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IN THE SUPREME COURT OF FLORIDA

SIERRA CLUB	)	
	)	
Appellant,	)	CASE NO. SC17-82
v.	)	
	)	Lower Tribunal Nos. 160021-EI
JULIE IMANUEL BROWN,	)	160061-EI
ETC., ET AL.	)	160062-EI
	)	160088-EI
Appellees.	)	

APPELLEE FLORIDA POWER & LIGHT COMPANY'S ANSWER BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal by one objector to a settlement of FPL's[1] rate case that was unanimously approved by the Public Service Commission and supported by the Office of Public Counsel, South Florida's hospitals and Florida retail businesses.

A. Course of Rate Case Proceedings

On March 15, 2016, FPL made three filings with the Florida Public Service Commission: a petition for an increase in rates and charges, a petition for approval of its storm hardening plan, and a depreciation study. R. 349-82.[2] On April 15,

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[1] This brief will use "**FPL**" to refer to Appellee Florida Power and Light Company. "**PSC**" or the "**Commission**" refers to the Florida Public Service Commission. "**OPC**" refers to the Office of Public Counsel. "**SFHHA**" refers to South Florida Hospital and Healthcare Association. "**FRF**" refers to Florida Retail Foundation. Collectively, OPC, SFHHA, and FRF are referred to as the "**Signatories**." Wal-Mart Stores East, LP and Sam's East, Inc. are collectively referred to as "**Walmart**." "**FEA**" refers to the Federal Executive Agencies. "**FIPUG**" refers to the Florida Industrial Power Users Group.

A few other defined terms are used throughout this brief. The "**Rate Case**" refers to the four proceedings filed by FPL, consolidated on May 4, 2016, from which this appeal arises. The "**August hearing**" refers to a duly noticed hearing by the PSC that commenced August 22, 2016 and concluded September 1, 2016. "**Settlement Agreement**" refers to the Stipulation and Settlement entered in the matter below by FPL and the Signatories, approved by the PSC and contained in pages 4146 – 4388 of the record on appeal. "**The Settlement hearing**" refers to proceedings held on October 27, 2016 to address the Settlement Agreement. The "**Final Order**" refers to the Commission's Order on appeal. Finally, "**DSM**" refers to demand side management.

[2] This brief will use **"R. _"** to cite pages of the record on appeal. **"T. _"** refers to citations to the reporter's transcript of the August hearing. "**Ex. _**" refers to the exhibits that were entered into the record during the August hearing, which can be

2016, FPL filed a petition for continuation of its asset optimization incentive mechanism, subject to a few modifications. On May 4, 2016, the PSC consolidated the four dockets for discovery and hearing (the consolidated proceeding is hereinafter referred to as the "Rate Case"). R. 567-71.

Nine intervenors, including appellant Sierra Club, participated in the Rate Case.[3] After extensive discovery, the PSC held a duly noticed hearing that commenced August 22, 2016 and concluded September 1, 2016 ("the August hearing"). R. 1884-88. A total of 167 issues were identified for adjudication. One of those, Issue 57, addressed the reasonableness of FPL's Peaker Replacement Project, as to which FPL stated that "replacement of the peaking units was essential to maintain system reliability given parts availability issues of the current equipment." R. 2962.

Thirty-five witnesses testified and 805 exhibits were admitted over ten days of hearing. R. 3319-62. Each party – including Sierra Club – had the opportunity to cross-examine each adverse witness on the issues addressed by that witness. Sierra Club examined witnesses but presented no testimony. R. 2877. Each party

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found in Attachment Two of the Record on Appeal. "**Oct. T. _**" refers to the reporter's transcript of the Settlement hearing on October 27, 2016. Finally, "**SC Br. _**" refers to pages of Appellant Sierra Club's Initial Brief.

[3] The other intervenors were the OPC, SFHHA, FRF, Walmart, FEA, FIPUG, Daniel and Alexandria Larson, and AARP.

submitted a post-hearing brief following the conclusion of the August hearing. R. 3363-4135.

B. Course of Settlement Proceedings

FPL, OPC and several of the intervenors explored the possibility of settlement throughout the Rate Case. It was not until after briefs were filed, however, that FPL and three of those intervenors – OPC, SFHHA and FRF (collectively, the "Signatories") – were able to conclude those complex negotiations on mutually agreeable terms. On October 6, 2016, the Signatories executed a settlement agreement that memorialized those terms (the "Settlement Agreement") and filed a joint motion for its approval. R. 4136-4388. Walmart, FEA and FIPUG took no position. R. 4420-23. Sierra Club, AARP and the Larsons opposed the Settlement Agreement. *Id*.

The PSC reopened the record to take supplemental testimony to "give parties an opportunity to present testimony and conduct cross examination on terms of the Settlement Agreement which were not identified in the [August] hearings." R. 4400. In doing so, the PSC's order stated: "The sole issue to be decided in this hearing is whether the Settlement Agreement . . . is in the public interest and should be approved." *Id*. The Commission also identified five subordinate issues pertaining to settlement terms not addressed in the August hearing and therefore would need to be addressed in a subsequent hearing. Any party who believed that

other terms of the Settlement Agreement were not addressed in the August hearing was allowed to file a "Notice of Additional Terms," file prepared testimony and exhibits or file a notice listing the witnesses it planned to present and the settlement terms and conditions that it planned to address. Sierra Club submitted no testimony, identified no witness who would appear to oppose the settlement, and filed no notice of any topics it wanted to address in assessing whether the Settlement Agreement is in the public interest and should be approved.

The Commission timely noticed a hearing for October 27, 2016 to address the Settlement Agreement (the "Settlement hearing"). R. 4412. Sierra Club delivered an opening statement observing that Sierra Club supported the provisions of the Settlement Agreement that allow FPL to construct and recover the costs of 1,200 MW of new solar projects. Oct. T. 23-25. But Sierra Club declined to support approval of the Settlement Agreement, renewing its objection to the Peaker Replacement Project, a position that had been explored in depth during the August hearing. *Id*.

Four FPL witnesses took the stand at the Settlement hearing and were available for cross-examination. R. 4442-43. Sierra Club did not pose a single question. All parties had the opportunity to file post-hearing briefs. R. 4405. Sierra Club's settlement post-hearing brief primarily referred back to the argument it made at the August hearing regarding Issue 57. R. 4498-4519.

Following the Settlement hearing and submission of post-hearing briefs, the Commission held a special agenda conference to publicly consider the Settlement Agreement. R. 4412-13. Upon deliberation, with the benefit of the full record pertaining to the 167 issues developed during the August hearing and the supplemental issues developed during the Settlement hearing, the PSC unanimously approved the Settlement Agreement, finding it to be in the public interest. R. 6242, 6285. The PSC noted that the standard for approval of a settlement is whether it is in the public interest, requiring consideration of the Settlement Agreement as a whole. R. 6284. The PSC found that the Signatories represented a broad cross-section of FPL's customer base and that many of the positions Signatories and others advocated throughout the Rate Case were reflected in the Settlement Agreement, which reduced FPL's revenue requirements for 2017 by more than $400 million compared to FPL's original request. *Id.* The Commission stated that "having reviewed all of the briefs filed and evidence presented," the Settlement Agreement "as a whole provides a reasonable resolution of all the issues raised," establishes rates that "are fair, just, and reasonable," and is in the "public interest." R. 6284–85.

Sierra Club is the only party that appealed the PSC's decision. Its appeal is based solely on Sierra Club's objection to FPL's Peaker Replacement Project, which consisted of replacing old, inefficient gas-fired generation with modern

units. SC Br. 1-2. FPL completed the replacements in 2016, and included the costs along with the rest of its "plant in service" in the full set of financials upon which its request for rate relief was based. T. 1420-21, 1500-01; Exhs. 28, 29.

C. Facts Relevant to this Appeal

FPL's Rate Case. FPL's original rate petition sought approval of (i) an increase in rates and charges of $866 million effective January 1, 2017; (ii) a subsequent year revenue increase of $262 million effective January 1, 2018; (iii) a $209 million increase associated with the Okeechobee Clean Energy Center ("Okeechobee Unit"), effective on its commercial in-service date, scheduled for June 1, 2019;[4] and (iv) a 11.0% return on equity ("ROE") midpoint, with a 50 basis points adder as an incentive for continued exceptional service, for a total range of 10.5% to 12.5%. R. 372-74, 379-80.

In support of its requested rate increase, FPL demonstrated the overall quality and value of service it provides to customers. A benchmarking analysis showed that the Company out-performs other utilities in terms of productive efficiency, reliability, fossil generation fleet performance, and low emissions. T. 417-19; Exhs. 35, 40. Corroborating the benchmarking results, customers throughout Florida attested to FPL's strong reliability record and described the

[4] These figures were subsequently adjusted to $826 million in 2017, $270 million in 2018, and $209 million for Okeechobee.

importance of receiving reliable service. R. 695, 709-12, 1133, 1137, 1168, 1177, 1185, 1194, 1606-07. The Company attained this level of service while maintaining bills that in 2016 were 14% lower than they were in 2006 for residential customers and 16% to 23% lower for commercial customers. T. 2804. The average utility bills throughout the country have, by contrast, *increased* by about 29% over this same time frame. *Id*.

FPL's clean-energy leadership also was addressed at the hearing. Among major U.S. utilities, FPL has one of the lowest emissions profiles of carbon dioxide, sulfur dioxide and nitrogen oxides. T. 419. If the Company were an average performing utility, emissions would be far higher, adding the equivalent emissions of more than six million cars to Florida's roads for an entire year. T. 121-22. Instead, FPL makes informed decisions regarding the adoption of technologies with cleaner environmental attributes, while accounting for the impact to customer bills. T. 375, Ex. 56. For example, FPL has made an affirmative decision not to pursue more oil- or coal-fired generation. T. 301. Modernizing FPL's fleet to high-efficiency natural gas units, as was done with the Peaker Replacement Project, not only enhances reliability and reduces costs, but also contributes to cleaner air. T. 419; Ex. 40.

FPL's commitment extends to renewable energy. No utility in the state has done more on solar development. T. 345. When the Florida legislature in 2008

enabled utilities to build up to 110 MW of renewables even though they were not yet cost-effective, FPL was the only utility that invested in that opportunity, building the full 110 MW allotment. *Id*.; Ex. 552, p. 58; *see also* § 366.92(4), Fla. Stat. In 2016, for the first time in Florida and in a monumental step forward, FPL demonstrated the ability to install cost-effective solar generation; consequently, FPL invested in three large-scale sites totaling 224 MW, tripling its renewable resources portfolio and making FPL the absolute leader in the development and construction of cost-effective solar energy in Florida. T. 125.

The Settlement Agreement. FPL, OPC, SFHHA and FRF proposed the Settlement Agreement as a global resolution of all 167 issues raised in the consolidated dockets. The Settlement Agreement represents a four-year "stay out," in which FPL agreed not to seek any additional base rate increases before 2021 unless its earnings fall below 9.6%. The major terms of the Settlement Agreement include: (i) increases of $400 million effective January 1, 2017, $211 million effective January 1, 2018 and $200 million effective on the in-service date of the Okeechobee Unit; (ii) a 10.55% ROE midpoint, with a range of 9.6% to 11.6%; (iii) authorization for FPL to construct up to 1,200 MW of solar generation by the end of 2021 and to recover the costs of those investments when each unit goes into service if determined by the PSC to be cost effective and the construction costs are reasonable; and (iv) authorization to implement a battery storage pilot program

with *no* associated cost-effectiveness requirement (because it is not yet cost-effective). R. 4149-67

The Settlement Agreement was the result of extended, complex and collaborative negotiations, R. 4459, and it reflects positions advocated by groups that opposed FPL's base rate request, but who now either support or take no position regarding the Settlement Agreement. Compared to FPL's original petition, the Settlement Agreement: cuts more than $400 million from FPL's 2017 request, and more than $2 billion of the total requested revenue over the four-year settlement period; reduces FPL's ROE by about 100 basis points; and reduces FPL's allowed recovery of depreciation expense. The Settlement Agreement includes terms that further FPL's leadership in the development of renewable resources in Florida through the construction of cost-effective solar, and FPL's exploration of the use of battery storage as a component of its system, terms which Sierra Club endorses, despite its opposition to the natural gas-fired peaker facilities under Issue 57.

Evidence presented at the Settlement hearing supported the PSC's finding that "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" the level of service that makes it a top-performing utility. R. 6284. Specifically, the Settlement Agreement will provide FPL the revenue it requires to

continue investing in reliability and storm hardening projects, new generation and storage technologies. Oct. T. 101-02. By facilitating these initiatives, the Settlement Agreement directly supports FPL's ability to continue improving its customer service and delivering great value for all customers. *Id.* Because the Settlement Agreement strictly prescribes FPL's limited ability to adjust base rates during the four-year minimum settlement term, it also provides rate stability and predictability for all customers. Oct. T. 28, 85.

The Peaker Replacement Project. The Peaker Replacement Project consists of retiring gas-fired generation units originally constructed more than 40 years ago and installing state-of-the-art units in their place. Specifically, FPL replaced 44 1970s-vintage gas turbine generation units with seven new, larger, cleaner and more fuel-efficient combustion turbine generation units. In total, FPL replaced 1,731 MW of aging gas turbines with 1,667 MW of new combustion turbines, thus modestly reducing the total amount of gas-fired capacity in FPL's generation fleet. T. 813-14; Ex. 552, pp. 7, 10.

Peakers play a critical role in an electric utility's generation fleet because they can start quickly and are available at all times. Contrary to Sierra Club's characterization, peakers do not simply "supply South Florida's [summer] peak demand." *See* SC Br., p. 3 & n.2. They are reliability units, meaning they can be called upon to provide "emergency service." T. 1506-07 ("[W]ithin a half hour,

we have to replace what was lost."). FPL dispatches peakers at any time of day or night and during any season of the year when there is insufficient generation from the rest of FPL's system to meet *either* FPL's peak load requirements *or* FPL's reliability requirements. Emergencies requiring peaker dispatch can be caused by extreme weather, unusual demand for power or equipment failures at other power plants. T. 1507.

The combustion turbines selected to serve as peakers have quick-start capability. *Id*. This means they are ready when FPL – and the rest of the state – needs them. *Id*. Quick-start capability that is available 24 hours a day is critical to FPL's ability to satisfy its state and federal reliability mandates that require immediate dispatch in the event of generation capacity shortfalls. Technologies that lack quick start and dispatch capability 24 hours a day are inherently incapable of supporting this critical emergency need. *See, e.g*., T. 1582-83.

Need for Peaker Replacement. The gas turbines FPL replaced were essentially jet aircraft engines originally designed for use on the then-new Boeing 707 in approximately 1958, nearly 60 years ago. T. 375-82, 1501. The manufacturer of the old gas turbines no longer supported the units, and replacement parts are not readily available. T. 814, 1420-21, 1500. The potential peril posed by this obsolescence had manifested itself by the time of the August 2016 hearing: a torque converter from one of the old gas turbines had failed. To

salvage the unit, the manufacturer would have needed to reverse-engineer the replacement part, a process that would have involved excessive costs and a waiting period of more than twelve months. T. 871-72, 935. FPL witness Kennedy explained that FPL came close to experiencing the same failure with other 1970s gas turbine units in the old peaker fleet. T. 871-72. FPL's ability to respond to emergency events was at risk.[5]

2013 Consideration of Replacing Peakers. In 2013, FPL examined replacement of the obsolete peakers. In addition to the reliability concerns, it was initially determined that the gas turbines presented an environmental compliance concern because air emission modeling revealed that the old units failed to meet the Florida Department of Environmental Protection's one-hour National Ambient Air Quality Standard for Nitrogen Dioxide ("1-hour NO_2 Standard"). Order No. PSC-13-0513-PHO-EI, p. 24.

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[5] Sierra Club's repeated assertion that the replaced gas turbines could operate until 2025 (SC Br. at 1, 14) ignores the record. Sierra Club cites solely to part of the transcript in which Mr. Barrett explains that costs for "replacement parts for the old equipment … would be avoided when we replace it with the new equipment," and those projected savings run through 2025, because "that was the retirement date *we had thought* would be there." T. 4663-64. As established in the August hearing, and as testimony directly established, the absence of replacement parts and manufacturer support for the 40-year-old gas turbines warranted earlier replacement. Compared to the Peaker Replacement Project, keeping the old gas turbines would have cost customers $81 million more in maintenance alone, assuming maintenance support were available. Ex. 87.

FPL evaluated options that both satisfied the 1-hour NO_2 Standard and could fulfill FPL's important reliability obligations, including: (i) retrofitting the old peakers with emission control equipment, (ii) retiring all of the old gas turbines and accelerating the next planned generating unit to be operated as a reserve unit, (iii) retiring all of the old gas turbines and replacing them with highly efficient combustion turbines that have much lower NO_2 emissions, i.e., an equivalent to the Peaker Replacement Project, and (iv) various options that involved purchasing power from an independent power generator or purchasing that generator's facility outright. FPL determined that installing highly efficient combustion turbines was the most cost-effective option, beating the next-best alternative by $56 million. Order No. PSC-13-0513-PHO-EI, p. 24.

Because it believed the project was necessary to comply with a governmentally imposed environmental regulation based on the modeled level of NO_2 emissions, FPL petitioned for cost recovery through the Commission's environmental cost recovery clause. *Id.*; § 366.8255, Fla. Stat. However, when actual monitoring data did not indicate that the emissions exceeded governmental limits, FPL voluntarily withdrew its petition to recover the costs of the proposed peaker replacement project as an environmental compliance measure.[6] R. 195-98.

[6] Sierra Club is wrong in stating that FPL proceeded with the project "after failing to secure preapproval from the Commission." SC Br. at 2, 4. FPL properly

2015-2016 Peaker Replacement Project. Irrespective of how the costs of the project were to be recovered, i.e., whether through the environmental cost recovery clause or through base rates, the need to replace the aging and obsolete peaking units remained urgent. Therefore, in 2015, FPL proceeded with the Peaker Replacement Project. The cost of the Project was $725.6 million. T. 851, 1420-21. Submitted as part of the full set of costs included in the Rate Case, the 2017 revenue requirement associated with the Project was $92 million of the 2017 requested base rate increase of $866 million. T. 1500. Compared to keeping the old gas turbines, the combustion turbines are projected to save customers approximately $203 million. T. 814, 1421. The Peaker Replacement Project also reduces unwanted air emissions and, perhaps most importantly, eliminates reliability concerns associated with obtaining replacement parts that are unavailable in the marketplace.

Consideration of Alternatives. Sierra Club misapplies, misinterprets and, in some cases, misrepresents the record to suggest that FPL – a leader in solar energy development in Florida – and the Commission ignored an available superior option. On the contrary, the record shows that existing solar and storage technology, while making promising strides, was not yet a realistic or cost-

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withdrew a request for approval under environmental cost recovery provisions. No provision of law required preapproval of the Commission for the Peaker Replacement Project to be recovered through FPL's base rates.

effective option for FPL's reliability needs. In fact, no company in the world produces more electricity from wind and solar than FPL and its affiliate NextEra Energy Resources, LLC. Ex. 698, p. 4.

As its name suggests, solar technology generates power only when the sun is shining. T. 1570. But FPL was not replacing units used solely to serve load when the sun is shining, such as on a summertime afternoon. Peakers must be available *whenever* demand and a generation shortfall arises, 24 hours a day, seven days a week, during any season. Emergencies also can result from unplanned generation outages and equipment failures that are entirely unrelated to weather and are characteristically unpredictable.

Battery storage is an emerging technology, but it does not yet constitute an alternative for FPL's reliability needs. FPL's President and CEO, Eric Silagy, confirmed that FPL continues to evaluate battery storage, that it reviews battery storage–related materials in the public domain and all sources it deems legitimate and that it monitors battery storage projects developed by its affiliate NEER. T. 292, 305. FPL has first-hand knowledge and understands the costs associated with storage technology, as well as some of its operational limitations. *Id.*

Balancing reliability, clean energy goals, and low costs, FPL has followed a step-wise approach to the integration of battery storage as an alternative to generation. FPL began with small battery storage research and development

projects designed to ascertain how batteries "work" on FPL's system. T. 1591, Oct. T. 100. The Settlement Agreement allows FPL to expand that work through a 50 MW pilot program that, while not cost-effective at this time, will allow the Company to gain an even deeper understanding of the value that battery storage might add to FPL's system. Oct. T. 84, 99-100. FPL witness Barrett explained that battery costs might decline in the future, and the knowledge acquired from this pilot program will place FPL in a better position to react if and when that occurs. *Id*.

It is axiomatic that battery storage, like any technology, will be cost effective sooner on high-cost electric systems than it will be on lower-cost systems.[7] FPL is a low-cost system. Storage has the *potential to* be cost-effective in FPL's system in the future, and it might someday meet FPL's reliability needs. Oct. T. 99-100. That had not proven to be the case, however, at the time FPL made the decision to proceed with the Peaker Replacement Project or even

[7] Citing a self-authored, unsworn letter, Sierra Club alleges it "presented evidence" that "utilities are investing in energy storage as an alternative to peakers . . . ." (SC Brief, p.10). Sierra Club presented no such evidence during the hearing, despite having ample opportunity to do so. Sierra Club instead sought judicial notice of the purported "evidence" for the first time on appeal. Neither the Commission nor FPL or any other party had an opportunity to test the statements in the document or to present any contrary evidence demonstrating its irrelevance. It should not be considered by this Court. *Tyson v. Aikman*, 31 So. 2d 272, 273 (Fla. 1947) ("it is not the practice to receive new evidence on appeal"); *see also* § 120.57(1)(j), Fla. Stat. ("Findings of fact . . . shall be based exclusively on the evidence of record and on matters officially recognized.").

eighteen months later at the time of the August and Settlement hearings. T. 292, 1652. These facts were undisputed.

To suggest the contrary, Sierra Club misrepresents the record:

- Mr. Barrett never stated that "by 2020, storage combined with other resources would be so cheap that it would render the peakers at issue in this case economically obsolete." (SC Brief, pp. 10-11).

Mr. Barrett agreed only that Sierra Club correctly read aloud the words in a trade article, which quoted NextEra's CEO as saying that "post-2020, there ***may*** never be another peaker built." T. 1635, 1651 (emphasis added). The trade article actually specified that: (i) current projects "will mostly be for frequency regulation" (which is not the purpose of the peakers), (ii) the use of storage to address reliability was still in the "research and development" phase; and (iii) battery's ability to compete economically with gas-fired technology is entirely dependent on a plunge in costs. Ex.639, p. 2. Sierra Club omits any reference to these conclusions.

- Mr. Barrett did not "readily and repeatedly admit[]" that the four-year battery storage pilot project "will be 'cost-effective.'" (SC Brief, p. 11, citing Oct. T. 84, 86, 90, 97, 99).

Not a single page cited by Sierra Club comes close to resembling such a statement by Mr. Barrett. The only pages in which the costs associated with the battery storage pilot program are discussed reveal the opposite:

> **Q.** (by Commissioner Graham): Okay. Let's go to the battery storage. Walk me through that a little bit.

> **A.** (by Mr. Barrett): Okay. We think that there is – that battery storage technology is *becoming* a more viable and more cost-effective technology, *even though today it may not be cost-effective in terms of lowering costs*. (Oct. T. 99) (both emphases added).

Sierra Club also misrepresents the testimony of Mr. Silagy.

- NEER's competitive bids to build battery storage projects do not indicate that FPL could build battery storage cost-effectively "even before 2020." (SC Brief, p. 11).

In fact, Mr. Silagy explained that winning a bid to install at the lowest cost among bidders is not the same as a project being cost-effective. T. 293-94. He further emphasized that the economic analyses for those projects are site- and market-specific so cannot be translated to FPL's highly efficient system. T. 294.

Nor is there any record support for Sierra Club's assertions regarding energy efficiency and conservation measures, known as demand side management ("DSM"). In 2014, the Commission followed the statutorily prescribed process for the review and determination of DSM goals. It determined that FPL's total amount of achievable, cost-effective level of summertime DSM over a 10-year period was an annual average of about 53 MW, all of which is reflected in FPL's generation planning. T. 1346-1351; Ex. 626, pp. 22, 51, 56, 62-64.

STANDARD OF REVIEW

This Court has consistently held that when reviewing an order of the Commission, including an order approving a non-unanimous settlement, great deference must be afforded to the Commission's findings. *Citizens v. Fla. Pub.*

Serv. Comm'n, 146 So. 3d 1143, 1149 (Fla. 2014) ("*Citizens*") (Commission orders are "clothed with the presumption that they are reasonable and just."). *see also S. Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 752 (Fla. 2013) ("*SACE*") ("[PSC] orders, and concomitant interpretations of statutes and legislative policies that it is charged with enforcing, are entitled to great deference."); *W. Fla. Elec. Coop. Ass'n, Inc. v. Jacobs*, 887 So. 2d 1200, 1204 (Fla. 2004); *Gulf Coast Elec. Coop., Inc. v. Johnson*, 727 So. 2d 259, 262 (Fla. 1999); *BellSouth Telecomms. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998).

Therefore, "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." *Citizens*, 146 So. 3d at 1149 (quoting *SACE*, 113 So. 3d at 752 and *Crist v. Jaber*, 908 So. 2d 426, 430 (Fla. 2005)). This Court has emphasized that it will not second-guess the PSC's rate-making decisions, nor will it overturn a PSC order because it would have reached a different result in making the initial decision. *See, e.g.*, *SACE*, 113 So. 3d at 753. *Shevin v. Yarborough*, 274 So. 2d 505 (Fla. 1973); *Gulf Oil Co. v. Bevis*, 322 So. 2d 30 (Fla. 1975).

SUMMARY OF ARGUMENT

The PSC approved the Settlement Agreement as being in the public interest and establishing rates that are fair, just and reasonable. In so doing, the PSC appropriately focused on the Settlement Agreement as a whole, as it has done in prior rate case settlements, and as this Court has upheld in reviewing such orders. Here, the PSC approved the Settlement Agreement after compiling extensive record evidence both on the Rate Case and on the Settlement Agreement. Because Sierra Club does nothing more than challenge the Peaker Replacement Project, a single issue among 167 issues in FPL's Rate Case, and not whether the Settlement Agreement as a whole is in the public interest, the appeal is misdirected.

To require the PSC in approving a settlement to decide each of the numerous issues that comprise a rate case would render the entire settlement process pointless: there would be neither reason nor opportunity to settle if the parties must still proceed to litigate to conclusion the merits of every issue. This never has been the approach employed by the PSC in reviewing settlements in rate cases or employed by this Court in reviewing orders approving such settlements.

The *Gulf Power* decision cited frequently by Sierra Club requires nothing different here. That case, which upheld a PSC decision, did not involve the review of a settlement, did not address or interpret the standard for prudent investment under Section 366.06(1), and did not deal even remotely with the facts here. Yet,

from *Gulf Power*, Sierra Club attempts to fabricate a standard of review against which to measure the Commission's action in this case. It does so by cobbling together disparate statements from the Court's and the Commission's discussions regarding different issues in that case. Even assuming incorrectly that a "prudence" determination is the appropriate standard of review as to the Settlement Agreement or any of its discreet elements, nowhere does Sierra Club's version of the prudence standard exist in Florida law. The applicable prudence standard is what a reasonable utility manager would have done in the circumstances at which time a decision was made. There is no statutory requirement for an analysis of every hypothetical alternative.

Even if an explicit review and findings with respect to the Peaker Replacement Project were required in order to approve the Settlement Agreement, the Commission had more than ample competent, substantial evidence to support a finding of prudence. Aging 40+-year-old peakers no longer supported by their manufacturer required replacement, and the new peakers were both cleaner and more fuel efficient, leading to over $200 million in customer savings and lower emissions. No detailed comparison with solar, battery storage, or further energy conservation was required because the Peaker Replacement Project cost-effectively satisfies a specific reliability need for quick-starting, always-available power.

Neither solar nor battery storage or DSM could have cost-effectively met this need on FPL's system.

ARGUMENT

I. THE COMMISSION PROPERLY DETERMINED THAT THE SETTLEMENT AGREEMENT ESTABLISHES FAIR, JUST AND REASONABLE RATES AND IS IN THE PUBLIC INTEREST.

A. The PSC Properly Reviewed the Settlement Agreement as a Whole, Rather than Focusing on the Single Issue Contested by Sierra Club.

Sierra Club's appeal misunderstands the nature of the PSC's action expressed in the Final Order. This misunderstanding starts with the very first line in its Brief where Sierra Club says "it appeals the Commission's final order that the public pay FPL nearly $800 million in construction costs to replace [peakers]." SC Br. at 1. The PSC's Final Order does not say that. The Final Order reflects the PSC's review and approval of the Settlement Agreement among FPL and several intervenors representing the interests of FPL customers, which resolved comprehensively a general base rate case involving 167 separate issues. Only one of those 167 issues addressed the Peaker Replacement Project. Yet it is the exclusive focus of Sierra Club's appeal.[8]

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[8] Sierra Club asserts (SC Br. at 5) that the Commission "acknowledged" that its "standard of review was whether 'FPL's replacement of its peaking unit [was] reasonable and prudent.'" The cite is to the parties' statement of issue number 57 before the August hearing (R. 2962); it relates to the litigation of that issue in the context of the base rate proceeding and similar wording would be found with

When presented with a proposed settlement agreement in a rate case, the PSC consistently has evaluated the settlement to determine whether, taken as a whole, it provides a reasonable resolution of all issues raised. If the PSC so finds, then it will approve the settlement agreement, finding that it establishes rates that are fair, just and reasonable and that the agreement is in the public interest.

This Court has sanctioned that approach in its review of prior PSC orders involving rate case settlements, such as FPL's 2012 rate case. *Citizens*, 146 So. 3d at 1164-65. *Citizens*, like this case, presented a settlement with less than all parties. There, the Court began by noting that the "Commission is authorized by statute to resolve rate-making proceedings by approving negotiated settlements," even where — unlike here — the OPC objects. *Id.* at 1149. Pursuant to Section 120.57(4), Fla. Stat., "informal disposition of the rate proceeding may be made by stipulation, agreed settlement, or consent order." *Id.* Indeed, this Court noted it had upheld non-unanimous settlements approved by the Commission even without conducting an evidentiary hearing. *Id.* at 1152-53 (citing *S. Fla. Hosp. v. Jaber*, 887 So. 2d 1210, 1213 (Fla. 2004)). Further, this Court found "without merit" the argument that the Commission needed to explain why it overruled each objection.

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respect to multiple issues dealing with a variety of expenditures. It does not pertain to the approval process for the Settlement Agreement which, in the whole, addresses all 167 issues as well as additional elements of the Settlement Agreement that were not litigated in the August hearing.

Instead the Court examined, with deference, the PSC's explanation of why the settlement was in the public interest, and whether the settlement established rates that were "fair, just and reasonable." *Id*. at 1165.

These are precisely the findings made by the Commission here in the Final Order, similar to findings the PSC has made in approving numerous prior rate case settlements. *See, e.g.*, Order Nos. PSC-13-0023-S-EI, at 7-8; PSC-11-0089-S-EI, at 6; PSC-10-0398-S-EI, at 6; PSC-05-0945-S-EI, at 6-7; PSC-05-0902-S-EI, at 6; and PSC-02-0501-S-EI, at 5.

Reviewing the Settlement Agreement as a whole not only is consistent with a long and unbroken line of PSC precedent, it also is the only viable, logical basis for the PSC's review. The very nature and purpose of a settlement is to strike a compromise that is mutually acceptable to competing interests. Had there been no settlement in the instant rate case, the PSC would have worked its way through each of the 167 issues raised by the parties, leading ultimately to a determination of adjustments to FPL's rates that the PSC would have calculated and characterized as the "fallout" of its decisions on the many subordinate issues. *See, e.g.*, R. 3057 (prehearing order describing Issue 123 concerning the amount of FPL's allowed operating revenues as a "fallout issue"). In an appeal of a litigated rate case outcome, an appellant might properly challenge the ultimate decision on rates based upon alleged errors by the PSC on individual subordinate issues.

In contrast, this "bottom up" decision-making approach to a litigated outcome would have been unworkable for the PSC's review and approval of the Settlement Agreement because settlements do not result from such an approach. The Settlement Agreement does not resolve separately each of the 167 issues that the parties had identified to litigate, with a resulting "fallout" rate increase. Indeed, there would be no point to even attempting a settlement in a rate case if the Commission were obligated nonetheless to resolve all of the disputed issues before or in approving the Settlement Agreement.

Rather, the Settlement Agreement is a negotiated compromise by the settling parties on the rate increase itself with no specific dollar value attributed to particular investments or expenses. Here, the compromise rate increase is substantially smaller than FPL had requested: over the four-year settlement term, the total revenue is about $2 billion less – only about half of FPL's original request. Oct. T. 112. Indeed, FPL reduced its proposed rate increase by far more than the associated revenue requirement related to the Peaker Replacement project for 2017 and for the other years covered by the Rate Case.

Thus, the PSC's task in reviewing the Settlement Agreement is not to reverse engineer a resolution to each of the subordinate issues so that they yield mathematically the same compromise rate increase on which the settling parties agreed. Rather, as noted above, the PSC's job is to determine whether the

Settlement Agreement, taken as a whole, provides a reasonable resolution of all issues, such that its proposed rates are fair, just and reasonable, and it is in the public interest. That is precisely what the PSC did in this instance.

Within this context, one can readily appreciate how widely the Sierra Club appeal misses the mark by focusing exclusively and obsessively on one subordinate issue. Nothing in the Sierra Club's brief purports to show that the rates established by the Settlement Agreement are not fair, just and reasonable or that the Settlement Agreement does not meet the public interest standard. Sierra Club's appeal thus fails even to address the salient factors that the PSC properly considers in deciding whether to approve a settlement. As discussed below, there is abundant support in the record for the PSC's findings that the Settlement Agreement, taken as a whole, *is* a reasonable resolution of all issues, that the rates it established *are* fair, just and reasonable, and that it *is* in the public interest.

B. Competent, Substantial Evidence Supports the PSC's Conclusion That the Settlement Agreement is in the Public Interest.

Page 4 of the Final Order enumerates several factors that the PSC considered in determining that the Settlement Agreement is in the public interest, each of which is supported by substantial, competent evidence:

"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." R. 6284. FPL's success in delivering reliable, high-quality service to customers is well documented

in the record. For example, FPL's System Average Interruption Duration Index, a key measure of the reliability of electric service for customers, was 50% better than the national average in 2015 and had improved by 23% from 2006 to 2015. Exhs. 69, 71. Moreover, FPL has been recognized consistently and frequently for the high quality of its customer service. For example, in 2015 and 2016 FPL achieved the highest customer satisfaction ratings in the southeastern United States for both residential and business customers in J.D. Power and Associates surveys. R. 689-90; Ex.136. None of this evidence on the reliability and quality of FPL's service was disputed.

FPL has delivered this outstanding service at extremely low electric rates. For example, FPL's typical 1,000 kWh residential bill is lower in 2016 than it was ten years earlier, is the lowest on average in Florida for the past seven years, is 30% below the national average, and is 20% below the state average. Ex. 346. Even after taking into account the rate increases provided under the Settlement Agreement, FPL's typical residential bill is expected to remain well below the current national and Florida averages as well as remaining among the lowest in the state. Oct. T. 28, 78; Ex. 808. The evidence of FPL's low rates was uncontested. *See* FPL's Appendix at 1-9 (Exs. 45, 136, 139 and 389, comparing FPL's rates to other utilities).

"*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.*" R. 6284. This too, is undisputed. *See* pp. 8–10, *supra*.

"*The signatories to the Settlement Agreement represent a broad segment of FPL's customer base, including both residential and commercial classes.* R. 6284. The Intervenor Signatories' settlement brief describes their diverse interests. R. 4492. Three other major customer representatives in this proceeding either took no position or did not oppose approval of the Settlement Agreement: FEA, FIPUG, and Walmart. R. 4492; *see also* Oct. T. 20-23.

"*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.*" R. 6284. The Settlement Agreement reflects substantial compromises by FPL in order to reach a mutually agreeable basis for resolving the Rate Case:

- FPL agreed to terminate hedging natural gas prospectively for the minimum term of the Settlement Agreement. Oct. T. 60-61.

- FPL expanded its commitment to cost-effective solar generation. Oct. T. 76, 81.
- FPL agreed to a compromise ROE range nearly 100 basis points lower than FPL's requested authorized range in its March 2016. T. 207, 2127, 2129, 2470, 2472-77.
- Finally, the Settlement Agreement's compromise depreciation rates reduce FPL's 2017 depreciation expense by nearly $126 million compared to FPL's proposed depreciation rates. Oct. T. 44.

"[T]he Settlement Agreement constitutes a reduction in revenue requirement for 2017 of over $400 million from FPL's request." R. 6284. FPL requested a 2017 increase of more than $826 million, but agreed to reduce the increase to $400 million. *Cf.* R. 3057 (Issue 123 in prehearing order for Rate Case reflects FPL's position on 2017 rate increase as $826.212 million), and Settlement Agreement ¶4(a), R. 4149 (provides for $400 million increase in 2017). This is a decrease of nearly 52%. And, the Settlement Agreement's restrictions on base rates will remain in effect for at least the four-year Minimum Term. Over those four years, the Settlement Agreement will result in customers paying almost *$2 billion less* than they would under FPL's requested rates. *See* Oct. T. 112; R. 4489.

The PSC's most recent electric rate case settlements all have contained provisions similar to those in the Settlement Agreement, specifying allowed

revenue increases, authorized ROEs, the duration of the agreement, and restrictions on the opportunity to seek any base rate increases during the settlement term. R. 4492; *see* Order Nos. PSC-13-0023-S-EI (FPL), PSC-13-0670-S-EI (Gulf Power Company), PSC-13-0443-FOF-EI (Tampa Electric Company), and PSC-14-0517-S-EI (Florida Public Utilities Company). Thus, not only is the PSC's finding that the Settlement Agreement is in the public interest well supported by competent, substantial evidence in this proceeding, it is closely in line with settlements that the PSC recently has found to be in the public interest for other electric utilities. *See* R. 4492.

C. The Commission's Order Approving the Settlement Adequately Explains its Decision.

Relying on *Citizens v. Graham*, 213 So. 3d 703 (Fla. 2017) (hereinafter "*FPUC*"), Sierra Club claims that the Commission's order fails to "expose and elucidate" whether the record supported recovery of the Peaker Replacement Project's costs. *FPUC*, a case not involving approval of a settlement resolving all issues in a rate case, is inapplicable. Florida law does not require the inclusion of such analysis in the Commission's order.

As discussed above, the form and nature of the Commission's Final Order in question in this appeal is substantially similar to the order affirmed by this Court in *Citizens.* The order appealed in *Citizens* concerned the Commission's approval of a non-unanimous settlement following a fully litigated rate case involving a

multitude of individual issues. 146 So. 3d at 1143. Following a hearing that addressed the elements of that settlement agreement not addressed in the initial rate case, the Commission determined that the settlement established fair, just, and reasonable rates and that it was in the public interest. *Id.* The final order memorialized that finding and incorporated the approved settlement. *Id*. The 193 disputed issues of fact identified in the initial rate case proceeding at issue in *Citizens* were not specifically addressed and determined by the Commission in its final order in that case. *Id*.

The appellant in *Citizens* argued that the factual findings in the final order were insufficient because the Commission did not explain why it overruled the appellant's objections to consideration of the settlement and did not resolve every disputed issue of fact. *Id*. at 1153. This Court disagreed:

> Section 120.569(2)(*l*), Florida Statutes (2012), provides 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 . . . ." Here, the Commission's final order discusses the major elements of the settlement presented for its review on FPL's motion to approve the settlement agreement. . . . Further, the Commission explained why the settlement agreement was in the public interest.

Id. The Court held that "the Commission is not required by statute or case law to address each issue of disputed fact in its final order," and concluded that "the final order otherwise satisfies section 120.569(2)(*l*)." *Id*.

The same is true here. Sierra Club and amicus Florida League of Women Voters argue that the factual findings in the final order were insufficient because the Commission did not explain why it overruled the Sierra Club's objection to the settlement and did not address the prudence of FPL's investment in the Peaker Replacement Project (Issue 57). It is not required to do so. *See id*.

Just like in *Citizens*, the Commission's order in this case memorializes its finding that the Settlement Agreement established fair, just, and reasonable rates and that it is in the public interest. R. 6284-85. It incorporates the approved settlement. R. 6282, 6282. The Commission discusses the major elements of the settlement presented for its review. R. 6282-6284. The Commission also explained why the settlement agreement is in the public interest. R. 6284-85. The Settlement Order therefore satisfies the requirements of Section 120.569(2)(*l*). *See Citizens*, 146 So. 3d at 1153.

FPUC is irrelevant. That case involved this Court's review of a Commission order approving cost recovery of transmission interconnection costs over the appellant's objection that such recovery violated the utility's Commission-approved rate settlement agreement under which the parties were operating. *FPUC*, 213 So. 3d at 707. The Court held in *FPUC* that the Commission departed from essential requirements of law by failing to adequately address its deviation from the terms of that settlement agreement it had previously approved, which is

binding on the Commission and thus effectively is agency policy. *Id*. at 710-12. Interpreting Section 120.68(7), Florida Statutes and *McDonald v. Department of Banking & Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), the Court cataloged the four types of agency acts that must be set aside if not sufficiently explained: non-rule policies within the agency's exercise of delegated discretion; deviation from any agency rule, policy or prior agency practice; denial of a license; or deviations from a hearing officer's finding of fact. *Id*. at 711.

None of the grounds for reversal articulated by the *FPUC* Court exists here. The Commission exercised its discretion in approving the Settlement Agreement, and in doing so it adequately stated the reasons why it is in the public interest. *See Citizens*, 146 So. 3d at 1153. No Commission rule, policy or practice required it to make an explicit prudence determination for the Peaker Replacement Project in approving a settlement agreement. *See* § I.A., *infra*. Even had such a rule existed, a prudence determination does not require FPL to evaluate any theoretical or hypothetical alternative, and there is no requirement to pursue the least-cost option while ignoring other considerations such as reliability. *See* § II, *infra*.

II. NEITHER FLA. STAT SECTION 366.06(1) NOR *GULF POWER* REQUIRES REVIEW OF ALL THEORETICAL ALTERNATIVES FOR EACH INVESTMENT DECISION.

Having established that competent substantial evidence supports the PSC's determination that the Settlement Agreement is in the public interest, there should

be no reason to explore separately the Sierra Club's objections to FPL's recovery of the Peaker Replacement Project. However, even if the Court were to do so, the Sierra Club's argument against recovery is fatally flawed, starting with its gross mischaracterization of the standard for evaluating the prudence of utility investments. Fundamental to Sierra Club's argument is that Section 366.06(1), Fla. Stat., and *Gulf Power Co. v. Public Service Comm'n*, 453 So. 2d 799 (Fla. 1984) ("*Gulf Power*") require an evaluation of all possible alternatives to a utility investment before it can be found prudent. In fact, neither the statute nor the case stands for anything remotely close to what Sierra Club asserts.

A. Section 366.06(1) Requires that Investments be Prudent but does not Prescribe Specific Procedures that the PSC or FPL Must Follow.

Regarding rate recovery of utility investment, Section 366.06(1) provides:

> 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.

Nothing in this standard for recovering utility investments mentions a comparison of proposed investments to all available alternatives. Nor has this Court or the PSC interpreted the phrase "prudently invested" to require such a comparison.[9]

Recently, this Court had occasion to evaluate the concept of prudent utility costs, in the context of a dispute over whether the Florida Legislature had provided sufficient guidance to the PSC in Section 366.93(2), Fla. Stat., which directs the PSC to allow recovery of "prudently incurred" nuclear costs. The Court found that the PSC indeed had an objective standard, well documented in prior PSC orders,[10] by which to gauge the prudence of costs that a utility seeks to recover: "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." *SACE*, 113 So. 3d at 749-50. The Court expressed no misgivings about that standard and affirmed the PSC order in which it had been

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[9] The PSC's interpretation and application of Section 366.06(1) is subject to review under Section 120.68(7)(e)(1), Fla. Stat. *See S.w. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 597 (Fla. 1st DCA 2000). While review of final PSC action pursuant to Section 120.68(7)(e)(1) is de novo, because the PSC's exercise of authority pertains to its own enabling statute, its decision is afforded great weight and will be accepted on appeal unless clearly erroneous. *See BellSouth*, 708 So. 2d at 596.

[10] Order No. PSC-11-0547-FOF-EI, the order on appeal in that case, pointed to Order Nos. PSC-08-0749-FOF-EI and PSC-09-0783-FOF-EI as also stating and applying this prudence standard previously.

applied. *Id*. Nothing in this prudence standard requires a comparison of proposed investments to all available alternatives.

B. This Court's Decision in *Gulf Power* Provides No Support For Sierra Club's Assertion That Utility Investment Decisions Must Be Compared To All Alternatives To Be Found Prudent.

Sierra Club's interpretation of this Court's decision in *Gulf Power* misses the mark widely in at least the following ways:

First, in *Gulf Power* the Court *affirmed* the PSC's decision in response to a challenge by the utility. In affirming the PSC, the Court cautioned that it "will not overturn an order of the PSC because we would have arrived at a different result" so long as there is "competent substantial evidence support[ing the] order" and that the Court will not "substitute its judgment for the PSC's action taken within the statutory range of discretion." 453 So. 2d at 803, 805. In contrast, Sierra Club urges here that the Court *reverse* the Final Order because Sierra Club disagrees with the decision that the PSC made on the record before it. Sierra Club is in the same procedural posture as the utility in *Gulf Power*, inviting the Court to intrude into the PSC's decision-making province. As it did in *Gulf Power*, the Court should decline that invitation.

Second, Sierra Club misleadingly cobbles together an extraordinary version of what *Gulf Power* actually says. On pages 2 and 3 of its initial brief, Sierra Club asserts that the Court held in *Gulf Power* as follows: "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].'" In fact, each of the substantive quotes in that paraphrase comes from a different part of the opinion. "Minimize" appears in the discussion on page 802 about reducing adverse short-term consequences of Gulf Power's decision to buy a portion of Plant Daniel. "Timely" appears in a separate paragraph on page 802, addressing the separate topic of Gulf Power's efforts to make off-system sales from Plant Daniel. Finally, "range of alternat[ives]" actually appears in the opinion on page 804 as "range of alternate coal inventory levels," yet a third independent topic. Nowhere does *Gulf Power* even address evaluating alternatives as part of a prudent investment decision concerning utility property.

Third, by referring to Section 366.06(1) and *Gulf Power* in consecutive sentences on pages 2 and 3 of its initial brief, Sierra Club creates the misleading impression that *Gulf Power* addresses the prudent investment standard of Section 366.06(1). In fact, the opinion does not even mention Section 366.06(1). The closest it comes is on page 804, where the Court cites more generally to Section 366.06 regarding the exclusion from Gulf Power's rate base of a portion of Plant Daniel. But this exclusion was made, not because the purchase of a portion of Plant Daniel was imprudent, but rather because it was "determined to be nonused and [non]useful by present customers." 453 So. 2d at 806. The "used and useful"

requirement plays no role in this case. The new peakers are operating and are, in fact, both used and useful.

Finally, there is no plausible parallel between the facts of *Gulf Power* and those of the instance case. In *Gulf Power*, the utility was found to have repeatedly ignored the PSC's prior warnings that its projections of future load growth were too high for planning purposes and therefore did not begin to look for opportunities to make wholesale sales of the excess capacity on favorable terms. As a result, the utility was left with no option but to sell the excess capacity at Plant Daniel on unfavorable terms to its affiliates. The PSC said that it had given Gulf Power every opportunity to explain its dilatory actions, but the utility failed to do so satisfactorily. Likewise, the PSC disallowed recovery on a portion of coal inventory, because the utility's only support for the requested inventory level was "the collective wisdom of [its] management." The PSC wanted to see the management judgment substantiated in some manner, but found that the utility failed to do so. 453 So. 2d at 802-03, 804. This is a far cry from the facts surrounding the Peaker Replacement Project, where FPL presented competent, substantial evidence that the Project is a prudent investment that will save customers more than $200 million over its life. *See* Section III, *infra*.

III. SUBSTANTIAL EVIDENCE IN THE EXTENSIVE RECORD BEFORE THE PSC SUPPORTS THE PRUDENCE OF FPL'S REPLACEMENT OF AGING GAS TURBINES.

As discussed above, the PSC, in approving the Settlement Agreement, was under no legal obligation to adjudicate individually any one of the 167 issues from the initial phase of the Rate Case, including Issue 57, the prudence of the Peaker Replacement Project. Even if a specific prudence determination were required, however, ample competent, substantial evidence exists to support a finding that the Project is a prudent utility investment.

Prudence, as explained above, is a fact-specific determination based on "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." *SACE*, 113 So. 3d at 750. The Commission also has made clear that "speculation and hindsight review is not consistent with the prudence standard recognized by [the PSC] and shall be rejected as a basis for finding imprudence." Order No. PSC-11-0547-FOF-EI, cited with approval in *SACE*.

In deciding whether and how to replace the old gas turbines, the paramount "condition and circumstance" was FPL's need to fulfill its reliability obligation. And the prudence of FPL's investment in the Peaker Replacement Project must be based on facts known in February of 2015 when FPL made the decision to proceed.

A. FPL's Primary Obligation is To Deliver Reliable Service to its Customers and the State of Florida.

As a public utility, FPL's fundamental duty is "to furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms

as required by the commission." § 366.03, Fla. Stat. (2016) (defining the duties of Florida public utilities). Under Florida law, adequate service means reliable service, and FPL's duty to maintain reliable generation extends not only to its own customers but to the entire state energy grid. *See, e.g.*, § 366.05, Fla. Stat. (2016) ("the commission shall have power to prescribe fair and reasonable rates and charges . . . for purposes of ensuring the reliable provision of service"); § 366.06, Fla. Stat. (2016) ("Energy reserves of all utilities in the Florida energy grid shall be available at all times to ensure that grid reliability and integrity are maintained."). The reliable delivery of electricity is vital to Florida. *See* Florida Reliability Coordinating Council's Generating Capacity Shortage Plan, § 3, *adopted in* Fla. Admin. Code R. 25-6.0183 ("FRCC Plan").[11] It is critical for the existing and growing residential population, for commerce and industry, and for tourism. *Id*.

The Commission has adopted a series of regulations that further prescribe those service responsibilities. The Commission requires that FPL "make all reasonable efforts to prevent interruptions of service and when such interruptions occur shall attempt to restore service within the shortest time practicable consistent with safety." Fla. Admin. Code R. 25-6.044. Additionally, "to protect the health, safety, and welfare of the people of the Florida," FPL must be positioned to supply emergency power in the event of a generation capacity shortage, whether the

[11] The FRCC Plan in effect at the time is reproduced in FPL's Appendix.

shortage was caused by an event on FPL's own system or the system of another Florida utility. FRCC Plan, p. 7. Thus, FPL must respond to capacity shortfalls experienced by other Florida utilities that serve areas subject to different climates.

Generation capacity shortages can occur during periods of very hot or very cold weather, during periods in which plants are forced to shut down due to major storms, high winds, flooding, or storm surge, or in the event of other unanticipated generating outages. FRCC Plan, pp. 4, 6. FPL and other utilities within Peninsular Florida must collectively maintain sufficient generation reserves to replace the loss of generation that would result if their largest generating unit experienced an unplanned outage. At the time of FPL's rate case, the largest generating unit was 1418 MW. These reserves must be "fully available within 15 minutes." *Id*. Within 30 minutes of the start of the emergency event, FPL may no longer rely on the resources of the other utilities. It must make up all of its lost power through power generated by its own system. T. 1506-07; *Florida Power & Light Company, et al*., Docket No. ER08-1340-000, et al., Federal Energy Regulatory Commission Letter Order issued January 7, 2009 (accepting Florida Reserve Sharing Group Agreement).[12]

[12] The Letter Order and docket are available from FERC. Excerpts, including the full Letter and FPL's portion of the Agreement, are reproduced in FPL's Appendix.

It is against this backdrop that FPL made its decision to replace its 1970s-era gas turbines with modern combustion turbine technology.

B. FPL's Investment in the Peaker Replacement Project Meets Its Obligations to its Customers and the State of Florida Using Cleaner, More Reliable, and Lower Cost Technology.

As discussed above, the 40-year-old gas turbines that FPL replaced are no longer supported by their manufacturers and their replacement parts no longer are readily available, as evidenced by the difficulties FPL encountered when a torque converter failed on one of the units. Therefore, FPL moved forward with the cost-effective Peaker Replacement Project. Due largely to substantially greater efficiency and an improved environmental profile, the advanced combustion turbine technology is projected to save customers approximately $203 million. T. 814, 1421, 1505-06. This evidence was uncontroverted.

The new peakers require less fuel to generate power. The greatest portion of the Project's savings is derived from the combustion turbines' generating efficiency. Because they operate at a lower "heat rate" – which translates to the amount of fuel required to generate a unit of electricity – the new peakers represent a 35% to 40% efficiency improvement.[13] T. 804, 814. In everyday terms, it is like FPL replacing old polluting cars with modern, clean and fuel-efficient vehicles.

[13] Thirty-six of the old peakers had a heat rate of 17,168, and the remaining eight had a heat rate of 13,226. T. 934. The heat rate of the new peakers is much better at about 10,000. T. 956.

See T. 1501-02. This efficiency upgrade accounts for $114 million of the projected savings. Ex. 87.

The peaker replacement project reduces emissions and maintenance costs and avoids disturbing unused land. The new peakers reduce air emissions by 35%, resulting in projected savings of $8 million. The equipment and installation cost associated with the new combustion turbines reflect another $81 million savings compared to continuing to maintain the old peakers. Ex. 87. Beyond reducing emissions and maintenance costs, the Peaker Replacement Project reuses an existing industrial site, which not only avoids increased property costs and the construction of new transmission lines but also obviates the need to disturb potentially thousands of acres of land.

All of these reasons constitute competent, substantial evidence upon which the Commission could have made an explicit finding of prudence under Issue 57 if it had been necessary. There is no credible evidence to the contrary.

C. No Basis Exists Requiring FPL to Have Considered Sierra Club's Alternatives.

FPL was not required to examine unrealistic alternatives to the peakers. Its informed utility managers know what functions a particular generation unit must perform and which technologies do not yet fall within the realm of reasonable choices based on price or performance. That experience dictates that (i) solar is not a suitable "24-hour reliability" generating resource in the absence of cost-

effective energy storage, (ii) battery storage was still too expensive on FPL's low cost system, and remains unproven at this scale to be able to provide needed power for longer periods, and (iii) demand side management had reached its cost-effective limit as determined through another statutorily prescribed PSC proceeding. Sierra Club was the only intervenor to contest any of these facts.

1. Solar

Sierra Club is well aware of the challenge that low prices for natural gas-generated electricity pose currently for the economics of solar generation. Determined to "prevent[] new gas infrastructure," Sierra Club has publicly stated that "[t]he low current market price of natural gas creates a risk that new natural gas power plants will out-compete emerging forms of renewable energy in the electricity sector. The Sierra Club continues to legally challenge new natural gas plants . . . ." *Protect Our Climate*, Sierra Club, http://content.sierraclub.org/naturalgas/protect-our-climate.[14]

Sierra Club's anecdotes regarding what other utilities outside and within Florida are implementing are irrelevant. Many states are subject to renewable portfolio standards, which means their utilities *must* install renewable generation irrespective of how such costs compared to fossil fuel-fired units and their impact

[14] FPL notes that what Sierra Club views as a "challenge" is actually a boon for FPL customers. The low cost of generating electricity from highly efficient gas-fired plants is a major factor behind FPL's low electric rates. T. 191-93, 1403-04.

on retail rates.[15] Florida is not among them. Furthermore, cost-effectiveness is a measure unique to each utility's system costs. In that regard, Sierra Club utterly fails to address, much less rebut, the testimony of FPL witness Sam Forrest that the proposals FPL has received from third parties for the sale of solar power are not competitive in FPL's low-cost environment. T. 4801-03.

Sierra Club's suggestion that solar should have been considered as an alternative also disregards entirely the operational purpose of the Peaker Replacement Project. In the absence of cost-effective energy storage, existing solar technology is unsuitable for the particular reliability needs met by the peakers: not only meeting peak summer demands when the sun is shining, but being available for emergency needs 24 hours a day, seven days a week, during any time of the year. In fact, the highest peak load that FPL has ever recorded occurred during the winter. T. 3346. Solar, however, has no winter peak value because peak winter demand occurs during the early morning hours when "the sun's not even up yet." T. 1569-70. Because it was not a feasible alternative for FPL's reliability needs at the time, a detailed cost analysis was unnecessary.

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[15] *See Renewable Portfolio Standard Policies*, Database of State Incentives for Renewables & Efficiency (Feb. 2017), http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2017/03/Renewable-Portfolio-Standards.pdf (identifying 29 states with renewable portfolio standards).

That FPL built three cost-effective solar sites in 2016 – the first cost-effective solar to be constructed in Florida – does not alter that conclusion. Economic analyses showed that the cost to run FPL's system with the solar units was $26 million lower than the cost to run FPL's system without them. But the analysis did not and could not suggest that those sites would help meet the reliability need that the gas or combustion turbines serve.[16]

2. Battery Storage

Also as established in the record, FPL has investigated battery storage as an alternative to generation but determined that it could not yet serve as a cost-effective emergency unit in FPL's highly efficient system. T. 292, 1652. As with solar or any other form of generation, the cost-effectiveness of battery storage is a utility-specific calculus. Sierra Club's comparison to higher-cost utilities is simply irrelevant. Sierra Club's position depends on grossly mischaracterizing record testimony and misquoting NextEra's CEO as to what "may" in the "post-2020" future be feasible, but without reference to the specific application served by the peakers and the low cost of FPL's system.

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[16] Sierra Club misapplies the operational basis upon which economic analysis was conducted. That FPL's large scale solar projects are cost-effective and that solar is available to help meet peak demand on a sunny day does not make solar cost-effective *as a peaking unit*, i.e., one that runs only in emergencies. T. 944.

Storage has the potential to be cost-effective on FPL's system in the future, and its ability to meet FPL's reliability needs is being tested through the pilot program facilitated by the Settlement Agreement. Oct. T. 99-100. The technology had not reached that advanced stage, however, in early 2015 when FPL made the decision to proceed with the Peaker Replacement Project or even eighteen months later at the time of the August and Settlement hearings. T. 292, 1651-52. These facts were not only undisputed, but so patently obvious that no other intervenor challenging the amount of FPL's requested rate increase even raised the possibility that FPL should have considered installing more than 1600 MW of battery storage to supply emergency power.[17]

3. Demand Side Management

The notion that FPL could have pursued additional energy efficiency measures as an alternative to the old peakers is contrary to the Commission's determination that the total amount of achievable, cost-effective level of summertime DSM for FPL over a 10-year period was about 53 MW per year on average, and it altogether ignores governing law.

The Florida Energy Efficiency and Conservation Act ("FEECA") requires the Commission to review and establish the DSM goals of certain utilities,

[17] Intervenors OPC, SFHHA, FIPUG and FRF had opposed FPL's original rate request and regularly participate in PSC dockets that examine the cost-effectiveness of investments made by Florida utilities.

including FPL, at least every five years. § 366.82, Fla. Stat. (2016). The Legislature declared that "it is critical to utilize the most efficient and cost-effective demand-side renewable energy systems and conservation systems." § 366.81, Fla. Stat. (2016). Thus, in establishing goals, the Commission must consider "costs and benefits to the general body of ratepayers as a whole, including utility incentives and participant contributions." § 366.82(3)(b), Fla. Stat. (2016).

In 2014, the Commission followed the FEECA-prescribed process. *In re: Comm'n Review of Numeric Conservation Goals*, Order No. PSC-14-0696-FOF-EU, 2014 WL 7188030, at *1 (F.P.S.C. 2014) ("*In re Conservation Goals*"). Utilities submitted testimony regarding the benefits and costs of DSM programs. *Id.* Several intervenors participated, including Sierra Club. *Id*. On December 16, 2014, the Commission entered an order establishing that the total amount of achievable, cost-effective level of DSM for FPL over a 10-year period was about 53 MW per year on average. *Id*. at Attachments B, p.1 and Attachment C, p. 1. No party or intervenor appealed.

It is undisputed that FPL's planning already reflects the full amount of its approved DSM goals. T. 1346-1351; Ex. 626, p. 22. The Commission has approved a DSM Plan and a specific set of programs for FPL to achieve those goals. Order No. PSC-15-0337-PAA-EG. The Company is prohibited from

seeking recovery for any DSM program that stretches beyond the Commission-approved level. Fla. Admin. Code. R. 25-17.015(4).

Tellingly, not even Sierra Club's own energy efficiency expert believed that DSM measures could replace the gas turbines. Sierra Club advocated in the FEECA docket an average annual summer conservation level for FPL of about 493 MW, an amount deemed by the Commission to be unsupported and not based on any cost-effectiveness evaluation. *In re Conservation Goals*, at Attachments B, p.1 and Attachment C, p. 1. But even that unrealistic level of DSM falls woefully short of capacity required to replace the obsolete peakers.[18] Totaling 1,667 MW of generating capacity, the Peaker Replacement Project represents more than ***30 times*** the 53 MW of DSM that the Commission determined was cost-effective and achievable and more than three times Sierra Club's unrealistic goal.

Finally, Sierra Club's argument that the approved levels of energy conservation were "stale" belies any reasonable concept of time. The Commission entered its FEECA order on December 16, 2014. Mr. Barrett testified that FPL's

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[18] Sierra Club disingenuously quotes from FPL's annual report, asserting that FPL's past energy efficiency efforts have eliminated the need to construct approximately 15 new 400 MW generating units and claiming this means that conservation programs can cost-effectively eliminate the need for peakers. SC Brief, pp. 9-10. The approximate 6,000 MW (15 x 400) is a cumulative amount of conservation achieved every year since 1978. *See* SC Appendix p. 303. Taking a simple average, DSM has avoided the need for about 160 MW per year, or less than one-tenth of the peakers' generation capacity. And, all of that past DSM is fully taken into account in FPL's resource planning.

Board of Directors approved the Peaker Replacement Project in February of 2015, only two months later. Moreover, on January 19, 2016 – after FPL board approval and four days after FPL filed its rate case letter – the Commission determined in the context of a Power Plant Siting Act proceeding that "no additional cost-effective DSM could mitigate FPL's need for *new* generation." *In Re: Petition for Determination of Need for Okeechobee Clean Energy Ctr. Unit 1, by Fla. Power & Light Co.*, Order No. PSC-16-0032-FOF-EI, 2016 WL 454542, at *13 (F.P.S.C. 2016) (emphasis added). *A fortiori*, no cost-effective measures are available to displace *existing* generation.

CONCLUSION

On multiple occasions, this Court has ruled that settlement agreements, including in rate proceedings, are to be taken as a whole. The PSC did so here and found, for abundant reasons, this settlement was in the public interest. Competent, substantial evidence supports that conclusion. Only one party below has challenged the Settlement Order, on erroneous legal grounds and an incomplete reading of the record. The Settlement Order of the PSC should be affirmed.

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Respectfully submitted,

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I HEREBY CERTIFY that a true copy and correct copy of the foregoing was served electronically on October 9, 2017:

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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.

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