FILED 11/16/2018
DOCUMENT NO. 07152-2018
FPSC - COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause and generating performance incentive factor.
_____/

Docket No. 180001-EI
Filed: November 16, 2018

THE FLORIDA INDUSTRIAL POWER USERS GROUP'S POST-HEARING STATEMENT OF ISSUES AND POSITIONS AND POST-HEARING BRIEF

The Florida Industrial Power Users Group (FIPUG), by and through its undersigned counsel, files this Post-Hearing Statement of Issues and Positions and Post-Hearing Brief in the above-styled matter.

BASIC POSITION

The contested issues to be resolved by the Commission relate to FPL's efforts to recover capital costs for solar energy projects through the fuel clause. To be clear about FIPUG's position on renewable energy, FIPUG supports renewable energy, provided such renewable energy is needed and is reasonably priced compared to other supply side options. However, if such renewable energy is not needed or is not reasonably priced compared to other supply side options, including other renewable energy options, then such projects are not worthy of support from FIPUG, and should not be worthy of support by the Florida Public Service Commission.

The Commission should apply a prudence standard when reviewing FPL's proposed solar projects and not merely look to select provisions of a settlement agreement that FPL executed with a limited number of parties. Additionally, this Commission has in place by rule a 15% reserve margin for the state's investor-owned utilities. See Rule 25-6.035(1), Florida Administrative Code ("F.A.C."). A prior stipulation involving certain utilities, including FPL,

established a 20% reserve margin that FPL uses for planning purposes. The facts adduced at hearing demonstrate that FPL does not have a need for its proposed solar projects since FPL can maintain either a 15% or a 20% reserve margin without any of the proposed solar projects.

To support its solar projects and establish cost-effectiveness, FPL relies on assumptions made by someone who did not appear at hearing or offer any testimony that Congress will enact a tax on carbon. To date, FPL has not paid one penny pursuant to a carbon tax. The current administration has withdrawn the country from the multi-national Paris Climate Agreement and is working to the repeal the federal Clean Power Plan. A carbon tax is simply not in the cards. Basing a decision to spend ratepayer dollars on speculation and hearsay that a future tax on carbon is coming is not supportable legally or factually, particularly when the carbon tax "expert" did not testify at hearing so that neither the Commission, staff nor the parties could question him. The carbon tax testimony is uncorroborated hearsay and cannot support a finding of fact.

Finally, solar costs are not appropriately recovered through the fuel clause. The fuel clause is a mechanism to recover increases in fuel costs incurred during the year to reduce regulatory lag; the fuel clause is not a mechanism to recover the capital costs of new solar projects. Such recovery, if prudent, should be done in a base rate case. The Legislature has not provided this Commission with the legal ability to recover solar costs through a clause mechanism, be it the fuel clause or otherwise, and FPL's request to use the fuel clause in this manner should be rejected.

For the reasons set forth herein, FPL's request to recover its solar project costs through the fuel clause should be denied.

ISSUES

ISSUE 2M: What is the appropriate revised SoBRA factor for the 2017 projects to reflect actual construction costs that are less than the projected costs used to develop the initial SoBRA factor?

FIPUG: **As the SoBRA projects are neither cost effective nor needed, no new rates should be recovered.**

ISSUE 2N: What is the appropriate revised SoBRA factor for the 2018 projects to reflect actual construction costs that are less than the projected costs used to develop the initial SoBRA factor?

FIPUG: **As the SoBRA projects are neither cost effective nor needed, no new rates should be recovered.**

ISSUE 2O: Should the Commission approve revised tariffs for FPL reflecting the revised SoBRA factors for the 2017 and 2018 projects determined to be appropriate in this proceeding, effective January 1, 2019?

FIPUG: **No position at this time.**

ISSUE 2P: Are the 2019 SoBRA projects (Miami-Dade, Interstate, Pioneer Trail, Sunshine Gateway) proposed by FPL cost effective?

FIPUG: **No position at this time.**

ISSUE 2Q: What are the revenue requirements associated with the 2019 SoBRA projects?

FIPUG: **As the SoBRA projects are neither cost effective nor needed, no new rates should be recovered.**

ISSUE 2R: What is the appropriate base rate percentage increase for the 2019 SoBRA projects to be effective when all 2019 projects are in service, currently projected to be March 1, 2019?

FIPUG: **As the SoBRA projects are neither cost effective nor needed, no new rates should be recovered.**

ISSUE 2S: Should the Commission approve revised tariffs for FPL reflecting the base rate percentage increase for the 2019 SoBRA projects determined to be appropriate in this proceeding?

FIPUG: **No.**

ISSUE 24D: What is the appropriate true-up adjustment amount associated with the 2017

SOBRA projects approved by Order No. PSC-2018-0028-FOF-EI to be refunded through the capacity clause in 2019?

FIPUG: **No position at this time.**

ISSUE 24E: What is the appropriate true-up amount associated with the 2018 SOBRA projects approved by Order No. PSC-2018-0028-FOF-EI to be refunded through the capacity clause in 2019?

FIPUG: **No position at this time.**

DISCUSSION OF ISSUES

The Commission should not limit its review of FPL's SoBRA projects to select provisions of the 2016 Settlement Agreement. Instead, the Commission should follow its precedent and statutory provisions and apply a prudence standard to whether FPL's proposed solar projects should be approved for rate recovery. The pertinent statutory provisions are the following:

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

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

The Florida Supreme Court has recognized that the prudence standard is routinely and

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

In this case, the Commission should conduct a prudence review and analysis. It should consider whether the SoBRA projects proposed by FPL in this proceeding represent "money honestly and prudently invested by the public utility company in such property used and useful in serving the public" as statutorily required.

The Commission has made the following pronouncements about its role when considering matters set forth in a settlement agreement. The Commission previously stated:

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

Order No. 22353 issued December 29. 1989 in Dockets No. 890216-TL and 890216-TL, *In re: Petition of Citizens of the State of Florida for a limited proceeding to reduce General Telephone*

Company of Florida's authorized return on equity; In re: Investigation into the proper application of Rule 25-14.003, F.A.C., relating to tax savings refunds for 1988 and 1989 for GTE Florida Incorporated; *See also* Order No. 13-0194-PCO-EI issued May 10, 2013 in Docket No. 100437-EI at p. 4, *In re Examination of the outage and replacement of fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc*. The Commission's failure to conduct a prudence review of FPL's SoBRA projects and limiting its review of FPL's solar project to only items set forth in the Settlement Agreement impermissibly sidesteps the Commission's statutory obligations.

Furthermore, 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. The Commission should not rely on the uncorroborarted hearsay of FPLwitness Enjamio related to the projected cost of carbon or the projected cost of natural gas. Witness Enjamio does not have expertise in either area and offered nothing to suggest otherwise. He cannot rely on what others may have told him about the projected cost of natural gas or carbon. "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).

Finally, the Commission's and FPL's use of the fuel cost recovery clause for FPL's SoBRA projects is inappropriate. As the Florida Supreme Court has noted, the fuel clause

"should be 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).

By using the fuel clause to consider FPL's solar projects, arguably FPL, the Commission and SoBRA issues in the case are statutorily exempt from rulemaking, insulating the Commission and FPL 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).") Rulemaking is an important tool in the development of public policy and should not be avoided by employing the fuel clause for consideration of FPL's solar energy capital requests.

As the Florida Supreme 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, even if such costs are ultimately recovered in base rates.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for the reasons set forth above, the Commission should not permit FPL to use the fuel clause to saddle its customers with additional solar capital costs for energy that:

- is not prudent and does not meet the statutory prudence review standard;
- is not needed to for reserve margin purposes;

- is not proven to be cost effective (unless one improperly relies on and accepts uncorroborated hearsay evidence about future carbon tax and fuel price assumptions from non-testifying witnesses)
- is neither related to recovery of fuel costs nor appropriately recovered through the fuel clause;
- is a cost for which the Legislature has not given the Commission statutory authority to permit recovery by a clause mechanism.

WHEREFORE, for the foregoing reasons, the Commission should deny FPL's Petition for Recovery of its solar costs through the fuel clause; and, FIPUG seeks such other relief as the Commission deems just and appropriate.

/s/ *Jon C. Moyle*

Jon C. Moyle, Jr.
Moyle Law Firm, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 681-3828
Facsimile: (850) 681-8788
jmoyle@moylelaw.com
Attorneys for Florida Industrial Power Users Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response was furnished to the following by Electronic Mail, on this 16th day of November, 2018:

Suzanne Brownless
Johana Nieves
Florida Public Service Commission
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
sbrownle@psc.state.fl.us
jnieves@psc.state.fl.us

Ken Hoffman
Florida Power & Light Company
215 S. Monroe Street, Suite 810
Tallahassee, Florida 32301-1858
Ken.Hoffman@fpl.com

James Beasley./J. Jeffry Wahlen/
Ashley M. Daniels
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
jbeasley@ausley.com
jwahlen@ausley.com
adaniels@ausley.com

Ms. Paula K. Brown
Tampa Electric Company
Post Office Box 111
Tampa, Florida 33601
regdept@tecoenergy.com

Matthew Bernier
106 East College Avenue, Suite 800
Tallahassee, Florida 32301
Matthew.bernier@duke-energy.com

Dianne M. Triplett
299 First Avenue North
St. Petersburg, Florida 33701
Diane.triplett@duke-energy.com

John Butler/Maria Jose Moncada
Florida Power & Light Company
700 Universe Blvd. (LAW/JB)
Juno Beach, FL 33408
John.Butler@fpl.com
Maria.Moncada@fpl.com

Russell A. Badders/Steven R. Griffin
Beggs & Lane
Post Office Box 12950
Pensacola, Florida 32591-2950
rab@beggslane.com
srg@beggslane.com

Jeffrey A. Stone/Rhonda J. Alexander
Gulf Power Company
One Energy Place
Pensacola, Florida 32520-0780
jastone@southernco.com
rjalexad@southernco.com

J.R. Kelly/Patricia A. Christensen/Charles J. Rehwinkel/Erik L. Sayler
Office of Public Counsel
111 W. Madison Street, Room 812
Tallahassee, Florida 32399
Kelly.jr@leg.state.fl.us
Christensen.patty@leg.state.fl.us
Rehwinkel.charles@leg.state.fl.us
Sayler.erik@leg.state.fl.us

Beth Keating
Gunster, Yoakley & Stewart, P.A.
215 South Monroe Street, Suite 601
Tallahassee, Florida 32301
bkeating@gunster.com

Mike Cassel
Florida Public Utilities Company
1750 S. 14th Street, Suite 200
Fernandina Beach, Florida 32034
mcassel@fpuc.com

James W. Brew/Laura A. Wynn
Stone Mattheis Xenopoulos & Brew, P.C.
1025 Thomas Jefferson Street, NW
Eighth Floor, West Tower
Washington, DC 20007-5201
jbrew@smxblaw.com
law@smxblaw.com

Robert Scheffel Wright/John T. LaVia, III
Gardner Bist Wiener Wadsworth Bowden Bush Dee LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308
schef@gbwlegal.com
jlavia@gbwlegal.com

/s/ Jon C. Moyle
Jon C. Moyle
Florida Bar No. 727016