BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 170001-EI
Filed: November 13, 2017

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 AND SUMMARY

The contested issues to be resolved by the Commission relate to FPL's efforts to recover nearly $1 billion of 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.

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 make the projects "cost effective" on paper, 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 The current administration has withdrawn the country from the multi-national Paris Climate Agreement and is working to the repeal the federal Clean Power Plan.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 nearly one billion 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. Nevertheless, only with a carbon tax are FPL's solar projects projected to save money for FPL's customers. And the carbon tax testimony is suspect 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.

Florida Power & Light Company (FPL)

ISSUE 2J: Are the 2017 SoBRA projects proposed by FPL (Horizon, Wildflower, Indian River, and Coral Farms) cost effective?

FIPUG: No.

ISSUE 2K: What are the revenue requirements associated with the 2017 SoBRA projects?

FIPUG: Less than $60.52 million.

ISSUE 2L: What is the appropriate base rate percentage increase for the 2017 SoBRA projects to be effective when all 2017 projects are in service, currently projected to be January 1, 2018?

FIPUG: Less than 0.937%.

ISSUE 2M: Are the 2018 SoBRA projects proposed by FPL (Hammock, Bearfoot Bay, Blue Cypress and Loggerhead) cost effective?

FIPUG: No.

ISSUE 2N: What are the revenue requirements associated with the 2018 SoBRA projects?

FIPUG: Less than $59.89 million.

ISSUE 2O: What is the appropriate base rate percentage increase for the 2018 SoBRA projects to be effective when all 2018 projects are in service, currently projected to be March 1, 2018?

FIPUG: Less than 0.919%.

ISSUE 2P: Should the Commission approve revised tariffs for FPL reflecting the base rate percentage increases for the 2017 and 2018 SoBRA projects determined to be appropriate in this proceeding?

FIPUG: No.

Discussion of Issues

I. The FPL Solar Projects Are Not Needed To Meet FPL's Reserve Margin; Unneeded Projects Are Not Prudent or Cost Effective

Commission Rule 25-6.035(1), F.A.C., establishes a 15% reserve margin. Despite the Commission policy set forth in rule, as required by the state's Administrative Procedures Act, FPL nevertheless uses a 20% reserve margin criterion as explained by FPL witness Enjamio. Tr. 252-253. As Exhibit 100, page 3, makes clear, FPL at no time needs its proposed solar projects to meet the Commission's 15% reserve margin or FPL's 20% reserve margin requirements. FPL witness Enjamio conceded that the FPL solar or SoBRA[1] projects are not primarily intended or needed to meet FPL's reserve margin requirements. Tr. 458. If a 15% reserve margin were to be used, as set forth by Commission rule 25-6.035(1) F.A.C., then all of the FPL solar projects are added to a reserve margin figure that is already 5% higher than the 15% figure before the first megawatt of SoBRA solar is added.

For utility planning purposes, FPL counts only 54% of the name plate rating of solar units toward capacity. Tr. 477. Exhibit 100 p. 3, reflects that FPL's lowest capacity during the four year term of the current SoBRA laden settlement agreement is 21.2% of peak load or 4,689 MW of reserve margin in 2017. FPL is seeking recovery of 298 MW of solar for 2017. 54% of 298 MW is 161MW. Not including the 2017 SoBRA solar results in a reduction of the reserve margin for 2017 being 4528 MW or 20.44%, a figure still above the 20% reserve margin that FPL uses to plan its system. Similarly, these calculation for years 2018 through 2021 likewise

[1] A provision of Florida Power & Light Company's 2017 Settlement Agreement addresses solar energy. This provision, commonly known as a solar based rate adjustment mechanism or "SoBRA", is found in paragraph 10 of the 2017 Settlement Agreement, an agreement which FIPUG did not sign and thus by which FIPUG is not bound.

reveal that FPL's reserve margin is above 20%, even without the addition of the SoBRA projects. See also, Exhibit 100, p. 3.

II. FPL Did Not Meet Its Burden To Prove the SoBRA Projects Are Cost Effective; Information About Future Carbon and Natural Gas Costs is Uncorroborated Hearsay

Recognizing that it comes up short when applying the Commission's 20% reserve margin test to FPL's solar projects, FPL conveniently pivots and suggests that these SoBRA projects are being built due to a "cost-effectiveness" construct found within FPL's 2016 Settlement Agreement.

> **Question:** Okay. So, if I ask you the question live, today, is the primary purpose of the solar generation to meet reserve margin?
>
> **Answer:** No, sir. The primary purpose is still cost-effectiveness, which is the standard by which the SoBRA stipulation was based on….

Tr. 460.

FPL has the burden of proof in this proceeding, something acknowledged by FPL's witness Enjamio. Tr. 474. However, FPL's efforts to prove that the SoBRA projects are "cost effective" are misplaced and supported only by hearsay evidence, which cannot be the basis of a finding of fact.

Exhibit 100 p. 2, purports to show the rate impacts upon FPL customers if the FPL solar projects are approved. However, the exhibit shows that FPL customers actually lose $127.3 million should fuel prices remain low in the future and no carbon tax is imposed in the future. The Trump administration has given no indication that it will impose a carbon tax, has withdrawn from the Paris Climate Change Agreement and has taken steps to rescind the Clean Power Plan. Tr. 470. FPL witness Enjamio characterized the current administration as "hostile"

to a carbon tax and agreed that no carbon tax is likely to be enacted in the near future. Tr. 471, 472. Indeed, a carbon tax has never been imposed on FPL generating assets and there are no signs that Congress will impose such a tax at any point in the future. Tr. 470.

This Commission will find itself on shifting sands if it accepts, as the premise for approving the solar/SoBRA projects, FPL's invitation to speculate that, in more than a decade from now, Congress will enact a carbon tax that would justify approving now nearly $1 billion in new solar projects so FPL's customers might save a small amount of money over 32 years. The future actions that Congress may take next month cannot be predicted with any degree of certainty; pinning nearly $1 billion in solar capital dollars, supplied by ratepayers, on a predicted decision of a witness who did not appear before the Commission that Congress will, a decade from now, pass a carbon tax is speculative and unwarranted.

FPL asks the Commission to rely on the "expert" opinions of others to suggest that natural gas prices will climb and a carbon tax will be imposed, making the SoBRA projects "cost effective" for FPL's customers. While nobody can predict the future, a natural gas pricing "expert" and carbon tax "expert" gave it a try when preparing certain reports for FPL. If the Commission is going to accept "expert" projections about what the future holds for a carbon tax and natural gas pricing, the very experts whose view the Commission is being asked to accept should appear as witnesses to explain their analysis and answer questions, given that the Commision is being asked to spend nearly $1 billion in ratepayer dollars. Neither expert provided testimony at hearing.

> **Question:** Okay. And -- and you -- the person who is doing the analysis -- they didn't provide testimony in this case, did they -- the CO2 analysis?
>
> **Answer:** By CO2 analysis, you mean the –
>
> **Question:** The cost of carbon, the carbon tax.

Answer: No, that was developed by a consultant called ICF, which we used for quite a few years, the most respected consultant in the field.

Tr. 472.

Question: With respect to the -- the Oil and Gas Auction Announcement, who would be best to talk to about that, you or Mr. Brannen?

Answer: Well, neither Mr. Brannen or I are experts on fuel markets….

Tr. 495.

The report of the projected carbon tax is not part of the record in this case. Tr. 473-474. This bootstrapped expert opinion about a future carbon tax, or future fuel prices, cannot be relied upon as the basis for a finding that FPL ratepayers will save money with FPL's proposed solar projects.

A testifying expert opinion cannot be used as a conduit to introduce the expert opinion of another non-testifying expert. *Riggins v. Mariner Boat Works, Inc.*, 545 So.2d 430, 432 (Fla. 2d DCA 1989) (recognizing a line of cases that prohibits the use of expert testimony merely to serve as a conduit to place otherwise inadmissible evidence before the trier of fact.) See also, *Linn v. Fossum*, 946 So. 2d 1032, 1033 (Fla. 2006) (holding that expert testimony which is based on consultations or information from another non-testifying expert is inadmissible because it impermissibly permits the testifying expert to bolster his or her opinions and creates the danger that the testifying experts will serve as conduits for the opinions of others who are not subject to cross-examination.) In this case, key assumptions about the future cost of natural gas and the future cost or tax of carbon were made by non-testifying entities, and simply parroted into this record by means of an improper conduit, FPL witness Enjamio.

Furthermore, the information about the future costs of natural gas and the future cost of carbon resulting from a carbon tax is uncorroborated heresay. Such information was prepared or

authored by others not witnesses in this case. While hearsay is admissible in an administrative proceeding, uncorroborated hearsay cannot form the basis for any findings of fact. See, s. 120.57(1)(c), F.S. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.") See also, *see also, Sheriff of Broward County v. Stanley,* 50 So.3d 640, 644 (Fla. 1st DCA 2010) (While hearsay is admissible in administrative cases to supplement or explain evidence, hearsay alone is not competent substantial evidence, citing *Forehand v. Sch. Bd. of Gulf County,* 600 So.2d 1187, 1191 (Fla. 1st DCA 1992).

III. Nearly $ 1 Billion of Non-Volatile SoBRA Solar Capital Projects Are Not Appropriately Recovered Through The Fuel Clause

FPL is asking this Commission to approve the expenditure of nearly $1 billion of ratepayer money on these unneeded solar projects. Tr. 467. However, FPL did not identify what authority (other than a non-unanimous settlement agreement) under which the Commission has authority to approve these solar projects, and FPL's witness was unaware of any authority to approve these solar projects. Tr. 507. The Prehearing Order in this case has a Jurisdictional Section, Section III. This section provides in its entirety:

> **This Commission is vested with jurisdiction over the subject matter by the provisions of Chapter 366, Florida Statutes (F.S.). This hearing will be governed by said Chapter and Chapters 25-6, 25-22, and 28-106, F.A.C., as well as any other applicable provisions of law.**

The Florida Supreme Court recently reviewed the fuel clause, the clause under which FPL is asking the Commission to approve nearly $1 billion in solar capital projects. The Supreme Court's prior pronouncements about the fuel clause should be heeded. "The fuel cost adjustment

clause is a cash flow mechanism to allow utilities to recover costs for unanticipated changes in fuel costs between ratemaking proceedings." *Citizens v. Graham,* 213 So.3d 703, 717 (Fla. 2017); See also, *Gulf Power Co. v. Fla. Pub. Serv. Comm'n*, 487 So.2d 1036, 1037 (Fla. 1986)("Fuel adjustment charges are authorized to compensate for utilities' fluctuating fuel expenses. The fuel adjustment proceeding is a continuous proceeding and operates to a utility's benefit by eliminating regulatory lag."). See *Citizens of State v. Graham,* 191 So.3d 897, 899 (Fla. 2016)(The Court reaffirmed the purpose of the fuel clause as a mechanism for addressing the volatility of fuel prices between ratemaking proceedings.) Tellingly, the Court recently 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. Today's case is certainly not the first example of utilities seeking to recover for items that are more properly base rate costs through the fuel clause in a practice that has become alarmingly frequent.**

Citizens v. Graham at 217.

FPL's effort to again use the fuel clause to recover predictable capital costs runs afoul of the underlying purpose of the fuel clause, which is to address the volatility of fuel prices between base rate cases. FPL's solar recovery effort via the fuel clause should not be allowed. Like the Woodford project in *Citizens of State v. Graham,* 191 So.3d 897 (Fla. 2016), the monies recovered from ratepayers in this case will not pay for actual fuel, but will pay for investment, operation and maintenance of solar assets, including a profit on the capital dollars spent.

The FPL proposed SoBRA solar projects are planned years in advance, and do not have volatile fuel prices, because the projects use free energy from the sun. Indeed, FPL has agreed to construct such SOBRA projects for the next four years under a cost cap of $1,750 per kilowatt

per alternating current, a fact which supports the finding that FPL's projected solar capital costs are not volatile. Tr. 522. Permitting the fuel clause to be used to recover the stable capital costs of projects which use free energy from the sun, and recover no fuel costs, is hardly within the scope of the Commission's fuel clause, and should not be done.

Furthermore, there is no statutory authority provided to the Commission to permit FPL to recover its solar capital costs through a clause mechanism. The Commission is a creature of statute, and all of its power comes from the express grant of power by the Florida Legislature. *Southern States Utilities v. Florida Public Service Commission*, 714 So.2d 1046, (Fla. 1st DCA 1998) ("Inasmuch as the PSC, like other administrative agencies, is a creature of statute, 'the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State.' *Rolling Oaks Utils. v. Florida Public Serv. Comm'n,* 533 So.2d 770, 773 (Fla. 1st DCA 1988). *See, e.g., Deltona Corp. v. Mayo*, 342 So.2d 510 n. 4 (Fla.1977) (quoting *City of Cape Coral v. GAC Utils.*, 281 So.2d 493, 496 (Fla.1973)").

The Legislature has expressly acted to provide the Commission with authority for a clause mechanism for Florida utilities to use to recover to qualifying nuclear cost recovery costs, the nuclear cost recovery clause. See s. 366.93, F.S. Similarly, the Legislature has expressly acted to provide the Commission with authority for a clause mechanism to recover environmental costs. See s. 366.8255 F.S. The Legislature has not similarly acted to provide the Commission with express (or implied) authority for a solar energy capital cost recovery clause, or a fuel clause for that matter. The Commission does not have jurisdiction to permit FPL to recover its solar capital costs through the fuel clause and this Commission cannot have fuel clause jurisdiction conferred upon it by a rate case settlement agreement.

IV. Conclusion and Requested Relief

WHEREFORE, for the reasons set forth above, the Commission should not permit FPL to use the fuel clause to saddle its customers with nearly $1 billion in solar capital costs for energy that:

- is not needed to meet the Commission's 15% reserve margin rule, or FPL's 20% reserve margin criterion;
- 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 for the next 33 years and assumes Congress will enact a carbon tax);
- is neither related to recovery of fuel 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.

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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 13th day of November, 2017:

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