IN THE SUPREME COURT OF FLORIDA

SIERRA CLUB

Appellant,

v.

JULIE IMANUEL BROWN, ETC., ET AL.

Appellees.
_____/

CASE NO.: SC17-82

LT Numbers: 160021-EI
160061-EI
160062-EI
160088-EI

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

KEITH C. HETRICK
General Counsel
Florida Bar No. 564168
khetrick@psc.state.fl.us

SAMANTHA M. CIBULA
Attorney Supervisor
Florida Bar No. 0116599
scibula@psc.state.fl.us

ROSANNE GERVASI
Senior Attorney
Florida Bar No. 0001848
rgervasi@psc.state.fl.us

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0862
(850) 413-6199

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SYMBOLS AND REFERENCES

In this Brief, Appellee Florida Public Service Commission will be referred to as the Commission. Appellee Florida Power & Light Company will be referred to as FPL. Appellee Citizens of the State of Florida through the Office of Public Counsel will be referred to as Public Counsel. Appellee South Florida Hospital and Healthcare Association will be referred to as SFHHA. And Appellee Florida Retail Federation will be referred to as FRF. FPL, Public Counsel, SFHHA, and FRF will collectively be referred to as the signatories to the settlement agreement, or the signatories. The final order on review, In re: Petition for increase in rates by FPL, 2016 WL 7335779 (2016), Commission Order No. PSC-16-0560-AS-EI, will be referred to as Final Order No. PSC-16-0560-AS-EI or the Final Order.

The following symbols will be used: (B. [Page #]) – Sierra Club's Initial Brief; (APP. [Page #]) – Sierra Club's Appendix to its Initial Brief; (R. [Vol. #]: [Page #]) – Record on Appeal; (T. [Vol. #]: [Page #, Line #]) – Consolidated Base Rate Case Hearing Transcript; (Oct.T. [Page #, Line #]) – Settlement Hearing Transcript; (EXH. [#]) – Exhibits.

Unless otherwise noted, all references to the Florida Statutes are to the Florida Statutes (2016).

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

This case is a direct appeal filed by the Sierra Club from Final Order No. PSC-16-0560-AS-EI. (R. 32:6281-6529) The Commission does not dispute that the Sierra Club has standing to maintain this appeal on behalf of its members who are FPL ratepayers. (B. 18-22)

By the Final Order, the Commission approved a stipulation and settlement ("settlement agreement") of an underlying FPL petition for base rate increase and limited-scope adjustment, storm hardening plan, depreciation and dismantlement study, and to modify and continue an incentive mechanism ("2016 rate petition" or "rate petition"). (R. 32:6281; R. 3:567-571) The Commission conducted a full evidentiary hearing on the rate petition and on the proposed settlement thereof. (R. 32:6282; T. 1:1-37:6034; Oct.T. 1-151) The Sierra Club intervened in the case below on behalf of its Florida members who are customers of FPL. (R. 10:1893-1900; R. 10:1917-20) This Court has mandatory jurisdiction pursuant to Art. V, § 3(b)(2), Fla. Const., and §§ 350.128(1) and 366.10, Fla. Stat., because the Final Order relates to the rates of a public utility providing electric service.

The settlement agreement was proposed for the Commission's approval by FPL, whose interests were being determined through the proceedings, and intervenors Public Counsel, SFHHA, and FRF ("signatories"). (R. 2:212; R. 3:510-

513; R. 3:563-566; R. 21:4136-4199; R. 22:4200-4388; R. 22:4393-4396) "The [intervenor] signatories to the Settlement Agreement represent a broad segment of FPL's customer base including both residential and commercial classes." (R. 32:6284) Other intervenors to the case below included the Sierra Club, Florida Industrial Power Users Group ("FIPUG"), Wal-Mart Stores East, LP and Sam's East, Inc. ("Wal-Mart"), Federal Executive Agencies ("FEA"), AARP, and two residential customers of FPL. (R. 3:445-448; R. 3:452-454; R. 3:507-509; R. 3:559-562; R. 13:2504-2508; R. 21:4146) Sierra Club, AARP, and the two residential customers of FPL opposed the settlement agreement on various grounds (R. 32:6284), FIPUG took no position on the settlement agreement (R. 32:6282), and Wal-Mart and FEA did not oppose it. (R. 32:6282)

II. STATEMENT OF THE FACTS

FPL's 2016 Consolidated Base Rate Case

Among other things, § 366.06(1), Fla. Stat., 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 consolidated base rate case underlying the settlement agreement consists of: (1) FPL's petition for base rate increase and for a limited-scope adjustment ("2016 rate petition") (R. 2:350-381) filed March 15, 2016, pursuant to §§ 366.06 and 366.076(1), Fla. Stat., and Fla. Admin. Code R. 25-6.0425, 25-6.043, and 25-6.0431; (2) FPL's

2016 depreciation and dismantlement studies (EXH. 110, 113) filed March 15, 2016, pursuant to Fla. Admin Code R. 25-6.0436 and 25-6.04364; (3) FPL's petition for approval of its 2016-2018 storm hardening plan (R. 2:219-229) filed March 15, 2016, pursuant to Fla. Admin. Code R. 25-6.0342; and (4) FPL's petition for a limited proceeding to modify and continue an incentive mechanism filed April 15, 2016, pursuant to § 366.076(1), Fla. Stat., and Fla. Admin. Code R. 25-6.0431. (R. 3:476-487; EXH. 113)

In its 2016 rate petition, FPL requested:

> (i) an increase in rates and charges sufficient to generate additional total annual revenues of $866 million to be effective January 1, 2017; (ii) a subsequent year revenue increase of $262 million to be effective January l, 2018; and (iii) a $209 million limited-scope adjustment for the Okeechobee Clean Energy Center . . . , to be effective on its commercial in-service date, currently scheduled for June 1, 2019.

(R. 2:350) Through notices of identified adjustments, FPL revised its 2016 rate petition to $826 million in 2017, $270 million in 2018, and $209 million for the Okeechobee Clean Energy Center. (R. 3:549-555; R. 5:845-943; R. 7:1328-1339) FPL requested that it be allowed the opportunity to earn a rate of return on common equity ("ROE") within a range of 10.5 percent to 12.5 percent, with a midpoint of 11.5 percent. (R. 2:357)

In this appeal, Sierra Club challenges the Final Order to the extent that it approves cost recovery for upgrades to FPL's gas turbine peaking fleet ("peaker replacement project"). (B. 1, 2, 5 fn6) The peaker replacement project consists of

FPL's projected retirement and replacement of a total of 44 gas turbines ("GTs") with seven new, larger and more efficient combustion turbines ("CTs"). (T. 8:813, lines 10-18; T. 8:956, line 24 – T. 8:957, line 5) "The total effect of all these changes is the replacement of approximately 1,700 megawatts ("MW") of peaking capability with new/upgraded CTs by the end of 2016." (T. 8:813, lines 19-21) FPL witness Barrett explained that

> these particular [peaker] units are reliability units. They are there when we lose generation and we have to get back quickly. We have requirements that we have to meet. Within 15 minutes we have to be able to bring a certain amount of load onto the system. Within a half an hour, we have to replace what was lost in order to meet our reliability commitments. . . . So these units, if they were combined cycle plants, they would be base-loaded and then, therefore, not available to meet those emergency kind of conditions. So it's a totally different application, totally different technology.

(T. 12:1506, line 17 – T. 12:1507, line 4) He further explained that "it can be hot weather or equipment failures that cause the need for these units." (T. 12:1507, lines 18-19)

FPL's request for cost recovery for the peaker replacement project is contained within the 2016 rate petition. (T. 1:131, lines 1-5) Major factors necessitating FPL's requested base rate increase to be effective January 1, 2017 included, in relevant part:

> b. Generation upgrades ($188 million). FPL is investing nearly $1.65 billion in three generation upgrades that lower costs and improve reliability for customers. These upgrades include the following:

> 1. Investment of nearly $800 million ($92 million revenue requirements) in new combustion turbine technology to upgrade its 1970s era gas turbine peaking fleet to improve its reliability in light of declining parts availability. The new technology will improve FPL's industry-leading emissions profile and its heat rate efficiency is projected to produce $203 million in net customer savings (cumulative present value revenue requirement or "CPVRR") over the operating life of the units. . . .

(R. 2:362)

Evidentiary Hearing on 2016 Rate Petition

Fla. Admin. Code R. 25-6.043 sets forth the general filing instructions and minimum filing requirements for rate proceedings before the Commission. Pursuant to Fla. Admin. Code R. 25-6.043(1), simultaneous with the filing of its 2016 rate petition, FPL filed the minimum filing requirements for its requested test years, along with the supporting direct testimony and exhibits of its witnesses. (R. 2:378; EXH. 28-148)

A prehearing conference was held on August 12, 2016, (R. 14:2747-2994; R. 15-2795-2866) and a prehearing order was issued on August 19, 2016, containing 167 issues for the Commission's resolution of the 2016 rate petition. 2016 WL 7335779 (2016). (R. 15:2873-2994; R. 16:2995-3133) One of those issues, Issue 57, relates to this appeal. That issue asks "[i]s FPL's replacement of its peaking units reasonable and prudent?" (R. 15:2962)

The Commission afforded all parties and its staff ample opportunity to file testimony and exhibits responsive to the 2016 rate petition and to engage in

discovery in advance of the evidentiary hearing on the 2016 rate petition ("rate hearing"). (R. 3:425-435; R. 3:567-571; R. 4:659-661) Sierra Club did not sponsor the testimony of any witnesses, nor did it seek leave to file testimony opposing FPL's 2016 rate petition upon intervening in the case. (R. 15:2877-2891)

In advance of the rate hearing, the Commission conducted customer service hearings in nine locations throughout FPL's service territory: in Fort Myers, Sarasota, West Palm Beach, Melbourne, Daytona Beach, Miami, Pembroke Pines, Fort Lauderdale, and Miami Gardens. (R. 4:662-794; R. 5:795-838; R. 5:944-994; R. 6:995-1194; R. 7:1195-1327; R. 7:1359-1394; R. 8:1395-1595; R. 9:1596-1796; R. 10:1797-1883)

A nine-day full evidentiary rate hearing was held on the 2016 rate petition on August 22-26 and August 29-September 1, 2016, as scheduled in the orders establishing procedure for the case. 2016 WL 1238773 (2016); 2016 WL 2621960 (2016); 2016 WL 3038951 (2016); 2016 WL 4062839 (2016). (R. 3:425-435; R. 3:567-571; R. 4:659-661; R. 10:1921-1922; T.1:1-T.37-6034) The hearing involved taking testimony and cross-examination of 17 FPL direct witnesses, 16 intervenor witnesses, 2 Commission staff witnesses, and 17 FPL rebuttal witnesses. (T. 1:1-37:6034; R. 21:4147) Sierra Club conducted cross-examination at the hearing. (T. 1:25, lines 11-12; T. 2:174, line 7; T. 6:565, line 5; T. 7:724, line 8; T. 8:787, line 11; T. 11:1241, line 7; T. 13:1534, line 5)

Post-hearing briefs were filed on September 19, 2016. (R. 17:3363-3389; R. 18:3390-3597; R. 19:3598-3799; R. 20:3800-3999; R. 21:4000-4135) In its opening statement and its post-hearing brief, Sierra Club principally addressed Issue 57 in arguing that FPL's replacement of its peaking units was not prudent. (T. 1:25, lines 11-12; T. 1:95, line 13 – T.1:97, line 9; R. 17:4046-4101)

Joint Motion for Approval of Settlement Agreement

On October 6, 2016, the signatories filed a joint motion for approval of settlement agreement, in an effort to fully resolve the 2016 rate petition. (R. 21:4136-4144) The settlement agreement itself is attached to the joint motion as Exhibit A. (R. 21: 4146-4175)

The settlement agreement contains a number of concessions made by FPL as compared to its revised 2016 rate petition. Among other things, the settlement agreement provides for (1) a revenue increase of $400 million effective January 1, 2017, as opposed to the $826 million requested in the 2016 rate petition; (2) a subsequent year revenue increase of $211 million effective January 1, 2018, as opposed to the $270 million requested in the 2016 rate petition; and (3) a revenue increase of $200 million to be effective on the commercial in-service date of the Okeechobee Clean Energy Center, as opposed to the $209 million requested in the 2016 rate petition. (R. 2:350; R. 21:4146-4147, 4154; Oct.T. 3, lines 7-11; Oct.T. 88, lines 8-13; Oct.T. 101, lines 20-24)

The settlement agreement further provides for FPL's authorized ROE to be within a range of 9.6 percent to 11.6 percent, as opposed to the 10.5 percent to 12.5 percent range requested in the 2016 rate petition, with all rates, including those established in clause proceedings during the settlement term, to be set using a 10.55 percent ROE, as opposed to the midpoint of 11.5 percent requested in the 2016 rate petition. (R. 21:4148; R. 2:357; Oct.T. 88, lines 13-15) The minimum settlement agreement term is four years, from the implementation date through December 31, 2020, during which time FPL may not petition the Commission for a base rate increase unless its ROE falls below the bottom of its authorized range. (R. 21:4161-4162) Pursuant to paragraph 24, the provisions of the settlement agreement were contingent on the Commission's approval thereof in its entirety without modification. (R. 21:4169)

A schedule showing the resulting revenue increase by rate class is attached to the settlement agreement as Exhibit A. (R. 21:4175-4177) The resulting 2017 tariff sheets are attached to the settlement agreement as Exhibit B (R. 21:4178-4199; R. 22:4200-4285) and the resulting 2018 tariff sheets are attached to the settlement agreement as Exhibit C. (R. 22:4286-4374) Exhibit D to the settlement agreement is a schedule showing the resulting depreciation parameters and rates. (R. 22:4375-4388)

Evidentiary Hearing on Settlement Agreement

On October 12, 2016, the Commission issued a revised order establishing procedure and set the procedural schedule for the Commission's consideration of the settlement agreement. 2016 WL 6033312 (2016). (R. 23:4399-4406) By that order, the Commission afforded all parties an opportunity to provide supplemental testimony and exhibits and to conduct discovery on the settlement issues. (R. 23:4400-4403) The Commission scheduled an administrative hearing ("settlement hearing") to be held on October 27, 2016, for the record to be reopened "to take supplemental testimony regarding terms of the Settlement Agreement not previously addressed in the prior hearing." (R. 23:4399) Moreover, the Commission found that additional information was necessary on certain terms of the settlement agreement and provided the parties an opportunity to file a "Notice of Additional Terms" by a date certain, if they believed there were any other additional terms and conditions of the settlement agreement that were not addressed in the rate hearing. (R. 23:4400) No such "Notice of Additional Terms" was filed. The Commission determined that "[t]he sole issue to be decided in this hearing is whether the Settlement Agreement dated October 6, 2016, is in the public interest and should be approved." (R. 23:4400)

In advance of the settlement hearing, pursuant to the revised order establishing procedure, the signatories filed the testimony and exhibits of all

witnesses they intended to sponsor and the non-signatory parties were given the option to file a notice listing the witness(es) they planned to sponsor at the hearing in lieu of prefiling testimony and exhibits on the settlement issues. 2016 WL 6033312 (2016). (R. 23:4400-4401) Sierra Club did not sponsor any witnesses on the settlement issues, either by prefiled testimony or by live witness testimony. (R. 23:4442-4443) AARP was the only non-signatory party to the case below that sponsored testimony for the settlement hearing. (R. 23:4438-4440) A second prehearing order was issued on October 24, 2016. 2016 WL 6248257 (2016). (R. 23:4441-4444)

The formal hearing reconvened on October 27, 2016, as scheduled, to take evidence on the proposed settlement agreement. (Oct.T. 1-151; EXH. 807-812) Sierra Club did not offer any evidence concerning the issues of the settlement agreement, nor did it conduct cross-examination of any witnesses. (Oct.T. 1-151) Sierra Club gave an opening statement, stating that it objected to the peaker replacement project in favor of more solar power, a contention that was heavily litigated under Issue 57 in the rate hearing. See Point II.A., infra. (Oct.T. 24, line 3 – 25, line 3)

Post-hearing briefs on the settlement issues were filed on November 10, 2016. (R. 23:4459-4539) In its post-hearing brief, Sierra Club again argued that FPL's replacement of its peaking units was not prudent. (R. 15:2962; R. 23:4498-

4519) The Commission held a special agenda conference to rule upon the merits of the settlement agreement on November 29, 2016. (R. 32:6243-6276)

Final Order

Upon review of the full evidentiary record consisting of the evidence taken at the rate hearing and at the settlement hearing, and upon discussion and deliberation at the special agenda conference, the Commission unanimously approved the settlement agreement it in its entirety. (R. 32:6243-6276) The Commission's ruling is memorialized in the Final Order, rendered on December 15, 2016. (R. 32:6281-6286) In the Final Order, the Commission found that "taken as a whole the settlement provides a reasonable resolution of all the issues raised in the consolidated dockets." (R. 32:6284-6285) The Commission therefore found "that the Settlement Agreement establishes rates that are fair, just, and reasonable and is in the public interest." (R. 32:6285) The settlement agreement is incorporated therein. (R. 32:6287-6399 – R. 33:6400-6529)

SUMMARY OF ARGUMENT

The law is well-settled that the Commission is authorized to approve negotiated settlement agreements "as a whole" to resolve ratemaking proceedings, upon finding them to be in the public interest. The legal system favors the settlement of disputes by mutual agreement between the contending parties.

The Final Order comports with the requirements of § 120.569(2)(l), Fla. Stat., because it includes findings of fact and conclusions of law separately stated. It also describes the Commission's policy sufficiently for judicial review. In the Final Order, the Commission appropriately exposed and elucidated its reasons for approving the settlement agreement. The Final Order does not violate the prudence requirement of § 366.06(1), Fla. Stat. In determining the settlement agreement to be in the public interest, the Commission considered all of the competent substantial evidence of record, which fully supports the prudence of the peaker replacement project.

Sierra Club misconstrues Gulf Power Co. v. FPSC, 453 So. 2d 799 (Fla. 1984), to require FPL to have provided "empirical support" that the money spent on the peaker replacement project was "minimized through a timely analysis and pursuit of a range of alternatives." The correct prudence standard with respect to the Commission's consideration of the underlying 2016 rate petition is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should [have] been known, at the time the decision was made." S. Alliance for Clean Energy v. Graham, 113 So. 3d 742, 750 (Fla. 2013).

The law did not require FPL to seek Commission pre-approval of the peaker replacement project. FPL was correct to withdraw its request for approval of the

project from the Commission's 2013 environmental recovery clause proceeding upon determining that it was not necessary to replace the original peakers for environmental compliance reasons. Nor is the peaker replacement project subject to the Florida Electrical Power Plant Siting Act because the peaking units at issue are not steam or solar electrical generating facilities.

The Commission carefully considered the record evidence and the terms of the settlement agreement in finding it to be in the public interest as a whole. Sierra Club's arguments invite this Court to reweigh the evidence, something the Court should decline to do. The Final Order should be affirmed because it is based on competent substantial record evidence and comports with the essential requirements of law.

ARGUMENT

I. THE COMMISSION CORRECTLY ADDRESSED THE SETTLEMENT AGREEMENT "AS A WHOLE" IN DETERMINING THAT IT RESULTS IN RATES THAT ARE FAIR, JUST, AND REASONABLE AND IN THE PUBLIC INTEREST.

Standard of Review

The standard for reviewing a Commission order is as set forth in Citizens of State v. FPSC, 146 So. 3d 1143, 1149 (Fla. 2014), wherein this Court stated that:

> [a]s we have consistently held, when reviewing an order of the Commission, this Court affords great deference to the Commission's findings. S. Alliance for Clean Energy v. Graham, 113 So. 3d 742, 752 (Fla. 2013) (noting that this Court has repeatedly held that "[the Commission's] orders, and concomitant interpretations of statutes and

> legislative policies that it is charged with enforcing, are entitled to great deference."). "Commission orders come to this Court clothed with the presumption that they are reasonable and just." W. Fla. Elec. Coop. Ass'n, Inc. v. Jacobs, 887 So. 2d 1200, 1204 (Fla. 2004) (citing Gulf Coast Elec. Coop., Inc. v. Johnson, 727 So. 2d 259, 262 (Fla. 1999)); see also BellSouth Telecomm., Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998) (noting that Commission orders carry a presumption of validity). 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, or that the findings of the Commission are not supported by competent, substantial evidence." S. Alliance for Clean Energy, 113 So. 3d at 752 (quoting Crist v. Jaber, 908 So. 2d 426, 430 (Fla. 2005) (citing Jacobs, 887 So. 2d at 1204)).

Sierra Club argues that the Final Order is legally deficient because it relies on an abstract assessment of the settlement "as a whole," without expressly finding that the peaker replacement project costs were prudently incurred, in violation of § 366.06(1), Fla. Stat. (B. 37) The standard of review for this point on appeal is whether the Commission erroneously interpreted a provision of law and a correct interpretation compels a particular action. § 120.68(7)(d), Fla. Stat.

Argument in Response

A. The Final Order Adheres to the Commission's Long-Standing Practice of Approving Settlement Agreements "as a Whole" upon Finding Them to Be in the Public Interest.

1. The Commission Did Not Err by Approving the Settlement Agreement "as a Whole."

The law is well-settled that the Commission is authorized to approve negotiated settlement agreements "as a whole," to resolve ratemaking proceedings.

See Citizens of State v. FPSC, 146 So. 3d 1143 (Fla. 2014) (affirming Commission order approving non-unanimous negotiated settlement of an FPL rate petition upon finding that the Commission's determination that the settlement "as a whole" was in the public interest and resulted in rates that were fair, just, and reasonable was supported by competent, substantial evidence).

In finding that the Commission is authorized by statute to resolve ratemaking proceedings by approving negotiated settlements, this Court explained in Citizens of State v. FPSC that:

> pursuant to section 120.57(4), Florida Statutes (2012), informal disposition of [a] rate proceeding may be made by stipulation, agreed settlement, or consent order "[u]nless precluded by law." Chapters 350 and 366, pertaining to the Commission and public utilities respectively, do not prohibit the Commission from approving a negotiated settlement to resolve a rate-making proceeding.

Id. at 1150. Those findings continue to hold true with respect to § 120.57(4) and Chapters 350 and 366, Fla. Stat. (2016). There is no provision of law precluding the Commission's informal disposition of rate proceedings.

This Court further found that:

> As this Court stated in AmeriSteel Corp. v. Clark, in the context of utility service agreements to resolve territorial disputes, "[t]he legal system favors the settlement of disputes by mutual agreement between the contending parties" and "[t]his general rule applies with equal force in utility service agreements." AmeriSteel Corp. v. Clark, 691 So.2d 473, 478 (Fla. 1997) (quoting Utilities Comm'n of New Smyrna Beach v. Fla. Pub. Serv. Comm'n, 469 So. 2d 731, 732 (Fla. 1985)). Nothing in our precedent or the language of the statute

> suggests that this general rule does not also apply in rate-setting cases.

Id. at 1155. See also In re: Application for rate increase by Alafaya Utils., Inc., 2007 WL 1988374, *2 (2007) (finding that the settlement agreement at issue promoted administrative efficiency and avoided the time and expense of a hearing). As the record of the instant case decidedly reveals, rate cases are particularly lengthy and cumbersome. Therefore, the promotion of administrative efficiency is an important consideration within the rate case arena.

Moreover, Fla. Admin. Code R. 28-106.204(1) requires that "[t]he presiding officer shall conduct such proceedings and enter such orders as are deemed necessary to dispose of issues raised by [motions]." Therefore, the Commission was obliged to dispose of the signatories' joint motion for approval of settlement agreement. (R. 21:4136-4144)

Sierra Club cites to Citizens of State v. Graham, 213 So. 3d 703 (Fla. 2017) (reversing Commission decision approving recovery of certain transmission interconnection costs through the fuel clause), as support for its argument that the Commission erroneously ruled upon the settlement agreement "as a whole," without analyzing whether the record supported recovery of the peaker replacement project costs. (B. 41) Sierra Club is mistaken. Citizens of State v. Graham is inapplicable to the instant case. The Commission's authority to approve a settlement agreement "as a whole" was not at issue in Citizens of State v.

Graham. At issue was whether the Commission's approval of certain transmission interconnection costs through the fuel clause violated a previously Commission-approved settlement agreement entered into between Florida Public Utilities Company and Public Counsel. Id. at 705-706. In holding that it did, this Court found, in relevant part, that "the Commission departed from the essential requirements of law here by acknowledging [Public Counsel's] contention that the settlement agreement applied, but failing to address the terms of the settlement in its analysis." Id. at 713. In the instant case, there is no previously Commission-approved settlement agreement that the Commission failed to address in the Final Order.

2. In Approving the Settlement Agreement, the Commission Correctly Invoked Its Public Interest Standard.

The Final Order notes that the Commission's "standard for approval of a settlement agreement is whether it is in the public interest." (R. 32:6284) As this Court found in Citizens of State v. FPSC, 146 So. 3d 1143 at 1173,

> [t]he determination of what is in the public interest rests exclusively with the Commission. See § 366.01, Fla. Stat. (2012) (declaring the regulation of public utilities to be in the public interest, and deeming Chapter 366 "to be an exercise of the police power of the state for the protection of the public welfare and all the provisions [thereof] shall be liberally construed for the accomplishment of that purpose").

The record reflects that the settlement agreement provides for a substantial reduction in rates and a substantially lower return on equity as compared to the

2016 rate petition. (R. 2:357; R. 3:549-555; R. 5:845-943; R. 7:1328-1339; R. 21:4146-4148, 4154; Oct.T. 3, lines 7-11; Oct.T. 88, lines 8-15; Oct.T. 101, lines 20-24) As illustrated infra at Point II.B., based on the record evidence, the Commission correctly found that the settlement agreement "as a whole" reasonably resolves all of the issues raised in the underlying rate petition, provides rate stability and predictability for FPL's customers, allows FPL to maintain the financial integrity necessary to make the capital investments required to continue to provide its customers with excellent service over the next four years at rates that are the lowest in the state and among the lowest in the country, and establishes rates that are fair, just, and reasonable in the public interest. (R. 32:6284-6285)

The Final Order references four previous Commission orders in which the Commission approved settlement agreements upon finding them to be in the public interest. (R. 32:6284, fn 4) Among them is In re: Petition for increase in rates by FPL, 2013 WL 209584 (2013), affirmed by this Court in Citizens of State v. FPSC, 146 So. 3d 1143, in which the Commission noted that "[s]ettlement agreements are approved if we determine that they are in the public interest." 2013 WL 209584 at *7. (R. 32:6284, fn 4) The Final Order further references that order to support the Commission's finding that "[a] determination of public interest requires a case-specific analysis based on consideration of the proposed settlement taken as a whole." (R. 32:6284, fn 5) Also referenced are In re: Petition for increase in rates

by FPL, 2011 WL 344916 (2011) and In re: Petition for increase in rates by Progress Energy Florida, 2010 WL 2542531 (2010), in which the Commission approved settlements upon finding them to be reasonable resolutions of the outstanding issues and in the public interest, as well as In re: Petition for increase in rates by Progress Energy Florida, 2005 WL 2416368 (2005) (approving settlement upon finding that it established fair, just, and reasonable rates, that approval thereof was in the public interest, and that the Commission has a long history of encouraging settlements, giving them great weight and deference, and enforcing them in the spirit in which they were reached by the parties). (R. 32:6284, fn 4)

3. The Commission Exposed and Elucidated Its Reasons for Approving the Settlement Agreement.

Contrary to Sierra Club's assertions, there is no requirement in the law for the Commission to expose and elucidate its reasons for approving the peaker replacement project. (B. 18) In Citizens of State v. Graham, this Court cited to McDonald v. Department of Banking & Finance, 346 So. 2d 569, 583-84 (Fla. 1st DCA 1977) (footnote omitted) (citations omitted), for the principle that:

> [f]ailure by the agency to expose and elucidate its reasons for discretionary action will, on judicial review, result in the relief authorized by Section 120.68(13): an order requiring or setting aside agency action, remanding the case for further proceedings or deciding the case, otherwise redressing the effects of official action wrongfully taken or withheld, or providing interlocutory relief.

Id. at 712. Moreover, § 120.569(2)(l), Fla. Stat., 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." And "[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, 346 So. 2d at 582.

The Final Order comports with these requirements. The Final Order includes the Commission's findings of fact, which set forth the major elements of the settlement agreement. (R. 32:6282-6284) Because cost recovery for the peaker replacement project is not a specified element of the settlement agreement, there was no reason for the Commission to address it in the Final Order. (R. 32:6287-6315) The Final Order also includes the Commission's conclusions of law, which set forth the public interest standard upon which the Commission reviews settlement agreements and the reasons the Commission found it appropriate to approve the settlement agreement "as a whole" based on the record evidence in the instant case, sufficiently for judicial review. (R. 32:6284-6285) Thus, Citizens of State v. Graham, 213 So. 3d 703, provides no support for Sierra Club's argument that the Commission erroneously ruled upon the settlement agreement "as a whole," without analyzing whether the record supported recovery of the peaker replacement project costs.

Sierra Club also erroneously argues that case law and Commission precedent require the Commission to expressly determine the prudence of the peaker replacement project costs. (B. 25-26) See Point I.B.1., infra. No such case law or Commission precedent requires a Commission order approving a settlement agreement drafted to resolve a petition for a rate increase to address each and every issue of the underlying rate case. See Citizens of State v. FPSC, 146 So. 3d at 1153 (finding that although it may be the better practice to address every factual dispute in the underlying case in a final order approving settlement agreement, the Commission is not required by statute or case law to do so).

Indeed, due to the many issues involved in rate proceedings, such a requirement would likely thwart all efforts to negotiate and settle rate cases upon mutually acceptable terms among the parties to the case. There would be little incentive for the parties to engage in settlement negotiations if the Commission were required to rule on each issue of the underlying rate case regardless of whether a settlement is reached. This would hinder the Commission's long-standing practice of encouraging settlements, to "reduce the time and cost of proceedings, which ultimately benefit the ratepayers." In re: Application for rate increase by South Seas Utility Co., 1989 WL 1640860 (1989). And, as noted supra at Point I.A.1., the legal system favors settlement of disputes by mutual agreement

between contending parties. See, e.g., Utilities Comm'n of New Smyrna Beach v. FPSC, 469 So. 2d at 732.

The Final Order should be affirmed because it adheres to the Commission's long-standing practice of approving settlement agreements "as a whole" upon finding them to be in the public interest.

B. The Final Order Does Not Violate the Prudence Requirement of § 366.06(1), Fla. Stat.

1. Section 366.06(1), Fla. Stat., Does Not Require the Commission to Expressly Rule on the Prudence of the Peaker Replacement Costs When Approval of the Settlement Agreement Obviated the Need for the Commission to Rule on All of the Base Rate Case Issues.

Sierra Club argues that the Final Order does not make an express finding as to whether the peaker replacement project costs were prudently incurred, in violation of § 366.06(1), Fla. Stat. (B. 16-17, 24-25) Sierra Club is wrong. Although whether the peaker replacement project costs were prudently incurred was appropriately included as one of the 167 issues comprising the underlying rate case (R. 15:2912-3106), specifically as Issue 57 (R. 15:2962), the Commission no longer needed to rule on this individual issue in its approval of the settlement agreement. Citizens of State v. FPSC, 146 So. 3d at 1153.

Upon determining the settlement agreement to be in the public interest, there was no longer a need for the Commission to determine the value of the peaker replacement project for ratemaking purposes. Section 366.06(1), Fla. Stat., does

not require the Commission to expressly rule on the prudence of a public utility's investment in used and useful property when the public utility's base rate case application is resolved by way of a settlement agreement found by the Commission to be in the public interest. There was no need for the Commission to establish FPL's base rates going forward because the Commission-approved settlement agreement does just that. (R. 32:6290, R. 32:6317-6318) In the Final Order, the Commission noted that a major element of the settlement agreement is that "FPL is authorized to implement revenue increases of $400 million effective January 1, 2017. . . ." (R. 32:6282) And in holding the settlement agreement to be in the public interest, the Commission found that "[i]t is also important to note that the Settlement Agreement constitutes a reduction in revenue requirement for 2017 of over $400 million from FPL's request." (R. 32:6284)

The Commission's approval of the settlement agreement by way of the Final Order obviated the need for the Commission to rule on all of the issues of the base rate case. See Point I.A.3., supra. Nevertheless, in determining the settlement agreement to be in the public interest, the Commission considered all of the evidence of record taken in the rate hearing as well as in the settlement hearing. (R. 32:6282, 6284-6285) See Point II.A., infra, for a discussion of the evidence taken below regarding the prudence of the peaker replacement project. If no negotiated settlement agreement had been filed resolving the 2016 rate petition in

the public interest, the Commission would have expressly ruled on that issue and on all of the issues comprising the rate case based on the evidence of record before it, in order to fix or change FPL's base rates in accordance with § 366.06(1), Fla. Stat.

2. Case Law Does Not Require FPL to Provide "Empirical Support" that the Peaker Replacement Project Costs Were "Minimized through a Timely Analysis and Pursuit of a Range of Alternatives."

Sierra Club misconstrues Gulf Power Co. v. FPSC, 453 So. 2d 799 (Fla. 1984) (affirming Commission order authorizing a rate increase at less than that sought by electric utility), to require FPL to have provided "empirical support" that the money spent on the peaker replacement project was "minimized through a timely analysis and pursuit of a range of alternatives" in order to satisfy the prudent investment requirement of § 366.06(1), Fla. Stat. (B. 25) This argument is meritless. The correct prudence standard with respect to the Commission's consideration of the underlying 2016 rate petition is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should [have] been known, at the time the decision was made." S. Alliance for Clean Energy v. Graham, 113 So. 3d 742, 750 (Fla. 2013) (affirming Commission order upon holding that § 366.93, Fla. Stat., does not unconstitutionally delegate legislative authority to the Commission and that the order was not arbitrary and unsupported) (citation omitted).

Gulf Power did not involve this Court's review of a Commission order approving a settlement agreement, but of a Commission order granting a rate increase. Id. at 800. Therefore, unlike in the case at bar, the reasonableness and prudence of Gulf Power's investments were expressly at issue in the Commission order on review. At issue in Gulf Power, in relevant part, was whether the Commission erred by not allowing Gulf to include all of its fuel inventory in rate base. Id. at 804. The Commission reduced Gulf's proposed coal inventory value upon finding that Gulf had failed to prove that its inventory policy was reasonable and prudent. Id. at 805. In so doing, in dicta contained in the final order on review, the Commission suggested a specific methodology involving a "range of alternative" coal inventory levels for the utility to provide as "empirical support" for the soundness of its coal inventory policy in the future. This Court quoted from that Commission dicta, as follows:

> We do not wish to substitute our judgment for that of management. However, we insist that management's judgment be substantiated in a way that permits intelligent review of it. In this context, this can best be accomplished by performance of an analysis or study that identifies all of the major factors that influence development of a coal inventory policy, indicates the relative weight that should be attached to each factor, and evaluates the benefits and costs, in light of these factors, associated with a range of alternate coal inventory levels. The reasons why a particular factor is selected, why a particular weight is attached to it, and how it is included in a cost benefit analysis of alternative inventory levels should be clearly stated. In the absence of that kind of empirical support for its position, we find that the

> Company failed to carry its burden of proof with respect to the soundness of its [coal inventory] policy.

Id. at 804 (emphasis added).

In affirming the Commission's order to reduce the coal inventory to a level that the Commission believed to be within a zone of reasonableness, this Court found that although the Commission rejected the testimony of Gulf Power and the competing testimony of its staff on the matter, the Commission was presented with sufficient evidence to enable it to choose a reasonable alternative. Id. This is a far cry from Sierra Club's characterization of Gulf Power, which would expand the case to mean that "empirical support" for a "range of alternatives" is required to satisfy any determination of prudence. The Gulf Power Court made no such pronouncement.

3. FPL Was Not Required to Seek Commission Approval of the Peaker Replacement Project prior to Construction.

Sierra Club complains that the Commission had no prior proceedings involving the prudence of the peaker replacement project because FPL withdrew from the Commission's review an "essentially equivalent" project in 2013 (T. 13:1579, line 22 – T.13:1580, line 11) and did not return for approval until 2016, in its rate petition filed below in the instant case, after it had largely built the peakers. (B. 3-5, 39)

FPL was correct to withdraw its request for approval of the peaker replacement project costs in 2013. That request was made in the Commission's 2013 environmental cost recovery clause proceeding, to comply with a new National Ambient Air Quality Standard for Nitrogen Dioxide ("NOx"). (R. 1:177-179; T. 8:863, line 18 – T.8:865, line 17) In order to qualify for cost recovery through the environmental cost recovery clause, the costs must be incurred in complying with environmental laws or regulations. § 366.8255(1)(d), Fla. Stat.

On cross-examination on the matter in the instant case, FPL witness Barrett explained:

> We brought the project forward in 2013 for environmental cost recovery, it was on the basis of modeling that we had done on the air emissions of those units that would indicate they would not be able to meet the one-hour limitation on NOx emissions. And so we thought that it would be prudent to bring it forward. We were actually thinking that we were going to be required to meet that obligation with those units and our modeling saying they were failing. So as we moved through that process, it was determined that we did some monitoring at the plants. We actually removed the petition, said, okay, let's do some monitoring to affirm whether the modeling is correct or not. As we put up some monitors at the plant boundaries, we never exceeded the emissions limitations, so there was no longer an environmental reason to replace those peakers.

(T. 12:1504, line 24 – T. 12:1505, line 16)

Moreover, the Commission noted that the Florida Department of Environmental Protection needed additional data to confirm whether FPL was out of compliance with the NOx standard. In re: Withdrawal of NOx petition by FPL,

2103 WL 7869995 *1 (2013) (finding that circumstances had changed since FPL filed its petition, that those changes could impact the timing and nature of potential NOx compliance project costs, and that FPL was not precluded from seeking recovery of future costs associated with the project). (R. 2:196) Thus, FPL appropriately withdrew the peaker replacement project costs from the 2013 environmental cost recovery clause proceeding and instead included them in the 2016 rate petition.

As further support for its argument, Sierra Club cites to Citizens of State v. FPSC, 146 So. 3d at 1170, in which this Court noted that certain generation base revenue adjustments included in the Commission-approved settlement at issue were associated with projects that "were thoroughly reviewed and approved by the Commission in prior need determination proceedings." (B. 38-39) The Florida Electrical Power Plant Siting Act (Siting Act) requires a determination of need for the construction of any new steam or solar electrical generating facility of 75 megawatts in capacity or greater. § 403.503(14), Fla. Stat. The peaking units at issue are not steam or solar electrical generating facilities. Rather, they are gas turbines, or CTs, which run on natural gas or oil. (R. 2:362; T. 8:868, line 6 – 8:869, line 22) Thus, the peaker replacement project is not subject to the Siting Act and it was unnecessary for the Commission to conduct a need determination proceeding prior to the construction of the project. (T. 8:867, lines 11-17)

The Final Order should be affirmed because it does not violate the prudence requirement contained in § 366.06(1), Fla. Stat., and it comports with the essential requirements of law.

II. THE COMMISSION'S DETERMINATION THAT THE SETTLEMENT AGREEMENT RESULTS IN RATES THAT ARE FAIR, JUST, AND REASONABLE AND IN THE PUBLIC INTEREST IS SUPPORTED BY COMPETENT, SUBSTANTIAL RECORD EVIDENCE.

Standard of Review

Sierra Club argues that the Final Order is not supported by competent, substantial evidence. (B. 37-38) The standard of review for this point on appeal is as set forth in Citizens of State v. FPSC, 146 So. 3d at 1149, in which this Court held that "'a party challenging an order of the Commission on appeal has the burden of showing . . . that the findings of the Commission are not supported by competent, substantial evidence.'" (citations omitted). In noting that the appellant in that case pointed to conflicting evidence of record, this Court also stated that it affords great deference to the Commission's findings, that it will not overturn an order of the Commission because it would have arrived at a different result, and that it will not re-weigh the evidence. Id. at 1164.

Argument in Response

A. The Prudence of the Peaker Replacement Project Is Supported by Competent Substantial Record Evidence.

Sierra Club concocts an erroneous prudence standard in arguing that "FPL never produced evidence that the Project was cheaper or even equivalent in cost to potential money-savings alternatives – because it did not undertake the requisite alternatives analysis [under Gulf Power] and therefore did not have such evidence to produce." (B. 22) There is no requirement in the law for FPL to have undertaken an analysis of what Sierra Club characterizes as "potential money-saving alternatives" to the peaker replacement project in order to prove the prudence of those projects. (B. 5, 12, 16, 22) See Point I.B.2., supra.

Sierra Club suggests that potential alternatives that FPL failed to analyze include solar, demand side resources, and energy storage. (B. 29) There is no evidence in the record to show the viability of any of those potential alternatives as they relate to the peaker replacement project. Rather, as evidence to show the cost-effectiveness of those alternatives to supply peak demand generally, Sierra Club points to EXH. 751, an empirical analysis of solar project cost, performance, and pricing trends in the United States, and to comments that Sierra Club submitted for the Commission's review of the Florida electric utilities' 2013 and 2016 ten-year site plans, which are not in the record below but which this Court took judicial notice of by order dated June 26, 2017, in this appeal. (APP. 439-453; APP. 593-

609; B. 29-31) Sierra Club would have this Court weigh that evidence and judicially-noticed materials against the evidence that FPL put on to support the prudence of the peaker replacement project costs, something this Court should decline to do. S. Alliance for Clean Energy v. Graham, 113 So. 3d at 753.

Sierra Club argues that the record is devoid of basic information to determine if the peaker replacement project was prudent. (B. 6) This is simply not the case. Competent substantial record evidence shows that by undertaking the peaker replacement project, FPL did "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should [have] been known, at the time the decision was made." S. Alliance for Clean Energy v. Graham, 113 So. 3d at 750. Thus, the record contains competent substantial evidence supporting the prudence of the peaker replacement project.

In describing why FPL undertook the project, FPL witness Barrett testified that:

> First, from 2015 through 2017, FPL will be investing nearly $800 million to upgrade its gas turbine peaking fleet with new highly efficient combustion turbine technology. As described by FPL witness Kennedy, from an operational benefits perspective, upgrading FPL' s gas turbine peaking fleet with new, highly efficient combustion turbine technology is essential for maintaining the reliability of FPL's critical peaking units given equipment parts availability issues. FPL projects that these new combustion turbines will provide approximately 35% to 40% heat rate efficiency improvement resulting in lower fuel usage and better air emission rates. The new units will also alleviate the replacement parts availability issue on the existing 45 year old equipment. This project

> is expected to provide a [cumulative present value revenue requirement] benefit to customers of $203 million over the operating life of the units (See Exhibit REB-9 [EXH. 87]) and accounts for about $92 million of the total requested base revenue increase in 2017.

(T. 11:1420, line 19 – T. 11:1421, line 9) Witness Barrett further testified that

> In a nutshell, the plan is to replace the 1970s vintage gas turbines that are currently at Port Everglades, Ft. Lauderdale and Ft. Myers with state-of-the-art combustion turbines. 44 of the 48 would be retired. Four of the 48, two at Ft. Lauderdale, two at Ft. Myers, would be kept for black start capability, which means when the lights are out, they can start. The advanced combustion turbines don't have that capability. They need auxiliary power to get them started. So the plan is to basically replace those old Toyotas with a new Prius.

(T. 12:1501, line 25 – T. 12: 1502, line 11) He explained that:

> we determined that the long-term viability of those [original] peakers was suspect. They were going to cost a lot of money to keep running; and, in fact, parts were really not any longer available for those . . . machines. So it was then that we pivoted to looking at the economics of replacing them, and determined that replacing those 44 of the 48 peakers with seven combustion turbines could probably provide tremendous benefits in terms of [cumulative present value revenue requirement]. It's over $200 million.

(T. 12:1505, line 18 – T. 12:1506, line 2)

EXH. 502 shows that "[s]ignificant capital investment would be required to keep FPL's existing gas turbines operating reliably," and that "[n]ew combustion turbines (peaker upgrades) are expected to further modernize the FPL fleet and provide emissions and fuel consumption savings." Moreover, witness Kennedy testified that the retirement of the older, less efficient peaking units reduces costs.

(R. 8:817, lines 13-18) She testified that FPL's customers benefit from this project because the new peaking units are more environmentally friendly, with a 37 percent improvement in emissions, and they have better heat rates. (T. 8:948, lines 9-12) "So like for like, if they are operated for similar capacities, the fuel savings is going to be greater. They are 30 -- they are much more efficient. We will use less natural gas. It's like we traded in a 15-mile per . . . gallon . . . car for something that gets . . . 40 miles per gallon, and you get to reap that savings." (T. 8:948, lines 12-18) And witness Silagy, FPL President and CEO (T. 1:109, lines 22-23), testified that:

> The peakers we're replacing are the exact engines that hung on the Boeing 707. The last 707 rolled off the production line in 1978. They are not the most fuel-efficient machines. They are not the most environmentally friendly. When you start them up, they're great for quick starts when they work. The problem now is, you can't find any parts for them. So clean generation is also a function of being able to replace equipment with very fuel efficient, very clean technology.

(T. 4:382, lines 4-14)

Regarding whether solar would be a viable alternative to the peaker replacement project, witness Barrett testified that "[t]hese particular machines provide a duty for the services of electric service for our customers in that they have that quick-start capability. So they cannot be replaced with solar." (T. 13:1582, lines 20-23) And "[t]hey cannot be replaced with other combined cycle because combined cycle plants don't have that same quick-start capability.

They would be base loaded. So there's a specific application for this technology, and this is basically trading out a 40-year-old car for a new car and saving money on it." (T. 13:1582, line 25 – T. 13:1583, line 5)

In response to a cross question posed by counsel for Sierra Club as to whether FPL looked at doing a smaller project that could cost less, witness Barrett testified that "[w]e have a 20 percent reserve margin. If we were to not have replaced all of the megawatts that we were retiring, we would be shorter that reserve margin." (T. 13:1582, lines 8-10) FEA witness Alderson defined a utility's reserve margin to be:

> the excess capacity above expected demand at the hours of the annual system peaks of the system. A minimum reserve margin threshold is used by system planners to ensure that the generating capacity is available when demands on the system are at the highest levels taking into account forecasting error and weather fluctuations, in order to greatly reduce the likelihood of brownouts or blackouts.

(T. 27:3791, lines 14-19) Witness Barrett testified that "[t]he peakers are basically within a few megawatts replacing like for like. So we are getting rid of, roughly, 1,600 or so megawatts of the old peakers, replacing with the new peakers. So there really is no difference in reserve margin, or difference in need." (T. 12:1510, lines 13-18)

Regarding the use of battery storage as a potential alternative to the peaker replacement program, on cross-examination by Sierra Club, witness Silagy

testified that he has investigated battery storage as an alternative to generation. (T. 1:291, lines 16-21) He further testified that:

> I can tell you that we continue to look at battery storage technology, including at our sister company, NextEra Energy Resources. And I also read materials provided that are public domain, and have a understanding of what the costs are associated with battery technology, and also understand what some of the limitations are around battery technology. And so while I personally am a fan of battery technology, I also recognize that there are lots of limitations, and very expense [sic] costs associated with it, and they would not meet the needs, in my opinion, for a peaker system in our system at this time.

(T. 2:292, lines 2-14) Moreover, paragraph 18 of the settlement agreement includes a provision allowing FPL to implement a battery storage pilot program. (R. 32:6308-6309) During the settlement hearing, FPL witness Barrett testified that this program will allow FPL to expand its small battery storage pilot program "to a sizable, meaningful pilot program where we think that over the next four years as we do this . . . we'll begin to see some scale efficiencies and maybe some cost declines, and that we [will] be better positioned after this pilot to know what's the potential to do further deployment in the future." (Oct.T. 100, lines 4-12) He further testified that "it's going to take a number of years, I would think, to get enough data to really understand what are we getting for the dollars that we're investing." (Oct.T. 117, lines 15-17)

Sierra Club argues that EXH. 639, a Greentech Media article, shows that FPL should have studied the economics of waiting until 2020 to replace the

original peakers, "by which time FPL expected that – given the cost 'plunge' of alternate resources – no power producer in the country would build new peakers." (B. 14) This argument is a mischaracterization of what EXH. 639 shows. EXH. 639 quotes the CEO of NextEra Energy Resources as stating that "he and his team expect energy storage prices to experience a similar cost plunge to that of solar costs over the last seven years. If that happens, energy storage will be competitive with gas peaker plants." (emphasis added) He is further quoted as stating that "[p]ost-2020, there may never be another peaker built in the United States – very likely you'll be just building energy storage instead." (emphasis added) The following transpired on redirect examination by counsel for FPL of witness Barrett concerning EXH. 639:

> Q And if you would, turn, please, to Exhibit 639. Do you have that? This is the Greentech Media article.
> A Let me find it. (Examining document.) Yes.
> Q Okay. First of all, on Page 2 of 3, you were asked about a quote in this, what Mr. Robo said. And just to clarify, does -- does this article indicate that Mr. Robo says that there certainly will be no other peakers built or that there may not be other peakers built post-2020?
> A He said may never be.
> Q Okay. When does FPL -- or when will FPL be placing its current peaking CTs into service?
> A This year.
> Q Okay. At today's prices, would battery storage be a cost-effective alternative to replacing the old GTs with these current CTs?
> A No.
> Q You were asked by Ms. Csank about whether there was value to keeping more than two of the old GTs per site on -- around having sort of a larger retained fleet of the old GTs. Do you think that that would be a cost-effective alternative to retiring all but two per site?

> A No. I believe keeping just the two that we need for black star[t] capability or what -- would be the prudent decision.

(T. 14:1651, line 15 – T. 14:1652, line 16)

The Commission considered all of the evidence in finding that the settlement agreement reasonably resolves all of the issues contained in the underlying rate case (R. 32:6284-32:6285), which issues include whether the peaker replacement project costs were prudently incurred. (R. 15:2962) In Crist v. Jaber, 908 So. 2d at 431, this Court noted that its "review is limited to a determination of whether evidence exists to support the Commission's findings." Just as the Court found that extensive evidence supported the Commission's findings in that case, Id. at 431-32, extensive record evidence supports the Commission's finding that the settlement agreement reasonably resolves all of the issues contained in the underlying 2016 rate petition in the case at bar (R. 32:6284-32:6285), including the issue that Sierra Club raises on appeal. The Final Order should be affirmed because it is based on competent substantial record evidence.

B. The Final Order Approving the Settlement Agreement as Being in the Public Interest Is Supported by Competent Substantial Evidence.

In its opening statement at the settlement hearing, counsel for Sierra Club stated that the settlement agreement is not in the public interest. (Oct.T. 24, line 25 – 25, line 3) Sierra Club put on no evidence during the settlement hearing to support this contention or to otherwise oppose the settlement agreement. Nor did

Sierra Club cross-examine any of the witnesses who testified on the settlement issues.

AARP is the only non-signatory party below who sponsored a witness in opposition to the settlement agreement. (Oct.T. 125, line 23 – 126, line 3) Among other things, AARP witness Brosch testified in opposition to paragraph 12 of the settlement agreement, which authorizes FPL to apply certain depreciation parameters and resulting rates. (Oct.T. 126, lines 4-12; Oct.T. 134, line 10-139, line 14; R. 32:6304-6306) The depreciation parameters contained in paragraph 12 are not a subject of this appeal. In opposition to the settlement agreement, counsel for the two individual FPL customers submitted a written statement in lieu of appearance at the settlement hearing. (R. 23:4445-4454) Counsel for Wal-Mart stated that "while Wal-Mart is not a signatory to the stipulation and settlement, it does not oppose the agreement reached by the settling parties." (Oct. T. 23, lines 10-12) FEA also did not oppose the settlement agreement and FIPUG took no position on it. (Oct. T. 20, lines 7-13)

In its opening statement, counsel for Public Counsel stated that "[t]he Public Counsel's Office, on behalf of all the citizens that we represent in this case, strongly believe that this agreement is in the public interest taken as a whole." (Oct.T. 16, lines 5-8) Public Counsel further stated that "the settlement . . . produces a reasonable result for all customers, given the range of likely outcomes

based on the Public Counsel's judgment after conclusion of the evidentiary record in this docket." (Oct.T. 16, lines 9-13) Counsel for FPL stated that "these discussions did not happen overnight. In fact, as you might expect, a lot of complex issues, a lot of lengthy discussions over several months occurred. . . ." (Oct.T. 13, lines 14-17) He further noted that "even though we had very lengthy conversations, the issues, as I said, were very, very complex and we obviously were attempting, as you well know based on the filed positions in this docket, attempting to bring together some pretty divergent interests." (Oct.T. 13, line 23-14, line 3) In supporting the settlement agreement, counsel for SFHHA urged the Commission "take into account the complexity of the settlement and its interwoven nature." (Oct.T. 16, lines 19-22) And counsel for FRF stated that "[t]his settlement was reached through extended discussions, . . . literally over a period of some months. This agreement represents a reasonable and mutually acceptable resolution of, as you see before you, many complex issues." (Oct.T. 17, lines 1-6)

The record includes competent substantial evidence showing that the settlement agreement as a whole is in the public interest. FPL witness Cohen testified that:

> [u]nder the Proposed Settlement Agreement, the bills for all customers are projected to remain among the lowest in the state and nation. As shown on [EXH. 808], the projected 2020 typical residential 1,000-20 kWh bill would remain 30 percent below the current national average and 13 percent below the current Florida average, even without taking into account likely increases in other

> utilities' rates over the Minimum Term for which the Proposed Settlement Agreement would be in effect.

(Oct. T. 28, lines 17-23) FPL witness Ferguson testified to the appropriateness of the revised depreciation parameters contained in the settlement agreement (R. 32:6304-6306), and as to why they are key elements of the overall settlement. (Oct. T. 42, line 14-46, line 6) FPL witness Forrest testified to the reasonableness of terminating FPL's natural gas financial hedging for the minimum term of the settlement agreement (R. 32:6307-6308), as part of the negotiated resolution of the disputed issues that led to the settlement. (Oct. T. 60, line 7 – 63, line 9)

FPL witness Barrett testified as to why, taken as a whole, the settlement agreement is in the public interest. (Oct.T. 76, line 11 – 86, line 7) He testified that the settlement agreement would resolve all of the issues of the 2016 rate petition "in a fashion that balances the interests that customers have in receiving low bills, high reliability and excellent customer service with the opportunity for investors to have the potential to earn a fair rate of return." (Oct. T. 77, lines 8-13) He testified that:

> [t]aken as a whole, the Proposed Settlement Agreement will provide for a high degree of base rate certainty to all parties and FPL customers for a fixed term of four years; encouraging management to continue its focus on improving service delivery, realizing additional efficiencies in its operations and creating stronger customer value, while maintaining residential bills that are projected to continue to be among the lowest in the state and nation. This negotiated outcome

> resolves a number of competing considerations in a way that produces an overall result that is in the public interest.

(Oct. T. 77, line 22 – 78, line 6)

Among other provisions of the settlement agreement, witness Barrett testified to the reasonableness of the solar base rate adjustment (SoBRA) contained in paragraph 10. (R. 32:6298-6302; Oct. T. 80, line 10 – 83, line 22) Under the SoBRA mechanism, "FPL may construct approximately 300 MW of solar generating capacity per calendar year, projected to go into service no later than 2021. The cost of the components, engineering and construction for any solar project undertaken pursuant to the Proposed Settlement Agreement will be reasonable and will not exceed $1,750 kWac." (Oct.T. 80, lines 15-19)

Witness Barrett also testified about the battery storage pilot program that is included in the settlement agreement at paragraph 18, which "will allow FPL to deploy 50 MW of battery storage technology designed to serve commercial, industrial and retail customers. (R. 32:6308-6309; Oct.T. 84, lines 4-6) See Point II.A., supra. According to witness Barrett, the signatories "agree that this pilot program is a prudent investment and provides benefits for FPL's customers. Through this program, FPL will be able to gain a better understanding of how battery storage can improve the reliability and efficiency of the system." (Oct.T. 84, lines 6-9) On cross-examination, witness Barrett testified that FPL views the battery storage pilot program as "an opportunity to make a modest investment into

this new technology to try to figure out how in different applications it plays on our system and where we can provide value to customers." (Oct.T. 96, lines 6-9) He added that "to the extent that the 50 megawatts of batteries provides, for instance, fuel savings, that will flow right through to customers during this term. But we're not going to be asking for any of the cost recovery [of investment or any other costs of the pilot program] until the next rate case." (Oct.T. 97, lines 14-18)

In response to questioning by a Commissioner, witness Barrett testified that the settlement agreement decreases FPL's initial revenue request by a little over $400 million. (Oct.T. 101, lines 21-24) When asked what tangible things consumers would get as a result of the $800 million increase that would result from the settlement agreement, witness Barrett testified that:

> we're going to continue to invest heavily in our infrastructure through reliability investment projects through storm hardening efforts, which we've just seen some good empirical evidence of the performance of our system that has been hardened. We're going to continue to invest in new technologies on the generation side. So part of this is paying for the new solar plants we're just bringing online this year. The peaker program, which is providing substantial savings to customers. So all of those capital initiatives that I principally testified to are going to be paid for, if you will, by the revenues that are generated from this settlement agreement.

(Oct.T. 102, line 20 – 103, line 8)

Witness Barrett concluded that "[a]s in any settlement context, parties will have made concessions relative to their positions in the case. This settlement is no different and must be viewed and accepted (or not) on its whole." (Oct.T. 85, lines

16-18) He testified that the factors that FPL would offer in support of the Commission's approval of the settlement agreement include:

> First, the Proposed Settlement Agreement provides customers with predictability and stability in their electric rates, while allowing FPL to maintain the financial strength to make investments it believes are necessary to provide customers with safe and reliable power. Second, the Proposed Settlement Agreement also will increase the amount of emissions-free solar power and energy that will be available to serve customers on a cost-effective basis. Third, the Proposed Settlement Agreement reflects an average annual growth in rates of slightly less than 2%, below the expected rate of inflation. For these reasons, FPL submits that the Proposed Settlement Agreement, taken as a whole, is in the public interest and should be approved by this Commission.

(Oct. T. 85, line 20 – 86, line 7) He further testified that "I think over the four-year period, if you kind of accumulate the rate increases that we filed [in the 2016 rate petition] versus what are contained here, it's about $2 billion less, about half, roughly half of what we had requested, which we, again, we felt was appropriate and also well defended." (Oct.T. 112, lines 1-6)

In approving the settlement agreement by the Final Order, the Commission found that:

> The weight of the evidence presented at both the customer hearings held throughout FPL's service territory and at the technical hearings conducted in Tallahassee fully supports the conclusion that FPL is providing excellent service to its 4.8 million customers at rates that are the lowest in the state and among the lowest in the country. The Settlement Agreement will allow FPL to maintain the financial integrity necessary to make the capital investments over the next four years required to sustain this level of service while providing rate stability and predictability for FPL's customers. The signatories to the Settlement Agreement represent a broad segment of FPL's

> customer base including both residential and commercial classes. Many of the positions advocated by these groups, including cessation of natural gas hedging, construction of cost-effective solar generation, reduction of FPL's proposed 11.0 percent ROE, and reduction of proposed depreciation rates, are contained in the Settlement Agreement. It is also important to note that the Settlement Agreement constitutes a reduction in revenue requirement for 2017 of over $400 million from FPL's request.

(R. 32:6284) The Commission found the settlement agreement to be a compromise with give and take on both sides, and that "taken as a whole the settlement provides a reasonable resolution of all the issues raised in the [2016 rate petition]." (R. 32:6284-6285) Therefore, by the Final Order, "[h]aving carefully reviewed all briefs filed and evidence presented," the Commission approved the settlement agreement upon finding that "taken as a whole the settlement provides a reasonable resolution of all the issues raised in the consolidated dockets," that it "establishes rates that are fair, just, and reasonable[,] and [that it] is in the public interest." (R. 32:6284-6285) The Final Order should be affirmed because it is supported by competent, substantial evidence and comports with the essential requirements of law. S. Alliance for Clean Energy, 113 So. 3d at 752.

CONCLUSION

Sierra Club 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,
/s/ Rosanne Gervasi
Senior Attorney
Florida Bar No. 0001848
rgervasi@psc.state.fl.us

Keith C. Hetrick
General Counsel
Florida Bar No. 564168
khetrick@psc.state.fl.us

Samantha M. Cibula
Attorney Supervisor
Florida Bar No. 0116599
scibula@psc.state.fl.us

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0862
(850) 413-6199

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail through the Court's e-filing portal to all counsel on the attached service list this 9th day of October, 2017.

By: *s/ Rosanne Gervasi*

SERVICE LIST

Case No. SC17-82

Diana A. Csank
Josh Stebbins
Sierra Club
50 F St. NW, 8th Floor
Washington, DC 20001
diana.csank@sierraclub.org
josh.stebbins@sierraclub.org
Attorneys for Sierra Club

Joshua Smith
Sierra Club
2101 Webster St., Suite 1300
Oakland, CA 94612
Joshua.Smith@sierraclub.org
Attorney for Sierra Club

Kenneth L. Wiseman
Mark F. Sundback
William M. Rappolt
Andrews Kurth LLP
1350 I Street NW, Suite 1100
Washington, D.C. 20005
kwiseman@andrewskurth.com
msundback@andrewskurth.com
wrappolt@andrewskurth.com
Attorneys for South Florida Hospital and Healthcare Association

Deb Swim
1323 Diamond Street
Tallahassee, FL 32301
dswim.attorney@gmail.com
Attorney for the League of Women Voters of Florida

J. R. Kelly, Public Counsel
Patricia A. Christensen
Charles J. Rehwinkel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
kelly.jr@leg.state.fl.us
christensen.patty@leg.state.fl.us
rehwinkel.charles@leg.state.fl.us
Attorneys for the Citizens of the State of Florida

Robert Scheffel Wright
John Thomas LaVia, III
Gardner, Bist, Bowden, Bush, Dee, LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, FL 32308
schef@gbwlegal.com
jlavia@gbwlegal.com
Attorneys for the Florida Retail Federation

John T. Butler
Maria J. Moncada
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408-0420
john.butler@fpl.com
maria.moncada@fpl.com
Attorneys for Florida Power & Light Company

SERVICE LIST

Case No. SC17-82

Courtney Brewer
John S. Mills
The Mills Firm, P.A.
The Bowen House
325 North Calhoun Street
Tallahassee, FL 32301
cbrewer@mills-appeals.com
jmills@mills-appeals.com
service@mills-appeals.com
Attorneys for City of South Miami

Stuart H. Singer
Boies, Schiller & Flexner LLP
401 East Las Olas Boulevard, Suite 1200
Fort Lauderdale, Florida 33301
ssinger@bsfllp.com
Attorney for Florida Power & Light Company

CERTIFICATE OF COMPLIANCE

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.

s/ Rosanne Gervasi
ROSANNE GERVASI