IN THE SUPREME COURT OF THE STATE OF FLORIDA

SIERRA CLUB,
Appellant,

v.

JULIE IMANUEL BROWN, ECT. ET AL,
Appellees.

CASE NO. SC17-82
Lower Tribunal Nos. 160021-EI
160061-EI
160062-EI
160088-EI

CITIZENS'/INTERVENOR'S ANSWER BRIEF

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PREFACE

Appellant, Sierra Club, will be referred to as "SC" or "Sierra Club." Appellant, League of Women Voters of Florida, will be referred to as "LWVF." Appellant, City of South Miami, will be referred to as "CSM" or "South Miami." Appellee, Florida Public Service Commission will be referred to as the "PSC" or "Commission." Appellee, Florida Power and Light will be referred to as "FPL" or "Company." Appellee, Office of Public Counsel, will be referred to as "Citizens" or "OPC." Appellee, Florida Retail Federation will be referred to as "Retail Federation" or "FRF." Appellee, South Florida Hospital and Healthcare Association will be referred to as "SFHHA." Collectively, Appellees Citizens, FRF, and SFHHA, will be referred to as "Intervener Signatories."

"Peaker Replacement Project" refers to the Peaker Replacement/Upgrade Project. "ROE" refers to Return on Equity.

References to the transcript for the August Hearing on the base rate case which was transmitted as Attachment One of the record will be referenced as TR at p._____. References to the transcript for the October Hearing on the Settlement Agreement which was transmitted as Attachment One of the record will be referenced as Oct. TR at p. _____.

Reference to the Record on Appeal will be referenced as R., Vol. ___, at p. ____. References to the documents contained in the Appellant's initial brief shall

be App. at p.____. Commission orders available on the Commission website shall be referenced as Order No. PSC- ##-####.

All references to the Florida Statutes are to Florida Statutes (2017) unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

This matter is an appeal of the Settlement Agreement approved by the Commission as a resolution of all issues in the 2016 base rate proceeding filed by FPL. FPL, OPC, SFHHA, and FRF are signatories[1] to the Settlement Agreement. Sierra Club opposed the Settlement Agreement based on the absence of a rejection of FPL's Peaker Replacement Project in the Settlement Agreement. Oct. TR at pp. 23-25. The Commission's Final Order on the Settlement Agreement did not address the Peaker Replacement Project, nor was the Commission required to address that project. Moreover, there is no factual basis to support the alternatives Sierra Club asserts should have been considered in lieu of the Peaker Replacement Project units.

[1] Wal-Mart Stores East, LP and Sam's East, Inc. (Walmart), the Federal Executive Agencies (FEA) and Florida Industrial Power Users Group (FIPUG), were interveners in the case below and did not object to the Settlement Agreement. Daniel and Alexandria Larson (Larsons) were Interveners but did not participate at the hearing on the settlement. AARP was an Intervener and objected to the settlement at the October hearing, but did not participate in this appeal. Sierra Club is the sole appellant of the interveners in the lower tribunal.

I. *Rate Case Proceedings*

Pursuant to Chapter 366, Florida Statutes, FPL filed a petition for a base rate increase seeking an approximately $826 million increase in 2017, another $270 million increase in 2018, plus a third increase of $209 million in mid-2019 for the Okeechobee Clean Energy Center, representing cumulative total increased revenues of approximately $4.45 billion over the four-year period covered by FPL's Petition. TR at p. 147. FPL also requested an 11.0 % authorized return on equity ("ROE") midpoint plus a 50 basis point "adder" to the rate-setting mid-point with an earnings range of 10.5% to 12.5%. R., vol. 2, at pp. 350-351.

The Commission consolidated Docket Nos. 160021-EI, (Petition for Base Rate Increase), 160061-EI, (Storm Hardening Plan), 160088-EI, (Incentive Mechanism), and 160062-EI, (Depreciation and Dismantlement), and conducted an evidentiary hearing from August 22, 2016 through September 1, 2016 ("August Hearing"). The parties filed post hearing briefs on September 19, 2016, addressing the parties' positions on the identified issues.

The Pre-Hearing Order No. PSC-16-0341-PHO-EI identified 167 issues for resolution at the August Hearing on base rates. R., Vol. 15, at p. 2873 - R., Vol. 16, at p. 3133. One issue amongst the 167 issues the Commission initially accepted for disposition at the August Hearing was Issue 57: "Is FPL's replacement of its peaking

units reasonable and prudent?"[2] R., Vol. 15, at p. 2963. After the August technical hearing, FPL, OPC, SFHHA, and FRF filed a Joint Motion for Approval of the Settlement Agreement on October 6, 2016, which resolved all outstanding issues in the consolidated dockets, including Issue 57 regarding FPL's Peaker Replacement Project. R., Vol. 22, at pp. 4211-4388, App. at pp. 8-9.

The Settlement Agreement reduced FPL's initial cumulative base rate increase request of approximately $4.45 billion over 4 years to $2.55 billion.[3] R., Vol. 22, at pp. 4211-14, 19. This revenue award in the Settlement Agreement was in the form of a "black box" resolution of the overall base rate revenue requirement as it did not specifically identify or assign set amounts to specific line items or costs. App. at pp. 7-35. The Agreement further set the authorized return on equity at 10.55% with an earnings range of 9.6% to 11.6%. The Parties to the Settlement Agreement also negotiated additional terms and conditions. R. Vol. 22 at pp. 4211-4388. None of the terms and conditions in the Settlement Agreement specifically addressed the Peaker Replacement Project that was related to Issue 57. R., Vol. 22,

[2] The Prehearing Order also identified an issue regarding the upgrade projects: Issue 57A: "Are FPL's .05 combustion turbine upgrade projects reasonable and prudent?" See, R. Vol. 15, at p. 2963 (Order No. PSC-16-0341-PHO-EI at p. 90).

[3] Base rates are determined based upon the revenue requirement which is applicable to all customers who are represented by the OPC pursuant to Section 350.0611, Florida Statutes.

at pp. 4211-4235. This treatment was typical of that for the vast majority of the cost components that were the subject of FPL's rate case petition. The Commission held a hearing on the Settlement Agreement on October 27, 2016 ("October Hearing").

At the October Hearing, the Commission received supplemental evidence regarding the provisions of the Settlement Agreement that were not presented to the Commission in the August Hearing on FPL's original Petition. Oct. TR. at pp. 1-151. The Intervener Signatories agreed that the Settlement Agreement when taken as a whole is a fair resolution of the pending base rate case and consolidated dockets given the specific facts and circumstances of these cases and is in the public interest. Oct. TR. at pp. 13-17. Sierra Club made an opening statement objecting to the Settlement Agreement,[4] but asked no questions of the witnesses during the October Hearing on the provisions of the Settlement Agreement and offered no additional evidence. Oct. TR. at pp. 5, 23-25.

II. *Facts Regarding the Peaker Replacement Project Units*

FPL's Peaker Replacement Project consisted of retiring 44 of its 48 gas turbine (GT) units which are over 40 years old. TR at pp. 813, 1578. Four units

[4] Sierra Club argued erroneously that "it [the Settlement Agreement] takes away your [the Commission's] ability to complete the fact-finding process on whether FPL should recover any of the more than $1 billion the company has dedicated to building more fracked gas-burning peaker power plants." Oct. TR. at p. 24.

were retained for black-start capability. TR at p. 813. FPL replaced these 44 GT units with 7 newer, larger and more efficient combustion turbines (CT) as replacements for the approximately 1,700 MW of peaking capability. TR at p. 813.

In this appeal, Sierra Club asserts that solar generation can be used as a substitute for the peaking units. SC Brief at p. 7. However, solar generation is an intermittent resource, which only generates electricity when the sun is shining. TR at p. 1576. Peaker units are reliability units that can provide power quickly when the utility loses base load generation capability or needs additional power to meet customer load. TR at pp. 1506 -1507, 1582. Within 15 minutes, FPL must be able to bring a certain amount of load onto the system. TR at p. 1506. Within half an hour, FPL must replace power that is lost or add power that is needed in order to meet its reliability commitments to the Florida Reliability Coordinating Council ("FRCC") and to the North American Electric Reliability Corporation ("NERC"). TR at p. 1506. FPL needs peaking units for emergencies such as hot weather or equipment failures. TR at p. 1507. Moreover, the peaker units provide quick-start capability; thus, they cannot be replaced with solar. TR at p.1582.

SUMMARY OF THE ARGUMENT

The Commission did not depart from the essential requirements of law when it approved the settlement without explicitly addressing the Peaker Replacement Project. The Commission addressed the major terms of the settlement, discussed its case-specific analysis, and found the Settlement Agreement when taken as a whole to be in the public interest. R., Vol. 32, at pp. 6282-85 (Order No. PSC-16-0560-AS-EI at pp. 2-5). This Court has previously stated that, "although it may be the better practice to resolve every factual dispute in the final order, the Commission is not required by statute or case law to address each issue of disputed fact in its final order, and the final order otherwise satisfies section 120.569(2)(l)." *Citizens v. Fla. PSC*, 146 So.3d. 1143, 1153 (Fla. 2014). Thus, the Commission's order approving the Settlement Agreement comports with the requirements of law, and the Court therefore should uphold the Commission's decision without consideration of the single issue Sierra Club would carve out for judicial review independent of the Commission's determination that the settlement as a whole was in the public interest.

Sierra Club's arguments also fail because they are based on misinterpretations of the laws and misrepresentations of the facts. For instance, Sierra Club contends that FPL needed pre-approval to construct the generating facilities that comprise the Peaker Replacement Project. In fact, there is no requirement in the law for FPL to have obtained such pre-approval.

Further, there is no lack of competent substantial evidence regarding the peaker units. Sierra Club's reliance upon statements by management of FPL's parent company opining as to future, aspirational goals that FPL may be able to use energy storage along with solar or demand-side management to displace peaking units is insufficient to support a need for an alternative analysis. Thus, the record evidence cited by Sierra Club does not support that solar, energy storage, and demand-side management are actual, viable alternatives to the peaker units. Therefore, there is no merit to Sierra Club's argument that an analysis of the use of solar, energy storage, and demand-side management was required.

STANDARD OF REVIEW

The standard of review to challenge an order of the Commission on appeal is set forth in *Crist v. Jaber*, 908 So.2d 426, 430 (Fla. 2005):

> . . . 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. *W. Fla. Elec. Coop. Ass'n v. Jacobs*, 887 So.2d 1200, 1204 (Fla. 2004).

This Court has held that "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." See, *Southern Alliance v. Graham*, 113 So. 3d 742, 752 (Fla. 2013) (citations omitted). This Court further stated that it will approve the

Commission's findings and conclusions if they are based upon competent, substantial evidence and are not clearly erroneous. 887 So.2d at 1204.

This Court has also held that the Commission can authorize a non-unanimous settlement. See, *Citizens v. Fla. PSC*, 146 So.3d. 1143, 1149-50 (Fla. 2014). Further, this Court has held that while it may be better practice, the Commission is not required by statute or case law to address each issue of disputed fact in its final order. *Id.* at1150.

ARGUMENT

I. THE COMMISSION DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW WHEN IT APPROVED THE SETTLEMENT WITHOUT EXPLICITLY ADDRESSING THE PEAKER UNITS.

In the Final Order which is the subject of this appeal, the Commission approved the Settlement Agreement between FPL and the Intervener Signatories which resolved all of the 167 disputed issues identified in FPL's 2016 base rate case. R. Vol. 32, at pp. 6284-85 (Order No. PSC-16-0560-AS-EI at pp. 4-5). The Commission, after the evidentiary hearing on the disputed issues in August and the evidentiary hearing on the additional terms included in the Settlement Agreement in October, found "that taken as a whole the settlement provides a reasonable resolution of all the issues raised in the consolidated dockets. We find, therefore, that the Settlement Agreement establishes rates that are fair, just, and reasonable and is in

the public interest." R. Vol. 32, at p. 6286 (*Id.* at 5). This determination should be upheld by this Court.

The individually identified issues are used as building blocks by the Commission in the hearing process to resolve the ultimate issue of the revenue requirement to be established in order to set rates. The Peaker Replacement Project issue was only one of the 167 issues that the Commission initially accepted to be disposed of in the base rate case. R., Vol. 15, at p. 2963. The Settlement Agreement which is the subject of this appeal was a "black box" resolution of the overall revenue requirement and did not identify specific amounts or costs related to each of the 167 issues, with the exception of those items addressed by separate paragraphs therein. App. at pp. 7-35.

FPL's initial petition requested a cumulative total revenue increase of approximately $4.45 billion over the four-year period covered by the petition; the total cumulative increase included in the Settlement Agreement's "black box" revenue determination amounted to approximately $2.55 billion over the four year term. App. at pp. 7-35, TR at p.146. Thus, the Settlement Agreement included a revenue determination that resulted in a substantial overall reduction to FPL's initial base rate revenue request for the four year period. In addition, FPL's initial Petition requested an 11.0 % authorized ROE midpoint plus a 50 basis point "adder" to the rate setting mid-point with a range of 10.5% to 12.5%. R., Vol. 2, at pp. 350-351.

The Settlement Agreement incorporated an ROE of 10.55%, with a range of 9.6% to 11.6%, and with no adder included. App. at pp. 7-35. These reductions in the requested revenue increases, along with the other specific terms and conditions outlined in the Settlement Agreement, were considered by the Commission in deciding whether to approve the Settlement.

At the October Hearing, the record was reopened to allow supplemental testimony and evidence regarding the terms and conditions of the Settlement Agreement not previously addressed at the August Hearing. R. Vol. 23, at p. 4441 (Order No. PSC-16-0483-PHO-EI at p. 1). Therefore, the Commission had the benefit of all the evidence and testimony presented in the August Hearing as well as the evidence and testimony presented in the October Hearing. The sole issue considered at the October Hearing was identified as: "Is it in the public interest for the Settlement Agreement to be approved?" R. Vol 23, at p. 4441 (*Id.*). In the Commission's Settlement Order, it stated "[h]aving carefully reviewed all briefs filed and evidence presented, we find that taken as a whole the settlement provides a reasonable resolution of all issues raised in the consolidated dockets." R. Vol. 32, at pp. 6285-86 (Order No. PSC-16-0560-AS-EI at pp. 4-5).

The Settlement Agreement disposed of all pending issues in the consolidated dockets by resolving the ultimate issues relating to revenue requirements and rates. The fact that the Agreement did not specifically address each and every issue

identified in the consolidated dockets, including the treatment of the Peaker Replacement Project and its associated revenue requirement, is irrelevant. As stated previously, the Commission had the benefit of the evidence and testimony in both the August Hearing and the October Hearing in rendering its decision to approve the settlement. And this Court has held the Commission is not required by statute or case law to address each issue of disputed fact in its final order, and the final order otherwise satisfies Section 120.569(2)(l), Florida Statutes. See, *Citizens v. Fla. PSC*, 146 So.3d 1143, 1153 (Fla. 2014).

In its appeal, Sierra Club has not raised an issue regarding a term or condition contained in the Settlement Agreement. Rather, Sierra Club is attempting to resurrect an issue it raised in the base rate case regarding the Peaker Replacement Project. Sierra Club's arguments fail because they rely on the false premise that the Commission is required to address all factual issues raised in the base rate case to dispose of the matter by an agreed settlement. However, Section 120.57(4), Florida Statutes, permits the disposition of any proceeding by stipulation, agreed settlement, or consent order, unless precluded by law. This Court in *Citizens v. Fla. PSC* upheld a settlement where the Commission did not expressly address each and every issue of disputed fact in its final order. 146 So.3d at 1153.

This Court noted in *Citizens v. Fla. PSC* that Section 120.569(2)(l), Florida Statutes, requires the final order in a proceeding which affects substantial interests

to be in writing and include finding of facts, if any, and conclusions of law separately stated. *Id*. at 1153. In its review in that case, the Court found that "the Commission's final order discusse[d] the major elements of the settlement presented for its review on FPL's motion to approve the settlement agreement." *Id.* The Court further noted that the Commission explained why the settlement agreement was in the public interest. *Id.*

Similarly, in the instant case, the Commission in its Final Order approving the Settlement Agreement discussed the major elements of the settlement. R. Vol. 32, at pp. 6282-85 (Order No. PSC-16-0560-AS-EI at pp. 2-5). The Commission also made a point of stating "[t]he signatories to the Settlement Agreement represent[ed] a broad segment of FPL's customer base including both residential and commercial classes". R. Vol. 32, at p. 6284 (*Id.* at p.4). Further, the Commission's decision noted that many of the positions advocated by the customer groups were included in the Settlement Agreement including the cessation of hedging, a reduction in ROE, a reduction in depreciation rates and an overall revenue reduction. R. Vol. 32, at p. 6284 (*Id.)*. Furthermore, the Commission acknowledged that Sierra Club opposed the Settlement due to various grounds including the agreed-to ROE and depreciation surplus; however, the Commission also explained that "a settlement is necessarily a compromise with give and take on both sides to reach the final, agreed upon settlement terms." R., Vol. 32, at p. 6284 (*Id.* at p. 4). After providing its case-

specific analysis, the Commission made its determination that the Settlement Agreement was in the public interest. R., Vol. 32, at pp. 6284-6285 (*Id.* at pp. 4-5). Thus, the Commission's order did not depart from the essential requirements of law and, in rendering its decision to approve the Settlement, the Commission comported with the requirements of law consistent with the standard expressed by this Court in *Citizens v. Fla. PSC*. Therefore, this Court should uphold the Commission's Final Order.

II. THERE IS NO FACTUAL OR RECORD BASIS TO SUPPORT A LACK OF COMPETENT SUBSTANTIAL EVIDENCE REGARDING THE PEAKER UNITS.

Since there is competent, substantial evidence to support the Commission's approval of the terms and conditions of the Settlement Agreement without the need to dispose of the issue related to the Peaker Replacement Project specifically, this Court need not address Sierra Club's objection to FPL's recovery of the Peaker Replacement Project. Nevertheless, if the Court were to address this issue, Sierra Club's appeal is still without merit. First, Sierra Club has mistaken the burden of proof that the Commission should apply in determining prudency. Second, the analysis of alternatives argument related to the Peaker Replacement Project that

Sierra Club asserts is required under its interpretation of the burden of proof is not supported by the evidence in the record.

A. *Burden of Proof for Determining Prudency*

Sierra Club references Section 366.06(1), Florida Statutes, for the proposition that it authorizes the Commission to permit a utility to recover money that is "prudently invested." SC Brief at p. 2. Sierra Club then cites to *Gulf Power Co. v. Pub. Serv. Comm'n,* 453 So.2d 799 (Fla. 1984), for the principle that "[a] prudent investment is one that 'minimize[s]' the money spent to serve the rate-paying public ('ratepayers' or 'customers') via a 'timely' analysis and pursuit of 'a range of alternat[ives]." SC Brief at pp. 2-3. This formulation misapplies and misrepresents the *Gulf Power* case by inappropriately cobbling together words and phrases from disparate parts of that decision to create a prudency standard that does not exist. A review of the *Gulf Power* case demonstrates the Court never espoused the standard that the Sierra Club proffers. See, 453 So. 2d at 802, 804.

The *Gulf Power* case involved two issues on appeal. The first was a downward adjustment to base rates made by the Commission due to the unused capacity for the Plant Daniel in which Gulf Power had a 50% ownership interest. 453 So. 2d at 800. The other issue related to the Commission's adjustment to coal inventory levels for working capital. *Id.* The quoted words and phrases cited to by the Sierra Club are from portions of the Commission's order referenced by the Court

addressing these two issues. *Id.* at pp. 802, 804.

In the first instance, the Commission was discussing whether Gulf had carried its burden of proof regarding "whether it took every reasonably available prudent action to **minimize** the adverse short-term consequences of purchasing a portion of Plant Daniel." *Id.* at 802 (Emphasis added). In the second instance, the Commission's order stated "[i]n short, Gulf failed to prove that, if it had made a **timely** effort to sell an additional 186 MW off-system at marginal cost, it would have been unable to do so." *Id.* (Emphasis added). After citing the portion of the Commission's order containing the above referenced language, this Court stated that "[w]e 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 reweigh the evidence." *Id.* at 803.

The final section of the Commission's order referenced by this Court contained the following statement where the Commission addressed the coal inventory issue:

> [i]n 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 cost, in light of these factors, associated with a **range of alternate** coal inventory levels.

Id. at 804 (Emphasis added). After citing the above referenced language from the

Commission's order, this Court noted the Commission was confronted with competing testimony regarding what was reasonable, and as such, it was the Commission's prerogative to evaluate the competing expert testimony and accord whatever weight to the conflicting opinions it deemed necessary. *Id.* at 805. This Court stated that, while the Commission rejected Gulf's coal inventory position and Commission staff's coal inventory position, it was presented with sufficient evidence to enable it to choose a reasonable alternative. *Id.*

A comparison of the *Gulf Power* decision with Sierra Club's brief clearly demonstrates Sierra Club patched together words and phrase from distinct parts of the opinion that set forth separate and distinct rationale used by this Court as a basis for upholding the Commission's decision. This attempt to cobble together disparate words and phrases results in not only a misapplication of the *Gulf Power* decision, but a misrepresentation of how that case was decided. *Gulf Power* does not support Sierra Club's unfounded assertions.

The standard of proof that the Commission uses to determine the eligibility of costs for recovery is set forth in Section 366.06(1), Florida Statutes, which states:

> The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the

> public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor.

While the statute requires the Commission to make a determination of the money that has been honestly and prudently invested by the utility that is used and useful in serving the public, the statute does not require an analysis of the alternatives comparison suggested by the Sierra Club. As noted in the *Southern Alliance* case, the Commission explained that the "standard for determining prudence is well documented in our past Orders. That standard 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.'" 113 So. 3d at 750.

In the *Gulf Power* case regarding the excess capacity issue, the Court stated "[t]he record demonstrates that the PSC did find imprudent managerial decisions resulting from faulty load forecasting. We agree with that finding and the PSC's resulting adjustment." 453 So. 2d at 803. Clearly, the Commission applied its prudency standard of "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" and found mismanagement. *Gulf Power*, 453 So. 2d at 803, *Southern Alliance*, 113 So. 3d at 750. The coal inventory issue in *Gulf Power* case did not involve the prudency of maintaining coal-inventory, but rather

was a credibility determination by the Commission of competing evidence regarding the reasonable alternative levels for coal-inventory. *Gulf Power*, 453 So. 2d at 805.

In the instant case, were the Commission required to make a specific determination on the Peaker Replacement Project issue, which it is not, the appropriate standard that would be applied regarding prudency is the "reasonable utility manager" standard. Sierra Club's attempt to piece together unrelated words and phrases from various parts of the opinion to create a new "prudency" standard which supports its position, not only misapplies the *Gulf Power* case, but is a misrepresentation of how that case was decided.

B. *Sierra Club Misrepresents the Applicable Statutes, Rules, and Facts*

Sierra Club misrepresents the applicable statutes to support its assertion that pre-approval was required prior to the building the peaker units, which it was not. Further, Sierra Club asserts that the statute, rules and facts required the Commission to consider renewables – solar, demand-side management, and energy storage – as alternative to the peaking units. SC Brief at pp. 6-14. However, the statutes, rules, and facts cited to by Sierra Club do not support this assertion.

1. Pre-Approval to Build Peakers is not Required

Sierra Club argues that FPL undertook the Peaker Replacement Project without obtaining pre-approval from the Commission. SC Brief at p. 3. This is an

incorrect assertion. In 2013, FPL petitioned for cost recovery in the Environmental Cost Recovery Clause ("ECRC") for the Nitrogen Dioxide ("NO_2") Compliance Project, which was essentially the retirement and installation of its peaking units. R, Vol. 1, at p. 160 (Order No. PSC-13-0513-PHO-EI at p. 6). Sierra Club erroneously suggests that this petitioning for recovery by FPL in the ECRC was somehow a necessary pre-approval by the Commission. SC Brief at pp. 3-4. Sierra Club further asserts that in the ECRC proceeding OPC, amongst other Intervener-parties, objected that the NO_2 Compliance Project was neither "the lowest cost solution" nor "required as an environmental compliance measure." SC Brief at p. 4.

However, the thrust of OPC's position in that docket was that the Commission should reject FPL's efforts to transform the ECRC into a *de facto* generation clause merely because the utility decided building a new power plant – be it a peaking unit or a baseload unit – is a convenient way to avoid the possible strictures of potential future environmental regulations. R, Vol. 1, at p. 160 (Order No. PSC-13-0513-PHO-EI at pp. 6). FPL's petition in the 2013 ECRC docket was specific as to cost recovery of those units as an environmentally required project recoverable through the clause. OPC's position for the NO_2 project was simply that FPL had failed to demonstrate that any proposed measure to comply with an existing environmental regulation is designed using the lowest cost solution. R, Vol. 1, at p. 161 (*Id.* at p. 7). Subsequently, FPL voluntarily withdrew its request for recovery of the peaking

units in the ECRC. R, Vol. 2, at pp. 197-198 (Order No. PSC-13-0687-FOF-EI at pp. 3-4).

The ultimate decision for the Commission in the 2013 ECRC proceeding was whether that clause proceeding was the proper place for cost recovery and not whether FPL had permission to build the units. This ECRC filing and subsequent withdrawal by FPL in no way supports Sierra Club's argument that FPL somehow failed to obtain pre-approval to undertake the Peaker Replacement Project.

The appropriate mechanism for obtaining approval to construct new steam generation plants in Florida is the need determination process set forth under Chapter 403, Florida Statutes. Section 403.503(14), Florida Statutes, provides:

> "Electrical power plant" means, for the purpose of certification, any steam or solar electrical generating facility using any process or fuel, including nuclear materials, except that this term does not include any steam or solar electrical generating facility of less than 75 megawatts in capacity unless the applicant for such a facility elects to apply for certification under this act.

The peaking units are combustion turbines,[5] and they do not use steam to generate electricity. TR at pp. 820, 848, 857, 868, 821-23. Thus, peaker units which use natural gas to produce electricity are not subject to a need determination by the Commission prior to construction, and FPL was not statutorily required to obtain

[5] The combustion turbines and their associated generators operate using natural gas. TR at pp. 820, 868.

pre-approval for this project. Therefore, Sierra Club's position on this issue is meritless.

2. Other Statutory and Rule Misrepresentations

On page 9 of its brief, Sierra Club cites to Section 366.82(b)(1), Florida Statutes, for the proposition that "[d]emand-side resources refer to technologies 'located on the customer premises,' including energy efficiency, energy conservation, and renewable energy systems such as rooftop solar panels." However, there is no Section 366.82(b)(1) in the Florida Statutes. And even assuming that this is a typographical error, Section 366.82(1)(b), Florida Statutes, defines demand-side renewable energy as "a system located on a customer's premises generating thermal or electric energy using Florida renewable energy resources and primarily intended to offset all or part of the customer's electricity requirements provided such system does not exceed 2 megawatts." This statute does not define "Florida renewable energy resources." Renewable energy is defined in Section 366.91(2)(d), Florida Statutes, as "electrical energy produced from a method that uses one or more of the following fuels or energy sources: hydrogen produced from sources other than fossil fuels, biomass, solar energy, geothermal energy, wind energy, ocean energy, and hydroelectric power." Neither of these statutory references defines energy efficiency or energy conservation; thus, Sierra Club misrepresents the meaning of Section 366.82(1)(b), Florida Statutes.

In addition, Sierra Club references Section 366.81, Florida Statutes, as support for its assertion that "these are all 'solutions' to peak demand because they offset the need for expensive gas plants to supply that demand." SC Brief at p. 9. Yet, Section 366.81, Florida Statutes, states it is the Legislative intent that "it is critical to utilize the most efficient and cost-effective demand-side renewable energy systems and conservations systems . . ." and that "the Legislature intends that the use of solar energy, renewable energy sources, highly efficient systems, cogeneration, and load-control systems be encouraged." Sierra Club's representation that these solutions – energy efficiency, energy conservation, and renewable energy system such as rooftop solar panels – offset "expensive" natural gas plants ignores the statutory provision to encourage "highly efficient" systems such as these highly efficient CT peaking units. SC Brief at p. 9, TR at pp. 813-814.

In citing the same statutory section, Sierra Club argues "[t]hus, demand-side resources 'increas[e] the overall efficiency and cost-effectiveness of electricity and natural gas production and use.'" See, Sierra Club Brief at p. 9, CITING Section 366.81, Florida Statutes. Again, this reliance on Section 366.81, Florida Statutes, for this assertion is based on a misrepresentation and is misplaced. The full context of this statutory provision is as follows:

> The Legislature further finds and declares that ss. 366.80-366.83 and 403.519 are to be liberally construed in order to meet the

> complex problems of reducing and controlling the growth rates of electric consumption and reducing the growth rates of weather-sensitive peak demand; increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use; encouraging further development of demand-side renewable energy systems; and conserving expensive resources, particularly petroleum fuels.

Nowhere does this statute state that demand-side resources increase the efficiency and cost-effectiveness of electricity and natural gas production and use. On the contrary, it provides that the statutes specified therein (i.e. Sections 366.80 – 366.83 and 403.519) are to liberally construed to meet the complex problems associated with increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use. Sierra Club's reliance on this provision is based on a misrepresentation and is misplaced.

Finally, on page 26 of its brief in a footnote, Sierra Club cites to Rule 25-22.072(1), Florida Administrative Code, "quoting" that this rule recognizes the Commission "must have information sufficient to assure an adequate and reliable supply of electricity at the ***lowest cost possible***." (unattributed emphasis supplied in SC Brief). However, in full context, Rule 25-22.072(1), Florida Administrative Code, states "Individual electric utility ten-year site plans required by Rule 25-22.071, Florida Administrative Code, shall include at a minimum the information listed in Form PSC/ENG 43-E. Form PSC/ENG 43-E (11/97), entitled "Electric Utility Ten-Year Site Plan Information and Data Requirements," is incorporated by

reference into this rule and is available from the Division of Engineering." In the document entitled "Electric Utility Ten-Year Site Plan – Information and Data Requirements, Form PSC/RAD 043-E (11/97) uses the word "lowest" one time. The full sentence reads "The ten year site plan shall provide sufficient information to assure the Commission that an adequate and reliable supply of electricity at the lowest cost possible is planned for the state's electric needs." App. at p. 835. Sierra Club did not accurately quote the requirement in the form. It is clear from the language that the "lowest cost possible" requirement is contingent on ensuring the adequacy and reliability of the electricity supply for the State. Thus, the first issue to be addressed is whether the resource can meet the electricity supply needs of the State adequately and reliably. The record evidence does not support Sierra Club's assertions that a renewable energy resource alternative they put forth can adequately or reliably meet the peaking capacity needs on FPL's system and the State.

3. The Alternatives Analysis to the Peaker Replacement Project that Sierra Club Asserts is Required is Not Supported by the Evidence in the Record

Assuming arguendo, that the Commission was required to specifically address the issue of the Peaker Replacement Project using the "reasonable utility manager" prudency standard, then Sierra Club's issue of whether to consider alternatives to the peaker units might have been relevant. Nevertheless, Sierra Club did not present any expert witness testimony at the August Hearing or the October Hearing. R. Vol.

15, at pp. 2877-2891 (Order No. PSC-16-0341-PHO-EI at pp. 5-19), R. Vol. 23, at pp. 4442-42 (Order No. PSC-16-0483-PHO-EI at pp. 2-3). The evidence relied upon by Sierra Club includes (1) testimony by FPL's witnesses, (2) news articles containing statements from NextEra's Chairman, (3) FPL's Ten-Year Site Plan, and (4) Sierra Club's own unsworn comments to the Ten-Year Site Plan review. However, it is clear from the record when viewed in full context that this evidence does not present reasonable alternatives that the Commission should have considered.

Sierra Club argues erroneously that solar facilities supply peak demand cost-effectively and save money, and that FPL never presented an analysis which considered using solar generation in lieu of the CT peakers. SC Brief at p. 6. However, the record evidence cited by Sierra Club does not support factually that solar is a viable replacement for the peakers. Sierra Club first asserts that FPL admitted solar can supply peak demand cost-effectively. SC Brief at p. 7. Specifically, Sierra Club attempts a tortured paraphrase of Mr. Barrett's testimony from the August Hearing to say "that by 2015 FPL was able to build 'cost-effective' solar projects that are 'available to meet summer Peak [*sic*]' demand." SC Brief at p. 8. However, a review of the record testimony cited by Sierra Club as the basis for this paraphrasing, when read in full context, compels the opposite conclusion. Mr. Barrett's exact testimony was "I do know that we've determined that about 52

percent of the nameplate capacity [of solar] is available to meet summer Peak." TR at p. 1570. He then explained that solar plants produce the most power between noon and 2:00 and 3:00 p.m. and that FPL's system faces peak customer demand around 4:00 p.m. or 5:00 p.m., which is why the full nameplate capacity is not being received at the time of summer peak. He further testified that solar adds almost nothing toward meeting peak demand in winter because FPL peaks at 6:00 a.m. or 7:00 a.m., and the sun is not up at those times. TR at p. 1570.

The discovery response cited by Sierra Club also does not support its "cost effective" paraphrasing argument when viewed in context. The discovery response states "[a]s noted on Exhibit REB-11, the benefits associated with this project [Large Scale Solar] are primarily fuel savings, lower emission costs and avoided capacity purchases." App. at p. 280. When further explaining these large scale solar projects, Mr. Barrett testified that "FPL is investing approximately $400 million in three large scale solar projects during 2015 and 2016 that will continue its strategy of advancing clean energy while keeping customers' bills low." TR at p. 1421. He also testified that "[t]he evaluation of these large scale solar projects followed FPL's process of assessing the system benefits and performing economic modeling to ensure there is an expected net benefit to customers." TR at p. 1422. When taken in their full context, Mr. Barrett's testimony and the FPL discovery response do not in any way indicate or support that solar is an effective way to address summer or winter peak.

Peaker units provide quick-start capability, and solar generates electricity only when the sun is shining; thus, solar cannot be considered a peaking unit replacement. TR at pp. 1576, 1582.

Sierra Club then suggests that demand-side resource can offset peak demand in lieu of the peaker units. SC Brief at p. 9. In an attempt to support this statement, Sierra Club cites to FPL's 2016 Ten Year Site Plan to imply the demand-side management reductions that are the equivalent of approximately 15 new 400 MW generating units "could" have eliminated the new peaker units. SC Brief at pp. 9-10. However, Sierra Club omitted the relevant qualifier that this equivalent demand-side reduction statement is based on FPL's <u>total</u> efforts from 1978 through 2015. App. at p. 303.

Sierra Club also argues that energy storage could supply peak demand cost-effectively. SC Brief at p. 10. First, Sierra Club cites to its own unsworn comments to the Ten Year Site Plan review for the proposition that energy storage is an alternative to peakers. App. at p. 623-625. Sierra Club next cites to an article quoting Mr. Robo, Chairman of FPL's parent company, NextEra, that he "expect[s] energy storage prices to experience a similar cost plunge to that of solar costs over the last seven years." SC Brief at p. 10. However, in its full context, Mr. Robo is thereafter quoted in the article as stating that "**[i]f** that happens, energy storage will

be competitive with gas peaker plants" and 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." App. at p. 316 (emphasis added). Sierra Club tries to argue these statements somehow demonstrate Mr. Barrett purportedly testified that by 2020 energy storage combined with other resources would make peaker units economically obsolete. SC Brief at pp. 10-11.

However, an examination of the full record shows that Sierra Club during cross examination simply asked Mr. Barrett to confirm the content of the article in which Mr. Robo was quoted, and whether he (Mr. Barrett) had any reason to doubt the accuracy of the article. TR at pp. 1592-1593. Merely confirming the contents of a news article which quoted a NextEra representative is woefully insufficient to assert that Mr. Barrett affirmatively adopted the content of the article as his own testimony. Furthermore, Sierra Club provided no foundational basis or context for the Commission to determine whether Mr. Robo's comments were applicable to the regulated operations of FPL or some non-regulated aspect of NextEra.

Moreover, Mr. Robo's quotes do not in themselves support the proposition that energy storage will replace peaker units in the near future. The quotes from the article use conditional language such as "if," "may," and "very likely." Contrary to Sierra Club's representations attempting to assert that Mr. Robo's comments are a

factual certainty, at best the conditional language shows the comments to be aspirational, that someday in the future NextEra or perhaps FPL "may" be able to use energy storage along with solar to displace its peaking units. Thus, these comments in and of themselves are insufficient to form a factual basis supporting the need for an alternative analysis. Further, when asked if at today's prices battery storage would have been a cost-effective alternative to the peaker units, Mr. Barrett testified "no." TR at p. 1652.

In summary, all of the "factual" evidence that Sierra Club argues should have been considered by the Commission as alternatives to the peaker units is unreasonable. Based on the evidence in the record, the renewable energy alternatives put forth by Sierra Club have not yet been developed to the point of replacing the current peaker unit technology. Thus, the alternatives analysis to the peaker units that Sierra Club asserts is necessary is not supported by the evidence in the record and is, in any event not required.

III. CONCLUSION

This Court should uphold the Florida Public Service Commission's Final Order approving the Settlement Agreement. The Commission did not depart from the essential requirements of law in this case in that its decision comported with the requirements of law in approving the Settlement Agreement. Further, Sierra Club

has failed to demonstrate there is a lack of competent substantial evidence regarding the peaker units. The record evidence cited by Sierra Club does not support that solar, energy storage, and demand-side management are realistic alternatives to the peaker units. Therefore, there is no merit to Sierra Clubs argument that an analysis of the use of solar, energy storage, and demand-side management was required. As a result, this Court should uphold the Commission's Final Order approving the Settlement Agreement.

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I HEREBY CERTIFY that a true and correct of the foregoing was served by U.S. Mail on this 9th day October, 2017, to the following:

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In compliance with 9.210(a), Fla. R. App. P. the font size used in this Brief is Times New Roman, size 14.

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