by the State or possibly the federal government, and all customers will thus benefit from the solar at issue being constructed, that does not mean it is not unduly discriminatory for a few select customers to benefit a whole lot more by receiving payments to the tune of billions of dollars from the other customers.

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[12] 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. 45090 (analysis used 10.55% ROE); R. 45280 (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. 45281.

FPL has millions of customers. R. 290656. Yet, the waitlist to subscribe to the new solar under the SolarTogether expansion has just 193 different customers. Appx. 118. Given how lucrative it is to participate in SolarTogether, it is no surprise that the waitlist had to close. Appx. 118. Just four customers represent 655 MW of subscription waiting to sign-up after Settlement approval. Appx. 119.[13] The total expansion of SolarTogether is 1,788 MW, Appx. 91, meaning that these four customers, on their own, were looking to sign-up for 36.6% of the expanded program, worth approximately $402.3 million (nominal) or $73.6 million (present value) in net bill credits, or about $100 million each in free bill credits (net) paid for by the general body of customers.[14]

Nor, as FPL might argue, is there any real risk in signing-up for SolarTogether, as participants can leave anytime,[15] and FPL has, through the Settlement, increased the compensation participants are paid to account for the real-world performance of the solar plants at issue.

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[13] Customers "Government_W2," "Commercial_W15," "Governmental 15," and "Governmental 19."

[14] 0.366 times the net participant distributions in the expanded program. *See* Appx. 113 (line "Participant Net Distribution" contains the net bill credits to participants under the expanded SolarTogether program).

[15] *See* R. 8593 ("Participants may, at any time following their first billing cycle, terminate their participation.").

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), increased, heightening the undue preference for participants. *Compare* Appx. 114 *with* Appx. 115. However, as the Commission has recognized, its statutory duty is to "generally ensure that one customer is not charged a greater or lesser amount than another customer with like services under the same or similar circumstances." *In re: Petition for a limited proceeding to approve clean energy connection program and tarriff and stipulation, by Duke Energy Florida, LLC*, Order No. PSC-2020-0059A-S-EI at 7 (Sept. 23, 2022). This is because, to have nondiscriminatory rates, the Commission must "sufficiently identif[y] and distinguish[] a class of consumers" based on a "reasonable classification of consumers." *Fla. Power Corp. v. Mayo*, 203 So.2d 614, 615 (Fla. 1967). As this Court quoted approvingly in deciding whether municipal garbage rates were fair and non-discriminatory, "the right to classify consumers under reasonable classifications based upon such factors as the cost of service, the purpose for which the service or the product is received, the quantity or the amount received, the different character of the service furnished, the time of its use

or any other matter which presents a substantial difference as a ground of distinction. . . . Discrimination to be unlawful must draw an unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges." *City of New Smyrna Beach v. Fish*, 384 So. 2d 1727, 1274 (Fla. 1980) (quoting 12 McQuillin, Municipal Corporations (3d Ed. 1970)). This way of drawing customer-class distinctions mirrors the requirements of section 366.06(1), Florida Statutes. *See* § 366.06(1), Fla. Stat. ("In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.").

Customers (participants in this case) voluntarily raising their hand saying they want free money paid by other customers is not a sufficient distinction. 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 payment (bill credits) funded by

non-participating customers, not premised on a reasonable customer distinction, the rate structure for this program is unfair, unjust, provides an unreasonable preference and advantage, and is unduly discriminatory in violation of Florida law.

C. Customer-class allocations of SolarTogether also Show Disproportionate Benefits to Largest 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 in the Settlement reserving 60% of the addition for those large customers, while both small businesses and residential customers must split the remainder. R. 45092. These allocations do not reflect FPL's customer base. Even excluding small businesses, residential customers on their own make up

63% of FPL's energy *sales*. Appx. 123. 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. 123, those customer classes already had an outstanding 1,694 MW waitlist, which has long since had to close. Appx. 118.

D. SolarTogether Also Against 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% return on equity ("ROE"). R. 45091; R. 35803. Under the more realistic 11.7% ROE, FPL's projected return on equity from the extension exceeds $2.4 billion. R. 33553 (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. 45284, leaving residential customers *worse-off* than if FPL's original proposal had been approved in full. Since the SolarTogether expansion makes residential customers worse-off in the medium-term than if FPL's original proposal in full had been approved, and residential customers must constitute a large part of the public interest, the approval of the SolarTogether expansion cannot be in the public interest. Thus, the Settlement cannot be in the public interest and no competent and substantial evidence in the record supports a different conclusion.

II. All Other Major Features of the Settlement Agreement Still Work Against the Public Interest.

The Final Supplemental Order's unsupported approval of SolarTogether provides more than sufficient grounds to vacate the Commission's approval of FPL's rate settlement. However, the remaining "major elements" of the settlement agreement, for which this Court directed the Commission develop legible findings, *FAIR*, 371 So. 3d at 912 (quoting *Sierra Club*, 243 So. 3d at 914), continue to find no competent and substantial evidence in the record to sustain a finding that these components, and the Settlement as a whole, would operate in the public interest. Although the Final Supplemental Order bristles with claims as to

the "preponderance of the evidence," it rarely cites any of this purported evidence. Saying it does not make it so, and the Commission has still failed to show that its findings are supported by competent and substantial evidence. Crucially, to the extent that the Final Supplemental Order makes findings on these individual components at all, it fails to consider these components together, and thus fails to consider how the settlement agreement operates "as a whole."

A. The approved ROE, equity ratio, and RSAM produce unjust rates, which are aggravated by interactions between these components that the commission erroneously refused to consider.

The Final Supplemental Order separately discusses the Settlement Agreement's Return on Equity ("ROE") (Issue 2), Equity to Debt Ratio (Issue 3), and Reserve Surplus Amortization Mechanism ("RSAM") (Issue 4), Order at 12-18, as though each constitutes an isolated issue with no impact on the other components, or on the agreement as a whole. This approach is clearly erroneous and counter to this Court's directions for evaluating settlement. *FAIR*, 371 So. 3d at 912, 914. Moreover, the Commission's findings still fail to engage with the record and do not rest on competent, substantial evidence. Fundamentally, a utility with a high ROE should be offset by a lower equity ratio (and vice versa), and FPL's demonstrated historic use of the RSAM to maintain permanent earnings at

the top of its authorized range should have also been considered when evaluating the other elements of the capital structure.

First, even when considered completely on its own, the ROE approved by the Final Supplemental Order is unreasonably high. A reasonable ROE is one that: 1) reflects the returns the investors would expect from like investments of comparable risk, 2) is reasonably sufficient to assure investor confidence that the utility is financially sound, and 3) is adequate for the utility to maintain creditworthiness and attract capital. *Fed. Power Comm'n v. Hope Nat. Gas Co.* ("*Hope*"), 320 U.S. 591, 603 (1944); *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692-93 (1923). The record showed that a 10.8% *midpoint* and 11.8% top-of-range were grossly out of step with a nationwide, decades-long downward trend in electric utility ROEs, and were "significantly above" the average ROE awarded in 2021. R. 61578-79; R. 62040; R. 33997. From 2000 to 2020, the average authorized electric utility ROE dropped from 12.5% to 9.39%, reaching an all-time low in the year immediately preceding this rate case. R. 61578-79. The Commission's Order waives off the reasonable lower ROEs suggested by multiple witnesses' testimony and exhibits, and instead adopts wholesale FPL's suggestion that it experiences a uniquely high risk—including the fact

that its territory is located on a low-lying peninsula, and that COVID-19 would create higher market volatility—which justifies such an aggressive ROE. Appx. 18-19. Duke Energy Florida and Tampa Electric Company *also* occupy the low-lying coast and would face the same coronavirus-impacted market, yet the Commission made no attempt to reconcile the ROE approved for FPL with its nearly contemporaneous approvals of much lower ROEs for the other two peninsular utilities: 9.85% and 9.95%,[16] respectively. R. 45194.

Moreover, the Commission's Order completely ignores the uncontested record evidence that—whatever the drivers of a given utility's risk—these factors are *already* accounted for by credit rating agencies during their evaluation and ranking of risk. R. 46548-51 (noting that S&P considers financial risks and business risks, which "among others," encompasses a "company's size,[17] competitive position, generation

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[16] Then pending, since approved.

[17] The inverse relationship between investment risk and company size—that is, the larger the utility, the lower the risk—is well known. *See, e.g.*, *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 547 (Ky. 2011); *Ex parte Baron Servs., Inc.*, 874 So. 2d 545, 551 (Ala. 2003); *Ponderosa Tel. Co. v. Cal. Pub. Utilities Comm'n*, 36 Cal. App. 5th 999, 1007 (Cal. App. 5th 2019). As FPL's witness Barrett highlighted, "FPL is, by far, the largest utility in the state of Florida; even more so now that we've added Gulf Power into the FPL company. It's almost three times the size of Duke, six times the size of TECO." R. 45323.

portfolio, and capital expenditure programs, as well as consideration of the regulatory environment, current state of the industry, and the economy as whole"). Indeed, FPL already enjoyed S&P and Moody's credit ratings two- and three levels higher than averages of the two proxy utility groups created by FPL witness Coyne. R. 46602. OPC witness Woolridge noted that this gap "clearly indicates that FPL is less risky" than its peer utilities. *Id.* The actual record fails to support any finding of any heightened risk of investing in FPL, much less a level of risk to justify such an extraordinary ROE.

Likewise, the equity ratio approved in the Final Supplemental Order is against the public interest even considered on its own. The Commission adopts FPL's exaggerated 59.6% equity ratio with virtually no discussion and without responding to intervenors' evidence about the inappropriateness of that value. Utilities fund their investments from two primary sources: debt and equity. R. 46970. Because a utility makes a profit only on equity spending, it has an incentive to maximize the ratio of spending from equity, even when not cost effective for its customers; the capital structure, or equity ratio, sets the authorized limit.

Due to the "direct correlation" between the percent of equity spending in the capital structure and the ultimate revenue requirements charged to

customers, "[a]s the equity ratio increases, the utility's revenue requirement increases and the rates paid by customers increase." R. 46626-27. Consequently, when "the proportion of equity is too high, rates will be higher than they need to be." R. 46627. If rates are set higher than necessary for the reliable function of the utility, they are unreasonable, and contrary to the public interest. *See, e.g.*, *Hope*, at 603, *Bluefield* at 693. The record shows that the taxes alone owed on dividends to shareholders made equity spending "about 21% more expensive than debt financing," R. 46970, to say nothing of the historically low interest rates at the time that further increased the comparative cost-effectiveness of debt-financing, R. 45007. The Commission's Final Supplemental Order made no attempt to explain how this higher than necessary equity ratio was in the public interest, particularly when multiple experts testified for equity ratios closer in line with the then-national average of 51.62% that would still allow FPL adequate financial strength. R. 45186-202; R. 46487-92; R. 46976-702.

The Commission did not acknowledge or grapple with the facts from the record before approving FPL's requested equity ratio. Instead, its determination essentially comes down to the fact that the equity ratio was "consistent" with those it had approved for FPL in the past, and that a high equity ratio is part of FPL's "overall strategy" of financial strength. Appx.

22. No party questions that the more money FPL can extract from its customers, the stronger *FPL* will be financially, but the financial strength of a monopoly utility is only in the public interest to the extent necessary to access the capital required to provide *affordable*, reliable service. A utility that recovers more profit than necessary to ensure its uninterrupted operation works counter to the public interest by squeezing rents from a captive customer base. R. 46972-74.

Regarding the RSAM, the Commission again fails to show how it operates in the public interest, even without accounting for its negative interactions with other elements of the Settlement Agreement. First, 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. 47490-91. 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.*

The factual basis for the supposed surplus remains dubious at best, and the Commission fails to acknowledge the significance of FPL presenting two dramatically contradictory calculations of the hypothetical

reserve imbalance in the underlying rate case. The first, by FPL witness Allis, found 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. 47492-93; R. 26937. Then 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. 47042 (emphasis added). Witness Ferguson then presented the new depreciation reserve calculations based on "RSAM parameters,"[18] 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. 47492-93; R. 26798. Why create two conflicting studies? FPL shouted the quiet part aloud when, prior to introducing the Settlement Agreement (which locked in use of the RSAM), FPL asked the Commission to approve the surplus-creating parameters

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[18] 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. 47042; R. 45013-14 (noting the flimsy justifications for each of these modifications). Ultimately, without these "cherry-picking adjustments," the RSAM would not be possible. 46739-40.

only if FPL could also use RSAM; if the Commission denied further use of RSAM, FPL asked that the Commission adopt the deficit-creating parameters instead. R. 57887.[19]

But even assuming that FPL's preferred RSAM-enabling study, finding a $1.48 billion surplus or over-recovery of depreciation reserves, were accurate, that would mean that FPL had taken nearly $1.5 billion from customers *more* than it should have. R. 26798. The Commission's Final Supplemental Order points to no competent, substantial evidence that it is in the public interest for customers to overpay FPL and to allow FPL to keep the extra. Instead, 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. 46935-36; R. 28099-143.

The Commission's approval of the RSAM appears largely predicated by its finding that use of the RSAM "has been a key to FPL implementing multiyear rate terms and avoiding multiple rate cases" and that the resulting "rate stability . . . [is] in the public interest." Appx. 23-24. The outrageous

[19] "If the Commission adopts the RSAM as part of the Company's four-year rate proposal, then the appropriate theoretical reserve imbalance is a surplus of approximately $1,480,203,000. . . . If the Commission does not approve the RSAM, the theoretical reserve imbalances from FPL's 2021 Depreciation Study are . . . a net deficit of $436,529,000 (total system)."

claim that multiyear rate settlements have only been made possible by use of the RSAM is wholly unsupported by the record. FAIR witness Devlin testified that over a 35 year career at the Florida Public Service Commission, including concurrent service on the National Association of Regulatory Utility Commissioners' Subcommittee for Accounting and Finance, he had "never heard of any such proposal being approved (or even considered) by any other state regulatory authority" and that "[n]o other electric utility in Florida has used an RSAM." R. 45545-46.[20] Despite FPL being the only utility to have ever used an RSAM, the record is also clear that multiyear rate terms have become common, offering examples of such plans for other Florida utilities and across the country. *See*, *e.g.*, R. 47803, R. 48181-82, R. 48386, R. 60807, R. 60865 ("In recent years, the Florida Public Service Commission has issued a number of decisions, most of which adopted multiyear settlements."), R. 60892. Moreover, FPL's own history further undercuts this argument: at the time the Commission considered FPL's Settlement Agreement, FPL had successfully used multiyear rate plans for twenty-two years—twice as long as the

[20] Although this testimony is in the confidential portion of the record, it is not confidential. *See* R. 62566-67 (same non-confidential testimony pre-filed).

Commission had authorized it to use the RSAM (or its predecessor). R. 633, R. 47758.

Still, the worse problem with these capital components is that the Commission refused, despite ample evidence in the record, to acknowledge—much less discuss—the interaction between these components, nor to make any attempt to connect their operation to the public interest. For instance, use of the RSAM has demonstrably allowed FPL to stay at the top of its earnings range since it was first implemented. 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.[21] In fact, during the 11 years (at the time) that the Commission has permitted FPL to use this mechanism or its predecessor, the company has achieved its top of line ROE every single year except twice, including when FPL chose to "absorb" the costs of several hurricanes and tropical storms instead of using the established channel for storm cost recovery. Appx. 152-55 (in the only two years that FPL did not max out its annual ROE, FPL still achieved ROEs of just 54 and 52 basis points, respectively, below the maximum—

[21] Appx. 127, 130, 133, 135, 137, 139, 141, 143, 145, 147, 149.

still well above its mid-point); R. 47826-27; R. 47954-55. Even FPL has admitted that they use the RSAM to achieve this maximum ROE target. R. 46765. Therefore, the Commission discussion about approving a 10.7% ROE—already a notable and unreasonable departure from industry trends and actual risk—is disingenuous where the record established that, due to the RSAM, the practical ROE FPL would achieve was effectively guaranteed to be the maximum 11.7%. The Commission is meant to approve a reasonable rate of return with a bracketed range around that targeted midpoint to "acknowledge[e] the economic reality that a company's rate of return will fluctuate in the course of a normal business cycle," where earnings above "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)).[22] Moreover, this Court has held that earning an ROE within the authorized range is not automatically 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**

[22] Consistent with controlling case law, OPC's expert witness Smith emphasized that because "[t]he earnings range set by the Commission around the rate-setting mid-point is the established fair, just and reasonable return . . . no adjustment should be needed when actual earnings fall within this range." R. 46766.

> **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).

The Commission's Final Supplemental Order likewise fails to account for the interaction between the high ROE (further exacerbated by the RSAM), and the high equity ratio. As noted earlier, a reasonable ROE must be based on the actual risk of investing in a utility, with the end of ensuring the utility can continue to attract the capital investments it requires to maintain reliable service, without causing customers to overpay for such service. *Hope*, 320 U.S. at 603; *Bluefield*, 262 U.S. at 692-93. It is well known, and established in the record, that as a company's equity ratio increases, its financial risk necessarily decreases. *See, e.g.*, R. 45197-98; R. 46628-29. Even if the Commission accepted FPL's erroneous assertions that it is somehow a high-risk investment, having either a very high ROE or a very high equity ratio dramatically lowers that risk. In the face of the extraordinary ROE and equity ratio sought by FPL, the only two reasonable options would have been: 1) to adopt a more reasonable equity ratio in line with the average of the proxy group from which the cost of equity was calculated and then reflect the

lower equity ratio through lowered revenue requirements, or, 2) to recognize the significant financial risk mitigation of a very high equity ratio and adopt a common equity cost rate that is below the proxy group average. R. 46628-29. The Commission's Supplemental Final Order does not even acknowledge the record arguments and expert testimony to this effect. The Settlement Agreement, with its industry bucking highs for both ROE and equity ratio, is plainly against the public interest as its fundamental capital structure would produce unfair, unjust, and unreasonable rates. To the extent that the Commission believed it could not alter these components individually, the entire agreement was due to be denied as against the public interest.

B. Other Mechanisms Increase FPL's Profits Without Competent and Substantial Evidence that They are in the Public Interest.

Numerous other features of the Settlement Agreement work against the public interest to needlessly inflate FPL profits to the detriment of its customers, including extensive rate base additions and system overbuilding, the extension of asset recovery time, incentive mechanisms, and pilot programs. While the Commission's Final Supplemental Order does at least mention these features, it still fails to cite to any competent,

substantial evidence that, individually or together, these components serve the public interest.

As to rate base additions (Issue 1) and system overbuilding (Issue 11), the Commission failed to show competent, substantial evidence that the additions to FPL's rate base are in the public interest. Rate base broadly refers to the total sum for which FPL can earn a guaranteed ROE. Consequently, any capital investment in FPL's grid, whether for gas or solar plants, batteries or transmission lines, runs up the tab that FPL's customers must pay off—all the while paying FPL's additional ROE on top. Each additional dollar added to rate base burdens customers, so all additions must be in the public interest.

While a settlement might ordinarily be expected to reflect a compromise, FPL's Settlement Agreement contains every single addition to rate base sought in its original filing. Appx. 70 ¶ 2 (approved); R. 52712, ¶ 2 (more legible). This includes all of FPL's originally proposed gas plant investments, amounting to, approximately, an additional 4.125 GW being added to rate base at a cost of $4.384 billion. Appx. 158-61. The Final Supplemental Order failed to discuss these projects at all, much less provide any competent, substantial evidence that these additions to rate base—which themselves constitute a "major element[]" of the settlement

agreement, *FAIR* at 912—were in the public interest.[23] FPL projected that the capital expenditures for which it sought approval in the underlying rate case (later baked into the Settlement Agreement), would result in a return on capital of $72.837 *billion* pre-tax and $60.842 *billion* after tax.[24] Numerous assumptions[25] in this estimate suggest that FPL's actual earnings would be substantially higher. R. 45013; R. 45291.

But not only did the Settlement Agreement not remove a single proposed addition to rate base, it actually *increased* rate base over the original filed case by nearly $2 billion for SolarTogether expansion discussed earlier, as well as another roughly $200 million for new rate-

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[23] Through its tortured misreading of this Court's precedent, the Commission continues to imply that it never need consider the prudence of *any* project in rate base and whether the resulting rates are fair, just, and reasonable. *See* Final Supplemental Order at 11, n.22, citing *Sierra Club*, 243 So. at 911-12. This is simply not what the Court stated in *Sierra* or *FAIR*. It defies understanding that the Commission still considers *billions of dollars* in spending on new and expanded gas plants—including nearly half a billion on a single unit ("Gulf Clean Energy Center 8"), R. 34182—to not constitute an element of sufficient size to merit discussion.

[24] R. 44906-10 (excerpted at Appx. 168-69 for viewing clarity) (total pre-tax capital in row "1447", column "L") & R. 44899 (total weighted pre tax rate). 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.

[25] Including using a 10.55% ROE, R. 45090, instead of the 11.7% that FPL is virtually guaranteed through use of the RSAM, with pre-RSAM (shorter) asset depreciation schedules, *see, e.g.*, R. 44903 (excerpted at Appx. 166-67 for viewing clarity) (solar facilities with book life of 29.4 years adjusted to 35 years by RSAM).

based electric vehicle infrastructure. Appx. 91-95 (approved), R. 52733-37 (more legible). The result is that FPL's combined rate base (including that of former Gulf Power) will have exploded by 373%—nearly quadrupling—in the 16 years between 2010 and the end of FPL's Settlement Agreement, compared to a population growth of 20% over the same period. In 2010, FPL and Gulf had a combined jurisdictional rate base of $18.313 billion, roughly $1,883 per person. R. 34952 (FPL: $16,800,538,432); R. 35324 (Gulf: $1,512,206,226); R. 29937 (population). The Settlement allows FPL's total rate base to balloon to $68.349 billion by 2025, or roughly $5,830 per person.[26] The Commission refers to no competent and substantial evidence that any of this spending was prudent and necessary.

In contrast, the record shows that FPL's system is already substantially overbuilt—that customers are being made to pay for much more generation and transmission infrastructure than reasonable for reliable electric service. Looking first at the generation side, FPL uses a 0.1 loss of load probability ("LOLP") criterion, R. 29965, better stated as an expectation of not being able to meet all firm load due to lack of generation

[26] Pre-Settlement projected rate base of $66.314 billion, R. 35745, plus SolarTogether expansion of $1.865 billion, R. 33074 (row "Total Rate Base, Average"), plus electric vehicle charging infrastructure expansion of roughly $170 million, Appx. 93-95. (Settlement investments less existing "EVolution" pilot program costs).

resources once every ten years. Gulf, as a standalone system in 2021, already had an LOLP corresponding to an outage once every 171 years. Appx. 177.[27] 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 left over during the highest projected demand of the year. R. 26242. FPL never bothered to calculate the LOLP for Gulf in 2022 with or without the addition of that huge turbine. Appx. 173; Appx. 178. 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. Of course, that is far from the only generation addition that the Commission approved—without competent, substantial evidence showing need or service to the public interest—through FPL's Settlement as additions therein alone totaled to over 4 GW of new gas.[28]

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

[27] 1 divided by 0.005837 equals 171.3.

[28] R. 34180 (938 MW Gulf CT, 1,163 MW Dania Beach Unit 7); R. 32493 (924 MW Crist conversion); R. 47344 (approximately 100 MW Lansing Smith); R.47362 (over 1,000 MW miscellaneous plant upgrades). The only arguable exception to this lack of evidence is Dania Beach 7, for which FPL sought and received a need determination in an earlier proceeding.

years. Appx. 177. 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.

Not only is FPL's rate base for generation overinflated, so too is its rate base for transmission and distribution. FPL's own recurring testimony shows it to have one of the most reliable transmission and distribution systems in the nation. FPL nonetheless included $11.5 billion of additional transmission and distribution rate base spending in 2019-2023 to this purportedly top-performing system. R. 46412. 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 vacate the Final Order as against the public interest, and unsupported by competent and substantial evidence.

In direct conflict with the record, the Commission's Final Supplemental Order finds "the greater weight of the evidence supports" greenlighting FPL's spending on generation, transmission, and distribution projects, and rejecting the argument that FPL's assumptions are unreasonable because the "public interest dictates that a utility consider a wide range of possibilities in planning for a reliable system." Appx. 32. The Commission apparently does not believe that the public has any interest in an *affordable* electric system. It also fails to cite any competent, substantial evidence supporting this apparent finding.

We turn next to the Settlement's extension of asset recovery time (Issue 9). Because FPL's ROE—guaranteed profit—is a function of the total amount in rate base, extending the time period over which FPL will amortize the costs of certain retired plants in rate base from 10 to 20 years achieves two things. It does, as the Commission emphasizes, incrementally lower the revenue requirement in the short term by lowering

the total amount to be amortized each year. Appx. 31; Appx. 39. However, it also keeps the overall remaining balance higher, for longer, leading customers to pay more over time.[29] In contrast to FPL's and the Commission's rosy outlook on the impact of extending the amortization period, expert testimony on the record calculated the additional cost to customers for the ten year extension to be nearly $1.4 *billion*—all for plants that are no longer used and useful in public service, due to their early retirement by FPL. R. 45290-92.

Regarding the Settlement Agreement's incentive mechanisms for asset optimization (Issue 14) and solar construction (Issue 15), the Commission's Final Supplemental Order once again fails to point to competent, substantial evidence to support its conclusion that either mechanism works in support of the public interest. It is undisputed that each dollar of cost avoided would ordinarily be a dollar back in customers' pockets. By proposing mechanisms that instead divert some of those savings to the utility, customers necessarily lose out. The Commission points to no evidence in the record to show that customers are better off

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[29] Financing a car provides a reasonable analogy. Over the lifetime of the loan, the consumer with a low monthly payment spread over more time will end up paying considerably more for the same vehicle compared to one with a higher, shorter duration pay back.

with these mechanisms, because, for instance, FPL would otherwise intentionally avoid any of the efficiencies and cost-controlling measures that led to the savings in the first place. Considering that the claimed function of the mechanisms is to incentivize FPL to reduce certain costs and save customers money, whether customers are actually coming out ahead should guide the public interest determination. The Commission cites no evidence to suggest that they do.

Finally, there are the pilots programs for hydrogen, electric vehicle infrastructure, and rooftop solar (Issue 7).[30] That the Commission may have the legal authority to approve certain pilot projects via the Settlement does not make those projects in the public interest, and the Commission's Final Supplemental Order failed to cite any competent, substantial evidence to support any such finding. In all, the Settlement cumulatively adds a quarter of a billion dollars for electric vehicle chargers 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.

[30] (Previously listed as Issue 6 on page 5 of the Final Supplemental Order).

Stat.; R. 45293. There is no competent, substantial evidence that this addition is in the public interest.

The approval of the hydrogen pilot 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 research and development rents from captive ratepayers to subsidize its possible entry into wholesale hydrogen sales, which does nothing to benefit its customers. R. 45010-12. This pilot is an exorbitant "solution" in search of a problem, contrary to the public interest, and unsupported by competent, substantial evidence.

The "Solar Power Facilities pilot" program, which allows FPL to install rate-based rooftop solar for non-residential customers, was also introduced in the Settlement. Appx. 94-95; R. 30268-69. 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. 94-95; R. 30268-69.

Without a legally enforceable mechanism, nothing ensures FPL will keep the program revenue neutral to non-participants as it expands rate base into an inappropriate sector—one that already has a competitive private market. Despite this, the Commission assumes that program participants will pay the full costs of the program and that, because it involves solar, it must be in the public interest. Appx. 30. There is no reason to include such facilities in rate base, and the vague invocation of renewable energy does not confer a public interest.

C. Other Elements Work Against the Public Interest.

Some other features of the Settlement Agreement do not necessarily increase FPL's profits, they are just terrible for its residential customers and contribute to unfair and discriminatory rates. Chief among these is the Settlement's revenue allocation between customer classes (Issue 10). 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." If rates are lopsided, with some classes paying less than their fair share, other classes will have to pay extra to make up the difference, resulting in a transfer of wealth between classes. The record

shows that under FPL's as-filed rate case, residential customers would have paid nearly $100 million *per year* over 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. 187 (residential class deficiency of $396,789,000 at parity with full rate increase) *with* Appx. 188 (residential as-filed proposed rate increase $490,976,000).

Incredibly, the Settlement Agreement further increased the cost allocation to the residential customer class, R. 45276, without even conducting a cost-of-service study to justify the new revenue allocations, as FPL's own Witness Cohen admitted, R. 45107. Instead, negotiation between invited signatories, not informed study, shrugged much more of the revenue burden onto residential customers than originally proposed by FPL. Although FPL declined to conduct a full cost of service study to support the Settlement, nothing in the record suggests that the Settlement changed FPL's actual cost to serve the various classes of customers. Thus, 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. 45277. 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. 45276.

With respect to cost allocation, not only did the Commission's approval of the Settlement violate its statutory duty of fact-finding on the actual characteristics and costs to serve each class, § 366.06, Fla. Stat., the enormous transfer of wealth it contains is not fair, just, nor reasonable and constitutes an undue preference. The Commission's Final Supplemental Order entirely fails to show this to be in the public interest, basing its purported finding that that the Settlement's revenue allocations are "reasonable" solely on a long-debunked "typical residential bill,"[31] FPL's

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[31] The Commission continues to accept FPL's claim of extremely low residential bills despite the uncontroverted evidence to the contrary. What FPL means when it discusses low residential "bills" is a comparison of standardizing all electric bills to an arbitrary 1,000 kWh of usage across all utilities, regardless of actual usage. Appx. 191; R. 45101. Between January 2017 and the hearing in this case, FPL customers averaged approximately 1,119 kWh of usage per month, Appx. 201-03, with residential electric bills averaging over $140 per month in the summer months (July-September). Appx. 194. In fact, according to EIA data that FPL pulled, which FPL has no reason to dispute, R. 45103, FPL already had the 13th highest average residential electric monthly bills among the largest 50 U.S. electric utilities. Appx. 205 (FPL average residential bill lower than 12 companies, and higher than 37 companies). Even when limited to just the largest 20 investor-owned utilities, FPL' average

representations of a “negotiated compromise,” and the application of “gradualism.” Appx. 31-32. To the extent that gradualism would prevent a cost allocation that returns the classes to parity—i.e., because the overburdened residential and small business classes have subsidized commercial and industrial users to such a high degree that it would be somehow unfair to *the latter classes* to remove those subsidies too quickly—it functions decisively against the public interest.

The other major deficiency in this area is the Settlement’s inclusion of a minimum bill (Issue 8). The Commission’s Final Supplemental Order purports to find that a $25 minimum bill is in the public interest, without citation to supporting record evidence. Appx. 30-31. Instead, the Commission defers to FPL’s generic claim that nearly tripling the minimum charge to a customer each month from $8.99 to $25—before that customer turns on a single lightbulb—will “ensure that all ratepayers contribute their share to the fixed system costs.” Appx. 30. However, the Commission does not and cannot point to anything in the record to establish that $25 is the actual cost to serve a customer with no load. FPL provided no evidence justifying this minimum bill with any kind of cost-of-service study

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residential bills remain significantly higher than the average. R. 44997. And that is before accounting for any increases contemplated by the Settlement.

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. No such evidence exists because the minimum bill was added during the secret settlement negotiations. On the other hand, the record does contain evidence *against* the minimum bill, showing that it would affect 360,000 customers, disproportionately harming low-income households with bills that fall below $25 while subsidizing households with higher energy usage. R. 45288; R. 45114; R. 28690. Without evidence of the actual fixed system costs, the $25 minimum bill contained in the Settlement Agreement is an arbitrary amount, and therefore unlawful. *See* § 366.06, Fla. Stat.

III. FPL's Abysmal FEECA Performance Remains Unaddressed by the Commission's Final Supplemental Order.

When this Court determined that the Commission's original order approving FPL's Settlement Agreement was insufficient and remanded to the Commission to better explain the basis for its rulings, this Court also made it clear that a "reasonably explained decision" must reflect the Commission's consideration of FPL's performance pursuant to the Florida Energy Efficiency and Conservation Act ("FEECA"). *FAIR* (citing § 366.82(10), Fla. Stat.). Both FAIR and the Florida Rising appellants sought

to reopen the record, consistent with this Court's order, *id.* at 914, and attached specific FEECA performance reports and data from the Energy Information Administration for the Commission's consideration. R. 747-1081; R. 1091-1160. The Commission declined to admit any of the information into the record, and despite clear instruction from this Court, further decided to ignore FEECA performance altogether in its revised order, arguing that that it is "not subject to reexamination in a base rate case." Appx. 40. Had the Commission properly considered FEECA performance, as directed, the evidence would show that FPL failed to meet 8 of its 9 FEECA goals for 2022, R. 776, R. 969; 7 of its 9 goals for 2021, R. 850, R. 1006; and 4 of its 9 goals for 2020, R. 920, R. 1038. It would further show that despite being the largest utility in the nation, FPL is far surpassed by much smaller utilities in terms of total energy savings achieved. R. 1071-73; R. 1075-77; R. 1079-81.

CONCLUSION

For all the reasons stated above, this Court should find that the Settlement violates Florida law, vacate the Commission's Supplemental Final Order (and other, prior orders) approving the unlawful Settlement, and remand the case to the Commission for further proceedings consistent with applicable law and the Court's opinion.

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 17th day of May 2024, to the following:

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DATED this 17th day of May, 2024.

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I HEREBY certify that the foregoing is typed in Arial 14-point font and contains 11,955 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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