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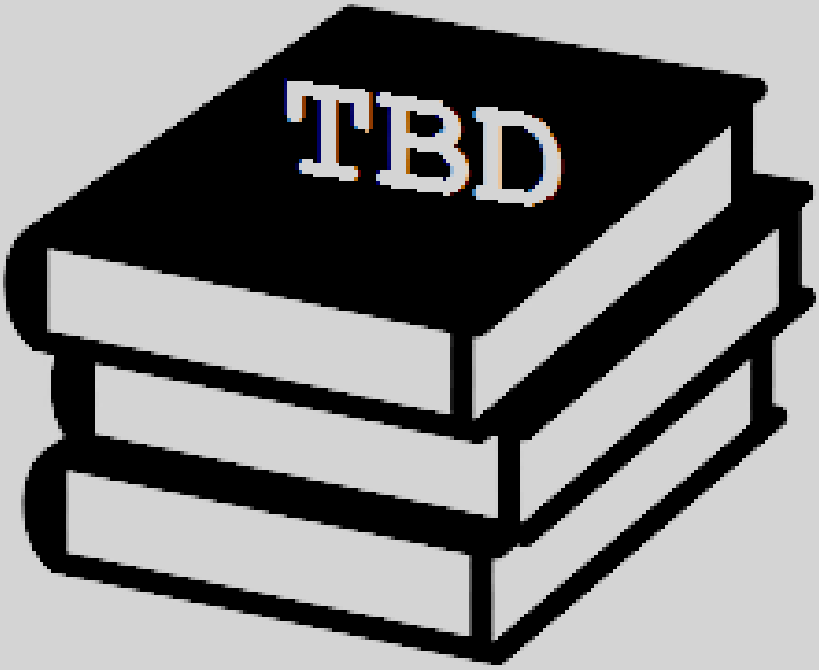

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IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA,
THROUGH THE FLORIDA OFFICE OF
PUBLIC COUNSEL,

Petitioner. Case No.

vs.

FLORIDA POWER & LIGHT COMPANY;
FLORIDA INDUSTRIAL POWER USERS GROUP;
FLORIDA RETAIL FEDERATION; FEDERAL
EXECUTIVE AGENCIES; ALGENOL BIOFUELS,
INC.; SOUTH FLORIDA HOSPITAL AND
HEALTHCARE ASSOCIATION; VILLAGE OF
PINECREST; JOHN W. HENDRICKS; and THOMAS
SAPORITO,

Respondents.

OFFICE OF PUBLIC COUNSEL'S PETITION FOR WRIT OF QUO WARRANTO OR, IN THE ALTERNATIVE, CONSTITUTIONAL WRIT UNDER THE "ALL WRITS" PROVISION OF THE CONSTITUTION OF THE STATE OF FLORIDA

The Office of Public Counsel ("Petitioner" or "OPC") petitions the Court to issue a writ of quo warranto to the Florida Public Service Commission ("Commission" or "FPSC") requiring it to terminate its proceeding on, and consideration of, a facially invalid, purported settlement agreement in FPSC Docket No. 120015-EI, which docket was established to process a petition for

authority to increase base rates that Florida Power & Light Company filed on March 19, 2012. Alternatively, OPC petitions the Court to exercise its jurisdiction under the "all writs" provision of Article V, Section 3(b)(7) of the Constitution of the State of Florida to issue a constitutional writ prohibiting further consideration of the purported settlement.

In support of the Petition, OPC states as follows:

JURISDICTION

1. The Court has jurisdiction to issue the writ of quo warranto sought by Petitioner. Article V, Section 3(b)(8) of the Constitution of the State of Florida empowers this Court to issue writs of mandamus and quo warranto to state officers and state agencies. The Florida Public Service Commission is a "state agency" within the meaning of this provision. Section 350.011, F.S. A petition for writ of quo warranto is an appropriate means through which to challenge a proposed action that is beyond the authority of a public official. *Florida House of Representatives v. Crist,* 999 So.2d 601 (Fla. 2008), cert. den. 555 U.S. 1212, 129 S.Ct. 1526, L.Ed.2d 657 (2009); *State ex rel. Smith v. Jorandly,* 498 So.2d 948 (Fla. 1986); *Whiley v. Scott,* 79 So.3d 702 (Fla. 2011).

2. Alternatively, the Court has jurisdiction under the "all writs" language of Article V, Section 3(b)(7) of the Constitution of the State of Florida to issue extraordinary writs when to do so would aid the complete exercise of the Court's ultimate jurisdiction. Pursuant to Article V, Section 3(b)(2) of the Constitution of the State of Florida and Sections 350.128(1) and 366.10, F.S., this Court has exclusive jurisdiction to review any actions of the Commission relating to rates or service of utilities providing electric service. Commission Docket No. 120015-EI involves a request by a regulated utility for authority to increase electric rates. The Commission is entertaining in that docket a purported settlement agreement that is violative of state law and public policy as interpreted and pronounced by this Court in its opinion in *Citizens v. Mayo,* 333 So.2d 1 (Fla. 1976). Further, the proponents of the purported settlement agreement have asserted that the standard that the Commission should apply to their proposal is whether the purported settlement agreement is "in the public interest." Thus, the Commission is considering a course that would displace the detailed findings of fact that would resolve the myriad of issues that OPC and other parties have litigated and briefed. If the Commission were to adopt the proposal, in the face of OPC's opposition, it would threaten the Court's exclusive jurisdiction to ascertain, on review, whether the result is supported by competent

substantial evidence and whether the Commission satisfied the essential requirements of law. The issuance of a constitutional writ pursuant to the "all writs" provision would aid the Court in the complete exercise of its jurisdiction to review "any" such actions.

FACTUAL BACKGROUND

3. The FPSC is an agency created by the Florida Legislature to regulate the rates and service of utilities that are subject to its statutory jurisdiction.

4. OPC is an agency created by the Florida Legislature to represent the interests of the Citizens of the State of Florida who are customers of regulated utilities. Pursuant to Section 350.0611(1), F.S., OPC is authorized to intervene in Commission dockets by filing notice of its intervention and, upon intervening, to take any positions that OPC determines to be in the public interest.

5. Florida Power & Light Company ("FPL") is a public utility within the definition of Section 366.02(1), F.S. It is subject to the ratemaking jurisdiction of the Commission.

6. The Florida Industrial Power Users Group ("FIPUG"), the Federal Executive Agencies ("FEA"), and the South Florida Hospital and Healthcare Association ("SFHHA") are associations of specific industrial and commercial customers of FPL that frequently participate in Commission

proceedings on behalf of their participating member corporations and/or constituents.

7. The Florida Retail Federation ("FRF") is a trade association that represents several thousand commercial retail customers of FPL. OPC and FRF jointly filed certain pleadings in the FPSC docket that is the subject of this Petition.[1]

8. On January 17, 2012, as required by Commission Rule 25-6.140, Florida Administrative Code ("F.A.C."), FPL filed with the Commission written notice of its intent to submit a petition for authority to increase its base rates. FPL asked the Chairman of the Commission to approve calendar year 2013 as the representative "projected test year" upon which FPL would base its depiction of its investment in plant, annual revenues, and annual expenses. By letter dated February 7, 2012, the Chairman authorized FPL to proceed on the basis of its "test year letter." The Commission established Docket No. 120015-EI for the purpose of receiving and processing FPL's petition.

9. On March 19, 2012, FPL filed its petition in Docket No. 120015-EI. Within its petition, FPL asked for authority to increase its base rates and charges to generate an additional $516.5 million of revenues annually, beginning in

[1] For the sake of brevity, OPC has not referred explicitly to all of the intervenors in Docket No. 120015-EI. For purposes of this introductory background, OPC has limited the references to the signatories and to FRF, with whom OPC jointly filed certain pleadings in opposition to the purported settlement agreement.

January 2013. FPL also asked for authority for a step adjustment to increase its base rates by an additional $173.9 million annually when its Cape Canaveral generation project, currently under construction, enters commercial service in June 2013. The January 2013 and June 2013 proposed increases are the only base rate increases that FPL sought in its petition. FPL submitted with its petition the voluminous financial, accounting, and other information ("Minimum Filing Requirements," or "MFRs") prescribed by Commission Rule 25-6.043, F.A.C. FPL also submitted "prefiled" (i.e., written) testimony of 15 witnesses, who sponsored the portions of the MFRs that they were responsible for preparing, as well as additional testimony and exhibits. With its petition, FPL filed proposed tariff sheets designed to collect the requested $516.5 million 2013 base rate increase and the requested $173.9 million of additional revenue related to the Cape Canaveral base rate step increase. The petition and accompanying MFRs and tariff sheets triggered the procedure under which, pursuant to Section 366.06(3), F.S. (the "file-and-suspend law"), the Commission processes and reviews the utility's request under statutorily mandated time frames.

10. OPC filed its Notice of Intervention in Docket No. 120015-EI on March 19, 2012. The Commission acknowledged OPC's intervention by Order No. PSC-12-0132-PCO-EI, issued on March 21, 2012.

11. In approximately the same time frame, FRF, FIPUG, SFHHA, FEA, and other affected parties filed petitions for leave to intervene, which the Commission granted by separate orders.

12. The Commission issued an Order Establishing Procedure ("OEP"), Order No. PSC-12-0143-PCO-EI, on March 26, 2012. The OEP established the procedural milestones of the case, such as the deadlines for intervenor testimony, rebuttal testimony, and the cutoff date for discovery. The OEP scheduled the Prehearing Conference for August 14, 2012, and set the evidentiary hearing on FPL's petition for a two-week period beginning on August 20, 2012.

13. Pursuant to the schedule contained in the OEP, OPC served 14 sets of interrogatories and 13 requests to produce documents on FPL based on the information contained in FPL's petition and supporting documents during the period March-June 2012. On July 2, 2012, OPC filed the testimony of seven expert witnesses. OPC's witnesses addressed the capital structure that the Commission should approve for ratemaking purposes; the appropriate return on equity capital that it should approve for FPL in light of FPL's risk

profile and prevailing conditions of capital markets; FPL's transactions with its affiliates; recommendations for various adjustments to the expense levels that FPL included in its test year; the manner in which the Commission should treat FPL's amortization of depreciation reserve surplus[2] after the conclusion of the rate case; and the impact of OPC's recommendations on indices of FPL's financial integrity. OPC's overall, "bottom line" position on FPL's petition was and remains that FPL's existing rates are too high, in that they generate $184–$253.4 million of revenues (depending on the choice of capital structures that the FPSC employs for ratemaking purposes) in excess of the amount that is necessary to defray FPL's operational expenses and to provide a fair return on its investment. Other intervenors, including FRF, FIPUG, SFHHA, and FEA also submitted testimony opposing FPL's proposed rate increases. Between July 24, 2012, and August 10, 2012, OPC participated in numerous depositions of FPL, staff, and intervenor witnesses.

14. On July 31, 2012, FPL filed the testimony of 17 rebuttal witnesses.

[2] In FPL's last rate case, Commission Docket No. 080677-EI, the Commission ordered FPL to amortize $894 million of depreciation reserve surplus over a four-year period that ends on December 31, 2013.

15. On August 14, 2012, the Prehearing Officer conducted the Prehearing Conference, when nearly 200 issues raised by intervenors and the Commission Staff in response to FPL's petition and supporting documents were formalized for inclusion in the Prehearing Order.

16. On August 15, 2012, FPL filed a document that it claimed to be a "settlement agreement" among FPL, FIPUG, SFHHA, and FEA.[3] The purported settlement agreement contains the following controversial terms and provisions:

    a. A proposed return on equity having a midpoint of 10.7%, except that the return on equity applicable to FPL's investment in a large new generating unit would be 11.5%;

    b. An annual base rate increase of $378 million, plus the ability of FPL to continue to collect the revenue requirements (presently about $160 million annually) of its West County Energy Center Unit 3, a large, gas-fired electrical power plant that began commercial service in 2010, through its separate Capacity Cost Recovery Clause;

[3] OPC refused to become a signatory to the purported settlement agreement, as did FRF, which represents approximately 3,200 customers in FPL's service area. Intervenors Saporito and Hendricks have expressed their opposition to the purported settlement agreement. Intervenor Algenol Biofuels, Inc. did not sign the purported settlement agreement, but has expressed support for it.

c. Rate/revenue concessions (relative to FPL's original proposal for allocating its requested increase among customer classes) to the intervenors who are signatories to the purported settlement agreement, which are worth approximately $50 million annually to the customer classes to which the signatories belong. These revenue concessions would be offset by increases in the revenue responsibility allocated to the rates that other non-signatory customers, including residential customers, would pay;

d. The ability of FPL to increase its rates by the full amount of the incremental revenue requirements associated with its Cape Canaveral generating project and two additional, future generating plant additions (the Riviera and Port Everglades units) when these begin commercial operations, regardless of whether FPL's future earnings at the time are sufficient to absorb some or all of those revenue requirements and continue to yield a fair return on equity. FPL did not propose or request the incremental base rate increases that would be associated with the Riviera and Port Everglades units, presently scheduled to enter service in 2014 and 2016, respectively, in its March 19, 2012 petition. Information provided by FPL indicates that the

increases would amount to approximately $236 million (Riviera) and $218 million (Port Everglades) annually;

e. The ability of FPL to enhance its achieved future earnings by amortizing up to $200 million of its accumulated fossil plant dismantlement reserve during the four-year term of the purported settlement agreement, without correspondingly reducing customers' rates by the amount of reduced dismantlement expense that FPL would record on its books as it implements the provision. FPL did not propose or request this provision in its March 19, 2012 petition[4];

f. A stipulation, related to (e) above, providing that the periodic depreciation and dismantlement studies called for by Commission Rule 25-6.0436, F.A.C., which FPL is required to file by March 2013, would be postponed until after the four year term of the purported settlement. FPL did not propose or request this postponement in its March 19, 2012 petition[5];

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[4] The effect of amortizing the reserve for dismantlement expense would be to reverse previously recorded expense, thereby offsetting (reducing) the amount of expense incurred during the period in which amortization is booked. The lower net dismantlement expense would result in higher net income and a higher earned rate of return.

[5] The Commission uses the results of such studies to gauge the status of FPL's capital recovery programs, including the calculation of depreciation and

g. A provision authorizing FPL to retain for its shareholders a portion of profits gained from selling or leasing a wide range of assets, including surplus gas transportation rights, sales of commodity gas, and electric transmission capacity rights ("asset optimization"), and further authorizing FPL to recover the full costs of administering an "asset optimization program" through FPL's fuel cost recovery clause. The Commission's current policy is to require that all such profits inure to the benefit of customers because it is the customers who pay the costs of these assets through the rates they are charged. FPL did not propose or request this departure from the Commission's current practice or the expansion of the current cost recovery mechanism in its March 19, 2012 petition.

17. Accompanying the purported settlement was a joint motion of the signatories seeking its approval. The signatories also filed a motion to suspend the full technical, evidentiary hearing scheduled to begin less than 3 business days later, and to conduct an evidentiary hearing limited to the purported settlement agreement. OPC is attaching a copy of the signatories'

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dismantlement reserve balances and the identification and quantification of any reserve imbalances severe enough to warrant amortizations such as the one contained in the purported settlement agreement.

Joint Motion to Suspend Procedural Schedule ("Motion to Suspend"), the Joint Motion for Approval of Settlement Agreement ("Motion for Approval"), and the purported settlement agreement, as composite Item 1 of the Appendix to this Petition.

18. On August 17, 2012, OPC and FRF jointly responded to the Motion to Suspend. OPC asked the Commission to suspend the full hearing so that it could first deal with and dispose of the purported settlement agreement. OPC is attaching the joint response of OPC and FRF as Item 2 of the Appendix to this Petition.

19. On August 17, 2012, the Chairman issued Order No. PSC-12-0430-PCO-EI, in which he denied the signatories' Motion to Suspend. OPC is attaching a copy of this order as Item 3 to the Appendix to this Petition. On the same date, the Prehearing Officer issued Prehearing Order No. PSC-12-0428-PHO-EI.

20. On August 20, 2012, OPC filed a Motion to Dismiss the purported settlement agreement or, in the alternative, FPL's March 19, 2012 petition. In that motion, OPC requested the Commission to schedule oral argument on the document prior to beginning the evidentiary hearing. OPC is attaching this pleading as Item 4 of the Appendix to this Petition. At the outset of the evidentiary hearing, OPC orally requested the full Commission to reconsider

Order PSC-12-0430-PCO-EI. (TR 12-32) The Commission voted not to reconsider that order. (TR 64) FRF presented a motion in limine, which OPC supported, asking the Commission to prohibit references to the purported settlement during the course of the hearing. The Commission denied the motion. (TR 65-70) The Commission also voted to deny OPC's Motion to Dismiss. OPC is attaching excerpts from the transcript of the discussion of preliminary matters as Item 5 of the Appendix to this Petition.

21. On August 22, 2012, OPC filed its response in opposition to the Joint Motion for Approval. Within its response, OPC presented its major reasons for opposing the provisions of the purported settlement. In addition to its opposition to the substantive terms of the purported settlement agreement, OPC asserted that the purported settlement is a nullity without the participation of OPC, the statutory representative of all the customers, and that it is effectively a new and different request for rate increases that the Commission cannot approve unless and until FPL complies with the statutory requirements and Commission rules applicable to such new requests. OPC is attaching its response to the Joint Motion for Approval as Item No. 6 of the Appendix to this Petition.

22. During the evidentiary hearing, counsel for SFHHA orally asked the Commission to reconsider its decision to process the purported settlement

agreement without taking evidence on its provisions. The other signatories supported the oral motion. The Commission voted to deny the oral motion for reconsideration. OPC is attaching the portion of the transcript of the hearing in which SFHHA presented its oral motion as Item 7 of the Appendix to this Petition.

23. On August 27, 2012, the Chairman issued Order No. PSC-12-0440-PCO-EI, in which he stated that he would set a date on which the Commission would consider the purported settlement agreement. The order stated that parties would be permitted to provide comments, but that no evidence would be received during the oral argument. The order purported to authorize parties to serve "data requests" and to use the responses to the data requests during the oral argument. OPC is attaching this order as Item 8 of the Appendix to this Petition.

24. On August 28, 2012, FPL served a set of interrogatories on OPC. OPC responded by letter dated September 4, 2012. OPC also filed a motion asking the Chairman to clarify or reconsider Order No. PSC-12-0440-PCO-EI as it pertained to "data requests." The Chairman treated OPC's motion as a request for protective order, which he granted in Order No. PSC-12-0487-PCO-EI, dated September 21, 2012. FPL's interrogatories to OPC, OPC's letter response to FPL, OPC's Motion for Clarification/Reconsideration and

Order No. PSC-12-0487-PCO-EI are attached as Items 9-12 of the Appendix to this Petition.

25. At the conclusion of the evidentiary hearing on August 31, 2012, the Chairman recessed the hearing until the date of the scheduled oral argument without formally closing the evidentiary record. See Item 13 of the Appendix to this Petition.

26. The Commission convened to hear oral argument on the Joint Motion for Approval (of the purported settlement agreement) and parties' opposition thereto on September 27, 2012. At the outset, OPC objected to the proceeding. The Chairman noted OPC's objections for the record, and the Commission proceeded to hear oral argument. OPC opposed the Commission's consideration of FPL's purported settlement. Specifically, OPC asserted that it is a necessary party to any settlement agreement in the case. OPC observed that all the customers represented by the signatories to the purported settlement agreement comprise far fewer than one percent of FPL's 4.6 million customers. OPC also argued that the purported settlement agreement contains base rate increase proposals that were not within the scope of FPL's March 19, 2012 petition, and thus constitutes a new and separate request for a general rate increase. The signatories to the purported settlement asserted that OPC's participation as a signatory is not essential to

the legitimacy of their agreement, and argued that the Commission should approve it as being in the "public interest." During the argument, counsel for FPL again urged the Commission to hold an expedited and abbreviated evidentiary hearing on the components of the purported settlement agreement that were not within the scope of FPL's March 19, 2012 petition. Ultimately, the Commissioners voted unanimously to instruct the Staff to place on hold the preparation of the Staff's written recommendation on the many individual issues that had been identified in the Prehearing Order, litigated before the Commission, and briefed by the parties. The Commissioners voted to schedule an expedited evidentiary hearing on the aspects of the purported settlement agreement that are not within the scope of the original petition, and authorized the Chairman to establish procedural dates for the evidentiary hearing. The Commissioners asked FPL if it would waive its right to place the tariffs that accompanied its March 19, 2012 petition into effect in January 2013[6] pending completion of additional proceedings on the purported settlement agreement. FPL declined to do so.

[6] In FPL's last rate case, Commission Docket No. 080677-EI, the Commission approved a settlement agreement among FPL and the other parties to the case that maintains existing rates through December 31, 2012. The agreed expiration date of the settlement supersedes the statutory eight-month period that ordinarily would apply to FPL's March 19, 2012 petition as the earliest date on which FPL could implement the proposed tariffs that accompanied its March 19, 2012 petition.

(Appendix, Item 14; TR 5130-5131) OPC is attaching the transcript of the oral argument[7] on the purported settlement agreement that the Commission conducted on September 27, 2012 as Item 14 of the Appendix to this Petition.

27. On October 3, 2012, the Chairman issued Order No. PSC-12-0529-PCO-EI, in which he identified new supplemental issues (consisting of several components of the purported settlement agreement that were not within the scope of FPL's March 19, 2012 request) for an evidentiary hearing now scheduled for November 19-21, 2012. This order also established October 12, 2012 as the deadline for FPL's testimony; November 2, 2012 as the testimony deadline for OPC and other intervenors[8]; and November 8, 2012 as the due date for rebuttal testimony. The order requires discovery to be completed by November 14, 2012. Post-hearing briefs are due on November

[7] Included in the transcript are the FPL and Commission briefs filed in this Court in *South Florida Hospital and Healthcare Association v. Jaber,* 887 So.2d 1210 (Fla. 2004). OPC distributed the briefs during oral argument held by the Commission on September 27, 2012. OPC is including pertinent pages from FPL's brief in the Appendix.

[8] The order requiring intervenors to file testimony on November 2, 2012 made no distinction between those intervenors who are signatories and those who oppose the purported settlement agreement. Apparently recognizing the issue of the alignment of interests, FIPUG, SFHHA, and FEA filed testimony on October 12, 2012.

30, 2012, or five days following the Thanksgiving weekend. OPC is attaching a copy of this order as Item 15 of the Appendix to this Petition.

NATURE OF THE RELIEF REQUESTED

OPC requests the Court to require the Commission to demonstrate its authority to entertain a purported settlement agreement that: (1) is actively opposed by OPC, the statutory representative of all the petitioning utility's customers, whose intervention and participation this Court has recognized to have been given special status by the Florida Legislature, and (2) constitutes a new and vastly different request to increase base rates that is not compliant with the statutory requirements and Commission rules that govern new requests by regulated utilities to increase their rates. Ultimately, OPC requests the Court to issue a writ of quo warranto prohibiting the Commission from considering or acting on the purported settlement agreement. Alternatively, OPC requests the Court to exercise its jurisdiction under the "all writs" provision of Article V, Section 3(b)(7) of the Constitution of the State of Florida to prohibit the Commission from further considering the purported settlement agreement.

ARGUMENT SUPPORTING THE ISSUANCE OF A WRIT

28. ***The purported settlement agreement, which was executed on behalf of only an extremely small number of FPL's 4.6 million customers, is invalid in view of OPC's non-participation and active opposition to it.*** In the case

of *Citizens v. Mayo,* 333 So.2d 1 (Fla. 1976) (hereinafter *Citizens v. Mayo*), this Court discussed the significance of OPC's participation in a case in which it has intervened. The *Citizens v. Mayo* decision grew out of an appeal of one of the first rate cases filed pursuant to (then) Section 366.06(4), F.S. (the provision known as the "file-and-suspend" law). The Florida Legislature enacted this provision in 1974 to streamline the ratemaking process and reduce regulatory lag. (It created OPC in the same bill. See Chapter 74-195, Laws of Florida). Subsequently, Gulf Power Company submitted a petition for rate increase to the Commission that invoked the new statutory provision and requested an interim increase. The Commission scheduled a hearing on the request for an interim increase, but established parameters for the hearing that denied OPC the ability to cross-examine witnesses or present testimony. OPC appealed the Commission's action. On review, this Court said:

> Whatever public format the Commission chooses to provide, however, special conditions pertain in cases where public counsel has intervened. *This is a consequence of the statutory nexus between the file and suspend procedures and the role prescribed for public counsel in rate regulation.* Public counsel was authorized to represent the citizens of the State of Florida in rate proceedings of this type. *That office was created with the realization that the citizens of the state cannot adequately represent themselves in utility matters, and that the rate-setting function of the Commission is best performed when those who will pay utility rates are represented in an adversary*

> *proceeding by counsel at least as skilled as counsel for the utility company*. The office of public counsel was created by the same enactment which brought the utilities accelerated rate relief. Under these circumstances, the Commission cannot schedule a 'public hearing' and preclude public counsel, the public's advocate, from acting to protect the public's interest. Indeed, where public hearings are scheduled for interim rate increases these procedural requirements may be more important than they are for permanent rate increases, since the need for special expertise in rate matters is compressed into a shorter period of time.
>
> *Citizens v. Mayo, supra,* at pages 6-7 (emphasis supplied)

29. The decision of this Court in *Citizens v. Mayo* is applicable to the current case pending before the Commission. As in the *Citizens v. Mayo* case, "special conditions pertain" to OPC's intervention in the instant case. Pursuant to the authority conferred by Section 350.0611, F.S., OPC filed notice of its intervention in the docket, identified issues, and supported the positions that it deems to be in the public interest with testimony, cross-examination, and argument. In *Citizens v. Mayo,* this Court ruled that the Commission cannot conduct a hearing without allowing OPC's full participation. It follows logically that, where OPC intervenes as a matter of statutory right and contests the petitioning utility's rate request, the Commission cannot approve a purported settlement agreement in which OPC has not participated and to which OPC actively objects.

30. The applicability of *Citizens v. Mayo* to the instant case goes beyond the obvious analogy between the insufficient hearing of that case and the concept of a proposed settlement agreement that does not include OPC in this case. OPC asserts that the rationale of the *Citizens v. Mayo* case is directly applicable here. In fact, in this case the Commission is poised to repeat the mistake it made in *Citizens v. Mayo* in a broader and more egregious form, in that it would impact the very statutory framework for the public's representation in all general rate proceedings. In *Citizens v. Mayo,* the Commission scheduled a hearing, but denied OPC's ability to participate meaningfully — thereby thwarting OPC from exercising the role that the Florida Legislature assigned to it. The Commission's consideration of the purported settlement agreement in this case would have a strikingly similar effect, except that here the Commission actually conducted a hearing in which OPC actively participated before pursuing a course that would effectively deprive OPC of a hearing after all. OPC intervened, articulated the positions that it believes to be in the public interest, sponsored expert testimony, cross-examined witnesses, submitted a post-hearing brief, and is entitled to have the Commission adjudicate the merits of OPC's positions as these impact the level of FPL's rates and authorized rate of return. Having taken evidence during a two-week period, including the evidence of OPC's

seven expert witnesses, the Commission is now considering the possibility of discarding the hearing process in which OPC participated and substituting a purported settlement agreement that OPC vigorously opposes.[9]

31. ***Approval of the purported settlement agreement would effectively eviscerate the statute that created OPC, as that statute has been interpreted by this Court in Citizens v. Mayo.*** In *Citizens v. Mayo,* this Court said that "special conditions pertain" when OPC intervenes in a Commission docket. The essential thrust of the purported settlement agreement in this case, and of the arguments that FPL and other signatories have advanced (explicitly and implicitly) in support of it, is that special conditions do *not* pertain when OPC intervenes in a Commission docket. (Appendix, Item 14; TR 5056) In FPL's (very recent) view, OPC is a party whose opposition to a proposed settlement and whose demands that the Commission rule on the merits of specific issues that OPC raised and litigated in the proceedings can be ignored by the Commission. If the Commission were to approve the

[9]During the oral argument on the purported settlement agreement, the signatories told the Commission that all the Commission has to do is decide whether, in its judgment, the purported agreement is in the public interest. (Appendix, Item 14; TR 5051, 5057-5065, 5070) Thus, the signatories would have the Commission override the burden of proof standard that governs the adjudication of the nearly 200 substantive issues that were addressed by testimony, exhibits and argument in the absence of a legitimate settlement agreement.

purported settlement agreement over OPC's active opposition, it would necessarily signal that it regards OPC's objection to *any* proposed settlement in *any* docket as being of no consequence. The effect would be to marginalize OPC's participation, not only in the instant case, but in all future proceedings in which it intervenes, as the petitioning utility could bypass OPC's opposition through the expedient of offering a revenue concession (or some other inducement) to a willing intervenor (and shifting that revenue responsibility to others). It is hard to imagine a more radical departure from the holding by this Court in *Citizens v. Mayo, supra,* or one that would more directly undermine the general ratemaking procedure established by statute and Commission rule.

32. In response to OPC's opposition to the purported settlement agreement, FPL and the other signatories to the purported settlement agreement have cited the case of *South Florida Hospital and Healthcare Association v. Jaber,* 887 So.2d 1210 (Fla. 2004) (hereinafter "*Jaber*"). They are mistaken. This case supports OPC's position, not the signatories' position.

33. The *Jaber* case involved SFHHA's appeal of a Commission order approving a settlement agreement in a Commission docket over SFHHA's objection. In the instant case, the signatories told the Commission that *Jaber* supports their position that OPC's signature on the purported settlement agreement is

unnecessary, because in *Jaber* this Court upheld an order that approved a settlement among fewer than all of the parties to that case. The support that the signatories see in that case is superficial and ephemeral. It vanishes upon a closer examination of the circumstances of the case. Unlike the instant Commission proceeding, the docket that was the subject of the *Jaber* decision was a limited proceeding concerning alleged overearnings that was initiated by the Commission, not by a petitioning utility. As the Commission initiated the case, it controlled the proceeding, and was in a position to proceed with or discontinue the docket that it began on its own motion. In addition, unlike the instant Commission proceeding, the settlement agreement that the Commission entertained and approved in the docket that led to the *Jaber* decision involved a significant rate *decrease,* not a rate increase. Said another way, the participating parties did not impose a rate increase on the non-participating party. However, the most critical distinction is that OPC was a signatory to the agreement that the Commission approved in the case that SFHHA appealed in *Jaber,* but OPC actively opposes the purported settlement that the signatories put forward, and that the Commission is on a path to consider, in the case now pending before the Commission.

34. The language in *Citizens v. Mayo* became an important topic in the briefs of

the parties to *Jaber*. As OPC pointed out to the Commission during the oral argument that the Commission conducted on September 27, 2012, FPL, who in the instant case contends that OPC's participation in the purported settlement agreement is unnecessary, relied heavily on OPC's participation in the settlement agreement that was the subject of the *Jaber* appeal to urge its validity. In its brief before this Court in the *Jaber* case, FPL quoted the above language of the *Citizens v. Mayo* case, then stated:

> Here, the shoe is on the other foot. Public Counsel is not only not opposed to the Stipulation, he was actively involved in negotiating the Stipulation and supports it enthusiastically. *The "special conditions" applicable to Public Counsel make his participation in the Stipulation vitally important* and, by the same token, make the FPSC's decision to conclude its rate review by approving the Stipulation without holding a hearing especially appropriate.
>
> (Appendix, Item 14; TR 5083-5084); FPL brief in *Jaber*, at page 18) (emphasis provided)

35. FPL and the signatories cited other Commission orders for the proposition that OPC's participation is not essential to the legitimacy of the purported agreement. None of these orders support the signatories' argument. In each of those cases, OPC either did not intervene in the case or OPC raised no objection to the proposed stipulation. In a "position statement" that they filed with the Commission shortly before the date of oral argument on the signatories' motion for approval of the purported settlement agreement, the

signatories represented to the Commission that in two of its prior decisions it had approved "settlements" without OPC's participation. The two orders do not support the signatories' premise, because the two cases differ fundamentally from the facts of the instant case. The Commission has long had a practice of processing partial, issue-specific stipulations to which some of the parties take "no position" – signifying that they are neither for nor against the proposed resolution. Unlike the facts of this case, OPC did not object to or oppose the partial stipulations that were presented to the Commission in the cases that FPL cited. For example, FPL pointed the Commission to Order No. PSC-99-1794-FOF-WS, Docket No. 950495-WS, *In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc* (F.P.S.C, Sept. 14, 1999). That order ruled on a revised settlement offer of the First District Court of Appeal's remand of a portion of a complicated multi-system rate case. The Commission's order expressly notes on Page 11 that the "OPC represented that it is neither for nor against, our approval of the Modified Offer of Settlement of this case." FPL also cited, in support of its purported settlement, Order No. PSC-12-0179-FOF-EI, Docket No. 110138-EI, *In re: Petition for increase in rates by Gulf Power Company* (F.P.S.C., April 3, 2012). Much like the *Southern States* case, in the *Gulf Power* case OPC

neither opposed nor supported a very narrow rate structure stipulation that involved a handful of issues out of dozens that had been identified during the case.[10] The *Gulf Power* circumstance was hardly a "settlement" of the entire case and, unlike this case, OPC did not object to or oppose the limited stipulation that the *Gulf Power* case involved.

36. ***The purported settlement is effectively a new petition.*** The purported settlement agreement includes, among other things, provisions for significant, automatic increases in base rates that would coincide with the in-service dates of generating units in 2014 and 2016. FPL did not request these 2014 and 2016 rate increases in its March 19, 2012 petition; nor were they addressed in FPL's March 19, 2012 MFRs. The petition, MFRs, testimony, and exhibits were limited to FPL's request for an increase to become effective in January 2013 and a "step increase" to be added when its Cape Canaveral generating project comes on line in mid-2013.[11] Such a new

[10] At page 118 of the order in the *Gulf Power* case, the Commission noted that the stipulated resolution was pursuant to a "Motion for Approval of Partial Settlement Agreements." The plural in the word "Agreements" is significant because OPC was a party to a companion revenue requirement stipulation and neither joined in nor opposed the separate stipulation regarding the subject of cost of service allocation methodology.

[11] FPL styles the unit-related increases as "generation base rate adjustments." FPL proposed a similar mechanism *in the petition* with which it initiated its last rate case, Docket No. 080677-EI. OPC opposed the mechanism with testimony and

request, once properly accompanied and supported by the required MFRs and proposed tariffs, triggers statutorily mandated review periods (eight months prior to the time the utility can implement the proposed rates subject to refund; twelve months within which to make a final decision). Section 366.06(3), F.S. Yet, the Commission has indicated its intent to treat the proposed 2014 and 2016 rate increases as "supplemental issues" in the existing rate case docket, for the purpose of considering the purported settlement agreement, despite the fact that they appeared for the first time 5 months after FPL filed its March 19, 2012 petition and 3 business days before the evidentiary hearing began on the March 19, 2012 petition. Given that the purported settlement agreement was signed by 3 parties representing substantially fewer than 1 percent of FPL's customers, the veneer provided

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arguments in that docket. Noting that FPL placed several power plants into commercial service without requiring an increase in rates in the past, the Commission rejected the mechanism in FPL's last rate case. Referring specifically to the file-and-suspend statute and the MFR requirements of Rule 25-6.043, F.A.C., the Commission said that the "existing ratemaking procedure provided by Florida Statutes and our rules provides for a more rigorous and thorough review of the costs and earnings associated with new generating units. . . .These procedures have been sufficient in the past for FPL and other regulated utilities wishing to recover capital expenditures when a new generating facility begins commercial service." See Order No. PSC-10-0153-FOF-EI, at pages 13-16. In its recent effort to tee up the subject anew, FPL waited until three business days prior to the hearing on its March 19, 2012 petition before seeking to inject the significant subject of "generation base rate adjustments" that would occur beyond the test year into the proceeding on its pending petition.

by the "party" signatures is too thin to disguise the document's true nature as a request by FPL for a new base rate increase.

37. The proposed, unit-related rate increases within the purported settlement agreement, as well as the other provisions that exceed the scope of FPL's March 19, 2012 petition and would affect rates, are governed by Section 366.06(1), F.S., and Rules 25-6.140 and 25-6.043, F.A.C. Section 366.06(1), F.S., provides that, "All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service." The "rules and regulations prescribed" for petitions seeking general base rate increases include Commission Rule 25-6.140, F.A.C., Test Year Notification, and Rule 25-6.043, F.A.C., Investor-Owned Electric Utility Minimum Filing Requirements. The Motion for Approval of the purported settlement agreement is effectively a petition for changes in FPL's general base rates. However, FPL has failed to file a Test Year Notification letter as required by Rule 25-6.140, F.A.C., and has not submitted any Minimum Filing Requirements, testimony, or exhibits purporting to show that FPL would *need* a base rate increase in either 2014 or 2016. If and when FPL were to follow those requirements, the

proceeding that the Commission would conduct on the "new petition" would be governed by Chapters 366 and 120, F.S. This would include rights of full discovery by all parties; hearings required by Section 366.06(2), F.S.; the right to present evidence and conduct cross-examination; the right to file proposed findings of fact; and all other rights conferred by Chapter 120, F.S., with meaningful times allowed for all such activities. In lieu of following the applicable statutes and rules, and with apparent disregard for the significance of the hundreds of millions of dollars in proposed additional rate increases and other major issues that the purported settlement presents, the Commission instead has announced its intent to receive and consider evidence on the elements of the purported settlement agreement that were not part of FPL's March 19, 2012 petition. The Commission's Third Order Revising the Order Establishing Procedure, dated October 3, 2012, suggests that the Commission is aware that it is not in a posture to consider the purported settlement, but believes that it can substitute a hasty shortcut for compliance with the requirements of statutes and rules discussed above.[12]

[12] During oral argument on SFHHA's oral motion to reconsider the Commission's decision to deny an evidentiary hearing on the purported settlement agreement, counsel for FPL suggested that the Commission "take a little evidence" with which to defend against a claim of a "procedural infirmity" that could "hold hostage" the purported settlement agreement through judicial review. (Appendix, Item 7; TR 4604) FPL's suggestion that the Commission "take a little evidence" on its

As the Commission's intended course does not satisfy the essential requirements of law, the Commission is without authority to approve the purported settlement agreement.

38. ***Quo warranto is an appropriate remedy.*** In the case of *Florida House of Representatives v. Crist, supra,* the Governor had entered into a compact with the Seminole Tribe of Florida that purported to allow forms of gambling prohibited by Florida Statutes. The House of Representatives petitioned this Court to issue a writ of quo warranto to the Governor. The Court said, "We conclude that the Governor's execution of a compact authorizing types of gaming that are prohibited under Florida law violates the separation of powers. . .we hold that the Governor lacked authority to bind the State to a compact that violates Florida law as this compact does." Similarly, in the instant case the Commission is conducting proceedings on a purported, but facially invalid, settlement agreement that is violative of state law. The Commission is without authority to do so. In *Whiley v. Scott, supra,* this Court determined that the issuance of a writ for quo warranto is appropriate where the functions of government would be adversely affected

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initiatives to raise customers' rates offers a stark contrast to the Commission's description of the detailed and rigorous review contemplated by statute and its rules in FPL's last rate case. See footnote 9 above.

absent an immediate determination by the Court. Here, the Commission has indicated its intent to not only entertain a facially invalid settlement agreement, but to conduct an expedited proceeding that bypasses the essential requirements of law. Moreover, its purpose is to adhere to a timeline that is related — not to the new time frames that would be appropriate to the new subjects of the purported settlement agreement — but to the March 19, 2012 petition that does not encompass major, substantive provisions of the purported settlement agreement.[13] OPC submits that the Commission's actions to consider the purported settlement agreement affect the functioning of the regulatory body adversely, to the detriment of FPL's customers. More broadly, the Commission's intended course threatens to rend the fabric of Florida's regulatory scheme. The "government" (FPSC) should "function" to apply and follow pronouncements of this Court, and to

[13] Instead of informing FPL that its purported settlement agreement is effectively a new request that triggers filing requirements and, when complete, will initiate a new review period, the Commission asked FPL whether it is willing to waive the review period associated with its March 19, 2012 petition and forgo placing those proposed tariffs into effect. FPL declined. The time frames of the Commission's Third Order Revising Order Establishing Procedure clearly are an attempt to conform its proceeding on "supplemental issues" of the purported settlement agreement as closely as possible to the time frame applicable to FPL's March 19, 2012 petition, even though FPL submitted the purported settlement agreement on August 15, 2012, only 3 business days before the beginning of the evidentiary hearing on the original petition.

require petitioning monopoly utilities to comply with requirements governing proposed rate increases, not brush aside the customers' statutory representative and ignore those requirements in order to accommodate the utility's wishes in quick time. Just as a writ of quo warranto was available to prevent the Governor from suspending agency rulemaking without authority (*Whiley v. Scott, supra*), it is appropriate here to prevent the Commission from bypassing the requirements of its own rules.

Alternatively, the Court should exercise its jurisdiction under Article V, Section (3)(b)(7) of the Constitution of the State of Florida, as preventing the Commission from departing the essential requirements of law would aid the Court's complete exercise of its exclusive jurisdiction to review all actions that relate to electric rates. In the absence of a legitimate settlement that includes OPC, on review the Court would examine the record and the Commission's resolutions of disputed facts to assess whether the Commission's factual determinations are based on competent, substantial evidence and whether its procedure met the essential requirements of law. *W. Fla. Elec. Coop. Ass'n v. Jacobs,* 887 So. 2d 1200, 1204 (Fla. 2004). The signatories are attempting to displace that role by urging an amorphous "public interest" standard on the Commission. (Appendix, Item 14; TR 5051, 5057-5065, 5070) The issuance of a constitutional writ pursuant to

the "all writs" provision would aid the complete exercise of the Court's jurisdiction to review any actions relating to electric rates. Article V, Section 3(b)(2) of the Constitution of the State of Florida; Sections 350.128(1) and 366.10, F.S.

39. ***OPC has no adequate remedy at law.*** Waiting until the instant situation can be reviewed on appeal of a final order in this matter would not provide OPC an adequate remedy at law. The very act of the Commission in entertaining a stipulation submitted by FPL and entered into by only a minuscule fraction of FPL's customers, in the absence of OPC's signature or support, creates an unacceptable amount of uncertainty regarding OPC's role in any multi-party litigation before the Commission. This untenable situation creates a very real and immediate impairment to the expectations of the Citizens whom OPC represents regarding OPC's ongoing representation of customers in any similar case before the Commission. Accordingly, the issue should not wait until appellate review of any final order that might be issued after additional months. The Public Counsel's special, statutory role in representing all customers in all cases before the Commission in which it intervenes – seen by this Court as an essential corollary to the file-and-suspend law – cannot be effectuated without prompt resolution by the issuance of the requested writ(s).

WHEREFORE, the Florida Office of Public Counsel respectfully asks the Court to require the Florida Public Service Commission to show cause why it has authority to conduct proceedings on or in any way consider the purported settlement agreement, and thereafter issue its writ prohibiting further consideration of the purported settlement agreement.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **OFFICE OF PUBLIC COUNSEL'S PETITION FOR WRIT OF QUO WARRANTO OR, IN THE ALTERNATIVE, CONSTITUTIONAL WRIT UNDER THE "ALL WRITS" PROVISION OF THE CONSTITUTION OF THE STATE OF FLORIDA** has been furnished by U.S. Mail on this 17th day of October, 2012, to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.100(l), Florida Rules of Appellate Procedure, that OFFICE OF PUBLIC COUNSEL'S PETITION FOR WRIT OF QUO WARRANTO OR, IN THE ALTERNATIVE, CONSTITUTIONAL WRIT UNDER THE "ALL WRITS" PROVISION OF THE CONSTITUTION OF THE STATE OF FLORIDA was prepared using a Times New Roman 14-point font.

Joseph A. McGlothlin
Associate Public Counsel

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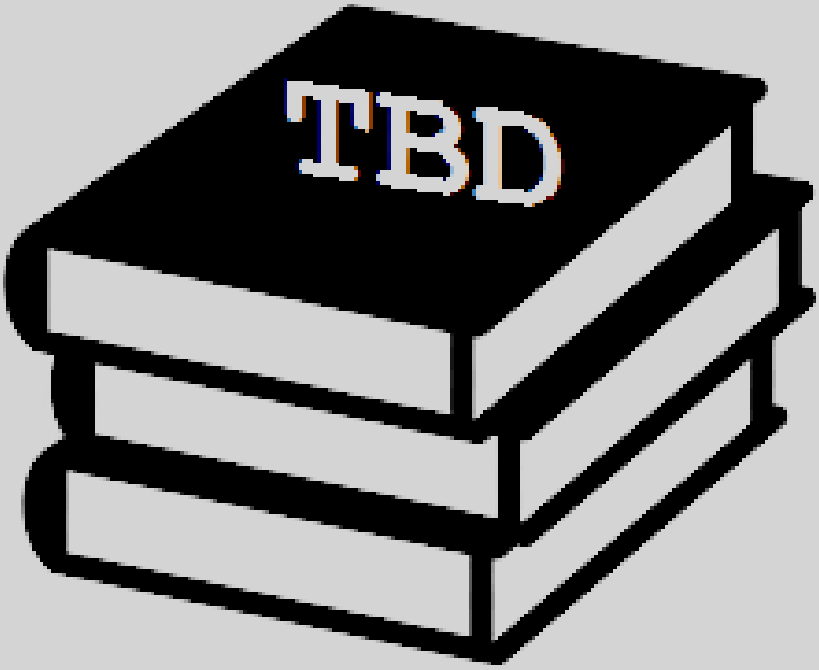

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