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.	)	

ON APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

PRELIMINARY STATEMENT v

REPLY ARGUMENT 1

I. The Standard of Review Is De Novo 3

II. Section 366.06(1), Florida Statutes, Only Allows Prudent Investments 5

A. Prudence Is a Statutory Condition on Commission Authority 5

B. The Signatories Had the Burden to Prove that the Project Was a Prudent Investment, and that FPL Should Be Allowed Recovery via Higher Rates 7

C. Under *Gulf Power* and *SACE*, Prudence Boils Down to an Inquiry into Whether the Utility Reviewed the Relevant Factors, including Potential Lower Cost Options, and So Informed, Rendered a Prudent Decision 8

D. FPL Never Provided Evidence of Whether the Project or the Composite Elements of the Settlement as a Whole Were Prudent, as Required By *Gulf Power* and *SACE*, Nor Therefore Could, or Did, the Commission Find Prudence, and Thus the Commission's Post-Hoc Finding Is Due No Deference 10

III. The Record Is Devoid of Evidence that the Project Was a Prudent Investment Because Neither FPL Nor the Commission Considered Other Options, Despite Their Admitted History of Saving Ratepayers Money 12

A. FPL's Consideration of Doing Nothing as Compared to Building the Project Immediately Fails to Prove that FPL's $725.6 Million Choice to Build Was Prudent 12

B. Evidence in the Record Demonstrates that There Were Other Options that Should Have Been Considered, But Were Not, including the Very Options that Saved Ratepayers Money while Avoiding the Need for Many Peakers in the Past 14

i. Delay and incremental approaches were cheap, basic options that neither FPL nor the Commission considered 14

ii. Other options on the market, including those with a history of saving ratepayers money while avoiding the need for many peakers, should have been considered, but neither FPL nor the Commission considered them 16

iii. Because FPL failed to consider other options before it built the Project, FPL can only resort to post-hoc rationalizations and extra-record material to challenge the viability of other options 18

IV. A Settlement Cannot Override Section 366.06(1) to Allow Imprudent Investments 21

V. A Rate Case Can Be Resolved By a Settlement, But the Record in this Case Does Not Establish that the Settlement the Commission Approved Reflects Prudent Investments 24

CONCLUSION 29

CERTIFICATE OF SERVICE 31

CERTIFICATE OF COMPLIANCE 33

TABLE OF CITATIONS

CASES

Baker Cty. Med. Servs., Inc. v. State, 178 So. 3d 71 (Fla. 1st DCA 2015) 23

Citizens v. Fla. Pub. Serv. Comm'n, 146 So. 3d 1143 (Fla. 2014) ("*Citizens I*") .....*passim*

Citizens v. Graham, 191 So. 3d 897 (Fla. 2016) ("*Citizens II*").....3, 22

Crist v. Jaber, 908 So. 2d 426 (Fla. 2005).....22

De Groot v. Sheffield, 95 So. 2d 912 (Fla. 1957).....5

Fla. E. Coast Ry. Co. v. King, 158 So. 2d 523 (Fla. 1963) 5

Fla. Power Corp. v. Cresse, 413 So. 2d 1187 (Fla. 1982).....7

GTC, Inc. v. Edgar, 967 So. 2d 781 (Fla. 2007).....3, 4, 5

Gulf Coast Elec. Coop., Inc. v. Johnson, 727 So. 2d 259 (Fla. 1999).....5

Gulf Power Co. v. Fla. Pub. Serv. Comm'n, 453 So. 2d 799 (Fla. 1984).....8, 9, 10

Level 3 Communs., LLC v. Jacobs, 841 So. 2d 447 (Fla. 2003).....3, 22

S. Alliance for Clean Energy v. Graham, 113 So. 3d 742 (Fla. 2013) ("*SACE*").....*passim*

United Tel. Co. of Fla. v. Pub. Serv. Comm'n, 496 So. 2d 116 (Fla. 1986).....22

Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles, 209 So. 3d 1165 (Fla. 2017).....4, 5

STATUTES

§ 120.57(4) Fla. Stat.....22, 23, 29

§ 120.68(7), Fla. Stat.....3

§ 186.801(2)(d), Fla. Stat. 20

§ 366.01, Fla. Stat. 2, 24

§ 366.06(1), Fla. Stat. ..... *passim*

RULES

Fla. Admin. Code R. 25-17.015(4) 20

FLORIDA PUBLIC SERVICE COMMISSION ORDERS

In re: General Investigation of the Rates, Charges, and Earnings of Florida Power and Light Company, as well as a Review and Reevaluation of the Ratemaking Practices, Policies, and Philosophies under which said Public Utility Operates and Prices Its Service, for the Purpose of Making Whatever Adjustments, if any, May Be Appropriate and in the Public Interest, Docket No. 7759-EU, Order No. 4078 (F.P.S.C. Nov. 2, 1966) 6

In re: Nuclear Cost Recovery Clause, Docket No. 110009-EI, Order No. 2011-0547 (F.P.S.C. Nov. 23, 2011) 9, 13, 14

In re: Petition for Determination of Need for Okeechobee Clean Energy Center Unit 1, by Florida Power & Light Company, Docket No. 150196-EI, Order No. 2016-0032 (F.P.S.C. Jan. 19, 2016) 20

In re: Petition for Prudence Determination Regarding New Pipeline System by Florida Power & Light Company, Docket No. 130198-EI, Order No. 2013-0505 (F.P.S.C. Oct. 28, 2013) 26

OTHER CITATIONS

FRANCIS X. WELCH, CASES AND TEXT ON PUBLIC UTILITY REGULATION (rev. ed. 1968) 7

JONATHAN A. LESSER & LEONARDO R. GIACCHINO, FUNDAMENTALS OF ENERGY REGULATION (2d ed. 2013) 9

PRELIMINARY STATEMENT

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

- **"Commission"** refers to the Appellee Florida Public Service Commission.
- **"Demand-side resources"** refer to technologies on a customer's premises that offset the need for power plants.
- **"Final Order"** refers to the Commission's Order No. 2016-0560 on appeal.
- **"FPL"** refers to the Appellee Florida Power & Light Company.
- **"New peakers"** refer to FPL's peakers that replaced the original peakers.
- **"OPC"** refers to the Florida Office of Public Counsel.
- **"Original peakers"** refer to FPL's peakers that used to supply peak demand in South Florida.
- **"Peaker Replacement Project"** and **"Project"** refer to FPL's project to replace the original peakers with the new peakers.
- **"Peakers"** refer to fossil-fuel-burning power plants that supply peak demand, which is the hour of highest power usage in a given year.
- **"SC"** refers to Appellant Sierra Club.
- **"Signatories"** refers to the contested settlement's signatories, FPL, OPC, the Florida Retail Federation, and the South Florida Hospital and Healthcare Association.
- **"Solar"** refers to technologies that produce power from the sun.
- **"Storage"** refers to technologies that store power for later use.

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 are included in the Appendix to Appellant's initial brief, which will be cited as "App[Page #]." The record will be cited as "R[Vol. #]:[Page #]." The corrected transcript of the hearing from August 29 to September 1, 2016, in Attachment 1 of the record, will be cited as "T[Vol. #]:[Page #]," and the transcript of the hearing on October 27, 2016, will be cited as "Oct.T[Page #]." Prudence Hearing exhibits, in Attachment 2 of the record, will be cited as "Ex[#]:[Bates #]." Appellant's initial brief and Appellees' answer briefs will be cited as "[Party Name Abbreviation] B.[Page #]."

REPLY ARGUMENT

The Commission's position in this case is that it can grant a rate increase to an electric utility without knowing the basic information necessary to determine whether the utility made prudent investments and should be allowed to recover them from the public via higher rates. Stated another way, when a utility seeks a rate increase via a "black box" settlement that obscures the basis for the increase, the Commission's position is that it can find the settlement to be in the public interest without any inquiry into whether the settlement's core elements individually, or even as a whole, were prudent.

In the proceeding below, the Commission acknowledged that prudence was a relevant standard, but then, disconcertingly, suspended any inquiry into prudence when FPL proposed a black box settlement to resolve all of the issues in the proceeding. Thus, the Commission never inquired into the costs to the public of a core element of the settlement—the costliest peaker replacements in Florida's history. Nor did the Commission inquire into whether lower cost options are available on the market, including simply delaying the exorbitant peaker replacements or approaching them in an incremental manner. Had the Commission attempted this inquiry, it could not have gotten far, because nowhere in the record is there any economic analysis of, or competent evidence revealing, whether the peaker replacements or the terms of the settlement as a whole were prudent.

In its appellate brief, the Commission disputes that prudence is the relevant standard, arguing that approval of the settlement was appropriate because it was allegedly in the public interest—regardless of whether it was prudent. Then, in the alternative, the Commission argues that it would have found prudence anyway.

However, precisely because the Commission disavowed its duty to inquire into prudence below, the only evidence that it can point to in support of its public interest finding has little to no bearing on the actual basis for the rate increase—despite the unprecedented cost of the peaker replacements and the multi-billion dollar price tag of the settlement as a whole. The Commission's evidence includes: FPL's purported history of reliable and affordable electric service; the cross-section of parties that decided to settle with FPL based on their particular assessments of litigation risk; the supposed "stability" afforded by increasing average household electric bills by about 10%; and the fact that the overall price tag was reduced by $400 million—without any inquiry into how unnecessary or inflated FPL's initial ask might have been.

The Commission's position that it can grant a rate increase without investigating whether the increase has a prudent basis is flatly wrong. Defying the plain language of statute, the bounds on Commission authority, and this Court's precedent, the position upends the traditional role of utility regulation. Indeed, utility regulation is for "the protection of the *public* welfare." § 366.01, Fla. Stat.

(emphasis added). Fundamental to this protection is that rate recovery is limited to the "money honestly and prudently invested by the public utility company" to serve the public. § 366.06(1), Fla. Stat. Accordingly, the Court should reverse the Final Order and remand the case to the Commission for further proceedings consistent with the Court's decision. § 120.68(7), Fla. Stat.

I. THE STANDARD OF REVIEW IS *DE NOVO*.

Whether the Commission correctly applies a statute and acts within its bounds are questions subject to *de novo* review. When a statute is clear, "this Court's task goes no further than applying the plain language of the statute." *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007). Likewise, whether an agency has a "grant of legislative authority to act" is not a question due deference. *Citizens v. Graham*, 191 So. 3d 897, 900 (Fla. 2016) ("*Citizens II*"). No deference is due to an agency that exceeds its authority. *Level 3 Communs., LLC v. Jacobs*, 841 So. 2d 447, 450 (Fla. 2003). Rather, section 120.68(7), Florida Statutes, provides, "[t]he court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate."

Here, Appellees seek "great deference" to the Commission's legal conclusions based on inapposite cases, where the deference afforded to the Commission did not concern plain statutory text that bound its authority. *See*, *e.g.*, PSC B.14-15. In *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742,

752-53 (Fla. 2013) ("*SACE*"), the Court deferred to the Commission's construction of an ambiguous statute. Similarly, in *Citizens v. Florida Public Service Commission*, 146 So. 3d 1143, 1149 (Fla. 2014) ("*Citizens I*"), the Court cited the deferential standard in *SACE*, but did not apply it to any *un*ambiguous statutes. By contrast, this case centers on the Commission overstepping plain, unambiguous statutory bounds on its authority to only allow rate recovery of prudent investments. *See* §§ II.A, IV, *infra*.

Appellees also seek "great deference" to the Commission's findings. *See*, *e.g.*, PSC B.14. But the record conveys no Commission finding whatsoever regarding the prudence of the Peaker Replacement Project, which is the issue on review. *See* § II.D, *infra*. For this reason, the Commission and FPL are left to argue that the Commission *could* have made a finding, PSC B.13, 32, FPL B.43, and that this post-hoc finding offered in their appellate briefs is due deference, PSC B.30, FPL B.18-19. Deference is limited, however, to actual findings that the Commission makes based on competent, substantial evidence. *See*, *e.g.*, *GTC*, 967 So. 2d at 790. *Cf. Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1171 (Fla. 2017) (emphasis added) (citing cases on zoning and policy issues where the Court has deferred to administrative *decisions* and *determinations*, "as the agency fact-finder in theory has the requisite experience, skill, and perspective to adequately *adjudicate* specialized proceedings.").

Moreover, precisely because the Commission has disavowed its duty to inquire into prudence below, the record under review lacks the competent, substantial evidence that could sustain a finding to which the Court might defer. *See GTC*, 967 So. 2d at 790; *Fla. E. Coast Ry. Co. v. King*, 158 So. 2d 523, 525-26 (Fla. 1963). Such competent, substantial evidence must be reasonable, logical, and adequate to support the Commission's findings. *Wiggins*, 209 So. 3d at 1173; *see also Gulf Coast Elec. Coop., Inc. v. Johnson*, 727 So. 2d 259, 262 n.2 (Fla. 1999) (citing *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)).

II. SECTION 366.06(1), FLORIDA STATUTES, ONLY ALLOWS PRUDENT INVESTMENTS.

A. Prudence Is a Statutory Condition on Commission Authority.

Regarding a rate case settlement, this Court has affirmed that "the Commission independently determines rates of public utilities subject to the conditions set forth in chapter 366. . . ." *Citizens I*, 146 So. 3d at 1150. Prudence is among those conditions. As set forth in plain, unambiguous language, under section 366.06(1), Florida Statutes, the "value, as determined by the commission, [that] *shall* be used for ratemaking purposes . . . [is] the money honestly and *prudently invested* by the public utility company in such property used and useful in serving the public." § 366.06(1), Fla. Stat. (emphasis added). Clearly, this statutory text only allows rate recovery of prudent investments. It mandates that the Commission itself determine the value of a utility's prudent investments and use

that value for ratemaking. The Legislature's choice of the term "shall" precludes any doubt.

After determining the prudent investment rate base, the Commission can proceed to fix "fair, just, and reasonable rates," which the utility recovers from the public. § 366.06(1), Fla. Stat. As the Commission has long recognized, but now abandons in this case, without a proper rate base, ratemaking devolves to "pure guesswork" and "fallacy." (App782)[1] That is precisely what happened here.

The Commission's position that the black box settlement "resolve[d] all of the issues in the underlying rate petition" defies law and reason. PSC B.19. Specifically, the Commission's position defies the statutory bounds limiting rate recovery to prudent investments, and side steps the related, paramount issue here of whether the settlement falls within those bounds. Further, fundamentally, the position is baseless: there is no way the Commission could rule that the settlement is in the public interest without knowing whether one of its core elements, the Project, was prudent. At a cost of $725.6 million,[2] the Project is not, as Appellees invite the Court to conclude, *de minimis*.

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[1] Enclosed with the initial brief, the seminal Order No. 4078 on ratemaking notes the Commission's practice of determining the prudent investment rate base even before it became a statutory requirement in 1951. (App778-829.)

[2] That the Commission made no finding regarding how much it ordered the public to compensate FPL for the Project illustrates the arbitrary nature of the Commission's Final Order. Because the Commission made no such finding, this brief refers to the cost provided by FPL in its answer brief. FPL B.14. *See also* SC

B. The Signatories Had the Burden to Prove that the Project Was a Prudent Investment, and that FPL Should Be Allowed Recovery via Higher Rates.

Appellees erroneously imply that Sierra Club had the burden of proof in the proceeding below. *See*, *e.g.*, OPC B.25-31. It did not. "'Burden of proof in a [C]ommission proceeding is *always* on a utility seeking a rate change, and upon other parties seeking to change established rates.'" *Fla. Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982) (emphasis added) (quoting FRANCIS X. WELCH, CASES AND TEXT ON PUBLIC UTILITY REGULATION 638) (rev. ed. 1968). Here, the burden of proof was on FPL and the other signatories who sought a rate increase for, among other things, the Project. To meet the requirements of section 366.06(1) discussed above, they had to prove that the core elements of the settlement individually, or as a whole, were prudent and that FPL should be allowed recovery via higher rates. Appellees cannot evade the signatories' failure to meet their burden by now seeking to shift it onto Sierra Club.[3]

Nonetheless, as discussed below, Sierra Club did proffer evidence to the Commission that demonstrated FPL's binary analysis—limited to replacing all 44 peakers immediately or doing nothing—failed to consider common sense options

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B.14-15 (citing various Project price from FPL in the proceeding below).

[3] Sierra Club properly maintained its objection to the signatories' failure to carry their burden of proof. *See*, *e.g.*, PSC B.11-12 (acknowledging Sierra Club's repeated objections before, during, and after the hearing on the settlement). Contrary to Appellees' insinuation, where a party fails to meet its burden of proof, an objector need not present countervailing evidence to succeed.

on the market that have a proven track record before the Commission of saving ratepayers money. As such, these money-saving options were relevant, and a comparison between them and the peaker replacements was necessary for FPL to render an informed, prudent decision, just as that comparison was necessary for the Commission in its review.

C. Under *Gulf Power* and *SACE*, Prudence Boils Down to an Inquiry into Whether the Utility Reviewed the Relevant Factors, including Potential Lower Cost Options, and So Informed, Rendered a Prudent Decision.

Prudence can equally be articulated as "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, or as whether the utility "minimize[d]" its investments through a "timely" analysis and pursuit of a "range of alternat[ives]," *Gulf Power Co. v. Fla. Pub. Serv. Comm'n*, 453 So. 2d 799, 802, 804 (Fla. 1984) ("*Gulf Power*"). Either inquiry boils down to whether the utility reviewed the relevant factors and, so informed, rendered a prudent decision.

Here, the relevant factors that should have been considered by FPL before acting, and by the Commission in its review, include potential lower cost options that have a history of savinge ratepayers money. SC B.27-37; *see also* OPC B.25 (conceding such options "might have been relevant"). Indeed, potential lower cost

options are relevant to utility decisions under *Gulf Power*, *SACE*, and common sense. As the Commission stated in earlier precedent:

> A Company's review of *all* available options for a long-term, complex project is routine procedure in the business world. Such options might well include earlier or later extremes of commercial operations date.

Order No. 2011-0547, at 82 (emphasis added).[4] The Project is a prime example—it involved the long-term replacement of 44 peakers with seven massive new peakers, and complicated the risks of FPL's out-sized reliance on gas. SC B.3-5, 14-15, 34-36.

As applied to this case, the inquiry articulated by *SACE* is whether FPL acted as a reasonable utility manager would act when it built the $725.6 million Project, ignoring potential lower cost options on the market, including those with a history of saving ratepayers money. The answer is clearly no—FPL did not act prudently. No evidence demonstrating prudence was provided in the proceeding below, and no such evidence exists now. Neither FPL nor the Commission undertook any meaningful inquiry that would inform them of whether it would cost less to delay the Project, or approach the Project in an incremental manner, or pursue options on the market with no fuel cost such as demand-side resources, solar, and storage. *See*

[4] Scholars agree. *See*, *e.g.,* JONATHAN A. LESSER & LEONARDO R. GIACCHINO, FUNDAMENTALS OF ENERGY REGULATION 131 (2d ed. 2013) ("At the heart of the prudent investment standard . . . is an important role for economic analysis: choosing the 'best' from among different, and competing, investment alternatives.").

§§ III, *infra*. Nor was there evidence then, nor is there evidence now, that the composite elements of the settlement as a whole were prudent. *See* § V, *infra*.

D. FPL Never Provided Evidence of Whether the Project or the Composite Elements of the Settlement as a Whole Were Prudent, as Required By *Gulf Power* and *SACE*, Nor Therefore Could, or Did, the Commission Find Prudence, and Thus the Commission's Post-Hoc Finding Is Due No Deference.

It is undisputed that FPL made what it termed a "pretty simple" decision to build the Project based on the potential savings from replacing all 44 peakers immediately, relative to doing nothing. (T13:1582; *see also* T12.1505-06.) But at a cost of $725.6 million, the Project very well could have cost more than other options, because the record demonstrates that those very options have a history of saving ratepayers money. *See* § III.B, *infra*. However, FPL failed to produce any economic analysis of how such options compared to the Project. *Id.*

FPL never reviewed the economics of delaying the Project—and thus FPL never put forward any evidence in the record below as to whether it would have cost less to delay the Project. *Id*.; *see also* SC B.12-14, 33-34. FPL never reviewed the economics of approaching the Project in an incremental fashion over time—and thus FPL never put forward any evidence in the record below as to whether it would have cost less if FPL approached the Project incrementally. *Id.* FPL never reviewed the economics of pursuing other options on the market, such as solar and storage, which in FPL's own judgment can replace peakers, (App315-17.) Not even

demand-side resources, which have consistently earned Commission approval and saved ratepayers, in FPL's words, "the equivalent of approximately 15 new 400 [megawatt] generating units," such as peakers, by "eliminate[ing] the need to construct [them]," were considered. (App303.) Nor did FPL ever introduce evidence that the settlement as a whole was prudent. *See* § V, *infra*.

For this reason, and as discussed below, when FPL offers post-hoc rationalizations for not doing standard economic analysis of options—dismissing as "unrealistic" options such as delay, incrementalism, or pursuit of demand-side resources, solar, and storage—FPL has virtually nothing to cite in the record for support. Nor did the Commission review such factors before approving recovery. Because the record lacked the requisite evidence, the Commission could not have done so had it tried. Unsurprisingly, therefore, nothing in the record conveys a Commission decision that the Project, either alone, or as discussed below, as part of the settlement as a whole, was prudent. *See* § V, *infra*. Rather, the Commission asserts on appeal, "it no longer needed to rule on this individual issue," PSC B.23, and that prudence was no longer the standard. *See*, e.g., PSC B.22. In the absence of that ruling, no deference is due on judicial review. *See* § I, *supra*.

III. THE RECORD IS DEVOID OF EVIDENCE THAT THE PROJECT WAS A PRUDENT INVESTMENT BECAUSE NEITHER FPL NOR THE COMMISSION CONSIDERED OTHER OPTIONS, DESPITE THEIR ADMITTED HISTORY OF SAVING RATEPAYERS MONEY.

A. FPL's Consideration of Doing Nothing as Compared to Building the Project Immediately Fails to Prove that FPL's $725.6 Million Choice to Build Was Prudent.

FPL built the Project based primarily on the economic advantage of replacing all 44 peakers immediately relative to doing nothing. *See* § II.D, *supra*. No reasonable utility manager would build a project—let alone a $725.6 million project—without considering the economics of other options. *See* § II.C, *supra*. Yet that is exactly what FPL did.

FPL presented the Commission just *one* option besides the status quo. Then, during discovery, FPL stated that 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 may have conducted, it admits there are no records of it, and thus necessarily proffered no evidence of it to Commission. Indeed, there is no evidence in the record at all demonstrating that the Project was prudent compared to other options. FPL therefore failed to prove that it had considered relevant factors or "conditions and circumstances"—such as the economics of delay, incrementalism, demand-side resources, solar, and storage—and, thus informed, chose the prudent option. *See SACE*, 113 So. 3d at 750 (citation omitted).

The law is clear that it was never Sierra Club's burden to show that other options were cheaper than the Project. *See* § II.B, *supra*. To the contrary, it was FPL's duty to perform the "routine" review of whether the Project made sense compared to "all available options." Order No. 2011-0547, at 82. Nonetheless, Sierra Club adduced other options, including those with a history of being prudent and avoiding the need for many peakers. SC B.5-11, 27-37. Sierra Club then argued that the Commission could not rule on whether the Project was prudent without first having FPL provide the required review of other options as compared to the Project. (R23:4498-4519 (Sierra Club's brief in the proceeding below).)

As discussed below, because FPL never did the required review, its attorneys offer post-hoc rationalizations as to why FPL did not have to do it. *See* § III.B-C, *infra*. They argue that the options adduced by Sierra Club were "unrealistic," FPL B.43; that building the Project immediately was "urgent," FPL B.14; and that the Project was suddenly not about summer peak, but about "quick starts," FPL B.11. But precisely because FPL's lawyers are offering these rationalizations for the first time in its appellate brief, there is no record evidence to support them. FPL's lawyers can only resort to misrepresentations of extra-record material to challenge the viability of other options that Sierra Club demonstrated should have been considered. FPL B.43-50.[5]

[5] The other signatories never say that the Project was prudent; they never

B. Evidence in the Record Demonstrates that There Were Other Options that Should Have Been Considered, but Were Not, including the Very Options that Saved Ratepayers Money while Avoiding the Need for Many Peakers in the Past.

i. *Delay and incremental approaches were cheap, basic options that neither FPL nor the Commission considered.*

To demonstrate that FPL had many options, Sierra Club adduced evidence in the proceeding below, including admissions by FPL witnesses as well as empirical analysis. *See* SC B.6-11. FPL's options included basic, cheap ones such as delay and incremental approaches that would, for example, replace half of the 44 peakers and use the replaced units for spare parts. In fact, review of such options that vary the "commercial operations date" of new generation units is so "routine" that failure to do the review "likely would be viewed as irresponsible by both regulators and [utility managers]." Order No. 2011-0547, at 82-83. Yet FPL did no such review.

FPL's failure to consider delay or incremental approaches is clear from the testimony of its witnesses upon cross-examination by Sierra Club (and others). FPL's vice president for finance, Mr. Barrett, testified that the original peakers could run through 2025. (T31:4664),[6] but FPL only "looked at replacing [the

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acknowledge their burden of proof on prudence at all. Instead, they impermissibly seek to shift their burden onto Sierra Club. *See* OPC B.25-31; *see also* § II.B, *supra* (discussing law holding that rate increase proponents bear burden of proof).

[6] The fact that the original peakers could run until 2025 is the premise of FPL's projected savings from the Project: FPL would avoid the costs of fuel and

original peakers] all at one time," (T12:1503.) Likewise, the FPL witness most knowledgeable about its peakers' "operational needs," Ms. Kennedy, (T2:289-90), conceded that incremental approaches were possible, just "not part of the strategy that [FPL] put forward." (T8:878.) Whatever FPL's strategy was, FPL in the proceeding below professed "economics" as the "primary reason" for replacing all 44 peakers immediately. (Ex.502:2790.) Yet FPL never produced any economic analysis to substantiate that those replacements cost less than other alternatives, like simply delaying the replacements or approaching them in an incremental manner.

FPL's failure to consider and produce any economic analysis of delay or incremental approaches is all the more prejudicial to ratepayers, because in FPL's own judgment peakers will soon become economically obsolete, given the plummeting price of solar and storage. (T13:1592-93; T14:1635; App315-17.) Given that judgment, no reasonable utility manager would undertake the long-term replacement of 44 peakers with seven massive new peakers, and the concomitant risks of relying on gas to generate power. (T20:2491-92 (explaining FPL's "extensive utilization of . . . natural gas" involves risks, "which certainly include exposure to the commodity price . . . [and] the supply of natural gas").) At the very

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parts it would incur had those peakers run through 2025. SC B.1, 14. FPL cannot justify Project with those savings, (Ex.502:2790), and also deny the premise of those savings. FPL B.12, n.5.

least, before acting the manager would review options to defer these high-cost, high-risk replacements. Because FPL never undertook such a review, the Commission could not possibly do so either.

ii. *Other options on the market, including those with a history of saving ratepayers money while avoiding the need for many peakers, should have been considered, but neither FPL nor the Commission considered them.*

To demonstrate additional options available to FPL on the market, Sierra Club adduced demand-side resources, which have avoided the need for many peakers in the past, (App303), and solar and storage, which FPL itself believes can replace peakers, (App315-17.) Unlike peakers, these options have the distinct economic advantage of having no fuel cost whatsoever. SC B.16-21, 38-41. Despite this well-known fact, FPL and the Commission tout the projected fuel savings from new, more efficient peakers—without any economic analysis of how much more fuel savings ratepayers would enjoy had FPL pursued *zero*-fuel-cost options instead.

Regarding demand-side resources, on cross-examination by Sierra Club, FPL's witness with more than 35 years of experience in the energy industry, Mr. Reed, testified that these resources "can be very cost-effective." (T6:611.) He further testified, "there is a wide range of measures that can be and have been shown to be cost-effective within energy efficiency and [demand-side management] programs." (T6:611-12.) Moreover, the Commission has consistently

approved demand-side resources as prudent, and these resources have saved ratepayers, again, in FPL's words, "the equivalent of approximately 15 new 400 [megawatt] generating units" such as peakers. (App303.)

Regarding solar, Sierra Club adduced an empirical analysis showing that by 2015 market-based solar procurements were about 14% cheaper than gas-burning generation such as peakers. SC B.7, n.9 (citations omitted). In addition, Sierra Club elicited testimony by Mr. Barrett that solar has been "cost-effective" relative to FPL's system (T13:1561-62), of which about 70% is gas-burning generation. (T2:295); SC B.8; *see also* (T11:1421 ("[L]arge scale solar projects . . . will continue . . . [to] keep[] customers' bills low."); T12:1514 ("[Solar projects] are being built to save customers money . . . ."); T13:1572-73 ("[Solar's] benefit, obviously, is going to come from fuel savings, emissions savings, et cetera . . . .").)

Regarding storage, Sierra Club elicited testimony by Mr. Barrett—corroborating a statement made by FPL's chairman—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.) Further, Mr. Barrett and FPL's president testified that during the same period when FPL replaced the peakers, storage procurements were on the rise, (T2:295; Oct.T108-09), and were "becoming . . . more cost-effective." (Oct.T99.) And because pairing storage with solar multiplies the "fuel savings"

from generating power from the sun, at no cost, the resulting "fuel savings . . . will flow right through to customers." (Oct.T97.)

Thus, as the record makes clear, options on the market with no fuel cost such as demand-side resources, solar, and storage were available to FPL as an alternative to high-cost, high-risk peakers. Furthermore, under such alternatives, ratepayers very well could have saved significant sums of money. A reasonable utility manager would have at least calculated the potential savings from pursuing zero-fuel-cost options and compared them to the potential savings from peakers that are only 35% to 40% more fuel efficient than the original peakers. (T11:1421.) But FPL did no such analysis, and the Commission had none to inform its review.

iii. *Because FPL failed to consider other options before it built the Project, FPL can only resort to post-hoc rationalizations and extra-record material to challenge the viability of other options.*

To be sure, FPL's lawyers now argue that options adduced by Sierra Club were "unrealistic." FPL B.43. Yet nowhere in the record is there any competent evidence to demonstrate that such options were not realistic, nor even that they were considered by FPL and rejected. The fact is that they simply were never considered by FPL in any meaningful way, and there was no basis for the Commission to approve the Project without a standard comparison of options.

The testimony of FPL's president regarding storage exemplifies this. He claimed that he had reviewed storage as an alternative to peakers, but when asked

if that review was "documented somewhere," he testified: "Not that I am aware of." (T2:291.) He explained: "You know, at Florida Power & Light, I don't know if we have that documentation." (T2:292.)

Likewise, nowhere in the record is there any analysis by FPL of whether solar or demand-side resources such as energy efficiency could have met the need the Project was intended to address—despite the Commission's past approval of demand-side resources that have avoided the need to build many peakers. *See* (App303.) Nor is there any reliability analysis that suggests peakers, specifically, were needed for reliability purposes, or that demand-side energy efficiency, solar, delay, or incrementalism could not have addressed the need the peakers were purportedly built to address.

Precisely because FPL never considered any other options, the nearly seven pages of its brief where it argues other options were unrealistic are practically bereft of record citations. *See* FPL B.43-50. Unable to cite to an actual review of its options, FPL cites Sierra Club's website and two other dockets, which it misrepresents. Specifically, FPL argues that a Commission rule limits recovery to pre-approved amounts of demand-side resources, FPL B.48-49, and that two past dockets pre-approved demand-side resources, rendering further inquiry into the market for those resources unnecessary, FPL B.47-50. This simply is not true.

Just as FPL sought Commission approval for the Project in this case, it could have instead sought permission to build out demand-side energy efficiency. In fact, the Commission rule that FPL cites specifically provides that "a utility may seek recovery" for additional demand-side resources, beyond the pre-approved amounts, when they are "prudent." Fla. Admin. Code R. 25-17.015(4).[7] And the inquiry that should have been performed by FPL, and that the Commission should have reviewed in this case, is whether the Project was the prudent investment or whether commonly pursued alternatives such as demand-side energy efficiency would have been the prudent investment.

Nor is there any merit to FPL's new theory that the Project was "urgent," FPL B.43, because the original peakers were too unreliable to run for even just a few more years—until 2020, for example, when FPL management believed, "there may never be another peaker built in the United States—very likely you'll be just building energy storage instead." (App316.) To the contrary, FPL's position in the proceeding below was that the original peakers could "operat[e] reliably" through at least 2025. (Ex.502:2790.) FPL even kept four original peakers running because they are *more* reliable than the new peakers. As Mr. Barrett explained, unlike the

[7] This rule is one of many authorities reinforcing FPL's ongoing duty to investigate market conditions to make informed, prudent decisions. *See*, *e.g.*, Order No. 2016-0032, at 25 ("If conditions change [in the market], then a prudent utility would be expected to respond appropriately," including "before, during, and after construction of a generating unit."). *Cf.* § 186.801(2)(d), Fla. Stat. (requiring bi-annual review of "alternatives" to utility resource plans).

original peakers, the new peakers cannot operate in an emergency ("black start capability"), "[t]hey need auxiliary power to get them started." (T12:1502.)

Nor can FPL cite a single document in the record that even mentions an urgent need to replace all 44 peakers for reliability issues, despite the fact that conducting a reliability analysis is a standard practice to address such issues. To the contrary, FPL initially proposed replacing peakers as an environmental compliance measure in 2013, but then withdrew the proposal. SC B.3-5. FPL instead waited several years to begin construction and justified it below based on the new peakers' supposedly better economic performance. *Id.*

Tellingly, the only evidence that FPL's attorneys can muster is a single, self-serving anecdote told by a FPL witness about a time when one original peaker out of 48 had a broken part. FPL B.11. Particularly given the $725.6 million price of the Project and the supposedly serious and urgent reliability concerns FPL's counsel contend were at issue, it is inconceivable that FPL would lack any other evidence of urgency. A single anecdote offered in testimony by a witness in this context cannot possibly consitute substantial and competent evidence.

IV. A SETTLEMENT CANNOT OVERRIDE SECTION 366.06(1) TO ALLOW IMPRUDENT INVESTMENTS.

Regarding a rate case settlement, in *Citizens I* this Court recognized:

> Ultimately, the Commission's actions are conditioned by statute (rates set must be fair, just, and reasonable) and its actions are subject to judicial review—the Commission cannot simply

> accept any settlement agreement devoid of record support as in the public interest.

146 So. 3d at 1153. Contrary to this fundamental principle, the Commission believes that it can find the settlement in this case to be in the public interest without any independent, record-based inquiry into the prudence of the Project, or of even the settlement as a whole. This simply is not the law and is subject to *de novo* review. *See* § I, *supra*. Even were the Court's review not *de novo*, the Final Order cannot stand because it "depart[s] from the essential requirements of law and the legislation controlling the issue." *Crist v. Jaber*, 908 So. 2d 426, 430 (Fla. 2005); *Level 3 Communs*., 841 So. 2d at 450.

As the Court re-affirmed in *Citizens I*, the Commission is a creature of statute and must act in accordance with delegated limits and authorities. 146 So. 3d at 1153; *see also Citizens II*, 191 So. 3d at 900 (quoting *United Tel. Co. of Fla. v. Pub. Serv. Comm'n*, 496 So. 2d 116, 118 (Fla. 1986)) ("'[T]he Commission derives its power solely from the legislature.'"). Furthermore, this Court has expressly recognized 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." *SACE*, 113 So. 3d at 748, 750 (citation omitted).

Nor can a settlement override section 366.06(1) to allow rate recovery of imprudent investments. Appellees' reliance on section 120.57(4), Florida Statutes,

is misplaced. The very first clause preserves other statutory conditions on Commission authority. It provides: "[*u*]*nless precluded by law*, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." § 120.57(4), Fla. Stat. (emphasis added). Construing this statutory text as applied to a settlement within the purview of another agency, the First District concluded, "no principle of law allow[s] an agency . . . to exceed its delegated statutory authority simply because private parties to a settlement agreement deem it mutually beneficial." *Baker Cnty. Med. Servs., Inc. v. State*, 178 So. 3d 71, 77 (Fla. 1st DCA 2015).

Nowhere do Appellees identify any authority suggesting that, by proposing a settlement, a utility can unilaterally redraw the bounds of Commission authority, with no further obligation on the Commission to assure compliance with the actual statutory bounds before the public is held responsible for resulting rate increases. Appellees' reliance on *Citizens I* is flatly wrong. PSC B.16, 18-21, 23; FPL B.23-24; OPC B.7. The Court in *Citizens I* was not presented a single question regarding the prudence of the expenses in the settlement on review. Thus, *Citizens I* lends no support to the position that the Commission can make a public interest finding without any inquiry into whether a rate case settlement is prudent.

Surrendering to the Commission's position that prudence is somehow irrelevant to the public interest would have acute consequences. A utility could

recover imprudent expenses that are over-priced and not market-based simply by including them within the black box of a settlement, and not listing those expenses as a term of the settlement agreement. This would shield those expenses from Commission review, thereby shattering the protection afforded ratepayers by statute, and open the door to abuse. Instead of being subject to the rigors of an evidentiary hearing before an impartial tribunal tasked with protecting the public,[8] recovery would instead be decided via settlement negotiations between parties preselected by the utility and conducted behind closed doors. Such a dereliction of the Commission's "paramount duty"—"to protect the consumer . . . interests and, at the same time, deal fairly with the utility"—cannot stand. (App817.)

V. A RATE CASE CAN BE RESOLVED BY SETTLEMENT, BUT RECORD IN THIS CASE DOES NOT ESTABLISH THAT THE SETTLEMENT THE COMISSION APPROVED REFLECTS PRUDENT INVESTMENTS.

At issue in this case is not whether rate cases can be resolved by settlement, or even whether the Commission can approve a settlement as a whole. *See*, *e.g.*, PSC B.22. Nothing in this case would call that into question. At issue in this case is whether the Commission can approve a settlement without any analysis of, or any evidence revealing, the settlement's core elements—especially a $725.6 million

[8] Under chapter 366, the "purpose" of utility regulation, including ratemaking, is "the protection of the public welfare." § 366.01, Fla. Stat. "[A]ll the provisions" of the chapter "shall be liberally construed for the accomplishment of that purpose." *Id.*

line item—and without any determination of whether these elements, individually or as a whole, are prudent.[9] The answer is no. As a matter of law, as discussed above, the Commission cannot render a finding that a settlement is in the public interest without discharging its duty to inquire into whether the core elements of the settlement are prudent. *See* §§ II.A, IV, *supra*.

Furthermore, precisely because the Commission has disavowed its duty to inquire into prudence below, and because the signatories failed to carry their burden to prove prudence below, there is virtually no evidence that the Commission can cite in support of a finding that the settlement "as a whole" was in the public interest. Instead, the Commission's evidence as discussed below has little or no relevance to the actual terms of the settlement and whether those terms individually or collectively were prudent.

Both the Commission and FPL cite FPL's supposedly reliable and affordable service in the past as evidence supporting approval of the settlement. PSC B.44; FPL B.26-27. However, neither its past service nor its past rates are relevant to whether FPL's *particular transactions* included in the settlement are in the public interest or whether the settlement as a whole is prudent and in the public interest. Were it otherwise, FPL would have free-ranging authority to engage in self-dealing

[9] The Commission's prudence reviews do not undermine administrative efficiency or impede the Commission from disposing of rate cases via settlement, as shown in Commission precedent. *See* SC B. 38-39 (discussing precedent).

and other uncompetitive behavior that may result in good service at rates deemed low, but in fact be inferior to the service and rates that are actually possible via proper, market-based transactions.

Another vaunted hallmark of the settlement is the supposed rate "stability and predictability" afforded by about increasing the average household's electric bill by about 10%. *See*, *e.g.*, PSC B.39-40, 44 (quoting testimony of FPL witness Barrett). Again, however, the overall rate increase resulting from the settlement does not bear on whether the settlement's terms—individually or as a whole—are themselves actually prudent and in the public interest. For example, if an alternative such as delay, incrementalism, energy efficiency, or solar would have been half as expensive as the peakers over time and would have resulted in only a 5% rate increase, an increase double that—the 10% increase—would certainly not be prudent and in the public interest.

Likewise, FPL's financial integrity is an important consideration for the Commission, but in this context it proves too much. *See*, *e.g.*, PSC B.19. FPL's choice to spend $725.6 million without obtaining Commission pre-approval and without conducting any consideration of alternatives may have exposed its investors to the costly risk of disapproval.[10] But the answer surely cannot be for the

[10] The relevant issue here is not whether pre-approval was necessary as a matter of law, *see*, *e.g.*, PSC B.27-30, but that FPL took great risks on its own by forgoing pre-approval, which it can seek as of right. *See*, *e.g.*, Order No. 2013-

Commission to abandon any consideration of whether the terms of the settlement reflected costs that are reasonable and prudent. Doing so shifts the risk and capital cost onto the public and raises a moral hazard on the utility's part—it may take greater risks seeing as the Commission is prone to shift losses incurred due to those risks onto the public.

The Commission and FPL also cite the signatories as evidence that the settlement is in the public interest. PSC B.39-40; FPL B.28, 47, n.17. The parties that decide to settle a case do not reflect whether the underlying terms and substance of the settlement are prudent. Moreover, there are many litigation reasons why parties might choose to settle a case. Simply because some parties chose to settle a case does not mean that the terms on which they settled are prudent and reflect the public interest, or that the Commission is relieved of its duty to undertake a prudence inquiry. Reviewing a contested rate case settlement, this Court established in *Citizens I* that the Commission must do its job "independently." 146 So. 3d at 1149. Nor are the signatories' self-serving statements in this case persuasive on prudence: they do not permit intelligent review of the elements of the settlement, alone or as a whole.

0505 (reviewing FPL's request for pre-approval of proposed contracts, given "substantial financial commitments involved," rather than any legal obligation to obtain pre-approval).

Finally, and perhaps most troublingly, the Commission and FPL point to concessions FPL made in the settlement. PSC B.44-45; FPL B.28-30. For example, they point to a $400 million reduction in the settlement's overall price tag. The problems with measuring the public interest via such a reduction are three-fold. First, the mere fact that there was a reduction says nothing about the soundness of FPL's original request or the reduced request. Second, the litigation calculus of the various signatories based on their own interests presumably culminating in this reduction is not the equivalent of the public interest. Third, relying on this reduction creates perverse incentives for FPL and other utilities to make their original rate increase requests higher and higher so that they can later concede to similar reductions via settlement and use that purportedly in support of the public interest of the agreement.

Thus, contrary to Appellees' stance, what the Commission deemed support for the settlement as a whole in the Final Order does not amount to competent, substantial evidence that the settlement as a whole, or the $725 million Project, was prudent and in the public interest. Under the Commission's seminal order on ratemaking, prudence reviews are "mandatory" and "necessary" for good reason—without them ratemaking devolves to "pure guesswork" and "fallacy." (App822.)

CONCLUSION

Never before has the Court ruled that a rate case settlement can override a statutory condition on Commission authority. Nor has the Court ruled that a settlement can override the bedrock prudence requirement in section 366.06(1). Yet the Commission has taken the position in this case that a settlement is in the public interest even if neither the settlement as a whole nor its core elements are prudent. This position must be rejected because it defies law and reason and utterly defeats the public interest. The Court should reverse the Commission's Final Order and remand the case to the Commission for further proceedings consistent with the Court's decision, as provided by section 120.57(4).

Respectfully submitted,

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Dated: November 3, 2017

CERTIFICATE OF SERVICE

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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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