IN THE SUPREME COURT OF FLORIDA

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

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

REPLY BRIEF OF THE FLORIDA INDUSTRIAL POWER USERS GROUP TO THE ANSWER BRIEF OF THE FLORIDA PUBLIC SERVICE COMMISSION AND FLORIDA POWER & LIGHT COMPANY

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

A. FIPUG's Appeal is not a Collateral Attack on a Prior Final Order Approving a Settlement Agreement, but is a Timely Appeal of a Final Rate Order.

Both FPL and the Commission suggest that FIPUG's appeal is a collateral attack on the Commission's 2016 Order Approving FPL's Settlement Agreement. (PSC Brief at 20-23; FPL Brief at 12-17). It is not. FIPUG has appealed the Commission's 2017 Final Fuel Clause Order, not the Commission's 2017 Final Order Approving a Non-Unanimous Settlement Agreement.

The thin reed upon which Appellees pin their argument is an option found in paragraph 10 of the 2016 Settlement Agreement. This option addressed the possibility of FPL seeking recovery for certain solar energy projects. Termed a solar based rate adjustment or SoBRA, the SoBRA settlement provision purports to dictate the limited facts the Commission could review *only if* FPL decided to pursue the option of building new solar projects and seeking rate recovery. Whether or not the SoBRA provision would ever be used was not known by FIPUG, the Commission, or other parties based on the record of the 2016 FPL rate

case, the subsequent, non-unanimous 2016 rate case Settlement Agreement, or the Commission's 2017 Final Order approving the non-unanimous rate case Settlement Agreement.

The suggestion that FIPUG should have appealed the 2016 Settlement Order based upon the mere possibility that FPL would exercise the SoBRA option ignores the doctrine of ripeness. There would have been no case or controversy; that is, the case would not have been ripe had FIPUG appealed a provision that not only had not been used, but might never be used.

Black's Law Dictionary describes the ripeness doctrine as a requirement that a court consider whether a case has matured or ripened into a controversy worthy of adjudication before it will decide the case. *See*, *Black's Law Dictionary Fifth Edition*. Appellate courts disfavor ruling prematurely on matters that are not factually at issue, sufficiently developed, or ripe. *See*, *e.g*., *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972) ("The appropriate test in each case is whether there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant judicial action.")

In *Grady v. Dep't of Prof'l Regulation, Bd. of Cosmetology,* 402 So. 2d 438, 440 (Fla. 3d DCA 1981), the appellate court held that an appellant's constitutional challenges to a board's licensing and testing procedures were not ripe for review

"in the absence of an actual controversy between the parties," as "the Board has neither tested appellant nor denied him a license." In *Shands v. City of Marathon,* 999 So. 2d 718, 725 (Fla. 3d DCA 2008), the appellate court found that an as-applied takings claim challenging the application of a land use ordinance was not ripe until the plaintiff had obtained a final decision regarding the application of the regulations to the plaintiff's property. Without FPL having built, sought, and obtained rate recovery for its new solar projects, no live controversy actually existed between FIPUG and the Commission.

In this case, FIPUG's claim contesting the Commission's failure to use the statutory prudence standard when considering FPL's rate increase was not ripe until the Commission entered its Final Order now on appeal. This Final Order does not apply the statutory prudence standard, but instead applies the litigant-created standards for review tucked into the 2016 Settlement Agreement.

Further, when confronted with a SoBRA petition after FPL exercised its 2016 Settlement Agreement paragraph 10 option, the Commission should have followed its past precedent and held that the PSC is not subject to the SoBRA settlement terms that limited the Commission's scope of review. In Commission Order No. 22352, Docket Nos. 870171-TL and 890216-TL, *In re: Petition of Citizens of the State of Florida for a limited proceeding to reduce General*

Telephone Company of Florida's authorized return on equity; In re: Investigation into the proper application of Rule 25-14.003, F.A.C., relating to tax savings refunds for 1988 and 1989 for GTE Florida Incorporated (Dec. 29, 1989), the Commission explained:

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

(emphasis added).

Thus, the Commission was required to exercise its statutory duty and obligations and review FPL's rate relief request pursuant to the statutory prudence standard. It erred in not following past precedent when it narrowly reviewed the FPL SoBRA projects using only the litigant-penned provisions of the Settlement Agreement. Neither the Commission nor FPL made any real attempt to distinguish, differentiate, or otherwise explain the failure of the Commission to apply the rationale and reasoning of the Commission precedent that, contractual provisions found within a Settlement Agreement do not cause the Commission to "forego action in derogation of our statutory obligations." *Id.*

Appellees suggest that FIPUG should have appealed when the Commission entered its 2016 Settlement Order. At that time, FIPUG did not know if FPL would

exercise its option to build certain solar projects and seek SoBRA rate recovery for such projects. Nor did FIPUG know that the Commission would err in not following its precedent (if and when such projects came before it) which provides that the Commission is not subject to the terms and conditions of a Settlement Agreement. FIPUG did not know nor could it predict ahead of the Commission's action, that the Commission would act like a party to the Settlement Agreement (which it is not), and ground its rate increase decision on FPL and settling party-crafted SoBRA criterion, ignoring its statutory prudence obligations.

Sound jurisprudence and the doctrine of ripeness require that an appeal be based on a ripe controversy, not the future speculative unknown actions of a party. Here, whether FPL would exercise its option to build SoBRA projects was an open question when the 2016 Settlement Agreement Final Order was issued. FIPUG could not reasonably foresee that the Commission would disregard its prior precedent and statutory direction to apply a prudence standard of review when considering a rate increase request, and instead review the rate request in accord with only a handful of select provisions contained within a rate case settlement agreement when the 2016 Settlement Final Order was entered.[1]

[1] The Commission should have reviewed the rate increase using a prudence standard and considered the applicable terms of the 2016 Settlement Agreement.

FIPUG's appeal is timely and is not a collateral attack on the 2016 Settlement Final Order.

B. The Statutory Prudence Standard Used For Ratemaking is Different Than the Public Interest Standard Used when Considering a Settlement Agreement; the Commission Should Have Used its Prudence Standard when Subsequently Reviewing FPL's SoBRA Projects.

The PSC suggests that "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 v. Brown*, 243 So. 3d at 913, 916 (Fla. 2018) and shows that FIPUG is attempting to relitigate the Commission's Order Approving Settlement Agreement." (PSC Br. p. 24). FPL makes the same point: "Re-examining a component of the Settlement Agreement would undermine that determination [2016 Settlement Agreement was in the public interest] and would be contrary to this Court's *Sierra Club v. Brown* decision." (citations omitted) (FPL Br. p. 17).

Put simply, Appellees conflate the standard of review the Commission and this Court use when considering the Commission's approval of a settlement agreement, a "public interest" standard, with the standard of review the Commission and this Court use when considering a subsequent and separate Commission approval of an order setting rates, a "prudence" standard. The order

subject to review here is a separate and distinct final order issued more than a year after the Commission approved the rate case settlement.[2] As noted, *supra*, the Final Order in question now could not and would not have been appealed but for FPL's subsequent exercise of its option to build and seek rate recovery for the specific solar units.

Prudence is the appropriate standard of review for ratemaking decisions. This standard of review is derived from section 366.06(1), F.S., and is well-established:

> It is from this statute [s. 366.06(1) F.S.] that the Commission derives its prudence standard, which it applies to ensure that the recovered costs result from prudent investments." *See S. All. for Clean Energy v. Graham*, 113 So.3d 742, 749–50 (Fla. 2013); *Fla. Power & Light v. Beard*, 626 So.2d 660, 662 (Fla. 1993).

Sierra Club, at 908.

This Court in *Sierra Club* made clear that the non-statutory public interest test is applied only when reviewing settlement agreements: "Importantly, in the absence of a settlement, prudence review of investments --- regardless of magnitude --- is still an express statutory requirement 366.06(1), Fla. Stat." *Sierra Club*, n. 10 at p. 919.

[2] The Commission approved the non-unanimous rate case settlement agreement at its November 29, 2016 special agenda conference. The Commission's Final Fuel Clause Order, which contained the FPL SoBRA issue among other topics, was issued January 8, 2018.

The Legislature's wisdom in requiring a prudence review of utility ratemaking is understandable. Circumstances change. For example, if the cost of solar energy production fell precipitously, the Commission has the ability, under its statutory prudence authority, to ensure that the regulated utility takes advantage of the significant solar price declines and passes along the savings to ratepayers. If a regulated utility's service territory contracted significantly, or energy efficiency efforts resulted in no immediate need for additional generation assets within a utility's service territory, the Commission should have the ability, under its statutory prudence authority, to review and possibly scale back the number of solar projects the utility plans to construct.

Further, a future Commission may not have its statutorily-imposed prudence duties impaired by a Settlement Agreement crafted by a few self-interested parties. One Commission may not tie the hands of a future Commission. *See, In Re Examination of the Outage and Replacement Fuel/Power Costs Associated with the CR3 Steam Generator Replacement Project, by Progress Energy Florida, Inc.*, Order No. 13-0194-PCO-EI at 4 (Fla. P.S.C. May 10, 2013). The Legislature, as the state's policymaking body, has acted and statutorily imposed on the Commission a non-delegable duty to review ratemaking for prudence. The Commission's failure to review the FPL SoBRA projects using the statutory

prudence standard is a failure to follow the law and is a usurpation of legislative authority.

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

A. The Commission's Attempt to Bootstrap Hearsay Carbon Pricing Information, Material Evidence Which Directly Affected the Commission's Factual Finding as to Whether the SoBRA Projects Cost or Saved Ratepayers Money, is Inadmissible Hearsay Evidence in Violation of section 120.57(1)(a), F.S.

Uncorroborated hearsay is not sufficient to support a finding of fact unless it would be admissible over objection in a civil action. *See*, s. 120.57(1)(c), F.S. Here, the Commission's Final Order impermissibly relies on uncorroborated hearsay when it finds that FPL's carbon cost forecast opinion is:

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

(Final Order, at p. 10; R. 1210). Despite the fact that this December 2016 CO2 emission forecast is not in the record, it serves as the basis for an important Commission finding of fact. In the order on appeal, the Commission noted that the carbon forecast played a key part in determining whether ratepayers would lose or save money with FPL's proposed SoBRA projects. (Final Order p. 10) ("FPL

witness Enjamio identified ICF's CO2 emissions forecast as a major assumption in FPL's economic analysis of its proposed solar PV generation projects.").

FPL witness Enjamio has no substantive expertise in the subject matters of carbon cost or natural gas forecasting and thus may not offer an expert opinion on these matters. "Witnesses may not testify to matters that fall outside of their area of expertise." *Cordoba v. Rodriquez*, 939 So. 2d 319, 323 (Fla. 4th DCA 2006); *see also, Gulf Power v. Kay*, 493 So. 2d 1067, 1076 (Fla. 1st DCA 1986) ("It is, of course, impermissible for an expert to give an opinion requiring special expertise in a discipline other than that in which the witness is shown to be qualified.") The use of one hearsay statement as corroborating evidence of the facts described in another hearsay statement could lead to evidentiary bootstrapping, which took place here. *Delacruz v. State* 734 So. 2d 1116, 1121 (Fla. 1st DCA 1999).

Tellingly, FIPUG made the point regarding the lack of substantial evidence on carbon cost and gas forecasts in its initial brief. Appellees did not seriously challenge it. And in its brief, FPL all but conceded that the carbon price forecasts were insufficient to support the cost-effectiveness finding. FPL said: "Accordingly, the price forecasts might arguably have been insufficient on their own to support the cost-effectiveness finding." (FPL Br. p. 35).

Appellees try to save the Commission's infirm cost-effectiveness factual findings by arguing that witness Enjamio was "explaining other evidence." (PSC Br. p. 31-32; FPL Br. p. 35) Section 120.57(1)(c), F.S., contemplates that hearsay evidence may be used to supplement or explain "other evidence." However, this statutory provision does not allow a witness who is not qualified in a subject matter (carbon cost forecasting) to "explain" and bootstrap into evidence hearsay information, such as portions of a December 2016 carbon cost report, not offered into evidence, upon which the Commission based a material factual finding. Explaining other evidence does not trump the statute's preclusion of using hearsay as the basis for of factual finding.

FPL also cites *Orasan v. Agency for Health Care Admin. Bd. of Medicine*, 668 So. 2d 1062, 1066, as authority for the "explaining other evidence" exception to the legal tenet contained in section 120.57(1)(c), F.S., that uncorroborated hearsay cannot support a factual finding. (FPL Br. p. 35). In *Orasan*, excerpts of medical treatises were offered into evidence to support, supplement or explain the doctor's direct testimony. The administrative law judge did not admit the medical treatise excerpts into evidence. The appellate court reversed, finding that the medical treatises supplemented or explained the testimony of the doctor who was defending an action against his license. *Id.*

Here, nothing is being offered to supplement or explain FPL witness Enjamio's carbon cost testimony, which is based on impermissible hearsay. And Mr. Enjamio's carbon cost testimony, inextricably linked to hearsay, namely the December 2016 carbon cost report, did not supplement or explain other non-hearsay testimony regarding carbon pricing. FPL witness Enjamio merely read a December 2016 carbon cost report, a topic on which he has no expertise, and then repeated select, out-of-court hearsay statements to the Commission. The Commission improperly used these statements to make material cost-effectiveness findings. This is impermissible.

Appellees argue that FIPUG waived any challenge to Mr. Enjamio's credentials. However, FIPUG did not waive its right to challenge Mr. Enjamio's expertise during cross examination, which it did at length, largely without objection from Appellees. In addition, no expert witness tender was ever made of FPL witness Enjamio's knowledge, credentials, or areas of expertise. (Tr. 449-507). The Appellees' waiver argument is misplaced and was not preserved.

The Commission's finding of cost effectiveness was based on uncorroborated hearsay, in violation of section 120.57(1)(c), F.S., and was not based on competent, substantial evidence.

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

A. The Fuel Cost Recovery Clause, Which is Exempt from Statutory Rulemaking, Is Intended to be Used to Recover the Cost of Fuel; It Is Not an Omnibus Recovery Clause to Recover Solar Panel Capital Costs as a Matter of Convenience or Administrative Efficiency.

The Commission's and FPL's use of the fuel cost recovery clause for FPL's SoBRA projects is inappropriate. The Court has previously corrected the Commission when it has used the fuel clause to recover for inappropriate costs. For example, in rejecting the Commission's contention that the fuel clause was used for convenience, an argument advanced again in this case by the Appellees, this Court stated:

> We do not believe that the fuel clause is an end-all-be-all of cost recovery, but rather its history suggests its use should be limited to facilitating recovery of costs related to fuel and power purchases that are volatile, rendering them less than ideal for a base rates case.

Citizens v. Graham 213 So. 3d 703, 716-717 (Fla. 2017). Appellees have again run afoul of the Court's direction.

FIPUG disagrees with Appellees' suggestion that use of the fuel clause has no substantive consequences. As pointed out in FIPUG's Initial Brief, matters handled through the fuel clause are statutorily exempt from rulemaking, insulating

the Commission from rulemaking requirements related to SoBRA matters. *See*, s. 120.80(13)(a), F.S. ("Agency statements that relate to cost-recovery clauses, factors, or mechanisms implemented pursuant to chapter 366, relating to public utilities, are exempt from the provisions of s. 120.54(1)(a).") FPL, without meaningful explanation and in error simply states that "…it is not exempt from APA rule-making requirements." (FPL Br. p. 28).

As this Court has stated, the use of the fuel cost recovery clause should be limited to volatile fuel costs. The fuel cost recovery clause should not be regularly and routinely used, for convenience or otherwise, as the procedural process for bringing extensive capital projects before the Commission for consideration.

CONCLUSION

The Commission has departed from the essential requirements of law in this case. This Court has previously opined that the prudence standard is to be routinely and regularly used when the Commission reviews utility costs and is engaged in ratemaking. *Southern Alliance for Clean Energy v. Graham,* 113 So. 3rd 742, 750 (Fla. 2013) ("Moreover, statutes and case law routinely apply the prudence standard in the PSC context.") (internal citations omitted); *See also, Sierra Club v. Brown,* 243 So. 3d 903, 919 at n. 10 (Fla. 2018) ("Importantly, in the absence of a settlement, prudence review of investments --- regardless of

magnitude --- is still an express statutory requirement 366.06(1), Fla. Stat.”). The Commission departed from the essential requirements of law, the legislation controlling the issue, and usurped legislative authority, when it failed to apply a prudence standard in its review of FPL’s SoBRA projects.

The Commission also departed from the essential requirements of law in basing a material finding of fact on impermissible hearsay as well as using the fuel cost recovery clause to consider the SoBRA projects.

The Commission’s Final Order on appeal should be reversed.

Respectfully submitted this 11th day of September 2018.

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