IN THE SUPREME COURT OF THE STATE OF FLORIDA

LULAC FLORIDA EDUCATIONAL FUND, INC.,

Case No.: SC21-303
L.T. Case No.: 20200176-EI

Appellant,

v.

GARY F. CLARK, ETC., ET AL.,

Appellees.
_____/

ANSWER BRIEF OF APPELLEE THE FLORIDA PUBLIC SERVICE COMMISSION

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STATEMENT OF THE CASE AND FACTS

This case is a direct appeal by the League of United Latin American Citizens of Florida, a/k/a LULAC Florida Educational Fund Inc. (LULAC) of the Florida Public Service Commission's (Commission) Final Order No. PSC-2021-0059-S-EI (Final Order). (R. 2857) By the Final Order, the Commission approved Duke Energy Florida, LLC's (DEF) Petition for a Limited Proceeding to Approve Clean Energy Connection Program and Tariff and Stipulation. (R. 2831)[1]

This Court has mandatory jurisdiction pursuant to Art. V, Section 3(b)(2), Florida Constitution, and sections 350.128(1) and 366.10, Florida Statutes, because the Final Order relates to the rates of a public utility providing electric service.

DEF's Petition and The Stipulation

The proceeding before the Commission was initiated when DEF filed a Petition and Stipulation on the Petition (Stipulation), requesting that the Commission approve all costs and expenses for its Clean Energy Connection Program (CEC Program). (R. 18) The

[1] The following symbols will be used: LULAC's Initial Brief (LULAC Br. [Page #]); Record on Appeal (R. [Page #]).

Petition included the description of the CEC Program (R. 18-113). The Stipulation was between DEF and certain DEF customers – Walmart Inc. (Walmart), Vote Solar, and the Southern Alliance for Clear Energy (SACE) and was offered to resolve the Petition. (R. 27-39)

The signatories to the Stipulation intervened in the proceeding, as did the Office of Public Counsel and the Florida Industrial Power Users Group. (R. 131-157) LULAC intervened in the proceeding and requested a hearing on the Stipulation. (R. 114-126) An administrative hearing on the Stipulation was held on November 17 and 18, 2020. (R. 874-875, 1584, 1824, 2833)

Discovery Disputes and Orders

Prior to the hearing, LULAC filed a motion to compel discovery responses from Walmart on interrogatories 1-2 and 4-6 and request for production of documents 1-3. (R. 1154-1217) LULAC sought to compel the discovery of information about settlement discussions, and LULAC argued that the information sought in these interrogatories was relevant to the proceeding. (R. 1154-1168) Both DEF and Walmart objected to the discovery on the ground that LULAC was seeking settlement discussions, which both Walmart

and DEF argued were not properly the subject of discovery. (R. 1238, 1243) Walmart also separately objected to several aspects of the discovery sought by LULAC on the basis that it was confidential business and proprietary information and confidential trade secret information. (R. 1244-1248)

LULAC also sought to compel Walmart to disclose certain information about the CEC Program's subscriptions and how Walmart preregistered for the program. (R. 1154-1168) Walmart argued a non-disclosure agreement (NDA) was necessary because the information LULAC sought was a confidential trade secret pursuant to section 688.002(4), Florida Statutes. (R. 1244-1248)

The Commission denied LULAC's motion as to the interrogatories and requests for production of documents that sought discovery of settlement negotiations. (R. 1550-1553) While the Commission granted the motion as to the rest (i.e., information related to preregistration and anticipated bill credits and return on investment from participation in the program), it prefaced the granting of the motion subject to any claim of confidentiality pursuant to section 366.093, Florida Statutes, and LULAC's execution of an appropriate NDA. (R. 1551-1553) LULAC declined to

sign a NDA (R. 1871-1872) and, thus, never received the information/documents.

The Hearing

At the November hearing, DEF introduced into evidence the testimony of witnesses Huber, Stout, Foster, and Borsch. (R. 1649, 1743, 1777, 1887, 2003, 2020) Walmart introduced witness Chriss, who supported DEF's testimony. (R. 1830) LULAC introduced witness Rabago. (R. 1950)

Testimony on the CEC's Program Benefits to All Customers

DEF presented testimony that the CEC Program was a cost-effective, voluntary community solar program that was developed because of feedback from stakeholders to provide customers, who either do not have the ability or the desire to place solar facilities on their property, or the ability to subscribe to solar generation. (R. 783, 1567, 1654, 1661-1662, 1664, 1666, 1668-1670) There was testimony that the CEC Program would benefit all DEF customers by meeting the customers' needs for renewable energy and expanded access to solar energy. (R. 1639, 1655, 1669-1670) There was also testimony the CEC Program would lower customer bills over the life of the CEC Program and save DEF's total customer

population money. (R. 1638, 1652-1654, 1662-1664, 1686, 1696-1698, 1786-, 1795, 1803, 1805, 1825, 1869-1870, 1894, 1897-1898, 1902-1905, 1908, 1911, 2503-2506) There was also evidence that the CEC Program would allocate new generation costs so that all customers benefit, while the program participants eventually fund all of the fixed revenue requirements of the new generation. (R. 1782, 1790, 2023, 2026, 2029) In addition, there was testimony that the program would bring economic benefits to the areas where the solar would be located and additional tax value to the local and state governments. (R. 1669)

DEF witnesses also testified in detail on how the CEC Program's financial structure and subscription fees would allow for benefits to nonparticipants in DEF's customer base. (R. 1662, 1668-1669, 1682-1683, 1688-1689, 1773, 1765, 2026-2027) DEF witnesses testified that DEF designed the CEC Program to allow 87.3 percent of the Cumulative Present Value Revenue Requirements (CPVRR) benefit to be allocated to the general body of customers, and the remaining 12.7 percent would go to the program participants. (R. 1669, 1688, 1785, 1796, 1841, 2024, 2026) The testimony was that this would result in a net CPVRR

benefit, both for participants and the general body of customers. (R. 1783)

DEF also presented testimony that the CEC Program would bring benefits to all of DEF's customers by providing renewable energy that would diversify DEF's fuel mix, firm summer capacity, and help DEF's future fuel needs. (R. 1653, 1883-1884, 1899-1900) There was testimony that the CEC Program's solar projects would also reduce DEF's annual average use of natural gas and coal, thereby reducing DEF's reliance on fossil fuels. (R. 1883-1884, 1899-1900). In addition, there was evidence that these new solar projects would reduce the use of fossil fuels and reduce global warming gases. (R. 1883-1884) The Walmart witness also testified that the Stipulation would provide a benefit to the Florida public by helping to deliver cleaner power to the grid overall and would provide millions of dollars in projected savings to both participants and the majority of DEF customers. (R. 1638, 1652-1653,1662-1663, 1686, 1696-1698, 1712-1713, 1786-1787, 1795, 1803, 1805, 1825, 1869-1870, 1883-1884, 1894, 1897-1900, 1902-1905, 1908, 1911, 2503-2506)

Testimony on the CEC's Program Benefits to Participating Customers

DEF presented evidence that the customer makeup of the program would be diverse, non-discriminatory, and fair. (R. 1650, 1662-1666, 1668, 1686, 1842) The testimony was that 25 percent of CEC Program capacity would be fairly allocated to residential, small business customers, 10 percent to local government, and 65 percent of the CEC program capacity would be allocated to commercial/industrial customers. (R. 1692, 1736) There was evidence that of the large majority of commercial/industrial subscribers, 73 percent would be nonprofits, local cities, and towns and of the 30 customers that pre-subscribed to the program, 22 included tax-exempt local governments, schools, and healthcare organizations. (R. 1662, 1678, 1741-1742, 1725)

There was evidence that of the 25 percent of CEC Program capacity allocated to residential and small business customers, DEF committed to allocate 27.7 percent of the residential capacity to low-income customers. (R. 1691, 1701-1702) There was testimony that the low-income allocation was chosen because this

is the percentage of DEF residential customers that were eligible for low-income energy efficiency programs. (R. 1647, 1663, 1689, 1692)

DEF provided evidence that all participating customers would be able to purchase the same 1 kW increment blocks. (R. 1163, 1689, 2009) Also, while the CEC program was designed to give low-income customers the same benefit/kw subscription on a CPVRR basis as other customers in the program, there was testimony that the low-income program was not subsidized. (R. 1663, 1688, 2025-2027) Rather, the program was adjusted to have relatively more benefits early and less benefits later allowing for bill reductions every year. (R. 1664) There was further testimony that all participants in the CEC program would benefit by a lower DEF monthly bill. (R. 1650, 1662-1666, 1668, 1686, 1842)

With regard to the low-income customers, there was testimony that the bill credit rate was developed to deliver low-income participants the same CPVRR benefit per kw subscribed but without the 1.5 percent annual escalation imposed on the other categories of participants. (R. 1662-1664, 1708-1709, 1785) Additionally, the evidence was that the low-income credit was structured on a per kw (vs per kWh basis) to remove variability

associated with fluctuations in plant generation. (R. 1786) Also, this structure would yield a consistent bill credit for low-income customers to more than offset the subscription fee in every month over the life of the CEC Program. (R. 1786) There was witness testimony that the Stipulation would provide additional benefits for the low-income subscribers, such as a "hold harmless" provision to ensure low-income customers' bills do not increase because of enrollment, co-marketing of the Program with existing energy efficiency programs, and open enrollment regardless of a customer's arrearage status. (R. 1842)

Testimony on the CEC's Program's Cost-Effectiveness

DEF presented testimony at the hearing supporting the cost-effectiveness of the CEC Program. (R. 1668, 1688, 1690, 1746-1747, 1749, 1766, 1771, 1899, 2015) The testimony was that DEF's experience with recent solar projects would allow for better solar facility pricing, market forecasting, and conservative and reasonable project costs. (R. 1742-1744, 1759) DEF witnesses also testified that DEF designed for the most cost-effective projects regardless of the way the revenue is recovered because DEF designed the program to obtain the lowest installed cost, lowest operating cost,

and most efficient production to optimize the cost-effectiveness. (R. 1750, 1766)

The testimony was that the CEC Program would have low costs because DEF agreed in the Stipulation to a competitive request for proposals for all major equipment, engineering, procurement, and construction services. (R. 1750, 1875-1876) The testimony was also that DEF analyzed the total system cost of the DEF system with the CEC Program solar projects as compared to the total DEF system costs without the projects and found that the solar projects as proposed reduced the total system cost and were, thus, cost-effective for DEF's customers. (R. 1878, 1894)

LULAC Witness Rabago presented testimony that the CEC Program was unfairly structured as to allow a large company like Walmart to be the recipient of the program benefits. (R.1958-1959) This testimony was rebutted by DEF Witness Huber, who testified that of the 30 customers who have pre-subscribed to the program, 22 are tax-exempt local governments, schools, and healthcare organizations, not wealthy corporations. (R. 1678) In addition, the rebuttal testimony was that there are thousands of additional small businesses and residential customers, including low-income

customers, who will save a modest sum over decades while achieving their goal of using renewable energy through the CEC Program. (R. 1678)

LULAC Witness Rabago also testified that the CEC Program failed to meet the Interstate Renewable Energy Council (IREC) standards. (R. 1962-1964) However, DEF provided rebuttal testimony on this point, explaining that the CEC Program met the standards and contained aspects promoted by IREC because Vote Solar was involved with developing these standards and Vote Solar was a signatory to the Stipulation. (R. 1685-1688) Witness Huber testified in rebuttal that DEF conducted extensive outreach and that the only non-profit community stakeholder that objected to this program was LULAC. (R. 1688)

LULAC Witness Rabago testified that the CEC program creates an unfair subsidy for participants from non-participants. (R. 1958-1959) The rebuttal testimony showed the contrary – that both participants and non-participants would benefit from the program. (R. 1683-1688, 1693, 2023-2025) The rebuttal testimony was that non-participants would experience a net savings in 9 years, and participants will pay 104.9 percent of the fixed program costs with

the general body of customers receiving 87.3 percent of the benefits. (R. 1688, 2024, 2026)

During the cross-examination of Walmart Witness Chriss, LULAC began asking questions on topics that were the subject of the Commission's order on the Motion to Compel. (R. 1550-1553, 1853-1854, 1861-1862, 1866-1867, 1872) Walmart objected, and ultimately, the Commission disallowed LULAC's questions and held that the questions were outside the scope of the witnesses direct testimony and that LULAC was asking for information deemed confidential. (R. 1550-1553, 1848, 1853-1854, 1861-1862, 1865-1868, 1872)

The Final Order

In the Final Order, the Commission stated that the standard for approval of a settlement agreement is whether it is in the public interest. (R. 2834) The Commission held that the Stipulation demonstrated that the signatories negotiated improvements to DEF's original CEC Program and that litigation was avoided based on the agreements they reached. (R. 2834)

The Commission reasoned that its decision should not rest on an analysis of the settlement negotiations, but rather the final

agreement among the adverse parties. (R. 2834-2835) The Commission held that ultimately the only question before the Commission was whether the resulting Stipulation was in the public interest. (R. 2834-2835)

The Commission stated that the determination of whether a settlement is in the public interest requires a case-specific analysis based on consideration of the proposed settlement taken as a whole. (R. 2835) The Commission found that the Stipulation aligned with the Florida Legislature's expressed intent to promote renewable energy in section 366.92, Florida Statutes, and provided ample system-wide benefits, including: promoting the development of renewable energy, encouraging investment within the state, diversifying the types of fuel used to generate electricity, lessening the state's reliance on fossil fuels, and decreasing carbon emissions. (R. 2835) In addition, the Commission found that the Stipulation comported with section 366.06, Florida Statutes, by establishing fair, just, and reasonable rates without undue preference. (R. 2835)

The Commission reasoned that assuming the mid-fuel costs and including carbon costs projections, 87.3 percent of the CPVRR benefits from the CEC Program would go to the general body of

ratepayers. (R. 2835) The Commission found that the significant benefits reasonably expected to be realized by the general body of ratepayers over a long period of time supported its finding that approval of the CEC Program was in the public interest. (R. 2835) The Commission also recognized that approximately 27.7 percent of the residential allocation within the CEC Program was carved out for low-income customers. (R. 2835)

After reviewing the Stipulation, the exhibits entered into the record, and the testimony provided by witnesses, the Commission held that, taken as a whole, the Stipulation established rates that were fair, just, and reasonable; was supported by the record evidence; and was in the public interest. (R. 2853)

SUMMARY OF THE ARGUMENT

The Commission applied the correct standard in considering and approving the Stipulation. This Court has repeatedly held that the proper standard for the Commission's consideration and approval of a stipulation or settlement agreement is whether the stipulation or settlement agreement is in the public interest.

The fact that the Stipulation initiated the proceeding is of no import, and whether the Stipulation made the proceeding non-

adversarial is a red herring. The Commission followed the due process requirements of the Administrative Procedure Act in considering and approving the Stipulation. All parties, including LULAC, were given full opportunity to present evidence and argument on all relevant issues in the case and were allowed to conduct cross-examination of all witnesses on the case's relevant issues. It was not until after the full evidentiary hearing on the Stipulation that the Commission rendered its decision.

The Final Order is supported by competent, substantial record evidence. The record shows that the CEC Program provides cost-effective benefits to all DEF customers, including the low-income participants, and provides customers with fair, just, and reasonable rates. LULAC's arguments show that it is asking this Court to reweigh the evidence, but this is something the Court simply cannot do. It is the Commission's job as fact-finder to weigh the credibility of the witnesses and determine the weight of the evidence.

The Commission did not abuse its discretion and did not violate LULAC's due process rights when it disallowed discovery and cross-examination on settlement agreement negotiations because the Commission's decision was to be on the stipulation itself, i.e.,

the result of the negotiations. The substance of the negotiations themselves was not the issue in the proceeding. The Commission did not abuse its discretion and did not violate LULAC's due process rights when it limited LULAC's cross-examination to matters within the scope of the witness's direct testimony and when the cross-examination was conducted as a means to circumvent the Prehearing Officer's prehearing order.

Moreover, the Commission was correct to not consider the Power Plant Siting Act when rendering its decision because the record showed that the projects did not fall within the thresholds of the Act. The Commission's Final Order should be affirmed.

ARGUMENT

I. THE COMMISSION APPLIED THE CORRECT STANDARD IN APPROVING THE STIPULATION, AND THE PROCEDURE THE COMMISSION USED TO CONSIDER AND APPROVE THE STIPULATION COMPORTS WITH CHAPTER 120, FLORIDA STATUTES, AND PRIOR COMMISSION PRACTICE.

Standard of Review

In Point I of its Brief, LULAC calls into question the standard the Commission used to approve the Stipulation. (LULAC Br. 10-20) The standard of review is whether the Commission erroneously

interpreted a provision of law, and whether a correct interpretation compels a particular action. § 120.68(7)(d), Fla. Stat. The Court will review *de novo* an agency's interpretation of law. Art. V, § 21, Fla. Const.

In Point I of its Brief, LULAC also calls into question the procedure the Commission used to consider and decide the case. (LULAC Br. 21) The appropriate standard of review is whether the fairness of the proceedings or the correctness of the Commission's action may have been impaired by a material error in procedure or a failure to follow prescribed procedure. See § 120.68(7)(c), Fla. Stat.

Argument in Response

A. The public interest standard is the correct standard for considering and approving a stipulation.

The Administrative Procedure Act allows for the resolution of a proceeding via stipulation. § 120.57(4), Fla. Stat. ("Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order."). This Court has repeatedly held that the proper standard for the Commission's consideration and approval of a stipulation or settlement agreement

is whether the stipulation or settlement agreement is in the public interest. *See, e.g., Sierra Club v. Brown*, 243 So. 3d 903, 909-10 (Fla. 2018).

"The determination of public interest requires a case-specific analysis based on consideration of the proposed settlement taken as a whole." *Id.* at 910. Although the ultimate issue the Commission decided was whether the Stipulation was in the public interest, the Commission still considered all testimony, evidence, and argument that LULAC and all other parties provided before rendering its decision[2] and found that the resulting rates were just, fair, and reasonable without giving any customer group an undue preference (R. 2835), in accordance with sections 366.03, 366.05, and 366.06, Florida Statutes. *See Sierra Club*, 243 So. 3d at 916 (affirming

[2] LULAC argues that the public interest standard "collapses all issues considered by a settlement agreement into a universal yes-or-no evaluation of the agreement." (LULAC Br. 10) It is unclear as to what LULAC is purporting to be a more appropriate standard for the Commission to apply to the consideration of a tariff. If LULAC is attempting to argue that the Commission did not consider all the issues it raised with the tariff, it is incorrect. In order to make the determination of whether the tariff should be approved, the Commission considered all of the testimony, evidence, and argument as to whether the tariff contained in the Stipulation would result in fair, just, and reasonable rates and was in the public interest.

Commissions decision approving settlement agreement when there was competent, substantial evidence supporting Commission's finding that it resulted in just, fair, and reasonable rates and that it was in the public interest).

The Commission was presented with a Stipulation, along with evidence that the Stipulation was in the public interest. Thus, the Commission correctly applied the public interest standard when considering and approving the Stipulation. (R. 2831-2835)

B. The Commission met all due process requirements of chapter 120, Florida Statutes, when considering and approving the Stipulation.

Parties' due process rights must be protected when the Commission is considering and approving a non-unanimous stipulation or settlement agreement. *See Citizens of State of Florida v. Florida Public Service Commission*, 146 So. 3d 1143, 1154 (Fla. 2014). "The fundamental requirements of due process are satisfied by reasonable notice and a reasonable opportunity to be heard." *Florida Public Service Commission v. Triple "A" Enterprises, Inc.,* 387 So. 2d 940, 943 (Fla. 1980).

The Commission met all the due process requirements found

in the Administrative Procedure Act.[3] It is uncontested that the Commission met the noticing requirements of section 120.569, Florida Statutes. (R. 874-875) Moreover, an administrative hearing was held in accordance with sections 120.569 and 120.57, Florida Statutes, at which all parties, including LULAC, were given full opportunity to present evidence and argument on all relevant issues in the case and to conduct cross-examination of all witnesses on the case's relevant issues. (R. 813-816, 1218-1235, 1584, 1824, 2833-35)

The fact that the Stipulation initiated[4] the proceeding (LULAC Br. 16-20) is of no import. After DEF filed the Petition and Stipulation to commence the proceeding, the Commission held a full evidentiary hearing in accordance with the requirements of chapter 120, Florida Statutes, to consider the Stipulation. (R. 1584, 1824, 2833) It was not until after the full evidentiary hearing on the Stipulation that the Commission rendered its decision. *See Citizens of State of Florida*, 146 So. 3d at 1143. Thus, LULAC's statement

[3] Chapter 120, Florida Statutes.

[4] LULAC uses the term "pre-filed." It is unclear what LULAC means by this term. The Petition and Stipulation were filed with the Commission, and the Commission immediately opened a docket to process the Petition and Stipulation. (R. 2)

that the Commission uses "pre-filed stipulations to defeat public participation and true Commission review" (LULAC Br. 17) is patently false and contrary to the procedure used by the Commission to consider and approve the Stipulation.

Moreover, whether the Stipulation made the proceeding "non-adversarial" (LULAC Br. 16-20) is a red herring. There is no requirement in the law that the parties have some level of adverseness before a stipulation is reached. Even if one could be found, the Commission did not render its decision on the Stipulation until after the administrative hearing. (R. 2831-2836) As such, a proceeding was commenced when DEF filed its Petition, and the Stipulation is the informal disposition of the proceeding under section 120.57(4), Florida Statutes.

LULAC's claim that the Commission deviated from Commission procedure when it considered a stipulation that was filed to initiate a proceeding is incorrect. The Commission has considered settlement agreements and stipulations that have initiated proceedings, and the Commission has used the same procedure it did in the proceeding below – providing notice and offering the opportunity for an evidentiary hearing under chapter

120, Florida Statutes, prior to making a decision on the settlement agreement/stipulation – and applied the public interest standard to consider and approve the stipulations and settlement agreements. *See In re: Petition for limited proceeding to approve stipulation and settlement agreement by Progress Energy Florida, Inc.*, Order No. PSC-12-0104-FOF-EI, 2012 WL 769484 (Fla. P.S.C. March 8, 2012); *see also In re: Petition for limited proceeding to approve revised and restated stipulation and settlement agreement by Duke Energy Florida, Inc. d/b/a Duke Energy*, Order No. PSC-13-0598-FOF-EI, 2013 WL 6053492 (Fla. P.S.C. Nov. 13, 2013).

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

Standard of Review

In Point II of its Brief, LULAC raises arguments about the sufficiency of the evidence supporting the Final Order. (LULAC Br. 23-34) The standard of review is whether there is competent, substantial evidence supporting the Commission's findings of fact. § 120.68(7)(b), Fla. Stat. The Court will remand a case or set aside an agency decision if the agency's findings of fact are not supported by competent, substantial evidence. *Id.* However, the Court shall not

substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. *Id.*

Argument in Response

LULAC argues that even if the public interest standard applies, the Final Order is not supported by competent, substantial evidence. (LULAC Br. 23) According to LULAC, the program provides a financial windfall to a few, large corporate customers and would unduly subsidize and protect participants at the expense of the general body of ratepayers, who may never benefit from the CEC Program. (LULAC Br. 23) However, the record evidence shows the contrary – that the CEC Program does not create a subsidy, and, in fact, benefits all DEF customers, including the low-income participants, and provides customers with fair, just, and reasonable rates. (R. 1663-1666, 1683, 1688-1692, 1696-1697, 1712-1713, 1726-1727, 1735-1763, 1958-1959, 2023, 2025-2027)

The Commission has authority to set just, fair, and reasonable rates. *Citizens of State of Florida*, 146 So. 3d at 1150. While LULAC focuses on "discriminatory" and "unfair" rates, the law prohibits a utility from giving "undue" or "unreasonable" preferences or advantages. *See* § 366.03, Fla. Stat.; *see also In re: Petition of*

Tampa Electric Company for approval of construction deferral agreement with IMC Fertilizer, Inc., Order No. 24151, 1991 WL 11689239 (Fla. P.S.C. February 25, 1991) (finding that a special rate for a single customer was not unduly discriminatory where revenues received by the utility for the benefit of all customers outweighed the additional revenues they gave up under a construction deferral agreement).

The Stipulated tariff is not unduly discriminatory, nor does it single out any particular customer or group of customers unfairly. Instead, the record shows that DEF created the CEC Program to address the needs of all DEF customers, not a specific customer segment, and showed that all program participants, including low-income, residential customers, small business customers, tax-exempt local governments, schools, healthcare organizations, and non-profits would benefit from the CEC program. (R. 1662, 1678, 1681, 1684-1665, 1741-1742, 1725-1727)

While LULAC argues that the CEC Program creates benefits only for large, corporate customers at the expense of the general body of ratepayers (LULAC Br. 24), DEF presented a voluminous amount of evidence showing that the CEC Program provides fair

and non-discriminatory rates to all DEF customers and all program participants. (R. 1638, 1652-1653, 1712-1713, 1773, 1825)

Additionally, the records shows that LULAC's arguments about unfair subsidization (LULAC Br. 8, 23-24, 29) are unfounded. (R. 1653) As demonstrated by DEF's testimony and exhibits, no DEF customers will subsidize the CEC Program, and the program is projected to provide $533 million in present value system savings, of which almost 90 percent will accrue to all customers. (R. 1634, 1663, 1688, 2025-2027) Moreover, the record shows that the CEC Program is cost-effective, and that even in the worst-case scenarios included in DEF's various modeling and assumptions, the general body of ratepayers will still save money with the CEC Program relative to not building the CEC Program solar projects. (R. 1875-1876, 1878-1880, 1931-1932)

Although LULAC argues that the CEC Program unfairly discriminates against low-income customers (LULAC Br. 8, 12, 18, 33-34), there is a plethora of record evidence showing otherwise. DEF included a large carve out specifically to encourage the participation of low-income customers. (R. 1659, 1663, 1685, 1687, 1689-1690, 1700, 1702, 1740, 2500) The record shows that not

only would the CEC Program be available to DEF's low-income customers,[5] the program was designed to give low-income customers the same benefit/kw subscription as other customers in the program to ensure that the low-income program was fair and not subsidized. (R. 1663-1665, 1673, 1678, 1681, 1685-1690, 2025-2027) In addition, DEF presented evidence that the participating low-income customers would receive numerous protections and benefits from the CEC Program, such as no bill increases and higher bill credits as a result of program participation. (R. 1659, 1665)

Finally, the record shows that the purposes of sections 366.06, 366.91, and 366.92(1), Florida Statutes, were served by the Stipulation. There is evidence showing that all DEF customers would enjoy numerous benefits from having cost-effective, clean, renewable energy delivered to the grid. (R. 1654, 1659-1660, 1669, 1674, 1677, 1685-1686, 1696, 1899-1900)

[5] The evidence showed that DEF would allocate 27.7 percent of the residential capacity for low-income customers because this was the percentage of DEF residential customers eligible for low-income energy efficiency programs. (R. 1701-1702)

The Stipulation accomplishes an acceleration of clean energy adoption by DEF in a cost-effective manner and at a lower total cost to ratepayers and results in fair, just, and reasonable rates without undue preference. (R. 1712-1713, 1791-1792, 1796-1797, 1816, 1883-1884, 1869-1870, 1897, 1902, 2023-2027, 2029) There is competent, substantial evidence showing the Stipulation resulted in just, fair, and reasonable rates for all DEF customers, under sections 366.03, 366.05, and 366.06, Florida Statutes, and furthered the Legislature's intent to promote the development of renewable energy, pursuant to section 366.92, Florida Statutes.

A closer look at LULAC's arguments show that it is a thinly-veiled attempt to ask this Court to reweigh the evidence. This is something the Court simply cannot do. *See* § 120.68(7) and (10), Fla. Stat. (stating that the court shall not substitute its judgment for that of the fact-finder as to the weight of the evidence on any disputed findings of fact). As illustrated above, the Final Order should be affirmed because it is supported by competent, substantial record evidence.

III. THE COMMISSION DID NOT ABUSE ITS DISCRETION AND NO DUE PROCESS VIOLATIONS WERE COMMITTED IN LIMITING DISCOVERY AND CROSS-EXAMINATION IN THE PROCEEDING BELOW.

Standard of Review

In Point III of its Brief, LULAC claims the Commission erred when it prohibited discovery and prohibited cross-examination of witnesses. (LULAC Br. 35-43) The standard of review for this point on appeal is whether the Commission's exercise of discretion was outside the range of discretion delegated to the agency by law. § 120.68(7)(e)1., Fla. Stat.

Argument in Response

A. The Commission did not abuse its discretion and did not violate LULAC's due process rights when it disallowed discovery and cross-examination on settlement agreement negotiations.

Florida Administrative Code Rule 28-106.206 addresses discovery in administrative hearings and allows parties to obtain discovery through the means and in the manner provided in the Florida Rules of Civil Procedure. Rule 28-106.206 authorizes the presiding officer to issue appropriate orders "to effectuate the purposes of discovery and to prevent delay." Florida Rule of Civil Procedure 1.280(b)(1) sets forth the scope of discovery and states:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party….

The key word is that discovery must be "relevant" to the subject matter of the proceeding. LULAC's statement that "[t]he ability to understand the adverse positions of parties to a settlement is a vital baseline in being able to assess the positions compromised, and in turn, whether a settlement is in fact in the public interest" is false. (LULAC Br. 38) The standard for determining whether a settlement agreement is in the public interest is whether the actual settlement agreement, not the negotiations leading up to the settlement agreement, results in just, fair, and reasonable rates. *See Sierra Club*, 243 So. 3d at 909. Thus, the Prehearing Officer was correct to find that the results of the negotiations, not the substance of the negotiations themselves, was the issue in the proceeding. (R. 2834-2835)

Section 90.408, Florida Statutes, of the Evidence Code[6] bolsters the Prehearing Officer's decision not to grant LULAC's motion to compel. Section 90.408, Florida Statutes, addresses compromises and offers to compromise and states:

> Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value.

The case interpreting section 90.408, Florida Statutes, *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078, 1083 (Fla. 2009), highlights the policy reason behind not allowing such evidence at trial – promoting Florida's public policy favoring settlement by excluding such prejudicial evidence at trial. This is the same public policy at the heart of the Commission's consideration of settlement agreements and stipulations. *See, e.g.*, *In Re: Petition for Rate Increase by Florida Power & Light Co.*, Order No. PSC-05-0902-S-EI, 2005 WL 2276715 (Fla P.S.C. Sept. 14, 2005) (recognizing the

[6] While the Evidence Code is not binding in agency hearings, *Florida Industrial Power Users Group. v. Graham*, 209 So. 3d 1142, 1145-46 (Fla. 2017), the Commission often uses it as a guide in determining evidentiary questions.

Commission's long history of encouraging settlements). Moreover, the *Saleeby* case is clear that there is not an implicit exception permitting the use of settlement negotiations for impeachment purposes. *Id.* at1086.

The Prehearing Officer found that allowing the discovery, even if the discovery is proposed to be used at the hearing for impeachment purposes, would undermine this policy and would be contrary to Commission precedent. (R. 1552) Because LULAC's discovery question went to the negotiations between the parties – not to the results of the Stipulation itself – and LULAC's discovery question would undermine the Commission's longstanding policy of favoring settlement agreements, the Prehearing Officer and the Commission did not abuse their discretion or violate LULAC's due process rights by denying LULAC's motion to compel and disallowing cross-examination questions on this subject at the administrative hearing.

B. The Commission did not abuse its discretion and did not violate LULAC's due process rights when it limited LULAC's cross-examination to matters within the scope of the witness's direct testimony and when the cross-examination was conducted as a means to circumvent the Prehearing Officer's prehearing order.

LULAC's argument that Commission erroneously excluded LULAC from obtaining information on Walmart's financial interests is without merit. (LULAC Br. 39-40) To be clear, with the exception on discovery on the settlement negotiations discussed above, the Prehearing Officer granted LULAC's motion to compel their discovery requests. (R. 1551-1553) In response to Walmart's contention that the remainder of the information was proprietary confidential business information and trade secret, the Prehearing Officer required LULAC to execute a NDA with Walmart prior to obtaining the information. (R. 1551-1553) LULAC chose not to enter into a NDA. (R. 1871-1872)

Pursuant to section 120.569(2)(f), Florida Statutes, and Florida Administrative Code Rules 28-106.206 and 28-106.211, the presiding officer has the power to effect discovery and issue appropriate orders to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all

aspects of the case. In considering LULAC's request for this information, the Commission's Prehearing Officer balanced Walmart's interest in keeping the information confidential with LULAC's need for the information. The record shows that Walmart was willing to enter into a NDA to provide the materials to LULAC. (R. 1158, 1244-46, 2638) LULAC provided no legitimate basis as to why it could not enter into a NDA. (R. 1158-1159,1858-1863, 1871-1872)

Despite refusing to enter into a NDA to obtain the materials via discovery as required by the Prehearing Officer, LULAC then attempted to circumvent the Prehearing Officer's order by asking questions on these identical topics at the administrative hearing. (R. 1844-1850, 1853-1854, 1861-1862, 1866-1867, 1872) The Commission's reasons for disallowing the questions were two-fold: (1) the questions were outside the scope of the witness's direct testimony; and (2) the information LULAC's counsel was attempting to obtain was confidential. (R. 1848, 1853-1854, 1861-1862, 1865-1868, 1872)

When Walmart Witness Chriss was questioned by LULAC's counsel, it was on the information subject to the order on the

motion to compel – the information that was offered by Walmart to LULAC subject to a NDA but which LULAC declined to enter into a NDA to obtain. (R. 1871-1872) Witness Chriss could not provide any place where he testified on the matter LULAC was asking about. (R. 1865) Accordingly, Walmart objected to that line of questioning, because it was outside the scope of Witness Chriss' testimony. (R. 1867-1868)

Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable – in other words, when no reasonable person would take the view adopted by the lower court. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). If reasonable people could disagree as to whether the lower court's action was proper, then it cannot be said that the lower court abused its discretion. *Id.*

"Trial courts have wide latitude to impose reasonable limits on the scope of cross-examination." *Jones v. State*, 580 So. 2d 143, 145 (Fla. 1991). It is proper for the trial court to limit cross-examination to matters brought out during direct testimony. *Miller v. State*, 780 So. 2d 277, 280 (Fla. 3d DCA 2001). Thus, the Commission did not abuse its decision when it prohibited LULAC's

counsel from cross-examining the witness on matters outside the witness's direct testimony. *See Canakaris*, 382 So. 2d at 1203.

Moreover, even it the information was not outside the scope of the direct testimony, the information was deemed by the Prehearing Officer to be confidential. (R. 1550-1553) LULAC declined to enter into a NDA to obtain the information via discovery. (R. 1158, 1244-46, 1552-53, 1871-1872)

The Commission is obligated to maintain the confidentiality of proprietary confidential business information records. *See* § 366.093, Fla. Stat. The Prehearing Order for the November hearing notified the parties of the Commission's obligation to protect proprietary confidential business information from disclosure outside the proceeding, and the Prehearing Order set forth the procedure by which parties, including LULAC, were required to follow if a party intended to use confidential information at the November hearing. (R. 161, 166-167, 170, 1220-1221, 1237, 1480-1481) LULAC failed to follow the hearing procedure for introducing confidential information at the November hearing. (R. 1480-1481, 1860, 1869, 1871-1873) Thus, the Commission did not abuse its

discretion and did not violate LULAC's due process rights when it limited LULAC's cross-examination of Witness Chriss.

IV. LULAC IS IMPERMISSIBLY ASKING THIS COURT TO REWEIGH THE EVIDENCE.

Standard of Review

In Point IV of its Brief, LULAC argues the sufficiency of the evidence supporting the Final Order. (LULAC Br. 43-50) The standard of review is whether there is competent, substantial evidence supporting the Commission's findings of fact. § 120.68(7)(b), Fla. Stat. "If any administrative law judge's final order depends on any fact found by the administrative law judge, the court shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on any disputed finding of fact." § 120.68(10), Fla. Stat.

Argument in Response

As shown in Point II of this Brief, the Commission's Final Order is supported by competent, substantial record evidence. In Point IV of LULAC's Brief, LULAC invites this Court to reweigh the evidence. This is something the Court simply cannot do. It is the Commission's job as fact-finder to weigh the credibility of the

witnesses and determine the weight of the evidence. As the Court stated in *Gulf Power Company v. Florida Public Service Commission*, 453 So. 2d 799, 803 (Fla. 1984):

> We have repeatedly stated the standard for judicial review by which we are guided when we review [Commission] orders. We will not overturn an order of the [Commission] because we would have arrived at a different result had we made the initial decision and we will not reweigh the evidence. Our task is to determine whether competent substantial evidence supports a [Commission] order.

Like in *Gulf Power Company*, the Commission was presented with conflicting evidence from DEF and LULAC. The Commission gave LULAC the opportunity to cross-examine DEF's witnesses and introduce its own witness testimony and evidence.

LULAC disputes DEF's evidence showing that the CEC Program will bring benefits to all DEF customers and argues the projected benefits were based on "three faulty premises." (LULAC Br. 44) However, DEF presented evidence and rebuttal testimony to support its assumptions, which showed its analysis for the CEC Program was not new to the Commission and its forecasting was developed using industry-recognized sources. (R. 1980-84, 2010-14, 2040-2042, 2477-82)

After weighing the testimony and other evidence in the record, the Commission determined that DEF's CEC Program was in the public interest and results in fair, just, and reasonable rates. (R. 2835) As demonstrated above in Point II, the Commission's decision is supported by competent, substantial record evidence.

V. THE COMMISSION DID NOT NEED TO CONSIDER THE POWER PLANT SITING ACT WHEN RENDERING ITS DECISION BECAUSE THE RECORD SHOWED THAT THE PROJECTS DID NOT FALL WITHIN THE THRESHOLDS OF THE ACT.

Standard of Review

In Point V of its Brief, LULAC argues the Commission incorrectly interpreted the Power Plant Siting Act, sections 403.501 through 403.518, Florida Statutes. (LULAC Br. 50) The standard of review is whether the Commission erroneously interpreted a provision of law, and whether a correct interpretation compels a particular action. § 120.68(7)(d), Fla. Stat. The Court will review *de novo* an agency's interpretation of a law. Art. V, § 21, Fla. Const.

Argument in Response

LULAC's argument that the CEC Program requires a determination of need under the Power Plant Siting Act (PPSA)[7] is also meritless. The PPSA applies to all steam or solar electrical generating facilities that generate 75 megawatts or more in gross capacity. §§ 403.503(14) and 403.506, Fla. Stat.

The record shows that the CEC Program consisted of ten separate solar projects, with each individual solar project planned to be 74.9 megawatts and an assumed capacity factor of 28 percent. (R. 1757, 1762-64) The fact that the combined total of the ten projected results in a total capacity of approximately 750 megawatts of universal solar generation does not change whether the PPSA is applicable. (R. 1762-63)

Section 403.506, Florida Statutes, explicitly provides that the provisions of the PPSA do not apply to any electrical power plant or steam generating plant that is less than 75 megawatts. The statute does not consider the total capacity of combined projects. *Id.* Instead, the statute is triggered based on each individual project's

[7] The Power Plant Siting Act consists of sections 403.501 through 403.518, Florida Statutes.

capacity size. *Id.* Thus, the Commission did not need to consider the PPSA when rendering its decision. (R. 2834-36)

CONCLUSION

LULAC has failed to meet the heavy burden of overcoming the presumption of correctness that attaches to Commission orders. *See General Telephone Company of Florida v. Carter*, 115 So. 2d 554, 556–57 (Fla. 1959) (stating that orders of the Commission come before the Court with the presumption that they have been made within the Commission's jurisdiction and powers, and that "they are reasonable and just and such as ought to have been made"). The Commission's Final Order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document has been furnished by electronic mail through the Court's e-filing Portal on July 26, 2021, to the following:

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I HEREBY CERTIFY, pursuant to Florida Rule of Appellate Procedure 9.045(e), that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and was prepared using Bookman Old Style 14-point font, and complies with the word limit of Florida Rule of Appellate Procedure 9.210(a)(2)(B) and contains 7109 words.

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