IN THE SUPREME COURT OF FLORIDA

FLORIDA INDUSTRIAL POWER
USERS GROUP

Appellant,

CASE NO.: SC18-226
LT Number: 20180001-EI

v.

JULIE IMANUEL BROWN, ETC.,
ET AL.

Appellees.
_____/

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND REFERENCES

In this Brief, Appellee Florida Public Service Commission will be referred to as "the Commission." Appellant Florida Industrial Power Users Group will be referred to as "FIPUG." Appellee Florida Power & Light Company will be referred to as "FPL."

The order on review, *In re: Fuel and purchase power cost recovery clause with generating factor*, Order No. PSC-2018-0028-FOF-EI, 2018 WL 367863 (Fla. P.S.C. January 8, 2018), will be referred to as Final Order No. PSC-2018-0028-FOF-EI or the Final Order. The order approving the 2016 Settlement Agreement, *In re: Petition for Rate Increase by Florida Power & Light Co.*, Order No. PSC-16-0560-AS-EI, 2016 WL 7335779 (Fla. P.S.C. Dec. 15, 2016), *affirmed*, *Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018), will be referred to as Order Approving Settlement Agreement.

The following symbols will be used: Florida Industrial Power Users Group's Initial Brief (FIPUG Br. [Page #]); Record on Appeal (R. [Page #]); October 25-27, 2017 Hearing Transcript (T. [Page #]); Supplement to Attachment One of the Record from the October 25-27, 2017 Hearing (Supp. Tr. [Page #]).

Unless otherwise noted, all references to the Florida Statutes are to the Florida Statutes 2017.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

This case is a direct appeal filed by FIPUG of Final Order No. PSC-2018-0028-FOF-EI, by which the Commission, among other things, approved FPL's petition for cost recovery for certain solar projects (FPL's Solar Petition). (R. 1201-1304, 1305-1306)

The genesis of FPL's Solar Petition was FPL's 2016 petition for rate increase. (R.115-116) FIPUG was a party to the 2016 proceeding. (R.115-116)

The Commission approved a non-unanimous Settlement Agreement that resolved all issues in the proceeding and allowed FPL to increase its base rates. *In re: Petition for Rate Increase by Florida Power & Light Co.*, Order No. PSC-16-0560-AS-EI, 2018 WL 7335779 (Fla. P.S.C. Dec. 15, 2016)(Order Approving Settlement Agreement). (R.115-116) The Settlement Agreement included provisions allowing FPL to recover costs for solar projects if the projects met certain capacity requirements and in-service dates and were demonstrated to the Commission to be cost effective. (R.132-136) The Settlement Agreement provided that for each solar project approved by the Commission for cost recovery, FPL's base rates would be increased by the incremental annualized base revenue requirement and that each base rate adjustment would be referred to as a Solar Base Rate Adjustment or "SoBRA." (R.132-136)

Although FIPUG was not a signatory to the Settlement Agreement, FIPUG was given the opportunity to participate in the evidentiary hearing on the Settlement Agreement. (R. 1202-1203) FIPUG chose to take no position on the Settlement Agreement and did not present any testimony or other evidence opposing the Settlement Agreement. (R. 1115, 1165, 1203-1205)

Another party who was not a signatory to the Settlement Agreement, Sierra Club, opposed provisions of the Settlement Agreement unrelated to the matters FIPUG has raised in this appeal and appealed the Order Approving Settlement Agreement to this Court. This Court affirmed the Order Approving Settlement Agreement, holding that the Commission applied the appropriate standard of review in its consideration of the Settlement Agreement and that the Commission's decision to approve the Settlement Agreement was supported by competent, substantial evidence. *Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018).

In accordance with the Order Approving Settlement Agreement, FPL filed its Solar Petition, which requested an increase in base rates for costs for four solar energy centers expected to be placed in service by 2017 and for four solar energy centers expected to be in service by 2018 (SoBRA projects). (R. 450-452, 467) FPL's Solar Petition stated that FPL's SoBRA projects were cost effective, would benefit the environment, and that the SoBRA projects costs were well below the

cost cap provided in the Settlement Agreement. (R. 470-473, 1118, 1143, 1169, 1175-1176)

The Commission held a hearing to consider evidence on FPL's SoBRA projects. In accordance with the Order Approving Settlement Agreement, the Commission considered the following issues: (1) the cost effectiveness of the solar generation, (2) the requested amount of revenue requirements; and (3) the appropriate percentage increase in base rates needed to collect the estimated revenue requirements. (R. 452) At the hearing, the Commission considered evidence on the cost effectiveness of the SoBRA projects and on whether the SoBRA projects comported with the cost requirements and cost recovery mechanism that was set forth by the Settlement Agreement. (R. 133-134, 511, 1202, 1208-1210) Upon consideration of the evidence admitted at hearing, the Commission issued Final Order No. PSC-2018-0028-FOF-EI, finding that the SoBRA projects comported with the Order Approving Settlement Agreement and that the projects were cost effective. (R. 1201, 1205, 1212)

FIPUG appealed the Final Order No. PSC-2018-0028-FOF-EI on February 6, 2018. (R. 1305) FIPUG raises three issues on appeal: (1) whether the Commission used the proper standard in its review of FPL's SoBRA projects; (2) whether the Commission's decision is supported by competent, substantial evidence; and (3) whether the Commission erred when it considered FPL's SoBRA

projects in the Fuel Clause docket. This Court has mandatory jurisdiction pursuant to Art. V, § 3(b)(2), Fla. Const., and §§ 350.128(1) and 366.10, Fla. Stat., because the Final Order relates to the rates of a public utility providing electric service.

II. STATEMENT OF THE FACTS

FPL's 2016 Petition for Base Rate Increase

In 2016, FPL's filed a petition for an increase in base rates. (R. 115) Nine parties were granted intervention to participate in the docket, including FIPUG. (R.115) The Commission held a hearing on FPL's 2016 petition. (R. 116) At that time, 35 witnesses testified and 805 exhibits were admitted in evidence. (R. 116) All parties to the docket filed briefs and post-hearing statements. (R.116)

2016 Settlement Agreement

Prior to the Commission rendering its decision on FPL's petition for increase in base rates, FPL and three of the nine intervening parties (signatories) filed a Joint Motion for Approval of Settlement Agreement (Settlement Agreement), which they asserted resolved all issues in the case. Three of the parties, including the Sierra Club, opposed the Settlement Agreement. (R. 115-118) FIPUG took no position on the Settlement Agreement (R. 115-118)

The Settlement Agreement resolved the 167 issues raised by FPL's 2016 rate increase petition. (R. 115-363) In addition to resolving all the underlying issues in the pending rate case, Section 10 of the Settlement Agreement specified

the terms and conditions under which FPL would be permitted to seek cost recovery for certain SoBRA projects. (R. 132-136) Section 10a authorized FPL to construct SoBRA projects producing 300 MW of solar generation per year to go into service in 2017-2018, and FPL could not seek cost recovery for a SoBRA project until the project went in service. (R. 132) This provision of the Settlement Agreement also provided that the costs of any SoBRA project constructed by FPL must be reasonable, and the total costs of each project could not exceed $1,750 per kilowatt alternating current "kWac." (R. 132)

Section 10a of the Settlement Agreement also stipulated that SoBRA project costs would be recovered in base rates. (R. 132) It provided that for each SoBRA project approved by the Commission for cost recovery, FPL's base rates would be increased by the incremental annualized base revenue requirement and that each base rate adjustment would be referred to as a Solar Base Rate Adjustment or "SoBRA." (R. 132-133) Section 10c of the Settlement Agreement specified that SoBRA projects not subject to the Florida Electrical Power Plant Sitting Act, i.e., projects producing less than 75MW, must be approved by the Commission. (R. 133)

The Settlement Agreement set forth the procedure the Commission would use to consider the SoBRA projects. It required that approval would be conditioned upon FPL filing a request for approval of the solar generation projects at the time

of its final true-up filing in the Fuel and Purchased Power Cost Recovery Clause (Fuel Clause) docket. (R. 133) The issue would be resolved at the Commission's regularly scheduled Fuel Clause docket hearing, unless the Commission on its own initiative or upon good cause shown by an intervenor party demonstrated that FPL's request for approval the SoBRA projects should be held in a separate hearing. (R. 133)

The Settlement Agreement also specified that the SoBRA projects would be evaluated on the cost effectiveness of the projects (i.e., FPL would need to demonstrate that its revenue requirement over time would be lower than if the SoBRA project was not undertaken). (R 133) FPL was required to provide the Commission with calculations to support the requested revenue requirement and the associated percentage increase in base rates. (R 133-134)

Section10c of the Settlement Agreement further stipulated that, if approved, FPL would calculate and submit to the Commission the actual costs of the solar projects using the Capacity Cost Recovery Clause or "CCR," so the SoBRA project's actual and projected costs could be trued-up. (R. 133-134, 843) The Settlement Agreement stated that FPL could not implement a base rate adjustment until the project was approved by the Commission and the project was in service. (R. 133)

Section 10e of the Settlement Agreement stipulated that each solar base rate adjustment would be reflected on FPL's customer bills by increasing base rates and non-clause recoverable credits and commercial/industrial demand reduction rider credits by an equal percentage contemporaneously. (R 134) Sections 10f and 10g stipulated each solar base rate adjustment would be calculated and submitted to the Commission for approval. (R. 135) Section 10h stipulated that FPL was prohibited from recovering through the SoBRA mechanism any costs greater than $1,750 per kWac under any circumstances. (R. 136)

Hearing on Settlement Agreement

The Commission held a hearing on October 27, 2016, to take testimony and evidence on the Settlement Agreement. (R. 116) At the Settlement Agreement hearing, the Commission heard testimony and six more exhibits were admitted into evidence. (R. 116) FIPUG took no position on the Settlement Agreement. It did not offer any testimony in opposition to the Settlement Agreement, it did not cross examine any of the witnesses at the hearing, and it did not file a post-hearing brief. (R. 1115, 1138, 1165, 1203)

The Commission issued Order No. PSC-16-0560-AS-EI approving the Settlement Agreement. (R. 115-363) Only Sierra Club appealed Order No. PSC-16-0560-AS-EI. (R. 116-118) This Court affirmed Order No. PSC-16-0560-AS-EI in *Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018).

FPL's 2017 Solar Petition

In accordance with the Settlement Agreement, FPL petitioned the Commission for approval of recovery of costs for a total of eight solar centers, each generating 74.5 MWac each. (R. 450-457, 1206-1207) Altogether the eight centers would generate 596 MW of solar energy. (R. 452, 1169) As contemplated by the Settlement Agreement, FPL proposed to place the solar centers in commercial operation in 2017 and 2018, each center generating enough energy to serve approximately 15,000 homes. (R. 452) The Solar Petition stated that pursuant to the Order Approving Settlement Agreement, the issues for determination for the SoBRA projects were limited to: (1) cost effectiveness of the solar generation, (2) the amount of revenue requirements; and (3) the appropriate percentage increase in base rates needed to collect the estimated revenue requirements. (R. 452)

According to the Solar Petition, FPL selected the most cost effective designs, equipment, and technology to lower the costs of the solar energy centers. (R. 453-456, 1169) The Solar Petition also stated that based on a reduction in tax costs, efficient design, reduced interconnection costs, and reduced property taxes, the estimated cumulative present value revenue requirement (CPVRR) would

produce savings of up to $39 million in 2017.[1] (R. 455, 1169) FPL stated that the Settlement Agreement provided that 2107 and 2018 projects are cost effective because they lowered the system CPVRR in 2017 and 2018. (R. 453-456, 1169, 1188, 1206) FPL asked the Commission to find that its proposed SoBRA projects satisfied the cost requirements established by the Settlement Agreement and that the projects were cost effective. (R. 450)

Order Establishing Procedure for the Solar Petition Hearing

The Commission issued Order No. PSC-2017-0053-PCO-EI (Order Establishing Procedure), which set forth the order of witnesses and other procedures for the hearing on the Solar Petition. (R. 380, 996-998, 1037-1038) The Order Establishing Procedure required that a party must identify each witness the party wishes to voir dire and state with specificity the portions of the testimony and line number and/or exhibits to which the party objects. (R. 380, 996-998, 1037-1038) It further provided that if the party failed to object to the specific portions of that witness's testimony or exhibits in the party's prehearing statement, the party was prohibited from conducting voir dire at the hearing absent a showing of good cause. (R. 380, 996-998, 1037-1038)

[1] Due to an update in tax law in August 2017 that provided a further reduction in property tax costs for the solar center cites, FPL provided an updated economic analysis that stated an estimated CPVRR savings of up to $106 million. (R. 1169, 1174; T. 437-438, 514)

The Commission held a prehearing conference on the Solar Petition in accordance with the procedure set forth by Order Establishing Procedure. FIPUG lodged a general objection to all FPL witnesses being considered experts. (R. 996-997) The Prehearing Officer ruled that because FIPUG did not identify the witnesses that it wished to voir dire or the portions of witness testimony that were objectionable in its prehearing statement in accordance with the Order Establishing Procedure, FIPUG waived its right to voir dire the witnesses and challenge FPL's witnesses' expertise at the hearing. (R. 996-998)

Hearing on FPL's Solar Petition

The Commission held an evidentiary hearing on the SoBRA projects, taking evidence on whether the SoBRA projects comported with the requirements of the Settlement Agreement. In accordance with the Settlement Agreement, the SoBRA projects were taken up as a separate issue in the Fuel Clause docket. (R. 133; T. 1) FPL witnesses Brannen, Enjamio, Fuentes, and Cohen provided testimony and exhibits in support of FPL's SoBRA projects.

To show that the SoBRA projects costs were reasonable and the projects were cost effective as required by the Order Approving Settlement Agreement, FPL witnesses Brannen and Enjamio testified that the costs of the proposed SoBRA projects would fall well below the $1750 per KWac cap allowed by the Settlement Agreement. (R. 452, 462, 1169; T. 522, 533) Additional testimony was

presented on fuel and construction costs and customer savings to evidence the SoBRA projects' cost effectiveness. (T. 182, 184, 434, 463-464, 512-513, 524, 527, 530-532, 538-539, 545, 564, 567-569, 573-574, 460-461; R. 843)

Witness Brannen provided evidence as to the reasonableness of the costs of the SoBRA projects (R. 462, 469, 473; T. 522, 533) Witness Brannen described the solar centers, their technology, engineering design, construction and operation characteristics, and testified as to how these factors led to the overall lower costs of the solar centers. (R. 461-462, 1178) In addition, witness Brannen provided testimony as to the design efficiencies and economic benefits of the solar energy centers. (R. 467, 470, 472; T. 531-533)

FPL witness Enjamio testified that the SoBRA projects met the capacity requirements set forth in the Settlement Agreement, which allowed FPL to construct up to 300 MW of solar capacity every year for the next four years. (R. 134, 498-499) Witness Enjamio also testified that because the SoBRA projects costs were below the $1,750 kWac threshold, the SoBRA projects satisfied the cost effectiveness criteria established by the Settlement Agreement. (T. 499, 503)

In further support of the cost effectiveness conclusion, witness Enjamio provided an economic analysis that showed that the solar generation projects would be cost effective. (R. 498) Witness Enjamio testified that his economic analysis concluded that FPL customers would receive a benefit up to $39 million in

CPVRR savings with the proposed solar generation. (R. 502-503) Witness Enjamio later filed revised testimony to provide an updated economic analysis up to $106 million in CPVRR savings with the proposed solar generation. (R. 1174; T. 437-438, 514) Witness Enjamio explained that emission costs from an ICF report were one of the major assumptions in the cost effectiveness analyses. (R. 500-503, 1173; T. 471-473, 505) 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. (T. 471-473; R. 500)

Witness Enjamio further testified that the SoBRA projects would meet the cost effectiveness standard set forth by the solar stipulation in the Settlement Agreement and that the projects make economic sense to FPL customers. (T. 458, T. 460-461) When asked about the cost effectiveness of the SoBRA projects as compared to other types of energy projects, such as combined cycle generation projects, witness Enjamio explained it was not a practical comparison because solar could be built much more quickly than other systems, and he reiterated how the SoBRA project made the most economic sense for customers. (T. 461-462)

In addition, witness Enjamio provided testimony that the proposed solar centers would produce environmental benefits such as reduction of fossil fuels, reduction of air emissions, and reduction of FPL's reliance on natural gas. (R.

503) Witness Enjamio also testified that the SoBRA projects meet a reliability need. (T. 458)

FPL witness Fuentes explained how the revenue requirements and the adjustment amounts for the SoBRA projects would comport with the Settlement Agreement. (R. 904-905, 1184; T. 175-178) Witness Fuentes testified on the calculations based on capital expenditures, depreciation rates, operating expenses, incremental costs of capital, and accumulated deferred income taxes. (R. 907-908)

Witness Cohen explained how the incremental cost recovery factors would be applied to base rate charges in order for FPL to collect the revenue necessary to recover the costs associated with building and operating the SoBRA projects (R. 840, 1179, 1213-1215; T. 182-184) Witness Cohen testified that the Settlement Agreement authorized FPL to recover the revenue requirements based on the first 12 months of operations of the SoBRA projects and that the methodology used to determine those base rate adjustments was similar to base rate methodologies previously approved by the Commission in other Commission dockets. (R. 905-906, T. 182-184) Witness Cohen also testified that, pursuant to the Settlement Agreement, once the FPL projects go into service, FPL would submit its actual costs to the Commission using the Capacity Cost Recovery Clause or "CCR," so that the Commission could verify or true-up the SoBRA projects actual and projected costs. (R. 132-134, 843; T. 182-184) No witnesses rebutted witnesses

Fuentes and Cohen's testimony, and FIPUG waived cross-examination of both witnesses. (R. 1114, 1184, 1186, 1188, 1205, 1214-1215) Although FIPUG cross-examined witnesses Brannen and Enjamio, no witness testified to rebut their testimony. (R. 1114, 1184, 1186, 1188, 1205, 1214-1215)

Final Order Approving SoBRA Projects

After considering the evidence presented at the hearing on FPL's SoBRA projects, the Commission granted the petition by Final Order PSC-2018-0028-FOF-EI. (R. 1201) In the Final Order, the Commission made specific findings that the SoBRA projects comported with the Order Approving Settlement Agreement.

The Commission found that, in accordance with the Settlement Agreement, FPL requested cost recovery for the SoBRA projects for the time periods set forth in the Settlement Agreement. (R.1205-208) Additionally, the Commission found that FPL's SoBRA projects were projected to produce savings under multiple scenarios and that the construction costs would be kept under the $1,750 per kWac cost cap as set forth by the Settlement Agreement. (R. 1212) The Commission also found that recovery of the SoBRA projects' costs through bases rates was appropriate and in accordance with the Settlement Agreement (R.1205)

The Commission found in the Final Order that based on the evidence, the SoBRA projects were cost effective, as set forth by the Settlement Agreement. (R. 1205, 1207-1208) The Commission considered FIPUG's questions on the carbon

emission forecasts submitted by witness Enjamio. (R. 1206-1215) The Commission found that FPL performed multiple carbon emission and natural gas price sensitivities analyses for which the results showed that the 2017 and 2018 SoBRA projects were cost effective in seven out of nine fuel and carbon sensitivity scenarios, including scenarios that assumed zero carbon costs. (R. 1206-1215) The Commission found that no intervenor offered testimony rebutting FPL's emission cost forecasts or provided any alterative emission cost forecast. (R. 1210) Based on its examination of the evidence presented, the Commission concluded that FPL's SoBRA projects would produce savings in multiple scenarios and that FPL's SoBRA projects met the cost cap requirement allowed by the Settlement Agreement and were, therefore, cost effective. (R. 1266)

The Final Order also cited to the testimony, exhibits, and calculations on the revenue requirement and SoBRA factor that supported the Solar Petition, which the Commission found to be reasonable. (R. 1210-1215) In its Final Order, the Commission noted that FIPUG did not sponsor a witness and waived cross-examination of several of FPL's witnesses who testified on the revenue requirements for the SoBRA projects. (R. 1114, 1184, 1186, 1188, 1205, 1212, 1214-1215)

In response to FIPUG's argument that the Commission should not have considered the SoBRA projects in its Fuel Clause Proceeding, the Commission

found that the SoBRA projects were taken up as a separate issue in the Fuel Clause docket for purely administrative purposes; the SoBRA project costs were appropriately recovered through an increase in base rates; and FIPUG's insistence that FPL file its petition for rate base cost recovery for the SoBRA projects in a separate docket was unnecessary. (R. 1205) The Commission further found that FIPUG did not allege that it did not have adequate notice of the SoBRA projects; FIPUG failed to show that it had been harmed in any way by including the SoBRA projects issues in the Fuel Clause docket; that FPL filed direct testimony of four witnesses on these points; that Commission staff conducted extensive discovery on this matter; that FIPUG cross examined FPL witnesses Enjamio and Brannen on this topic at hearing; and that FIPUG filed a post-hearing brief in the proceeding. (R. 1205) The Commission concluded that considering the SoBRA projects as a separate issue in the Fuel Clause docket for administrative purposes did not change that fact that SoBRA projects costs would be recovered in base rates only, not Fuel Clause factors, nor did the consideration of the SoBRA projects at that time deprive FIPUG of any due process rights. (R. 1205) For these reasons, the Commission found that it had the authority to approve the recovery of FPL's 2017 and 2018 SoBRA projects through base rates in the Fuel Clause docket. (R. 1205)

SUMMARY OF ARGUMENT

The Final Order should be affirmed because the Commission used the proper legal standard in its review of the SoBRA projects. The Settlement Agreement, which the Commission approved by the Order Approving Settlement Agreement, clearly stated that the Commission's review of the SoBRA projects would be limited to the cost effectiveness of each project and the amount of revenue requirements and appropriate percentage in based rates needed to collect the estimated revenue requirements. The Final Order shows that this is what the Commission reviewed.

FIPUG's appeal is an inappropriate attempt to relitigate the Commission's Order Approving Settlement, for which it had the opportunity to litigate and appeal, but instead chose to take no position on the Settlement Agreement. Its argument that the Commission is required to conduct an individual prudence review for each SoBRA project is contrary to this Court's recent decision in *Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018), wherein the Court definitively held that the proper standard for the review of non-unanimous settlement agreements is the public interest standard.

FIPUG's request that the Commission in essence vacate its Order Approving Settlement Agreement and conduct a prudence review of the SoBRA projects

would violate the doctrine of administrative finality. The record is devoid of any evidence that would compel the Commission to vacate its order.

The Commission's Final Order is supported by competent, substantial evidence. FIPUG waived its right to challenge witness Enjamio's expertise. Witness Enjamio testified at the hearing, so his testimony was not hearsay. As an expert, witness Enjamio was entitled to rely on the ICF report. Even if the ICF report were hearsay, it supplements and explains other record evidence supporting the Commission's findings on the cost effectiveness of the SoBRA projects. The record shows that the SoBRA projects comport with the all of the terms and conditions of the Settlement Agreement. No witnesses were offered to counter the FPL witness testimony supporting the SoBRA projects.

The SoBRA projects were approved for cost recovery through base rates, and the Commission did not abuse its discretion when it considered the SoBRA projects in the Fuel Clause docket for administrative convenience purposes. In accordance with the procedure approved by the Commission in the Order Approving Settlement Agreement, the Commission considered FIPUG's arguments as to why it believed FPL's SoBRA projects should be heard in a separate hearing. The record shows that FIPUG failed to show good cause why the SoBRA projects should have been considered in a separate hearing. Moreover, the

procedure adequately protected FIPUG's due process rights. The Final Order should be affirmed.

ARGUMENT

I. THE FINAL ORDER SHOULD BE AFFIRMED BECAUSE THE COMMISSION USED THE PROPER LEGAL STANDARD IN ITS REVIEW OF THE SoBRA PROJECTS.

Standard of Review

In Point I of its Brief, FIPUG calls into question the standard the Commission used to review FPL's SoBRA projects. (FIPUG Br. 10-20) The proper standard of review is whether the fairness of the proceedings or the correctness of the Commission's action may have been impaired by a material error in procedure or a failure to follow prescribed procedure. *See* § 120.68(7)(c), Fla. Stat. Nevertheless, even if the de novo standard were applied as FIPUG alleges, the Commission's decision should be affirmed because the Commission used the correct legal standard from the Order Approving Settlement Agreement, which has been reviewed and affirmed by this Court. *See Sierra Club*, 243 So. 3d at 913, 916.

A. FIPUG's appeal is an inappropriate attempt to relitigate the Commission's Order Approving Settlement Agreement, which has been reviewed and affirmed by this Court.

The Settlement Agreement approved the cost requirements and cost effectiveness criteria for FPL's SoBRA projects that FIPUG now challenges on

appeal. (R. 132-136) The Commission held a hearing on the Settlement Agreement to give all parties and non-signatories an opportunity to review and challenge the agreement's provisions. (R. 1115, 1138, 1165, 1203) FIPUG participated in the hearing but took no position on the Settlement Agreement. (R. 1115, 1138, 1165, 1203) FIPUG should have raised its issues with the Settlement Agreement's provisions on the cost effectiveness criteria and the base rate recovery mechanism for the SoBRA projects at the hearing. Because it failed to do so, FIPUG effectively waived its right to challenge these terms of the Settlement Agreement.

Another party to the proceeding, Sierra Club, participated in the hearing, opposed certain provisions of the Settlement Agreement (that were unrelated to the solar provisions), and appealed the final order approving the Settlement Agreement. This Court affirmed the Settlement Agreement order in *Sierra Club*, 243 So. 3d at 905, 916.

The Settlement Agreement included a provision that allowed FPL to construct up to 300 MW per calendar year of solar capacity during 2017-2021 and to recover the costs through base rates when the solar facilities are placed into service. (R. 132, 1206-1207) FIPUG attempts to use the fact that the SoBRA projects were an option that FPL could choose to pursue in the future as an excuse as to why it was not required to object to the terms of the Settlement Agreement and appeal the Commission's Order Approving Settlement Agreement. (FIPUG Br.

20) This argument fails because the Settlement Agreement comprehensively set forth the terms of the Commission's future consideration of the SoBRA projects. (R. 133-135)The Settlement Agreement was clear that if FPL chose that option and FPL's SoBRA projects met certain parameters set forth in the Settlement Agreement, FPL would be entitled to receive cost recovery for the SoBRA projects. (R. 133-135)

FIPUG's quote from the Settlement Agreement on page 20 of its Brief illustrates that FIPUG was clearly on notice that the Commission's future consideration of FPL's SoBRA projects would be limited to the cost effectiveness of each project and the amount of revenue requirements and appropriate percentage increase in base rates needed to collect the estimated revenue requirements. (R. 133-135, 452) FIPUG had the opportunity to object to this provision during the Commission's consideration of the Settlement Agreement. FIPUG chose to take no position on the Settlement Agreement and chose not to appeal the Commission's Order Approving Settlement Agreement.

The law is clear that failure to object at the time the tribunal is taking action is a waiver of the right to object. *See Citizens of State of Fla. v. Wilson*, 571 So. 2d 1300, 1303 (Fla. 1990)(finding that Public Counsel waived its right to complain about the Commission order approving Tampa Electric Company's (TECO) petition for conservation cost recovery because Public Counsel was present at and

participated in both the prehearing conference and the hearing where TECO sought reimbursement from customers for the conservation costs, and Public Counsel made no objection to the amount of costs). Moreover, the time for appealing the Commission's Order Approving the Settlement Agreement has long-since passed. Thus, FIPUG should be barred from challenging the Order Approving Settlement Agreement in this appeal.

FIPUG seems to call into question the validity of the Commission's Order Approving Settlement Agreement due to the fact that FIPUG was not a signatory to the Settlement Agreement. (FIPUG Br. 14-16) This Court has addressed the Commission's authority to approve non-unanimous settlement agreements, and it has consistently held that the Commission has the authority to do so, as long as due process rights are protected and the Commission's finding that the settlement agreement is in the public interest is supported by competent, substantial evidence. *See Citizens of State of Florida v. Florida Public Service Commission*, 146 So. 3d 1143 (Fla. 2014); and *Sierra Club*, 243 So.3d at 903.

It would be unfair to parties seeking resolution of cases through a settlement agreement to permit one party, FIPUG in this case, to remain silent in a hearing on a settlement agreement and then allow that party to oppose a settlement agreement provision in the future. Allowing such gamesmanship would undermine the Commission's ability to approve settlement agreements that are in the public

interest and would discourage parties from trying to reach a settlement agreement that may be in the public interest. *See Austin Tupler Trucking, Inc. v. Hawkins*, 377 So. 2d 679, 681 (Fla. 1979) (stating that "[t]o allow the Commission to revisit an issue disposed of long ago would contravene the sound principles of finality" and that allowing the parties to relitigate indefinitely would present "an administrative nightmare").

B. This Court determined in *Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018), that the Commission is not required to conduct an individual prudence review for each project approved by the Commission in the Order Approving Settlement Agreement.

FIPUG's argument that the Commission should have conducted a prudence review and analysis when considering FPL's SoBRA projects is contrary to the Court's recent decision in *Sierra Club*, 243 So. 3d at 913, 916, and shows that FIPUG is attempting to relitigate the Commission's Order Approving Settlement Agreement. In 2016, the Commission found that the terms of the Settlement Agreement were in the public interest, and this determination included the stipulation that FPL would construct and receive cost recovery in base rates for a certain number of SoBRA projects. Once certain specific parameters were met as to the size and in service date of the projects, FPL's ability to receive cost recovery depended on the utility's demonstration that the SoBRA projects were cost effective and the amount of revenue requirements and percentage increase of base rates needed to collect the estimated revenue requirements were appropriate.

(R. 452, 1208) Accordingly, FPL's demonstration that the SoBRA projects were cost effective and FPL's requested amount of revenue requirements and percentage increase of base rates needed for the projects were the issues considered during the SoBRA hearing.

Whether the Commission used the proper standard when it approved the Settlement Agreement was definitively determined by this Court in *Sierra Club*, 243 So. 3d at 913, 916. Sierra Club argued in its appeal of the Commission's Order Approving Settlement Agreement that the Commission was required to independently apply the prudence standard to projects contained in the Settlement Agreement. *Id.* at 907. This Court rejected Sierra Club's argument and held that the public interest standard is the proper standard and that the Commission did not err when approving the Settlement Agreement. *Id.* at 913, 916.

The Settlement Agreement included a provision that allowed FPL to construct up to 300 MW per calendar year of solar capacity during 2017-2021 and to recover the costs through base rates when the solar facilities are placed into service. (R. 132, 1206-1207) If the subject of the SoBRA hearing was whether FPL was prudent to construct the SoBRA projects at all or whether there was still a need for the projects, as FIPUG is suggesting (FIPUG Br. 18), it would have required the Commission to vacate its Order Approving Settlement Agreement. Relitigating the provision of the Settlement Agreement that allowed FPL to

construct future SoBRA projects would be contrary to the doctrine of administrative finality, which requires agencies, such as the Commission, to abide by their final decisions. *See Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335, 338 (Fla. 1966) (stating that the doctrine of administrative finality "assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of any agency as being final and dispositive of the rights and issues involved therein") *See also Austin Tupler Trucking*, 377 So. 2d at 681(quashing and remanding Commission decision allowing relitigation of case where the record showed that the party had full procedural and substantive rights which enabled him to litigate fully in the prior case).

Although this Court has recognized exceptions to the doctrine of administrative finality when there is a significant change of circumstances or a demonstrated public interest, *see Florida Power & Light Company v. Beard,* 626 So. 2d 660, 662 (Fla. 1993), *Reedy Creek Utilities Company v. Florida Public Service Commission,* 418 So. 2d 249, 253 (Fla. 1982), FIPUG presented no evidence, and the record is devoid of any evidence, of any significant change of circumstances or demonstrated public interest on which the Commission could have even considered vacating its order. Although FIPUG claims to have elicited factual testimony that the projects were not needed when FPL's 20 percent margin reserve is applied (FIPUG Br. 18-19), FIPUG offered no witnesses to testify on

this, and FPL presented evidence that the SoBRA projects would contribute towards its capacity needs. (T. 455-456, 458)

II. THE COMMISSION'S FINAL ORDER IS SUPPORTED BY COMPETENT, SUBSTANTIAL RECORD EVIDENCE.

Standard of Review

In Point II of its Brief, FIPUG asserts that the Final Order is not supported by competent, substantial evidence. (FIPUG Br. 20-25) The standard of review for this point on appeal is as set forth in *Citizens*, 146 So. 3d at 1149, in which this Court held "Commission orders come to this Court clothed with the presumption that they are reasonable and just" and that a party challenging a Commission order on appeal has the burden of showing that the Commission's findings of fact are not supported by competent, substantial evidence." *Id.* In reviewing a Commission order, the Court must not substitute its judgment for that of the Commission as to the weight of the evidence on disputed findings of fact. *See* §120.68(10), Fla. Stat.

Argument in Response

FIPUG argues that the Final Order is not supported by competent, substantial evidence because there was no expert witness to support the carbon cost assumptions in the ICF report and that the ICF report was uncorroborated and unsworn hearsay. (FIPUG Br. 20-25) As illustrated below, FIPUG's arguments are without merit.

A. FIPUG waived its right to challenge witness Enjamio's expertise.

FIPUG calls into question FPL witness Enjamio's expertise. (FIPUG Br. 22-25). The Commission's Prehearing Officer ruled that FIPUG waived its right to challenge the FPL witnesses' expertise through voir dire at the hearing because FIPUG failed to comply with the Order Establishing Procedure in the proceeding below. (R. 380, 996-998, 1037-1038) *See In re: Application for amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation,* Order No. PSC-01-1919-PCO-WU, 2001 WL 37112963 (Fla. P.S.C. September 24, 2001) (wherein the Commission explained the rationale for its procedure for challenging a witness's expertise in Commission proceedings, "Due to the nature of the Commission's duties and the specialized and unique issues presented in Commission cases, most persons testifying at formal hearing are experts since they have acquired specialized training, education or extensive experience in the area in which they work. In Commission practice, a witness' professional and educational qualifications are set forth in his or her prefiled testimony and are accepted unless that witness' expertise is challenged."). Witness Enjamio testified as an expert before the Commission. (T. 449) As FIPUG waived its right to challenge witness Enjamio's expertise before the Commission because it failed to meet the prehearing requirements, the Court should reject any attempt by FIPUG to challenge his expertise on appeal.

Nonetheless, the record clearly shows that witness Enjamio possessed specialized knowledge, acquired through his experience, training, and employment at FPL, that qualified him to testify on the cost effectiveness of the SoBRA projects. (R. 497-498; Supp. Tr. 424-425) *See Sihle Insurance Group, Inc. v. Right Way Hauling, Inc.*, 845 So. 2d 998 (Fla. 5th DCA 2003)("A witness may testify as an expert if he is qualified to do so by reason of knowledge obtained in his occupation or business."). The record shows that he graduated with a Bachelors of Science degree in electrical engineering from University of Florida almost 40 years ago. (R. 497; Supp. Tr. 424-425) For over three decades, witness Enjamio worked at FPL in various positions until becoming the manager of resource planning in 2014. (R. 497; Supp. Tr. 424-425) No other witnesses were presented at the hearing that countered witness Enjamio's expertise.

B. Witness Enjamio's testimony was not hearsay.

FIPUG argues the Commission improperly relied on witness Enjamio's testimony, claiming his testimony on the ICF report in his economic analysis is uncorroborated hearsay. (FIPUG Br. 22-25) This argument is baseless.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. *Cephas v. State, Dep't of Health & Rehab. Servs.*, 719 So. 2d 7, 8 (Fla. 2d DCA 1998), §90.801, Fla. Stat. Witness Enjamio testified at the hearing. FIPUG had the opportunity, and did, cross examine witness Enjamio at the

hearing. Thus, witness Enjamio's testimony was not hearsay. *Cephas*, 719 So. 2d at 8, § 90.801, Fla. Stat.

Even if for the sake of argument the ICF report was hearsay as FIPUG alleges, the Commission did not err because witness Enjamio's testimony on the ICF report is admissible over objection in a civil action. § 120.57(1)(c), Fla. Stat. (stating that hearsay evidence is sufficient in itself to support a finding if it would be admissible over objection in a civil action). Civil actions are governed by the Florida Evidence Code, Chapter 90, Fla. Stat. Section 90.704, Fla. Stat., addresses the basis of expert opinion testimony in civil actions and states that "[i]f the facts or data are of the type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence." *See also Vega v. State Farm Mutual Automobile*, 45 So. 3d 43, 45 (Fla. 5th DCA 2010)(stating that expert witnesses may properly rely upon hearsay in arriving at an opinion so long as the hearsay is of the type reasonably relied upon by experts in the field). In response to FIPUG's questions about the ICF report during cross-examination at the evidentiary hearing, witness Enjamio testified:

> All projections are based on the judgement and analysis of experts. ICF is the—recognized as an expert in the filed. They have the best—best tools. They do the analysis for the [Environmental Protection Agency] EPA, been used in many – as I said, many proceedings here, since at least 2009. So they're recognized as experts.

(T. 473) There was no testimony that countered witness Enjamio's testimony in this regard. Witness Enjamio was allowed to rely on the ICF report in the formulation of his expert opinion because he is an expert, and his testimony in regard to the report was sufficient to support the Commission's finding because it was admissible over objection in civil actions. *See* §120.57(1)(c), Fla. Stat.; *Vega*, 45 So. 3d at 45.

Nonetheless, the ICF report was not the sole basis the Commission used in its factual finding on the cost effectiveness of the SoBRA projects, as FIPUG alleges. (FIPUG Br. 20-25) FIPUG would have this Court believe that the issue the Commission was determining was the future cost of carbon. (FIPUG Br. 20-25) However, the issue before the Commission was the cost effectiveness of the SoBRA projects, not the carbon assumptions or carbon calculations. The ICF report supplements and explains the Commission's findings that the projects were cost effective. §120.57(1)(c), Fla. Stat. (stating that hearsay may be used for the purpose of supplementing and explaining other evidence).

The ICF report was just one piece of witness Enjamio's economic analysis and supplemented and explained his overall testimony about the projects' cost effectiveness, customer savings, and non-economic benefits. (R. 498, 500-503, 1173) Section 120.57(c), Fla. Stat., allows the Commission to rely on hearsay evidence for the purpose of supplementing or explaining other evidence. *See Fla.*

Min. & Materials Corp. v. Fla. Unemployment Appeals Comm'n, 530 So. 2d 426 (Fla.1st DCA1988) (while hearsay evidence is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions, hearsay evidence may be used for the purpose of supplementing or explaining other evidence). So, even if for the sake of argument witness Enjamio's testimony on the ICF report was hearsay, the hearsay exception in Section 120.57(1)(c), Fla. Stat., would apply.

C. The SoBRA projects comport with the terms of the Settlement Agreement.

Besides witness Enjamio's reliance on the ICF report in his testimony, FIPUG does not call into question any other evidence from the hearing. FIPUG does not allege that the SoBRA projects failed to comport with the terms of the Settlement Agreement, nor could FIPUG do so because the record shows that the SoBRA projects satisfied all of the requirements of the Settlement Agreement and were cost effective. (R. 452, 1169, 467, 470, 472-473, 500-503, 524, 527, 530-532, 538-539, 545, 564, 567-569, 573-574, 843, 904-905, 907-908, 840, 1173, 1179, 1184, 1213-1215; T.175-178, 182-184, 461-462, 469)

The testimony of multiple FPL witnesses supports the Commission's Final Order approving the SoBRA projects. (R. 452, 1169, 467, 470, 472-473, 500-503, 524, 527, 530-532, 538-539, 545, 564, 567-569, 573-574, 843, 904-905, 907-908, 840, 1173, 1179, 1184, 1213-1215; T. 182, 184, 461-462, 469) The record shows

the SoBRA projects satisfied the cost requirements and cost effective criteria required by the Order Approving Settlement Agreement. (T. 182; R. 633, 644, 680, 841, 843, 904-905, 1120, 1123, 1129-1131, 1139, 1180, 1205, 1213, 1215; T. 539, 564) There were no witnesses presented that countered any of the FPL witnesses' testimony.

A closer look at FIPUG's arguments shows that FIPUG is asking this Court to reweigh the evidence. This Court should decline FIPUG's invitation to do so. It is the Commission's job as fact finder to weigh the evidence. §120.68(10), Fla. Stat.

III. THE SoBRA PROJECTS WERE APPROVED FOR COST RECOVERY THROUGH BASE RATES, AND THE COMMISSION DID NOT ABUSE ITS DISCRETION WHEN IT CONSIDERED FPL'S SOLAR PETITION IN THE FUEL CLAUSE DOCKET.

Standard of Review

In Point III of its Brief, FIPUG claims the Commission erred because it approved cost recovery for the SoBRA projects in the Fuel Clause. (FIPUG Br. 25-29) The standard of review for this point on appeal is whether the Commission abused its discretion when it considered FPL's SoBRA projects in the Fuel Clause docket. § 120.68(7)(e), Fla. Stat.

Argument in Response

FIPUG would have this Court believe that the Commission allowed cost recovery of FPL's SoBRA projects through the Fuel Clause,[2] not through base rates. (FIPUG Br. 25-29) This is false. FIPUG's reliance on *Citizens v. Graham*, 191 So. 3d 897 (Fla. 2016), is misplaced because the cost recovery of FPL's SoBRA projects was through base rates, not the Fuel Clause. (R. 132-134, 1205, 1213-1215)

The Settlement Agreement permitted FPL to receive recovery for the SoBRA projects approved by the Commission through a solar base rate adjustment or "SoBRA." The Settlement Agreement provided that each SoBRA would be reflected on FPL's customer bills by increasing base charges and base non-clause recoverable credits and commercial/industrial demand reduction rider credits by an equal percentage contemporaneously. (R. 134) To put it simply, a SoBRA is an adjustment of base rates to allow the utility to earn a return on its investment and to recover depreciation and operating costs, which is the method traditionally used to recover utility plant investment. (R. 1114-1115, 1203-1205; T. 451)

The Settlement Agreement required that approval of the SoBRA projects

[2] As part of annual ratemaking proceedings, public utilities such as FPL petition the Commission for cost recovery of their fuel costs through the Fuel Clause. *See In re: Cost Recovery Methods for Fuel Related Expenses*, Order No. 14546, 1985 WL 1090146 (Fla. P.S.C. July 8, 1985).

qualifying under the agreement would be conditioned upon FPL filing a request for approval of the SoBRA projects at the time of FPL's final true-up filing in the Fuel Clause docket. (R. 133) The Settlement Agreement also specified that the Commission would consider FPL's request for approval of the SoBRA projects during the regularly scheduled Fuel Clause hearing, unless the Commission on its own initiative or upon good cause was shown by an intervenor party that FPL's request be considered during a separate hearing. (R. 133) The procedure to consider the SoBRA projects at the time of the Fuel Clause hearing was purely for administrative efficiency purposes, not for the purpose of allowing cost recovery of the SoBRA projects though the Fuel Clause. (R. 1205)

FIPUG's argument that the Commission should not have approved the provisions in the Settlement Agreement that set forth the procedure for the Commission's consideration of FPL's SoBRA projects at the time of the Fuel Clause hearing (FIPUG Br. 25-29) is another example of FIPUG asking this Court to relitigate the Commission Order Approving Settlement Agreement. Its arguments about the propriety of considering FPL's SoBRA projects during the Fuel Clause docket (FIPUG Br. 25-27) and its concerns about the Fuel Clause being exempt from the rulemaking requirements of Section 120.54, Fla. Stat., (FIPUG Br. 27-29) could have been presented to the Commission at the time the Commission was considering whether to approve the Settlement Agreement.

However, FIPUG took no position on the Settlement Agreement, and, as illustrated in Point I, *supra*, should not be allowed to relitigate the Settlement Agreement now.

Nonetheless, FIPUG's arguments about the Fuel Clause being exempt from the rulemaking requirements of Section 120.54, Fla. Stat., are irrelevant. Cost recovery of the SoBRA projects will be through base rates, not through the Fuel Clause factors. (R. 1205)

In accordance with the procedure approved by the Commission in the Order Approving Settlement Agreement, the Commission considered FIPUG's arguments as to why it believed FPL's SoBRA projects should be heard in a separate hearing. (R. 1205) The Commission's finding that its consideration of the SoBRA projects during the Fuel Clause hearings was purely administrative is supported by the evidence that the recovery of costs for the SoBRA projects will be through base rates, not the through the Fuel Clause mechanism. (R. 132-134, 1205, 1213-1215)

Moreover, the costs for the SoBRA projects could not be recovered through the Fuel Clause as FIPUG suggests, because the 2017 and 2018 fuel factors were already stipulated to by the parties and were previously approved by the Commission prior to the filing of FPL's Solar Petition. (R. 531, 1158, 166, 1203,

1205; T. 390-391) Thus, the Commission could not change these fuel factors when approving the SoBRA projects. (R. 1203)

The procedure adequately protected FIPUG's due process rights. All Commission hearings are governed by §§120.569 and 120.57, Fla. Stat., and this hearing was no different. (R. 119, 381, 385, 512) FIPUG never alleged that it did not have adequate notice of the SoBRA projects being considered in the docket, and it makes no such allegation in this appeal. FIPUG had the opportunity to present witnesses in the proceeding below, but it choose not to avail itself of this opportunity. (R. 1114, 1184, 1186, 1188, 1205, 1214-1215)

All witnesses were subject to cross examination by FIPUG. (R. 1114, 1184, 1186, 1188, 1205, 1214-1215) FIPUG chose to cross examine only two of the witnesses, FPL witnesses Enjamio and Brannen. FIPUG had the opportunity to file, and did file, a post-hearing brief. (R. 1205)

The record shows that FIPUG failed to show good cause why the SoBRA projects should have been considered in a separate hearing. The Commission was correct to conclude that FIPUG's due process rights were protected through the procedure used to consider the SoBRA projects. (R. 1203-1205) FIPUG had adequate notice and opportunity to respond. *See Citizens of the State of Florida*, 146 So. 3d at 1154 (stating that "[t]he fundamental requirements of due process are satisfied by reasonable notice and a reasonable opportunity to be heard"). Thus, the

Commission did not abuse its discretion when it found that it has the authority to approve the SoBRA projects through base rates in the Fuel Clause docket. (R. 1205)

CONCLUSION

FIPUG has failed to overcome the presumption of correctness that attaches to Commission orders. *See Citizens of the State of Florida*, 146 So. 3d at 1149. The Final Order comports with the essential requirements of law and is supported by competent, substantial record evidence. *Id.* The Commission's Final Order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail through the Court's e-filing portal to the following this 1st day of August, 2018:

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

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