**IN THE SUPREME COURT OF FLORIDA**

**CASE NO.: SC18-226**
Lower Tribunal No.: 20180001-EI

FLORIDA INDUSTRIAL POWER USERS GROUP,

Appellant,

vs.

JULIE I. BROWN, etc., et al.,

Appellees.

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# ANSWER BRIEF OF FLORIDA POWER & LIGHT COMPANY

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# I. STATEMENT OF THE CASE AND FACTS

## The Rate Case

This case essentially commenced with Florida Power & Light Company's ("FPL's") filing of a base rate increase petition with the Florida Public Service Commission (the "PSC") in March of 2016. Nine customer groups intervened in that proceeding, including Appellant, the Florida Industrial Power Users Group ("FIPUG"), which played an active role in opposition to the rate increase.

## The Rate Case Settlement

Following a nine-day hearing and the submission of post-hearing briefs, a settlement was reached among FPL and three of the intervenors. Order No. PSC-2016-0560-AS-EI ("Stlmt. Order") p. 2 (Attached as Tab A of the Appendix).[1] On October 6, 2016, these parties moved for approval of a Rate Case Settlement Agreement (the "Settlement Agreement") intended to resolve all issues in the base rate proceeding. As is not uncommon, the Settlement Agreement included additional components that had not been part of the original petition. *Id.*

The sole additional component germane to this appeal was the inclusion of a Solar Base Rate Adjustment ("SoBRA") Mechanism, similar to other base rate

[1] For the convenience of the Court, FPL has submitted an Appendix with this Brief containing eight PSC Orders and two relevant transcripts approved by the Court as supplements to the Record on Appeal. References to this Appendix will be indicated as "App.", with contents of the Appendix being indicated as Tabs A through J.

adjustment mechanisms found in other settlement agreements previously approved by the PSC. App. A, Stlmt. Order, Att. A, ¶ 10. The SoBRA allowed FPL to request base rate recovery for costs associated with the construction of up to 300 megawatts of solar generation per year from 2017 through 2020 (the "Solar Projects" or "Projects"). App. A, Stlmt. Order, pp. 2-3.

The Commission then established a procedure for evaluating the Settlement Agreement, which included re-opening the record and holding an evidentiary hearing to "give parties an opportunity to present testimony and conduct cross-examination on the terms of the Settlement Agreement that were not identified in [the base rate proceeding.]" Order No. PSC-2016-0456-PCO-EI, p. 2 (Attached as Tab B of the Appendix). It was necessary, the Commission announced, to obtain additional information to fully evaluate the terms of the Settlement Agreement, including the SoBRA Mechanism addressed in Paragraph 10, among other new terms. This re-opening of the record would permit the Commission to determine if the Settlement Agreement was in the public interest and should, accordingly, be approved.

Parties were allowed to file prepared testimony and exhibits in support of or in opposition to the Settlement Agreement or any of its components, including the SoBRA Mechanism. *Id.* at p. 3. Alternatively, in lieu of prepared testimony, non-signatory parties to the Settlement Agreement were permitted to file a witness list

that identified the terms of the Settlement Agreement that each witness would address at the settlement hearing. *Id*. Significantly for purposes of this appeal, FIPUG submitted no testimony. FIPUG identified no such witness. Order No. PSC-2016-0483-PHO-EI, pp. 2-3 (Attached as Tab C of the Appendix).

**The Settlement Hearing**

A hearing was convened on October 27, 2016 to examine the Settlement Agreement. FIPUG appeared, stated that it took no position on the Settlement Agreement and waived opening statement. 10/2016 Tr. 20 (Attached as Tab E of the Appendix).[2]

Four FPL witnesses testified at the hearing and were available for cross-examination. App. E, 10/2016 Tr. 25-26. The SoBRA Mechanism was addressed in detail by FPL's Vice President of Finance, Robert Barrett, on both direct and cross-examination. FIPUG did not question Mr. Barrett. App. E, 10/2016 Tr. 103-107.

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[2] There are three transcripts referred to in this brief. The references are indicated as follows: "Tr. __" - refers to the transcript of the hearing conducted on October 25, 2017 addressing the SoBRA Petition at issue in this appeal. This transcript may be found in Attachment One to the record, as supplemented by the parties on July 27, 2018. "10/2016 Tr.__" refers to the transcript of the Settlement Hearing on October 27, 2016 at which the Settlement Agreement in the 2016 Rate Case was addressed. This transcript may be found at Tab E of the Appendix to this Answer Brief. "11/2016 Tr.__" refers to the transcript of the Agenda Conference at which the Settlement Agreement pertaining to the 2016 Rate Case was approved. This transcript may be found at Tab F of the Appendix to this Answer Brief.

All parties were provided the opportunity to file post-hearing briefs. App. E, 10/2016 Tr. 148. FIPUG did not file a brief. Nor did FIPUG challenge in any way, at any time, the legal sufficiency of the SoBRA Mechanism. App. F, 11/2016 Tr. 5-6; App. A, Stlmt. Order, p. 2.

**The Settlement Agreement is Approved**

On November 29, 2016, the Commission held a special agenda conference to publicly consider the Settlement Agreement. App. F, 11/2016 Tr. 3-6.

Based on the record developed during the original base rate proceeding and during the settlement hearing, the Commission unanimously approved the Settlement Agreement, finding "that taken as a whole the settlement provides a reasonable resolution of all the issues raised in the consolidated dockets." App. A, Stlmt. Order, pp. 4-5. Importantly for purposes of this appeal, the Commission expressly found "that the Settlement Agreement establishes rates that are fair, just, and reasonable and is in the public interest." App. A, Stlmt. Order, p. 5.

**The Rate Case Appeal**

The Sierra Club, one of the intervenors, appealed the Commission decision. FIPUG did not. Nor did it join in the Sierra Club appeal. *Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018).

Although the Sierra Club appeal did not address the SoBRA mechanism, its appeal is nonetheless instructive here for one particular reason. The Sierra Club

argued that the Commission was obligated to independently evaluate the prudence of the Peaker Project, one of the projects addressed in the Settlement Agreement. It argued that the Commission's application of the public interest standard instead was improper.

In affirming the Commission's approval of the Settlement Agreement, this Court addressed that prudence argument at length. It noted that in the absence of a settlement agreement, it would have been appropriate for the Commission to have applied the prudence standard to the Peaker Project, in an independent evaluation of that project. The Court made clear, however, that when presented with a settlement agreement, "the Commission's review shifts to the public interest standard . . . ." *Sierra Club*, 243 So. 3d at 909. The Court concluded that "an independent prudence finding was not a prerequisite to a public interest finding . . . and there was no need for the Commission to make an express individual prudence determination." *Id*. at 913.

**The SoBRA Mechanism**

Paragraph 10 of the Settlement Agreement details the SoBRA mechanism, which permits FPL to adjust base rates to collect revenue requirements associated with solar generation projects if certain conditions are met. Pursuant to Paragraph 10(a), "the cost of the components, engineering and construction for any solar project constructed by FPL . . . shall be reasonable and in no event shall the total

cost of such project exceed $1,750 per kilowatt alternating current." Paragraph 10(c) of the Settlement Agreement addresses the manner in which the PSC will evaluate projects smaller than 75 megawatts, which are the projects implicated in this appeal:

> (i) FPL will file a request for approval of the solar generation Project at the time of its final true-up filing in the Fuel and Purchased Power Cost Recovery Clause docket ("Fuel Docket");
>
> (ii) All Fuel Docket deadlines and schedules shall apply;
>
> (iii) the issues for determination *are limited to* the cost effectiveness of each such project (i.e. will the project lower the projected system cumulative 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; and
>
> (iv) approval of the solar generation project will be an issue to be resolved at the regularly scheduled Fuel Docket hearing; provided, however, that the Commission on its own initiative or upon good cause shown by an intervenor…may set FPL's request for approval of the solar generation project for a separate hearing to be held in the Fuel Docket before the end of that calendar year.

(emphasis added). If the request is approved, FPL then calculates and submits for Commission confirmation the amount of the SoBRA for these projects using, for administrative purposes only, the capacity cost recovery clause filing for the year that they will go into service. App. A, Stlmt. Order, pp. 2-3, Att. A ¶ 10(c).

**The 2017 SoBRA Proceeding**

As required by the Settlement Agreement, FPL filed its SoBRA Petition on March 1, 2017, at the time of its final true-up filing in the Fuel Docket, seeking

approval to implement SoBRAs for 298 megawatts of solar generation expected to enter service by December 31, 2017 and another 298 megawatts of solar generation expected to enter service by March 1, 2018. R. 395-510.[3] The Petition was accompanied by the testimony of William Brannen and Juan Enjamio, who addressed the reasonableness of the capital costs and the cost-effectiveness of the solar generation as expressly required by the Settlement Agreement. R. 395-510. Mr. Enjamio and Mr. Brannen supplemented their testimony on August 2, 2017. R. 610-21. On August 24, 2017, FPL filed the testimony and exhibits of Liz Fuentes and Tiffany Cohen who addressed the calculation of the associated revenue requirements and the SoBRA billing factors needed to cover the costs of FPL's proposed 2017 and 2018 Projects. R. 839-919.

On October 25, 2017, the Commission held a duly noticed hearing to address the SoBRA-related issues. The prepared testimony of Liz Fuentes and the prepared the testimony of Tiffany Cohen were admitted by stipulation. Tr. 10. Witnesses Juan Enjamio and William Brannen presented testimony and were cross-examined at length by FIPUG. Tr. 449-507, 540-69. During the hearing, FIPUG explored not only the costs associated with the Projects but also whether they would be required to ensure system reliability, i.e., whether the Solar Projects

[3] Entries in the Record of Appeal will be indicated as "R. __"

would be "needed." Following the close of the evidence, FPL and FIPUG submitted post-hearing briefs. R. 1, 112-47.

**The PSC's Final 2017 SoBRA Order Under Appeal**

On January 8, 2018 the Commission entered its order approving FPL's SoBRA Petition, among other rulings. Order No. PSC-2018-0028-FOF-EI ("SoBRA Order"), p. 16 (Attached as Tab D of the Appendix). The Commission first noted that the process for SoBRA cost recovery being followed by the Commission was that which had been approved in the 2016 Settlement Order. The Commission expressly noted that FIPUG had not challenged that Order. App. D, SoBRA Order, p. 3.

The Commission then addressed and disposed of a "jurisdictional" challenge raised for the first time in FIPUG's post-hearing brief. App. D, SoBRA Order, p. 5. As it does here, FIPUG challenged the use of the fuel clause docket for the SoBRA proceeding, although the use of that docket was clearly spelled out in the Settlement Agreement and approved by the Commission in 2016. App. A, Stlmt. Order, pp. 2-3. The Commission explained that since FPL was not requesting recovery through the fuel adjustment clause factor but was requesting recovery of solar project costs through increases in base rates, FIPUG's complaint "does not raise a jurisdictional question at all." App. D, SoBRA Order, p. 5. Agreeing with

FPL's position, the Commission emphasized that the placement of the SoBRA issue in the Fuel Docket was purely administrative.

The Commission's Order thereafter consists of a detailed analysis of the evidence required to meet the Standard for Approval of SoBRA cost recovery adopted in the 2016 Settlement Order. App. D, SoBRA Order, pp. 5-12. The Commission begins by first reciting the standard and then proceeds to describe and analyze the comprehensive evidence presented by FPL's witnesses and through its exhibits in compliance with that standard. Because it was the principal focus of the FIPUG objections, the Commission devoted a large measure of its discussion to the cost-effectiveness requirement of the 2016 Settlement Order, finding that FPL had established cost-effectiveness in a number of ways. It considered and properly rejected FIPUG's counter arguments. App. D, SoBRA Order, pp. 5-12.

The Commission approved the FPL Petition.

This appeal followed. Only FIPUG has appealed.

## II. STANDARD OF REVIEW

It is firmly established that, "when reviewing an order of the Commission, this Court affords great deference to the Commission's findings." *Sierra Club*, 243 So. 3d at 907 (citing *Citizens v. Fla. Pub. Serv. Comm'n*, 146 So. 3d 1143, 1149 (Fla. 2014)). Commission orders are "clothed with the presumption that they are reasonable and just." *Id*. To overcome these presumptions, "a party challenging

an order of the Commission on appeal has the burden [to] show a departure from the essential requirements of law and the legislation controlling the issue, or that the findings of the Commission are not supported by competent, substantial evidence." *Id*. (citing *Crist v. Jaber*, 908 So. 2d 426, 430 (Fla. 2005)). This Court has emphasized that it will not second-guess the PSC's rate-making decisions, nor will it overturn a PSC order because it would have reached a different result in making the initial decision. *Id*. (citing *Gulf Power Co. v. Fla. Pub. Serv. Comm'n*, 453 So. 2d 799, 803 (Fla. 1984)). Nor will the Court reweigh the evidence that was presented to the Commission. *Id*.

The Court's determination regarding whether the Commission acted within the authority granted to it by the Legislature is subject to *de novo* review, and the Commission's interpretation of statutes it is tasked with enforcing "is entitled to great deference and will be approved by the Court unless it is clearly erroneous." *Sierra Club*, 243 So. 3d at 908 (citing *BellSouth Telecomms. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998)).

## III. SUMMARY OF THE ARGUMENT

### 1. This Appeal is Untimely

The issue being challenged by FIPUG in this appeal was raised, thoroughly considered and properly resolved in an earlier proceeding before the Commission. FIPUG participated in that proceeding but elected to remain silent as to the SoBRA

mechanism being adopted. The 2016 Settlement Order entered after that earlier proceeding, which detailed the SoBRA process, was appealed by another party to that proceeding, but not by FIPUG. Nor did FIPUG join in that appeal. The 2016 Settlement Order was affirmed by this Court as being in the public interest. The 2017 SoBRA Order being challenged here followed the standard established by the 2016 Settlement Order, to the letter.

FIPUG is barred by the doctrine of administrative finality from attempting to challenge the results of that earlier proceeding now. It has identified no legal basis for doing so. The additional reliability criteria that FIPUG seeks to have the Court employ here are not a part of the standard established earlier and are therefore legally irrelevant. The need issue that FIPUG would have the Court address is otherwise satisfied in any event.

### 2. FIPUG's Challenge to the Use of the Fuel Docket is Without Legal or Factual Merit

Contrary to FIPUG's implication, the costs of the Solar Projects at issue here will be recovered through base rates, not through the fuel clause. This is clear from the express language of the 2016 Settlement Order and from the testimony in the 2017 SoBRA proceeding under review here. Additionally, the Commission went to some lengths to explain in the challenged 2017 SoBRA order itself, for the express benefit of FIPUG, that the use of the Fuel Docket was for administrative

purposes only. It emphasized that FPL's Solar Project costs would be recovered through base rates, as were the costs of similar base rate recovery projects.

### 3. The Commission's Decision was Fully Supported by Competent Substantial Evidence

FPL presented evidence in a manner completely consistent and compliant with the standard established for the SoBRA Project in the 2016 Settlement Order. The Commission, in turn, carefully attended to that same standard in evaluating and weighing that evidence. As found by the Commission, that evidence was competent, substantial and sufficient to meet the required standard.

FIPUG's post-hearing hearsay objection is a contrivance that misrepresents the evidence relied upon by the Commission.

## IV. ARGUMENT

### A. FIPUG's Appeal Provides No Basis for Relief

The standard and the process followed by FPL and the Commission for the approval of FPL's SoBRA Petition were established in the Commission's 2016 Final Settlement Order, which was affirmed by this Court. FIPUG participated in that earlier proceeding but elected not to challenge the standard or the process when it had the opportunity to do so. That opportunity no longer exists. The time to propose different criteria for the review of the SoBRA Projects was when the criteria were being established in the 2016 settlement proceeding. Not now. As a matter of law, not now.

### 1. Final Administrative Orders Are Preclusive Under Florida Law

#### a. Florida Law Bars Collateral Challenges

Florida courts have long held that a judgment that could have been, but was not, appealed cannot be collaterally attacked. *Eastern Shores Sales Co. v. City of North Miami Beach*, 363 So. 2d 321, 323-24 (Fla. 1978); *McGregor v. Kellum*, 39 So. 697 (1905) (where an objection could have been raised before a final order was issued and could have been pursued on appeal, a party who failed to urge the objection cannot later rely on the same argument to collaterally attack the final order). Likewise, an administrative order that has become final in a prior case will be given preclusive effect. *M.C.G. v. Hillsborough County Sch. Bd*., 927 So. 2d 224, 227 (Fla. 2d DCA 2006) (giving preclusive effect to prior administrative order where appellant could have asserted constitutional challenge in the prior proceeding).

There must be an end to litigation. The doctrine of res judicata rests on the principle that any party that litigated – or, as here, had an opportunity to litigate – a matter in a former action should not be permitted to litigate it again in a later proceeding. *Caldwell, for Use and Benefit of Hawkins v. Massachusetts Bonding & Ins. Co*., 29 So. 2d 694 (1947). That party already had its day in court, and the matter in question, with exceptions not present here, will not be reexamined. *Topps v. State*, 865 So. 2d 1253 (Fla. 2004). Thus, the application of res judicata

produces certainty as to individual rights. *U.S. Gypsum Co. v. Columbia Cas. Co*., 169 So. 532 (1936). Once rendered by a tribunal of competent jurisdiction, a judgment on the merits in a former suit is conclusive not only as to every claim or defense actually litigated but also as to every other matter that could have been litigated and determined in that action. *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984).

The administrative law counterpart to res judicata is the doctrine of administrative finality. *See Fla. Power Corp. v. Garcia*, 780 So. 2d 34, 43-44 (Fla. 2001) (the Commission's prior, unappealed ruling regarding its jurisdiction to entertain a controversy barred a subsequent effort to determine that jurisdiction). While Florida's administrative agencies have the inherent power to reconsider final orders which are still under their control, this Court has clearly articulated that this inherent authority to modify is "a limited one." *Peoples Gas Sys., Inc. v. Mason*, 187 So. 2d 335, 338 (Fla. 1966). In *Peoples Gas*, this Court considered the Commission's authority to modify a prior order, and held that:

> [O]rders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

*Id*. at 339. The Sierra Club, FIPUG and particularly FPL had the right and the expectation that the 2016 Settlement Order, once affirmed by this Court, was final, dispositive and could be relied upon by the parties. FPL obviously relied upon it when it invested in and constructed eight solar energy centers. That Order cannot be and should not be subject to challenge now, in an entirely new proceeding.

**b. FIPUG's Silence Does Not Preclude Finality**

Importantly here, since FIPUG stood silent on the SoBRA issue in the 2016 settlement proceedings, administrative finality precludes relitigation of a matter that was actually decided or could have been decided by a prior order, unless it can be shown that there has been a significant change of circumstances or there is a demonstrated public interest. *See Florida Power & Light Co. v. Beard*, 626 So. 2d 660 (Fla. 1993). The determination of whether a significant change in circumstances occurred, so as to warrant reconsideration of a previously decided matter rather than the application of administrative finality, lies within the discretion of the agency. *Delray Medical Center, Inc. v. State, Agency for Health Care Admin*., 5 So. 3d 26 (Fla. 4th DCA 2009); *Miller v. Booth*, 702 So. 2d 290 (Fla. 3d DCA 1997). *See also Holiday Inns v. City of Jacksonville*, 678 So. 2d 528, 529 (Fla. 1st DCA 1996).

In determining that a claim or defense could have been raised, courts consider whether the parties were afforded a fair opportunity to litigate the matter.

*Austin Tupler Trucking, Inc. v. Hawkins*, 377 So. 2d 679, 681 (Fla. 1979). Here, of course, FIPUG was repeatedly offered the opportunity to be heard on the SoBRA issue and it repeatedly declined. App. E, 10/2016 Tr. 90 and 145. FIPUG failed to offer any evidence of, and has not even hinted at, any substantial change in circumstance warranting reconsideration of the 2016 Final Settlement Order. Its apparent epiphany regarding the standard it believes should be applied does not qualify as a substantial change.

Administrative finality bars FIPUG's challenge even if no party actually addressed in the earlier proceeding whether Section 366.06(1), Florida Statutes requires the Commission to subject the solar projects to a need or prudence determination. The record demonstrates that FIPUG was afforded the opportunity to explore the SoBRA approval process that would be implemented under the Settlement Agreement. App. B, Order No. PSC-2016-0456-PCO-EI; App. E, 10/2016 Tr. 90 and 145. FIPUG knowingly waived that right. The Fourth Order Establishing Procedure issued by the Commission during the 2016 settlement proceeding expressly identified the SoBRA Mechanism as an issue to be addressed at the settlement hearing. FIPUG expressly chose to take no position on it. FIPUG presented no witness of its own. *Id*. It opted not to ask Mr. Barrett – or any other FPL witness – any questions, even after Mr. Barrett further clarified that FPL would not be required to demonstrate a reliability need for the smaller-sized Solar

Projects. App. E, 10/2016 Tr. 5, 90, 66. It filed no post-hearing brief, did not move for reconsideration of the Final Settlement Order, and did not appeal that Order. At no time prior to the 2017 SoBRA proceeding did FIPUG raise any question regarding the validity of the SoBRA Mechanism.

Sierra Club's appeal of the Final Settlement Order further underscores the fact that FIPUG could have timely raised its challenge during the settlement proceeding. During the underlying rate proceeding, the settlement proceeding and again on appeal, Sierra Club argued that Section 366.06(1) Fla. Stat. required a prudence review of the Peaker Project. App. E, 10/2016 Tr. 24. There is no reason FIPUG could not have asserted the same argument, however infirm, with regard to the SoBRA Mechanism during the settlement proceeding.

FIPUG makes no attempt to explain its fatal waiver. It instead appears to rely on its theory that a prudence determination is the Commission's invariable statutory duty, that cannot be contracted away in the form of a Commission approved settlement. But, as recently articulated by this Court, the Commission appropriately fulfilled its statutory responsibility when it determined that the Settlement Agreement as a whole, including the SoBRA Mechanism, was in the public interest. *Sierra Club*, 243 So. 3d at 903. Re-examining a component of the Settlement Agreement would undermine that determination and would be contrary to this Court's *Sierra Club v. Brown* decision. *See also Florida Power Corp. v.*

*Garcia*, 780 So. 2d 34, 44 (Fla. 2001) (challenge to Commission's jurisdiction barred by administrative finality); *M.C.G. v. Hillsborough County Sch. Bd.*, 927 So. 2d 224, 227 (Fla. 2d DCA 2006) (administrative finality bars even constitutional claims or defenses).

As noted, FIPUG makes no effort to demonstrate a substantial change in circumstance that would warrant re-opening the Final Settlement Order. In fact, it demonstrates no changed circumstance at all. There is none. The terms of the 2016 Settlement Order, including the requirements for cost recovery under the SoBRA Mechanism, may not be re-opened. *Holiday Inns v. City of Jacksonville*, 678 So. 2d 528, 529 (Fla. 1st DCA 1996) (agency was "without power to reverse its previous determination" due to absence of substantial changed circumstances).[4]

Finally, FIPUG fails to acknowledge, let alone explain, why the Court should re-write the Settlement Agreement to include a prudence or need requirement for SoBRA cost recovery when FIPUG is a signatory to a settlement agreement with another Florida utility that, like FPL's, requires no such showing. *In re: Petition for limited proceeding to approve 2017 amended and restated stipulation and settlement agreement by Tampa Electric Company*, Order No. PSC-2017-0456-S-EI, at p. 5, Docket No. 20170210-EI (F.P.S.C. Nov. 27, 2017).

[4] The only relevant changed circumstance has been the construction of eight solar energy centers by FPL in reliance on the 2016 Settlement Order.

It offers no justification for applying Section 366.06 to the Commission's review of FPL's SoBRA Projects but not the projects of another utility. FIPUG should be estopped from taking inconsistent positions. *See Smith v. Avatar Properties, Inc.*, 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998) ("Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings.") (internal quotations omitted).

### 2. The 2016 Settlement Order Was Properly Applied

The 2016 Settlement Order approved and incorporates the Settlement Agreement. The terms of the SoBRA Mechanism are express and unambiguous. The process for Commission approval of Solar Projects smaller than 75 megawatts is prescribed with specificity and was followed with precision here. FPL's request was filed in the annual Fuel Docket, the Project costs were reasonable and did not exceed $1,750 per kilowatt. And, the Projects were cost-effective. For its part, the Commission properly limited its determination to the Project's cost-effectiveness, and the associated revenue requirement and SoBRA factor calculations. This mechanism was approved by the Commission after discovery and a full hearing, and affirmed by this Court.

### 3. FIPUG's Proposed Reliability Criteria Were Irrelevant

FIPUG persisted in arguing before the Commission and continues to argue here that the reliability factor should have been considered in the Commission's evaluation of FPL's SoBRA Petition. R. 1, 135-47. However, reliability was not one of the factors included in Paragraph 10(c) of the Settlement Agreement adopted by the parties, approved by the Commission and affirmed by the Court. It was not a factor proposed by FIPUG during the settlement hearing, which is when it should have been raised. Nothing was proposed by FIPUG during that hearing.

It is particularly noteworthy, in light of FIPUG's arguments here, that reliability – need – was very much a factor in the development of the terms of the Settlement Agreement. Paragraph 10 (b) of that agreement requires that for solar generation projects of 75 megawatts and greater "FPL will file a petition for need determination pursuant to Chapter 25-22, F.A.C." No "need" language appears in Paragraph 10(c), which governs the approval process for these solar generation projects which are smaller than 75 megawatts. In crafting this very detailed agreement, the parties determined, and the Commission agreed, that a need determination would not be required for projects of the size at issue here. This Court thereafter affirmed the Settlement Order including these provisions.

Having been a party to the settlement proceedings, FIPUG had to have been well aware of this "split" regarding need determinations. Specifically, that no such

determination would be required for units of less than 75 megawatts. The appropriate, meaningful time to challenge this "split" was when the terms of the Settlement Agreement were submitted to the Commission for final approval. Or, at the very latest, in an appeal from the Commission Order approving the Settlement Agreement. It is extraordinarily inappropriate to attempt to challenge this provision of the long-approved Settlement Agreement now. It is an unfortunately chaotic approach that finds no support in the law or in commonsense.

FIPUG's argument also disregards the Commission's history of encouraging and approving investments that generate savings to customers, even in the absence of a resource need. *See, e.g.*, Order Nos. PSC-15-0401-AS-EI issued September 23, 2015 in Docket No. 150075-EI (Cedar Bay transaction); PSC-16-0506-FOF-EI issued November 2, 2016 in Docket No. 160154-EI (Indiantown Cogeneration transaction); PSC-2017-0415-AS-EI issued October 24, 2017 in Docket No. 20170123-EI (St. Johns River Power Park transaction). Requiring the showing of a resource need when not required by a statute or Commission rule would stifle FPL's continuous efforts to find money-saving opportunities for customers. *See also* Tr. 460-61 ("It is a false premise to say that FPL makes investments only if there is a reliability need. FPL also invests in projects that provide savings to customers.").

Nevertheless, while the primary purpose of the Projects is to provide savings to FPL customers, they also meet a reliability need in this instance. Tr. 458, 460. Mr. Enjamio explained that, in response to discovery, FPL updated its economic analysis to include significant developments in FPL's electric system. Tr. 455. That analysis revealed that FPL would have a capacity need in 2018 that is partially met by the 2017 and 2018 Projects. Tr. 456. In later years, the Projects also meet capacity needs on FPL's system and provide FPL the ability to make decisions to retire or upgrade other units if doing so results in customer savings. Tr. 456-57.

FIPUG's observation that FPL's reserve margin is projected to exceed 20% in future years is a red herring. The reserve margin criterion is a minimum, which exists to ensure that utilities have generation sufficient to provide adequate and reliable service to customers; it does not limit otherwise cost-effective projects. As demonstrated in this case, the addition of the 2017 and 2018 Projects results in lower costs to customers. Tr. 463-64. Having excess reserves in certain years is a function of the manner and timing in which generation is added to FPL's system: FPL adds units with capacity greater than what is needed in the year in which they enter service because doing so is economic for customers in the long run.[5] Tr. 480.

[5] Adding a larger unit leverages economies of scale and avoids the need to construct multiple smaller units over time.

Moreover, even in years where the reserve margin exceeds 20%, the Projects provide capacity value on FPL's system by deferring additional capacity needs. Tr. 512-13.

### B. FIPUG's Challenge to the Use of the Fuel Docket Misrepresents the Process

The Final Settlement Order expressly provides that FPL is to petition for approval of the SoBRA in the Fuel and Purchased Power Cost Recovery Clause docket ("Fuel Docket"). App. A, Stlmt. Order, Att. A ¶ 10(c). All Fuel Docket deadlines and schedules apply, but the Commission may set FPL's request for approval of the SoBRA for a separate hearing. *Id.*

Again, as explained in detail above, FIPUG had ample opportunity during the settlement proceeding to raise its objection to use of the Fuel Docket for the scheduling of SoBRA approvals. It does not suggest that it was prevented from doing so. And, as acknowledged by FIPUG, the SoBRA costs do not impact fuel cost recovery in any way.[6] The remainder of FIPUG's "fuel clause" related argument is a study in misdirection.

[6] The Solar Projects displace fuel that would have been used in the absence of the new solar generation. In practical effect, those *savings* serve to reduce the fuel factor. However, the costs to construct and operate the solar units, reflected in the SoBRA, are not part of the fuel factor.

### 1. The Costs for the Solar Projects Will Be Recovered in Base Rates, not through the Fuel Factor

FIPUG argues, somewhat speciously, that "[t]he fuel clause should not serve as an omnibus *cost recovery* vehicle for convenience." FIPUG Brief, p. 27 (emphasis added). It points out that "the fuel clause is a mechanism that allows utilities to recover changes in *fuel costs* between base rate proceedings." *Id*. at p. 26 (emphasis in original). That is both true and wholly irrelevant here. Nothing about the SoBRA Mechanism changes the nature of what is recovered through the fuel clause.

The Settlement Agreement is unambiguous. It expressly states in multiple places that the revenue requirements (costs) for the solar facilities will be recovered through the base portion of customer bills:

- "For each solar project that is approved by the Commission for cost recovery pursuant to the process described in this Paragraph, FPL's *base rates* will be increased by the incremental annualized base revenue requirement (as defined in Paragraph 10(e)) for the first 12 months of operation (the "Annualized Base Revenue Requirement"), but in no event before the facility is in service. Each such base rate adjustment will be referred to as a Solar Base Rate Adjustment ("SoBRA") . . . ." App. A, Stlmt. Order, Att. A ¶ 10(a).

- "[T]he issues for determination are limited to the cost effectiveness of each such project . . . and the amount of revenue requirements and appropriate percentage increase in *base rates* needed to collect the estimated revenue requirements." App. A, Stlmt. Order, Att. A ¶ 10(c).

- "For each solar project approved pursuant to this Agreement, the *base rate* increase shall be based upon FPL's billing determinants for the

first 12 months following such project's commercial in-service date . . . ." *Id.*

- "Each SoBRA is to 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. . . . FPL will begin applying the incremental *base rate charges* and *base credits* for each SoBRA to meter readings made on and after the commercial in-service date of that solar generation site." App. A, Stlmt. Order, Att. A ¶ 10(e).

(emphases added).

FPL's testimony further confirms it seeks to recover the Projects' capital, operations and maintenance costs through base rates, not through a fuel clause. FPL witness Tiffany Cohen presented the SoBRA factor and stated that "[a]pplication of the SoBRA factors to the Company's January 1, 2018 and March 1, 2018 *base rates* will provide the Company with sufficient revenue to recover the costs associated with the construction and operation of the 2017 and 2018 Projects." Tr. 182 (emphasis added). Witness Cohen provided exhibits that summarize the base rates proposed to become effective for meter readings made on and after January 1 and March 1. R. Attachment 2 (Redacted Hearing Exhibits), Exhibits 49-50.

Nowhere does the Settlement Agreement, the Prehearing Order or FPL's testimony contemplate that the revenue requirements associated with the Projects will result in an increase – or upward impact of any kind – to FPL's fuel factor. In fact, the fuel factors to be implemented January 1 and March 1 2018 already were

stipulated to and approved and did not change as a result of the SoBRAs. Tr. 390-91. In short, FPL does not seek to recover the costs for the Projects through the fuel factor.

Additionally, a cursory review of the Settlement Agreement makes clear that the SoBRA mechanism functions in much the same way as FPL's generation base rate adjustment mechanism ("GBRA"), an element of FPL's 2013 base rate settlement agreement to which FIPUG, not insignificantly, was a signatory. *See Citizens v. Public Service Com'n*, 146 So. 3d 1143, 1146 (Fla. 2014). FIPUG, again, fails to explain why the Commission suddenly lacks authority to approve a base rate mechanism that FIPUG agreed could be implemented – and was implemented – three times between 2013 and 2016. *See* Order Nos. PSC-12-0664-FOF-EI (Cape Canaveral GBRA); PSC-13-0665-FOF-EI (Riviera Beach GBRA); PSC-15-0586-FOF-EI (Port Everglades GBRA); *see also Avatar Props*, 714 So. 2d at 1107 (judicial estoppel prevents litigants from taking inconsistent positions in separate proceedings).

**2. Use of the Fuel Docket for FPL's SoBRA Petition is Based on Administrative Efficiency**

The Settlement Agreement provides that, like the GBRA mechanism that preceded it, SoBRA filings will be made in the Fuel Docket. Using the Fuel

Docket facilitates administrative and procedural efficiency but has no substantive impact.[7]

An annual proceeding with a relatively predictable schedule, the Fuel Docket provides a level of certainty as to when parties can expect the SoBRA filing to be made. Moreover, many intervenors who are traditionally interested in FPL's rates – including FIPUG – routinely appear in the Docket, thereby facilitating participation.[8] Finally, filing the request for SoBRA approval in the Fuel Docket streamlines the synchronization of the base rate increase and the reduction in fuel costs resulting from the Projects' commercial operation.

Use of the Fuel Docket does not change the nature of the cost recovery mechanism, however. Irrespective of the docket in which the SoBRA Petition is filed, the fuel factor is not used to recover the revenue requirements associated

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[7] In the Order under review, the Commission provided a detailed response to FIPUG's misrepresentation regarding the use of the Fuel Docket. App. D, 2017 SoBRA Order, pp.3-5. The Commission characterized FIPUG's "jurisdictional" issue as an administrative one that simply seeks a separate docket for the rate base cost recovery of the solar projects. That approach made no practical sense, since what would be done in a separate docket, was being done in the proceeding under review, with no prejudice to any party or interested person. In a sense, FIPUG is conducting itself in a similar fashion here. This is a non-issure. FIPUG has no legitimate reason to claim otherwise.

[8] Through its annual participation, FIPUG was well aware that the previously mentioned GBRA filings were made in the Fuel Docket, even though the costs for those plants were recovered through base rates. Adding an unfortunately disingenuous aspect to its appeal here.

with the solar generation. Therefore, the SoBRA does not alter the factor's role as the mechanism for recovery of volatile fuel costs and it is not exempt from APA rule-making requirements.

### C. Competent Substantial Evidence Supports the Commission's Determination that the SoBRA Projects Satisfy the Requirements of the Final Settlement Order

#### 1. Through competent, substantial evidence, FPL satisfied the Settlement Agreement's requirements: reasonableness of costs, cost-effectiveness, and proper calculation of the revenue requirements and SoBRA factors.

In its Petition, FPL proposed to construct and operate 596 MW of solar PV generation by 2018. Tr. 425, 476. Four solar energy centers – each sized at 74.5 megawatts for a total nameplate capacity of 298 megawatts – would be constructed and placed in service by December 31, 2017. Tr. 426. Four similarly sized centers would be placed in-service by March 1, 2018. Tr. 411.

Altogether, the eight centers generate enough electricity annually to power about 120,000 customer homes. Tr. 409. The solar energy from the Projects improves FPL's fuel diversity by displacing fossil fuel generation at a level that is equivalent to removing approximately 102,000 cars from the road annually. Tr. 430, 510. On an average annual basis, the Projects are estimated to reduce the use of natural gas by 8,400 million cubic feet, the use of oil by 15,300 barrels, and the use of coal by 9,500 tons. Tr. 429, 505-06. In turn, the reduced use of fossil fuel is estimated to reduce carbon dioxide emissions by an average of 526,000 tons

annually, along with significant declines in sulfur dioxide and nitrogen oxide emissions. Tr. 429-30.

The SoBRA Projects will require the installation of more than 2.6 million PV panels, along with other equipment such as power conversion units and inverters, and the construction of interconnection facilities. Tr. 523-24, 527. The panels and equipment selected by FPL for the Projects are highly efficient and reliable, and are expected to outperform equipment used in solar generation sites constructed just one year earlier. Tr. 522, 524, 552-53. (Mr. Brannen testifying that the panels used in the SoBRA Projects are expected to convert the electricity from DC and AC at an efficiency rating greater than 98.4% with a 99.5% long term availability). The use of higher quality, higher efficiency equipment with high levels of expected availability minimizes land disturbances and results in lower construction cost. *Id*.

**a. The Costs Associated with the SoBRA Projects Satisfy the Settlement Agreement's Cost Cap and are Reasonable**

FPL presented ample evidence that the cost for the SoBRA Projects, as well as the cost for each solar energy center, is reasonable and falls substantially below the $1,750 per kilowatt cap established in the 2016 Settlement Order. Mr. Brannen testified to the competitive bidding process that was employed to procure the equipment to be installed and the work to be performed at the solar energy centers.

Tr. 530-32. In response to comprehensive solicitations, FPL received high quality proposals from industry-leading suppliers and contractors. Tr. 532. The Company evaluated the proposals and successfully secured all equipment and services from the lowest-cost, qualified bidders. Tr. 530-32.

FPL's updated capital costs were estimated to be $419 million or $1,405 per kilowatt for the 2017 Project and $443 million, or $1,485 per kilowatt for the 2018 Project. Tr. 538. Mr. Brannen's testimony demonstrated that engaging competitive market forces provided assurance that the equipment, engineering and construction costs for the 2017 and 2018 Projects are reasonable. Tr. 532. Indeed, the same type of solar project would have cost 4.5 times more ten years earlier, and about a third more as recently as 2016. Tr. 560-70. The record unquestionably demonstrates that FPL satisfied the 2016 Settlement Order's cost requirements.

**b. The 2017 and 2018 Projects are Cost-Effective**

The Final Settlement Order provides that the SoBRA-eligible projects are cost-effective if they lower the overall system costs (measured by cumulative present value of revenue requirements or CPVRR) for FPL's electric system as compared to the overall system costs without them. Stlmt. Order, Att. A ¶ 10(c). FPL witness Juan Enjamio, an expert in integrated resource analysis, presented analyses demonstrating that adding the proposed 596 megawatts of solar

generation to FPL's fleet lowers system costs by more than $100 million and is therefore eminently cost-effective. Tr. 435.

Consistent with the 2016 Settlement Order, Mr. Enjamio evaluated cost-effectiveness by comparing a resource plan without the Projects against a resource plan that includes the Projects: the "No Solar Plan" and the "2017-2018 Solar Plan," respectively. Tr. 427-428. The No Solar Plan does not include any solar generation beyond that already in service as of the end of 2016. Tr. 427. It assumes that future resource needs are met by fossil- or nuclear-fueled generation, as well as purchased power. Tr. 427. The 2017-2018 Solar Plan adds the eight solar energy centers, consequently deferring the timing of future power generation and reducing the size of that generation. These differences save customers millions of dollars. Tr. 435.

Aside from the difference in the composition of FPL's generation fleet to reflect the solar generation, both resource plans use the same major system assumptions. Tr. 425. This includes FPL's official long-term fuel price forecast and official load forecast. FPL developed these forecasts using the Company's standard forecasting methodology, and both forecasts were used in FPL's annual Ten Year Site Plan filing. Tr. 427. The resource plans also use a carbon dioxide price projection forecast provided by ICF, which, as described in further detail below, was recognized by the Commission and others as an industry leader. *Id*.

Mr. Enjamio used economic models to calculate the overall system costs for each resource plan based on these cost assumptions. Tr. 428-29. Next, to determine the cost impact of the proposed solar generation, FPL subtracted the cost of the 2017-2018 Solar Plan from the cost of the No Solar Plan. Tr. 429. The economic analysis revealed that the Projects produce an estimated $106 million in customer savings.[9] Tr. 434. The cost-effectiveness requirement of the 2016 Settlement Order was clearly satisfied.

**c. FPL Calculated the Projects' Annual Revenue Requirements and SoBRA Factor as Prescribed by the Settlement Agreement**

FIPUG does not dispute the calculation of the annual revenue requirements for the SoBRA Projects, or the associated base rate increase (the "SoBRA Factor"). Nor are they subject to challenge.

FIPUG stipulated to admission of the prepared testimony of the witnesses supporting those calculations – Liz Fuentes and Tiffany Cohen. Tr. 10. Ms. Fuentes testified that the revenue requirements for the first 12 months of operations

[9] The analysis performed by FPL in March 2017 showed an estimated $39 million in savings. FPL updated its economic analysis in August 2017 due primarily to an intervening change in Florida law that provides an 80% property tax exemption for qualifying solar installations. This property tax reduction, in conjunction with the reduced capital costs resulting from the lower-than-expected costs for design and interconnection facilities described above, substantially improved the Projects' cost-effectiveness to the tune of $106 million of customer savings.

of the 2017 Project and 2018 Project are $60.5 million and $59.9 million, respectively. Tr. 175. FPL calculated the revenue requirements for the 2017 and 2018 Projects consistent with the requirements of the Settlement Agreement. Tr. 175-78. *See also* App. A, Stlmt. Order, Att. A ¶ 10(a) ("For each solar project that is approved by the Commission for cost recovery pursuant to the process described in this Paragraph, FPL's base rates will be increased by the incremental annualized base revenue requirement . . . for the first 12 months of operation").

Ms. Cohen likewise calculated the SoBRA Factor as prescribed by the Settlement Agreement and determined that the Factor for the 2017 Project is of 0.937%, and Factor for the 2018 Project is 0.919%. Tr. 182; *see* App. A, Stlmt. Order, Att. 1 ¶ 10(e). This means that application of the SoBRA Factors to the Company's January 1, 2018 and March 1, 2018 base rates was estimated to generate sufficient revenue to recover the costs associated with the construction and operation of the 2017 and 2018 Projects. Tr. 182. Ms. Cohen further testified that that the March 1, 2018 typical residential bill – inclusive of the SoBRAs for both the 2017 and 2018 Projects – would remain below the national average, below the state average, and would remain among the lowest in the state of Florida. Tr. 184.

### 2. The Commission Properly Relied on Expert Testimony Regarding Cost-Effectiveness.

As it did in its Fuel Clause argument, FIPUG mischaracterizes the evidence upon which the Commission properly relied in determining that the SoBRA Projects under review were cost-effective. It attempts to suggest that the Commission's cost-effectiveness findings "hinge on" unsworn reports of non-testifying experts which do not constitute competent, substantial evidence.

In fact, as is clear in the record of the proceeding, the Commission's conclusion "hinged on" the basic, comprehensive evidence on cost-effectiveness provided by FPL's resource planning expert, Juan Enjamio. As described above, Mr. Enjamio testified that the 2017 and 2018 Projects were cost effective because they are projected to save customers more than $100 million over the projects' lifespans. Tr. 435. His opinion was not hearsay. Mr. Enjamio offered his opinion during direct testimony and again during cross-examination, and it was based on an analysis that he personally performed. Tr. 425. The Commission appropriately relied on this testimony. FIPUG does not dispute this. Mr. Enjamio's expert opinion constitutes competent, substantial evidence that supports the Commission's cost-effectiveness determination.

In formulating his opinions, Mr. Enjamio properly relied upon information regarding fuel and carbon price forecasts prepared by companies widely accepted in the industry and by the Commission itself for the provision of reports of this

nature. Tr. 135-36. Under these circumstances, the Administrative Procedure Act, which governed the conduct of the 2017 SoBRA Proceeding, expressly allows the Commission to consider the fuel and emissions forecasts relied upon by the expert witness in arriving at its findings of fact. Section 120.57(1)(c) states that "[h]earsay 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." Accordingly, the price forecasts might arguably have been insufficient on their own to support the cost-effectiveness finding. In this case, however, they were clearly used to *explain* and amplify Mr. Enjamio's own expert opinion and therefore the Commission appropriately relied upon them. *See Orasan v. Agency for Health Care Admin. Bd. of Medicine*, 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996) (error for administrative hearing officer to sustain a hearsay objection to excerpts of medical treatises and texts because the evidence was "offered for a permissible purpose . . . to supplement or explain the appellant's testimony.").

Additionally, the Florida Rules of Evidence, while not strictly applicable in administrative proceedings,[10] also contemplate use of the underlying price

[10] *Florida Industrial Power Users Group v. Graham*, 209 So. 3d 1142, 1144–1145 (Fla. 2017) (Section 120.569(2)(g) "exemplifies the longstanding general rule, described above, that the rules of evidence do not strictly apply in administrative proceedings. We find that the Commission has discretion on whether to apply the Florida Evidence Code . . . .").

forecasts. Florida Rule of Evidence 90.704 states that "[t]he facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence." § 90.704, Fla. Stat. Florida courts interpret this to mean that experts may rely on hearsay to formulate their opinions. *Smith v. State*, 7 So. 3d 473, 501 (Fla. 2009). Section 90.704 recognizes that the traditional constraints of the hearsay rule do not, in many instances, comport with the reality that expert opinions are frequently based on information other than first-hand observation, or matters presented at trial. *Bender v. State*, 472 So. 2d 1370, 1372 (Fla. 3d DCA 1985); *Smith v. State*, 7 So. 3d 473, 501 (Fla. 2009) ("an expert may express an opinion and base the opinion on facts of which the expert does not have personal knowledge without the use of a hypothetical question."); *Geralds v. State*, 674 So. 2d 96, 100 (Fla. 1996) (holding that pathologist could base opinion as to cause of death on slides taken at murder scene and during autopsy and materials prepared and compiled by doctor who performed autopsy); *Department of Corrections v. Williams*, 549 So. 2d 1071 (Fla. 5th DCA 1989) (finding that, under the rules of evidence, "it was perfectly proper for the expert to consider" an affidavit prepared by someone who did not testify at trial "in formulating his opinion").

There is no dispute that Mr. Enjamio is an expert in resource planning, reliability analysis and economic analysis. FIPUG acknowledges this fact. Tr. 449. In response to FIPUG's cross-examination, Mr. Enjamio explained that the carbon cost forecast was developed by ICF, described as experts in the field of carbon price forecasts. Tr. 472. FPL has used ICF to develop its resource plans and other analyses presented to the PSC since at least 2009. Tr. 473. Mr. Enjamio also testified that ICF prepares the carbon price analysis for the U.S. Environmental Protection Agency. *Id*.

FIPUG did not dispute ICF's reputation. In fact, it did not dispute the reliability of the ICF's analysis or offer a competing carbon price forecast. FIPUG simply observed that ICF did not appear at the hearing. Tr. 505. Nor was it remotely necessary that ICF do so. Based on the indicia of reliability presented by FPL and the lack of any substantive challenge by FIPUG, it was appropriate for the Commission to consider the carbon price forecast to explain Mr. Enjamio's expert opinion. *See Centex-Rooney Constr. Co. v. Martin County*, 706 So. 2d 20, 28 (Fla. 4th DCA 1997) (noting that § 90.705(2), Fla. Stat., requires the party against whom the expert opinion or inference is offered to establish the insufficiency of the underlying facts or data through a voir dire examination; and holding that an unchallenged expert opinion was admissible and legally sufficient for consideration by the jury).

## CONCLUSION

FPL filed a SoBRA Petition pursuant to and fully compliant with the terms of the Settlement Agreement. That Petition was approved by the Commission pursuant to and fully compliant with the terms of the Settlement Agreement. That Settlement Agreement had been approved by an Order of the Commission in an earlier proceeding. That Order was affirmed by this Court.

FIPUG was a party to the earlier proceeding. It had raised no objection to the SoBRA procedures approved by the Commission. It did not appeal that earlier Order to this Court.

Accordingly, the FIPUG appeal is untimely. The issues it seeks to raise here should have been raised in the earlier proceeding. It is barred from raising them here as a matter of law. The Settlement Agreement is binding upon the parties. FPL's Petition complied with its terms. The Commission's Order complied with its terms.

The Order of the Commission should be affirmed.

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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 on this 1st day of August 2018 to the following:

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion is typed in Times New Roman 14-point font, is double spaced, and has margins no less than 1 inch, and conforms with the font requirements of Rule 9.100(l) of the Florida Rules of Appellate Procedure.

S/ ALVIN B. DAVIS