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*.

Appellant(s) Appellee(s)

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF APPELLANTS CITIZENS OF THE STATE OF FLORIDA, ETC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Florida Statutes and Orders

Miscellaneous

STATEMENT OF INTEREST

Excessive utility costs, which comprise a substantial portion of housing expenses, can severely burden older people, even if they own their homes outright. Inability to pay utilities ranks as the second most common cause for eviction after inability to pay rent.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. As the leading organization representing the interests of people aged fifty and older, AARP is greatly concerned about the impact of high utility costs on older people. AARP regularly intervenes in utility rate-setting cases and files amicus curiae briefs to protect the interests of older residential utility ratepayers.

This appeal raises questions of significant importance to AARP: ensuring that the Florida Public Service Commission, in accordance with law, sets residential utility rates that are fair, just, and reasonable to ratepayers. AARP's participation in this case raises issues not discussed by the other parties and will assist the Court in understanding the issues presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Florida Public Service Commission ("PSC" or the "Commission.") approved Florida Power and Light's ("FPL") unprecedented and ill-advised recovery of investment costs and guaranteed profit for the exploration, drilling, and development of natural gas wells in Oklahoma pursuant to its authority to regulate recovery of fuel costs. *See In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor* (Woodford Order), Order No. PSC-15-0038-FOF-EI (Jan. 12, 2015).

The Office of Public Counsel ("Public Counsel," or "OPC") and other parties appealed the Commission's decision, arguing, *inter alia*, that the PSC lacks subject matter jurisdiction to approve such costs, that the cost is not appropriately characterized as a fuel cost hedge, that a utility is not permitted to seek profits on the cost of fuel, that the Order is not supported by competent and substantial evidence, and that the record is otherwise faulty.

Amicus curiae AARP concurs with these arguments and writes separately to address the importance of protecting FPL's captive rate-paying customers. Older and low income people, in particular, are injured by being charged excessive utility rates. The Order should be reversed because approval of the cost shifting of speculative investments to ratepayers departs significantly from fundamental

ratemaking principles. Indeed, there is no assurance that the investment will ever produce any natural gas, let alone produce a net cost savings for ratepayers.

First and foremost, it violates the commerce clause of the U.S. Constitution for the PSC to regulate the activities of the exploration, distribution and production of natural gas taking place in Oklahoma. *See Missouri v. Kansas Natural Gas Co*., 265 U.S. 298, 307 (1924); *Public Utilities Comm'n v. Attleboro Steam & Elec. Co*., 273 U.S. 83 (1927); *State Corp. Comm'n v. Wichita Gas Co*., 290 U.S. 561 (1934). Thus, in addition to the argument advanced by OPC that the state statute does not authorize the PSC to exercise subject matter jurisdiction, the state commission is also "restrained [from regulating] that which in the absence of Federal regulation should be free." *Minnesota Rate Cases*, 230 U.S. at 352, 307-8 (1913).

Even if the investment were within the authority of the PSC to regulate, it nevertheless violates the law and should be reversed because it is contrary to fundamental principles of utility regulation. First, approval of the Woodford Project allows advance recovery of the cost of utility assets that are not "used and useful." It is thus contrary to explicit Florida law. *See* Fla. Stat. § 366.06 (2014) (setting out the requirements for cost recovery). It also eliminates important regulatory oversight that ensures utilities only recover costs through rates for expenses that are necessary and prudently incurred. *See* Fla. Admin. Code Ann. r.25-6.0423. As a result, it shifts to ratepayers the investment risk that should be

borne by utility shareholders. Because it is accomplished through the fuel adjustment mechanism, instead of the normal rate case, as it should, the cost recovery approved in this case does not provide a corresponding reduction in shareholder guaranteed return on equity for the reduction in risk. Thus, the cost recovery approved in this case is not fair, just, and reasonable.

It cannot be established at this point whether the project will even produce any natural gas, let alone provide a net benefit to ratepayers. Even if the investment ultimately benefits ratepayers, however, the PSC erred in approving the advance cost recovery through the fuel adjustment mechanism. The investment does not actually provide fuel and cannot fairly be considered a hedge. Moreover, state law requires utilities to follow universally applicable accounting requirements that specify precisely how a utility must account for income, investments, and expenses. Recovery for the cost of the investment in unregulated natural gas exploration and production assets at issue here is inconsistent with the accounting categories for fuel cost recovery. Indeed, the PSC recognized this problem and required FPL to create additional subcategories in order to account for this aberration.

Respectfully, this Court should reverse the Commission's approval of cost recovery for FPL's investment in unregulated exploration, drilling and production of natural gas through hydraulic fracturing in Oklahoma.

STATEMENT OF FACTS

Amicus Curiae AARP adopts the Statement of Facts and denomination of references to the record provided in the opening brief of the Office of Public Counsel ("OPC"), Op. Br. at 2-8.[1]

ARGUMENT

I. Utility Rates That Are Not Fair, Just, And Reasonable Endanger The Health, Financial Security, And Wellbeing Of Older And Low Income Ratepayers.

Public utility regulators are charged with the responsibility to ensure that utility rates are fair, just, and reasonable to both the investor owned utility and its captive ratepayers. *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (finding the setting of "'just and reasonable' rates involves a balancing of the investor and the consumer interests."). "The customer's interest is self-evident. Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18, 15 n.15 (1978) (noting "the uninterrupted continuity of [electric service] is essential to health and safety.").

Utility costs typically comprise a large percentage of an older person's monthly budget. The average low-income household, despite using less energy on

[1] References to the OPC brief will be designated ("OPC Op. Br. at __").

average than higher income households, spends 16 percent of its annual income on home energy costs, and these costs are rising. *See* Lynne Page Snyder & Christopher A. Baker, *Affordable Home Energy & Health: Making the Connections* 14, AARP Pub. Pol. Inst. (2010). Unaffordability of utilities forces older and low income consumers into untenable circumstances—cool or eat, use lights or medication—that endanger their health and wellbeing. *See id*. at 14, 2 (finding "74 percent of households that include older adults report that they cut back on the purchase of household necessities because of high home energy bills.").

Lower income older people who cannot afford their utility costs may reduce their heating and cooling to unsafe levels, increasing their risk of ill-health and even death. Each year, over 600 people die from exposure to extreme heat, most often inside of permanent homes with little or no air conditioning; a consistently high percentage of them are older than age 65. *See* Sabrina McCormick, PhD, *Heat-Related Deaths After an Extreme Heat Event—Four States, 2012, and United States, 1999–2009*, Centers for Disease Control, 62 Morbidity and Mortality Weekly Report No. 22, 433 (June 7, 2013), *available at* http://www.cdc.gov/mmwr/pdf/wk/mm6222.pdf. With advancing age, the risk of death from exposure to extreme heat or cold increases because older people become physiologically less aware of or able to maintain the proper body

temperature. They also tend to suffer disproportionately from diseases that are exacerbated by temperature extremes, such as heart disease, diabetes, and lung disease. Jan C. Semenza, et. al., *Excess Hospital Admissions During the July 1995 Heat Wave in Chicago*, 16 Am. J. Prev. Med. 271, 274 (1999), *available at* http://www.ajpmonline.org/article/S0749-3797(99)00025-2/pdf. They are also more likely to take medications that limit their ability to cool themselves. *Id.*

The tradeoffs residential consumers are forced to make when utility expenses are unaffordable also extend to more mundane but equally important choices for financial security and overall wellbeing. Excess utility rates force ratepayers to spend money they could otherwise save for a rainy day or to pay off debt. These are significant concerns for older people who may not have enough money to sustain them through their retirement years, or for the large number of low income older Floridians who rely on Social Security for more than 90 percent of their income.[2]

[2] *See* Mikki Waid, *Social Security Is a Critical Income Source for Older Americans: State-Level Estimates, 2010–2012*, AARP Pub. Pol. Inst. (Jan. 2014), *available at* http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2014/social-security-critical-income-source-AARP-ppi-econ-sec.pdf (over 27 percent of older families in Florida rely on Social Security for more than 90 percent of their income).

II. It Violates The Commerce Clause Of The United States Constitution For The PSC To Regulate The Exploration, Drilling, And Production Of Natural Gas Taking Place In Oklahoma.

First and foremost, the PSC order approving FPL's investment into the exploration, drilling, and production of natural gas taking place in Oklahoma must be reversed because the exercise of such jurisdiction violates the commerce clause of the U.S. Constitution. *See Missouri v. Kansas Natural Gas Co*., 265 U.S. 298, 307 (1924) ("If a state enactment imposes a direct burden upon interstate commerce, it must fall regardless of Federal legislation…") (quoting *Minnesota Rate Cases*, 230 U.S. 352, 396 (1913)). Thus, in addition to the argument advanced by OPC that the state statute does not authorize the PSC to exercise subject matter jurisdiction, the state commission is "restrained [from regulating] that which in the absence of Federal regulation should be free." *Minnesota Rate Cases*, 230 U.S. at 307-8.

Regardless of the purported benefit conferred on Florida rate payers, the PSC does not have authority to regulate the activities that impact interstate commerce. Here, there can be no argument that Oklahoma drilling operations are somehow exempt from that restriction merely because the investment gives FPL some ownership interest in those activities. "[T]he regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the

constitutional powers of the States." *Interstate Natural Gas Co. v. Fed. Power Comm'n.*, 331 U.S. 682, 689 (1947).

There are no regulated utility orders or cases on point in the country, as far as Amicus Curiae AARP have been able to find, because it is unprecedented for a regulated electric utility to approve investment in an unregulated natural gas exploration, drilling, and production enterprise. Even where other utilities have invested in exploration and production, those activities are conducted by subsidiaries of the utility and do not pass the cost of the investment through to rate payers in the form of rates or fuel costs.

III. Approval Of FPL's Recovery Of Costs For Investment In Speculative Natural Gas Exploration In Oklahoma Violates Fundamental Principles Governing Ratemaking By Regulated Utilities.

Florida law provides that "[t]he [public service] commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service . . . and [ ] the money [shall be] honestly and prudently invested by the public utility company in such property used and useful in serving the public." Fla. Stat. §366.06(1). The authority of the PSC is limited to that expressly delegated by the Legislature and guided by fundamental time-tested principles of utility regulation.

A. Allowing FPL To Recover Investment Costs For The Woodford Project, Which May Never Produce Any Fuel That Benefits Ratepayers, Is Inconsistent With State Law And Fundamental Principles Of Regulated Utility Ratemaking.

Pursuant to fundamental principles of regulated utility ratemaking, utility regulators are not traditionally authorized to approve recovery of costs for investments and assets that are not "used and useful in serving the public." *See* Fla. Stat. §§ 366.05, 366.06(1). Permitting recovery of such costs in advance of them returning a benefit in the form of reliable access to necessary amounts of electricity is unfair to ratepayers.[3]

Importantly, because a regulated utility is not guaranteed to recover all its expenses through rates, it has a significant incentive to keep rates low by controlling costs. Moreover, advance cost recovery, especially outside the regular

[3] Larkin & Associates, PLLC, for AARP, *Increasing Use of Surcharges on Consumer Utility Bills*, 9-10 (May 2012), *available at* http://www.aarp.org/content/dam/aarp/aarp_foundation/2012-06/increasing-use-of-surcharges-on-consumer-utility-bills-aarp.pdf ("A key concept in accounting and ratemaking is the matching principle. The matching principle involves matching revenues with related expenses and investments in the time period they occur. Accounting and ratemaking require the cost of capital investments to be spread over the period in which they will be used. Capital investments, such as replacement of equipment at the utility's plant can produce efficiencies such as reducing future O&M costs or enable new revenues. If the cost of the capital expenditure is recovered through a surcharge, these efficiencies may not be captured in the surcharge. Recovering capital investments via a surcharge can thus violate the matching principal. . . . There is also the risk that overpayment of costs may be not be returned to customers, because if the surcharge costs are reviewed only on a cursory basis, any errors or overcharges may not be detected and/or returned to customers.").

ratemaking proceedings, shifts onto the ratepayers the risk of investment that should be borne by shareholders, who earn a guaranteed profit on their investment in proportion to the risk they take.[4]

An after-the-fact review by regulators further ensures that the costs incurred were necessary to provide the essential utility service and that all expenses recovered through rates were prudently incurred. *See* Larkin Associates at 3. Put differently, utility regulators play an important role in ensuring that the utility is as careful spending ratepayer's money as it is spending its own.

Advance cost recovery is also antithetical to fundamental principles of ratemaking because it reduces the opportunity and incentive for a utility to take advantage of changing technology and other opportunities to keep utility rates low. Utilities and regulators alike generally agree that flexibility in fuel sources is the most effective means of ensuring the availability of electricity at reasonable prices

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[4] *See* NextEraEnergy Florida Power and Light Filing, Securities and Exchange Commission, Form10K (Feb. 20, 2015) *available at* https://www.sec.gov/Archives/edgar/data/37634/000075330815000079/nee-12312014x10k.htm. ("For both retail and wholesale customers, the prices (or rates) that FPL may charge are approved by regulatory bodies, by the FPSC in the case of retail customers, and by the FERC in the case of wholesale customers. In general, under U.S. and Florida law, regulated rates are intended to cover the cost of providing service, including a reasonable rate of return on invested capital. Since the regulatory bodies have authority to determine the relevant cost of providing service and the appropriate rate of return on capital employed, there can be no guarantee that FPL will be able to earn any particular rate of return or recover all of its costs through regulated rates.").

and hedging against fuel price spikes. *See* Ken Costello, , *Natural Gas Hedging: Should Utilities and Regulators Change Their Approach?* 2-3, National Regulatory Research Institute (May 2011). But the Woodford Project Investment locks FPL into the contract for 30 years. It is highly possible that the long term investment will result in significant stranded cost due to the rapid pace of changing technology. Scott Hempling & Scott Strauss, *Pre-Approval Commitments: When And Under What Conditions Should Regulators Commit Ratepayer Dollars to Utility-Proposed Capital Projects?* 29 (Nov. 2008).

"Utilities are generally required to "net" all costs and benefits of operation at the time rates are set to avoid "cherry-picking" individual cost increases that may be offset by other cost decreases." *See* Larkin & Associates, PLLC, for AARP, *Increasing Use of Surcharges on Consumer Utility Bills*, 9 (May 2012), *available at* http://www.aarp.org/content/dam/aarp/aarp_foundation/2012-06/increasing-use-of-surcharges-on-consumer-utility-bills-aarp.pdf. *Id*. at 1. As a result, the return on equity granted during ratemaking, which is not adjusted when the cost recovery is approved through a different mechanism, such as a cost recovery mechanism or fuel cost surcharge, may over-compensate investors for the actual risk they are taking at the expense of the ratepayers. *Id*. As previously noted, rates are not fair, just, and reasonable unless the investor and ratepayer interests are properly balanced. *See Fed. Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 603.

B. The Florida Legislature Has Not Authorized The PSC To Approve Advance Recovery Of Costs Related To Natural Gas Exploration And Production.

While the Florida Legislature has authorized the PSC to approve advance cost recovery in very limited circumstances, it has not granted the PSC blanket authority to approve recovery of a broad range of advance costs. For example, the Legislature enacted Fla. Stat. § 366.93, *et. seq.*, directing the PSC to allow advance cost recovery to incentivize utilities to build nuclear power plants. Advance cost recovery for nuclear power plants have been approved by several state utility regulators as a means to reduce the impact of price spikes by diversifying the generation and demand for utility generated electricity. The Legislature also authorized advance cost recovery for energy efficiency and renewable energy power sources to incentivize the utility to invest in such activities that might ultimately benefit ratepayers.[5] *See* Fla. Stat. § 366.8255; Fla. Stat. § 366.92 ("It is the intent of the Legislature to promote the development of renewable energy; protect the economic viability of Florida's existing renewable energy facilities; diversify the types of fuel used to generate electricity in Florida; lessen Florida's

[5] Renewable energy surcharges recover costs related to capital expenditures or purchased power contracts associated with a utility's renewable energy program. Renewable energy is defined as energy that can be replenished, such as wind, solar, geothermal, hydro, photovoltaic, wood and waste. Renewable energy typically also has environmental benefits. To encourage the development of renewable energy, many jurisdictions provide for utility cost recovery via surcharges. Larkin, *supra* note 3, at 39-40

dependence on natural gas and fuel oil for the production of electricity; minimize the volatility of fuel costs; encourage investment within the state; improve environmental conditions; and, at the same time, minimize the costs of power supply to electric utilities and their customers.").

Until now, the PSC has respected the bounds of its limited authority to approve advance cost recovery except where expressly authorized by the Florida Legislature. For example, the PSC has rejected recovery of costs for equipment and assets, such as generation plants and distribution lines, in advance of them becoming "used and useful." Fla. Stat. §366.06(1). *See, e.g.*, Order No. PSC-10-0153-FOF-EI pp 10-12 (rejecting future asset revenue request because the need to include the costs in base rates was "too speculative"); *see also* OPC Op. Br. at 16-17 (citing additional examples). Thus, AARP concurs with the OPC arguments that approval of the Woodford Project is contrary to previous decisions of the PSC.

This Court should find that the PSC does not have sufficiently broad inherent authority to approve advance cost recovery in this case, even if this Court finds they have authority to approve passing the costs on to the ratepayers. The PSC must have explicit statutory authority to approve such cost recovery, particularly where doing so deviates so significantly from fundamental regulatory principles. Otherwise, it would have been unnecessary for Florida to enact legislation giving the PSC authority to approve advance cost recovery in either

nuclear power or other energy efficiency and alternative power sources. In any event, the PSC Order fails to articulate any basis, supported by competent evidence in the record, that the Legislature's limited delegation of authority to approve advance cost recovery for three specific types of investments also extends to FPL's highly speculative investments in exploration and production of natural gas. *See* OPC Op. Br. at 20-23.

C. Recovery Of FPL's Investment Should Not Have Been Accomplished Through The Fuel Cost Recovery Mechanism.

Even if FPL's speculative and risky investment in the Woodford Project ultimately benefits ratepayers and is found to be in the public interest, the PSC erred in approving it though the fuel cost adjustment mechanism. Such a mechanism is designed to eliminate regulatory lag—the time between when actual costs of clearly recoverable fuel costs, which are passed through to ratepayers on a dollar for dollar basis, are expended and when they can be recovered through rates. The mechanism also permits utilities to recover actual costs of financial derivatives and physical hedges that help prevent price shocks from volatile fuel costs over a relatively short period of time, typically 12-24 months. In essence, the fuel cost adjustment clause is a cash flow mechanism to allow a utility to recover its costs for unanticipated spikes in fuel costs between ratemaking proceedings. Such adjustments typically also take into consideration the overcompensation of utilities if fuel costs are significantly lower than they were anticipated to be.

Unlike other fuel cost adjustments approved by the PSC in the past, costs being recovered through the Woodford Project are not certain. It is impossible to know what the cost of the natural gas will be until it is actually being produced. In fact, it is entirely speculative whether the investment will *ever* produce fuel that can be used to generate electricity for FPL's ratepayers. Therefore it cannot properly be characterized as a physical hedge, which typically involves procurement of a sufficient amount of actual fuel to ensure there will not be a critical shortage of necessary fuel. Moreover, despite FPL's equivocal and unconvincing assertion that it *may* result in long term cost savings, it is impossible to gauge accurately any aspect of the volatile natural gas market 30 years into the future. *See* Ken Costello, National Regulatory Research Institute, *Natural Gas Hedging: Should Utilities and Regulators Change Their Approach?* 10-11 (May 2011).

Properly characterized, the investment is simply an expansion by FPL into a new business venture. Permitting advance recovery of costs for this expansion through rates is not in the public interest. Indeed, other utilities have been divesting themselves of their investments in fuel production assets. For example, "two of the state's largest utilities have eschewed" investments in Oklahoma natural gas production operations. Jay F. Marks, *Florida utility to join drilling boom in Oklahoma*, The Oklahoman, June 27, 2014, *available at*

http://newsok.com/florida-utility-to-join-drilling-boom-in-oklahoma/article/4983533. Having fully considered its options, Oklahoma Gas and Electric affirmatively rejected making any investment in natural gas exploration and production because, it found, such investment is speculative, outside their core business operations, and does not provide optimal hedges against fuel price instability. *Id*. Instead, it decided that it's "best course of action to protect our customers from price volatility is to maintain a diverse fuel supply portfolio and participate in the SPP Integrated Market." *Id*.

For similar reasons, and after years of pressure from shareholders, Dominion Power has divested most of its interests in its production facilities, using the proceeds from the sale of its assets to pay down its debt.[6] Dominion reported that as a result of divesting, it significantly reduced its risk profile to shareholders and is better able to focus on its core utility business.[7] The divestiture did not impact

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[6] *See* Alejandro Lazo, *Dominion Bowing Out Of Energy Exploration*, Wash, Post, Tuesday, July 3, 2007 http://www.washingtonpost.com/wp-dyn/content/article/2007/07/02/AR2007070200627.html (reporting that "the gas and oil exploration and production business can be a volatile one, subject to price swings and natural disasters, and it made investors uneasy. . . 'The company had been under pressure from shareholders to sell its exploration and production assets for some time' . . . 'Certainly, it's a different business' . . . 'There was a general feeling on the part of a number of particular shareholders that it wasn't the best combination.'").

[7] *See* Josee Rose, *Dominion Resources Sells Mid-Continent Operations*, updated July 2, 2007, 8:13 am EST, http://www.wsj.com/articles/SB118337652460255165 (announcing "the sale of most of its exploration and production assets as part of a

rates because they were owned by unregulated subsidiaries of the company and were not regulated by the state. FPL's decision to move in the opposite direction from its peers is demonstrably and comparatively speculative and risky.

The PSC's approval of advance cost recovery for FPL's speculative investment in a not-yet-producing, unregulated gas exploration and production operation sets a very dangerous precedent for Florida ratepayers.[8] Each of the other electric utilities operating in Florida have expressed their intention to propose similar investments should the PSC Order be upheld. *See* Housley Carr, *Florida utility to invest in natural gas wells to fuel power plants*, Philadelphia (Platts), Dec. 18, 2014, 3:09 pm EST, http://www.platts.com/latest-news/electric-power/philadelphia/florida-utility-to-invest-in-natural-gas-wells-21728959. Unsurprisingly, other Florida utilities welcome the prospect that they too will be able to take advantage of advance cost recovery that will shift risk onto the

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strategic repositioning that realigned operations and risk profile more closely with the company's peer investment group, utilities.").

[8] Moreover, the PSC explicitly recognizes that it does not have any authority to regulate the production of natural gas. Natural gas drilling is not subject to price regulation, although companies that explore and drill for natural gas must comply with state and federal health and safety regulations. The delivery of natural gas intrastate is regulated by the state in which it is being delivered. The Federal Energy Regulatory Commission has exclusive jurisdiction over rates applicable to natural gas delivered interstate. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (holding that the Michigan Public Service Commission regulation of natural gas securities was preempted because FERC has exclusive jurisdiction over interstate commerce in natural gas).

ratepayers without a corresponding reduction in return on equity or provisions to hold ratepayers harmless should the investment not pan out (i.e., if the well is dry or increasing regulatory scrutiny prevents or makes further drilling more expensive).

D. The OPC's Argument That The Investment Is Not Properly Characterized As Fuel Cost Or Hedge Is Supported By This Cost Recovery Being Inconsistent With Uniform Accounting Requirements.

Contrary to the PSC Order on appeal, it is clear that the advance recovery of FPL's investment in exploration and production of natural gas will not pay for the cost of actual fuel. It provides recovery, instead, for the investment, operation, and maintenance and operation of assets that may or may not provide access to a stable source of fuel in the future. *See* OPC Op. Br. at 23-31.

The distinction is not merely academic: utilities are required pursuant to Florida law to comply with standardized accounting requirements that are highly detailed and explicit. *See* Fla. Stat. §25-6.014 (adopting 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, for Major Utilities (2013)). These accounting requirements prevent the utility booking as fuel costs the capital and operating costs related to the investment in exploration and production of natural gas. Similarly, the accounting requirements do not allow for profits on fuel costs, which are not properly included in utility rates. *Id.*

In straining to approve FPL's investment in the Woodford Project, the PSC is, in effect, forcing a square peg into a round hole. In fact, the PSC itself recognized that in order to include the cost recovery in the fuel cost, FPL had to invent new accounting subcategories. These would not be needed if the expenses were, in fact, fuel costs. *See* News Release, Florida Public Service Commission, *PSC Approves FPL Gas Reserve Investment Recovery; Stabilizes Fuel Costs for Customers* (Dec. 18, 2014), *available at* http://www.psc.state.fl.us/home/news/index.aspx?id=1218 (noting PSC imposed condition of creating subaccounts).

Importantly, moreover, the fact that the PSC is not able to regulate the activities being invested in, and that the Federal Energy Regulatory Commission has exclusive jurisdiction over the cost of the natural gas that will be produced and delivered to FPL to generate electricity, the production of natural gas does not ensure price stability in any respect. The PSC cannot order FPL to reduce the cost of the natural gas to benefit the ratepayers who are being forced to pay for the investment.

E. Approval Of FPL's Investment In Exploration And Production Of Natural Gas Creates Intergenerational Inequities

The cost recovery for FPL's investment in exploration and production of natural gas wells through the fuel cost adjustment mechanism impermissibly subjects ratepayers to intergenerational inequities: current ratepayers are paying for

the cost of highly speculative and volatile natural gas exploration and production before the investment becomes used and useful. This is particularly problematic for older ratepayers who will likely never benefit from cost benefits over the projected 30 year time frame for the investment.

CONCLUSION

For the reasons stated above, amicus curiae AARP urges this Honorable Court to reverse the Order of the Public Service Commission approving the recovery of Florida Power and Light's investment in the Woodford Project through the fuel cost adjustment clause.

Dated: June 18, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Brief Amicus Curiae of AARP in Support of Appellants Citizens of the State of Florida, etc,** was filed electronically with the Clerk of the Court, and I HEREBY CERTIFY that one copy of the foregoing was electronically sent to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 9.100(1), Florida Rules of Appellate Procedure, the foregoing Brief Amicus Curiae of AARP in Support of Appellants Citizens of the State of Florida**,** etc., was prepared utilizing Times New Roman, 14-point font in Microsoft Word 2010.

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