IN THE SUPREME COURT OF FLORIDA

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

CASE NO.: SC16-141
LT Number: 150001-EI

v.

ART GRAHAM, ETC., ET AL.,

Appellees.
_____/

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND REFERENCES

In this Brief, the Appellant Citizens of the State of Florida, through the Office of Public Counsel, will be referred to as "OPC." The Appellee Florida Public Service Commission will be referred to as "the Commission." Appellee Florida Public Utilities Company will be referred to as "FPUC" or "the Company." Florida Power & Light Company will be referred to as "FPL." Jacksonville Electric Authority will be referred to as "JEA." The final order on review, In Re Fuel and Purchased Power Cost Recovery Clause, 2015 Fla. PUC LEXIS 426 (2015), Commission Order No. PSC-15-0586-FOF-EI, will be referred to as "Final Order No. PSC-15-0586-FOF-EI" or "the Final Order." The 2015 Fuel and Purchased Power Cost Recovery Clause proceeding will be referred to as "the Fuel Clause." (The Fuel Clause is interchangeably referenced in the Final Order as the "fuel clause," the "fuel adjustment clause," and the "fuel cost recovery clause.")

The following symbols will be used: (B. [Page #]) – OPC's Initial Brief; (OPC APP. [Page #]) – Appendix to OPC's Initial Brief; (R. [Vol. #]: [Page #]) – Record on Appeal; (T. [Vol. #]: [Page #, Line #]) – Transcript; and (EXH. [#]) – Exhibit.

All references to the Florida Statutes are to the Florida Statutes (2015).

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

This case is a direct appeal filed by OPC from a portion of Final Order No. PSC-15-0586-FOF-EI. (R. 5:840-884; OPC APP. 1-40) OPC appeals only that portion of the Final Order by which the Commission approved FPUC's request to recover, through the Fuel Clause, $107,333 in projected 2016 depreciation expense, taxes other than income taxes, and return on investment associated with the interconnection of an FPUC transmission line with an FPL transmission line and the upgrading of an FPL substation to accommodate the interconnection ("interconnection costs" or "interconnection costs at issue"). (B. 3; R. 1:141-142; T. 3:532; EXH. 34, Page 9 of 10; R. 5:854-860)

OPC is responsible for providing legal representation for the citizens of the state in Commission proceedings pursuant to section 350.0611, Florida Statutes. OPC noticed its intent to remain a party to the 2015 Fuel Clause proceedings on January 6, 2015, (R. 1:110-111) pursuant to Order No. PSC-15-0001-PCO-EI, establishing a 2015 docket number for the Commission's active and continuing Fuel Clause docket. In Re Fuel and Purchased Power Cost Recovery Clause, 2015 Fla. PUC LEXIS 2 (2015). (R. 1:85-86)

The Commission's jurisdiction below is pursuant to sections 366.04, 366.05, and 366.06, Florida Statutes. Among other things, section 366.04(1) states that "the

[C]omission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service. . . ," section 366.05(1)(a) states that "[i]n the exercise of such jurisdiction, the [C]omission shall have power to prescribe fair and reasonable rates and charges. . . ," and section 366.06(1) authorizes the Commission "to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service." The Commission's jurisdiction to issue the Final Order is not at issue in the instant case.

This Court has mandatory jurisdiction because the Final Order relates to the rates of a public utility providing electric service. Art. V, § 3(b)(2), Fla. Const. See also §§ 350.128(1) and 366.10, Fla. Stat.

II. STATEMENT OF THE FACTS

2014 Settlement

FPUC's last rate case was resolved by way of a 2014 stipulation and settlement agreement ("2014 Settlement") entered into between FPUC and OPC, certain language of which is at issue on appeal. (B. 3; OPC APP. 57-105) OPC takes issue with the second sentence of Paragraph VI of the 2014 Settlement, which it refers to as the "Base Rate Freeze Anti-Circumvention Provision" or "BRFA." (B. 2, 4-5; OPC APP. 60)

The whole of Paragraph VI, entitled "Other Cost Recovery," states as follows:

> Nothing in this agreement shall preclude the Company from requesting the Commission to approve the recovery of costs that are: (a) of a type which traditionally and historically would be, have been, or are presently recovered through cost recovery clauses or surcharges, or (b) incremental costs not currently recovered in base rates which the Legislature or Commission determines are clause recoverable subsequent to the approval of this settlement. Except as provided in this Agreement, it is the intent of the Parties in this Paragraph VI that FPUC not be allowed to recover through cost recovery clauses increases in the magnitude of costs, incurred after implementation of the new base rates, of types or categories (including but not limited to, for example, investment in and maintenance of transmission assets) that have been traditionally and historically recovered through FPUC's base rates.

(OPC APP. 60)

By Order No. PSC-14-0517-S-EI ("Settlement Order"), a final order rendered September 29, 2014, the Commission approved the 2014 Settlement and incorporated it in the Settlement Order by reference upon finding it to be in the public interest. In Re Application for Rate Increase, 2014 Fla. PUC LEXIS 391 (2014). (OPC APP. 41-44)

In addition to including the Settlement Order and the 2014 Settlement in the Appendix attached to OPC's Initial Brief, OPC also includes a joint motion for approval of the 2014 Settlement. (OPC APP. 45-55) That motion was not incorporated in the Settlement Order and is not in the record on appeal.

Commission Order Establishing Procedure

The Commission issued Order No. PSC-15-0096-PCO-EI on February 10, 2015, establishing procedure for the 2015 Fuel Clause hearing ("Order Establishing Procedure"). In Re Fuel and Purchased Power Cost Recovery Clause, 2015 Fla. PUC LEXIS 59 (2015). (R. 1:114-129) By that order, the Commission: 1) required all parties to file their direct and rebuttal testimony and exhibits that they intended to sponsor by a date certain in advance of the full evidentiary hearing to be held in the matter; 2) allowed a period of time for discovery; 3) required all parties to file prehearing statements setting forth, among other things, "[a] statement of each question of fact, question of law, and policy question that the party considers at issue, along with the party's position on each issue;" 4) scheduled a prehearing conference; and 5) allowed for the filing of post-hearing briefs. (R. 1:114-129)

FPUC's Petition

The direct testimony and exhibits from the utilities, including FPUC, regarding projected costs for the period January through December, 2016, for the Fuel Clause hearing were due to be filed on September 1, 2015. (R. 1:123) In accordance with the Order Establishing Procedure, on September 1, 2015, FPUC filed with the Commission a petition for approval of its projected fuel adjustment costs and purchased power cost recovery factors for the period January through

December, 2016, along with the prefiled direct testimony of two witnesses, Curtis D. Young and Mark Cutshaw, in support of its petition. (R. 1:141-177)

Among other things, FPUC requested cost recovery for the interconnection costs at issue, stating that it was "aggressively pursuing one project in particular which would involve a new interconnection with FPL in [FPUC's] Northeast Division." (R. 1:142) FPUC further stated that

> [a]s explained by witness Cutshaw, this project will result in the Company being better situated in terms of negotiating a new power purchase agreement for the Northeast Division to follow the current agreement, which terminates at the end of 2017. The costs, as well as the projected savings . . . associated with that project, are addressed in the testimony of Mr. Young.

(R. 1:142)

Intervenor testimony and exhibits, if any, including from OPC, were due to be filed on September 23, 2015. (R. 1:123) OPC did not file any testimony concerning FPUC's request for recovery of the interconnection costs.

Fuel Clause Prehearing

After the filing of direct and rebuttal testimony and exhibits of all parties and the subsequent filing of prehearing statements, (R. 1:123) the Commission conducted a prehearing conference on October 19, 2015, to identify the issues of the case (R. 2:360-3:402) Thereafter, on October 29, 2015, the Commission issued Order No. PSC-15-0512-PHO-EI ("Prehearing Order"). In Re Fuel and Purchased Power Cost Recovery Clause, 2015 Fla. PUC LEXIS 395 (2015). (R. 3:420-510)

FPUC's request for recovery of the interconnection costs are included in the Prehearing Order as Issue 4A, which reads as follows: "Should FPUC be permitted to recover the cost (depreciation expense, taxes, and return on investment) of building an interconnection between FPL's substation and FPUC's Northeast Division through the fuel recovery clause?" (R. 3:451-452)

OPC stated its position on this issue as follows:

> Recovery of costs associated with transmission lines are not fossil fuel-related costs. Transmission costs are traditionally and historically recovered through base rates, not the fuel clause. Additionally, FPUC's request to recover these costs in the fuel clause violates the Company's rate case stipulation pursuant to Order PSC-14-0517-S-EI. Further, FPUC's argument that the transmission costs should be recovered as 2016 fuel costs should be rejected as the opportunity for potential "fuel savings" will not occur in 2016 because the current Purchase Power Agreement (PPA) does not expire until 2017 and this plant will not go into service until the end of 2017.

(R. 2:235, 3:452)

Fuel Clause Hearing

The Commission conducted its 2015 full evidentiary Fuel Clause hearing on November 2-3, 2015. (T. 1:1-6:1073) At the hearing, the prefiled direct and rebuttal testimony of all witnesses was inserted into the hearing record as though read, including the direct testimony of FPUC witnesses Young and Cutshaw concerning the interconnection costs at issue. (T. 3:516, Line 10-518, Line 5; T. 3:532, Line 14-534, Line 5; T. 4:584, Line 6-601, Line 6)

Cross-examination of all witnesses was conducted live at the hearing, and witnesses Young and Cutshaw were cross-examined by OPC, among other parties to the case. (T. 3:544, Line 14-575, Line 17; T. 4:602, Line 6-637, Line 19) Redirect examination was also conducted live at the hearing. (T. 3:575, Line 23-577, Line 13)

The following uncontroverted evidence of record is relevant to the issue on appeal:

1) "[T]he Fuel rates to FPU[C] customers began to increase significantly in 2007. This was based on the changes in [FPUC's] purchased power contracts for power, and [FPUC] heard loud and clear from [its] customers that something needed to be done about the increases." (T. 4:598, Lines 14-19);

2) "[The interconnection] costs will directly result in fuel savings to [FPUC's] customers, and will increase the reliability of electricity to [FPUC's] Northeast Division." (T. 3:532, Lines 17-19);

3) FPL's transmission system "is located in very close proximity to the existing FPUC transmission system." (T. 4:594, Lines 8-11) "Not only will this additional interconnection provide for more competitive wholesale power options, this will provide much needed redundancy to the power supply on Amelia Island and have a positive impact on the overall system reliability." (T. 4:594, Lines 11-15);

4) “These [interconnection] costs have not been recovered through base rates, and will directly benefit the customers through future reductions to [FPUC’s] fuel costs.” (T. 3:532, Lines 19-21); and

5) “This is a significant project for FPUC, one that the Company has embarked upon specifically because [FPUC] anticipate[s] it will directly improve [FPUC’s] ability to negotiate increased savings for [its] customers in [its] next power purchase agreements.” (T. 4:593, Lines 16-19)

In sum, the interconnection project at issue is a good project. (T. 3:563, Lines 12-20)

Post-Hearing Briefs

Post-hearing briefs were filed on November 13, 2015. (R. 3:539-4:677) OPC and FPUC filed their post-hearing briefs on Issue 4A, the issue that is relevant to this appeal, among other issues. (R. 4:593-5:624; R. 5:625-650)

Agenda Conference

The Commission staff filed its recommendation on the issues of the case on November 18, 2015. (R. 4:679-728) The staff recommended that FPUC not be permitted to recover the interconnection costs through the Fuel Clause. (R. 4:704-708) The staff based its recommendation on its interpretation of the language of Paragraph VI of the 2014 Settlement at issue on appeal. (R. 4:706-708)

The Commission ruled upon the merits of the case below at its December 3, 2015 agenda conference. (R. 4:734-775) After a brief discussion by two Commissioners regarding the subject of this appeal, the Commission rejected its staff's recommendation and voted to approve recovery of the interconnection costs through the Fuel Clause. (R. 4:768-771)

Final Order

The Commission's ruling is memorialized in the Final Order on review. (R. 4:787-5:826; OPC APP. 1-40) In the Final Order, the Commission noted that OPC, among other parties to the case below, took the position that the 2014 Settlement prohibits the recovery of the interconnection costs at issue through the Fuel Clause. (R. 4:797-798; OPC APP. 11-12) The Commission approved recovery of the interconnection costs through the Fuel Clause upon finding that all the parties agreed that the proposed interconnection will result in improved system reliability and that it will offer wholesale power purchase options not currently available to FPUC. (R. 4:801; OPC APP. 15)

SUMMARY OF ARGUMENT

OPC failed to meet its burden of moving forward with the evidence in this case. The record is devoid of any evidence showing that recovery of the interconnection costs through the Fuel Clause would violate the 2014 Settlement. There is no record basis for the Commission to have made such a finding in order

to have ruled in OPC's favor. Moreover, the issue OPC raises on appeal was not put squarely before the Commission below. Issue 4A identified for the Commission's resolution was whether the Commission should approve recovery of the interconnection costs through the Fuel Clause, not whether recovery of those costs would violate the 2014 Settlement. (R. 3:451-452) OPC did not raise the argument that recovery of the interconnection costs through the Fuel Clause violates the 2014 Settlement until it filed its prehearing statement stating its position on Issue 4A, which was after the deadlines had passed for OPC to file its intervenor testimony and for FPUC to file its case on rebuttal. (R. 1:123)

The 2014 Settlement and the Settlement Order approving it do not establish Commission policy concerning recovery of the interconnection costs through the Fuel Clause, nor does the Final Order deviate from existing Commission policy on the matter. Competent, substantial, uncontroverted record evidence supports that the Fuel Clause is an appropriate cost recovery mechanism for recovery of the interconnection costs based on existing Commission policy established in Order No. 14546, In Re Cost Recovery Methods for Fuel-Related Expenses, 1985 Fla. PUC LEXIS 531 (1985), and its progeny.

Moreover, because competent, substantial, and uncontroverted record evidence shows that FPUC's earned return on equity has fallen below its authorized range of return, FPUC is no longer subject to the base rate freeze

provision contained in the 2014 Settlement, and thus has no need to evade or circumvent it. (OPC APP. 61) Common sense would dictate that because the base rate freeze provision contained in the 2014 Settlement has been lifted by virtue of the fact that FPUC is underearning, the second sentence of Paragraph VI of the 2014 Settlement should not preclude FPUC from instead seeking cost recovery of the interconnection costs at issue the quicker, less costly way, through the Fuel Clause.

In the event this Court disagrees that the 2014 Settlement is inapplicable to the case at bar, the Commission alternatively argues that the Final Order does not violate its terms. Competent, substantial evidence of record shows that the interconnection costs are of the type that traditionally and historically have been recovered through the Fuel Clause, they are incremental in nature, and they were not being recovered in FPUC's base rates at the time the Commission approved the recovery of these costs through the Fuel Clause.

The Final Order should be affirmed because it contains findings of fact and conclusions of law sufficient for judicial review, it is based on competent, substantial record evidence and existing Commission policy, and it comports with the essential requirements of law.

ARGUMENT

I. THE COMPETENT, SUBSTANTIAL EVIDENCE OF RECORD DOES NOT SUPPORT OPC'S POSITION THAT THE FINAL ORDER VIOLATES THE 2014 SETTLEMENT.

Standard of Review

OPC argues that the Final Order violates the 2014 Settlement. The Commission contends that the competent, substantial record evidence does not support such a finding. The standard of review for this point on appeal is as set forth in Southern Alliance for Clean Energy v. Graham, 113 So. 3d 742 (Fla. 2013). In that case, this Court stated that

> [a]s we have repeatedly held:
>
> > [The Public Service] Commission's orders, and concomitant interpretations of statutes and legislative policies that it is charged with enforcing, are entitled to great deference. . . . Similarly, the Commission's factual findings are entitled to a presumption of correctness. . . .
> >
> > To overcome these presumptions, a party challenging an order of the Commission on appeal has the burden of showing a departure from the essential requirements of law and the legislation controlling the issue, or that the findings of the Commission are not supported by competent, substantial evidence. . . . "This Court will approve the commission's findings and conclusions if they are based upon competent, substantial evidence and are not clearly erroneous."

Id. at 752 (citations omitted). Moreover, in noting that the appellant in that case pointed to conflicting evidence of record, the court stated that "we 'will not overturn an order of the PSC because we would have arrived at a different result

had we made the initial decision and we will not re-weigh the evidence. Our task is to determine whether competent substantial evidence supports a PSC order.'" Id. at 753 (citation omitted).

Argument in Response

OPC did not put on a direct case in response to FPUC's petition for recovery of the interconnection costs at issue through the Fuel Clause, or as to why recovery of the interconnection costs would violate the 2014 Settlement. Nor did any other intervening party to the case below. The hearing transcript of record contains FPUC's direct case in support of its petition, cross-examination of FPUC's witnesses by intervening parties and by the Commission staff, and questioning from Commissioners. (T. 3:435, T. 3:516, Line 8-578, Line 11; T. 4:582, T. 4:584, Line 9-638, Line 8)

The record is therefore devoid of any evidence to show that recovery of the interconnection costs through the Fuel Clause violates the 2014 Settlement. There is simply no record basis for the Commission to have made such a finding in order to have ruled in OPC's favor in the case below. In fact, the only reason the 2014 Settlement is in this Court's possession for review is because it was incorporated by reference in the Settlement Order (OPC APP. 43) and appended to OPC's Initial Brief. (OPC APP. 57-105) It was not offered into evidence at the hearing. The joint motion for approval of the 2014 Settlement is also appended to OPC's Initial

Brief. (OPC APP. 45-55) However, that joint motion was not incorporated in the 2014 Settlement Order. See 2014 Fla. PUC LEXIS 391 at *3 (granting joint motion for approval of the 2014 Settlement, and approving the 2014 Settlement and incorporating it therein by reference). (OPC APP. 43) The joint motion was not offered into evidence at the hearing, and it is not in the record on appeal. Therefore, the court should decline to consider it. See, e.g., Diversified Numismatics v. City of Orlando, 949 F. 2d 382, 384 (11th Cir. 1991) (finding that appellants "should not have referenced material not in the record" and declining to consider any non-record evidence or arguments based upon non-record evidence.)

As the petitioning party in the case below, FPUC bore the burden to prove why it should recover the interconnection costs through the Fuel Clause. Florida Power Corp. v. Cresse, 413 So. 2d 1187, 1191 (Fla. 1982) (finding that the burden of proof in a Commission proceeding is always on a utility seeking a rate change). Nevertheless, a shifting of the burden of going forward with the evidence occurred after FPUC filed its case in chief on the matter. See FDOT v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981) (finding that a shifting of the burden of going forward with the evidence may occur during the course of a proceeding, even though the ultimate burden of persuasion does not shift). As set forth in the Order Establishing Procedure, intervenor direct testimony was due to be filed on a date certain after Company direct testimony and before Company rebuttal testimony.

(R. 1:123) That was when the burden shifted to OPC to produce the evidence necessary to make its case, and OPC failed to meet its burden. See J.W.C. Co., 396 So. 2d at 787 (finding that the duty of producing evidence passes from party to party as the case progresses, while the burden of proof rests throughout upon the party asserting the affirmative of the issue).

OPC and all parties had a hand in identifying the Fuel Clause issues in advance of the hearing. After the Company's direct testimony was prefiled in the docket, the Commission staff conducted an informal meeting with the parties "to further refine the issues" of the case. (R. 1:186) The issue OPC raises on appeal was not even put squarely before the Commission. Issue 4A before the Commission was not whether recovery of the interconnection costs violates the 2014 Settlement. Issue 4A identified for the Commission's resolution was whether the Commission should approve recovery of the interconnection costs through the Fuel Clause. (R. 3:451-452) See "Fuel Clause Prehearing" in the Commission's "Statement of the Facts," supra. And the Commission advised that at the Fuel Clause hearing, it would "address those issues listed in this [P]rehearing [O]rder." (R. 3:421)

OPC did not raise the argument that recovery of the interconnection costs through the Fuel Clause violates the 2014 Settlement until it filed its prehearing statement stating its position on Issue 4A, (R. 2:235) which was after the deadline

had passed for FPUC to file its rebuttal testimony. (R. 1:123) Because OPC failed to meet its burden of moving forward with the evidence with respect to the issue on appeal, FPUC did not file rebuttal testimony on the matter. There was simply nothing for FPUC to rebut.

Therefore, had the Commission ruled that the 2014 Settlement precluded recovery of the interconnection costs in the case below, FPUC would have been prejudiced not only because the final order in that event could not have been based on competent, substantial record evidence where there was none, but also because FPUC had no idea that OPC took the position that it did until after the deadline for FPUC to file its case on rebuttal had already passed. (R. 1:123; R. 2:235)

The Final Order should be approved because it is based on the competent, substantial evidence of record and comports with the essential requirements of law.

II. THE FINAL ORDER DOES NOT DEVIATE FROM OFFICIALLY STATED COMMISSION POLICY WHICH OPC ARGUES IS CONTAINED IN THE SETTLEMENT ORDER AND IN THE 2014 SETTLEMENT.

Standard of Review

In Southern Alliance for Clean Energy v. Graham, 113 So. 3d at 752 (Fla. 2013) (citations omitted), this Court stated that "[a]s we have repeatedly held: [the Public Service] Commission's orders, and concomitant interpretations of statutes and legislative policies that it is charged with enforcing, are entitled to great deference." Moreover, "[t]o overcome these presumptions, a party challenging an

order of the Commission on appeal has the burden of showing a departure from the essential requirements of law and the legislation controlling the issue. . . ." Id. (citation omitted).

Public Counsel argues that the Commission departed from the essential requirements of law because it failed to explain why it deviated from its own policy in the Final Order. (B. 15) The standard of review for this point on appeal is whether the Commission's exercise of discretion was "[i]nconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency." § 120.68(7)(e)3., Fla. Stat.

Argument in Response

A. The Settlement Order Does Not Establish Officially Stated Commission Policy Regarding the Interconnection Costs.

OPC asserts that the Settlement Order became "final agency policy" upon expiration of the 30-day appeal period. (B. 6) OPC is incorrect. OPC confuses "final agency action" with "final agency policy." "'Agency action' means the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order." § 120.52(2), Fla. Stat. And

> 'Final order' means a written final decision which results from a proceeding under s. 120.56, s. 120.565, s. 120.569, s. 120.57, s. 120.573, or s. 120.574 which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive, or declaratory in form. A final order includes all materials explicitly adopted in it.

§ 120.52(7), Fla. Stat.

The Settlement Order became final agency action, not "final agency policy." In Re Application for Rate Increase, 2014 Fla. PUC LEXIS 391 (2014) (notifying "any party adversely affected by the Commission's final action in this matter" that they may request reconsideration or judicial review). (OPC APP. 44) In approving the 2014 Settlement, the Commission made findings of fact and conclusions of law, but made no pronouncement of policy regarding the interconnection costs. Upon finding the 2014 Settlement to be in the public interest, the Commission concluded that "when taken as a whole, [the] Settlement [was] in the ratepayers' best interests, [met] the need for reliable electric service and price stability in a balanced manner, and establishe[d] fair just and reasonable rates." 2014 Fla. PUC LEXIS 391 at *1-*2. (OPC APP. 41-42)

The Commission did not adopt Paragraph VI of the 2014 Settlement as a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value. See § 120.53(2)(b), Fla. Stat. (requiring agencies to index "[e]ach final order rendered pursuant to s. 120.57(4) which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value"). Cf. In Re Cost Recovery Methods for Fuel-Related Expenses, 1985 Fla. PUC LEXIS 531 at *9-*10 (Commission Order No. 14546 approving a stipulation

entered into by the parties to the case as to what the Commission's prospective policy should be regarding the recovery of fossil fuel-related costs, and expressly adopting the stipulation as its own policy).

OPC further argues that when the Commission approved the 2014 Settlement, "all matters encompassed therein became final and binding Commission policy." (B. 13, 16) OPC bases this argument on the legal principal that "[a]side from rules, agency orders also contain official agency policy." (B. 13) This argument also lacks merit.

OPC cites to Gessler v. DBPR, 627 So. 2d 501, 503 (Fla. 4th DCA 1993), appeal dismissed, 624 So. 2d 624 (Fla. 1994), and Southern States Utilities v. FPSC, 714 So. 2d 1046 (Fla. 1st DCA 1998), as support for this argument. The Gessler court did not find that all matters encompassed in agency orders become final and binding agency policy. The Gessler court simply noted that

> [b]y requiring agency explanation of any deviation from "an agency rule, an officially stated policy, or a prior agency practice," Section 120.68(12)(b) recognizes there may be "officially stated agency policy" otherwise than in "an agency rule"; and, since all agency action tends under the APA to become either a rule or an order, such other "officially stated agency policy" is necessarily recorded in agency orders.

Gessler v. DBPR, 627 So. 2d at 503, quoting McDonald v. Department of Banking and Finance, 346 So. 2d 569, 582 (Fla. 1st DCA 1977) (emphasis added). And Southern States Utilities is not on point because the Commission has not made a

shift in officially stated policy that it has failed to justify. Southern States Utils. v. FPSC, 714 So. 2d at 1054-57 (requiring the Commission to give a reasonable explanation on remand to justify a change in policy). It does not support OPC's argument that all matters contained in all Commission orders constitute "final and binding Commission policy."

Finally, OPC argues that administrative finality attached to the Settlement Order. (B. 13, 16, 18, 22 fn 8) In so doing, OPC cites to Reedy Creek Utilities v. FPSC, 418 So. 2d 249, 253 (Fla. 1982) (quoting Peoples Gas System v. Mason, 187 So. 2d 335 (Fla. 1966), in finding that the Commission's inherent power to modify its orders is not without limitation, and that "there will be a terminal point in every proceeding at which the parties and the public may rely on [an agency's decision] as being final and dispositive of the rights and issues involved therein."). (B. 13, 16)

The Commission does not dispute that administrative finality has attached to the Settlement Order and that the Commission is obligated to adhere to its terms absent "a significant change of circumstances or a demonstrated public interest." Florida Power & Light Co. v. Beard, 626 So. 2d 660, 662 (Fla. 1993). Nevertheless, the doctrine of administrative finality is inapplicable to whether the Settlement Order establishes officially stated Commission policy. Administrative finality does not somehow transform all matters encompassed in the Settlement

Order into "final and binding Commission policy." The Settlement Order constitutes final agency action, not final agency policy. The Commission could not have deviated from officially stated agency policy where none exists. Therefore, the Final Order should be affirmed because it comports with the essential requirements of law.

B. The 2014 Settlement Does Not Establish Officially Stated Commission Policy Regarding the Interconnection Costs.

OPC repeatedly argues that the second sentence of Paragraph VI of the 2014 Settlement contains Commission policy. (B. 3, 5, 12-14, 16, 25, 26, 28, 30, 31, and 35) OPC is incorrect. Paragraph VI is a pronouncement made by the parties to the Settlement, not by the Commission, which the Commission approved as part of a comprehensive settlement of FPUC's 2014 rate case. (B. 4; OPC APP. 60)

OPC's reliance on Seminole Electric Cooperative v. DEP, 985 So. 2d 615 (Fla. 2008), for the proposition that the Commission made the entire Settlement Order its policy is misplaced. (B. 16) In Seminole Electric Cooperative, DEP was a party to the stipulation at issue in the case. Id. at 620. The court found that "[a]s a general rule, and absent a showing of fraud, misrepresentation or mistake, stipulations are binding on the parties who enter them, including administrative agencies participating in administrative proceedings and the courts." Id. at 621. Unlike in Seminole, the Commission was not a party to the 2014 Settlement. Nor

does the Seminole court make any pronouncement regarding whether the stipulation at issue therein contained agency policy.

Paragraph VI of the 2014 Settlement did not become Commission policy by virtue of the Commission's approval of it. The 2014 Settlement states, in Paragraph XVI., entitled "Commission Approval,"

> The Parties further agree that this Agreement shall have no precedential value in any proceeding before the Commission nor shall any Party assert same. The Parties agree that the terms of this Agreement shall be without prejudice to either Party's ability to assert a different position in future proceedings not involving this Agreement. It is the Parties' desire and intent that the Commission's approval of this Agreement recognizes that no individual term or condition set forth herein represents an opinion or position of either Party when considered in isolation.

(OPC APP. 65) Thus, by its very terms, the 2014 Settlement makes it clear that the parties did not intend for the language of the Settlement to establish Commission policy going forward, but only to affect the individual rights of the signatories to the Settlement as a means to resolve FPUC's 2014 rate case. Moreover, OPC erroneously asks this Court to consider one sentence of Paragraph VI to be officially stated Commission policy, when the 2014 Settlement clearly establishes that "no individual term or condition" thereof even represents the "opinion or position of either party when considered in isolation." (OPC APP. 65)

Neither the Settlement Order nor the 2014 Settlement itself establish officially stated Commission policy regarding the interconnection costs. The

Commission could not have deviated from officially stated agency policy where none exists. Therefore, the Final Order should be affirmed because it comports with the essential requirements of law.

III. COMPETENT, SUBSTANTIAL RECORD EVIDENCE SHOWS THAT THE 2014 SETTLEMENT IS INAPPLICABLE TO THE COMMISSION'S DECISION TO ALLOW FPUC TO RECOVER THE INTERCONNECTION COSTS THROUGH THE FUEL CLAUSE.

Standard of Review

The Commission contends that because competent, substantial record evidence shows that FPUC is underearning, FPUC is no longer subject to the base rate freeze provision contained in the 2014 Settlement, and that therefore FPUC was not precluded from requesting recovery of the interconnection costs under the Commission's existing policy of allowing these types of costs through the Fuel Clause. The standard of review for this point on appeal is as set forth in Southern Alliance for Clean Energy v. Graham, 113 So. 3d at 752. See "Standard of Review," Point I, supra.

In noting that the appellant pointed to conflicting evidence of record, the Southern Alliance for Clean Energy court stated that "we 'will not overturn an order of the PSC because we would have arrived at a different result had we made the initial decision and we will not re-weigh the evidence. Our task is to determine

whether competent substantial evidence supports a PSC order.'" Id. at 753 (citation omitted).

Rate setting is a quasi-legislative function of the Commission. See Chiles v. PSC Nominating Council, 573 So. 2d 829, 832 (Fla. 1991). This Court has consistently recognized the broad legislative grant of authority which sections 366.06(2) and 366.05(1), Florida Statutes, confer upon the Commission to fix fair, just and reasonable rates, "and the considerable license the Commission enjoys as a result of this delegation." Citizens v. PSC, 425 So. 2d 534, 540 (Fla. 1982). "[G]iven the arcane complexities of utility rate-making, the legislature's decision to vest supervision of rates and service exclusively in the [Commission] must be respected." Southern Alliance for Clean Energy, 113 So. 3d at 750 (citation omitted).

Argument in Response

A. Competent, Substantial, Uncontroverted Record Evidence Shows that FPUC Is Underearning.

OPC volunteers that it insisted on the inclusion of the second sentence of Paragraph VI in the 2014 Settlement because of its concern that "there would be a potential for utilities to use the various clause recovery mechanisms to evade the base rate freeze in settlements." (B. 33) There is no evidence in the record to support this statement. Nevertheless, OPC refers to the second sentence of

Paragraph VI as the "Base Rate Freeze Anti-Circumvention Provision" or "BRFA." (B. 2, 4-5; OPC APP. 60)

OPC notes that "[a] key term of the [2014] Settlement was that, absent an unforeseen change in FPUC's profit level – meaning FPUC's earning falling below 9.25% return on common equity ("ROE") – the Company's base rates would remain frozen and not be subject to increase until December 31, 2016." (B. 4; OPC APP. 58, 61) On cross-examination by OPC, Witness Young testified that he agreed that if earnings fall below the authorized range that was approved in the last rate case, the company has the option of petitioning for a base rate increase. (T. 3:560, Lines 11-16) Yet OPC ignores the fact that FPUC's most recent Surveillance Report for the second quarter of 2015 shows that FPUC's achieved rate of return on equity is 4.79%. (T. 3:574, Lines 13-15; EXH. 124) This evidence is uncontroverted. Because FPUC's earned return on equity has fallen below 9.25%, FPUC is no longer subject to the base rate freeze provision contained in the 2014 Settlement (OPC APP. 61) and thus has no need to evade or circumvent it. Therefore, OPC's unsupported concern in this regard is unfounded.

FPUC elected to request recovery of the interconnection costs through the Fuel Clause rather than filing a rate case because Fuel Clause recovery is quicker and less costly than a rate case proceeding, and the project is time sensitive. Witness Young testified that "Without recovery on this investment as requested,

the Company would either have to defer this project and the anticipated benefits, or would have to file a rate proceeding to pursue recovery through base rates, which would inevitably be a lengthy and costly process." (T. 3:533, Lines 12-16) And Witness Cutshaw testified that "the most expeditious way to make this happen, get it into service, provide savings to our customers was to be able to go through the fuel proceeding as we're doing so that that would minimize the length of time until it was in service." (T. 4:613, Lines 3-8)

Moreover, the interconnection project is time sensitive because FPUC's purchased power agreement with JEA will expire on December 31, 2017. Witness Cutshaw testified that "[w]ith the Commission's approval, FPU[C] can proceed with this project so that this valuable interconnection can be placed in service and fully utilized on December 31st, 2017, which is at the end of [FPUC's] existing wholesale power agreement." (T. 4:600, Lines 15-20) When asked how a decision not to approve, build, and place the new transmission line into service would impact FPUC's customers, Witness Cutshaw testified that

> [t]hat decision would result in a possible delay of having any savings. As we discussed, this is a very important project. We want to find a way to make it happen, and our goal at this point is to determine how quickly and most efficiently we can get it into service and then provide those savings to our customers.

(T. 4:629, Lines 4-12) And in response to a discovery request, the Company stated that

> The $107,333 of revenue requirement associated with the FPL interconnect project is appropriately included in the 2016 fuel factors because of the extended lead time needed to complete a project of this size and scope. To provide our customers with the expected benefit of future fuel savings, improved reliability and more fuel options, FPUC must make significant investment in 2016. Without recovery on this investment in this fuel clause, the Company may have to defer the project until such time as it can file a rate proceeding to seek recovery through base rates, which would delay savings for customers and produce additional expense associated with the rate case itself. The other alternative would be for the Company to incur the significant financial burden without rate relief, which would be to the detriment of both ratepayers and shareholders, as it would impair the Company's ability to pursue other potentially beneficial projects.

(EXH. 89)

Common sense would dictate that because the base rate freeze provision contained in the 2014 Settlement has been lifted by virtue of the fact that FPUC is underearning, the second sentence of Paragraph VI of the 2014 Settlement should not preclude FPUC from instead seeking cost recovery of the interconnection costs at issue the quicker, less costly way, through the Fuel Clause.

The Commission contends that Paragraph VI of the 2014 Settlement is inapplicable to the case at bar because FPUC is underearning. (T. 3:574, Lines 13-15; EXH. 124) Therefore, it matters not whether the interconnection costs are of the types or categories that have been traditionally and historically recovered through FPUC's base rates, "including but not limited to, for example, investment

in and maintenance of transmission assets," (OPC APP. 12, 60) so long as they are Fuel Clause recoverable costs in accordance with existing Commission policy.

B. Competent, Substantial Record Evidence Shows that the Interconnection Costs Are Fuel Clause Recoverable Costs in Accordance with Existing Commission Policy Authorizing Cost Recovery of Certain Capital Costs through the "Fuel Clause Exception to Base Rate Recovery."

The Commission's policy concerning the types of costs that are recoverable through the Fuel Clause is contained in Commission orders rendered prior to the 2014 Settlement. In the Final Order, the Commission determined that the interconnection costs are Fuel Clause recoverable in accordance with existing Commission policy. The Commission found that

> [o]ur basic guidelines for recovery of capital costs through the [Fuel Clause] are found in Order No. 14546. Since the issuance of Order No. 14546 in 1985, we have issued 19 orders interpreting and applying [the two principles contained in Order No. 14546] to various proposed rate base capital costs for which recovery through the [F]uel [C]lause was requested.

(R. 4:797; OPC APP. 11). In footnote 11 to the Final Order, the Commission referenced the 19 orders interpreting and applying the Commission's policy in this regard. (R. 4:797, fn 11; OPC APP. 11, fn 11)

The Commission's relevant, long-standing policy concerning the recovery of certain capital costs through the Fuel Clause begins with Order No. 6357, In Re General Investigation of Fuel Adjustment Clauses, 1974 Fla. PUC LEXIS 70, *15 (1974), in which the Commission noted that that the purpose of the Fuel Clause is

"to permit the companies to recover their fossil fuel and purchased power costs." The Commission allowed for purchased power costs to be recovered through the Fuel Clause upon finding that "[p]urchased power is nothing more than a substitute for power generated and entails one company purchasing power generated by another." Id. at *21.

In Order No. 14546, the Commission expanded on its policy concerning the proper means of recovery of various fossil fuel-related expenses. In Re Cost Recovery Methods for Fuel Related Expenses, 1985 Fla. PUC LEXIS 531 (1985). As noted supra, the parties to that proceeding stipulated to a prospective policy for the recovery of fossil fuel-related costs for the Commission's approval. Id. at *8-*10. The Commission approved the stipulation and adopted the provisions therein as its own policy. Id. at *9-*10. In so doing, the Commission noted that "each of the utilities do not incur all of the same types of fossil fuel-related expenses, and even in instances where the same types of expenses are incurred, utilities may recover them differently." Id. at *3.

Also in Order No. 14546, the Commission found that "[t]he policy agreed to among the parties and recommended to the Commission consisted of two essential points which appear to reflect the Commission's practical application of fuel adjustment clauses." Id. As noted in the Final Order, (R. 4:800; OPC APP. 14) those points are: 1) "When similar circumstances exist, the Commission should

attempt to treat, for cost recovery purposes, specific types of fossil fuel-related expenses in a uniform manner among the various electric utilities. At times, however, it may be appropriate to treat similar types of expenses in dissimilar ways;" and 2) "Prudently incurred fossil fuel-related expenses which are subject to volatile changes should be recovered through an electric utility's fuel adjustment clause. . . . All other fossil fuel-related costs should be recovered through base rates." Id. at *3-*4.

In the Final Order, (R. 4:800; OPC APP. 14) the Commission also noted that by Order No. 14546, the Commission stated that the parties recommended that the policy the Commission adopts should also

> be flexible enough to allow for recovery through fuel adjustment clauses of expenses normally recovered through base rates when utilities are in a position to take advantage of a cost-effective transaction, the costs of which were not recognized or anticipated in the level of costs used to establish the utility's base rates.

1985 Fla. PUC LEXIS 531 at *8. In Order No. 14546, the Commission further noted the parties' suggestion that "this flexibility is appropriate to encourage utilities to take advantage of short-term opportunities not reasonably anticipated or projected for base rate recovery." Id. at *9. In those instances, the Commission required the affected utility to "bring the matter before the Commission at the first available fuel adjustment hearing and request cost recovery through the fuel adjustment clause on a case by case basis." Id.

The Commission enumerated ten fuel-related cost items that are properly considered for recovery through the Fuel Clause, the tenth of which adopts the recommendation quoted supra, and applies to the interconnection costs at issue. It reads as follows:

> 10. Fossil fuel-related costs normally recovered through base rates but which were not recognized or anticipated in the cost levels used to determine current base rates and which, if expended, will result in fuel savings to customers. Recovery of such costs should be made [through the Fuel Clause] on a case by case basis after Commission approval.

Id.

The Commission has since applied these principles "to various proposed rate base capital costs for which recovery through the [F]uel [C]lause was requested." (R. 4:797, fn 11; OPC APP. 11, fn 11) In Order No. PSC-11-0080-PAA-EI, the Commission identified fuel-related cost item 10 quoted supra from Order No. 14546 as "the [F]uel [C]lause exception to base rate recovery." In Re Petition to Recover Turbine Upgrade Costs, 2011 Fla. PUC LEXIS 67, *19, *21 at fn 16 (2011). The Commission found that "the appropriate interpretation of this section of Order No. 14546 is that capital projects eligible for cost recovery through the Fuel Clause should produce fuel savings based on lowering the delivered price of fossil fuel, or otherwise result in burning lower price[d] fuel at the plant." Id. at *23. The Commission further found that "[t]he [F]uel [C]lause is a regulatory tool designed to pass through to utility customers the costs associated with fuel

purchases. Id. at *14. "The purpose is to prevent regulatory lag, which occurs when a utility incurs expenses but is not allowed to collect offsetting revenues until the regulatory body approves cost recovery." Id.

By Order No. PSC-11-0080-PAA-EI, among other things, the Commission denied FPL's request to recover certain turbine upgrade costs through the Fuel Clause upon finding that "the turbine upgrade increases the output and efficiency of the coal plant, resulting perhaps in less fuel burned per [kilowatt hour], but it has no effect on the delivered price of coal." Id. at *24. In so doing, the Commission contrasted its decision in Order No. PSC-95-1089-FOF-EI, In Re Fuel and Purchased Power Cost Recovery Clause, 1995 Fla. PUC LEXIS 1230 (1995), in which the Commission approved a capital project through the Fuel Clause involving FPL's "purchase of 462 high capacity aluminum rail cars for the delivery of coal" to the same FPL coal plant because the project "lowered the delivered price of fuel." 2011 Fla. PUC LEXIS 67 at *23. "The purchase of the rail cars enabled FPL to obtain favorable transportation rate savings from railroad companies that exceeded the recoverable cost of the purchase." Id. at *24. That capital investment provided FPL customers an estimated $24 million in fuel savings. Id. The Commission further found that, "[a]s Order No. 14546 states, projects that request recovery of costs through the Fuel Clause should be 'fossil

fuel related.' The turbine upgrade is a capital project that increases output and efficiency but is not specific to fossil fuel." Id.

As noted in Footnote 11 to the Final Order on review, (R. 4:797, fn 11; OPC APP. 11, fn 11) in Attachment A to Order No. PSC-11-0080-PAA-EI, the Commission "included a complete review of the capital costs that have been recovered through the [F]uel [C]lause pursuant to Order 14546." Id. at *25. In noting that it had granted recovery of "non-fossil fuel-related" costs through the Fuel Clause in two instances as shown on Attachment A to the order, the Commission found that "the appropriate policy going forward is to restrict capital project cost recovery through the Fuel Clause to projects that are 'fossil fuel-related' and that lower the delivered price, or input price, of fossil fuel. At the same time, we reaffirm our practice of reviewing the eligibility of projects for recovery on a case-by-case basis." Id. at *26.

Also in Footnote 11 of the Final Order, the Commission cited to Commission orders rendered after Order No. PSC-11-0080-PAA-EI that interpret and apply the "Fuel Clause Exception to Base Rate Recovery" ("Fuel Clause Exception") to various proposed base rate capital costs for which recovery through the Fuel Clause was requested. (R. 4:797, fn 11; OPC APP. 11, fn 11) See, e.g., In Re Petition to Recover Capital Costs through the Fuel Cost Recovery Clause, 2012 Fla. PUC LEXIS 456 (2012) (granting in part and denying in part recovery through

the Fuel Clause of certain capital project costs to convert a power plant from fuel oil- and propane-fired to natural gas upon finding that the project will produce fuel savings by burning a lower priced fossil fuel); and In Re Petition for Prudence Determination, 2013 Fla. PUC LEXIS 326 (2013) (approving recovery through the Fuel Clause of certain long-term transportation contracts for the delivery of natural gas through a new pipeline system upon finding that the contracts were projected to save up to $450 million over the term of the contracts when compared to the next most cost-effective proposal).

The record reflects that recovery of the interconnection costs through the Fuel Clause comports with existing Commission policy under the Fuel Clause Exception. The following testimony excerpts show that the interconnection project is a cost-effective, fossil-fuel related project, the costs of which are of a type normally recovered through base rates but which were not anticipated in FPUC's last rate case:

1) The interconnection project "is a significant project for FPUC, one that the Company has embarked upon specifically because [the Company] anticipate[s] it will directly improve [the Company's] ability to negotiate increased savings for [its] customers in [its] next power purchase agreements." (T. 4:593, Lines 16-19);

2) "FPU[C] has evaluated the impact of this additional transmission interconnection and determined that this will provide FPU[C] customers with an

estimated $2.3 million in savings in future purchased power costs." (T. 4:600, Lines 11-14) The lifetime fuel savings for this project are expected to far exceed the project's cost. (T. 4:630, Lines 4-7);

3) The interconnection costs "will directly benefit the customers through future reductions to [FPUC's] fuel costs." (T. 3:532, Lines 20-21) They "will lower the delivered price of fuel – or input price – for FPUC, as contemplated by Order No. 14546 and Order No. PSC-95-1089-FOF-EI." (T. 3:534, Lines 1-3);

4) Recovery of transmission rate base costs through base rates is normal utility regulatory practice in Florida. (T. 4:616, Lines 14-17); and

5) "[T]he costs associated with this project are were [sic] not anticipated and have not been recovered in our base rates." (T. 3:540, Lines 1-3)

Competent, substantial record evidence shows that the 2014 Settlement is inapplicable because FPUC is underearning, and recovery of the interconnection costs through the Fuel Clause accords with existing Commission policy. The Final Order should be affirmed because it comports with the essential requirements of law. Southern Alliance for Clean Energy, 113 So. 3d at 752.

IV. THE FINAL ORDER DOES NOT VIOLATE PARAGRAPH VI OF THE 2014 SETTLEMENT.

Standard of Review

In the event this Court disagrees that the 2014 Settlement is inapplicable to the case at bar, the Commission alternatively argues that the Final Order does not

violate its terms because competent, substantial evidence of record shows that the interconnection costs at issue are of the type that traditionally and historically have been recovered through the Fuel Clause, they are incremental in nature, and they were not being recovered in FPUC's base rates at the time the Commission approved the recovery of these costs through the Fuel Clause.

The standard of review for this point on appeal is as set forth in Southern Alliance for Clean Energy v. Graham, 113 So. 3d at 752. See "Standard of Review," Point I, supra. In noting that the appellant pointed to conflicting evidence of record, the Southern Alliance for Clean Energy court stated that "we 'will not overturn an order of the PSC because we would have arrived at a different result had we made the initial decision and we will not re-weigh the evidence. Our task is to determine whether competent substantial evidence supports a PSC order.'" Id. at 753 (citation omitted).

Rate setting is a quasi-legislative function of the Commission. See Chiles v. PSC Nominating Council, 573 So. 2d at 832. This Court has consistently recognized the broad legislative grant of authority which sections 366.06(2) and 366.05(1), Florida Statutes, confer upon the Commission to fix fair, just and reasonable rates, "and the considerable license the Commission enjoys as a result of this delegation." Citizens v. PSC, 425 So. 2d at 540. "[G]iven the arcane complexities of utility rate-making, the legislature's decision to vest supervision of

rates and service exclusively in the [Commission] must be respected." Southern Alliance for Clean Energy, 113 So. 3d at 750 (citation omitted).

Argument in Response

In the event that this Court disagrees that the 2014 Settlement is inapplicable, the Commission alternatively argues that the Final Order does not violate it. In addition to ignoring FPUC's underearnings posture, OPC also ignores the first sentence of Paragraph VI of the 2014 Settlement in arguing that the Final Order on appeal violates the second sentence of Paragraph VI.

The first sentence of Paragraph VI allows FPUC to, in relevant part, request recovery through the Fuel Clause during the Settlement term of (a) costs that traditionally and historically have been Fuel Clause recoverable, or (b) "incremental costs not currently recovered in base rates which the Legislature or Commission determines are clause recoverable subsequent to the approval of this settlement." (OPC APP. 60) The Commission contends that recovery of the interconnection costs is allowable under both (a) and (b), supra.

A. Competent, Substantial Record Evidence Shows that the Interconnection Costs Are of a Type that Traditionally and Historically Have Been Recovered through the Fuel Clause in Accordance with Existing Commission Policy.

Clause (a) of the first sentence of Paragraph VI does not state what the Commission's policy is concerning the types of costs "that traditionally and historically would be, have been, or are presently recovered through the Fuel

Clause." It simply makes reference to the existence of such policy. (OPC APP. 60) See Point III B, supra, for a discussion of the Commission's existing policy of allowing recovery of certain capital costs under the Fuel Clause Exception, and why the interconnection costs at issue fall squarely within that policy.

Moreover, on cross-examination, Witness Cutshaw testified that "[t]here is a probably 10 to 20 percent transmission charge included in fuel in our bills that we receive from our purchased power providers. . . ." (T. 4:615, Lines 21-23) Those transmission costs are recovered through the Fuel Clause as part of the payments that FPUC makes to its purchased power providers. (T. 4:615, Line 25-616, Line 4) As such, the interconnection costs are of a type that traditionally and historically have been recovered through the Fuel Clause and are Fuel Clause recoverable costs under clause (a) of the first sentence of Paragraph VI of the 2014 Settlement. On this basis alone, the Final Order does not violate the terms of the 2014 Settlement.

B. Competent, Substantial Record Evidence Shows that the Interconnection Costs Are Incremental in Nature, and that They Were Not Being Recovered in FPUC's Base Rates at the Time the Commission Approved Them for Recovery through the Fuel Clause.

With respect to clause (b) of the first sentence of Paragraph VI, the interconnection project is a new, fossil fuel-related capital project, the incremental costs of which were not anticipated in FPUC's last rate proceeding and which are not being recovered through the Company's base rates. (T. 3:532, Lines 19-21; T. 3:533, Lines 1-6; T. 4:594, Lines 2-15; T. 4:595, Line 18-596, Line 6; T. 4:599,

Line 19-600, Line 6; T. 4:628, Line 14-629, Line 15) See Point III B, supra, for testimony excerpts showing that the interconnection costs were not being recovered in FPUC's base rates when the Commission approved the recovery of these costs through the Fuel Clause in the Final Order.

The 2014 Settlement also tends to show that this project was not anticipated when base rates were last set for FPUC. Paragraph III. of the 2014 Settlement states that "[t]he Parties agree that FPUC shall use all reasonable and prudent efforts to continue implementing infrastructure projects, consistent with those outlined in the attached demonstrative Exhibit A, in order to maintain the reliability of its electrical system." (OPC APP. 59) Although Exhibit A to the 2014 Settlement was attached for demonstrative purposes and therefore does not necessarily constitute a complete list of the capital improvements that FPUC planned to make at that time, it does outline a good number of capital improvements and it does not include the interconnection project at issue. (OPC APP. 69-70)

On this basis alone, the Final Order does not violate the terms of the 2014 Settlement.

C. The Second Sentence of Paragraph VI of the 2014 Settlement Does Not Preclude the Recovery of the Interconnection Costs through the Fuel Clause.

The second sentence of Paragraph VI should be read within the context of the entire 2014 Settlement. See, e.g., J. C. Penney Co. v. Koff, 345 So. 2d 732, 735 (Fla. 4th DCA 1977) (finding that "[i]n reviewing [a] contract in an attempt to determine its true meaning, the court must review the entire contract without fragmenting any segment or portion."). Nevertheless, even looking at the second sentence of Paragraph VI in a vacuum, which OPC would urge this Court to do, (B. 15) competent, substantial record evidence supports that the interconnection costs are not strictly an "increase in the magnitude of costs, incurred after implementation of the new base rates, of types or categories (including but not limited to, for example, investment in and maintenance of transmission assets) that have been traditionally and historically recovered through FPUC's base rates." (OPC APP. 60)

The interconnection project is a capital project, the transmission interconnection costs of which are generally of a type that is traditionally and historically recovered in base rates. (T. 4:616, Lines 14-17) If that were not the case, the project costs would not be eligible for recovery through the "Fuel Clause Exception." See Point III B, supra. Moreover, this project represents much more

than an investment in and maintenance of transmission assets. Witness Cutshaw testified that

> The construction necessary will include expansion of the existing FPL substation in which the necessary transmission and system protection equipment will be placed in order to allow for the interconnection of the FPUC 138 KV transmission line. The FPUC 138 KV transmission will be rerouted to parallel the FPL 230 KV transmission line into the expanded substation.

(T. 4:594, Line 21-595, Line 6)

In addition, FPUC is currently recovering certain costs associated with transmission through the Fuel Clause, and has been for many years. (T. 3:577, Lines 5-11; T. 4:615, Line 11-616, Line 4) See 1974 Fla. PUC LEXIS 70 at *29-*30 (Order No. 6357, finding that FPUC has differing operating characteristics from the four major electric utilities in the state in that it has no generating facilities of its own, that it purchases power from JEA for resale to its customers, and that it passes on the exact dollar amount of fuel charges which it must pay to JEA through the Fuel Clause). Accord In Re Fuel and Purchased Power Cost Recovery Clause, 2013 Fla. PUC LEXIS 472 (2013) (reallocating a portion of FPUC's transmission costs through the Fuel Clause). FPUC's differing operating characteristics remain true to this day. (T. 4:615, Line 11-616, Line 4)

The Final Order should be affirmed because competent, substantial evidence supports that it does not violate the 2014 Settlement and that it comports with the

essential requirements of law. Southern Alliance for Clean Energy, 113 So. 3d at 752.

V. THE FINAL ORDER COMPORTS WITH THE REQUIREMENTS OF CHAPTER 120, FLORIDA STATUTES.

Standard of Review

In Southern Alliance for Clean Energy v. Graham, 113 So. 3d at 752, this Court stated that "[a]s we have repeatedly held: [the Public Service] Commission's orders, and concomitant interpretations of statutes and legislative policies that it is charged with enforcing, are entitled to great deference." Moreover, "[t]o overcome these presumptions, a party challenging an order of the Commission on appeal has the burden of showing a departure from the essential requirements of law and the legislation controlling the issue. . . ." Id. (citation omitted).

Public Counsel argues that the Final Order is deficient because it fails to explain the Commission's rationale for its discretionary action and fails to address countervailing arguments developed and urged by the Commission staff in its recommendation to the Commission. (B. 26-27) The standard of review for this point on appeal is whether the fairness of the proceedings or the correctness of the Commission's action was impaired by a material error in procedure or a failure to follow prescribed procedure, or whether the Commission's exercise of discretion was outside the range of discretion delegated to it. § 120.68(7)(c) and (7)(e)1., Fla. Stat.

Argument in Response

OPC cites generally to McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977), in arguing that the Final Order must "address countervailing arguments developed in the record" that recovery of the interconnection costs through the Fuel Clause violates the 2014 Settlement. (B. 26) OPC's argument is baseless. There were no countervailing arguments developed in the record for the Commission to address. See Point I, supra.

OPC's countervailing arguments are only contained in its prehearing statement (R. 2:235) and in its post-hearing brief before the Commission. (R. 3:593-600) They were not developed through record evidence. Therefore, the Commission was not required to address them in the Final Order. McDonald v. Department of Banking and Finance, 346 So. 2d at 583 (holding, in relevant part, that "the final order 'must address countervailing arguments developed in the record and urged by a hearing officer's recommended findings and conclusions. . . .'") (emphasis added).

OPC also misconstrues the McDonald holding that "the final order 'must address countervailing arguments developed in the record and urged by a hearing officer's recommended findings and conclusions'" to mean that the Commission erred by not explaining why it disagreed with its staff recommendation that recovery of the interconnection costs through the Fuel Clause violates the 2014

Settlement. (B. 26-27) Id. The McDonald trier of fact was not the agency head or collegial body, as in the case at bar, but a Division of Administrative Hearings ("DOAH") hearing officer. Id. at 574. In McDonald, the hearing officer made detailed findings of fact and conclusions of law in her recommended order. Id. at 574, 576. The court held that because the agency head requested assignment of a hearing officer, "the [agency] was required to honor the hearing officer's findings of fact unless 'not based upon competent substantial evidence.'" Id. at 578.

In contrast, the Commission staff does not sit as a trier of fact. Staff recommendations are filed in order to assist the Commission in making its decisions. Section 350.06(3), Florida Statutes, states that "[t]he commissioners may employ clerical, technical, and professional personnel reasonably necessary for the performance of their duties. . . ." It does not require staff recommendations to be filed in advance of Commission rulings. Citizens v. FPSC, 146 So. 3d 1143, 1153 (Fla. 2014). Accord 2015 Fla. PUC LEXIS 59 (2015) (Order Establishing Procedure, advising the parties that "[i]f the Commission (or assigned panel) does not render a bench decision at the hearing, it may allow each party to file a post-hearing statement of issues and positions pursuant to the schedule set forth in Section IX of this Order"). (R. 1:122) Nor does Section 350.06(3), Florida Statutes, require the Commission to explain when it disagrees with a staff recommendation when one is filed.

In the case below, the Commission rejected its staff recommendation to deny recovery of the interconnection costs upon hearing from the staff attorney that FPUC could file testimony in next year's fuel docket to recover these costs "and not be prohibited under the settlement agreement." (R. 4:770, Line 21-4:771, Line 13) The Commission voted to approve recovery of the interconnection costs through the Fuel Clause upon finding that the interconnection will result in fuel cost savings for the customers moving forward. (R. 4:771, Lines 9-22) It is the Commission's prerogative as the trier of fact and the decision-maker to adopt, modify, or reject the recommendations of it staff.

Section 120.569(2)(l), Florida Statutes, instructs, in relevant part, that "the final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated." Moreover, "[t]he agency's final order in 120.57 proceedings must describe its 'policy within the agency's exercise of delegated discretion' sufficiently for judicial review. Section 120.68(7)." McDonald v. Department of Banking & Finance, 346 So. 2d at 582. The Commission made findings of fact and conclusions of law specific to the issue before it based on the evidence of record, sufficiently for judicial review. See Crist v. Jaber, 908 So. 2d 426, 432 (Fla. 2005) (finding that "this Court's review is limited to a determination of whether evidence exists to support the Commission's findings"). See also Citizens v. FPSC, 146 So.

3d at 1153 (rejecting OPC's argument that "the factual findings in the final order were insufficient because the Commission did not . . . resolve every disputed issue of fact.").

Based on the competent, substantial record evidence, the Commission made a number of findings of fact in the Final Order relevant to the issue on appeal, including, but not limited to, the following:

1) "FPUC does not generate any electricity but is solely dependent on wholesale purchase power agreements to meet its capacity and energy needs." (R. 4:797; OPC APP. 11);

2) FPUC's purchase power agreement with JEA includes payments for JEA's transmission base rate costs to provide power to FPUC. "However, FPUC does not currently recover any of its own transmission rate base costs through the [F]uel [C]lause." (R. 4:797; OPC APP. 11);

3) "FPUC's current contract with JEA is set to expire on December 31, 2017, the same time that FPUC's interconnection with FPL is expected to be completed." (R. 4:797; OPC APP. 11) "If construction is started in 2016, the completion date is expected during the latter half of 2017." (R. 4:797; OPC APP. 11);

4) "FPUC is required to purchase all of its wholesale purchased power from JEA during the term of the current contract. Thus, the projected $2.3 million in

savings for future purchased power costs associated with the FPL interconnection cannot materialize until after January 1, 2018." (R. 4:797; OPC APP. 11);

5) FPUC anticipates that "it will be able to contract for wholesale capacity and energy at significantly lower rates once the FPL interconnection is completed." (R. 4:797; OPC APP. 11);

6) All the parties agreed that the proposed interconnection will result in improved system reliability and that it will offer wholesale power purchase options not currently available to FPUC. (R. 5:801; OPC APP. 15); and

7) "FPUC believes that costs incurred and projected to be incurred for the FPL interconnection . . . are directly fuel-related and will ultimately produce fuel savings that will flow to FPUC's customers through the [Fuel Clause], and thus, are appropriate for recovery through the [Fuel Clause]." (R. 4:798; OPC APP. 12)

Moreover, the Commission set forth and followed its existing policy in rendering its decision on the matter. See Point III B, supra. The Commission noted that its basic guidelines for recovery of capital costs through the Fuel Clause are found in Order No. 14546. 1985 Fla. PUC LEXIS 531 (1985). (R. 4:797; OPC APP. 11) Footnote 11 to the Final Order contains a reference to all orders issued since that time, in which the Commission has applied the two principles contained in Order No. 14546 "to various proposed rate base capital costs for which recovery through the [F]uel [C]lause was requested." (R. 4:797; OPC APP. 11)

The Commission approved recovery of the interconnection costs, among other costs, upon finding that all the parties agreed that the proposed interconnection will result in improved system reliability and that it will offer wholesale power purchase options not currently available to FPUC. (R. 5:801; OPC APP. 15) The Commission further concluded that "[t]he disagreement rests with OPC's conclusion that Order No. 14546 prohibits cost recovery until cost savings are received by ratepayers. We do not read Order No. 14546 that restrictively." (R. 5:801; OPC APP. 15)

The Final Order includes the Commission's findings of fact and conclusions of law, separately stated, and describes the Commission's relevant policy sufficiently for judicial review. Moreover, the Commission did not abuse its discretion by not explaining why it disagreed with its staff recommendation in ruling on the issue before it. The Final Order should be affirmed because it is supported by competent, substantial evidence and comports with the essential requirements of law. Southern Alliance for Clean Energy, 113 So. 3d at 752.

CONCLUSION

Public Counsel has failed to meet its heavy burden of overcoming the presumption of correctness that attaches to Commission orders. Id. The Commission's Final Order should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the individuals listed below by electronic mail this 27th day of June, 2016:

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I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that this brief was prepared using Times New Roman 14-point typeface, a font that is proportionally spaced.

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