IN THE SUPREME COURT OF FLORIDA

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

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Unless otherwise specified, in this Initial Brief, Appellant, Sierra Club, will use the following terms and abbreviations:

- **"Commission"** refers to the Appellee Florida Public Service Commission.
- **"FPL"** refers to the Appellee Florida Power & Light Company.
- **"Final Order"** refers to the Commission's Order No. 16-0560 on appeal.
- **"Peakers"** refer to fossil fuel-burning power plants that supply peak demand, which is the hour of highest power usage in a given year.
- **"Original Peakers"** refer to FPL's peakers that used to supply peak demand in South Florida.
- **"New Peakers"** refer to FPL's peakers that replaced the Original Peakers.
- **"Peaker Replacement Project"** and **"Project"** refer to FPL's project to replace the Original Peakers with the New Peakers.
- **"Solar"** refers to technologies that produce power from the sun.
- **"Demand-side resources"** refer to technologies on a customer's premises that offset the need for power plants.
- **"Energy storage"** and **"battery storage"** refer to technologies that store power for later use.
- **"Prudence Hearing"** refers to the Commission's hearing from August 29 to September 1, 2016, regarding FPL's request to recover the Peaker Replacement Project's costs.
- **"Settlement Hearing"** refers to the Commission's hearing on October 27, 2016, regarding a non-unanimous settlement proposal to allow FPL to recover the Peaker Replacement Project's costs.

- **"SOC"** refers to this Initial Brief's Statement of the Case and of the Facts.
- **"AARP"** refers to the American Association of Retired Persons.
- **"FEA"** refers to the Federal Executive Agencies.
- **"FIPUG"** refers to the Florida Industrial Power Users Group.
- **"FRF"** refers to the Florida Retail Federation.
- **"Larsons"** refers to Daniel R. Larson and Alexandria Larson.
- **"OPC"** refers to the Florida Office of Public Counsel.
- **"SFHHA"** refers to the South Florida Hospital and Healthcare Association.
- **"Walmart"** refers to Wal-Mart Stores East, LP and Sam's East, Inc.

* * *

Appellant will cite Commission orders not in the record but available on the Commission website as Order No. ##-####. Older orders not on that website will be cited as Order No. ##### and included in the Appendix, which will be cited as "App[Page #]." The record will be cited as "R[Vol. #]:[Page #]." The corrected Prudence Hearing transcript (in Attachment 1 of the record) will be cited as "T[Vol. #]:[Page #]," and the Settlement Hearing transcript will be cited as "Oct.T[Page #]." Prudence Hearing exhibits (in Attachment 2) will be cited as "Ex[#]:[Bates #]," except when they lack Bates numbers they will be cited as "Ex[#]:[Page # that appears in the exhibit]" and included in the Appendix. Settlement Hearing exhibits (in Attachment 2) will be cited as "Oct.Ex[#]:[Page #]."

INTRODUCTION

Sierra Club appeals the Commission's Final Order that the public pay FPL nearly $800 million in construction costs to replace power plants—known as peakers—that supplied South Florida's peak demand. The Commission never asked what the total costs to the public would be for the Peaker Replacement Project, nor what the savings would have been had FPL pursued alternatives instead. Yet, these are precisely the questions the Commission must address under the prudent investment requirement in section 366.06(1), Florida Statutes, which precludes recovery when a utility fails to prove that it made prudent, least-cost investments.

The record in this case cannot support a finding that the Project was prudent and least cost, because FPL never produced any meaningful comparison between the Project and potential money-saving alternatives. The alternatives included technologies to supply peak demand with zero fuel cost, customer-sited technologies that offset peak demand, and simply delaying the Project to allow the cost "plunge" of these technologies to continue. FPL failed to analyze such alternatives, and the Commission failed to require FPL to do so, despite knowing that the peakers FPL was building could be economically obsolete and superseded by alternate resources as early as 2020. Because FPL's original peakers could have operated until 2025, FPL did not have to replace them when it did, and it certainly

could not have been prudent to do so, without analyzing and pursuing potential money-saving alternatives.

Moreover, FPL moved forward with the Project unilaterally, after failing to secure pre-approval from the Commission, over objections from diverse ratepayer parties that the Project was neither necessary nor least cost. Despite FPL's stated commitment to work with those parties and analyze alternatives to the Project, FPL made what it termed a "pretty simple" decision and apparently spent close to $800 million in construction costs for the Project. The Commission subsequently never asked how much money the public—4.8 million families and businesses in FPL's service area—would have saved had FPL pursued alternatives instead.

Sierra Club asks the Court to reverse the Commission's approval of the Project because it violates section 366.06(1)'s prudent investment requirement and is not supported by competent substantial evidence.

STATEMENT OF THE CASE AND OF THE FACTS

Section 366.06(1), Florida Statutes, authorizes the Commission to allow a utility to recover the money that it "prudently invested."[1] A prudent investment is one that "minimize[s]" the money spent to serve the rate-paying public

[1] Recovery occurs via rates, which are the prices utilities charge for service. *See* Order 4078, at 1. Order 4078 is in the Appendix and cited hereinafter as "App778–829."

("ratepayers" or "customers") via a "timely" analysis and pursuit of "a range of alternat[ives]." *Gulf Power Co. v. Pub. Serv. Comm'n*, 453 So. 2d 799, 802, 804, 806 (Fla. 1984). The utility has the burden to prove that it made prudent investments. *Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1190–91 (Fla. 1982). When it fails to analyze alternatives, it fails to carry its burden of proof, which leaves the Commission without the requisite "empirical support" to allow recovery. *Id.* at 804.

This case concerns the Commission's decision to allow FPL to recover the costs associated with its project to replace power plants, known as peakers, which burn gas or oil to produce power during peak demand[2] in South Florida. (T8:813; T8:871; T12:1501–02.) FPL called this the Peaker Replacement Project. (T8:813.) The Project consisted of building seven large peakers in Fort Lauderdale and Fort Myers—the New Peakers—to replace 44 smaller, pre-existing peakers that came online in the 1970's in the same locations and Port Everglades—the Original Peakers. (T8:813; T12:1501–02.)

A. FPL Unilaterally Undertook the Peaker Replacement Project After Failing to Obtain Pre-Approval From the Commission.

FPL sought pre-approval from the Commission in 2013 for a project that

[2] Peak demand is the "single hour of highest usage" in a year (T11:1349), typically in the summer when temperatures spike. (T11:1300; T12:1507.)

was "essentially equivalent" to the Peaker Replacement Project.[3] (T13:1579–80.) FPL alleged that the related costs would be "prudently incurred because this project represents the lowest-cost, viable alternative to comply with applicable environmental regulatory requirements." (App258.) Intervenor-parties, including OPC on behalf of all ratepayers, objected that the project was neither the "lowest cost solution," nor "required as an environmental compliance measure." (R1:160–61, 177–84.)[4] Two intervenor-parties filed testimony on alternatives to the project (R1:155–59; R2:196), and one filed a motion to open a Commission docket to allow for a closer examination of the project and the alternatives. (R2:195.) Before the Commission could complete its fact-finding or rule on that motion, however, FPL withdrew the project from the Commission's review, conveying its intent to work with the parties and analyze alternatives. (R2:195–99.)

FPL subsequently proceeded with the Peaker Replacement Project. (T13:1593–94.) FPL did so unilaterally, and without pre-approval from the Commission. (R2:286.) The Project-related construction ran from February 2015 to December 2016. (T12:1525–26.) For construction alone, FPL apparently incurred

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[3] More specifically, FPL sought pre-approval via the Commission's annual, fast-track review of environmental compliance costs (R2:195–201), which is also a prudence review. *See* § 366.8255(2), Fla. Stat. ("the [C]ommission shall allow recovery of the utility's prudently incurred environmental compliance costs").

[4] The Commission recognized that FPL's request raised disputed issues and enumerated them as issues 10–10D and 11 in its prehearing order. (R1:177-184.)

an "estimated capital cost" of $772.4 million between 2015 and 2017. (Ex463:1943.)[5]

B. FPL Sought to Recover Nearly $800 Million in Project-Related Construction Costs Without Any Meaningful Analysis of Potential Money-Saving Alternatives to the Project.

With the Project well under way (T12:1525–26), FPL sought Commission approval to recover the Project's construction-related costs—"nearly $800 million"—through increases in FPL's base rates. (R2:350, 362–63.) At the outset of the proceedings that followed,[6] the Commission acknowledged that its standard of review was whether "FPL's replacement of its peaking units [was] reasonable and prudent." (R15:2962.) In contrast to 2013, FPL did not allege that the Project was the least-cost alternative, or necessary for environmental compliance. (T12:1505.) Nor did FPL produce evidence that it had analyzed potential money-saving alternatives to the Project (T35:5464), despite the Commission's history of approving such alternatives as prudent, cost-effective investments to supply peak demand (App699–707, 713), and FPL's admissions that they "can be very cost-effective" (T6:611) and "save customers money." (T12:1514.)

At the close of discovery and the Commission's two-week hearing—the

[5] Exhibit 463 is in the Appendix and cited hereinafter as "App278–80."

[6] The Commission consolidated its review of the Project and other issues raised by FPL's requested base-rate-increase. (R3:567–71.) This appeal focuses exclusively on the Commission's review of the Project.

Prudence Hearing—the record was devoid of evidence that the Project was in fact prudent and least cost. *See infra* SOC §§ C–F. Shortly thereafter, FPL and three of the nine-intervenor parties[7] proposed a settlement to dispose of all of the issues in the proceedings. (R23:4407–09.) The settlement was in a "black box" format, which identified the stipulated terms but obscured the reasoning and supporting evidence, if any, behind those terms. (R21:4136–99; R22:4200–388.)

The Commission held a second hearing—the Settlement Hearing—to clarify the settlement's terms. (R23:4441–44.) At that hearing, FPL confirmed that the settlement allowed FPL to recover Project-related costs. (Oct.T102–03.) However, neither FPL nor any other settling party addressed the Project's total costs to ratepayers under the settlement, nor the savings ratepayers would have enjoyed had FPL pursued alternatives instead. Thus, at the close of the Settlement Hearing, the record remained devoid of basic information to determine if the Project was prudent and least, but the Commission never asked FPL to submit that information.

C. Despite Evidence That Solar Supplies Peak Demand Cost-Effectively and Saves Ratepayers Money, FPL Never Produced Any Analysis of Pursuing Solar Instead of the Project.

Solar refers to technologies that produce power from the sun, a zero-cost

[7] Only FRF, OPC, and SFHHA joined the settlement. AARP, FEA, FIPUG, Larsons, Walmart, and Sierra Club did not. (R32:6281–82.)

fuel. (Ex751:1)[8] Sierra Club produced evidence to the Commission during the Prudence Hearing (as well as other proceedings) that utilities that have investigated solar as an alternative to peakers (and other gas-burning power plants ("gas plants")) have found that solar supplies peak demand cost-effectively and saves money. (App425, 427–428; App446–47, 604–07, 602–22.) For example, the evidence includes a series of government reports cataloging solar projects across the country, including in the Southeastern United States. (T32:4804; App392, 402.) The 2015 edition of these reports highlights that FPL's neighboring electric utility in Orlando invested in solar in 2011 and again in 2015 when the price "**was less than half**" of what it had been in 2011. (App430) (emphasis added). In fact, across the country, **contracts executed in 2015 to buy power from solar were cheaper than buying power from gas plants**. (App428.).[9]

FPL itself admitted that solar can supply peak demand cost-effectively.

[8] Exhibit 751 is in the Appendix and cited hereinafter as "App389–347."

[9] For 2017 through 2040, on a "levelized basis," the projected cost of electricity is 14% cheaper under solar contracts executed in 2015 than the cost of generating electricity via gas plants. (App428.) Such levelized cost projections are widely reported and used in the energy industry as "a convenient summary measure of the overall competiveness of different generating technologies. It represents the per-kilowatthour cost (in discounted real dollars) of building and operating a generating plant over an assumed financial life and duty cycle." U.S. Energy Information Administration, Levelized Cost and Levelized Avoided Cost of New Generation Resources in the Annual Energy Outlook 2017 (Apr. 2017), *available at* https://www.eia.gov/outlooks/aeo/pdf/electricity_generation.pdf.

FPL's Vice President for Finance and lead witness for its request to recover the Project's construction costs, Mr. Barrett, testified at the Prudence Hearing that by 2015 FPL was able to build "cost-effective" solar projects that are "available to meet summer Peak [*sic*]" demand. (T13:1569–70; App279-80) The basis for his testimony was FPL's experience building three solar projects between February 2015 and December 2016 (T11:1421–22; App279-80), the same period in which FPL was building the Peaker Replacement Project.

That solar can and does save ratepayers money is another undisputed fact, which FPL admitted throughout the proceedings below. (T11:1421 ("large scale solar projects … will continue … [to] keep[] customers' bills low"); T12:1514 (solar projects "are being built to save customers money"); T13:1572–73 ("so [solar's] benefit, obviously, is going to come from fuel savings, emissions savings, et cetera").)

The savings ratepayers enjoy from solar were also evident in the settlement (Oct.T90; Oct.T105–06), which included new investments in solar and energy storage. (R21:4137–38; R21:4167–68.) Pairing those investments expands FPL's ability to generate power from the sun without any fuel costs, and the resulting "fuel savings … will flow right through to customers," as Mr. Barrett testified at the Settlement Hearing. (Oct.T97.)

Despite evidence that solar supplies peak demand cost-effectively and saves

ratepayers money, FPL never produced any analysis of pursuing this alternative instead of the Peaker Replacement Project.

D. Despite Evidence That Demand-Side Resources Offset Peak Demand Cost-Effectively and Save Ratepayers Money, FPL Never Produced Any Analysis of Pursuing These Resources Instead of the Project.

Demand-side resources refer to technologies "located on the customer's premises," including energy efficiency, energy conservation, and renewable energy systems such as rooftop solar panels. § 366.82(b)(1), Fla. Stat. These are all "solutions" to peak demand because they offset the need for expensive gas plants to supply that demand. § 366.81, Fla. Stat. Thus, demand-side resources "increase[e] the overall efficiency and cost-effectiveness of electricity and natural gas production and use." *Id*.

Indeed, demand-side resources "can be very cost-effective" (T6:611), as FPL's consultant with more than 35 years of experience in the energy industry, Mr. Reed, confirmed. (Ex31:1.)[10] In FPL's service area, these resources are among the "primary drivers" of reduced peak demand. (T11:1345, 1350.) FPL reports that its past investments in demand-side resources, which the Commission has approved as prudent and cost-effective (App699–707, 713), saved ratepayers "the equivalent of approximately 15 new 400 [megawatt] generating units" by "eliminat[ing] the need

[10] Exhibit 31 is in the Appendix and cited hereinafter as "App274–76."

to construct" them. (App303.) FPL's New Peakers are half the size of these eliminated units (on a per unit basis) *id*., and thus well within the range that demand-side resources can eliminate.

Despite evidence that demand-side resources offset peak demand cost-effectively and save ratepayers money, FPL never produced any analysis of pursuing these resources instead of the Peaker Replacement Project.

E. Despite Evidence That Energy Storage Supplies Peak Demand Cost-Effectively and Saves Money, FPL Never Produced Any Analysis of Pursuing Energy Storage Instead of the Project.

Energy storage refers to technologies that store energy for later use. Sierra Club produced evidence that utilities are ramping up their investments in energy storage because its performance keeps improving and its costs keep declining. (App623–25.) This evidence shows that utilities are investing in energy storage as an alternative to peakers because energy storage can store and then dispatch surplus power from off-peak hours right at the peak. *Id*.

Even FPL expects that energy storage will be a cost-effective alternative to peakers. Mr. Barrett—corroborating a statement made by FPL's chairman, Mr. Robo, in 2015—confirmed that FPL "expect[s] energy storage prices to experience a similar cost plunge to that of solar costs over the last seven years." (T13:1592–93; App316.) Mr. Barrett further testified 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. (T13:1592–93; T14:1635; App316.) Thus, Mr. Barrett testified, that in FPL's judgment, "[p]ost-2020, there may never be another peaker built in the United States—very likely you'll be just building energy storage instead." (App316; T14:1635.)

That FPL could build energy storage cost-effectively even before 2020 is evident from the fact that its affiliate, NextEra Energy Resources (NEER), has won competitive bids to build multiple projects. (T2:293–94.) FPL itself previously built a pilot project. (App312.) It is also ready to build more projects over the next four years, which Mr. Barrett readily and repeatedly admitted will be "cost-effective," "prudent investment[s]". (Oct.T84, 86, 90, 97, 99.)

Nor are the savings from energy storage in dispute. For example, pairing energy storage with solar multiplies the "fuel savings" from generating power from the sun, because that power can be stored and dispatched around the clock instead of having to produce power from gas plants to supply peak demand. (Oct.T90 (fuel savings from solar), 97 (fuel savings from storage).) Those "fuel savings … flow right through to customers," testified Mr. Barrett. (Oct.T97; R21:4137–38; R21:4167–68.)

Despite evidence that energy storage is another potential cost-effective, money-saving means to supply peak demand, FPL never produced any analysis of pursuing energy storage instead of the Peaker Replacement Project.

F. FPL Admitted It Did Not Have Any Meaningful Alternatives Analysis to Produce.

Neither FPL's petition, nor its pre-filed testimony, provides any analysis of alternatives to the Peaker Replacement Project. Nor did FPL produce such analysis at any point during the proceedings below. FPL admitted it "does not have any of the analysis conducted to review alternative scenarios prior to selection of its [P]eaker [Replacement] [P]roject." (T35:5464.) Whatever analysis FPL "conducted," the record is clear that it did not include any meaning analysis of money-saving alternatives such as solar, demand-side resource, or energy storage.

With respect to solar, FPL reported that it had not tested the market since 2007 and 2008 (Ex552, 74–75),[11] despite knowing that solar prices started to "plunge" precisely after those years. (App316.) Although FPL did build three solar projects in 2015–16, as noted, the costs of those projects may not be reflective of a competitive market price for solar: Mr. Barrett admitted that FPL sized the projects to "avoid" the Commission's rule requiring a full competitive bidding prior to construction. (T12:1510–13.)

With respect to demand-side resources, FPL likewise admitted that it has not investigated any incremental additions beyond the levels set by the Commission. (T35:5372.) Those levels were based on information three or more years old

[11] Exhibit 552 is the Appendix and cited hereinafter as "App282–313."

(T11:1348; App282), and represent a floor rather than a ceiling for potential gains from investing in demand-side resources. (App606–07, 620, 625–26, 706–07.)

As for energy storage, although Mr. Silagy claimed that he had "investigated [it] as an alternative to generation," he did not know if FPL had the necessary information to substantiate his "opinion" that energy storage remains "very expens[ive]." (T2:292.)[12] Nor did he know when FPL would be ready to produce such information to the Commission. (T2:293.) Mr. Barrett testified two months later that in FPL's judgment energy storage was "becoming a more viable and more cost-effective technology, even though today it may not be cost-effective in terms of lowering costs." (Oct.T99.) Thus, energy storage may already be cost-effective, but the Commission would not know because FPL did not produce any analysis of where the costs were in their "plunge," or whether those costs were higher or lower than the costs of the Peaker Replacement Project.

Rather, FPL produced an analysis of only two alternatives: building the New Peakers or leaving the Original Peakers in place. (Ex502:2790.) As Mr. Barrett testified, the analysis underlying FPL's decision to undertake the Project "was pretty simple"—matching the size of the New Peakers to the size of the Original

[12] Although FPL's affiliate is building energy storage projects, Mr. Silagy conceded he was "not familiar with the details of those projects," and thus could not address their cost-effectiveness relative to the Peaker Replacement Project with any data or analysis. (T2:293–94.)

Peakers. (T13:1582.) This analysis lacked even the nuance of delaying the project or implementing an incremental approach.

The Original Peakers undisputedly could have operated until 2025. (T31:4664.) Incremental approaches to the Project were just "not part of the strategy that [FPL] put forward" (T8:878), as FPL's witness most knowledgeable about the peakers' "operational needs," Ms. Kennedy, testified. (T2:289–90.) FPL only "looked at replacing them all at one time" (T12:1503), as Mr. Barrett confirmed. (T1:132-33.) In other words, FPL re-committed to peakers without studying the economics of waiting just three years, until 2020, by which time FPL expected that—given the cost "plunge" of alternate resources—no power producer in the country would build new peakers. (App316; T14:1635.)

G. The Commission Approved the Project as Part of a Contested Settlement, With Insufficient Information to Determine If the Project Was Prudent Compared to Alternatives, or Even to Determine the Total Costs the Project Imposes on Ratepayers.

When the Commission approved the contested settlement, it did not know either the Project's total cost to ratepayers or how much ratepayers would have saved had FPL pursued alternatives, because FPL never produced that information. The settlement does not specify how much FPL can recover for construction. Nor did it address how much FPL can recover for fuel and other operating expenses over the four decades that the New Peakers are supposed to operate. (R5:1862

("probable retirement date" is June 2056).) Rather, the agreement includes the Project's costs in the overall headline costs of the larger settlement. (R32:6281–399; R33:6400–529.) At no point in the proceedings were the Project's total costs disclosed: FPL only produced estimates of the Project's construction-related costs. (R2:363 ("nearly $800 million"); R5:862 ("estimated … original cost" of $514.6 million); App279 ("estimated capital cost" of $772.4 million).)

The Commission nonetheless voted to approve the settlement on November 29, 2016, (R31:6242), and on December 15, 2016, it issued the Final Order disposing of "all the issues" in the proceedings via the settlement. (R32:6285.) Nowhere in its Order—or, for that matter, in the record of its deliberations (R32:6243–76)—did the Commission explain its rationale or point to support for its decision to allow FPL to recover the Project's costs. Nor does the Order specify what those costs are.

SUMMARY OF ARGUMENT

Sierra Club has standing to maintain this appeal. Pursuant to the Commission's Final Order, Sierra Club members in FPL's service area are paying higher electric rates. This economic injury establishes Sierra Club's standing as an adversely affected party. *See* § 120.68(1)(a), Fla. Stat. ("[a] party who is adversely affected by final agency action is entitled to judicial review").

The Commission violated Section 366.06(1)'s prudent investment requirement. Sierra Club brought this appeal because the Commission's Final Order violated the requirement in section 366.06(1) that the money a utility recovers must be "prudently invested." This requirement keeps the public—families and businesses that have little choice but to buy essential service from their utility—from shouldering costly power plants when cheaper alternatives are available in the market. *See Gulf Power Co. v. Pub. Serv. Comm'n*, 453 So. 2d 799, 802, 804, 806 (Fla. 1984) (holding section 366.06 precluded recovery of costs associated with a new power plant when the utility incurred those costs without analyzing potential alternatives in the market).

In this case, the record makes clear that money-saving alternatives to FPL's costly power plants, known as peakers, were available to supply South Florida's peak demand, and that even FPL expected these alternatives would likely be cheaper in just three years, in 2020, if they are not already cheaper. Yet FPL failed to produce any analysis of these alternatives. As FPL conceded, it could not produce such analysis because it undertook the Peaker Replacement Project unilaterally based on a "pretty simple analysis," matching the size of its Original Peakers to its New Peakers. Then, in the proceedings that FPL initiated to recover the Project's costs anyway, it bypassed section 366.06(1)'s prudent investment requirement by attempting to include the Project in a broader settlement, without

proving that the Project was the prudent, least-cost choice to supply peak demand in South Florida.

The Commission's subsequent approval of the contested settlement, and its implicit determination that the Project was prudent—without knowing the Project's actual costs or examining any alternatives—amounted to nothing more than speculation by the Commission. In other words, the Commission also bypassed section 366.06(1)'s requirement for record-based prudence reviews.

This Court has affirmed, however, that the prudence standard under chapter 366 has a sufficiently "fixed and definite meaning" to "define the power delegated" to the Commission and preclude it "from acting through whim." *S. All. for Clean Energy v. Graham*, 113 So. 3d 742, 748, 750 (Fla. 2013) (quoting *Lewis v. Bank of Pasco Cnty*., 346 So.2d 53, 55–56 (Fla.1976)). More specifically, under section 366.06, the Court has held that the Commission's prudence determination—especially with respect to utility expenses that add up to millions if not billions of dollars—must rest on "empirical support" that the utility "minimize[d]" the money spent via a "timely" analysis and pursuit of "a range of alternat[ives]." *Gulf Power Co. v. Pub. Serv. Comm'n*, 453 So. 2d 799, 802, 804, 806 (Fla. 1984). Because there was no such support in the record here, the Commission's decision to allow FPL to recover the Project's costs anyway departed from the essential requirements of section 366.06(1).

The Commission's Final Order is also contrary to law because it fails to meet the twin requirements that it be grounded in competent and substantial evidence, and "expose and elucidate" the Commission's reasons for its action. The Commission's Final Order assessed the merits of the contested settlement based on an abstract assessment of the settlement "as a whole," (App4), skipping the essential question—whether the Peaker Replacement Project met section 366.06(1)'s prudent investment requirement—that the Commission itself recognized at the outset of the proceedings controlled its review (R15: 2962.) As such, the Final Order failed to meet the twin requirements that it be grounded in competent and substantial evidence, *Plant City v. Mayo*, 337 So. 2d 966, 975 (Fla. 1976), and "expose and elucidate" the Commission's reasons for its action, *Citizens of State v. Graham*, 213 So. 3d 703, 712 (Fla. 2017) (quoting *McDonald v. Department of Banking & Finance*, 346 So.2d 569 (Fla. 1st DCA 1977)).

ARGUMENT

I. Sierra Club has Standing to Maintain this Appeal.

Sierra Club's standing to maintain this appeal is straightforward and not subject to legitimate challenge.[13] Sierra Club meets the requirements for appellate standing prescribed in *Legal Envtl. Assistance Found., Inc. v. Clark*, 668 So. 2d

[13] In fact, FPL stipulated to Sierra Club's standing to appeal. (T1:29–30.)

982, 986–97 (Fla. 1996): (1) the Commission's Final Order is final; (2) the Commission is subject to the Florida Administrative Procedure Act ("APA"), *see, e.g. Citizens v. Graham*, 213 So. 3d 703, 710–11 (Fla. 2017) (hereinafter "*FPUC*") (reviewing Commission action under APA); (3) the Commission granted Sierra Club intervention in the proceedings below (R10:1917–20); and (4) Sierra Club is adversely affected by the Commission's Final Order, because, as discussed further below, the Order requires more than 16,000 Sierra Club members in FPL's service area to pay higher electric rates, and, absent action from this Court, those rates will continue to rise.

In *Florida Home Builders Ass'n v. Dep't of Labor & Emp. Sec.*, 412 So. 2d 351 (Fla. 1982) (hereinafter "*Florida Home Builders*"), this Court established that an association has standing on its members' behalf where: (1) a substantial number of members are (2) adversely affected by an agency action, (3) which is within the general scope of the association's interest and activity; and (4) the relief requested is appropriate for the association to request on behalf of its members. *See Florida Home Builders*, 412 So. 2d at 353-54. Sierra Club satisfies each of these elements of associational standing.

First, as evidenced by declarations Sierra Club submitted in the proceedings below, more than 16,000 of its members—a substantial number—are subject to the Commission's Final Order encompassing the rates paid throughout FPL's service

area. (R14:2663, 2666.)

Second, rate increases are quintessential adverse impacts. The facts are undisputed that the settlement the Commission approved in its Final Order allows FPL to increase its rates to recover the Peaker Replacement Project's costs from ratepayers. (Oct.T103.) FPL itself admitted that the settlement "allow[s] for scheduled base rate increases in 2017, 2018." (R32:6281–86; Oct.T77.) FPL also introduced an exhibit showing that under the settlement it expects the average household to pay $10 more for electricity each month, which translates into an increase of over 10%,[14] and an average annual increase of $120 per year. (Oct.Ex808.) Such increases adversely affect Sierra Club members who take service from FPL. (R14:2669–70, 2672–73, 2675–76, 2678–80, 2682–84, 2685–86, 2688–89, 2691–92.)[15] Higher electric rates pose a special hardship for Sierra Club members who are on fixed incomes. (R14:2672–73, 2676, 2679, 2686.) Even FPL has recognized that higher rates are the quintessential adverse impact.[16]

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[14] This figure is likely conservative because FPL expects electricity rates to be higher in the summer. (Oct.Ex808.)

[15] The record includes 5,768 comments from Sierra Club members and supporters in FPL's service area reflecting the hardship posed by rate increases. (R23:4564–99; R24; R25; R26; R27; R28; R29; R30; R31; R32:6200–41.)

[16] Appellee FPL's Answer Brief at 4, *Florida Indus. Power Users Grp. v. Pub. Serv. Comm'n*, 123 So. 3d 1056 (Fla. 2013) (No. SC12-1440), 2012 WL 11851324 (FIPUG "cannot establish the fundamental requirement [for standing] that the electric rates paid by its members will increase as a result of" the approval

Sierra Club's other interests—in promoting a safe and sustainable environment (R14:2663–64)—are also adversely affected by the Commission's Final Order. The record establishes that less polluting alternatives to the Peaker Replacement Project could very well be cost-effective and save ratepayers money. *See supra* SOC §§ C–E. Yet the Final Order forces Sierra Club members to commit their money to the Project, which is not only costly, it also worsens air pollution, climate change, sea-level rise, and the associated economic and health-related harms. (R14:2663–65, 2666, 2669–70, 2672–73, 2675–76, 2678–80, 2682–84, 2685–86, 2688–89, 2691–92.) One member, for instance, already suffers from flooding in areas near his home and worries that climate change-induced sea level rise will worsen that problem. (R14:2683.) Other members cannot invest in demand-side resources such as efficiency upgrades to their homes because they have to pay higher rates to pay for the Project. (R14:2680.)

Third, the challenged action is within the Sierra Club's general scope of interest and activity. (R10:1893–1900;[17] R14:2664–65.) Sierra Club is an

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of the settlement"). *Cf.* Commission's Motion to Dismiss Appeal for Lack of Standing at *13, *S. All. for Clean Energy v. Graham*, No. SC12-94 (Fla. June 7, 2012) ("Nor does SACE argue on appeal that the [demand-side] programs the Commission approved in the Final Order will result in a rate increase that will adversely affect the interests of its members.") (motion granted by Order at 1, *S. All. for Clean Energy*, No. SC12-94 (Sept. 24, 2012) (order dismissing case)).

[17] Sierra Club's petition to intervene in the proceedings below is in the

association organized to advocate for clean, cost-effective alternatives to power the economy. (R14:2664–65.) Sierra Club intervened in this case to protect its members' interests in securing the benefits of such alternatives, and to avoid or reduce their exposure to the costs and risks of power produced from burning fossil fuels. (R10:1917–20.)

Finally, the relief requested is appropriate for Sierra Club to receive on behalf of its members. Sierra Club requests that the Commission's approval of the settlement be reversed, and this case be remanded with instructions that the Commission specify what amount of the rate increase approved in the settlement was attributable to the Project, which amount is to be precluded from recovery. Thus, as "a party who is adversely affected by final agency action," Sierra Club has standing to maintain this appeal. § 120.68(1)(a), Fla. Stat.

II. The Commission Violated the Prudent Investment Requirement of Section 366.06(1), Florida Statutes, when it Ordered the Public to Pay For the Peaker Replacement Project without Comparing Potential Money-Saving Alternatives to the Project.

Standard of Review. Section 120.68(7), Florida Statutes, guides judicial review of Commission orders. *FPUC*, 213 So. 3d at 711. That section provides in pertinent part, as follows:

> (7) The court shall remand a case to the agency for further

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Appendix and cited hereinafter as "App655–662."

> proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:
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> …
>
> (b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to §§ 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;
> …
>
> (e) The agency's exercise of discretion was:
>
> 1. Outside the range of discretion delegated to the agency by law;
>
> …
>
> 4. Otherwise in violation of a … statutory provision;
>
> but the court shall not substitute its judgment for that of the agency on an issue of discretion.

§ 120.68(7), Fla. Stat. Accordingly, the Court will "not affirm a decision of the Commission if it is arbitrary and unsupported by substantial evidence." *Citizens v. Pub. Serv. Comm'n*, 425 So. 2d 534, 538 (Fla. 1982); *see also Schreiber Exp., Inc. v. Yarborough*, 257 So. 2d 245, 246 (Fla. 1971) (quashing Commission order that lacked "any supporting evidence other than speculation or supposition as far as the Court [could] discern from the record"). Likewise, the Court will reverse a Commission decision when the Commission "fail[s] to properly consider and

address" the law governing a disputed issue. *FPUC*, 213 So. 3d at 720 (reversing Commission order on several grounds).

A. Under Section 366.06(1), the Commission can only find that an investment was prudent when record evidence allows for a comparison of alternatives.

The Florida Legislature granted the Commission the authority to set utility rates and barred utilities from setting their own rates. § 366.06(1), Fla. Stat.[18] Thus, when a utility seeks Commission approval to increase its rates to recover its costs, the Commission can only approve what the utility "prudently invested" pursuant to section 366.06(1), Florida Statutes. It provides, in pertinent part:

> 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….

Id. (emphasis added).[19] The statute unambiguously limits ratemaking/recovery to what is "prudently invested."[20]

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[18] For the purposes of chapter 366, the Legislature defined a "public utility" as a utility "supplying electricity or gas." § 366.02(1), Fla. Stat.

[19] The Commission's rate-setting is also known as "ratemaking." (App782.)

[20] The prudent investment and the "used and useful" requirements are inter-related; the latter tests whether the public has a use/need for utility expenses while

The Commission itself has recognized that adherence to section 366.06(1)'s prudent investment requirement is part of its "paramount duty"—"to protect the consumer… interests and, at the same time, deal fairly with the utility." (App817.) In its seminal order reviewing a base rate increase sought by FPL, the Commission affirmed that its prudence reviews are both "mandatory" and "necessary," *id.* at 5, and without such reviews ratemaking is "pure guesswork" and "fallacy." *Id*. Likewise, in this very case the Commission acknowledged that its standard of review of the Project was whether "FPL's replacement of its peaking units [was] reasonable and prudent." (R15:2962.)

Further, this Court's precedent has established the record evidence necessary to uphold section 366.06(1)'s prudent investment requirement. The required evidence is "empirical support" that the money spent to serve ratepayers must be "minimize[d]" through a "timely" analysis and pursuit of "a range of alternat[ives]." *Gulf Power*, 453 So. 2d at 802, 804. More specifically, the requisite empirical support is a comparison of the alternatives available to the utility when it

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the former tests whether the utility met that use/need through least-cost investments. *See Gulf Power,* 453 So. 2d at 803; *see also* James C. Bonbright, Principles of Public Utility Rates 67 (1961) ("[O]ne standard of reasonable rates can fairly be said to outrank all others in the importance attached to it by experts and by public opinion alike—the standard of cost of service, often qualified by the stipulation that the relevant cost is necessary cost or cost reasonably or prudently incurred."). This appeal focuses on the prudent investment requirement.

incurred the expenses. *Id.* at 804; *cf. S. All. for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013) (affirming prudence is measured against "the conditions and circumstances that were known, or should [have] been known, at the time the decision [to incur expenses] was made").[21] When, as in this case, a utility fails to produce such evidence to prove that it made prudent investments, section 366.06(1) precludes recovery. *Gulf Power*, 453 So. 2d at 806.

If the Commission nonetheless allows recovery, it abdicates its statutory duty to protect the public against the monopoly power of a utility. *See City of St. Petersburg v. Carter*, 39 So. 2d 804, 806 (Fla. 1949) ("Commission was created for the purpose of protecting the general public from unreasonable and arbitrary charges that might be made by … companies which may be classified as monopolies."); *see also Peoples Gas System Inc. v City Gas Co.*, 167 So. 2d 577, 582-83 (Fla. 3d DCA 1964), aff'd 182 So. 2d 429 (Fla. 1965) (discussing Commission's statutory mandate to protect the public from the monopoly power of electric and gas utilities).

[21] The Commission's own rule recognizes that it "must have information sufficient to assure an adequate and reliable supply of electricity at the ***lowest cost possible***." Fla. Admin. Code R. 25-22.072(1), incorporating by reference Form PSC/RAD 43-E (11/97) at 4. The Form is in the Appendix and cited hereinafter as "App831–40."

B. The Commission unlawfully approved the Peaker Replacement Project without the evidence necessary to determine how it compares to potential money-saving alternatives, or even to determine the total cost the Project will impose on ratepayers..

In this case, FPL had the burden to prove it made prudent investments, and the Commission had the responsibility to hold FPL to its proof. Order No. 13537 at 41–42 (recognizing "the responsibility of holding the [u]tility to its proof rests with this Commission" in base rate proceedings);[22] *see also Florida Power Corp.*, 413 So. 2d at 1190–91; § 366.06(1), Fla. Stat. (the rate base is the "value, **as determined by the** [**C**]**ommission**, [which] shall be used for ratemaking purposes and shall be the money … prudently invested" by the utility (emphasis added)). Again, the required proof was "empirical support" that FPL "minimize[d]" the money it spent through a "timely" analysis and pursuit of "a range of alternat[ives]." *Gulf Power*, 453 So. 2d at 802, 804. The Commission's approval of the Peaker Replacement Project was arbitrary and contrary to law, because the record is devoid of such proof.

To the contrary, the record contains FPL's admissions that numerous alternate resources—solar, demand-side resources, and energy storage—were available to address peak demand, that they "can be very cost-effective" (T6:611),

[22] *In re Petition of Florida Power & Light Co. for an Increase in its Rates and Charges*, Docket No. 830465-EI, Order No. 13537, at 41–42 (F.P.S.C. July 24, 1984). Order 13537 is in the Appendix and cited hereinafter as "App861-961."

and that they "save customers money." (T12:1514.) *See also infra* § II.B.i. These alternatives were certainly in the "range" of alternatives requiring a side-by-side comparison to the Project under section 366.06(1). *Gulf Power*, 453 So. 2d at 804. Yet, there is no such comparison in the record.

FPL never produced evidence that the Project was cheaper or even equivalent in cost to potential money-savings alternatives—because it did not undertake the requisite alternatives analysis and therefore did not have such evidence to produce. (T35:5464.) *See also infra* § II.B.ii. Nor did FPL demonstrate any operational or technical reason that it had to undertake the Project in 2015, much less all at once rather than in smaller increments. *See infra* § II.B.iii. As a result, while the cost "plunge" of alternatives has undisputedly continued (Ex639:1–4),[23] FPL never produced a "timely" analysis of the economics of waiting just three years. *Gulf Power*, 453 So. 2d at 802. By that time, however, in FPL's own judgment, the peakers it had just built, and asked ratepayers to pay nearly a billion dollars to build, would, for economic reasons, never again be built in the United States. (App314–17.) Under governing law, the Commission thus had no evidentiary basis to decide that FPL did, in fact, "minimize" the money it spent in accordance with section 366.06(1)'s prudent investment requirement. *Gulf*

[23] Exhibit 639 is in the Appendix and cited hereinafter as "App314–17."

Power, 453 So. 2d at 802, 804.

i. Solar, demand-side resources, and energy storage are all potential alternatives to the peaker replacement project that "can be very cost-effective," "keep[] customers' bills low," and "save customers money."

As discussed above, FPL's own witnesses provided the clearest statements in the record regarding its ability to add solar quickly and cost-effectively to supply peak demand, while saving ratepayers money. As FPL's president, Mr. Silagy, testified: FPL's experience was that "now cost-effectively at large-scale we can make [solar] work." (T2:302.) *See also* (T11:1421 ("large scale solar projects … will continue … [to] keep[] customers' bills low"); T12:1514 (solar projects "are being built to save customers money"); T13:1572–73 ("so [solar's] benefit, obviously, is going to come from fuel savings, emissions savings, et cetera"); T12:1516 (FPL "could take to market quickly … and bring [new solar] projects to market quickly"); T13:1561–62 ("when [FPL does] it, [FPL] builds the best and most cost-effective solar that anybody can build"; Ex697: 23 (solar "reduces fuel cost");[24] T13:1569–70 (solar is "available to meet summer Peak [*sic*]" demand).)

The savings ratepayers enjoy from solar were reinforced by the settlement (Oct.T.90; Oct.T.105–06), which included new investments in solar and energy storage. (R21:4137–38; R21:4167–68.) FPL bragged that the savings from those

[24] Exhibit 697 is in the Appendix and cited hereinafter as "App319–387."

investments "will flow right through to customers." (Oct.T:73, 97.)

The record also makes clear that money-saving solar is well-used by utilities across the Southeast, including FPL's neighboring utility in Orlando, at prices so low, solar contracts executed in 2015 could beat gas plants for 2017 through 2040. (App428.) Indeed, utilities in the region have been investing in solar for years because, as FPL's chairman, Mr. Robo, admitted, solar costs have "plunged" since 2007. (App316.) Moreover, in the 2014–15 timeframe—when FPL was making its decision to build the Project—the dramatic decline in solar prices was so evident from the solar contracts executed in the Southeast that government reports cited solar in the region as the "trend to watch." (App423.)

Demand-side resources also "can be very cost-effective" at offsetting peak demand, as Mr. Reed, FPL's reputed energy expert confirmed. (T6:611.) The savings and cost-efficacy of this alternative to peakers are clear from FPL itself having eliminated the need to build the equivalent of fifteen new peakers (App303), each far larger than the seven new peakers it just built. *Compare* (App313 (seven peakers that make up the New Peakers are each less than 200 MW)) *with* (App303 (FPL eliminated the need to build fifteen new 400 megawatt plants).) Given the Commission's prior conclusions that it was "prudent" and "cost-effective" for FPL to invest in demand-side resources to offset peak demand (T35:5372; App699–707, 713)—as opposed to building new peakers—the

Commission's decision to approve the Project without even asking what the comparable cost of these resources would be is the height of arbitrary action.

The cost-effectiveness and savings of addressing peak demand with energy storage—by 2020 if not sooner—is also clear from the record. Mr. Barrett's testimony at the Prudence Hearing confirmed that FPL "expect[s] energy storage prices to experience a similar cost plunge to that of solar costs over the last seven years." (T13:1592–93; App316.) Additional testimony and evidence in the record demonstrates that storage helps expand the "fuel savings" associated with solar. (Oct.T:73, 90, 97.) FPL even admitted that storage combined with solar would be so cheap—and effective at capturing fuel savings—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." (App316.)

ii. <u>FPL did not prove that the Project was prudent as compared to solar, demand-side resources, and energy storage.</u>

Given all of the evidence of cost-effective, money-saving alternatives to address peak demand, the only logical, prudent course would have been to compare those alternatives side by side with the Peaker Replacement Project to analyze and pursue whatever combination would "minimize" the money FPL spent to supply South Florida's peak demand. *Gulf Power*, 453 So. 2d at 804 (holding that investment in a new power plant without comparing alternatives was

imprudent and therefore recovery was precluded under section 366.06). But FPL produced no such comparison. Nor did the Commission require FPL to provide any evidence that the Peaker Replacement Project was in fact prudent, or cost-competitive, with alternatives that, again, FPL admitted were "very cost effective," (T6:611), "keep[] customers' bills low," (T11:1421), and "are . . . built to save customers money" (T12:1514.) This is especially striking given the Commission's history of approving demand-side resources as prudent investments to address peak demand. (T35:5372; App699–707, 713.)

To the contrary, FPL compared only one alternative: building the Project versus not building anything. Then, FPL touted the projected fuel savings of the New Peakers versus the Original Peakers. (App279–80.) This is woefully inadequate to prove the Project's prudence because solar, demand-side resources, and storage can all address peak demand with ***zero*** fuel costs, so the savings from these alternatives could very well be much greater—especially over the decades that the New Peakers are supposed to operate. (R5:862.) Yet, as "obvious[]" as those savings were even to FPL (T13:1572–73; App303; Oct.T90, 97), FPL never undertook any meaningful cost comparison between the Project and those zero-fuel cost alternatives. (T2:291, 302; T35:5464.)

In fact, FPL conceded it did "not have any of the analysis conducted to review alternatives" that it could produce. (T35:5464.) Nor, therefore, did the

Commission have any such information when it approved the settlement that included the Project. To be sure, whatever analysis FPL had "conducted," the testimony of FPL's president confirmed it was not in any form to permit a meaningful cost comparison. For example, although Mr. Silagy testified that he had "investigated battery storage as an alternative to generation" (T2:291), he was "not familiar with" such basic information as the cost of recent storage projects that FPL's own affiliate was building. (T2:294.) Thus, while Mr. Silagy proffered his "opinion" about the cost of storage in testimony, he did not even know if FPL had information regarding the cost of storage (T2:292), despite having being asked for that information by Sierra Club during discovery. (T35:5464.) Nor did Mr. Silagy know when FPL would be ready to produce such information to the Commission. (T2:293.)

iii. FPL did not prove that undertaking the Peaker Replacement Project in 2015–2017 was prudent as compared to an incremental construction or delay to allow the cost of alternatives "plunge" even though FPL admitted that by 2020 the project would "very likely" be economically obsolete anywhere in the nation.

The testimony the Commission heard at the Prudence Hearing firmly established that FPL preordained the timing of the Project without any analysis of operational or technical need that in 2015 it had to undertake the Project. Indeed, Mr. Barrett admitted that the Original Peakers had a remaining life expectancy through 2025 (T31:4664), but FPL only "looked at replacing [the Original Peakers]

all at once." (T12:1503.) Likewise, Ms. Kennedy, FPL's witness most knowledgeable about its peakers' "operational needs" (T2:289–90), conceded that an incremental approach of breaking up the Project into smaller projects over a period of time was possible, it was just "not part of the strategy that [FPL] put forward." (T8:878.)

Whatever FPL's strategy was—there was no basis in the record for its rushed decision to build the Project, without studying the economics of phasing in replacement resources over time, given its awareness of the cost "plunge" of solar and energy storage. (App316.) Nor was there a basis in the record for it to rush ahead without studying the economics of waiting three years, given its own judgment 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." (App316.)

iv. <u>FPL's heavy reliance on gas and steadfast refusal to consider alternatives needlessly exposes ratepayers to costly risks.</u>

FPL's failure to study alternatives to the Project is even more egregious because the record here contains ready admissions by FPL that its heavy reliance on gas[25] will continue to expose it—and the public—to risks so costly that the

[25] FPL's rush to build the New Fossil Plants seems to ignore the Commission's concern about fuel diversity. FPL undisputedly relies more heavily on natural gas than any of its peers. (T20:2500-02) and now generates over 70% of

billions of dollars FPL recovers through a separate pass-through mechanism (the fuel clause) [26] will not suffice to cover those risks. (T20:2464.)

FPL relies on expensive financial hedges to compensate for those risks, and since 2002 collected over $4 billion from ratepayers to pay for them. Order No. 15-0586, at *5.[27] Through these hedges, FPL attains a future supply of natural gas at a fixed price irrespective of market conditions at the time of delivery. When the market price for gas drops below the hedged price point the company overpays for its fuel and the excess is recovered from its ratepayers. The sheer quantity of natural gas required to run all of the company's facilities means that a hedge ending even a quarter above market price will have a noticeable impact on the ratepaying public. Importantly, while the Commission has opened a docket to consider whether to allow the utilities to continue hedging, FPL's position is that hedging, in one form or the other, is necessary. This problem is only exacerbated

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its electricity from Natural Gas. (App299.) This heavy reliance "exposes FPL and its investors to greater risk than the typical utility." (T20:2491.)

[26] FPL has also sought recovery of its natural gas-related expenses in the Commission's annual proceeding to review such expenses, known as the "fuel clause." (R15:2830.) See also *FPUC*, 213 So.3d at 714 (Fla. 2017) ("fuel clause" is "a regulatory tool designed to pass through to utility customers the costs associated with fuel purchases.") (citing Order No. 11–0080, at 6, 2011 WL 339538 (Fla. P.S.C. Jan. 31, 2011)).

[27] *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Docket No. 150001-EI, Order No. 15-0586 (F.P.S.C. Dec. 23, 2015).

by the addition of new gas plants to FPL's fleet, such as the New Peakers.

Yet, FPL built the New Peakers apparently expecting to operate them until 2056 (R5:862), without looking at alternatives that would reduce ratepayers' exposure to the costly risks of relying on gas for power. In fact, the record shows that FPL built the New Peakers while steadfastly refusing to consider the "hedge" value of alternatives, such as solar (App393, 428), which avoid the need to burn gas to produce power. FPL's testimony in the record reflects that it has gone so far as to reject ***all*** of the third party proposals to add solar to its system, of which there has been "a lot" over the years. (T32:4800–01.) Record evidence, in other words, shows that FPL may well have needlessly exposed ratepayers to the costly risks of its gas over-reliance, even as it expected that reliance to increase even further over the next ten years. (T2:295; App774.)

v. By approving the Project without knowing its costs or examining alternatives, the Commission violated section 366.06(1)'s prudent investment requirement.

Given the record before it, the Commission's decision to approve the Project anyway was a clear violation of section 366.06(1)'s prudent investment requirement. Not only did the Commission lack basic information to compare potential money-saving alternatives to the Project, it even lacked the information to determine the total costs the Project imposes on ratepayers—because FPL never produced that information. Rather, FPL sought and the Commission granted

approval of a broader settlement to allow recovery of the Project's costs while bypassing section 366.06(1)'s prudent investment requirement.

But as this Court has affirmed, Florida Statutes have "clearly define[d]" the Commission's delegated powers under the prudence standard and limited them to record-based decisions—as opposed to "acting through whim, showing favoritism, or exercising unbridled discretion." *S. All. for Clean Energy v. Graham*, 113 So. 3d 742, 748, 750 (Fla. 2013) (quoting *Lewis v. Bank of Pasco Cnty*., 346 So.2d 53, 55–56 (Fla.1976)). Therefore, the Commission's approval of the Project, and its implicit determination that it reflected a prudent investment, absent any basis in the record, cannot stand.

C. The Commission only discussed the settlement as a whole, violating the twin requirements to ground its final order in competent and substantial evidence and to "expose and elucidate" its reasons for ruling as it did.

The Commission correctly recognized at the outset that it faced the question of whether the Peaker Replacement Project met section 366.06(1)'s prudent investment requirement. (R15:2962.) However, at the conclusion of the proceedings below, the Commission skipped that question to decide—in the Final Order—the merits on an abstract assessment of the settlement "as a whole." (R32:6281–399; R33:6400–529) In so doing, the Commission's Order failed to meet the twin requirements that it (1) be grounded in competent and substantial

evidence, *Plant City v. Mayo*, 337 So. 2d 966, 975 (Fla. 1976), and (2) "expose and elucidate" the Commission's reasons for its action, *FPUC*, 213 So. 3d at 712 (quoting *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569 (Fla. 1st DCA 1977)).

The Commission's Final Order fails to satisfy this Court's standard for competent, substantial evidence. *Schreiber*, 257 So. 2d at 246; *see also Cent. Truck Lines, Inc. v. King*, 146 So. 2d 370, 373 (Fla. 1962) (quoting with approval *State of Florida et al. v. United States*, 282 U.S. 194, 212 (1931)) ("[I]n order to sustain the statewide order it must appear that there are findings, supported by the evidence, of the essential facts, which would justify that conclusion").

Citizens v. Graham, 146 So. 3d 1143 (Fla. 2014) (hereinafter "*2014 FPL Rate Case Appeal*") is instructive. In that case, this Court took great care to confirm that the evidence in the record supported the Commission's decision to approve the costs of new gas plants. In particular, the Court underscored that the costs of those new plants had been "thoroughly reviewed and approved by the Commission in prior need determination proceedings" and highlighted "the rigors of [the Commission's] cost review and operational scrutiny" of those plants in the prior proceedings. *Id*. Notably, the Commission in that case actually made a finding that the plants were not precluded from recovery because the Commission had "already approved the need for [them]" in prior proceedings. Order No. 13-

0023[28] at 77; *see also* Order No. 12-0187[29] (discussing empirical support for FPL's investment in a power plant); Order No. 08-0591[30] (discussing empirical support for FPL's investment in a power plant). Likewise, in their deliberations on the settlement in that case, the Commissioners discussed the threshold issue of whether they should add the plants to the rate base.[31] There, too, they cited the prior proceedings as support for that addition and affirmed that it was consistent with the "traditional base ratemaking process." *Id*. at 60–61.

In stark contrast, no such record-based prudence review was conducted in the present case. Here, the Commission had no benefit of any prior proceedings in which the Project was compared to alternatives, because in 2013 FPL withdrew from the Commission's prudence review in 2013 a project "essentially equivalent" to the Peaker Replacement (T13:1579–80), and FPL did not return for approval until 2016 after it had largely built the Plants. *See supra* SOC §§ A–B. Then,

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[28] *In re Petition for increase in rates by Florida Power and Light Company*, Docket No. 120015-EI, Order No. 13-0023, at 7 (F.P.S.C. Jan. 14, 2013) (2013 WL 209584).

[29] *In re Petition to determine need for modernization of Port Everglades Plant by Florida Power & Light Company*, Docket No. 110309-EI, Order No. 12-0187 (F.P.S.C. Apr. 9, 2012).

[30] *In re Florida Power & Light Company*, Docket Nos. 080203-EI, 080245-EI, 080246-EI, Order No. 08-0591 (F.P.S.C. Sep. 12, 2008) (2008 WL 5725619).

[31] Transcript of Special Agenda Proceedings, *In re Petition for increase in rates by Florida Power & Light Company*, Docket No. 120015-EI at 60 (F.P.S.C. Dec. 13, 2012).

instead of performing the record-based prudence review in 2016, the Commission simply skipped it. (R32:6281–399; R33:6400–529.) Indeed, the Final Order not only fails to analyze the highly contested, exorbitant costs of the Project, but also neglects to identify the precise amount ratepayers were being ordered to pay for the Project. *Id.* As such, "[t]he action taken by the Commission . . . was taken without any supporting evidence other than speculation or supposition"—and therefore fails to satisfy this Court's standard for competent, substantial evidence. *Schreiber*, 257 So. 2d at 246.

The Commission's Final Order also falls far short of the requirements of substantial and competent evidence because it fails to "expose and elucidate [the Commission's] reasons for discretionary action." *FPUC*, 213 So. 3d at 712 (quoting *McDonald v. Dep't of Banking & Fin.*, 346 So.2d 569 (Fla. 1st DCA 1977)).

In fact, the Final Order at issue here is remarkably similar to the one reversed by this Court in *FPUC*, for failure to justify the Commission's decision. 213 So. 3d at 714. In both cases, parties vigorously objected that the governing law—in *FPUC*, a previous settlement that the Commission approved and adopted as its own policy, in this case the prudence standard of section 366.06(1)—precluded the Commission from granting the utility recovery through higher rates. *See FPUC,* 213 So. 3d at 714 (noting OPC objections to higher rates because of

pre-existing settlement); *see also* App4–5 (registering parties' objections to proposed settlement because of lack of prudence review). And, in both cases, the Commission's order failed to discuss the parties' objections.[32] *See FPUC*, 213 So. 3d at 707 (citing Order No. 15-0586 at 13–15)[33]; *see also* App4–5. Likewise, in each case, the Commission subsequently failed in its order to "perform any analysis of the [governing law] with regard to [record evidence on the utility] project." *FPUC*, 213 So. 3d at 712 (discussing *Seminole Elec. Coop., Inc. v. Dep't of Envtl. Prot.*, 985 So. 2d 615 (Fla. 5th DCA 2008)).

Here, just as in *FPUC*, the Commission "skipp[ed]" the requisite analysis of whether the record supported recovery of the Project's costs by relying on an abstract assessment of the settlement "as a whole," (App4); *see FPUC*, 213 So. 3d at 713. Indeed, the Peaker Replacement Project received no serious attention

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[32] However, the acknowledgement was even more perfunctory in this case, where the Final Order referred to those objections as the "various grounds" upon which several parties opposed the settlement. (App4.) During the deliberations, the Chairman claimed the parties had "consistently" acknowledged FPL's "excellent service," attributing that to "smart, prudent decisions that FPL has made over the years." Nov.T:30. This statement ignores vigorous objections to FPL's *im*prudent decision to invest in the peakers, *see, e.g.*, Sierra Club's Post-Hearing Brief and Statement of Issue and Position, *In re Petition for Rate Increase by Florida Power & Light Co.*, Docket Nos. 160021-EI, 160061-EI, 160062-EI, 160088-EI (F.P.S.C. Nov. 10, 2016), and in any event lacks record support, as discussed.

[33] *In re Fuel and purchased power cost recovery clause with generating performance incentive factor*, Docket No. 150001-EI, Order No. 15-0586 (F.P.S.C. Dec. 23, 2015) (2015 WL9450334).

during the Commissioners' deliberations on the settlement because, as noted, the settling parties did not disclose the total costs the Project imposed on ratepayers, and the Commissioners never asked them to do so. In fact, their final deliberations regarding the Project spanned less than a minute and consisted of no more than a single question and answer, as follows:

> CHAIRMAN BROWN: On a separate note, though, in the rate case the company proposed to build 26 new and expanded natural gas combustion turbines. Are those also included in the revenue requirements in the Settlement Agreement?
>
> [STAFF]: Yes.

(R2:6363.)[34] That just before she voted to approve the settlement, the Chairman did not even know if it included the Project, reflects how little attention the Commission gave to the Peakers.[35] Clearly, the Commission had not "perform[ed] any analysis" of whether the record supported the governing legal standard—prudence. *FPUC*, 213 So. 3d at 713. Consequently, the Commission's conclusion is arbitrary and contrary to law.

Finally, to the extent that the Commission relied upon the settlement as a

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[34] "Combustion turbine" is another term for a peaker. (T8:813; T12:1501–02.)

[35] In their above-quoted exchange, the Chairman and her staff appeared uninformed of even such basic facts as the number/nature of the peakers in these proceedings, because FPL requested funding for seven new peakers and the expansion of 26 existing peakers. (T8:812–13.)

"fact" or "analysis" to support its decision, it was no substitute for the empirical support required to substantiate the prudency of the Project's costs. *Gulf Power*, 453 So. 2d at 804 (quoting Order No. 11936); *see also Gen. Dev. Utils., Inc. v. Hawkins*, 357 So. 2d 408, 409 (Fla. 1978) (rejecting Commission's "arbitrary selection of [a factor in its ratemaking] as a 'fact'" because it was not "supported by hard evidence in the record"). The settlement proposal before the Commission lacked the reasoning and evidence, if any, underpinning its terms. Therefore, the Commission cannot rely upon the settlement to support the Final Order.

Accordingly, since the Commission in its Final Order utterly "failed to perform its duty to explain its reasoning," it is legally deficient. *FPUC*, 213 So. 3d at 714. For this reason, and because it is unsupported by substantial competent evidence," this Court should reverse the Commission's approval of the Project.

CONCLUSION

Sierra Club asks the Court to: a) declare that the Commission violated section 366.06(1), Florida Statutes, by allowing recovery of the Peaker Replacement Project without having first determined, on the basis of an appropriate alternatives analysis, that the Project was a prudent investment; b) reverse the Commission's Order approving the settlement, and remand with instructions that the Commission specify what amount of the rate increase approved in paragraph 2 of the Settlement was attributable to the Project, and is

now precluded from recovery; and c) mandate that the Commission only allow recovery of utility expenses that it determines are prudent investments based on the type of alternatives analysis described in *Gulf Power*.

Respectfully submitted,

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Dated: June 28, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was served electronically on this 28th day of June, 2017 on:

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

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