

**IN THE SUPREME COURT OF FLORIDA**

CITIZENS OF THE STATE OF  
FLORIDA,

Appellants,

vs.

ART GRAHAM, ETC., ET AL.

Appellees.

CASE NOS.: SC15-95  
SC15-113  
SC15-115  
L. T. NOS.: 140001-EI  
150001-EI

FLORIDA INDUSTRIAL POWER  
USERS GROUP

Appellants,

vs.

ART GRAHAM, ETC., ET AL.

Appellees.

CASE NO.: SC15-274  
L. T. NOS.: 150001-EI  
140001-EI

---

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

---

**ANSWER BRIEF OF APPELLEE  
FLORIDA PUBLIC SERVICE COMMISSION  
TO CITIZENS' AND FIPUG'S INITIAL BRIEFS**

Charlie Beck  
Florida Bar No. 217281  
cbeck@psc.state.fl.us

Samantha M. Cibula  
Florida Bar No. 0116599  
scibula@psc.state.fl.us

Adria E. Harper  
Florida Bar No. 26198  
aharper@psc.state.fl.us

FLORIDA PUBLIC SERVICE COMMISSION  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0862  
(850) 413-6199

RECEIVED, 08/17/2015 01:48:38 PM, Clerk, Supreme Court

**TABLE OF CONTENTS**

	<u>PAGE NO.</u>
TABLE OF CITATIONS .....	iv
PRELIMINARY STATEMENT .....	1
STATEMENT OF THE CASE AND FACTS .....	2
I.    STATEMENT OF THE CASE .....	2
II.   STATEMENT OF THE FACTS .....	3
SUMMARY OF ARGUMENT .....	13
STANDARD OF REVIEW .....	15
ARGUMENT .....	16
I.    THE COMMISSION’S DETERMINATION THAT IT HAS SUBJECT MATTER JURISDICTION TO CONSIDER AND APPROVE THE WOODFORD PROJECT PETITION SHOULD BE AFFIRMED BECAUSE THE COMMISSION’S INTERPRETATION OF ITS RATEMAKING AUTHORITY IS NOT CLEARLY ERRONEOUS AND IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.....	16
II.   THE WOODFORD FINAL ORDER COMPORTS WITH PRIOR COMMISSION PRECEDENT AND POLICY. ....	25
A.   The Commission’s decision comports with the Commission’s hedging policy.....	25
B.   Recovery of a return on equity for the Woodford Project in the Fuel Clause comports with prior Commission precedent. ....	27

C.	The record showed that Florida Administrative Code Rule 25-6.014 was not applicable to the Woodford Project.....	30
D.	The Woodford Final Order comports with the FPL Settlement Agreement Order and Order No. 14546. ....	31
III.	THE WOODFORD FINAL ORDER IS SUPPORTED BY COMPETENT, SUBSTANTIAL RECORD EVIDENCE AND SHOULD BE AFFIRMED.....	34
IV.	THE COMMISSION’S USE OF ITS STAFF TO INVESTIGATE AND DETERMINE THE PRUDENCE OF THE WOODFORD PROJECT DID NOT VIOLATE FIPUG’S DUE PROCESS RIGHTS. ....	37
V.	THE COMMISSION DID NOT ABUSE ITS DISCRETION OR COMMIT A MATERIAL ERROR IN PROCEDURE WHEN IT ADMITTED INTO THE ADMINISTRATIVE RECORD THE REBUTTAL TESTIMONY OF WITNESS DEASON AND THE COMPLETE DEPOSITIONS OF THE FPL WITNESSES. ....	42
A.	The Commission did not abuse its discretion when it denied FIPUG’s motion to strike portions of FPL witness Deason’s rebuttal testimony.....	42
B.	Citizens has failed to show that the Commission abused its discretion or committed a material error in procedure when it admitted the FPL witnesses’ depositions into the record.....	45
VI.	CITIZENS’ APPEAL OF FUEL ORDER NO. PSC-14-0701-FOF-EI SHOULD BE DISMISSED BECAUSE CITIZENS IS NOT ADVERSELY AFFECTED BY THE ORDER.....	48
VII.	THIS COURT SHOULD NOT CONSIDER AMICUS CURIAE AARP’S IMPROPERLY RAISED ISSUE.....	49

CONCLUSION.....	50
CERTIFICATE OF SERVICE.....	51
CERTIFICATE OF COMPLIANCE.....	53

## TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE NO.</u>
<i>Acton, II v. Ft. Lauderdale Hospital</i> , 418 So. 2d. 1099 (Fla. 1st DCA 1982) .....	49
<i>Alsobrook v. State, Div. of Retirement</i> , 600 So. 2d 1173 (Fla. 1st DCA 1992) .....	42, 44, 47
<i>Braddy v. State</i> , 111 So. 3d 810 (Fla. 2012).....	46
<i>Castor v. State</i> , 365 So. 2d 701 (Fla. 1978).....	46
<i>Cherry Communications v. Deason</i> , 652 So. 2d 803 (Fla. 1995).....	39, 40, 47
<i>Citizens v. Fla. PSC</i> , 146 So. 3d 1143 (Fla. 2014) .....	31
<i>Department of Professional Regulation v. Wise</i> , 575 So. 2d 713 (Fla. 1st DCA 1991) .....	41, 44, 46, 48
<i>Fla. Power Corp. v. Garcia</i> , 780 So. 2d 34 (Fla. 2001).....	16
<i>Gulf Power Co. v. Florida Public Service Commission</i> , 453 So. 2d 799 (Fla. 1984) .....	24, 27, 34, 37
<i>Gulf Power Co. v. Florida Public Service Commission</i> , 487 So. 2d 1036 (Fla. 1986).....	18
<i>Gulf Power Co. v. Wilson</i> , 597 So. 2d 270 (Fla. 1992).....	29
<i>Legal Environmental Assistance Foundation v. Clark</i> , 668 So. 2d 982 (Fla. 1996).....	39, 40, 47
<i>McDonald v. Department of Banking &amp; Finance</i> , 346 So. 2d 569 (Fla. 1st DCA 1977) .....	35
<i>McWatters v. State</i> , 36 So. 3d 613 (Fla. 2010).....	42

<i>Panda-Kathleen, L.P. v. Clark,</i> 701 So. 2d 322 (Fla. 1997).....	16
<i>Pasco County School Board v. Florida Public Employees Relations Commission,</i> 353 So. 2d 108 (Fla. 1st DCA 1977) .....	41
<i>South Florida Natural Gas Company v. Public Service Commission,</i> 534 So. 2d 695 (Fla. 1988).....	39, 47
<i>Southern Alliance v. Graham,</i> 113 So. 3d 742 (Fla. 2013).....	15, 34, 45, 50
<i>Sunset Harbour Condo. Ass'n v. Robbins,</i> 914 So. 2d 925 (Fla. 2005).....	48
<i>Sunshine Chevrolet Oldsmobile v. Unemployment Appeals Comm'n,</i> 910 So. 2d 948 (Fla. 2d DCA 2005) .....	43
<i>Trees v. K-Mart Corp.,</i> 467 So. 2d 401 (Fla. 4th DCA 1985).....	43
 <b><u>FLORIDA PUBLIC SERVICE COMMISSION ORDERS</u></b>	
<i>In re: Cost Recovery Methods for Fuel Related Expenses,</i> Order No. 14546, 1985 Fla. PUC LEXIS 531 (July 8, 1985) (Order No. 14546) .....	18, 22, 32, 33
<i>In re: Fuel and purchased power cost recovery clause with generating performance incentive factor,</i> Order No. PSC-08-0667-PAA-EI, 2008 Fla. PUC LEXIS 501 (October 8, 2008) (Hedging Order II) .....	<i>passim</i>
<i>In re: Fuel purchased power cost recovery clause with generating performance incentive factor,</i> Order No. PSC-14-0697-PCO-EI, 2014 Fla. PUC LEXIS 683(December 17, 2014) (Jurisdictional Order) .....	5, 12, 15, 24,50

*In re: Fuel purchased power cost recovery clause with generating performance incentive factor,*  
Order No. PSC-14-0701-FOF-EI,  
2014 Fla. PUC LEXIS 686 (December 19, 2014)  
(Fuel Order) .....*passim*

*In re: Fuel purchased power cost recovery clause with generating performance incentive factor,*  
Order No. PSC-15-0038-FOF-EI,  
2015 Fla. PUC LEXIS 21(January 12, 2015)(Woodford Final Order) .....*passim*

*In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor,*  
Order No. PSC-93-1331-FOF-EI,  
1993 Fla. PUC LEXIS 1150 (September 13, 1993) .....28

*In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor,*  
Order No. PSC-95-1089-FOF-EI,  
1995 Fla. PUC LEXIS 1230 (September 5, 1995) .....18, 22, 28

*In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor,*  
Order No. PSC-96-0353-FOF-EI,  
1996 Fla. PUC LEXIS 504 (March 13, 1996) .....18, 19, 22, 23

*In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor,*  
Order No. PSC-96-1172-FOF-EI,  
1996 Fla. PUC LEXIS 1567 (September 19, 1996) .....18, 22, 28

*In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor,*  
Order No. PSC-97-0359-FOF-EI,  
1997 Fla. PUC LEXIS 372 (March 31, 1997) .....19, 23, 28, 32

<i>In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor, Order No. PSC-97-1045-FOF-EI, 1997 Fla. PUC LEXIS 1169 (September 5, 1997)</i> .....	19, 23, 32
<i>In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor, Order No. PSC-98-0412-FOF-EI, 1998 Fla. PUC LEXIS 578 (March 20, 1998)</i> .....	19, 23, 28
<i>In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor, Order No. PSC-98-1715-FOF-EI, 1998 Fla. PUC LEXIS 2348 (December 18, 1998)</i> .....	28
<i>In re: General Investigation of fuel adjustment clauses for electric companies, Order No. 6357, 1974 Fla. PUC LEXIS 70 (November 26, 1974)</i> .....	27
<i>In re: Petition by Florida Power &amp; 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, 2011 Fla. PUC LEXIS 67 (January 31, 2011)</i> .....	32,33
<i>In re: Petition for Increase in Rates by Florida Power &amp; Light Company, Order No. PSC-13-0023-S-EI, 2013 Fla. PUC LEXIS 15 (January 14, 2013)</i> .....	12, 31, 32, 33
<i>In re: Petition to recover capital costs of Big Bend fuel cost reduction project through the fuel cost recovery clause, by Tampa Electric Company, Order No. PSC-14-0309-PAA-EI, 2014 Fla. PUC LEXIS 226 (June 12, 2014)</i> .....	19, 23
<i>In re: Petition to recover capital costs of Polk Fuel Cost Reduction Project through the fuel cost recovery clause, by Tampa Electric Company, Order No. PSC-12-0498-FOF-EI, 2012 Fla. PUC LEXIS 456 (September 27, 2012)</i> .....	19, 23, 29



*In re: Review of investor-owned electric utilities’ risk management policies and procedures,*  
 Order No. PSC-02-1484-FOF-EI,  
 2002 Fla. PUC LEXIS 878 (October 30, 2002) (Hedging Order I) .....*passim*

FLORIDA CONSTITUTION

Article V, § 3(b)(2), Fla. Const.....2

FLORIDA STATUTES

Ch. 120, Fla. Stat. (2014).....*passim*

Ch. 350, Fla. Stat. (2014).....14

Ch. 366, Fla. Stat. (2014).....20

§ 90.702, Fla. Stat. (2014).....44

§ 120.569, Fla. Stat. (2014).....38, 43, 44

§ 120.569(2)(g), Fla. Stat. (2014).....43, 44

§ 120.569(2)(m), Fla. Stat. (2014).....34, 46

§ 120.57, Fla. Stat. (2014)..... 38

§ 120.66, Fla. Stat. (2014).....38

§ 120.66(1)(a), Fla. Stat. (2014) .....38

§ 120.68(1), Fla. Stat. (2014).....48

§ 120.68(7)(c), Fla. Stat. (2014) .....38, 41, 42

§ 120.68(7)(e)3, Fla. Stat. (2014) .....25

§ 120.68(8), Fla. Stat. (2014).....48

§ 350.042, Fla. Stat. (2014).....38

§ 350.042(1), Fla. Stat. (2014).....	38
§ 350.128(1), Fla. Stat. (2014).....	2
§ 366.01, Fla. Stat. (2014).....	<i>passim</i>
§ 366.02(1), Fla. Stat. (2014).....	5
§ 366.04, Fla Stat. (2014).....	13, 20, 24
§ 366.041, Fla. Stat. (2014).....	<i>passim</i>
§ 366.041(1), Fla. Stat. (2014).....	<i>passim</i>
§ 366.05, Fla. Stat. (2014).....	<i>passim</i>
§ 366.06, Fla. Stat. (2014).....	13, 17, 20, 24
§ 366.06(1), Fla. Stat. (2014).....	5
§ 366.10, Fla. Stat. (2014).....	3

OTHER AUTHORITIES

Fla. Admin. Code R. 25-6.014.....	13, 30
Fla. R. App. P. 9.210(b)(5) .....	15
Fla. R. Civ. P. 1.330(b) .....	45

## **PRELIMINARY STATEMENT**

Appellees, the Florida Public Service Commission and Commissioners Art Graham, Lisa Polak Edgar, Ronald A. Brisé, Eduardo E. Balbis, and Julie I. Brown, are collectively referred to as the “Commission.” Appellant, Office of Public Counsel, is referred to as “Citizens.” References to Citizens’ Initial Brief are designated “Citizens Br. Pg. [Page Number].” Appellant, Florida Industrial Power Users Group, is referred to as “FIPUG.” References to FIPUG’s Initial Brief are designated “FIPUG Br. Pg. [Page Number].” Reference to amicus curiae AARP’s Brief are designated “AARP Br. Pg. [Page Number].” Appellee, Florida Power & Light Company, is referred to as “FPL.”

References to the record on appeal are designated “R. Vol. [Volume Number, Pg. [Page Number].” References to the transcript of the December 1, 2014, hearing on the Woodford Project Petition are designated “T. Vol. [Volume Number], Pg. [Page Number].” References to the corrected transcript are designated “Tcr. [Volume Number], Pg. [Page Number].” References to the Appendix of this Brief are “Appendix at [Page Number].”

References to the gas reserves project final order on appeal, Order No. PSC-15-0038-FOF-EI, are designated “Woodford Final Order.” References to the fuel factors final order on appeal, Order No. PSC-14-0701-FOF-EI, are designated “Fuel Order.”

## **STATEMENT OF THE CASE AND FACTS**

### **I. Statement of the Case**

This is a consolidated appeal of Florida Public Service Commission (Commission) orders approving, under the Commission's ratemaking authority, a petition filed by Appellee, Florida Power & Light Company (FPL), in which the utility requested from the Commission a prudence determination and cost recovery for a natural gas reserve project (Woodford Project). (R. Vol. 1, Pg. 127, Vol. 9, Pg. 1610) The Commission found that it was prudent for FPL to acquire an interest in the Woodford Project because the project would reduce the price volatility of the natural gas used to provide electricity to FPL's customers and was projected to result in fuel savings to customers. (R. Vol. 9, Pg. 1610) The Commission also found that the revenue requirements associated with investing in and operating the gas reserve project are eligible for cost recovery through the Commission's Fuel and Purchased Power Cost Recovery Clause (Fuel Clause). (R. Vol. 9, Pg. 1610)

Appellants, the Citizens of the State of Florida, through the Office of Public Counsel (Citizens), and the Florida Industrial Power Users Group (FIPUG) challenge the Commission's jurisdiction to consider and approve the Woodford Project and raise evidentiary and procedural issues. This Court has jurisdiction pursuant to Article V, Section 3(b)(2), Florida Constitution, and sections

350.128(1) and 366.10, Florida Statutes, because the orders relate to the rates and service of a public utility providing electric service.

## **II. Statement of the Facts**

As part of an annual ratemaking proceeding, public utilities such as FPL petition the Commission for cost-recovery of their fuel costs in the “Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor” (Fuel Clause) proceeding. (R. Vol. 1, Pg. 127) FPL filed its petition seeking cost recovery for its fuel costs (Fuel Factor Petition) in the Fuel Clause. (R. Vol. 9, Pg. 1609-1618)

The Commission approved FPL’s Fuel Factor Petition by Order No. PSC-14-0701-FOF-EI (Fuel Order). (R. Vol. 8, 2194-1522) In determining the proper amount for which FPL could receive cost recovery, the Commission approved FPL’s hedging activities used to mitigate the price volatility of the natural gas purchased by FPL. (R. Vol. 8, 2194-1522) Citizens and FIPUG stipulated to the Commission’s approval of FPL’s Fuel Factor Petition, including FPL’s hedging activities. (R. Vol. 8, 2194-1522)

### **FPL’s Woodford Project Petition**

FPL also filed a petition in the Fuel Clause seeking a prudence determination and cost recovery for a natural gas reserve project that FPL alleged would provide price stability and projected fuel savings for customers (Woodford

Project Petition). (R. Vol. 1, Pg. 126-200, R. Vol. 2, Pg. 201-337)<sup>1</sup> The project was included in FPL's hedging activities in its Fuel Factor Petition. (R. Vol. 2, Pg. 201-400; R. Vol. 3, Pg. 401-416)

The Woodford Project Petition alleged that approximately 65 percent of the electricity FPL supplies to its Florida customers comes from natural gas-fired generation and that FPL supplies approximately 62 percent of all the electricity consumed in Florida. (R. Vol. 1, Pg. 129) FPL alleged that it was "looking for opportunities to acquire natural gas at production costs (as an investor), rather than at market prices (as a purchaser), in order to help insulate customers from the volatility of the gas market. (R. Vol. 1, Pg. 130)

FPL stated that an affiliate of FPL, USG Properties Woodford I, LLC (USG), entered into contracts with PetroQuest Energy, Inc. (PetroQuest), where USG would pay a share of the costs of developing and operating natural gas production wells and would receive a portion of PetroQuest's working interest in the wells in the Woodford Shale Gas region (Woodford Project). (R. Vol. 1, Pg. 131) FPL stated that it would take assignment of the USG interest in the Woodford

---

<sup>1</sup> In the Woodford Project Petition, FPL also requested the Commission establish guidelines (Proposed Guidelines Petition) to allow FPL to participate in future gas reserve projects without prior approval. (R. Vol. 1, Pg. 126-200, R. Vol. 2, Pg. 200-337) The Proposed Guidelines Petition was bifurcated from the Woodford Project Petition and is not a subject of this appeal. (R. Vol. 8, Pg. 1593-1594, R. Vol. 9, Pg. 138, 19.)

Project if the Commission found that the project was prudent and FPL was allowed to recover its costs for the project through the Fuel Clause. (R. Vol. 1, Pg. 131)

FPL alleged that its ownership interest in the Woodford Project would operate as a long-term physical hedge against the market volatility of natural gas prices used to provide electric service to FPL's customers. (R. Vol. 1, Pg. 126-200, R. Vol. 2, Pg. 201-337). FPL also claimed that the Woodford Project was "projected to benefit FPL's customers by providing natural gas at a lower cost per MMBtu than would be incurred if the same amount of natural gas were purchased at market prices." (R. Vol. 1, Pg. 132)

Citizens' Motion to Dismiss FPL's Woodford Project Petition and Commission Order Denying the Motion

Citizens filed a motion to dismiss the Woodford Project Petition, alleging that the Commission lacked subject matter jurisdiction to consider and approve the petition. (R. Vol. 4, Pg. 678-701) FIPUG filed a notice of joinder in Citizens' motion. (R. Vol. 7, Pg. 1291-1293) The Commission denied the motion to dismiss by Order No. PSC-14-0697-PCO-EI (Jurisdictional Order), finding that the Commission had subject matter jurisdiction over the petition pursuant to its ratemaking authority under sections 366.01, 366.02(1), 366.04(1), 366.05, and 366.06(1), Florida Statutes. (R. Vol. 9, Pg. 1611)

### FIPUG's Motion to Strike Portions of FPL witness Deason's Rebuttal Testimony

FIPUG filed a motion to strike portions of FPL's witness Deason's prefiled rebuttal testimony,<sup>2</sup> alleging that portions of the testimony were inadmissible because the witness gave opinions on matters of law. (R. 6, Pg. 1184-1200; R. Vol. 7, Pg. 1201-1226) FPL filed a response to the motion, arguing that the testimony was not an interpretation of statutes or regulations, but was instead information on how the Commission's regulatory policies should apply in evaluating the Woodford Project. (R. Vol. 7, Pg. 1294-1301)

The Commission denied the motion to strike, finding that witness Deason, as a former Commissioner, possessed specialized knowledge, acquired through his experience, training, and employment at the Commission. (R. Vol. Pg. 1314-1317) The Commission also found that witness Deason's rebuttal testimony was relevant to the issue of whether the Woodford Project falls within the framework of the Commission's duty to regulate in the public interest and the testimony would assist in the determination of the facts in relation to the matters at issue. (R. Vol. 7, Pg. 1314-1317)

### Administrative Hearing on Woodford Project Petition

The Commission held an administrative hearing on the Woodford Project Petition, at which FPL, Citizens, and FIPUG presented witness testimony and other

---

<sup>2</sup> The Commission required the parties and intervenors to prefile written direct and rebuttal testimony prior to the hearing. (R. Vol. 3, Pg-433-435).



evidence on the Woodford Project Petition. (T. Vol. 1. Pg. 1) While Citizens and FIPUG offered evidence challenging FPL's assertion that the Woodford Project was a hedge (T. Vol. 5, Pg. 639; Vol. 6, Pg. 685), FPL offered witness testimony and other evidence establishing that the project was a long-term physical hedge against the price volatility of the natural gas market used to power FPL's Florida power plants. (T. Vol. 2, Pg. 217-218)

FPL witness Forrest testified that FPL was heavily reliant on natural gas for its energy needs, natural gas price volatility was inherent, and that 100 percent of the risk of price volatility was currently being borne by FPL customers. (T. Vol. 3, Pg. 332-333) Witness Forrest testified that the gas from the Woodford Project would be delivered exclusively to Florida to burn in FPL's power plants. (T. Vol. 3, Pg. 332-333) FPL presented testimony that the Woodford Project would allow the pricing of natural gas to be decoupled from the market price and would reduce risk to FPL's customers by hedging a portion of FPL's fuel portfolio exposed to the market. (T. Vol. 2, Pg. 217-218)

Witness Forrest testified the Woodford Project costs were essentially fixed. (Tcr. Vol. 8, Pg. 1007, 1082-1083) Witness Taylor testified that the Woodford Project's production and price levels would not vary significantly, which he interpreted to be plus or minus ten to twenty percent in the aggregate. (T. Vol. 6, Pg. 856) Witness Taylor also testified that "[n]atural gas production is a well

understood technology, and the operating costs associated with gas production are highly predictable.” (T. Vol. 6, Pg. 847) Witness Taylor further testified that “the effective costs of production in the Woodford Shale region have been declining over the past few years as a result of technological advances.” (T. Vol. 6, Pg. 848) Witness Taylor concluded that “in view of this well-established and continuing pattern of technological progress, FPL’s assumption that the production costs will remain the same over the life of the Woodford Project is, if anything, conservative.” (T. Vol. 6, 848-849)

There was witness testimony that the Woodford Project would be an investment to provide a long-term physical hedge to customers. (T. Vol. 2, Pg. 217-218, 284; T. Vol. 3, Pg. 332-333; Vol. 4, Pg. 475; Tcr. Vol. 8, Pg. 1007) Witness Forrest addressed at hearing how “fixed” a physical hedge must be to be considered a hedge and that the definition of a physical hedge did not have to be “so fixated on fixed price.” (Tcr. Vol. 8, Pg. 1082-1083) Mr. Forrest testified the hedges provided by the Woodford Project would be “effectively very stable.” (Tcr. Vol. 8, Pg. 1082) Mr. Forrest further testified:

Because the inputs to the cost of gas from the Woodford Project are largely fixed and well understood, the cost to FPL for that gas should remain within a narrow range. This stable relationship is hedging, pure and simple.

(Tcr. Vol. 8, Pg. 1007) There was also testimony that a physical hedge such as the Woodford Project is more beneficial and likely to result in more cost savings for

customers than fixed-price financial hedges. (T. Vol. 1, Pg. 116; Vol. 3, Pg. 331; Tcr. Vol. 8, Pg. 1061-62)

There was testimony that the Woodford Project was a capital investment that was projected to result in fuel savings to customers. (T. Vol. 1, 114-115, 117, 124, 160; T. Vol. 5, Pg. 631; Tcr. Vol. 8, Pg. 1000-1003, 1076) Witness Forrest presented FPL's pricing and production sensitivities for the Woodford Project, which were based on FPL's October 2013 and July 2014 natural gas price forecasts. (Exhibit 64) FPL's July 2014 natural gas price forecast, which assumed a plus or minus ten percent production level variant, showed that six out of the nine sensitivities produced positive customer savings. (Exhibit 64, Attachment 2) The base production and fuel pricing case for July 2014 indicated savings of \$51.9 million over the life of the project. (Exhibit 64, Attachment 2)

There was testimony that FPL will only earn its allowed return on equity for the Woodford Project. (T. Vol. 2, Pg. 269, 311-313; Tcr. Vol. 8, Pg. 1029) Witness Forrest testified that the Woodford Project will earn at the midpoint of the authorized range, which cannot be considered "excessive" or a "windfall." (T. Vol. 2, Pg. 269, 312-313; Vol. 8, Pg. 1029) There was also testimony that customer savings from the Woodford Project would exceed any return on investment received by FPL's shareholders. (T. Vol. 2, Pg. 222)

In addition to entering the direct and rebuttal testimony of the witnesses into the record at the hearing, Commission staff also asked that the Commission enter the depositions of FPL witnesses Forrest, Ousdahl, Taylor, and Deason into the record. (T. Vol. 1, Pg. 27-29) Citizens objected to entering Citizens' portion of FPL's witness depositions into the record, arguing that the testimony was irrelevant, immaterial, and repetitive and barred by the Florida statutes and rules of procedure. (T. Vol. 1, Pg. 28-33) The Commission determined that the deposition testimony would aid in its investigation of the Woodford Project Petition. (T. Vol. 1, Pg. 37)

#### Public Meeting on Woodford Project Petition

The Commission voted to approve the Woodford Project at a public meeting at which Commission staff, but not the parties, were allowed to participate. (R. Vol. 1533-1534, 1591-1593) At this public meeting, Commissioner Brown referenced a notebook that Commission staff provided to the Commissioners. (R. Vol. 8, Pg. 1546-1548) The notebook contained information from the hearing record and one document – a one-page document addressing action the Los Angeles Department of Water and Power took to secure natural gas reserves in Wyoming – that was not part of the hearing record. (R. Vol. 10, Pg. 1830-2200; R. Vol. 11, Pg. 2001-2200; R. Vol. 12, Pg. 2201-2237) The notebook was provided to FIPUG in response to a public records request that it made to the Commission

after the public meeting. (R. Vol. 10, Pg. 1830-2200; R. Vol. 11, Pg. 2001-2200; R. Vol. 12, Pg. 2201-2237)

### Woodford Final Order

The Commission issued Woodford Final Order PSC-15-0038-FOF-EI (Woodford Final Order), memorializing its vote approving the Woodford Project. In the Woodford Final Order, the Commission found that the Woodford Project would act as a hedge to decouple natural gas costs from market prices, the project was expected to produce customer benefits, was in the public interest, and the project's costs were recoverable in the Fuel Clause. (R. Vol. 9, Pg.1613-1614); Appendix at 161-163.

In finding that the Woodford Project acts as a long-term physical hedge, the Commission cited to, among other things, evidence that FPL purchases more natural gas than any other electric utility in the country; the Woodford Project decouples costs from market prices; the Woodford project costs are based solely on the operations and maintenance costs, and on the investment that is required, and is essentially fixed; and the Woodford Project will be 30 years or longer in duration. (R. Vol. 9, Pg. 1609-1614) In finding that the Woodford Project is projected to result in fuel savings, the Commission cited to evidence on FPL's natural gas forecasts of October 2013 and July 2014 with the Woodford Project's projected positive customer fuel savings. (R. Vol. 9, Pg. 1613-1614)

The Commission found that the Woodford Project acts as a hedging program of the type traditionally, historically, and ordinarily recovered through the Fuel Clause. The Commission concluded that *In re: Petition for Increase in Rates by Florida Power & Light Company*, Order No. PSC-13-0023-S-EI, 2013 Fla. PUC LEXIS 15 (January 14, 2013)(FPL Settlement Agreement Order), did not preclude FPL from recovering the Woodford Project costs through the Fuel Clause. (R. Vol. 9, Pg. 1611-1612) The Commission required FPL to add subaccounts under the FERC Uniform System of Accounts to allow the Commission's audit staff to better review the Woodford Project transactions; required FPL to work with Commission staff to develop the scope of the audits; and required FPL to use an independent auditor to perform the audits of the Woodford Project transactions. (R. Vol. 9, Pg. 1614-1615)

#### Citizens' and FIPUG's Appeals

Citizens appealed the Fuel Order (SC15-115), the Jurisdictional Order (SC15-95), and the Woodford Final Order (SC15-113). FIPUG appealed the Woodford Final Order (SC15-274). The Court consolidated all of the appeals. AARP filed an amicus curiae brief in support of Citizens' and FIPUG's appeals. This Brief addresses the arguments raised in Citizens', FIPUG's, and AARP's Briefs.

## **SUMMARY OF ARGUMENT**

Sections 366.01, 366.04, 366.041, 366.05, and 366.06, Florida Statutes, give the Commission broad ratemaking jurisdiction over public utilities. Included in the Commission's ratemaking jurisdiction is the authority to consider and approve a public utility's hedging activities and fossil fuel-related costs. The record showed that FPL's Woodford Project was a long-term physical hedge that would reduce the volatility of the price of natural gas used to provide electric service to FPL's customers and was a fossil fuel-related project projected to result in fuel savings for FPL's customers. As such, the Commission's determination it had jurisdiction to consider and approve the Woodford Project Petition is not clearly erroneous and is supported by competent, substantial evidence.

The Woodford Final Order comports with Commission policy and precedent. The Commission has allowed hedging costs and fossil fuel-related projects that are projected to result in customer savings to be recovered through the Fuel Clause. The Commission was correct to allow FPL to earn its normal return on equity for the utility's investment in the project. The Commission did not deviate from Florida Administrative Code Rule 25-6.014 because the rule was not applicable to the Woodford Project. Moreover, the FPL Settlement Agreement Order did not bar the recovery of the Woodford Project through the Fuel Clause

because the record showed that the project acted as a long-term physical hedge, and the costs of hedging activities are recovered through the Fuel Clause.

The Woodford Final Order is supported by substantial, competent record evidence. The evidence the Commission relied upon to make its factual findings is concisely and explicitly stated in the Woodford Final Order, in accordance with the Administrative Procedure Act. The Court should decline Citizens' invitation to reweigh the Commission's factual determinations.

The Commission's use of its staff to investigate and determine the prudence of the Woodford Project Petition was consistent with established case law, the Administrative Procedures Act, and Chapter 350, Florida Statutes. FIPUG failed to show that the fairness of the proceedings was impaired by a material error in procedure when the Commissioners met with staff without the other parties present, because Commission staff is exempt from the ex parte prohibitions of the Administrative Procedures Act and Chapter 350, Florida Statutes.

The Commission's decision to admit FPL witness Deason's rebuttal testimony and the depositions of the FPL witnesses into the administrative record comports with the Administrative Procedure Act. FIPUG and Citizens failed to prove that the Commission abused its discretion when it admitted this evidence into the record.



The Court should dismiss Citizens' appeal of the Fuel Order because Citizens stipulated to the Commission's approval of FPL's fuel factors. The Court should not consider the additional issue raised in amicus curiae AARP's Brief because the issue was not raised by Citizens or FIPUG.

Citizens and FIPUG have failed to overcome the presumption of correctness that attaches to Commission orders. The Court should affirm the Woodford Final Order, Jurisdictional Order, and the Fuel Order.

### **STANDARD OF REVIEW**

The Commission's orders, and concomitant interpretation of statutes and legislative policies the Commission is charged with enforcing, are entitled to great deference, and its factual findings are entitled to a presumption of correctness. *Southern Alliance v. Graham*, 113 So. 3d 742, 752 (Fla. 2013). "A party challenging an order of the Commission on appeal has the burden of showing a departure from the essential requirements of law and the legislation controlling the issue, or that the findings of the Commission are not supported by competent, substantial evidence." *Id.*

Citizens' and FIPUG's Briefs raise arguments that require the Court to review the Commission's Woodford Final Order under varying standards of review. In accordance with Florida Rule of Appellate Procedure 9.210(b)(5), the

applicable standard of review for each point raised in Citizens' and FIPUG's Briefs will be included in each argument below.

## ARGUMENT

### **I. THE COMMISSION'S DETERMINATION THAT IT HAS SUBJECT MATTER JURISDICTION TO CONSIDER AND APPROVE THE WOODFORD PROJECT PETITION SHOULD BE AFFIRMED BECAUSE THE COMMISSION'S INTERPRETATION OF ITS RATEMAKING AUTHORITY IS NOT CLEARLY ERRONEOUS AND IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.**

#### Standard of Review

Both Citizens and FIPUG argue that the Commission lacked subject matter jurisdiction to consider and approve the Woodford Project Petition. (Citizens Br Pgs. 13-31; FIPUG Br. Pgs. 15-21) In reviewing the Commission's determination of its own subject matter jurisdiction, this Court presumes the order to be correct and only determines whether the Commission's action comports with the essential requirements of law and is supported by competent, substantial evidence. *Fla. Power Corp. v. Garcia*, 780 So. 2d 34, 42 (Fla. 2001); *Panda-Kathleen, L.P. v. Clark*, 701 So. 2d 322, 325-326 (Fla. 1997). The Court will not reweigh or reevaluate the evidence presented to the Commission. *Panda-Kathleen*, 701 So. 2d at 328.

## Response to Point I of Citizens' and FIPUG's Briefs

Section 366.04(1), Florida Statutes, gives the Commission exclusive jurisdiction to regulate and supervise each public utility with respect to its rates and service. Section 366.05, Florida Statutes, states that “[i]n the exercise of such jurisdiction, the Commission shall have power to prescribe fair and reasonable rates and charges” for public utilities. Section 366.041, Florida Statutes, states that “[i]n fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction, the [C]ommission is authorized to give consideration, among other things, to . . . the cost of providing service and the value of such service to the public.” Section 366.06, Florida Statutes, gives the Commission “the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service.” Section 366.01, Florida Statutes, further states that the regulation of public utilities is in the public interest and “an exercise of the police power of the state for the protection of the public welfare and all provisions shall be liberally construed for the accomplishment of this purpose.”

Encompassed in the Commission’s express ratemaking authority is the authority to determine the appropriate cost recovery to compensate public utilities for the fuel used to provide electric service to their customers. The Commission

has a long history of examining fuel cost expenditures and approving cost recovery to compensate for utilities' fluctuating fuel expenses though the Commission's Fuel Clause proceeding. *See Gulf Power Co. v. Florida Public Service Commission*, 487 So. 2d 1036 (Fla. 1986)(recognizing that the Commission's Fuel Clause is a continuous proceeding that operates to eliminate the regulatory lag associated with a utility's fluctuating fuel expense). Neither Citizens nor FIPUG challenge the Commission's ratemaking authority over cost-recovery for fuel costs.

The Commission's ratemaking authority extends to the cost recovery of the fixed and variable costs associated with fossil fuel-related expenses. *See In re: Cost Recovery Methods for Fuel Related Expenses*, Order No. 14546, 1985 Fla. PUC LEXIS 531 (July 8, 1985). (Appendix at 1) The Commission has approved cost recovery for a number of capital investments associated with fossil fuel that were projected to result in fuel savings to customers. *See In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-95-1089-FOF-EI, 1995 Fla. PUC LEXIS 1230, at \*8-\*9 (September 5, 1995); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-96-1172-FOF-EI, 1996 Fla. PUC LEXIS 1567, at \*9-\*10 (September 19, 1996); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-96-0353-FOF-EI, 1996 Fla. PUC LEXIS 504, at \*9 (March 13,

1996); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-97-1045-FOF-EI, 1997 Fla. PUC LEXIS 1169, at \*8-\*9 (September 5, 1997); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-97-0359-FOF-EI, 1997 Fla. PUC LEXIS 372, at \*10-\*11 (March 31, 1997); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-98-0412-FOF-EI, 1998 Fla. PUC LEXIS 578, at \*3 (March 20, 1998); *In re: Petition to recover capital costs of Polk Fuel Cost Reduction Project through the fuel cost recovery clause, by Tampa Electric Company*, Order No. PSC-12-0498-PAA-EI, 2012 Fla. PUC LEXIS 456, at \*9 (September 27, 2012); *In re: Petition to recover capital costs of Big Bend fuel cost reduction project through the fuel cost recovery clause, by Tampa Electric Company*, Order No. PSC-14-0309-PAA-EI, 2014 Fla. PUC LEXIS 226, at \*8 (June 12, 2014).

The Commission's ratemaking authority includes examining and approving cost recovery for public utilities' hedging of fuel costs. *See In re: Review of investor-owned electric utilities' risk management policies and procedures*, Order No. PSC-02-1484-FOF-EI, 2002 Fla. PUC LEXIS 878 (October 30, 2002) (Hedging Order I) (Appendix at 8-19), and *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Order No. PSC-08-

0667-PAA-EI, 2008 Fla. PUC LEXIS 501 (October 8, 2008) (Hedging Order II) (Appendix at 20-37). Hedging is a mechanism used by public utilities to reduce the price volatility of the fuel used to provide electric service to their customers. (Appendix at 12-14, 20, 26, 29, 31, 34-35)

The Commission's hedging policy contemplates cost recovery for both the financial and physical hedging of fuel purchased to provide electric service to customers. (Appendix at 12-14, 34) While the term "hedging" is not expressly referred to in Chapter 366, Florida Statutes, neither Citizens nor FIPUG argue that the Commission does not have jurisdiction over the cost recovery of these types of fuel-related expenses. In fact, Citizens and FIPUG stipulated to the Commission's approval of FPL's 2015 hedging activities. (R. Vol.8, 1497-1522)

The Woodford Project Petition set forth a request for relief that fell within the Commission's ratemaking authority under sections 366.01, 366.04, 366.041, 366.05, and 366.06, Florida Statutes. FPL's Woodford Project Petition alleged that FPL was entitled to cost recovery for the Woodford Project because its ownership of interests in the gas reserves of the Woodford Project would operate as a long-term physical hedge against market volatility for the price of natural gas used to provide electric service to FPL's customers. (R. Vol. 1, Pgs. 130-132) FPL also alleged that the project was projected to reduce the price its customers would pay for the fuel used to power its Florida plants. (R. Vol., Pg. 132-133)

At the administrative hearing, FPL established the prudence of the Woodford Project and that the revenue requirement associated with investing and operating the project was eligible for cost recovery through the Fuel Clause. While Citizens and FIPUG offered evidence at the administrative hearing challenging FPL's assertion that the Woodford Project was a hedge (T. Vol. 5, Pg. 639; Vol. 6, Pg. 685), FPL offered witness testimony and other evidence establishing that the project was a long-term physical hedge against the price volatility of the natural gas used in FPL's Florida power plants. (T. Vol. 1, Pg. 116; Vol 2, Pg. 217-218; Vol. 3, Pg. 332-333; Vol. 4, Pg. 475; Tcr. Vol. 8, Pg. 1007) FPL witness Forrest testified that FPL was heavily reliant on natural gas for its energy needs; that natural gas price volatility was inherent; and that 100 percent of the risk of the volatility was currently being borne by FPL customers. (T. Vol. 1 85, 89-90, 97) Witness Forrest testified that the gas from the Woodford Project would be delivered exclusively to Florida to burn in FPL's power plants. (T. Vol. 1 85, 89-90, 97) The record showed that the Woodford Project would allow the price of natural gas to be entirely decoupled from the market price and would, therefore, reduce the risk to FPL's customers by hedging a portion of FPL's fuel portfolio exposed to the market. (T. Vol. 2, Pg. 217-218)

FPL proved that the Woodford Project was a capital investment that was projected to result in fuel savings to customers. (T. Vol. 1, 114-115, 117, 124, 160;

Vol. 5, Pg. 631; Tcr. Vol. 8, Pg. 1000-1003, 1076) Witness Forrest testified that in six out of nine sensitivity scenarios that FPL analyzed, the Woodford Project was projected to achieve natural gas price savings for FPL customers, with the base production and fuel pricing case indicating savings of \$51.9 million over the life of the project. (Exhibit 64, Attachment 2; T. Vol. 2, Pg. 175-176, 211)

Citizens argues the Woodford Project is not within the Commission's jurisdiction because *In re: Cost Recovery Methods for Fuel Related Expenses*, Order No. 14546, 1985 Fla. PUC LEXIS 531 (July 8, 1985) (Order No. 14546), requires utilities to demonstrate that customer savings associated with fossil fuel-related expenses must be fixed or guaranteed and the Commission cannot rely on projections to make this determination. (Citizens Br. Pg. 28-29) However, the Commission has historically relied on projections to determine whether a capital investment will result in fuel savings to customers and should be recovered through the Fuel Clause. See *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-95-1089-FOF-EI, 1995 Fla. PUC LEXIS 1230, at \*8-\*9 (September 5, 1995)(projected \$24 million in savings over 15 years); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-96-1172-FOF-EI, 1996 Fla. PUC LEXIS 1567, at \*9-\*10 (September 19, 1996)(estimated savings \$193 million over 15 years); *In re: Fuel and Purchase Power Cost*



*Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-96-0353-FOF-EI, 1996 Fla. PUC LEXIS 504, at \*9 (March 13, 1996)(estimated savings \$16 million over 5 years); *In re: Fuel and purchased power cost recovery clause and generating performance incentive factor*, Order No. PSC-97-1045-FOF-EI, 1997 Fla. PUC LEXIS 1169, at \*8-\*9 (September 5, 1997)(estimated savings \$2.1 million total); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-97-0359-FOF-EI, 1997 Fla. PUC LEXIS 372, at \*10-\*11 (March 31, 1997)(estimated savings \$19 million over 3 years); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-98-0412-FOF-EI, 1998 Fla. PUC LEXIS 578, at \*3 (March 20, 1998)(estimated savings \$3.25 million over 5 years); *In re: Petition to recover capital costs of Polk Fuel Cost Reduction Project through the fuel cost recovery clause, by Tampa Electric Company*, Order No. PSC-12-0498-PAA-EI, 2012 Fla. PUC LEXIS 456, at \*9 (September 27, 2012)(estimated savings \$29.6 million over 5 years); *In re: Petition to recover capital costs of Big Bend fuel cost reduction project through the fuel cost recovery clause, by Tampa Electric Company*, Order No. PSC-14-0309-PAA-EI, 2014 Fla. PUC LEXIS 226, at \*8 (June 12, 2014)(estimated savings \$30 million over 5 years).

A closer look at Citizens' and FIPUG's arguments shows that they are not arguing the Commission lacked jurisdiction to consider and approve the Woodford Project. Rather, Citizens and FIPUG disagree with the Commission's factual determinations that the Woodford Project acts as a long-term physical hedge and is projected to result in fuel savings to customers and invite the Court to reweigh the evidence. (Citizens Br. Pg. 23-31) This is something the Court simply cannot do. It is the Commission's job as fact-finder to weigh the evidence. *See Gulf Power Co. v. Florida Public Service Commission*, 453 So. 2d 799, 805 (Fla. 1984) ("It is the [Commission's] prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems necessary). The Court's task is to determine whether competent, substantial evidence supports the Commission's order and will not overturn the Commission's order even if the Court would have arrived at a different conclusion. *Id.* at 803.

The Commission's factual determinations are supported by competent, substantial evidence. Because the Woodford Project is a long-term physical hedge that is projected to result in fuel savings to customers, the Commission's determination that its ratemaking authority under sections 366.01, 366.04, 366.041, 366.05, and 366.06, Florida Statutes, gives it jurisdiction to consider and approve the Woodford Project Petition is not clearly erroneous. The Jurisdictional Order and Woodford Final Order should be affirmed.

## **II. THE WOODFORD FINAL ORDER COMPORTS WITH PRIOR COMMISSION PRECEDENT AND POLICY.**

### Standard of Review

Citizens argues that the Commission erred because the Commission's approval of the Woodford Final Order deviated from prior Commission orders, policy, and rules without providing an explanation. (Citizens Br. Pg. 31) The appropriate standard of review is whether the agency's exercise of discretion was "inconsistent with officially stated agency policy or prior agency practice, if deviation therefrom is not explained by the agency." § 120.68(7)(e)3, Fla. Stat. (2014). As demonstrated below, this argument is baseless.

### Response to Point II of Citizens' Brief

#### **A. The Commission's decision comports with the Commission's hedging policy.**

Citing to the Hedging Orders I and II, Citizens argues that the Commission deviated from its hedging policy because the Woodford Project "involves neither fixed prices nor fixed quantities" and assert that a hedge must be fixed to fall within the Commission's jurisdiction. (Citizens Br. Pg. 26, 30, 32) Citizens' interpretation of Hedging Orders I and II is incorrect. (Citizens Br. Pg. 26, 30, 32)

First, Hedging Order II only defines that type of hedging activities that should be included in utilities' hedging information reports; it does not define the term "hedge." (Appendix at 34) Second, even if it can be concluded that Hedging

Order II defines the term “hedge,” it cannot be assumed that the terms “fixed price” qualifies both the terms “financial” and “physical transactions” as Citizens assert because there is an “or” separating the terms in the order. (Appendix at 34) This is material because the record showed that the Woodford Project was a physical hedge, not a traditional fixed priced financial hedge. (Tcr. Vol. 8, Pg. 1083)

Witness Forrest addressed at hearing how “fixed” a physical hedge must be to be considered a hedge and that the definition of a physical hedge did not have to be “so fixated on fixed price.” (Tcr. Vol. 8, Pg. 1082-1083) He testified that the hedges provided by the Woodford Project would be “effectively very stable.” (Tcr. Vol. 8, Pg. 1082) Witness Forrest further testified:

Because the inputs to the cost of gas from the Woodford Project are largely fixed and well understood, the cost to FPL for that gas should remain within a narrow range. This stable relationship is hedging, pure and simple.

(Tcr. Vol. 8, Pg. 1007) There was also testimony that a physical hedge such as the Woodford Project is more beneficial and likely to result in more cost savings for customers than fixed-price financial hedges. (T. Vol. 1, Pg. 116; Vol. 3, Pg. 331; Tcr. Vol. 8, 1061-62)

The common thread in Hedging Orders I and II is not that “that all prior hedging transactions involved purchasing a certain quantity of fuel for a certain price” (Citizens Br. Pg. 26) but is, instead, that hedging should manage the price

volatility in the fuel used to power a utility's plants to provide electric service to the utility's customers. (Appendix at 28-29, 31, 35) The record showed that the Woodford Project would do this. (T. Vol. 1, Pg. 86, 116, 125; Vol.3, Pg. 352; Vol. 5, Pg. 627; Tcr. Vol. 8, 1001, 1009, 1020)

The Commission's decision comports with Hedging Orders I and II and is supported by competent, substantial record evidence. The Court should decline Citizens' invitation to reweigh the record evidence. *See Gulf Power Co.*, 453 So. 2d at 803 (finding that the Court will not reweigh the evidence and will not overturn an order of the Commission because it would have arrived at a different result).

**B. Recovery of a return on equity for the Woodford Project in the Fuel Clause comports with prior Commission precedent.**

It is undisputed that it would be inappropriate for a utility to purchase fuel at market price and then attempt to mark it up or try to make a profit. (T. Vol. 2, Pg. 313). When *In re: General Investigation of fuel adjustment clauses for electric companies*, Order No. 6357, 1974 Fla. PUC LEXIS 70 (November 26, 1974), states that a utility does not make a profit on its fuel costs (Citizens Br. Pg. 33, FIPUG Br. Pg. 19-21), the order is referring to the purchase of fuel at market price. The Woodford Project, however, is not a purchase of fuel at market price; it is a capital investment that acts as a physical hedge against volatile fuel costs that is

projected to result in fuel savings to FPL's customers, which is appropriate for cost recovery through the Fuel Clause. (T. Vol. 2, Pg. 313)

Despite Citizens and FIPUG's assertions to the contrary (Citizens Br. Pg. 33, FIPUG Br. Pg. 19-21), the Commission has historically allowed utilities to recover a return on their capital investment via the Fuel Clause. *See In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-93-1331-FOF-EI, 1993 Fla. PUC LEXIS 1150, at \*8 (September 13, 1993); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-95-1089-FOF-EI, 1995 Fla. PUC LEXIS 1230, at \*8-\*9 (September 5, 1995); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-96-1172-FOF-EI, 1996 Fla. PUC LEXIS 1567, at \*10 (September 19, 1996); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-97-0359-FOF-EI, 1997 Fla. PUC LEXIS 372, at \*1, \*14 (March 31, 1997); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-98-0412-FOF-EI, 1998 Fla. PUC LEXIS 578, at\*3 (March 20, 1998); *In re: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. PSC-98-1715-FOF-EI, 1998 Fla. PUC LEXIS 2348, at \*8-\*9 (December 18, 1998); *In re: Petition to recover capital costs of Polk Fuel Cost*

*Reduction Project through the fuel cost recovery clause, by Tampa Electric Company*, Order No. PSC-12-0498-PAA-EI, 2012 Fla. PUC LEXIS 456, at\*8-\*9 (September 27, 2012)

Citizens' and FIPUG's suggestions that FPL will earn a profit the utility would not otherwise be able to obtain by recovering the costs of its capital investment in the Woodford Project through the Fuel Clause is misleading. (Citizens Br. Pg. 29, 33, FIPUG Br. Pg. 19-21) The record showed FPL will only earn its allowed return on equity for the Woodford Project. (T. Vol. 2, Pg. 269, 311-313; Vol. 8; Pg. 1029) The Woodford Project will earn at the midpoint of the authorized range, which cannot be considered "excessive" or a "windfall." (T. Vol. 2, Pg. 269, 312-313; Tcr. Vol. 8, Pg. 1029) The record also showed that customer savings from the Woodford Project would exceed any return on investment received by FPL's shareholders. (T. Vol. 2, Pg. 222)

It is well established that a public utility is entitled to an opportunity to earn a reasonable rate of return on its invested capital. *Gulf Power Co. v. Wilson*, 597 So. 2d 270, 273 (Fla. 1992) As shown above, the Commission's decision comports with both prior Commission precedent and the law.

**C. The record showed that Florida Administrative Code Rule 25-6.014 was not applicable to the Woodford Project.**

Contrary to Citizens' assertion, the Commission did not allow FPL to ignore the requirements of Florida Administrative Code Rule 25-6.014. (Citizens Br. Pg. 34) The record showed that the rule was not applicable to the Woodford Project.

The Woodford Project involves FPL investing in a natural gas reserves project that will provide natural gas price stability and projected fuel saving for FPL's customers. (T. Vol. 1, Pg. 86, 116, 125; Vol. 2, Pg. 222; Vol. 3, Pg. 352; Vol. 5, Pg. 627; Vol. 8, 1001, 1003, 1009, 1020) Accounting for costs of gas reserve projects is a highly specialized and unique form of energy accounting. (T. Vol. 3, Pg. 353, 363) The Federal Electric Regulatory Commission's (FERC) Electric Uniform System of Accounts and Natural Gas Uniform System of Accounts are not consistent with the standard accounting used in the oil and gas production industry. (T. Vol. 2, Pg. 363)

Even though the Uniform System of Accounts for electric utilities is not applicable to the Woodford Project, FPL provided an alternative method to track costs which required a combination of the various uniform accounting rules. (T. Vol. 3, Pg. 49) As additional protections to address Citizens' and FIPUG's concerns, the Commission required FPL to: (1) add subaccounts under the FERC Uniform System of Accounts to allow the Commission's audit staff to better review the Woodford Project transactions; (2) work with Commission staff to



develop the scope of the audits; and (3) use an independent auditor to perform the audits of the Woodford Project transactions. (R. Vol. 9, 1614-1615)

**D. The Woodford Final Order comports with the FPL Settlement Agreement Order and Order No. 14546.**

Citizens' argument that the Commission's decision contravenes the express terms of *In re: Petition for Increase in Rates by Florida Power & Light Company*, Order No. PSC-13-0023-S-EI, 2013 Fla. PUC LEXIS 15 (January 14, 2013)(FPL Settlement Agreement Order)<sup>3</sup> is incorrect. (Citizens Br. Pg. 34-36) The FPL Settlement Agreement Order allowed FPL to request and the Commission to approve the recovery of costs "that are of a type which traditionally and historically would be, have been, or are presently recovered through cost recovery clauses or surcharges." (Appendix at 64)

The record showed and the Commission found that the Woodford Project acted as a long-term physical hedge (T. Vol. 2 Pg. 218; Vol. 3, Pg. 332-333; Tcr. Vol. 8, Pg. 1001, 1003, 1006-1008, 1010, 1020, 1022, 1030-1031, 1035-1036, 107, 1082-1083). Both Hedging Orders I and II recognized physical hedging as a means for public utilities to manage the price volatility of the fuel used to provide electric service to customers. (Appendix at 12-13, 28-29, 31, 35) Both Hedging Orders I and II direct cost recovery for physical hedges through the Fuel Clause. (Appendix

---

<sup>3</sup> The FPL Settlement Agreement Order was affirmed by this Court in *Citizens v. Fla. PSC*, 146 So. 3d 1143 (Fla. 2014).

at 12-13, 28-29, 31, 35) Indeed, Citizens and FIPUG stipulated to the Commission allowing cost recovery of FPL's hedging activities through the Fuel Clause in the Commission's most recent order approving FPL's fuel adjustment factors. (R. Vol.8, 1497-1522) Thus, the Commission's decision to allow cost recovery of the Woodford Project comports with the FPL Settlement Order because the Woodford Project, as a physical hedge, traditionally and historically would be, has been, and is presently recovered through the Fuel Clause. (Appendix at 64, 162-163)

The Commission's allowance of cost recovery of the Woodford Project through the Fuel Clause under paragraph 6 of the FPL Settlement Agreement does not conflict with Item 10 of Order No. 14546. (Citizens Br. Pg. 35-36) Order 14546 allows cost recovery of fossil fuel-related costs which result in customer savings through the Fuel Clause if those costs were not previously included in the computation of base rates. *In re: Fuel and purchased power cost recovery clause and generating performance incentive factor*, Order No. PSC-97-0359-FOF-EI, 1997 Fla. PUC LEXIS 372, at \*11 (March 31, 1997); *In re: Fuel and purchased power cost recovery clause and generating performance incentive factor*, Order No. PSC-97-1045-FOF-EI, 1997 Fla. PUC LEXIS 1169, at \*8-\*9 (September 5, 1997). This is consistent with the Commission's interpretation of Item 10 in *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, 2011 Fla. PUC LEXIS 67(January 31, 2011), where the Commission states that projects must be “fossil fuel related” and “should produce fuel savings based on lowering the delivered price of fossil fuel” to be eligible for cost recovery through the Fuel Clause. (Appendix at 46)

The record showed that the Woodford Project was a fossil fuel-related capital investment that was projected to result in fuel savings to customers. (T. Vol. 1, 114-115, 117, 124, 160; Vol. 5, Pg. 631; Tcr. Vol. 8, Pg. 1000-1003, 1076) Thus, under the Commission’s long-established policy, the Woodford Project costs are “of a type which traditionally and historically would be, have been, or are presently recovered through cost recovery clauses” under paragraph 6 of the FPL Settlement Agreement Order. (Appendix at 64) Moreover, the Woodford Project does not fall within the categories specifically referenced in Order 14546 that the Commission found were more appropriate for inclusion in base rates. (Appendix at 5)

Again, Citizens is asking the Court to reweigh the Commission’s factual findings. As demonstrated in Point I, there is competent, substantial evidence in the record supporting the Commission’s factual findings that the Woodford Project acts a physical hedge and that the project is projected to result in fuel savings. The Commission’s factual findings should not be disturbed by this Court. *See Gulf Power Co.*, 453 So. 2d at 805.

### **III. THE WOODFORD FINAL ORDER IS SUPPORTED BY COMPETENT, SUBSTANTIAL RECORD EVIDENCE AND SHOULD BE AFFIRMED.**

#### Standard of Review

Citizens argues that Commission’s factual findings in the Woodford Final Order are not supported by competent, substantial evidence. (Citizens Br. Pg. 37-38) The standard of review is whether the findings of the Commission are supported by competent, substantial evidence. *Southern Alliance*, 113 So. 3d at 752. In reviewing the Commission’s factual findings, the Court will not reweigh the evidence and will not overturn the Commission’s order even if the Court would have arrived at a different conclusion. *Gulf Power Co.*, 453 So. 2d at 805. The Woodford Final Order is supported by competent, substantial evidence.

#### Response to Point III of Citizens’ Brief

Citizens’ assertion that the Commission’s “lack of any attempt at citation to the record frustrates the judicial process” (Citizens Br. Pg. 37) is baseless. Each factual finding in the Woodford Final Order concisely and explicitly states the evidence relied upon to support that finding, in accordance with section 120.569(2)(m), Florida Statutes. For example, in finding that the Woodford Project acts as a long-term physical hedge, the Commission cites to, among other things, evidence that FPL purchases more natural gas than any other electric utility in the country; the Woodford Project decouples costs from market prices; the Woodford

project costs are based solely on the operations and maintenance costs, and on the investment that is required, and is essentially fixed; and the Woodford Project will be 30 years or longer in duration. (R. Vol. 9, Pg. 1609-1614) In finding that the Woodford Project is projected to result in fuel savings, the Commission cites to evidence that, based on FPL's natural gas forecasts of October 2013 and July 2014, the Woodford Project will likely produce positive customer fuel savings. (T. Vol. 9, Pg. 1613)

There is no requirement that the Commission cite to every piece of evidence on which it relied, nor is there a requirement that the Commission provide pinpoint cites to the hearing record for each piece evidence upon which it relied. *McDonald v. Department of Banking & Finance*, 346 So. 2d 569, 582 (Fla. 1st DCA 1977). The Woodford Final Order comports with Chapter 120, Florida Statutes.

Citizens' assertion that there is no competent, substantial evidence supporting the Commission's factual findings that the Woodford Project costs are essentially fixed and that the production levels will vary by ten percent (Citizens Br. Pg. 37-38) is also baseless. Contrary to Citizens' claims, FPL witness Taylor was not the only witness with "direct knowledge to both the Woodford project costs and production levels." (Citizens Br. Pg. 38)

Witness Forrest testified to FPL's pricing and production sensitivities for the Woodford Project, which were based on FPL's October 2013 and July 2014 natural

gas price forecasts. (Exhibit 64) The record showed that, when using FPL's July 2014 natural gas price forecast, which assumed a plus or minus ten percent production level variant, six out of the nine sensitives produced positive customer savings. (Exhibit 64, Attachment 2) The base production and fuel pricing case indicated savings of \$51.9 million over the life of the project. (Exhibit 64, Attachment 2) Witness Forrest consistently testified the Woodford Project costs were essentially fixed. (Tcr. Vol. 8, Pg. 1007, 1082)

Witness Taylor's testimony corroborated Witness Forrest's testimony. Witness Taylor testified that the Woodford Project's production and price levels would not vary significantly, which he interpreted to be plus or minus ten to twenty percent in the aggregate. (T. Vol. 6, Pg. 856) Witness Taylor also testified that "[n]atural gas production is a well understood technology, and the operating costs associated with gas production are highly predictable." (T. Vol. 6, Pg. 847) Witness Taylor further testified "the effective costs of production in the Woodford Shale region have been declining over the past few years as a result of technological advances." (T. Vol. 6, Pg. 848) Witness Taylor concluded "in view of this well-established and containing pattern of technological progress, FPL's assumption that the production costs will remain the same over the life of the Woodford Project is, if anything, conservative." (T. Vol. 6, Pg. 848)

While Citizens argues “the record contains no evidence of any actual historical production costs” (Citizens Br. Pg. 38), it points to no authority that such costs must be used to determine future cost savings that may be realized from the Woodford Project. Again, a closer look at Citizens’ argument shows it is requesting this Court to reweigh the evidence. However, it is the Commission’s job as fact-finder to weigh the evidence and accord whatever weight to the conflicting opinions it deems appropriate. *See Gulf Power Co.*, 453 So. 2d at 805. The Court’s task is to determine whether competent, substantial evidence supports the Commission’s order and will not overturn the Commission’s order even if the Court would have arrived at a different conclusion. *Id.* at 803.

There is competent, substantial evidence supporting the Commission’s factual findings that the Woodford Project costs are essentially fixed and projected to result in fuel savings to customers. (R. Vol. 9, Pg. 1609-1614) The Commission’s decision should be affirmed.

#### **IV. THE COMMISSION’S USE OF ITS STAFF TO INVESTIGATE AND DETERMINE THE PRUDENCE OF THE WOODFORD PROJECT DID NOT VIOLATE FIPUG’S DUE PROCESS RIGHTS.**

##### Standard of Review

FIPUG argues that its due process rights were violated because Commission staff provided the Commissioners with documents outside of the record and met with Commissioners post-hearing without notice to FIPUG. ((FIPUG Br. Pg. 21-

31). The standard of review is whether “[t]he fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure.” §120.68(7)(c), Fla. Stat. (2014).

#### Response to Point II of FIPUG’s Brief

FIPUG’s assertion that the Commission’s staff is prohibited from having unnoticed private briefings with Commissioners and is prohibited from providing materials to Commissioners during those briefings not provided to the parties in the proceeding (FIPUG Br. Pg. 23-31) is in direct conflict with section 350.042, Florida Statutes. While section 350.042(1), Florida Statutes, prohibits a Commissioner from initiating and considering *ex parte* communications concerning the merits of any proceeding under section 120.569 or 120.57, Florida Statutes, the Commission’s staff is expressly exempted from the requirements of the subsection. *See* §350.042(1), Fla. Stat. (2014)(“This subsection does not apply to [C]ommission staff.”).

Moreover, the Administrative Procedures Act specifically exempts from the *ex parte* prohibitions communications between an agency head and advisory staff. *See* § 120.66, Fla. Stat. (providing that “[n]othing in this subsection shall apply to advisory staff members who do not testify on behalf of the agency in the proceeding.”) No Commission staff members testified at the administrative hearing. The *ex parte* prohibitions of section 120.66(1)(a), Florida Statutes, that



apply to public employees engaged in prosecution or advocacy do not apply in the matter at hand because the Woodford Project Petition was a ratemaking proceeding, not a quasi-judicial disciplinary proceeding, and Commission staff did not advocate a position on the Woodford Project Petition during the hearing. (R. Vol. 6, Vol. 1116-1118)

This Court rejected similar due process challenges to those of FIPUG in regard to the Commission's use of its staff in *South Florida Natural Gas Company v. Public Service Commission*, 534 So. 2d 695 (Fla. 1988), and *Legal Environmental Assistance Fund v. Clark*, 668 So. 2d 982 (Fla. 1996). In both cases, this Court found that in ratemaking-type cases the Commission may use its staff to test the validity, credibility, and competence of the evidence by allowing its staff to cross-examine witnesses and enter material into the record. *South Florida Natural Gas Company*, 534 So. 2d at 697-698, and *Legal Environmental Assistance Foundation*, 668 So. 2d at 986. The Court found that a party's due process rights were not violated when the same staff advised the Commission on the disposition of the issues post-hearing. *Id.*

The prohibitions on the Commission's use of its staff found in *Cherry Communications v. Deason*, 652 So. 2d 803 (Fla. 1995), (FIPUG Br. Pg. 27) are not applicable. In reviewing and approving the Woodford Project, the Commission was engaged in ratemaking, not the revocation of a utility's operating certificate.

(R. Vol. 9, Pg. 1611) In *Cherry Communications*, the Court recognized the difference between the Commission's use of its staff in ratemaking proceedings versus quasi-judicial disciplinary proceedings. *Id.* at 804, fn. 2. In *Legal Environmental Assistance Foundation*, this Court affirmed its holding that, in ratemaking-like proceedings, the Commission's staff may participate at the hearing and advise the Commission post-hearing without violating a party's due process rights. *Id.* at 985, 986.

FIPUG has failed to show its due process rights were violated by Commission staff providing the one-page Los Angeles document to the Commissioners post-hearing. (FIPUG Br. Pg. 23-26) The Los Angeles document is nowhere addressed or relied upon in the Woodford Final Order.

FIPUG takes a comment by Commissioner Brown out of context to insinuate a separate "pamphlet of liability" was provided to the Commissioners after the hearing. (FIPUG Br. Pg. 25) In Commissioner Brown's questions to Commission staff at the public meeting, she referenced the notebook staff provided to the Commissioners post-hearing. (R. Vol. 8, Pg. 1546-1548) Commissioner Brown and staff then discussed the record evidence presented at hearing about FPL's drilling discretion in the Woodford Project. (T. Vol 2, Pg. 295, 305; Tcr. Vol. 8, Pg. 1024, 1057). Thus, it is clear from the record that the Commission

relied on evidence presented at the hearing, not some mystery “pamphlet of liability” (FIPUG Br. Pg. 25) when it approved the Woodford Project.

Assuming for the sake of argument the Commission had relied upon outside record evidence, any error would be harmless, because as demonstrated in Points I, II, and III above, there was competent, substantial evidence presented at the hearing which supported the Commission’s findings. *See* §120.68(7)(c), Fla. Stat. (2014) (requiring appellant to show that a material error in procedure occurred); *see also Pasco County School Board. v. Florida Public Employees Relations Commission*, 353 So. 2d 108, 126 (Fla. 1st DCA 1977)(finding that, while the Florida Public Employees Relations Commission should not have relied on evidence presented at a collateral proceeding in making its decision, the appellant failed to show prejudice because there was competent, substantial evidence presented at the hearing which supported the hearing officer's determination), and *Department of Professional Regulation v. Wise*, 575 So. 2d 713, 715-716 (Fla. 1st DCA 1991)(holding that “[w]here unfairness has not otherwise infected the fact-finding process, findings which are founded solely upon evidence which is both competent and substantial will not be disturbed on appeal.”).

As demonstrated in Points I, II, and III above, there is competent, substantial evidence supporting the Commission’s approval of the Woodford Project. FIPUG has failed to show that the fairness of the proceedings or the correctness of the

action was impaired by a material error in procedure or a failure to follow prescribed procedure. §120.68(7)(c), Fla. Stat. (2014).

**V. THE COMMISSION DID NOT ABUSE ITS DISCRETION OR COMMIT A MATERIAL ERROR IN PROCEDURE WHEN IT ADMITTED INTO THE ADMINISTRATIVE RECORD THE REBUTTAL TESTIMONY OF WITNESS DEASON AND THE COMPLETE DEPOSITIONS OF THE FPL WITNESSES.**

Standard of Review

FIPUG argues that the Commission erred when it denied FIPUG’s motion to strike portions of the rebuttal testimony of FPL witness Deason. (FIPUG Br. Pg. 31). Citizens argues the Commission failed to follow the evidentiary requirements of Chapter 120 and the Florida Rules of Civil Procedure when it admitted witness depositions into the record. (Citizens Br. Pg. 39) The Court reviews a lower tribunal’s decision to admit evidence under the abuse of discretion standard. *McWatters v. State*, 36 So. 3d 613, 639 (Fla. 2010); *Alsobrook v. State, Div. of Retirement*, 600 So. 2d 1173, 1174-1175 (Fla. 1st DCA 1992).

Response to Point III of FIPUG’s Brief and Point IV of Citizens’ Brief

**A. The Commission did not abuse its discretion when it denied FIPUG’s motion to strike portions of FPL witness Deason’s rebuttal testimony.**

FIPUG’s claim that the Commission erred when it denied its motion to strike portions of FPL witness Deason’s rebuttal testimony, which it claims is legal opinions of a non-lawyer, (FIPUG Br. Pg. 31) is meritless. The Commission

properly admitted witness Deason's rebuttal testimony pursuant to section 120.569(2)(g), Florida Statutes (2014).

The Commission found that Mr. Deason, as a former Commissioner, possessed specialized knowledge, acquired through his experience, training, and employment at the Commission. (R. Vol. Pg. 1314-1317) The Commission found that Mr. Deason's rebuttal testimony was relevant to the issue of whether the Woodford Project falls within the framework of the Commission's duty to regulate in the public interest. (R. Vol. 7, Pg. 1314-1317) The Commission also found that Mr. Deason's rebuttal testimony would assist in the determination of the facts in relation to the matters at issue. (R. Vol. 7, Pg. 1314-1317) Thus, the Commission was correct to conclude that the testimony was admissible as the "type commonly relied upon by reasonably prudent persons in the conduct of their affairs." (R. Vol. 7, Pg. 1314-1317) *See* §120.569(2)(g), Fla. Stat. (2014); *see also* *Sunshine Chevrolet Oldsmobile v. Unemployment Appeals Comm'n*, 910 So. 2d 948, 951 (Fla. 2d DCA 2005)(quoting section 120.569(2)(g), Florida Statutes). *See also* *Trees v. K-Mart Corp.*, 467 So. 2d 401, 403 (Fla. 4th DCA 1985)("Where a trial court has weighed probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of discretion.").

The cases cited by FIPUG are not on point because they apply to civil court proceedings, not Commission ratemaking proceedings conducted under Chapter 120, Florida Statutes, the Administrative Procedure Act. (T. Vol. 1, Pg. 6) Section 120.569, Florida Statutes, states that evidence may be admitted “whether or not such evidence would be admissible in a trial in the courts of Florida.” §120.569(2)(g), Fla. Stat. (2014). Moreover, for this reason, the Commission’s citation to the incorrect version of section 90.702, Florida Statutes (2014), Florida Evidence Code, is harmless error.

The Commission’s decision to deny FIPUG’s motion to strike the rebuttal testimony of witness Deason comports with section 120.569(2)(g), Florida Statutes. FIPUG has failed to show that the Commission abused its discretion when it admitted the rebuttal testimony into the administrative record. *See Alsobrook*, 600 So. 2d at 1175 (holding appellant must demonstrate an abuse of discretion).

Even if the Court finds that the rebuttal testimony should not have been admitted, the Commission’s decision should still be affirmed. As demonstrated in Points I, II, and III above, there is competent, substantial evidence supporting the Commission’s decision without relying on witness Deason’s testimony. *See Wise*, 575 So. 2d at 715-716.

**B. Citizens has failed to show that the Commission abused its discretion or committed a material error in procedure when it admitted the FPL witnesses' depositions into the record.**

Citizens argues that the Commission failed to follow the evidentiary requirements of Chapter 120, Florida Statutes, and the Florida Rules of Civil Procedure when it admitted the depositions of FPL's witnesses into the administrative record. (Citizens Br. Pgs. 39-43) This argument is baseless.

Citizens asserts that irrelevant, immaterial, and unduly repetitious evidence was entered into the record. (Citizens Br. Pg. 39-43) Yet, it only points to a few pages of Mr. Forrest's testimony to support its argument (Citizens Br. Pg. 40) and fails to show where the Commission relied on this testimony in making its decision. *See Southern Alliance*, 113 So. 2d at 752 (holding that a party challenging an order of the Commission has the burden of showing that the findings of the Commission are not supported by competent, substantial evidence).

While Citizens asserts that the Commission did not rule upon 23 objections "lodged during the course of the depositions" when the depositions were admitted into evidence (Citizens Br. Pg. 40), Citizens never asked the Commission to rule on the 23 objections. (T. Vol. 1, Pg. 28, 31) Citizens had the burden to make those 23 objections at the administrative hearing before the Commission. *See Fla. R. Civ. P. 1.330(b)*(stating that objection may be made at the trial or hearing to receiving in evidence any deposition or part of it for any reason that would require the

exclusion of the evidence if the witness were then present and testifying). Citizens failed to carry that burden. Citizens cannot now argue before the Court something that was never raised before the Commission. *See Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978) (“[A]n objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal.”); *see also Braddy v. State*, 111 So. 3d 810, 836 (Fla. 2012) (“[I]n order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court.”).

Relying on *Wise*, 575 So. 2d at 713, Citizens argues that the Woodford Final Order should be remanded to the Commission for clarification. (Citizens Br. Pg. 43), However, unlike *Wise*, Citizens has not shown that the Commission relied on any irrelevant evidence that caused harm to the fact-finding process. *Wise*, 575 So. 2d at 715-716. As demonstrated in Point I, II, and III above, the Commission’s Woodford Final Order sufficiently explains the basis for its findings of fact in accordance with section 120.569(2)(m), Florida Statutes, and its factual findings are supported by competent, substantial record evidence even if the deposition testimony was excluded. *See Wise*, 575 So. 2d at 715-716.

Citizens’ suggestion that the Commission staff’s submission of the depositions into the record “does not align with Commission staff’s position that it is a neutral fact-gather in the related proceedings” (Citizens Br. Pg. 42) is



incorrect. As discussed in Point IV above, the Woodford Project Petition was a ratemaking proceeding, not a quasi-judicial disciplinary proceeding, and Commission staff did not advocate a position on the Woodford Project Petition during the hearing. (R. Vol. 6, Vol. 1116-1118) *See Cherry Communications*, 652 So. 2d at 804, fn. 2 (distinguishing the Commission's use of its staff when exercising its ratemaking authority versus its quasi-judicial disciplinary authority). The law is clear that the Commission is authorized to use its staff to test the validity, credibility, and competence of the evidence presented in a ratemaking proceeding through the cross examination of witnesses and entering material into the record. *South Florida Natural Gas Company*, 534 So. 2d at 695; *Legal Environmental Assistance Foundation*, 668 So. 2d at 982. The Commission determined that the deposition testimony would aid in its investigation of the Woodford Project Petition. (T. Vol. 1, Pg. 37)

Citizens has failed to demonstrate that the Commission abused its discretion or committed a material error in procedure when it admitted Citizens' portions of the FPL witnesses' depositions into the administrative record. *See Alsobrook*, 600 So. 2d at 1175 (holding that appellant had the obligation to demonstrate an abuse of discretion); *see also* §120.68(7)(c). Fla. Stat. (2104) (stating that appellant must demonstrate a material error in procedure that impaired the fairness of the proceeding or correctness of the action). However, even if the Court finds that the

depositions should not have been admitted, the error would be harmless. *See Wise*, 575 So. 2d at 715 (recognizing the harmless error standard in section 120.68(8), Florida Statutes). As demonstrated in Points I, II, and III above, there is competent, substantial evidence in the record apart from the deposition testimony supporting the Woodford Final Order. *Id.* at 715-716.

**VI. CITIZENS' APPEAL OF FUEL ORDER NO. PSC-14-0701-FOF-EI SHOULD BE DISMISSED BECAUSE CITIZENS IS NOT ADVERSELY AFFECTED BY THE ORDER.**

Section 120.68(1), Florida Statutes (2014), entitles a party who is adversely affected by final agency action to judicial review. Citizens never objected to the fuel factors or to any matters during the Fuel Clause proceedings. (R. Vol. 4, Pg. 678-701).

The law is well-settled that issues not presented to the lower tribunal during the hearing may not be raised for the first time on appeal. "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005). Thus, Citizens waived the arguments associated with the Fuel Order and Citizens' appeal of that order (Case No. SC15-115) should be dismissed.

**VII. THIS COURT SHOULD NOT CONSIDER AMICUS CURIAE  
AARP'S IMPROPERLY RAISED ISSUE.**

AARP's amicus brief asserts the Woodford Final Order is contrary to the Commerce Clause of the United States Constitution. (AARP Br. Pg. 8-9) This issue was never raised before the Commission and neither Citizens nor FIPUG raise this issue in their briefs. The issue cannot be raised for the first time on appeal by AARP as an amicus curiae. *See, e.g., Acton, II v. Ft. Lauderdale Hospital*, 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982) (holding amici do not have standing to raise issues not available to the parties, nor may they inject issues not raised by the parties). For these reasons, AARP's Commerce Clause arguments should not be considered by this Court.

## **CONCLUSION**

Citizens and FIPUG have failed to overcome the presumption of correctness that attaches to Commission orders. *Southern Alliance*, 113 So. 3d at 752. The Court should affirm the Woodford Final Order, Jurisdictional Order, and Fuel Order.

Respectfully submitted,

/s/ Adria E. Harper  
Adria E. Harper  
Associate General Counsel  
Florida Bar No. 26198  
aharper@psc.state.fl.us

CHARLIE BECK  
General Counsel  
Florida Bar No. 217281  
cbeck@psc.state.fl.us

SAMANTHA M. CIBULA  
Associate General Counsel  
Florida Bar No. 0116599  
scibula@psc.state.fl.us

FLORIDA PUBLIC SERVICE COMMISSION  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0862  
(850) 413-6199

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic mail on this 17th day of August, 2015, to the following:

John Truitt, Esq.  
Associate Public Counsel  
111 W. Madison Street, Room 812  
Tallahassee, FL 32399-1400  
truitt.john@leg.state.fl.us  
roberts.brenda@leg.state.fl.us  
woods.monica@leg.state.fl.us

John T. Burnett, Esq.  
Dianne M. Triplett, Esq.  
Duke Energy  
299 First Avenue North  
St. Petersburg, FL 33701  
john.burnett@duke-energy.com  
dianne.triplett@duke-energy.com

James D. Beasley, Esq.  
J. Jeffrey Wahlen, Esq.  
Ashley M. Daniels, Esq.  
Ausley & McMullen  
P.O. Box 391  
Tallahassee, FL 32302  
jbeasley@ausley.com  
jwahlen@ausley.com  
adaniels@ausley.com

Jeffrey A. Stone, Esq.  
Russell A. Badders, Esq.  
Steven R. Griffin, Esq.  
Beggs & Lane  
P.O. Box 12950  
Pensacola, FL 32591-2950  
jas@beggslane.com  
srg@beggslane.com  
rab@beggslane.com

PCS Phosphate-White Springs  
c/o James W. Brew, Esq.  
Brickfield, Burchette, Ritts & Stone,  
P.C.  
10215 Thomas Jefferson St., NW  
Eighth Floor, West Tower  
Washington, DC 20007-5201  
jbrew@bbrslaw.com

John T. Butler, Esq.  
Assistant General Counsel  
Florida Power & Light Co.  
700 Universe Blvd. (LAW/JB)  
Juno Beach, FL 33408-0420  
john.butler@fpl.com

Florida Retail Federation  
c/o Robert Scheffel Wright, Esq.  
John T. LaVia, III, Esq.  
1300 Thomaswood Drive  
Tallahassee, FL 32308  
schef@gbwlegal.com  
jlavia@gbwlegal.com

Ken Hoffman  
Florida Power & Light Company  
215 South Monroe St., Suite 810  
Tallahassee, FL 32301-1858  
ken.hoffman@fpl.com

Florida Industrial Power Users Group  
c/o Jon C. Moyle, Esq.  
Moyle Law Firm, P.A.  
118 N. Gadsden St.  
Tallahassee, FL 32301  
jmoyle@moylelaw.com

Cheryl Martin  
Florida Public Utilities Company  
1641 Worthington, Rd., Ste. 220  
West Palm Beach, FL 33409  
cheryl\_martin@fpuc.com

Robert L. McGee, Jr.  
Gulf Power Company  
One Energy Place  
Pensacola, FL 32520-0780  
rlmcgee@southernco.com

Paula K. Brown  
Tampa Electric Company  
PO Box 111  
Tampa, FL 33601  
regdept@tecoenergy.com

Beth Keating  
Gunster, Yoakley & Stewart, P.A.  
215 S. Monroe St., Suite 601  
Tallahassee, FL 32301  
bkeating@gunster.com

Raoul G. Cantero  
White & Case LLP  
Southeast Financial Center, Ste 490  
200 South Biscayne Boulevard  
Miami, FL 33131-2352  
raoul.cantero@whitecase.com  
lillian.dominguez@whitecase.com

Julie Nepveu  
PHV 95454  
AARP Foundation Litigation  
601 E Street, NW  
Washington DC 20049  
jnepveu@aarp.org

Jack L. McRay  
AARP Florida  
200 West College Ave. Suite 304  
Tallahassee, FL 32301  
jmcray@aarp.org

/s/Adria E. Harper  
Adria E. Harper  
Senior Attorney  
aharper@psc.state.fl.us  
Florida Bar No. 26198

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that this brief was prepared using Times New Roman 14-point typeface, a font that is proportionally spaced.

/s/Adria E. Harper  
Adria E. Harper