IN THE SUPREME COURT OF FLORIDA

**CASE NO.:** SC15-95
Lower Tribunal No(s).: 140001-EI

CITIZENS OF THE STATE OF FLORIDA vs. ART GRAHAM, ETC., ET AL.

**CASE NO.:** SC15-113
Lower Tribunal No(s).: 150001-EI

CITIZENS OF THE STATE OF FLORIDA vs. ART GRAHAM, ETC., ET AL.

**CASE NO.:** SC15-115
Lower Tribunal No(s).: 140001-EI

CITIZENS OF THE STATE OF FLORIDA vs. ART GRAHAM, ETC., ET AL.

**CASE NO.:** SC15-274
Lower Tribunal No(s).: 150001-EI
140001-EI

FLORIDA INDUSTRIAL POWER USERS GROUP vs. ART GRAHAM, ETC., ET AL.

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Appellant(s) Appellee(s)



**CITIZENS' INITIAL BRIEF**

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## PRELIMINARY STATEMENT

Within this Initial Brief, the Appellants will be identified also as "Citizens," "Public Counsel," or the "Office of Public Counsel," which will be shortened to "OPC." OPC will refer to the three orders appealed in this consolidated appeal as follows: 1) Order No. PSC-14-0697-PCO-EI in case SC15-95 as the "Motion to Dismiss Order;" 2) Order No. PSC-15-0038-FOF-EI in case SC15-113 as the "Woodford Order;" and 3) Order No. PSC-14-0701-FOF-EI in case SC 15-115 as the "Fuel Order." OPC will refer to the Florida Public Service Commission as the "PSC" or the "Commission." OPC will refer to the active parties in the gas reserve portions of the proceedings below as follows: 1) Florida Power & Light Company as "FPL;" 2) Florida Industrial Power Users Group as "FIPUG;" and 3) Florida Retail Federation as "FRF." Commission Orders available on the Commission's website will be cited as Order No. PSC-XX-XXXX, and for older Commission orders not available on the website, orders will be listed as Order No. XXXXX and a citation to Fla. PUC Lexis will be included along with the Order Number.

OPC will refer to the volumes of the consolidated record on appeal as "R.V.__,p.__." For portions of the hearing transcript contained in Attachment 1 of the consolidated record, the transcript of the October Fuel Hearing will be "Fuel TR V.__, p.__," and the transcript of the December hearing resulting in the Woodford Order as "Gas TR V.__, p. __." Hearing exhibits in Attachment 2 from

the Fuel Order hearing on October 22, 2014, will be referred to as "Fuel Ex.___, p. ___" and exhibits from the Gas Reserves hearing on December 1-2, 2014, will be "Gas Ex.___, p. ____." Any confidential exhibits located in Attachment 3 will be referred to as "Att. 3." Exhibits will reference the Bates number created by the Commission. Florida Statutes will be referred to as "F.S." and will refer to the 2014 version of the statute unless otherwise noted. The Florida Administrative Code will be referred to as "F.A.C." The Florida Administrative Procedure Act will be abbreviated as "APA."

## STATEMENT OF THE CASE AND OF THE FACTS

These consolidated appeals arose because the Commission erroneously interpreted clear statutory language and precedent, failed to explain its deviation from prior decisions and policies, and failed to follow basic evidentiary and discovery rules. Citizens, FIPUG, and FRF argued the Commission lacked subject matter jurisdiction to allow recovery of gas reserve investments and to earn profits through rates for the exploration, drilling, and development of natural gas wells; however, the Commission overruled those objections, found it possessed subject matter jurisdiction, and issued orders requiring FPL's customers to indemnify FPL's shareholders' for investments and insure profits on those investments in natural gas reserves.

Each year, the Commission creates a docket to review and allow cost-recovery of fuel expenditures as well as review hedging activities (those activities intended to minimize fuel price volatility usually by fixed price/fixed quantity hedges or swaps) by Florida's investor-owned utilities. This docket is generally referred to as the "Fuel Clause" or "Fuel Docket." In 2014, the Fuel Docket was 140001-EI (R.V. 1, pp. 97-98), and in 2015, the Fuel Docket is 150001-EI (R.V. 8, pp. 1597-98). Citizens, through OPC, reaffirmed party status in both Fuel Dockets. (*See* R.V. 1, pp. 107-08, R.V. 9, pp. 1605-06).

On June 25, 2014, FPL filed a petition ("Gas Reserves Petition" or "Petition"), which was refiled on July 18, 2014, due to an error in the original filing, requesting approval and recovery of a specific gas reserves investment ("Woodford Project") and requesting approval of proposed guidelines to govern the recovery of future gas reserves investments ("Guidelines"). (Att. 3 for original filing; R.V. 1, pp. 127-55 for July 18 filing). FPL's Gas Reserves Petition requested, through the Fuel Docket, "exploration expense, depletion expense, operating expenses, G&A, taxes, transportation costs and a return on the unrecovered investment, including working capital" for investments in the exploration, drilling, and production of natural gas in Oklahoma. (R.V. 1, pp. 146-47). The Gas Reserves Petition also requested "that the Commission approve guidelines for gas reserves projects, such that FPL would be eligible to recover

through the Fuel Clause the revenue requirements for future projects that meet those guidelines." (R.V. 1, p. 151). Never before had an investor-owned electric utility requested recovery of gas reserves investments before the Commission.

On July 25, 2014, FPL filed its Risk Management Plan ("RMP") in the Fuel Docket. (R.V. 3, pp. 405-16, Fuel Ex. 4). FPL's RMP contains FPL's "guiding principles" for FPL's fuel hedging strategy. (R.V. 3, p. 405). FPL's RMP, or hedging plan, mentions gas reserves only once stating, "[s]hould FPL enter into any joint venture transactions for natural gas reserves and these transactions are approved by the FPSC, the expected natural gas production from these transactions will be included as hedged volumes." (R.V. 3, p. 409). The plain language of the RMP indicated that gas reserves transactions would not be incorporated under the RMP **unless and until** gas reserves transactions were approved by the Commission.[1]

[1] The inclusion of gas reserves investments in the RMP was not ripe for challenge at this point in the proceedings, because the inclusion of gas reserves in the RMP was merely conjectural or hypothetical unless and until the Commission approved the first gas reserves project. Furthermore, when the RMP was considered by the Commission, Citizens' Motion to Dismiss for Lack of Subject Matter Jurisdiction regarding the gas reserves investments proposed by FPL was still pending. Therefore, all parties and the Commission were on notice that Citizens' believed the recovery of gas reserves investments was outside the jurisdictional scope of the Commission. The Commission approved the first gas reserves project after it approved FPL's RMP. This issue in the timing of the RMP approval and the subsequent approval of the Woodford Project will be discussed in the Argument section of this brief.

On August 1, 2014, FPL and OPC filed a joint motion for approval of a scheduling stipulation regarding the gas reserves issues raised in FPL's Gas Reserves Petition. (R.V. 3, pp. 417-23). On August 22, 2014, the Commission issued Order No. PSC-14-0439-PCO-EI approving the scheduling stipulation in part, setting a deferred discovery schedule (separated from the then existing discovery schedule in the Fuel Docket) on the gas reserves issues, and setting a hearing on December 1-2, 2014. (R.V. 3, pp. 433-35). That same day, Citizens filed a motion to dismiss the Gas Reserves Petition in its entirety arguing the Commission lacked subject matter jurisdiction to allow FPL's recovery of gas reserve investments, with a return on investment or profit, from its customers. (R.V. 4, pp. 678-701).

As the parties conducted discovery regarding the gas reserves issues, the remainder of the Fuel Docket proceeded on its original schedule. FPL filed a revised petition for fuel cost recovery with the Woodford Project costs and expenses removed per staff's request. (R.V. 4, p. 731). On September 26, 2014, Citizens filed a prehearing statement regarding all issues not related to gas reserves, and in this prehearing statement, Citizens took no position on Issue 2B regarding FPL's Risk Management Plan (R.V. 6, p. 1007) as the issues related to gas reserves remained pending along with Citizens' Motion to Dismiss (which effectively placed all on notice that Citizens opposed the gas reserves); therefore,

at the time of the prehearing statement, the inclusion of gas reserves in FPL's RMP remained a hypothetical scenario.

The Commission held a hearing regarding the fuel factors and hedging plans of the investor-owned utilities, including FPL, on October 22, 2014. The Commission took evidence regarding FPL's fuel costs and hedging plans and closed the record regarding FPL's fuel factors and hedging plan for 2015. (*See* Fuel TR V. 1). The Commission approved FPL's stipulated fuel factors (without the Woodford Project) and its 2015 RMP, or hedging plans, at the hearing (Fuel TR V. 1, p. 13) and issued the Fuel Order on December 19, 2014. (R.V. 8, pp. 1497-1522).

The Commission denied Citizens' Motion to Dismiss for Lack of Subject Matter Jurisdiction on November 25, 2014 (R.V. 7, pp. 1350-68), and issued the Motion to Dismiss Order on December 17, 2014. (R.V. 8, pp. 1478-83). The Commission found that, since the Commission believed it possessed subject matter jurisdiction over FPL and the setting of rates, then it possessed subject matter jurisdiction over the recovery of gas reserves investments as such recovery would cause a rate increase. (R.V. 8, p. 1482). The Commission did not address Citizens' arguments that recovery of costs by investor-owned electric utilities must involve costs arising from the "generation, transmission, or distribution" of electricity, which is the defining scope of an electric utility under Section

366.02(2), F.S., and that the exploration, drilling, and production of a fuel source does not fit within the scope of activities of an electric utility.

The Commission then held a hearing on issues arising from the Gas Reserves Petition on December 1-2, 2014. At hearing, Citizens' renewed its objection regarding subject matter jurisdiction (Gas TR V. 1, p. 13; Gas TR V. 8, p. 1086-87), and Citizens raised procedural/evidentiary objections regarding the wholesale inclusion of deposition transcripts into the record and the Commission's abdication of its duty to act as an evidentiary gate-keeper pursuant to Section 120.569(2)(g), F.S. (Gas TR V. 1, pp. 28-33, 37). The Commission overruled Citizens' objections and allowed the entry of "irrelevant, immaterial, or unduly repetitious" evidence into the record in contravention to the "shall be excluded" portion of Section 120.569(2)(g), F.S.

On December 18, 2014, the Commission voted to approve the Woodford Project (R.V. 8, pp. 1495-96), and issued the Woodford Order approving the gas reserves project as a "hedge" on January 12, 2015. (R.V. 9, pp. 1609-18). As part of the Woodford Order, the Commission based --without explanation-- part of its findings on customer savings (R.V. 9, pp. 1613-14), which is irrelevant to hedging and conflicts with prior Commission hedging policy.[2] As the Woodford Project was the first gas reserves investment approved by the Commission, the approval of

[2] *See* Order No. PSC-08-0667-PAA-EI, issued October 8, 2008, at page 2 of Attachment A (discussing that cost savings are not the purpose of hedging).

the Woodford Project as a hedge inserted the Woodford Project into FPL's Risk Management Plan for 2015, thereby retroactively altering the RMP approved by the Fuel Order. Once the Commission issued the Woodford Order, Citizens' timely filed Notices of Appeal of the Motion to Dismiss Order (R.V. 9, pp. 1708-18), the Woodford Order (R.V. 9, pp. 1732-46), and the Fuel Order (R.V. 9, pp. 1747-77), as the orders became inextricably linked at that point in time by the issue of subject matter jurisdiction.

## SUMMARY OF ARGUMENT

*The PSC lacks subject matter jurisdiction to allow an investor-owned electric utility to recover the costs of investments in gas reserves*. The Commission's jurisdiction is bounded by the limits placed by the Legislature and found in Chapters 350 and 366, F.S. Pursuant to Section 366.06(1), F.S., the Commission determines and fixes rates of electric utilities, which are utilities that operate "generation, transmission, or distribution systems." § 366.06(2), F.S. Nowhere in statute does the Legislature grant any express or implied power to the Commission to allow the recovery of costs and a corresponding profit for the exploration, drilling, and production of minerals (e.g., the production of fuel). Since there is overwhelming doubt regarding whether the Commission can allow recovery of investments for the production of fuel, that doubt should be resolved against the Commission exercising jurisdiction. *Lee County Elec. Coop. v. Jacobs*,

820 So. 2d 297 (Fla. 2002). Therefore, the Commission lacks the subject matter jurisdiction to allow the recovery of gas reserves investments from FPL's customers, and the Court should overturn the Commission's decision to allow recovery of such investments.

*The PSC deviated from prior policies/decisions and PSC rules without providing any explanation in contravention of precedent and the legislative intent of the APA.* Generally, agency orders contain official agency policy. *See McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569 (Fla. 1st DCA 1977). Florida law provides that the Court can remand or set aside agency action when agencies deviate from official policy or prior practice and fail to explain why the deviation occurred. § 120.68(7)(e)3, F.S.

Prior to the Woodford Order, the Commission's hedging policy required **fixed-price** financial or physical transaction. *In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor*, Order No. PSC-08-0667-PAA-EI, Attachment A (Oct. 8, 2008). Inexplicably, the Commission found the Woodford Project to be a hedge (R.V. 9, p. 1612-13) even though all evidence in the record clearly demonstrates that the Woodford Project involves neither fixed prices nor fixed quantities. (Gas TR V. 1, pp. 159, 161). The Commission provided no explanation for this substantial deviation from existing policy.

Commission Rule 25-6.014, F.A.C., requires electric utilities, like FPL, to use a specific method of accounts for recording financial information. FPL proposed to ignore the method of accounts required by Commission rule, and the Commission acquiesced. Again, the Commission failed to provide any explanation as to why it waived the application of a mandatory rule, which is error warranting reversal or remand pursuant to § 120.68(7)(e)2, F.S.

*The PSC's Woodford Order is not supported by competent and substantial evidence*. The Woodford Order emerged from a proceeding governed by Sections 120.569 and 120.57, F.S. As a Chapter 120 proceeding, the Commission's findings must be based on competent and substantial evidence. §§ 120.57(1)(l) and 120.68(7)(b), F.S. Although the Woodford Order lacks basic references to the record, there are two specific findings in the Woodford Order that are not supported by competent and substantial evidence.

The Commission found the Woodford Project costs are "essentially fixed" and customer savings are based on production variations of plus or minus ten percent. (R.V. 9, pp. 1613-14). Only one witness testified with direct knowledge of Woodford Project costs and production levels, and that witness testified that he expected costs to decrease, not stay the same. (Gas TR V. 8, p. 848). That same witness also testified that production levels would vary from plus or minus ten to twenty percent. (Gas TR V. 8, p. 856). As the Commission's findings regarding

"essentially fixed" costs and possible savings are not supported by competent and substantial evidence, the findings must be stricken.

*The PSC failed to follow evidentiary requirements in Chapter 120, F.S., and the Florida Rules of Civil Procedure, thus creating a faulty record, which impairs judicial review*. Commission staff entered discovery depositions conducted by parties into the record—wholesale—over the objections of the intervenor parties. The Florida Rules of Civil Procedure limit the ability to enter depositions into the record to only parties; however, staff claimed it was not a party to the proceeding yet used the rules to enter discovery depositions into the record, thus, making those deponents witnesses of the Commission under Florida Rule of Civil Procedure 1.330(c). Furthermore, the Commission made no finding that the depositions were necessary for its decision, which would have, at least, complied with Florida Rule of Civil Procedure 1.330(f)(3)(B). The introduction into the record of the discovery depositions allowed the introduction of "irrelevant, immaterial, or unduly repetitious evidence," in direct contravention to Section 120.569(2)(g), F.S. When an objection was raised, the Commission was incorrectly advised that the mandatory exclusion language in Section 120.569(2)(g), F.S., could be ignored if the evidence was of the type commonly relied on in other contexts. (Gas TR V. 1, pp. 33-34). And, when the depositions were entered, the Commission failed to rule on any of the objections noted and preserved during the deposition.

The failure to follow basic evidentiary and procedural rules created a record containing inadmissible evidence. More significantly, the Commission failed to reference the record in its Woodford Order, so there is no way to know exactly which evidence the Commission relied upon in making its findings. When inadmissible evidence is admitted into the record and the Commission fails to explain its findings, the Court should remand for clarification. *Dep't of Prof'l Regulation v. Wise*, 575 So. 2d 713, 716 (Fla. 4th DCA 1991).

## STANDARD OF REVIEW

In Section I of its Argument, Citizens assert the Commission lacks subject matter jurisdiction, which resulted from an error in statutory interpretation. This argument presents an issue of law to which the Court will apply a *de novo* standard of review. *Bellsouth Telecomm., Inc. v. Meeks*, 863 So 2d 287, 289 (Fla. 2003), *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007).

In Section II of its Argument, Citizens argue the Commission deviated from prior policies/decisions and rules without providing any form of explanation. The standard of review governing deviation from rules or prior policy without explanation in contravention of Section 120.68(7)(e)2,3, F.S., is whether the Commission departed from the essential requirements of law and the legislation controlling the issue. *Crist v. Jaber*, 908 So. 2d 426 (Fla. 2005).

In Section III of its Argument, Citizens argue the Woodford Order is not supported by competent and substantial evidence. The argument involves factual considerations that invoke the test of competent, substantial evidence. *Crist v. Jaber*, 908 So. 2d 426. The ultimate standard of review governing findings that are not supported by competent and substantial evidence is whether the Commission exceeded the limits of its authority and discretion. § 120.68(7)(e)1, F.S.

In Section IV of its Argument, Citizens assert the Commission failed to follow the evidentiary requirements in Chapter 120, F.S., and the Florida Rules of Civil Procedure, thereby creating a faulty record that impairs judicial review. The standard of review under this argument is, again, whether the Commission departed from the essential requirements of law and the legislation controlling the issue. *Crist v. Jaber*, 908 So. 2d 426.

## ARGUMENT

## I. THE PSC LACKS SUBJECT MATTER JURISDICTION TO ALLOW AN INVESTOR OWNED ELECTRIC UTILITY TO RECOVER THE COSTS OF INVESTMENTS IN GAS RESERVES

### A. The Gas Reserves Request

The Gas Reserves Petition is simple and straightforward. The Petition requested a determination for three items: 1) whether investing in the exploration, drilling, and production of natural gas in Oklahoma is prudent; 2) whether the costs associated with the exploration, drilling, and production of natural gas, and the

associated profit, may be recovered through the Fuel Clause in customers' rates; and 3) that the Commission approve proposed Guidelines for future gas reserves transactions. (R.V. 1, pp. 144, 147, 151).[3] These consolidated appeals deal solely with the Commission's decision to answer the first two requests affirmatively without the authority to do so.

Traditionally, FPL purchases fuel for its generating plants on the open market (as do the other electric utilities). (R.V. 1, p. 135). Historically, there were instances where an electric utility purchased fuel from a subsidiary as in *In re: Investigation into Affiliated Cost-Plus Fuel Supply Relationships of Florida Power Corporation*, Order No. 21847 (Sept. 7, 1989), 1989 Fla. PUC Lexis 1415. In the instant case, the Gas Reserves Petition proposed to create a completely different method of fuel procurement – FPL would purchase an affiliate's interest in the natural gas exploration, drilling, and production business[4] thereby making FPL's customers involuntary *de facto* investors in the natural gas drilling and fracking business. Never before in the entire country has any state public service commission approved the recovery of investments and associated profits through rates for investments in gas reserves for use as fuel by an investor owned electric utility. (Gas TR V. 1, p. 131-35, Gas TR V. 3, p. 88). Yet, the Commission

[3] The Guidelines portion of the Petition is still pending; therefore, it will not be discussed here.

[4] R.V. 1, p. 141; acknowledged by the Commission in the Woodford Order at R.V. 9, p. 1610.

determined the Florida Legislature granted them the power to allow an electric utility to recover investments (with profits) in the exploration and production of fuel for its electric generating facilities.

### B. Statutory Language – Plain Meaning and Interpretation

As with other agencies, it is incontrovertible and undisputed that the "powers exercised by the Commission must come from the statute." *Peoples Gas Sys., Inc. v. City Gas Co.*, 167 So. 2d 577, 584 (Fla. 1964). Furthermore, the "Commission may exercise an implied power if such exists." *Id*. However, the Court also held that the Commission cannot change the law and, being a creature of statute, "has only such powers as has been granted to it by the Legislature." *Florida Tel. Corp. v. Carter*, 70 So. 2d 508, 510 (Fla. 1954). The Commission clearly acknowledged these principles in the Motion to Dismiss Order (R.V. 8, p. 1480); however, it then inexplicably chose to ignore them.

As a creature of statute, the Commission is bound by the express or implied powers found in Chapters 350 and 366, F.S. Although many proceedings at the Commission involve complex and technical matters, that is not the case here. The issue of "statutory interpretation is a question of law subject to *de novo* review." *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785. The Court explained further that, "if the meaning of the statute is clear then this Court's task goes no further than applying

the plain language of the statute," and deference to an agency need only apply when the statute "is subject to varying interpretations." *Id.*

Pursuant to Section 366.06(1), F.S., the Commission has the authority to "determine and fix fair, just, and reasonable rates" for electric utilities. The investments and associated profits for the Woodford Project approved by the Commission in this case will be recovered through the Fuel Clause in rates. (R.V. 9, p. 1614). Thus, one must look at the statutes to see what the scope of what the Legislature understood electric utilities do, which will logically dictate what electric utilities can recover through rates. Fortuitously, the Legislature also translated its understanding into a defined scope of business for an electric utility.

In Section 366.02(2), F.S., an electric utility is defined as "any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state."[5] The record is devoid of any attempt by any party to argue, or any findings by the Commission, that the exploration, drilling, and production of natural gas somehow falls within the realm of the generation, transmission, or distribution of electricity.

The doctrine of *in pari materia* requires these related statutory provisions to be construed together. *Fla. Dep't of State v. Martin*, 916 So. 2d 763, 768 (Fla.

[5] There is no dispute that FPL is solely an electric utility. (Gas TR V. 3, p. 391).

2005). Applying the doctrine of *in pari materia* to the two preceding statutory provisions leads to a single, logical conclusion – the determination and fixing of rates for electric utilities, whether in a rate case or through the Fuel Clause, must involve consideration of items that fall within the scope of generating, transmitting, or distributing electricity as that is the scope or purview of an electric utility. It is illogical to conclude the Legislature intended the Commission to determine and fix rates for items or services that are not part of the definition of an electric utility. Moreover, neither FPL nor the Commission attempted to rationalize how the recovery of costs and a related profit through rates for the exploration, drilling, and production of a fugacious mineral in Oklahoma qualifies as generating, transmitting, or distributing electricity in this state. Quite simply, the notion that the drilling, fracking, and production of fuel somehow falls within the purview of an electric utility, as defined by the Legislature, is ridiculous.

Historically, the Commission handled doubts regarding regulatory jurisdiction in a manner upheld by this Court. An excerpt from *Lee County Electric Cooperative v. Jacobs*, 820 So. 2d 297, 300, is particularly illustrative:

> For this reason, the PSC concluded that it did not have jurisdiction to prescribe a wholesale rate structure for a rural electric cooperative. To support this conclusion, the PSC contends that any reasonable doubt regarding its regulatory power compels the PSC to resolve that doubt against the exercise of jurisdiction. See *City of Cape Coral v. GAC Utilities*, 281 So. 2d 493, 496 (Fla. 1973). We agree.

Since Chapter 366, F.S., limits electric utilities, and the rates they charge, to those items related to the generating, transmitting, and distributing of electricity, clearly there is doubt regarding the ability of the Commission to allow rate recovery of gas reserve investments or fuel production. Following the historical rationale detailed in the *Lee County Electric Cooperative* case, the Commission should have resolved this doubt against the exercise of jurisdiction allowing recovery of gas reserves investments in rates approved through the Fuel Clause. Not only did the Commission fail to resolve this doubt correctly in the orders below, the Commission did not even attempt to provide an explanation for its failure to do so.

In the Motion to Dismiss Order, the Commission attempts to rely upon cases where subject matter jurisdiction was questionable but analogous to the proceedings here; however, the Commission's attempts fail. The Commission references two orders: one involving storm restoration costs and the other involving the issuance of a water certificate, yet both are instances where the Commission clearly possessed subject matter jurisdiction by the plain language of the statutes. (R.V. 8, p. 1480). The Commission then makes an inexplicable and indefensible leap in logic. The Commission states, "the basis for our subject matter jurisdiction is that the relief sought by the petition is a rate increase passed through the fuel docket for costs related to the gas reserve project." (R.V. 8, p. 1482). Stated another way, the Commission implies that if an electric utility asks

for a rate increase, **regardless of what that rate increase is for**, the Commission has subject matter jurisdiction simply because the electric utility sought relief by a rate increase. This phrasing of the question defeats the plain language of the statutes and renders the limitations imposed by law meaningless.

The Commission totally ignored the threshold question – whether the item causing the rate increase was an item that is within the statutorily defined purview of an electric utility? Stated differently, the question should have been: does the exploration, drilling, and production of natural gas fall within the generating, transmitting, or distributing of electricity in the state? Clearly, the answer is no.

### C. Generation, Transmission, and Distribution

The generation, transmission, or distribution of electricity needs no interpretation as the plain meaning of the Legislature's language is simple and clear. As defined in MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 12th Ed. (2009): 1) generate means "to originate by a vital, chemical, or physical process" (p. 521); 2) transmit means "to send or convey from one person or place to another" (p. 1329); and 3) distribute means "to give out or deliver esp. to members of a group" (p. 364). Analyzing the plain meaning of these words gives a clear, as well as logical, picture as to what electric utilities do and, by inference, what an electric utility may recover through rates.

An electric utility generates electricity by using a chemical or physical process to convert an energy source into electricity. While this could involve photovoltaic cells and solar energy or turbines and wind energy, the overwhelming majority of electricity in Florida comes from fossil fuels. At the center of this case is the fossil fuel that generates the majority of electricity in the state – natural gas. (R.V. 8, p. 1528). At the most basic level, an electric utility purchases natural gas and then burns that gas in some form of generation unit to convert the energy contained in the natural gas to electricity. The electric utility then moves the electricity through a transmission system and distributes the generated electricity to its customers. Although the components of these systems are complex and technical, the basic principle is simple.

Citizens acknowledge that there are many moving parts to the generation, transmission, and distribution systems owned by electric utilities. Citizens also do not dispute that electric utilities must have other essential equipment, such as cars or trucks, to provide electric service to their customers. (Gas TR V. 7, p. 944). We have not argued that the Commission should not allow recovery of items integrally related to the maintenance of the generation, transmission, or distribution systems, such as maintenance parts for generating units or vehicles to carry workers from site to site. However, Citizens do not agree with allowing the recovery of costs not

related to the statutorily defined electric utility function of generating, transmitting, or distributing electricity.

FPL's own witness provided the clearest statement of how the Commission would be reaching outside its jurisdiction to allow recovery of gas reserves investments by providing absurd examples in an attempt to support FPL's request. During depositions, FPL's witness, Mr. Deason, testified that the Commission possessed the jurisdiction to allow electric utilities to recover costs from uranium mining (Gas Ex. 58, p. 1229-30) or even costs of investing in a manufacturing plant that makes solar panels. (*Id*. at 1230-31). During hearing, this witness further expanded on his pontification regarding the jurisdictional limits of the Commission stating that the Commission could "basically extend the vertical length of that vertically integrated utility" (Gas TR V. 7, p. 944),[6] seemingly into

[6] There is no dispute that FPL is a vertically integrated utility. Although Florida courts have not tackled the phrase "vertically integrated utility," it is generally understood in the industry that a vertically integrated utility is an entity that "constructed their own power plants, transmission lines, and local delivery systems." *New York v. FERC*, 535 U.S. 1, 5 (2002). The Commission acknowledges that vertically integrated utilities are utilities that combine the generation, transmission, and distribution components into one system wholly owned by a single utility. *See In re: Joint petition to determine need for Gainesville Renewable Energy Center in Alachua County, by Gainesville Regional Utilities and Gainesville Renewable Energy Center, LLC*, Order No. PSC-10-0409-FOF-EM (June 28, 2010). Clearly, the generation, transmission, or distribution definition found in Section 366.02(2), F.S., contains the subparts of the industry phrase vertically integrated utility. Although an electric utility is defined as possessing one or more of the generation, transmission, or distribution attributes, a vertically integrated utility would be a utility that encompasses all three.

any activity that the utility wanted to engage in. Contrary to this assertion, the Legislature has already determined the vertical length of FPL (as well as all other vertically integrated utilities) in Section 366.02(2), F.S.

The vertical height of an electric utility in the state of Florida is constrained to the generation, transmission, and distribution of electricity by Section 366.02(2), F.S. An electric utility may have only one of those attributes; however an electric utility, like FPL, can be vertically integrated and possess all three attributes – owning and maintaining generation, transmission, and distribution systems. FPL's assertion that the Commission can allow a vertically integrated utility to expand its scope beyond the statutory definition of an electric utility and then recover costs from the expanded scope is clearly erroneous. A simple analogy makes this clear. The Legislature constructed a building with three floors (generation, transmission, and distribution) and named it an electric utility. Those three floors limit the vertical height of the building. The Commission can allow recovery of prudent costs that occur anywhere in that three story building as well as prudent costs incurred moving between floors of that building; however, the Commission cannot add another floor to the building, call it exploration, drilling, and fracking for fuel, and allow an electric utility to recover those costs as well. The Legislature creates the jurisdiction, or builds the building, and the Commission allows recovery of prudent activities that occur within the building. The Legislature is the only entity

that can change the vertical height of the building or add additional floors, not the Commission.

### D. The Fuel Clause and Red Herrings

The Commission uses the long-standing (although never codified in statute) Fuel Clause as the mechanism to expand its jurisdiction granted by the Legislature in the present cases. The Commission argues that, if a proposed project can somehow be shoehorned into the Fuel Clause by calling it a hedge, then the Commission has jurisdiction over the requested recovery of that project. The Commission's rationale that attaching a particular label to an item creates instantaneous jurisdiction is a logical fallacy. The label is irrelevant. By looking past the hedging and Fuel Clause labels the Commission attached to gas reserves investments, it is obvious that the Commission exceeded its jurisdiction by allowing the recovery of an investment in exploration, drilling, and fracking, which is clearly outside the scope of the generation, distribution, and transmission of electricity. A brief examination of the history of the Fuel Clause shows the purpose of the Fuel Clause, which further illustrates why gas reserves investments in general, and the Woodford Project in particular, do not belong in the Fuel Clause or at the Commission.

An excerpt from a prior Commission Order provides the best summation for the purpose of the Fuel Clause:

> There is probably no one item of cost incurred by a public utility which has been more misunderstood by the public than the fuel charges which are passed on to the customers through the fuel adjustment clause….Their [fuel adjustment clauses] existence predates this Commission's jurisdiction over electric utilities and the record reflects that they have been used in Florida since as early as 1925….The objective of the fuel adjustment clause was expressed by this Commission some fifteen years ago in the following manner: "A fuel adjustment clause is intended to compensate for day-to-day fluctuations in the cost of fuel which cannot be anticipated in the base rates. It should be constructed and applied so as to reimburse the utility for the increase in the cost of fuel as related to generation. It also operates so as to pass on to the customer any savings realized by the utility from decreased cost of fuel." (Order No. 2515-A, dated April 24, 1959). **It should be emphasized that a utility does not make a profit on its fuel costs.** *In re: General Investigation of Fuel Adjustment Clauses of Electric Companies*, at 5-6, Order No. 6357 (Nov. 26, 1974), 1974 Fla. PUC Lexis 70. (emphasis added).[7]

No party disputes this explanation for the purpose of the Fuel Clause. Over time, the Commission has, of course, increased the scope of recoverable items through the Fuel Clause.

[7] Also, departing from prior decisions/policies by allowing recovery of profits on fuel costs passed through the Fuel Clause without an explanation in contravention of Section 120.68(7)(e)3, F.S., warrants remand. The issue regarding departure from prior decisions/policies is discussed in depth in Section II.

On July 8, 1985, the Commission issued Order No. 14546, 1985 Fla. PUC Lexis 531, reaffirming the policies set forth in Order No. 6357 and set forth the following:

> …the following charges are properly considered in the computation of the average inventory price of fuel used in the development of fuel expense in the utilities' fuel cost recovery clauses:
> 1. The invoice price of fuel.
> 2. Any revisions to the invoice price.
> 3. Any quality and/or quantity adjustments to the invoice price.
> 4. Transportation costs to the utility system, including detention or demurrage.
> 5. Federal and state taxes and purchasing agents' commissions.
> 6. Port charges.
> 7. All quantity and/or quality inspections performed by independent inspectors.
> 8. All additives blended with fuel prior to burning or injected into the boiler firing chamber along with fuel.
> 9. Inventory adjustments due to volume and/or price adjustments.
> 10. Fossil fuel-related costs normally recovered through base rates but which were not recognized or anticipated in the cost levels used to determine current base rates and which, if expended, will result in fuel savings to customers. Recovery of such costs should be made on a case by case basis after Commission approval.

Interestingly, the Commission avoids addressing Order No. 14546 in the Woodford Order even though all parties repeatedly referenced that seminal Order during the

hearing. Instead, the Commission finds the proposed gas reserve investment to be "a hedging program of the type traditionally, historically, and ordinarily recovered through the Fuel Clause." (R.V. 9, p. 1612). Thus, we turn to the label "hedging."

In *In re: Review of Investor-Owned Electric Utilities' Risk Management Policies and Procedures*, Order No. PSC-02-1484-FOF-EI (Oct. 30, 2002), the Commission set forth the basic principles of hedging as part of the electric utilities' risk management plans. In Order No. PSC-02-1484, the Commission determined that electric utilities should manage fuel price volatility through hedging transactions regarding fossil-fuels. On October 8, 2008, the Commission issued an order in *In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor*, Order No. PSC-08-0667-PAA-EI (made final by Order No. PSC-08-0748-CO-EI, Nov. 12, 2008), which clarified the Commission's hedging policy. In Order No. PSC-08-0667 (p. 3 of Attachment A), the Commission defined hedging activities as "natural gas and fuel oil **fixed price** financial or physical transactions." (emphasis added). The common thread in these two prior hedging orders, as well as all other prior Commission hedging orders except for the Fuel Order and Woodford Order, is that all other prior hedging transactions involved purchasing a **certain** quantity of fuel for a **certain** price. The record clearly demonstrates there is nothing certain about the quantity or price of natural gas to be obtained from the Woodford Project.

The Commission strains to grant itself jurisdiction by attaching the hedging and Fuel Clause labels through a convoluted and cursory comparison to prior Fuel Clause items that the Commission classifies as "non-fuel items." (RV 9, p. 1613). In the Woodford Order, the Commission cites *In re: Fuel and Purchases Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-97-0359-FOF-EI (Mar. 31, 1997) (regarding rail cars), and *In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-01-2516-FOF-EI (Dec. 26, 2001) (regarding incremental power plant security costs), as comparisons to the Woodford Project based on the projected savings in those orders. The Commission's comparison of "non-fuel items" with the Woodford Project in an attempt to show some kind of jurisdictional similarity is misplaced and tortured at best.

In Order No. PSC-97-0359, the Commission found that the cost of purchasing or leasing rail-cars was a fuel-related expense (since it affected the actual delivered price of a fixed quantity of fuel) that could flow through the Fuel Clause.[8] In Order No. PSC-01-2516, the Commission found a nexus between the incremental security costs at FPL's nuclear facility and the fuel savings realized by

[8] The rail car issue focused on the costs of fuel-delivery using either leased or purchased rail cars. The cost-savings analysis was simple, because the cost of purchasing the rail cars was fixed and the cost of leasing rail cars was fixed, so an analysis of the cost of buying versus leasing involved simply calculating the number of trips needed to deliver fuel followed by a comparison of the fixed lease price versus the fixed purchase price. (*See* Gas TR V. 8, p. 1039-40).

keeping those nuclear generating assets operating.[9] However, the Woodford Order conveniently ignores *In re: Petition by Florida Power & Light Company to Recover Scherer Unit 4 Turbine Upgrade Costs Through Environmental Cost Recovery Clause or Fuel Cost Recovery Clause*, Order No. PSC-11-0080-PAA-EI (Jan. 31, 2011), where the Commission states on pages nine through ten that:

> One of these orders [referring to Order No. PSC-01-2516] deals with incremental security costs incurred by utilities at nuclear power plants following the September 11, 2001, terrorist attacks. This was a unique circumstance, however, and we note that those security costs were subsequently removed from the fuel clause…While it is true that we granted recovery of "non-fossil fuel-related" costs through the Fuel Clause in those two discreet instances, we believe that the appropriate policy going forward is to restrict capital project cost recovery through the Fuel Clause to projects that are "fossil fuel-related" and that lower the delivered price, or input price of fuel.

The Commission's Woodford Order attempts to analogize the certain customer savings resulting from these "non-fuel items" with the projected customer savings the Commission found in the Woodford Project as support for the conclusion that the Woodford Project is jurisdictional and recoverable in the Fuel Clause. The cursory analogy (presented by footnote nine in the Woodford Order) fails to

[9] This order and the unusual inclusion of security costs must be considered in context given the order's issuance immediately after the terrorist attacks of September 11, 2001.

explain how the Commission's finding of possible savings somehow grants jurisdiction to allow for the recovery of drilling and fracking investments; not to mention the Commission, again, ignores the plain language of its prior policy in Order No. PSC-11-0080 stating that fuel costs are lowered, not may be lowered nor could be lowered.

In both the rail car and the security cost cases, the analysis of fuel savings was easily calculated. The cost of leasing versus buying rail cars was a straightforward analysis. (*See* Gas TR V. 8, p. 1039-40). The fuel savings presented by an operating nuclear fleet is also a straightforward calculation, although no party ever raised this analogy during the gas reserves hearing since it contradicts the Commission's position on security costs embodied in Order No. PSC-11-0080. The key difference, especially in light of item 10 from Order No. 14546 quoted above, is that the items "will result in fuel savings to customers." Note the Commission's prior language was not "may result" or "could result" or even "should result;" it was "will result," which is an absolute phrase. Again, the Commission's attempt to force the Woodford Project into the hedging/Fuel Clause category fails, because the record clearly demonstrates that the savings in Woodford are not fixed or guaranteed. (Gas TR V. 1, p. 160). Furthermore, none of the cases cited in the Woodford Order explain how the Commission has jurisdiction to allow the recovery of drilling and fracking investments **with a**

**profit** (in contravention of Order No. 6357's statement regarding no profits on fuel), nor can any of the cases cited in the Woodford Order be legitimately termed analogous to the Woodford Project.[10] Thus, the Commission's attempt to bootstrap the Woodford Project into cost recovery through the Fuel Clause by labeling it "hedging" even fails by strained analogy.

Citizens do not dispute that the costs for the actual fuel commodity used in the generation of electricity is rightly recovered in the annual Fuel Clause proceeding pursuant to past Commission practice. Furthermore, Citizens do not dispute that the longer-term contracts for fixed price/fixed quantity are, in fact, hedging transactions which can be properly recovered through the Fuel Clause pursuant to past Commission practice. However, Citizens do dispute that investing variable amounts (which are not known and fixed until after FPL spends them) in an exploration and drilling operation to recover variable quantities (which are unknown until the fugacious minerals are actually captured, if ever) of a fossil fuel qualifies as either fossil-fuel costs normally recovered in base rates or as a fixed price financial or physical hedging transaction. The record demonstrates that neither costs, savings, nor quantities of natural gas are fixed in the Woodford

[10] The Commission did not address whether gas reserves investments, which are *arguendo* a hedge, should be allowed to earn a profit or if such a hedge transaction can be conducted with an affiliate. A review of past Commission orders defining or approving hedging does not reveal a single instance where a hedge was allowed to earn a profit to the hedging utility's shareholders or be conducted through transaction with an affiliate.

Project. (Gas TR V. 1, pp.-159-61). The record also shows the Woodford Project's **variable** costs and fuel quantities bear no resemblance to previously approved **fixed** price/quantity hedging programs (Gas Ex. 55, pp. 389-96). The Commission's placing of hedging and Fuel Clause labels on this transaction fails to support subject matter jurisdiction over investments in gas reserves, because (aside from clearly being outside an electric utility's statutorily defined scope of operations) investments in gas reserves contain none of the fixed price attributes outlined in prior Commission decisions, nor are variable cost drilling investments similar to any items previously recovered through the Fuel Clause. Furthermore, since gas reserves investments are clearly not like any prior items that have flowed through the Fuel Clause, the Commission not only does not have subject matter jurisdiction to allow gas reserves investment recovery, but the Commission has further complicated matters by deviating from prior decisions without any explanation.

## II. THE PSC DEVIATED FROM PRIOR POLICIES/DECISIONS AND PSC RULES WITHOUT PROVIDING AN EXPLANATION IN CONTRAVENTION OF PRECEDENT AND THE LEGISLATIVE INTENT OF THE APA

### A. Prior Orders and Policy in General

The APA, in Section 120.68(7)(e)3, F.S., states a court can remand a case or set aside agency action when the agency's exercise of discretion was

"[i]nconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency." Aside from rules, agency orders also contain official agency policy. *Gessler v. Dep't of Bus. & Prof'l Regulation*, 627 So. 2d 501, 503 (Fla. 4th DCA 1993) citing *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 582 (Fla. 1st DCA 1977). See also *Southern States Utils. v. Florida PSC*, 714 So. 2d 1046 (Fla. 1st DCA 1998).

Until the Woodford Order, the Commission's current policy on hedging was embodied in *In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor*, Order No. PSC-08-0667-PAA-EI. On page one of Attachment A of the order, the Commission defined hedging activities as "natural gas and fuel oil **fixed price** financial or physical transactions." (emphasis added). The record reflects that all prior hedging involved fixed prices for fixed quantities. (Gas Ex. 55, pp. 392-93). Then, inexplicably, the Commission found the Woodford Project to be a hedge (R.V. 9, p. 1612-13) even though all evidence in the record clearly shows the Woodford Project involves neither fixed prices nor fixed quantities. (Gas TR V. 1, pp. 159, 161). The Commission failed to explain this deviation from existing policy, which causes uncertainty for all parties going forward and impairs this Court's ability to review the Commission's rationale. *See Gessler v. Dep't of Bus. & Prof'l Regulation*, 627 So. 2d 501.

The Commission also deviated from the policy in Order No. 6357 (which has carried forward over the intervening decades) that utilities do not earn a profit on fuel. The issue of profiting on fuel costs was thoroughly discussed in Section I above due to its important relationship with the purpose of the Fuel Clause and the subject matter jurisdiction discussion; the issue is also appropriate in this Section as well. The Woodford Order allows recovery of the revenue requirements of the Woodford Project (R V. 9, p. 1610), which includes a return on investment or profit (Gas TR V. 2, pp. 311-313). Profiting on fuel costs is a clear deviation from prior Commission policy, without explanation, which directly conflicts with the requirement of Section 120.68(7)(e)3, F.S.

Furthermore, the Commission deviated from its own rules in its approval of the Woodford Project. Rule 25-6.014, F.A.C., states that electric utilities "**shall** maintain its accounts and records in conformity with the Uniform System of Accounts (USOA) for Public Utilities and Licensees as found in the Code of Federal Regulations, Title 18, Subchapter C, Part 101." (emphasis added). FPL proposed a new method of accounts for the Woodford Project, not the accounts clearly required by Rule 25-6.014, F.A.C. (Gas TR V. 3, p. 392). Furthermore, the record clearly shows that FERC's USOA does not contemplate and cannot account for a transaction like the Woodford Project. (Gas TR V. 5, pp. 559-60; Gas TR V. 6, pp. 822-24). Even though the Woodford Order includes the fabrication of

additional subaccount requirements to ostensibly make regulatory oversight more feasible, the Commission allowed FPL to ignore the requirements of Rule 25-6.014, F.A.C., without any explanation.

It is well settled law that an agency cannot deviate from its own rules without an explanation. Section 120.68(7)(e)2, F.S., mandates remanding or overturning an agency decision that is inconsistent with an agency rule. Furthermore, the Commission may waive or deviate from a rule "and such deviation would be proper as long as adequately explained." *General Tel. Co. v. Florida Public Service Comm'n*, 446 So. 2d 1063, 1070 (Fla. 1984). See also *E.M. Watkins & Co. v. Bd. of Regents*, 414 So. 2d 583 (Fla. 4th DCA 1982). Pursuant to Section 120.68(7)(e)2, F.S., and precedent, the Commission's deviation from its own rule without any semblance of an explanation warrants reversal or remand.

**B. Contravening the Express Terms of Order No. 13-0023**

Item 10 of Order No. 14546 discussed above creates a specific conflict with the Commission's Order in *In re: Petition for Increase in Rates by Florida Power & Light Company*, Order No. PSC-13-0023-S-EI (Jan. 14, 2013), which this Court affirmed in *Citizens v. Florida PSC*, 146 So. 3d 1143 (Fla. 2014). Any item passing the test for inclusion in the Fuel Clause set forth in Order No. 14546 would necessarily violate the plain language of a specific prohibition found in Order No. PSC-13-0023.

The rationale under Order No. 14546 for including the Woodford Project (or any other gas reserve/drilling or mining investment project) in the Fuel Clause is that it can satisfy the three-prong test provided in Item 10 of that Order, which is: 1) fossil fuel-related costs normally recovered through base rates; 2) which were not recognized or anticipated in the cost levels used to determine current base rates; 3) and which, if expended, will result in fuel savings to customers. Paragraph six on page fourteen of Order No. PSC-13-0023 states in part, "[i]t is the intent of the Parties in this Paragraph 6 that FPL not be allowed to recover through cost recovery clauses increases in the magnitude of costs of types or categories (including but not limited to, for example, investment in and maintenance of transmission assets) that have been and traditionally, historically, and ordinarily would be recovered through base rates."

The plain language of the two orders quoted here conflict. Under Order No. 14546, an item must be a fossil-fuel related cost normally recovered through base rates to be included in the Fuel Clause. Therefore, pursuant to this Order, including the Woodford Project in the Fuel Clause means the Woodford Project must be a type of fossil-fuel related cost that could normally be recovered in base rates.[11] To continue the exercise, turn next to the limiting clause quoted above

[11] *See* RV 8, pp. 881-884, 865, 960 for record testimony regarding the inclusion of items in the Fuel Clause and the qualifier that those items must be base-rate recoverable for inclusion in the Fuel Clause.

from Order No. PSC-13-0023. The limiting clause specifically states the parties intended to exclude recovery of items that would have been or would be recovered through base rates. The Woodford Project cannot be a cost normally recovered through base rates and, at the same time, sidestep the limiting clause excluding items that would be ordinarily recovered through base rates as it is clear in these two instances the adverbs "normally" and "ordinarily" are synonymous. Stated differently, the item must be base-rate recoverable to be in the Fuel Clause under Order No. 14546, and Order No. PSC-13-0023 specifically prevents recovery of items that can be recovered in base rates for a set period of time.

The Commission makes an attempt at avoiding the conflict presented by these two orders, however, that attempt falls short. In the Woodford Order, the Commission again attempts to use a label to evade a legal conflict (this time with prior orders instead of statutes). (R.V. 9, p. 1612). The Commission uses the label "hedging" and declares no conflict; yet, the Commission failed to address the longstanding undisputed policy that items that flow through the Fuel Clause must still be items that are base-rate recoverable. There are no labels that remove the conflict between the plain language of these two orders. Therefore, the Commission, again, deviates from prior policy without an explanation in contravention of Section 120.68(7)(e)3, F.S., which warrants remand.

## III. THE PSC'S WOODFORD ORDER IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE

With a lack of citations to the record, it is impossible to determine which evidence the Commission used in reaching its decision or why the Commission chose to rely on some evidence and not other evidence. This lack of any attempt at citation to the record frustrates the judicial review process. These concerns are primarily addressed in Section II above; however, there are two specific findings in the Woodford Order that are not based on competent substantial evidence in the record, and these findings, therefore, cannot stand.

It is well understood that the Commission's findings must be based on competent substantial evidence. See *GTC, Inc. v. Edgar*, 967 So. 2d 781. Moreover, substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *Florida Rate Conference v. Florida R.R. & Pub. Util. Comm'n*, 108 So. 2d 601, 608 (Fla. 1959). This Court also noted the word competent modifies substantial by requiring the evidence to be "sufficiently relevant and material." *Id.* The Commission's findings in the Woodford Order that (1) the Woodford Project costs are "essentially fixed" and that (2) production levels (which affect possible customer

savings) will vary by ten percent[12] are not supported by competent and substantial evidence. (R.V. 9, pp. 1613-14)

Only one witness testified with direct knowledge to both Woodford Project costs and production levels – Dr. Taylor. First, the Woodford Order states the Woodford Project costs are "essentially fixed." (R.V. 9, p. 1613). The record contains no evidence of any actual historical production costs, and the only witness to testify with direct knowledge of production costs stated he expected the costs to decrease over time, not stay the same. (Gas TR V. 8, p. 848). Second, Dr. Taylor, the only witness to testify regarding projected production levels (other witnesses only referenced Dr. Taylor's testimony), testified that production levels would not vary "significantly," which he interpreted to be plus or minus ten to twenty percent in the aggregate. (Gas TR V. 8, p. 856). The Commission's purported findings regarding costs and production levels are the only findings supporting its conclusion that the Woodford Project is expected to result in customer savings (R.V. 9, p. 1613-14). In this exercise, the Commission fails. The record is void of any competent and substantial evidence to support these findings. Without the support of any competent substantial evidence of "essentially fixed" production costs or production levels limited to a ten-percent variation, the finding and

[12] The chart in the Woodford Order (R.V. 9, p. 1614) indicates savings based on a production variation of plus or minus 10%.

conclusion that the Woodford Project is expected to result in customer savings cannot stand.

## IV. THE PSC FAILED TO FOLLOW EVIDENTIARY REQUIREMENTS OF CHAPTER 120, F.S., AND THE FLORIDA RULES OF CIVIL PROCEDURE CREATING A MANIFESTLY FAULTY RECORD WHICH IMPAIRS JUDICIAL REVIEW

Under Chapter 120 hearings, "irrelevant, immaterial, or unduly repetitious evidence shall be excluded." § 120.569(2)(g), F.S. Florida Rule of Civil Procedure 1.310(f)(3)(A) states a party may file a deposition, and Florida Rule of Civil Procedure 1.330 discusses the use of depositions by parties at trial. These rules governing the use of depositions applied in the proceedings below under Rule 28-106.206, F.A.C. Even though the requirements of these statutes and rules are clear and straightforward, the Commission failed to follow them and thus created a manifestly defective record that can only impair judicial review. Furthermore, the failure by the Commission to follow the evidentiary requirements found in Chapter 120 and the Florida Rules of Civil Procedure adopted in Rule 28-106.206, F.A.C., creates uncertainty and impairs due process going forward for parties appearing before the Commission as the parties cannot know which statutes and rules the Commission will follow during hearings.

The depositions conducted during discovery in the proceedings below were true discovery depositions and involved questions that were calculated to lead to

the discovery of admissible information. As such, the depositions naturally contained irrelevant, immaterial, and/or unduly repetitious statements.[13] As an example, during the deposition of FPL witness Forrest, Mr. Forrest speculates as to future actions by PetroQuest (the drilling partner in the Woodford Deal) without being qualified to do so (Gas Ex. 55, pp. 0580-81) and discusses the irrelevant topic of whether FPL investors were briefed on the Woodford Project (Gas Ex. 55, pp. 615-16). The depositions were also clearly intended to be used at hearing during cross-examination for impeachment purposes. (Gas Ex. 55, p. 379). The parties did not agree to the wholesale inclusion of the depositions as standalone evidence.

Furthermore, as with most depositions, objections were noted for the record during the deposition. A review of the depositions unilaterally entered into the record over repeated objections reveals at least twenty-three objections lodged during the course of the depositions. None of these objections were ruled upon when the depositions were admitted into evidence. By itself, this may not be a fatal flaw in the record; however, taken with the facts that irrelevant and immaterial evidence was admitted into the record and that the Commission failed to cite to the record for its findings or its rationale for deviation from prior

[13] As is common practice in most depositions, when exploring a topic in the realm of discovery, attorneys routinely ask questions about tangentially related topics that turn out to be irrelevant or immaterial.

decisions/policy, the errors further confuse the judicial review process and warrant, at the least, remand for clarification. *Dep't of Prof'l Regulation v. Wise*, 575 So. 2d 713, 716.

In *Wise*, during an administrative hearing regarding misconduct by a physician, evidence regarding the witness' prior sexual history was erroneously included. The Court held:

> Where significant inadmissible evidence has been erroneously admitted and the bases for the findings of fact are not sufficiently explained so that a reviewing body can determine whether competent substantial evidence supports the findings, the harmless error standard cannot be applied. As previously indicated, the recommended order was conclusory in nature, providing almost no indication as to the evidentiary basis for the hearing officer's findings. Under these circumstances, we cannot say with any certainty that the improper admission of the irrelevant evidence did not impair the fairness or correctness of the fact-finding process. We therefore determine that remand for clarification of the recommended findings is requied. *Wise*, 575 So. 2d 713, 716.

As discussed in the preceding section, the Commission failed to link most of its findings to the record (notwithstanding the two findings that are clearly linked to the record but not supported by competent substantial evidence). With the inclusion of irrelevant, immaterial, and unduly repetitious evidence in

contravention of Section 120.569(2)(g), F.S., the Commission further obscures the basis for its findings articulated in the Woodford Order.

Commission staff first objected to discovery propounded on staff by arguing and stating it is not a party to these proceedings. Commission staff then relied on discovery rules that clearly apply only to parties and offered into evidence entire deposition transcripts. (Gas TR V. 1, pp. 34-35). Commission staff cannot have it both ways. Furthermore, pursuant to Florida Rule of Civil Procedure 1.330(c), Commission staff's introduction of the depositions of FPL's witnesses (the only depositions taken in the proceedings below) made the deponents the witnesses of the Commission staff. Making the witnesses of a party to the proceeding the witnesses of Commission staff does not align with Commission staff's position that it is a neutral fact-gatherer in the related proceedings. (*Id*. at 31-37). Moreover, the depositions were admitted at Commission staff's request on the grounds that "staff is trying to get as much information into the record we can get so they can come up with a final order, or a final recommendation." (*Id*. at 37). However, the burden of proof is not on Commission staff, but the petitioning party, here FPL.

Commission legal staff also advised the Commission that the "irrelevant, immaterial, or unduly repetitious" portion of Section 120.569(2)(g), F.S., can be ignored by using the "but all other types" provision of the statute, which is clearly an erroneous interpretation of the statute. (Gas TR V. 1, pp. 33-34). Cramming

the record with as much information as possible at the request of Commission staff, regardless of the requirements of the Florida Rules of Civil Procedure and Section 120.569(2)(g), F.S., is not a legal reason for overruling a valid objection, at least not in any Florida precedent. Furthermore, it was FPL's burden to prove its case, not Commission staff.

Due to the Commission's failure to follow the rules of evidence and discovery, the record created in the proceedings below is faulty and impairs judicial review. When inadmissible evidence is in the record and the Commission fails to explain its findings, the proper remedy is remand for clarification. *Dep't of Prof'l Regulation v. Wise*, 575 So. 2d 713, 716. In the present cases, the record contains irrelevant, immaterial, and unduly repetitious evidence through the Commission's failure to perform the gate-keeping function set forth in Section 120.569(2)(g), F.S., and the failure to adhere to the clear rules regarding depositions found in the Florida Rules of Civil Procedure adopted by Rule 28-106.206, F.A.C. These errors combined with the lack of citations to the record in the Woodford Order create a situation warranting, at the very least, a remand to the Commission for clarification per the clear holding set forth in *Wise*.

## CONCLUSION

As set forth above, the Commission performed an *ultra vires* act, because the Commission lacked subject matter jurisdiction to allow the recovery of

exploration, drilling, and fracking investments. This Court should reverse and remand with instructions the Commission's Motion to Dismiss Order, the Woodford Order, and the portion of the Fuel Order approving gas reserves investments as part of FPL's Risk Management Plan, because the Commission lacks subject matter jurisdiction to allow the recovery of investments in exploration and drilling operations as they are outside the purview of an electric utility's statutory functions of generating, transmitting, and distributing electricity. The Court's opinion should include instructions to the Commission that it lacks subject matter jurisdiction to allow the recovery of gas reserves investments, that the Commission cannot deviate from prior policies/decisions or Commission rules without explanation, and that the Commission is bound to follow the evidentiary requirements found in Section 120.569(2)(g), F.S., and the Florida Rules of Civil Procedure adopted by Rule 28-106.206, F.A.C.

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **CITIZENS' INITIAL BRIEF** has been furnished by electronic mail on this 8th day of June, 2015, to the following:

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## CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY**, pursuant to Rule 9.100(l), Florida Rules of Appellate Procedure, that the CITIZENS' INITIAL BRIEF was prepared using Times New Roman 14-point font.

*s/ John J Truitt*
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