IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC18-226
Lower Tribunal No(s).: 20180001-EI

FLORIDA INDUSTRIAL POWER USERS GROUP v. JULIE I. BROWN, ETC., ET AL.

INITIAL BRIEF OF THE FLORIDA INDUSTRIAL POWER USERS GROUP

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PRELIMINARY STATEMENT

The following abbreviations will be used in this brief. The Florida Industrial Power Users Group will be referred to as FIPUG. Florida Power & Light Company will be designated as FPL. The Florida Public Service Commission will be called the Commission or the PSC. The Office of Public Counsel is called OPC. The Solar Base Rate Adjustment mechanism is known as SoBRA. The 2016 Settlement Agreement between FPL and three out of nine parties in FPL's rate case proceeding will be referred to as the Settlement Agreement. The Final Order on appeal will be referred to as Final Order.

The Record on Appeal is designated as R. _. The transcript of the hearing below is designated Tr. _. Exhibits introduced at the evidentiary hearing will be designated as Ex. _.

Citations to the Florida Statutes will be referred to as F.S. and will refer to the 2017 version of the statute unless otherwise noted. Citations to the Florida Administrative Code will be referred to as F.A.C. The Florida Administrative Procedure Act will be abbreviated as APA.

STATEMENT OF THE CASE AND OF THE FACTS

Preliminary Information and Background

This case involves FPL's request for and the Commission's approval of the construction of a number of solar energy projects. R. 1202. Appellant, FIPUG, represents the interests of numerous large FPL customers whose rates will be affected as a result of the Commission's decision to allow FPL to recover nearly $1 billion dollars in capital costs and profits for the solar projects. Tr. 487.

FIPUG supports renewable energy. However, FIPUG made clear at the hearing below that such support of renewable energy was conditioned on the cost-effectiveness and need for the renewable energy projects. In this case, FPL seeks Commission approval to recover rates from ratepayers for solar energy projects that are neither needed nor cost effective. Tr. 412.

2016 Settlement Agreement

On January 15, 2016, FPL notified the Commission that it would seek to increase rates in a general rate case. FIPUG and eight other parties intervened in the rate case. R. 115-116. After a lengthy evidentiary hearing, three out of nine parties entered into a Settlement Agreement with FPL. R. 116. FIPUG was not a party to the Settlement Agreement and took no position on the Settlement

Agreement. R. 116. The Commission ultimately approved the Settlement Agreement. R. 118-119.

In addition to a series of rate increases totaling $811 million dollars, the Settlement Agreement contained language that provided FPL with the option to construct and seek cost recovery for solar energy facilities. R. 132-136. Specifically, the Settlement Agreement provided FPL with the ability to construct up to 1,200 MW of solar photovoltaic generation before 2022 and to recover the costs of these projects through a SoBRA. R. 123, 132-136. The Settlement Agreement specifically limited the criterion applicable to the evaluation of FPL's solar projects, should FPL decide to pursue such solar development projects. R. 133. Addressing the solar facilities for which FPL sought Commission review and approval in this case, the Settlement Agreement states, in pertinent part, that: "the issues for determination are limited to cost effectiveness of each such project (i.e., will the project lower the projected system present value revenue requirement "CPVRR" as compared to such CPVRR without the solar project) and the amount of revenue requirements and appropriate percentage increase in base rates needed to collect the estimated revenue requirements[.]" R. 133. The Commission entered a Final Order approving the 2016 Settlement Agreement on December 15, 2016. R.

155-363. R. 1191-1193, 1201-1304. That final order was appealed before this court in *Sierra Club v. Brown*, No. SC17-82, 2018 Fla. LEXIS 1090 (May 17, 2018).

FPL filed its first SoBRA Petition on March 1, 2017 in the Commission's fuel adjustment clause docket, Docket No. 20170001. R. 450-510. In the fuel adjustment proceeding, which is held annually, FPL and other utilities present evidence about monies spent to date and projected monies likely to be spent in the future on fuel, such as natural gas, to operate their power plants. After consideration of the evidence about the historical and forecast prices of fuel, the Commission issues a final order which grants or denies authorization for the utility to adjust the utility's fuel recovery rate charged to ratepayers on their monthly bills. The 2016 Settlement Agreement dictated that the SoBRA proceedings take place in the fuel adjustment clause. R. 133.

FIPUG opposed FPL's solar projects, arguing that the projects were not needed or cost effective. Tr. 412-418. FIPUG noted the Commission's Rule 25-6.035 F.A.C. Adequacy of Resources provides that the state's largest investor-owned electric utilities must maintain a minimum reserve margin of 15%. It is undisputed that this requirement has been met or exceeded. Tr. 415. FIPUG also referenced a Commission-approved stipulation in which the state's investor-owned utilities plan using a 20% reserve margin. *In re: Generic investigation into the*

aggregate electric utility reserve margins planned for Peninsular Florida, Order No. PSC-99-2507-S-EU, 1999 Fla. PUC LEXIS 2201 (Fla. P.S.C. Dec. 22, 1999) Tr. 452-453. The reserve margin criterion ensures that each utility has sufficient energy capacity available to meet its customers' firm electric load. The Commission also uses a reserve margin to stop utilities from overbuilding energy capacity and charging customers for new generating plants that are not needed. Tr. 463. All of the solar projects for which FPL sought approval in this case were above and beyond FPL's 20% reserve margin planning criterion. See Ex. 84, Staff's 3rd Set of Interrogatories, Attachment 1, Interrogatory No. 14 and Interrogatory No. 19 (R. 00121, 00127).

FIPUG also challenged the cost effectiveness of FPL's proposed solar projects. Tr. 412-416. FPL's evidence of cost effectiveness was premised on expert reports that projected future natural gas prices, the future cost of carbon, and implementation of carbon taxes. Tr. 1206. Neither the author of the carbon tax expert report nor the author of the natural gas fuel forecast export report testified at hearing. Tr. 472, 495.

After an evidentiary hearing, on November 13, 2017, parties timely filed post-hearing briefs. Staff issued a recommendation on November 30, 2017, which recommended that the Commission approve FPL's SoBRA projects. The

Commission did so at its December 12, 2017 Agenda Conference. R. 1191-1193. The Commission issued its Final Order on January 8, 2018. R. 1201-1304. FIPUG filed its Notice of Appeal of this Final Order on February 6, 2018. R. 1305-1306.

Facts and Procedural History

FIPUG raises three issues on appeal: 1) a challenge to the legal standard the Commission used when it considered FPL's SoBRA Petition; 2) a challenge to the Commission's factual finding of cost effectiveness, which is not supported by competent substantial evidence but based on uncorroborated hearsay; and 3) a challenge to the Commission's use of the fuel cost recovery clause to consider FPL's request to recover nearly $1 billion dollars in capital costs from ratepayers.

SUMMARY OF ARGUMENT

The Commission Used an Incorrect Legal Standard When It Evaluated FPL's SoBRA Projects

The Commission disregarded Commission precedent and its statutory duty to protect the ratepayers by failing to conduct a prudence review of FPL's solar projects. Instead, the Commission used the wrong legal standard when it evaluated FPL's SoBRA projects. Specifically, the Commission reviewed and evaluated the SoBRA projects using only the criterion set forth in the Settlement Agreement that FPL and three other parties executed. This Commission has previously found that

terms contained within a settlement agreement do not preclude the Commission from doing its job as directed by the Legislature to determine whether the projects for which new rates are requested are prudent. Neither the Commission nor FIPUG, as a non-party to this Settlement Agreement, should be inextricably bound to limited review criterion found only in the Settlement Agreement. Instead, the Commission, when it decides whether to increase customers' rates, must consider statutory requirements and case precedent, as well as all relevant information, to decide whether FPL's proposed SoBRA projects are prudent. Therefore, FIPUG must be permitted to present all relevant information, including reliability information, to establish that the FPL SoBRA projects are not prudent.

Because the Commission erroneously found that the Settlement Agreement constrained its review of FPL's solar projects and disregarded its statutory obligations, the Commission held that reliability criterion (information about whether a utility will build or buy additional energy or whether it has enough energy to serve its customers) was irrelevant for the purposes of its evaluation. The Commission's exclusive use of the limited criterion in the Settlement Agreement to increase rates and the Commission's disregard of relevant statutory criterion and prior precedent which require a prudence review of FPL's solar projects was improper.

The Commission Improperly Based Its Findings of Cost Effectiveness on Uncorroborated Hearsay

The Commission also erred by relying on uncorroborated hearsay testimony about the future costs of natural gas and the future cost of carbon when making its factual finding that the FPL SoBRA projects were cost effective. Section 120.57(1)(c), F.S., states, in pertinent part, that hearsay evidence "…shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." The Commission's findings of cost effectiveness hinge on the uncorroborated, unsworn hearsay report of a non-testifying carbon tax witness and the unsworn, hearsay natural gas fuel forecasts of a non-testifying fuel expert. The impermissible findings of fact based wholly on uncorroborated hearsay is not competent, substantial evidence that can legally support the Commission's decision.

The Commission Improperly Used the Fuel Clause to Consider the SoBRA Projects

In yet another error, the Commission improperly used the fuel clause to consider FPL's SoBRA projects. Again, the Commission erroneously determined that the Settlement Agreement mandated this action.

However, the fuel clause, as this Court has made clear, is to be used primarily for the recovery of volatile fuel and purchased power costs.

Nevertheless, FPL used the fuel clause to present to the Commission the capital costs of its SoBRA projects. Using the fuel clause for these and future SoBRA projects provides the Commission and FPL with an unauthorized exemption from the rulemaking requirements of section 120.54(1), F.S., as section 120.80(13)(a), F.S., provides for a rulemaking exemption for matters raised in the fuel clause.[1] The Commission's use of the fuel clause in this case was improper.

ARGUMENT

Standard of Review

The issues on appeal all present issues of law and should be reviewed on a de novo basis. *Citizens of State v. Graham,* 191 So. 3d 897, 900 (Fla. 2016);). *See also, Johnson v. State,* 78 So. 3d 1305, 1310 (Fla. 2012) (judicial interpretations of statutes are pure questions of law subject to de novo review).

The Court must review these issues de novo. FIPUG has the burden to show that the Commission departed from the essential requirements of law controlling the issue or that the Commission's findings are not supported by competent, substantial evidence. *Crist v. Jaber,* 908 So. 2d 426, 430 (Fla. 2005).

[1] The fuel clause was used to consider the SoBRA requests; the rate increases authorized in the fuel clause proceeding are recovered through base rate increases once the solar projects become operational.

I.
THE COMMISSION REVIEWED FPL'S SOLAR ENERGY PROJECTS BASED ON AN IMPROPER LEGAL STANDARD, A PROVISION OF A NON-UNANIMOUS SETTLEMENT AGREEMENT, INSTEAD OF THE APPLICABLE STATUTES AND CASE LAW

The Commission used an improper legal standard when it reviewed FPL's proposed SoBRA projects. Specifically, rather than applying the appropriate legal standard mandated by statute, the Commission looked solely to certain terms of a 2016 Settlement Agreement when considering whether to approve new rates to pay for such solar projects. R. 1208. The Commission's Final Order expressly recognizes that "the issues are 'limited to the cost effectiveness of each such project (i.e., will the project lower the projected system CPVRR as compared to each CPVRRR without the solar project) and the amount of revenue requirements and appropriate percentage in base rates needed to collect the estimated revenue requirements.'" R. 1208.

FIPUG's efforts at hearing to show that the FPL SoBRA projects were excessive and unwarranted in the face of Commission Order *In re: Generic investigation into the aggregate electric utility reserve margins planned for Peninsular Florida, Order No.* PSC-99-2507-S-EU, 1999 Fla. PUC LEXIS 2201 (Fla. PSC Dec. 22, 1999), (approving a stipulation which established a 20%

reserve margin reliability criteria for FPL) were summarily disregarded as "irrelevant." The Commission stated:

> If the [SoBRA] project meets these requirements [SoBRA terms and conditions agreed to by FPL and three intervenors], the terms of the 2016 Agreement have been met. Therefore, we find that FIPUG's argument based on reliability criteria is irrelevant.

Final Order, p. 8; R. 1208.

The Commission erred when it limited its review of FPL's SoBRA projects to the "requirements" of the 2016 Settlement Agreement and disregarded its own precedent as well as its legislatively imposed statutory duties. Such statutory requirements include:

- Section 366.03, F.S., provides in pertinent part, that "All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and reasonable." (emphasis added)

- Section 366.06, F.S., provides, in pertinent part, that "All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any

> goodwill or going-concern value or franchise value in excess of payment made therefor." (emphasis added).

The Commission eschewed its statutory obligations, including the statutorily required prudence review described above, when considering whether to increase customer rates for FPL customers due to the SoBRA projects.

This Court has recognized that the prudence standard is routinely and regularly used when the Commission reviews utility costs and is engaged in ratemaking. *Southern Alliance for Clean Energy v. Graham* 113 So. 3rd 742, 750 (Fla. 2013) ("Moreover, statutes and caselaw routinely apply the prudence standard in the PSC context.") (internal citations omitted); *See also*, *Sierra Club v. Brown*, No. SC17-82, 2018 Fla. LEXIS 1090 (May 17, 2018) n.10 – ("Importantly, in the absence of a settlement, prudence review of investments --- regardless of magnitude --- is still an express statutory requirement 366.06(1), Fla. Stat."). The Commission has long used a prudence standard of review when considering whether to increase customer rates. *Southern Alliance for Clean Energy v. Graham, supra,* at 750. The Commission has articulated its prudence standard 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. *Id.*

In this case, the Commission did not conduct a prudence review and analysis. It failed to consider whether the SoBRA projects represented "money honestly and prudently invested by the public utility company in such property used and useful in serving the public" as statutorily required.

The Commission failed to follow past Commission pronouncements about its role when considering matters set forth in a settlement agreement. The Commission previously stated:

> [w]e do not possess the legal capacity of a private party to enter into contracts covering our statutory duties. **Indeed, we cannot abrogate – by contract or otherwise – our authority to assure that our mandate from the Legislature is carried out.** As a result, we may not bind the Commission or forego action in derogation of our statutory obligations….Therefore, the parties cannot limit our jurisdiction by way of a settlement agreement. (emphasis added).

Order No. 22353 issued December 29. 1989 in Dockets No. 890216-TL and 890216-TL, *In re: Petition of Citizens of the State of Florida for a limited proceeding to reduce General Telephone Company of Florida's authorized return on equity; In re: Investigation into the proper application of Rule 25-14.003, F.A.C., relating to tax savings refunds for 1988 and 1989 for GTE Florida Incorporated*; *See also* Order No. 13-0194-PCO-EI issued May 10, 2013 in Docket No. 100437-EI at p. 4, *In re Examination of the outage and replacement of fuel/power costs associated with the CR3 steam generator replacement project, by*

Progress Energy Florida, Inc. The Commission's failure to conduct a prudence review of FPL's SoBRA projects and limiting its review of FPL's solar project to only items set forth in the Settlement Agreement is a derogation of the Commission's statutory obligations.

The Commission derives its authority to act solely from the Legislature. *United Telephone Company of Florida v. Public Service Commission*, 496 So. 2d 116, 118 (Fla. 1986). Administrative bodies or agencies created by the Legislature, including the Commission, are creatures of statute. *See Advisory Opinion to the Governor*, 223 So. 2d 35 (Fla. 1969). Thus, the Commission's powers, duties and authority are limited to those that its enabling statute expressly or impliedly confers. *City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So.2d 493, 496 (Fla 1973); *City of West Palm Beach v. Florida Public Service Commission*, 224 So.2d 322, 325 (Fla.1969). Any reasonable doubt as to the lawful existence of a particular power that the Commission attempts to exercise must be resolved against the exercise of the power in question. *Southern Armored Car Service, Inc. v. Mason*, 167 So.2d 848, 850 (Fla. 1964).

It is antithetical to the Commission's legislative authority to allow a regulated utility and a handful of intervening parties to establish, via settlement agreement, the terms and conditions under which future Commissions will review

forthcoming utility rate increase requests. This Court has previously questioned whether the Commission has usurped the policy making role of the Legislature. *See AT&T Communications v. Marks*, 515 So. 2d 741, 743 (Fla. 1987) ("Under the circumstances presented here, we can find no indication that the legislative policy-making function has been usurped by or improperly transferred to the PSC.").

Here, the legislative policy making role has indeed been usurped by a few litigants who crafted the Settlement Agreement, and the Commission when entering its Final Order in this case. When the Commission reviews utility rate increase requests, the Legislative pronouncements of prudence and usefulness must be applied. They may not be disregarded as the Commission has done in this case.

While the Commission in this case limited its review of FPL's SoBRA solar projects to certain terms found within the 2016 Settlement Agreement, FPL itself has recognized that such limitation is improper. This Court had occasion to consider the same 2016 Settlement Agreement and its implementation in *Sierra Club v. Brown*, No. SC17-82, 2018 Fla. LEXIS 1090 (May 17, 2018). During oral argument, the Court directly asked FPL counsel if FPL contended that the terms of the 2016 Settlement Agreement acted to obviate the Commission's obligation to conduct a prudence review of the Settlement Agreement.

Q. Justice Lewis:

> …[I]n fairness, the Sierra Club has said that you don't throw prudence out the window when you're looking at what settlements have been reached. Do you think that you do, that any time there is a dispute, you seek a rate increase and the cost is going to be passed on to customers, that whether it is prudent and reasonable just goes out the window and all you look to is a different standard, are you suggesting that?
>
> A. Counsel Singer:
>
> No, your Honor ….

See, Sierra Club v. Julie Brown et. al., SC 17-82, February 7, 2018 oral argument available at http://wfsu.org/gavel2gavel/viewcase.php?eid=2473 (time stamp 27:28). FPL further answered the Court's question by arguing that the prudence standard was subsumed by a public interest review. In this case, which only involves a settlement agreement in that FPL enjoys an option to make certain solar project filings to recover rates, the case on appeal was not settled; it was litigated by FIPUG. The standard by which settlement agreements are reviewed, a public interest standard, cannot and should not be carried forward to a new docketed case involving solar projects for which FPL had the option to construct and seek rate recovery, or not. The Commission should have used the statutory prudence standard when reviewing FPL's solar projects.[2]

[2] As noted, the Commission only used the limited review criterion contained in the Settlement Agreement when evaluating FPL's solar projects. It used neither a prudence standard nor public interest standard.

The position that the Commission's standard of review can be defined wholly by a settlement agreement would allow parties to a settlement agreement to alter required legislative standards, and circumvent or usurp the Legislature's policy-making role. For example, if legislative requirements or standards can be extinguished or modified through the terms of a settlement agreement, it would allow a few parties to a docket to agree to settlement terms that greatly advantaged the narrow interests of the agreeing parties, but worked to the detriment of other parties or to the general body of ratepayers. Future Commissions would find their hands tied if the terms of a multi-year settlement agreement set forth the basis upon which future Commission decisions were to be made. One legislature cannot act to bind another. *See, e.g.*, *Neu v. Miami Herald Pub.* Co., 462 So.2d 821, 824 (Fla. 1985); Similarly, one Commission cannot bind another. Commission Order *In re Examination of the Outage and Replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.*, Order No. 13-0194-PCO-EI at 4, (Fla. P.S.C. May 10, 2013); Commission Order *In re Application for original certificates for proposed water and wastewater system and request for initial rates and charges in St. Lucie County by Bluefield Utilities, LLC,* Order No. PSC-13-0196-PAA-WS at 5 (Fla. P.S.C. May 15, 2013).

The Commission's jurisdiction could be unlawfully expanded if certain terms of a settlement agreement require the Commission to take extra-jurisdictional action. Similarly, Commission rules and/or past practices could be found "irrelevant" if not made part of a settlement agreement.

Here, the Commission erred when it exclusively used the terms of a Settlement Agreement to judge FPL's solar projects. The Legislature has not given the Commission the ability to expand its power or authority by approving a Settlement Agreement or by reviewing subsequent utility rate increase requests based on terms of a Settlement Agreement rather than statutory criteria.

FIPUG argued and elicited factual testimony that the projects in question were simply not needed when the reliability criteria set forth in Commission orders was applied. As described above, FPL uses a reserve margin planning criterion of 20% for its operations. If FPL's generation assets total less than 20%, FPL proposes new generation or other measures to address the generation deficit. If FPL's generation assets total more than 20%, then new generation facilities are simply not needed to meet the Commission approved 20% reserve margin criterion.

FPL had already taken steps to meet its 20% reserve margin criterion and the new solar plants are above and beyond this 20% reserve margin criterion. In other

words, FPL did not need the proposed solar projects in order to stay about the 20% reserve margin. The purpose of the new solar plants was not to meet reserve margins or a reliability concern. See Ex. 84, Staff's 3rd Set of Interrogatories, Attachment 1, Interrogatory No. 14 and Interrogatory No. 19 (R. 00121, 00127). FIPUG members, and other FPL customers, should not have to pay for approximately $1 billion dollars of new solar projects that are not needed to serve them according to the Commission's own criteria. Rather than consider FIPUG's arguments in reaching its decision, the Commission opted not to look beyond the terms and requirements the parties to the Settlement Agreement crafted. The Commission erroneously concluded FIPUG's arguments that the solar plants were not needed were "irrelevant."

> If the projects meet these requirements, the terms of the 2016 Agreement have been met. Therefore, we find that FIPUG's argument based on reliability criteria is irrelevant. Final Order p. 8; R. 1208.

However, the prudence standard cannot be discarded when the Commission considers an action set out in a settlement agreement. FIPUG's arguments that the FPL solar projects were not needed were disregarded as irrelevant, notwithstanding clear legislative language that FPL was required to show that funds spent on the SoBRA solar projects was "money honestly and prudently invested" and would be

"used and useful in serving the public." The Commission erroneously used an incorrect legal standard when reviewing FPL's proposed solar projects and permitted the Legislative direction to use a prudence standard to be usurped.[3] The Commission's decision must be reversed.

II.
THE COMMISSION'S FINDING THAT FPL'S SoBRA PROJECTS ARE COST EFFECTIVE IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

The 2016 Settlement Agreement prescribed the following criterion for the Commission to consider when it evaluates the cost-effectiveness of FPL's SoBRA projects:

> The issues are limited to the cost effectiveness of each project (i.e., will the project lower the projected system CPVRR as compared to each CPVRR without the solar project) and the amount of revenue requirements and

[3] FPL may contend that FIPUG should have appealed the Settlement Agreement, which provided FPL merely with the option to pursue SoBRA projects, not the obligation to do so. Given the uncertain nature of whether FPL would indeed later seek a rate increase for new solar projects, FIPUG properly waited until a real case and controversy came into being, and FPL actually filed a petition to recover rates for solar projects that FPL decided to build and to seek rate recovery. *See Marion Cty. Hosp. Dist. v. Akins,* 435 So.2d 272, 273 (Fla. 1st DCA 1983) ("It is a long-standing rule of appellate jurisprudence that the court will not undertake to resolve issues which, though of interest to the bench and bar, are not dispositive of the particular case before the court.").

> appropriate percentage in base rates needed to collect the estimated revenue requirements.

Final Order p. 8; R. 1208

To address the cost effectiveness requirement, FPL initially filed testimony based on fuel and carbon costs assumptions which suggested that ratepayers would save money in six out of nine projected scenarios; however, one of the three scenarios which projected losses for FPL's customers suggested that ratepayers could lose $127.3 million due to FPL's solar projects. These losses arise under scenarios in which natural gas prices remain low and the cost of carbon is low. *See* Final Order, p. 10. R. 1210. Thus, assumptions and evidence addressing the future costs of natural gas and the future cost of carbon, including a tax on carbon, were significant and meaningful when the Commission considered whether the solar projects would be cost effective, *i.e.*, whether FPL's solar projects would save or cost ratepayers money. *Id.*

Despite the importance of the assumptions made for future natural gas prices and the future cost of carbon, and a carbon tax, FPL **did not offer a single expert witness** in either discipline to support its critical assumptions. The lack of competent, substantial evidence to support these important assumptions is glaring. The Commission's Final Order notes that FPL's carbon cost forecast opinion is:

> …based on ICF's CO2 emission forecast dated December 2016. ICF is a consulting firm with extensive experience in forecasting the cost of air emissions and is recognized as one of the industry leaders in this field.

Final Order, at p. 10. R. 1210.

Astonishingly, nobody from ICF, the carbon cost expert, appeared as a witness at hearing. Tr. 504, 505. The report of ICF was not even entered into the record as an exhibit. Tr. 505. Thus, FIPUG had no opportunity to cross-examine the people responsible for the critical assumptions upon which the Commission based its Final Order permitting almost $1 billion of cost recovery, and no competent substantial evidence supporting these assumptions is in the record. FIPUG had absolutely no ability to test the assumptions made by persons who did not appear as witnesses at the evidentiary hearing.

Rather, FPL presented witness Enjamio, an FPL employee, who is not an expert in the forecasting of carbon taxes, the cost of carbon or the forecasting of natural gas prices. Mr. Enjamio merely parroted some of the ICF findings into the record based on a conversation with ICF and/or a perusal of their report. Tr. 473, 474.

Mr. Enjamio testified that he provided Commission staff with numbers from the ICF report to support a low cost, medium cost, and high cost of carbon. These numbers then found their way into the Commission's Final Order, with no record

basis and no ability for FIPUG to test them at hearing. Thus, the Commission's findings about the future cost and timing of carbon costs rests wholly on uncorroborated hearsay and the work and opinions of ICF about the future costs of carbon.

FPL witness Enjamio, admittedly not an expert in environmental matters such as greenhouse gases and carbon, relied on uncorroborated hearsay, the ICF expert report. The Commission made several findings about the cost effectiveness of the SoBRA projects based on this uncorroborated hearsay. Such findings are improper and must be rejected. Tr. 504. See *Forehand v. School Bd. Of Gulf County,* 600 So. 2d 1187 (Fla. 1st DCA 1992).

FIPUG asked Mr. Enjamio how the carbon cost experts, ICF, know when the Congress and the President will enact a carbon tax. [4] Tr. 472-473. FPL witness Enjamio, again relying on hearsay, said that the carbon cost would not materialize until 2028. The Commission made a finding that assumed a carbon cost commencing in 2028 to supports its cost effectiveness decision. Had the carbon tax expert appeared at hearing, FIPUG would have had the opportunity to cross examine the expert regarding the basis for the assumptions, including:

[4] It is a perilous task to predict the future actions of the United States Senate, the United States House of Representatives, and the President of the United States or the state legislature, for that matter.

- the basis for the 2028 carbon cost effective date as opposed to a later point in time;
- state versus federal carbon costs;
- FPL's ability to possibly mitigate future carbon costs given its fleet of natural gas fired power plants and lack of coal-fired power plants;
- the range of projected carbon costs used in the expert's report;
- other questions to probe the underpinnings of a key assumption that the Commission and FPL rely upon to demonstrate cost effectiveness, namely the future cost of carbon.

Section 120.57(1)(c), F.S., provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (emphasis added).

Clearly, ICF is the carbon cost and carbon tax expert from whom all information about the future cost of carbon originated. ICF did the analysis. Tr. 472. ICF did the modeling. Tr. 504-505. ICF information was provided to the Commission staff about the low, medium, and high carbon cost forecasts information upon which the Commission based its cost effectiveness determination. Tr. 474. All information about the assumed future cost of carbon came directly from ICF. Thus, the Commission's

finding that FPL's SoBRA projects are cost effective, which hinges on the projected future cost of carbon, is impermissibly tethered to uncorroborated hearsay.

The carbon cost hearsay is both uncorroborated and unsworn. Therefore, it cannot support the Commission's finding that the FPL SoBRA projects are cost effective. *See Harris v. Game and Fresh Water Fish Commission*, 495 So.2d 806, 808 (Fla. 1st DCA 1986) ("In administrative hearings, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.") *See also*, section 90.605(1), F.S., providing that a witness will declare that the testimony provided will be truthful; *Houck v. State*, 421 So. 2d 1113 (Fla. 1st DCA 1982 ("An unsworn witness is not competent to testify."). The Commission's finding that FPL's solar project is cost effective is not supported by competent substantial evidence and must be reversed.

III.
THE COMMISSION ERRED WHEN IT USED THE FUEL CLAUSE TO CONSIDER THE RECOVERY OF FPL'S SoBRA CAPITAL COSTS

The Commission erred when it used the fuel clause to consider the recovery of FPL's SoBRA capital costs. The Commission's use of the fuel clause, like the

limited criteria it used to judge FPL's SoBRA projects, is also found in the 2016 Settlement Agreement. Specifically, the Settlement Agreement provides, in pertinent part, that consideration of FPL's SoBRA projects will occur in the fuel clause:

> FPL will file a request for approval of the solar generation at the time of its final true-up filing in the Fuel and Purchased Power Cost Recovery Clause docket ("Fuel Clause").
>
> 2016 Settlement Agreement, p. 13.

For the reasons set forth in Section I, *supra*, FPL and three out of nine intervenor parties may not be revise law and Commission policy by agreement.

The fuel clause is a mechanism that allows utilities to recover unanticipated changes in fuel costs between base rate case proceedings. The fuel clause is a continuous proceeding formulated to prevent regulatory lag. *See, e.g., Citizens v. Graham*, 191 So. 3d 897, 901 (Fla. 2016). In a recent case before this Court, witnesses for the utility testified below that the utility opted to pursue recovery through the fuel clause as a matter of convenience. The Court rejected this position and said:

> We do not believe that the fuel clause is an end-all-be-all of cost recovery, but rather its history suggests its use should be limited to facilitating recovery of costs related to fuel and power purchases that are volatile, rendering them less than ideal for a base rates case. *Citizens v. Graham* 213 So. 3d 703, 716-717 (Fla. 2017) (emphasis added).

The Commission and FPL may similarly suggest that in this case, the fuel clause was used for convenience, and that in accord with the Settlement Agreement, the rate increase will technically be recovered in base rates, not the fuel clause. However, regardless, as has been noted, the use of the fuel clause is limited. The fuel clause should not serve as an omnibus cost recovery vehicle for convenience, or to avoid certain statutory rulemaking requirements as detailed, *infra.*

The use of the fuel clause (rather than a regularly-docketed proceeding) serves to inoculate the Commission (and FPL) from APA rulemaking requirements. Generally, the Commission is subject to rulemaking. *Florida Public Service Commission v. Central Corp.*, 551 So. 2d 568 (Fla. 1st DCA 1989).

The Legislature has exempted matters considered in the fuel clause from rulemaking requirements. *See*, s. 120.80(13)(a), F.S. ("Agency statements that relate to cost-recovery clauses, factors, or mechanisms implemented pursuant to chapter 366, relating to public utilities, are exempt from the provisions of s. 120.54(1)(a).") The 2016 Settlement Agreement provides that FPL may seek additional solar projects through the SoBRA mechanism for five years, through 2021. R. 123, 132. Given the multi-year nature of the SoBRA proceedings, rulemaking could very well be warranted as these likely recurring SoBRA requests

will continue for the next four or five years. For example, as the solar panels output and efficiency degrades over time, the Commission could decide to pursue via rulemaking a policy to protect ratepayers that would require a customer credit or refund if the solar panels degraded beyond a certain limit. Using the fuel clause arguably prevents the Commission from undertaking such a rulemaking proceeding and applying the rule to FPL.

Avoiding the rulemaking requirement through the use of the fuel clause substantively benefits the Commission and FPL. However, it disadvantages other parties, who are assessed for these projects through rates, and who otherwise might have the opportunity to participate in a rulemaking process. The strategic choice to use the fuel clause for consideration of the SoBRA projects is inconsistent with the historical purpose of the fuel clause and should not be judicially tolerated.

In sum, the fuel clause should be used for its intended historical purpose: to facilitate the recovery of fuel and purchased power costs that are volatile. The fuel clause should not be used as a type of rule-making exempt, omnibus cost recovery vehicle to review the capital costs of FPL's solar projects. The Commission's use of the fuel clause to consider the FPL's SoBRA costs is largely inconsistent with Commission practice and policy, and this Court's recent prior pronouncements

about the fuel clause. The Commission's use of the fuel clause to consider the recovery of solar costs should be rejected.

CONCLUSION

For the reasons and arguments set forth above, the Commission's Final Order granting FPL's SoBRA projects petition should be vacated and reversed.

Respectfully submitted this 23rd day of May 2018.

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that this Brief was typed in Times New Roman 14 font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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