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. CASE NOS.: 140001-EI
150001-EI

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FLORIDA INDUSTRIAL POWER GROUP,

Appellant,

vs.

ART GRAHAM, ETC., ET. AL.,

Appellees.

CASE NO.: SC15-274

L.T. CASE NOS.: 140001-EI
150001-EI

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ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE FLORIDA POWER & LIGHT COMPANY

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STATEMENT OF THE CASE AND FACTS

This is a consolidated appeal from orders of the Florida Public Service Commission finding that Appellee, Florida Power & Light Company ("FPL"), may recover costs associated with its investment in the Woodford Gas Reserves Project (the "Woodford Project"), a joint venture to acquire and produce natural gas from reserves in Oklahoma. The Commission found that by investing in natural gas reserves, FPL could reduce gas price volatility and save its customers millions of dollars over the project's life. The Commission concluded that the Woodford Project is prudent and that the revenue requirements associated with FPL's investment may be recovered through the Fuel and Purchased Power Cost Recovery Clause (the "Fuel Clause").

The Office of Public Counsel ("OPC") and the Florida Industrial Power Users Group ("FIPUG") challenge the Commission's jurisdiction to approve the Woodford Project. They also challenge some evidentiary rulings.

A. Facts Relevant to the Appeal

FPL is an investor-owned utility that supplies electricity to millions of Floridians and 62% of all electricity consumed in Florida (T1. 85). Like other electric utilities subject to the Commission's jurisdiction, FPL recovers its costs and a reasonable rate of return on investments through charges to customers. § 366.05, Fla. Stat. (2014).

About 65% of the electricity FPL generates comes from natural gas-fired facilities (T1. 85). Natural gas is a naturally-occurring fossil fuel found underground in certain parts of the country; it is increasingly important for generating electricity (T1. 86, 97). Since 2001, FPL's investments in natural gas have saved customers about $7 billion in fuel costs, and will continue to provide savings for decades (T1. 90). Natural gas is also more environmentally friendly than other fossil fuels such as coal (T1. 85, 90).

Until now, FPL has purchased all of its natural gas on the wholesale market (T1. 89-99). Market prices can be volatile, so costs for FPL and its customers can vary dramatically (T1. 91). One of FPL's long-term goals is to reduce the costs to purchase natural gas as well as the volatility of those costs (T1. 85, 90, 92; T8. 1009).

This case is about FPL's plan to purchase natural gas at production costs that will be stable over the long term and provide a hedge against volatile market prices (T1. 126-27). FPL has identified an opportunity to invest in a natural gas production venture in Oklahoma (T1. 84). Under the venture, an FPL affiliate—USG Properties Woodford I, LLC ("USG")—will pay PetroQuest Energy, Inc. ("PetroQuest") a share of the costs to develop and operate natural gas production wells, and will receive a portion of their output (T1. 86, 100, 103-04). The wells are located in a known, producing natural gas field, so no exploration is needed

(T4. 507). Upon the Commission's finding that FPL's costs are recoverable, USG's interests in those properties were transferred to it (T1. 100). This venture allows FPL to acquire natural gas while it is still in the ground and purchase it at a fixed production cost rather than at volatile market prices (T1. 126-27).

As the Commission found, this venture will provide significant benefits to FPL's customers by allowing FPL to purchase gas at a lower price and to pass those savings on to its customers (T1. 114-15). This is especially valuable for FPL customers because FPL is the largest integrated electric utility purchaser of natural gas in the United States (T1. 126). FPL's analysis indicates that the venture will save customers $51.9 million under the base case scenario (T8. 1077), with potential savings of up to $300 million (R6, Attachment 2, Ex. 64). Because production costs are more fixed, the Woodford Project will act as a long-term hedge against price volatility (T1. 126). The Woodford Project represents only a small investment compared to its existing hedging program and total natural gas purchases (T1. 126, T2. 288).

B. Course of Proceedings and Disposition Below

The Commission reviews public utility rates. § 366.04(1), Fla. Stat. (2014). Like all investor-owned companies, FPL decides where to invest and how to charge customers. Because it is a regulated utility, the Commission reviews its

proposed rates and has the power to change them if it believes they are not fair and reasonable. §§ 366.04(1), -(2)(b), 366.05(1), Fla. Stat. (2014).

Electric utilities rely heavily on fossil fuels to generate power, and thus their operations are substantially dependent on purchasing large amounts of them. *See In re Gen. Investigation of Fuel Adjustment Clauses of Elec. Cos.*, Docket No. 74680-CI, Order No. 6357 (F.P.S.C. Nov. 26, 1974). The Fuel Clause is designed to pass through to customers the costs associated with those purchases. The Fuel Clause mechanism addresses regulatory lag, which occurs when a utility incurs expenses but is not allowed to collect offsetting revenues until the regulatory body approves the cost recovery. *Id.* The Fuel Clause allows recovery of "[f]ossil fuel-related costs normally recovered through base rates but which were not recognized or anticipated in the cost levels used to determine current base rates and which, if expended, will result in fuel savings to customers." *In re Cost Recovery Methods for Fuel-Related Expenses*, Docket No. 850001-EI-B, Order No. 14546 (F.P.S.C. July 8, 1985) ("Order 14546") (OPC A. 16). Each year, charges related to the purchase of fuel are reviewed under a separate docket (the "fuel docket").

Projects eligible for cost recovery under Order 14546 "should produce fuel savings based on lowering the delivered price of fossil fuel, or otherwise result in burning lower price fuel at the plant." *In re Petition by Fla. Power & Light Co. To Recover Scherer Unit 4 Turbine Upgrade Costs Through Envtl. Cost Recovery*

Clause or Fuel Cost Recovery Clause, Docket No. 100404-EI, Order No. PSC-11-0080-PAA-EI at 9 (F.P.S.C. Jan. 31, 2011). The Commission also regularly reviews projects designed to hedge against changing fuel costs and reduce price volatility. *In re Fuel & Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor*, Docket No. 080001-EI, Order No. PSC-08-0667-PAA-EI at 3 (F.P.S.C. Oct. 8, 2008) ("We will determine the prudence of hedging transactions at the annual fuel clause hearing."); *In re Review of Investor-Owned Electric Utilities' Risk Mgmt. Policies & Procedures*, Docket No. 011605-EI, Order No. PSC-02-1484-FOF-EI (F.P.S.C. Oct. 30, 2002) (establishing guidelines for hedging activities). Fuel Clause recovery for eligible capital projects may include a return on the utility's investment. *See, e.g.*, *In re Fuel & Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor*, Docket No. 120001-EI, Order No. PSC-12-0425-PAA-EU (F.P.S.C. Aug. 16, 2012). The Appellants have not disputed—nor could they dispute—the Commission's jurisdiction to review and approve, through the Fuel Clause, cost recovery for fuel costs, hedging costs, and fuel-related capital projects.

In June 2014, FPL petitioned the Commission "for a determination that it is prudent for FPL to acquire an interest in a natural gas reserve project that will provide price stability and projected fuel savings for customers; and that the revenue requirements associated with investing in and operating the gas reserves

are eligible for recovery through the [Fuel Clause]" (R1. 127). In other words, FPL sought approval to include the costs of the Woodford Project in its rates.

The Appellants opposed FPL's petition. The Commission held a hearing in which the Appellants contested whether the Woodford Project was prudent. Before the hearing, OPC filed a motion to dismiss FPL's petition for lack of subject matter jurisdiction, which FIPUG later joined (R4. 678-701, R7. 1291-93).

In November 2014—also before the hearing—FIPUG moved to strike the testimony of FPL's rebuttal witness, Terry Deason, who would render opinions on regulatory policy and how prior Commission decisions should be applied (FIPUG A. 52-58). The Commission denied the motion to strike, noting that the applicable evidentiary standards are "much broader than the Florida Evidence Code" (FIPUG A. 50) (the "Expert Testimony Order").

In December 2014, the Commission held a two-day hearing in which FPL, OPC, and FIPUG presented witnesses. Each party submitted its witnesses' pre-filed direct testimony, and FPL then submitted pre-filed rebuttal testimony. Witnesses were then presented for cross-examination and questions from Commissioners (*see, e.g.*, T1. 130-67, T2. 172-313 (FPL witness Sam Forrest); T3. 380-465, T4. 469-83 (FPL witness Kim Ousdahl)). The parties submitted testimony not only on the merits of the Woodford Project, but also on how the proposal related to the Commission's prior orders (*see, e.g.*, T5. 557 (OPC witness

testifying about Commission Order No. 14546)). FPL presented evidence that the costs to produce natural gas through the Woodford Project would be fixed at production costs; that this would serve as a hedge against volatile market prices; and that the project likely would lower FPL's overall fuel costs over the life of the project (T1. 92, 96, 114-15, 126-27).

The Commission denied OPC's motion to dismiss and found that it had jurisdiction over the petition under sections 366.04, 366.05, and 366.06, Florida Statutes (FIPUG A. 11) (the "Jurisdictional Order"). The Commission noted that Florida Statutes authorize it to review public utilities' rates, and "[t]here appears to be no controversy over whether FPL is a public utility" (FIPUG A. 14). It concluded that "we have jurisdiction over FPL, a public utility and jurisdiction to determine the prudence of the gas reserve project and whether FPL can recover its costs and expenses" (FIPUG A. 15).

In a separate order, the Commission approved, among other things, FPL's 2015 risk management plan, including its hedges for subsequent years (OPC A. 276) (the "Fuel Order"). And in another order, it found that "the Woodford Project, in the manner described in the FPL petition and evidence on the record, is expected to produce customer benefits and is in the public interest" (FIPUG A. 6) (the "Woodford Final Order"). The Commission found that FPL's costs for the Woodford Project are recoverable through the Fuel Clause (*id.*).

Both Appellants appealed the Jurisdictional Order (SC15-95) and the Woodford Order (SC15-113, SC15-274) (OPC br. at 43-44; FIPUG br. at 6). OPC also appealed the Fuel Order (SC15-115) on the same grounds as the Jurisdictional Order,[1] and FIPUG also appealed the Expert Testimony Order (FIPUG br. at 6). The appeals have been consolidated.

In their briefs, Appellants have not contested the Commission's conclusion that the Woodford Project is a prudent investment that will save FPL customers millions of dollars and will provide a hedge against volatile natural gas prices. They challenge only the Commission's jurisdiction to allow recovery of costs associated with this investment in FPL's rates, as well as certain procedural issues.

C. Standard of Review

Commission orders come to this Court "clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." *AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997); *see Legal Envtl. Assistance Found., Inc. v. Clark*, 668 So. 2d 982, 987 (Fla. 1996)

[1] OPC does not take issue with the Fuel Order other than to repeat its argument that the Commission lacks jurisdiction to allow recovery of costs related to the purchase of natural gas through the Woodford Project. In any case, OPC stipulated to the rulings in the Fuel Order (R3. 414-420, 430-432; R6, Attachment 2, at 10; R6. 1076, 1095-1110). OPC cannot now challenge rulings to which it stipulated. *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 202 (Fla. 2001) ("a party may not make or invite error at trial and then take advantage of the error on appeal").

("Commission orders come before this Court cloaked with the presumption of validity."). Moreover, an agency's interpretation of a statute it is charged with enforcing is entitled to great deference. *AmeriSteel*, 691 So. 2d at 477; *Citizens of State v. Fla. Pub. Serv. Comm'n*, 146 So. 3d 1143, 1149 (Fla. 2014); *S. Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 752 (Fla. 2013); *see also Gulf Coast Elec. Coop., Inc. v. Johnson*, 727 So. 2d 259 (Fla. 1999) ("Considering the PSC's specialized knowledge and expertise . . . this deferential standard of review is appropriate.").

Thus, a "party challenging an order of the Commission bears the burden of overcoming those presumptions by showing a departure from the essential requirements of law." *AmeriSteel*, 691 So. 2d at 477. This Court will approve the Commission's findings and conclusions if they are based upon competent, substantial evidence and are not clearly erroneous. *Id.*; *Legal Envtl. Assistance Found.*, 668 So. 2d at 987; *see also GTC, Inc. v. Edgar*, 967 So. 2d 781, 790 (Fla. 2007) ("While there may be legitimate disagreements as to the weight and credibility of the evidence presented below, this Court's review is limited to a determination of whether evidence exists to support the Commission's findings.") (citation omitted).

OPC concedes that these standards apply to most of its arguments (OPC br. at 13). Both Appellants argue, however, that as to the Commission's decision on

jurisdiction, the *de novo* standard applies. But this Court held in *Florida Power Corp. v. Garcia*, 780 So. 2d 34, 42 (Fla. 2001), that "[i]n reviewing the PSC's determination of its own subject matter jurisdiction, . . . the Court presumes "orders of the Commission to be correct, and . . . only determine[s] whether the Commission's action comports with the essential requirements of law and is supported by competent, substantial evidence." *See also Panda-Kathleen, L.P./Panda Energy Corp. v. Clark*, 701 So. 2d 322, 326 (Fla. 1997) (reviewing whether the Commission's determination of its jurisdiction "comports with the essential requirements of the law").

Appellants rely on *Bellsouth Telecommunications, Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003), *GTC*, 967 So. 2d at 785, and *Johnson v. State*, 78 So. 3d 1305 (Fla. 2012). But none of those cases addressed whether the Commission had subject matter jurisdiction. FIPUG also cites *Lee County Elec. Cooperative, Inc. v. Jacobs*, 820 So. 2d 297, 300 (Fla. 2002), but there, the parties did not contest the standard of review, and this Court did not suggest that its decisions in *Garcia* and *Panda-Kathleen* were incorrect.

FIPUG also argues that its appeal of the Commission's evidentiary decisions is subject to *de novo* review because it raises questions of due process (FIPUG br. at 14). But FIPUG's cases do not stand for the proposition that evidentiary rulings become subject to *de novo* review whenever an appellant raises due process

arguments. In *Philip Morris USA, Inc. v. Douglas*, 113 So. 3d 419, 430 n.7 (Fla. 2013), this Court applied the *de novo* standard of review when the appellant claimed that the application of res judicata deprived it of due process. And in *State v. Myers*, 814 So. 2d 1200 (Fla. 1st DCA 2002), the court reviewed *de novo* the trial court's dismissal of criminal charges on the grounds that the use of a probationer as an informant violated the defendant's due process rights. *Id*. at 1201. Thus, neither case suggests that the propriety of routine communications between the Commission and its staff is subject to *de novo* review. Finally, FIPUG argues that the admission of expert testimony should be reviewed *de novo*, but the case on which it relies applies section 90.702, Florida Statutes, which, as explained below, does not apply. *See Hildwin v. State*, 951 So. 2d 784 (Fla. 2006).

SUMMARY OF THE ARGUMENT

The Commission has jurisdiction. It has broad powers to review and set public utility rates. This inherently requires a case-specific, fact-intensive inquiry. As a public utility, FPL petitioned the Commission to determine whether the Woodford Project was prudent and whether its associated costs can be recovered through the Fuel Clause. The Commission had jurisdiction to decide those issues.

The orders on appeal do not depart from the Commission's prior precedent without explanation. The Commission is in the best position to interpret its own precedent, and it correctly found its orders consistent with its previous decisions.

The Woodford Final Order also is supported by substantial, competent evidence. OPC essentially asks the Court to reweigh that evidence.

Finally, the Appellants' challenges to certain procedural and evidentiary decisions ignore the less formal nature of Commission rate proceedings. In such proceedings, the Florida Evidence Code does not apply. The Commission's decisions were consistent with applicable rules.

ARGUMENT

To avoid duplication, FPL adopts the arguments in the Commission's brief.

I. THE COMMISSION HAS AUTHORITY TO APPROVE THE RECOVERY OF COSTS ASSOCIATED WITH THE WOODFORD PROJECT

The Commission had jurisdiction to review FPL's petition seeking recovery of costs associated with the Woodford Project. Below we demonstrate that (A) the Commission has broad powers to approve recovery of a public utility's costs; and (B) nothing in the Florida Statutes prohibits a public utility from seeking recovery of costs of natural gas facilities.

A. The Commission Has Broad Powers to Approve Recovery of Utilities' Costs

Chapter 366 defines the scope of the Commission's broad powers to review and set public utilities' rates. Section 366.04(1) states that the Commission "shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service." § 366.04(1), Fla. Stat. (2014). Section 366.02(1) defines a

"public utility" as "every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state." § 366.02(1), Fla. Stat. (2014). This statute gives the Commission jurisdiction over FPL.

The Commission also has jurisdiction to review FPL's proposed rates, which inherently includes oversight of the recovery of costs. Section 366.05(1) provides that the Commission "shall have power to prescribe fair and reasonable rates and charges . . . to be observed by each public utility." § 366.05(1), Fla. Stat. (2014). Section 366.06(1) provides that "a public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule." § 366.06(1), Fla. Stat. (2014).

The applicable standard in a rate-making proceeding is whether the rates are "fair, just and reasonable." *See* § 366.06(1), Fla. Stat. (2014) ("[T]he commission shall have 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."); *see also* § 366.03, Fla. Stat. (2014) ("All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and

reasonable."); § 366.05(1)(a), Fla. Stat. (2014) ("[T]he commission shall have power to prescribe fair and reasonable rates and charges.").

The Legislature generally delegated to the Commission the authority to decide what costs may be included in utility rates. "The statutory standard imposed upon the Commission is to fix 'fair, just and reasonable rates.' This Court has consistently recognized the broad legislative grant of authority which these statutes confer and the considerable license the Commission enjoys as a result of this delegation." *Citizens of State v. Pub. Serv. Comm'n*, 425 So. 2d 534, 540 (Fla. 1982) (citation omitted). Such decisions are inherently fact-specific, requiring the Commission to evaluate the particular circumstances of a utility expenditure and whether it benefits the rate-paying public. *See, e.g., Gulf Power Co. v. Wilson*, 597 So. 2d 270, 273 (Fla. 1992) ("What constitutes a fair rate of return for a utility depends upon the facts and circumstances of each utility, and this Court has expressly recognized that the Commission must be allowed broad discretion in setting a utility's appropriate rate of return."); *GTC*, 967 So. 2d at 787 ("The PSC is invested with discretion to determine what amount of [ ] recovery costs are reasonable to be charged to the consumer.").

The Legislature has not restricted the type of costs that, in the Commission's discretion, may be recovered. Chapter 366 imposes no detailed standards by which the Commission must determine which costs may be included in rates. Instead, it

provides that the provisions of Chapter 366 are to be "liberally construed" to protect the public welfare. § 366.01, Fla. Stat. (2014). Chapter 366, which outlines a general standard ("fair, just and reasonable") and provides how the Commission operates, grants the Commission substantial authority to determine what costs public utilities may recover.

In this case, the Commission concluded that the Woodford Project is prudent and "its costs are recoverable through the Fuel Clause" (FIPUG A. 6). The Appellants do not dispute that the Woodford Project will reduce customer rates over the long term and reduce FPL's exposure to volatile natural gas prices. Nor do they dispute that FPL is a public utility. And FPL's investment in the Woodford Project would allow it to obtain at production cost the natural gas it needs to generate electricity (T1. 126-27). Therefore, the Commission found that the Woodford Project "is expected to produce customer benefits" by providing fuel price stability, effectively acting as a long-term hedge to save consumers money and that the Woodford Project may reduce the delivered price of fossil fuel (FIPUG A. 6). The Commission's authority to decide these issues should be "liberally construed" to accomplish the purpose of "protection of the public welfare." § 366.01, Fla. Stat. (2014).

B. Nothing in Florida Statutes Prohibits Utilities from Recovering Costs Associated with Natural Gas Facilities

Jurisdiction means the power to act in a certain area. *See Bush v. State*, 945 So. 2d 1207, 1211 (Fla. 2006) ("Jurisdiction is 'the power to act,' the authority to adjudicate the subject matter.") (citations omitted). The Commission has jurisdiction over public utility rates. § 366.04(1), Fla. Stat. (2014) ("[T]he commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service."). And that is the basis of Appellants' direct appeal to this Court. *See* Art. V, § 3(b)(2), Fla. Const. ("When provided by general law [this Court] shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.") § 350.128(1), Fla. Stat (2014) ("As authorized by s. 3(b)(2), Art. V of the State Constitution, the Supreme Court shall, upon petition, review any action of the commission relating to rates or service of utilities providing electric, gas, or telephone service."). Appellants cite no support for the argument that the Commission cannot review FPL's proposed rates and set rates that it determines are fair, just and reasonable. They confuse the issue of whether the Commission acted within its authority (jurisdiction) with the issue of whether the Commission properly exercised that authority by allowing FPL to recover costs associated with the Woodford Project.

Appellants also cite no statute or case holding that an electric utility cannot recover a cost associated with the production of a fuel used to generate electricity.

OPC relies on the definition of "electric utility" in section 366.02(2) (OPC br. at 16). But that provision only defines "electric utility" for the purpose of identifying the companies whose rates the Commission regulates. § 366.02(2), Fla. Stat. (2014) ("As used in this chapter: . . . 'Electric utility' means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state."). It does not limit the costs that can be recovered through the ratemaking process. Such an interpretation is also inconsistent with the Legislature's interpretative rule that Chapter 366 is to be "liberally construed" to protect the public welfare. § 366.01, Fla. Stat. (2014).

In fact, no provision in Chapter 366 limits the recovery of costs to those directly expended on generating, transmitting, or distributing electricity. Otherwise, FPL would be prohibited from recovering costs that support such activities, such as vehicles, warehouses, office buildings, computer systems, and fuel storage tank yards (R4. 710). Yet the Commission regularly allows Florida utilities to recover such costs. *See In re Petition for Increase in Rates by Fla. Power & Light Co.*, Docket No. 0806677, Order No. PSC-10-0153-FOF-EI, at 73-74, 77 (F.P.S.C. Mar. 17, 2010) (granting in part FPL's petition for a rate increase and considering among other things costs related to automobiles, trucks, office complexes, office furniture and equipment, and personal computers). Inserting

such a limitation would rewrite section 366.02(2). *See Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999) ("[T]his Court may not rewrite statutes contrary to their plain language.").

Even if the definition of "electric utility" somehow limited the type of costs a utility could recover through its rates, the Woodford Project would still comply. FPL will invest in facilities that produce natural gas, which FPL will own (T1. 100). FPL burns natural gas to generate electricity (T1. 85). Until now, FPL has purchased natural gas on the wholesale market, which neither Appellant disputes is sufficiently related to generating electricity to allow cost recovery. The Woodford Project allows FPL to purchase natural gas at the production cost—essentially buying it in the ground before middlemen increase the price—with reduced volatility and potentially large savings (T1. 126-27).

Neither Appellant identifies any principled distinction between purchasing natural gas in the market and purchasing it in the ground and extracting it. Indeed, OPC concedes that "the costs for the actual fuel commodity used in the generation of electricity is rightly recovered in the annual Fuel Clause proceeding pursuant to past Commission practice" (OPC br. 30). Nor does OPC coherently explain why, for example, a utility can purchase rail cars to deliver coal—an investment for which it can recover a reasonable rate of return—but cannot invest in natural gas production facilities. *In re Fuel & Purchase Power Cost Recovery Clause and*

Generating Performance Incentive Factor, Docket 970001-EI, Order No. PSC-97-0359-FOF-EI (F.P.S.C. Mar. 31, 1997). Thus, even if section 366.02(2) limited recovery to costs relating to generating, transmitting, and distributing electricity, FPL's investment in a facility that produces natural gas—a necessary input to its electrical generation activities—is sufficiently related to its primary functions.

II. THE COMMISSION'S APPROVAL OF COST RECOVERY IS CONSISTENT WITH ITS PRIOR ORDERS

OPC next argues that the Commission's approval of cost recovery for the Woodford Project is inconsistent with "officially stated agency policy or a prior agency practice," and that the Commission did not explain the inconsistency (OPC br. at 32). But the Commission is in the best position to interpret its own orders. *See Citizens of State v. Fla. Pub. Serv. Comm'n*, 146 So. 3d 1143, 1149 (Fla. 2014) ("As we have consistently held, when reviewing an order of the Commission, this Court afford great deference to the Commission's findings"); *W. Fla. Elec. Coop. Ass'n, Inc. v. Jacobs*, 887 So. 2d 1200, 1204 (Fla. 2004) ("Commission orders come to this Court clothed with the presumption that they are reasonable and just."); *cf. Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulation). The Woodford Final Order is consistent with the Commission's prior orders; and even if it were not, the order explains the Commission's reasoning, as section 120.68(7)(e)(3) requires.

OPC first argues that all hedging the Commission had previously approved "involved fixed prices for fixed quantities," and that the Woodford Project is not fixed (OPC br. at 32). But the Commission found that the costs of the Woodford Project are "essentially fixed" (FIPUG A. 5). The record demonstrates that the costs of the Woodford Project are largely fixed, even if the exact amount of gas to be extracted will not be known until the project is complete (R6. 853; T8. 1007). Therefore, the Commission was not inconsistent.

Even if the Commission's decision departed from prior precedent, the Commission explained its decision, as section 120.68(7)(e)3 requires. Indeed, the Commission thoroughly explained why it believes that the Woodford Project is a long-term hedge, and hedging was precisely the topic of the prior orders discussing fixed prices. The Commission stated that it has "consistently found that the primary purpose of hedging programs is to reduce the variability or volatility in fuel costs paid by customers over time" and that it has "traditionally and historically allowed hedging costs to pass through the Fuel Clause" (FIPUG A. at 4). It then explained why "the Woodford Project acts as a hedging program of the type traditionally, historically, and ordinarily recovered through the Fuel Clause," noting that it is "designed to decouple costs from market prices" (*id*. at 4). It noted that "[t]he reality is that in this state, and nationally, we continue to grow the need for natural gas to provide electricity as we move away from coal. . . . [T]he

Woodford Project . . . will act as a long-term physical hedge (30 years or longer in duration) compared to financial hedges, which typically lock in prices for 12-24 months." *Id*. at 5.

Such statements demonstrate that the Woodford Final Order was consistent with past Commission policies and practice; but even if it was not, the Commission's explanation of its reasoning complies with the requirement of section 120.68(7)(e)(3) that any deviation from prior agency policy be explained.

OPC also claims that the Commission had not previously allowed utilities to earn a profit on fuel (OPC br. at 24 n.7). This is simply incorrect: prior orders had indicated that a utility could earn a return on investment for fuel-related capital projects included in the Fuel Clause. *See In re Fuel & Purchase Power Cost Recovery Clause with Generating Performance Incentive Factor*, Docket No. 120001-EI, Order No. PSC-12-0425-PAA-EU, at 2 (F.P.S.C. Aug. 16, 2012) ("This Commission, when appropriate, allows recovery of a return on capital investments through the Fuel and Purchased Power Cost Recovery Clause."); *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*, Docket No. 100404-EI, Order No. PSC-11-0080-PAA-EI, Attachment A (F.P.S.C. Jan. 31, 2011) (citing capital projects recoverable through the Fuel Clause that include a return on investment). When the Commission

approves a purchase of natural gas on the market, the price necessarily includes a return on investment to the producer; just because FPL seeks to purchase gas more cheaply at the wellhead should not eliminate the opportunity to recover a return on investment (T7. 893, 895-99). Indeed, OPC's own expert testified that if FPL's affiliate sold natural gas to FPL, the amount recoverable under the Fuel Clause would be the market price of gas (T5. 560, 564, 566), which necessarily would include a return on investment for the sellers. Moreover, no difference exists between the capital investment here and others related to producing electricity. If FPL appropriates capital to lower customer costs and reduce fuel price volatility, it is entirely proper that it recover a reasonable return just as with every other investment it makes for customers' benefit. In this case, FPL would earn the midpoint of the range of return on equity for prudently incurred costs (T1. 161, T2. 221-22).

OPC also asserts that the Commission departed from precedent by failing to require FPL to maintain accounts and records in accordance with the Federal Energy Regulatory Commission's Uniform System of Accounts for Public Utilities and Licensees ("USOA") (OPC br. at 33). But the evidence showed that FPL will use the standard SEC financial accounting classifications for natural gas industry at the subsidiary level, and will then map the information to the USOA natural gas

chart of accounts for FPL's consolidated financial reporting and ratemaking (T3. 363, 374, 441; R6, Attachment 2, Ex. 17, 19).

OPC also claims that the Woodford Final Order is inconsistent with the Commission's decision in *In re Cost Recovery Methods for Fuel-Related Expenses*, Docket No. 850001-EI-B, Order No. 14546 (F.P.S.C. July 8, 1985), and a stipulation and settlement approved by the Commission in *In re Petition for Increase in Rates by Florida Power & Light Company,* Docket No. 120015-EI, Order No. PSC-13-0023-S-EI (F.P.S.C. Jan. 14, 2013). OPC first argues that "[t]he plain language of the two orders quoted here conflict" because Order No. 14546 allows "a fossil-fuel related cost normally recovered through base rates to be included in the Fuel Clause," while Order No. PSC-13-0023-S-EI "exclude[s] recovery of items that would have been or would be recovered through base rates" (OPC br. at 34-35). But it is too late to challenge Order No. PSC-13-0023-S-EI; indeed, OPC appealed that order to this Court, which affirmed it. *Citizens of State v. Fla. Pub. Serv. Comm'n,* 146 So. 3d 1143 (Fla. 2014).

OPC specifically claims that the Woodford Final Order violates paragraph 6 of Order No. PSC-13-0023-S-EI (OPC 34-36). But that paragraph specifically provides that "[n]othing [herein] shall preclude the Company from requesting 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" (OPC A. at 195). And while the OPC argued below that the stipulation barred FPL's petition to recover costs of the Woodford Project, the Commission expressly rejected that argument, finding that the Woodford Project is "a hedging program of the type traditionally, historically, and ordinarily recovered through the Fuel Clause" (FIPUG A. at 4). Moreover, as noted above, to the extent that the Commission's conclusion that the Woodford Project is a hedge departed from its earlier precedent, the Commission sufficiently explained its reasoning under 120.68(7)(e)(3).

OPC also claims that to satisfy the requirements of Order No. 14546, FPL must seek recovery of a fuel-related cost normally recoverable through base rates, but Order No. PSC-13-0023-S-EI prohibits recovery of costs traditionally recovered through base rates (OPC br. 34-36). While paragraph 6 does state that the parties do not intend to permit recovery of costs that "traditionally, historically, and ordinarily would be recovered through base rates," that provision must yield to the language in the same paragraph which provides that "*[n]othing* shall preclude the Company from requesting 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" (OPC A. at 195) (emphasis added). Thus, the Commission's determination that the Woodford Project is "a hedging program of the type traditionally, historically, and ordinarily recovered

through the Fuel Clause" is consistent with Order No. PSC-13-0023-S-EI (FIPUG A. at 4). It is also consistent with Order No. 14546, which allows for recovery through the Fuel Clause of "fuel-related costs normally recovered through base rates but which were not recognized or anticipated in the cost levels used to determine current base rates and which, if expended, will result in fuel savings to customers" (OPC A. at 16). Thus, the Commission's decisions are either consistent with its precedent, or sufficiently explained in the Woodford Final Order to satisfy section 120.68(7)(e)(3).

The authorities OPC cites are not to the contrary. *Gessler v. Department of Business & Professional Regulation*, 627 So. 2d 501 (Fla. 4th DCA 1993), and *General Telephone Co. of Florida v. Florida Public Service Commission*, 446 So. 2d 1063 (Fla. 1984), did not address a challenge based on section 120.68(7)(e). *Gessler* involved a suspension of a physician's medical license by the Florida Board of Medicine; and *General Telephone* concerned the Commission's adoption of a rule governing the effect of parent debt on federal corporate income tax. *McDonald v. Department of Banking & Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), and *Southern States Utilities v. Florida Public Service Commission*, 714 So. 2d 1046, 1056 (Fla. 1st DCA 1998), are distinguishable on their facts. *McDonald* involved the failure of the Department of Banking and Finance to explain why it denied an application to operate a bank, and in *Southern States Utilities* the court

found that the Commission "relied on a method to determine the used and useful percentage of wastewater treatment plants, without adequate evidence in support." Here, by contrast the Commission's decisions were either consistent with its precedent or explained with citations to the record (FIPUG A. 4-5). And *E. M. Watkins & Co. v. Board Regents*, 414 So. 2d 583 (Fla. 1st DCA 1982), undermines the OPC's argument. There, the court found that the agency has "adequately explained its deviation, if any, from the cited rule." *Id*. at 588. Here, if the Commission's decision departs from its precedent on hedging transactions, it sufficiently explained that the Woodford Project provides a long-term hedge against volatility in the natural gas market.

III. THE ORDERS UNDER REVIEW ARE SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE

OPC does not dispute that the Woodford Project likely will save FPL customers millions of dollars and will provide a long-term hedge against volatile gas prices. Instead, it claims that two secondary findings of the Commission are not supported by substantial, competent evidence. First, OPC asserts that the Commission found that "production levels (which affect possible customer savings) will vary by ten percent" (OPC br. at 37-38). But the Commission made no such "finding." Rather, in its survey of the evidence, the Commission took note of a chart prepared by FPL that estimates the potential savings to customers from the Woodford Project assuming a production level variance of ten percent (FIPUG

A. 6). The Commission never stated that it found that the production levels will fall within a ten percent variance; it simply drew attention to potential savings should that assumption hold (*id*. at A. 5-6). Moreover, to the extent that OPC implies that a variance of twenty percent is appropriate (OPC br. at 38), the evidence shows that under that scenario, six of the nine iterations produce positive customer savings—just as in the 10% case (R6, Attachment 2, Ex. 64). Thus, even if the Commission relied on the 20% variance estimate, it would reach the same result.

OPC also argues that the Commission's determination that the costs of the Woodford Project are "essentially fixed" is not supported by substantial, competent evidence (OPC br. at 37). FPL presented evidence that "[b]ecause 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" (T8. 1007). The fact that the precise amount of gas that will be produced cannot be identified does not make this less than a fixed investment. This evidence is a sufficient basis for affirming the Woodford Final Order. *See GTC*, 967 So. 2d at 790 ("[T]his Court's review is limited to a determination of whether evidence exists to support the Commission's findings.").

The principal case on which OPC relies, *GTC*, undermines its argument. There, this Court found that "[w]hile there may be legitimate disagreements as to

the weight and credibility of the evidence presented below, this Court's review is limited to a determination of whether evidence exists to support the Commission's findings." *Id*. at 790. The Court also stated that it "will not reweigh the evidence or overturn an order of the Commission because the Court might have arrived at a different result." *Id*. Yet that is precisely what OPC asks the Court to do here: it challenges the credibility of FPL's expert that any variance with the costs associated with the Woodford Project would not be significant (T6. 852). But this Court does not second-guess a lower tribunal's credibility assessments. *GTC*, 967 So. 2d at 790. OPC also attacks FPL's expert for stating that he "expected the costs to decrease over time" (OPC br. at 38); but if that testimony is correct, then it would only buttress the Commission's conclusion that the Woodford Project will result in savings to FPL's customers (FIPUG A. 5).

IV. THE COMMISSION FOLLOWED ADEQUATE PROCEDURES IN MAKING THE DECISIONS UNDER REVIEW

Appellants fully participated in the proceedings below. They called witnesses, presented evidence, and cross-examined FPL's witnesses. They now argue that the Commission committed four procedural errors that warrant reversal: (A) it admitted deposition transcripts; (B) it communicated with its staff after the hearing; (C) it considered materials that staff presented to them after the hearing; and (D) it admitted expert testimony on questions of law. We address each argument in turn.

A. The Commission Did Not Abuse its Discretion in Admitting Deposition Transcripts

OPC argues that the Commission improperly admitted deposition transcripts (OPC br. at 39). As OPC concedes, however, the Administrative Procedure Act (APA) governs the Commission's procedure (OPC br. at 39). *See ASI, Inc. v. Fla. Pub. Serv. Comm'n*, 334 So. 2d 594 (Fla. 1976). The APA provides that "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." § 120.569(2)(g), Fla. Stat. (2014). This standard is more flexible than the Florida Rules of Civil Procedure or the Florida Rules of Evidence. In any case, Florida Rule of Civil Procedure 1.330(a)(3)(F) provides that "[t]he deposition of a witness . . . may be used by any party for any purpose if the court finds . . . the witness is an expert or skilled witness"—such as the individuals at issue here.

OPC fails to identify any evidence in the deposition transcripts that is "irrelevant, immaterial, or unduly repetitious." It cites only testimony by an FPL witness that (i) the parties could exercise an opt-out provision if there is a dramatic decline in the price of natural gas; and (ii) FPL briefed its investors on the Woodford Project (OPC br. at 40; R6, Attachment 2, Exh. 55 at 243-44). This testimony is "evidence of a type commonly relied upon by reasonably prudent

persons in the conduct of their affairs," regardless of whether it would be admissible in a civil proceeding. § 120.569(2(g), Fla. Stat. (2014).

Even if the evidence were "irrelevant, immaterial, or unduly repetitious," its admission would constitute harmless error. *See* § 59.041, Fla. Stat. (2014) ("No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause . . . on the ground of . . . the improper admission or rejection of evidence . . . unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice."). Here, OPC fails to show that the Commission relied on any deposition testimony; rather, the Commission relied on portions of the record where admissibility is not disputed (FIPUG A. at 3-6). *See Desimone v. Old Dominion Ins. Co.*, 740 So. 2d 1233, 1234 (Fla. 4th DCA 1999) ("[W]e agree that the trial court erred in admitting depositions of appellant's two former employers. . . . However, we find this error to be harmless in light of the court's extensive findings."); *Putnal v. State*, 468 So. 2d 444, 445 (Fla. 1st DCA 1985) (finding that admission of deposition testimony constituted harmless error).

In addition, the deposition transcripts OPC challenges were from FPL witnesses who testified live at the hearing. OPC had a full opportunity to cross-examine the witnesses at the hearing regarding their deposition testimony. This procedure eliminated any potential for harmful error.

The only case OPC cites, *Department of Professional Regulation v. Wise*, 575 So. 2d 713 (Fla. 1st DCA 1973), is not remotely relevant. There, the Department of Professional Regulation brought disciplinary proceedings against a psychiatrist who allegedly influenced several female patients to engage in sexual relations with him. *Id*. at 714. The court found that the defendant improperly introduced evidence about the patients' prior sexual histories, and reversed a decision dismissing the action against him because it was "based, at least in part, upon findings of fact reached after consideration of irrelevant evidence." *Id*. Here, there is no evidence that the Commission relied on the depositions in deciding the issues, or that they contain prejudicial material of the kind at issue in *Wise*.

B. Commission Staff Is Allowed to Communicate with Commissioners in a Rate Proceeding

FIPUG argues that the Commission violated its due process rights when commissioners met with Commission staff after the hearing (FIPUG br. at 26-31). This argument is based on the false premise that the Commission staff was a "party" to the proceedings (FIPUG br. at 26). During the hearing, OPC counsel expressly stated that "[s]taff has made it abundantly clear on numerous occasions that staff is *not* a party to the proceedings before the Commission" (T1. 30) (emphasis added). FIPUG counsel concurred (T1. 36). Counsel for the Commission stated at the hearing that its role was to make sure that the Commission had a factual basis to make a decision (T1. 34-35). Therefore, FIPUG

has waived any argument that Commission staff was a "party" below, which is the basis of its argument. *Nibert v. State*, 508 So. 2d 1, 3 (Fla. 1987) (noting that a waived issue "may not be raised on appeal").

Even if staff were a party, FIPUG's argument confuses the rules for quasi-judicial disciplinary proceedings with those that apply to rate proceedings, which are involved here (FIPUG A. at 15). FIPUG implicitly concedes that it is appealing from a rate proceeding, because it has invoked this Court's jurisdiction to hear direct appeals from actions of the Commission "relating to the rates or service of utilities." § 350.128(1), Fla. Stat (2014). Yet FIPUG relies on *Cherry Communications, Inc. v. Deason*, 652 So. 2d 803 (Fla. 1995), which reviewed a Commission order revoking a reseller's certificate to provide interexchange services in Florida due to customer complaints. *Id.* Noting that the disciplinary proceeding was "quasi-judicial," the Court held that "in our adversarial system of justice, which places a premium on the fairness of the judicial or quasi-judicial procedure, the decisionmaker must not allow one side in the dispute to have a special advantage in influencing the decision" and held that the defendants "were violated under the due process clause of our state constitution when the Commission invited the prosecutor to participate in its deliberations." *Id*. at 805.

The *Cherry* standards for a quasi-judicial disciplinary proceeding—such as to revoke a license—do not apply in a rate proceeding. In *South Florida Natural*

Gas Co. v. Public Service Commission, 534 So. 2d 695 (Fla. 1988), which involved a rate proceeding, this Court rejected a utility's contention that "it was deprived of due process of law because the commission allowed its staff to make inquiry of utility witnesses and assist in evaluating the evidence." *Id*. at 697. This Court found that "the commission is clearly authorized to utilize its staff to test the validity, credibility, and competence of the evidence presented in support of an increase. Without its staff, it would be impossible for the commission to 'investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service.'" *Id*. (quoting § 366.06(1), Fla. Stat. (1985)). Likewise, in *Legal Environmental Assistance Foundation (LEAF), Inc. v. Clark*, 668 So. 2d 982 (Fla. 1996), the Court found that the Commission did not deny due process when commissioners met with staff—even if staff had cross-examined witnesses and entered items into evidence—in a proceeding to set energy conservation goals for investor-owned utilities. *Id*. at 984. The Court stated that "[j]ust as we have found that the Commission may appropriately utilize its staff to test the validity, credibility, and competence of the evidence presented in a rate-increase hearing, we here find that the Commission may use its staff to evaluate the evidence." *Id*. at 986 (citation omitted).

FIPUG relies on the prohibition on *ex parte* communications in section 120.66, Florida Statutes. But that provision warns that "[n]othing in this

subsection shall apply to advisory staff members who do not testify on behalf of the agency in the proceeding." § 120.66, Fla. Stat. (2014). No Commission staff testified at the hearing. Therefore, any communications between commissioners and staff in this case fell within the exemption.

C. In Rate Proceedings, Commissioners May Consider a Variety of Materials

FIPUG argues that the Commission violated its due process rights when Commission staff apparently provided information to commissioners outside of the proceeding (FIPUG br. at 24). FIPUG states that the Commission received "factual information addressing action the Los Angeles Department of Water and Power took to secure natural gas reserves in Wyoming" (*id*.). FIPUG also notes that one commissioner referred to a "pamphlet on liability" which FIPUG did not have an opportunity to review (*id*.).

As explained above, this Court has found that the commissioners may communicate with staff during a ratemaking proceeding. *S. Fla. Natural Gas Co.*, 534 So. 2d at 696. Thus, the Commission could communicate and receive additional information from its staff "to test the validity, credibility, and competence of the evidence presented." *Id*. at 697.

Even if the Commission's receipt of information from its staff were improper, FIPUG fails to show that the Commission relied on the information. The orders on appeal do not refer to investments by the City of Los Angeles or the

liability issues apparently referred to in the alleged pamphlet. FIPUG has not even attempted to demonstrate that the findings and conclusions in the orders on appeal were not or could not have been properly founded on record evidence presented at hearing. Thus, any alleged error is harmless and not a basis for reversal. *See* § 59.041, Fla. Stat. (2014).

D. The Commission Did Not Abuse Its Discretion in Allowing Testimony About the Requirements of Law

FIPUG finally argues that the Commission "erred by admitting into evidence the opinions of former commissioner Mr. Deason on questions of law" (FIPUG br. at 31). Mr. Deason was a rebuttal witness who testified in response to testimony on legal matters by OPC and FIPUG witnesses (T7. 875-876, 878-879).

FIPUG's argument ignores that this was a Commission rate proceeding, not a judicial or even a quasi-judicial one. FIPUG relies on a series of civil cases. *See Lee Cnty. v. Barnett Banks, Inc.*, 711 So. 3d 34 (Fla. 2d DCA 1997) (eminent domain case); *Gyongyosi v. Miller*, 80 So. 3d 1070 (Fla. 4th DCA 2012) (negligence action); *Edward J. Seibert, A.I.A. Architect & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n*, 573 So. 2d 889 (Fla. 2d DCA 1991) (negligence action); *Ocean's Edge Dev. Corp. v. Town of Juno Beach*, 430 So. 2d 472 (Fla. 4th DCA 1983) (declaratory judgment action); *In re Estate of Williams*, 771 So 2d 7 (Fla. 2d DCA 2000) (probate action); *Devin v. City of Hollywood*, 351 So. 2d 1022 (Fla. 4th DCA 1976) (declaratory judgment action); *Sec. Feed & Seed Co. v. Lee*,

189 So. 869, 870 (Fla. 1939) (action seeking injunctive relief); *Perez v. Bell South Telecomms., Inc.*, 138 So. 3d 492 (Fla. 3d DCA 2014) (negligence action). Not one of these cases involved an administrative proceeding, much less a Commission rate proceeding.

FIPUG's cases all apply the Florida Evidence Code. Here, by contrast, the APA governs. As relevant here, the APA provides that "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." § 120.569(2(g), Fla. Stat (2014).

FIPUG's argument that the Commission relied on an outdated version of section 90.702 fails for the same reason (FIPUG br. at 36). Section 90.702 does not apply to a Commission proceeding, and thus the Commission had no obligation to observe either the current *or* the outdated version.

Even if the cases FIPUG cites did apply, the testimony of FPL's expert was proper. Mr. Deason's testimony addressed how the Commission's regulatory principles and policies, including its prior precedent, should apply to evaluating FPL's proposed gas reserve project (T7. 875-915). He did not offer legal opinions, but his perspective as a former commissioner on how this Commission should

evaluate the Woodford Project within the framework of its duty to regulate in the public interest (*id.*).

The Commission commonly permits witnesses to offer opinions on regulatory policy and how prior Commission decisions should be applied. *See, e.g., In re Petition on Behalf of Citizens of the State of Florida to Require Progress Energy Florida Inc. to Refund Customers $143 million,* Docket No. 060658-EI, Order No. PSC-07-0816-FOF-EI at 15-16 (F.P.S.C. Oct. 10, 2007) (noting testimony from a witness offered by Progress Energy Florida and OPC about the proper regulatory policy for retrospective review of fuel costs, and commenting that OPC's witness "referred to numerous Commission Orders to support OPC's contention"); *In re Application for a Rate Increase in Pasco Cnty. by Mad Hatter Util., Inc.*, Docket 910637-WS, Order No. PSC-93-0295-FOF-WS (F.P.S.C. Feb. 24, 1993) (noting an OPC witness's testimony about applying "sound regulatory policy" to recover the costs for abandoning wastewater treatment plants).

FIPUG also ignores that Mr. Deason was a rebuttal witness, responding to testimony from Appellants' own witnesses, themselves non-lawyers, about regulatory policy and how the Commission should apply its precedent to FPL's proposed gas reserve project (T5. 557, 561, 568, 570, 572, 574, 579, 582, 659-660; T6. 680, 684-85, 712, 738). For example, FIPUG's expert witness, Jeffry Pollock, testified about whether "the Commission ha[s] a specific policy [on] the types of

costs for which fuel clause recovery is appropriate," stating that "[t]he Commission's policy was adopted in Order No. 14546 issued in Docket No. 850001-EI-B on July 8, 1985" and that "excluding G&A costs from the Fuel Clause is [ ] consistent with the Commission's policy" (T5. 659-660). Because the Commission allowed this testimony, it was proper to allow FPL to rebut it. *See Vargas v. Chamsy Transfer, Inc.*, 999 So. 2d 1101, 1103 (Fla. 1st DCA 2009) (finding that the lower tribunal "should have either excluded both the [respondent's evidence] and Claimant's rebuttal to it, or permitted both.").

V. THE AARP PROVIDES NO BASIS FOR REVERSING THE ORDERS

Amicus curiae AARP raises several issues that Appellants do not raise, including a claim that the Commission's ruling violated the commerce clause of the United States Constitution and that the approved cost recovery is not fair, just and reasonable. But the AARP was not a party below, is not one here, and cannot raise new issues. *See Reichmann v. State*, 966 So. 2d 298, 304 n.8 (Fla. 2007) ("[I]t is axiomatic that amici are not permitted to raise new issues."). AARP also improperly relies on materials outside the record. *See Dade Cnty. v. E. Air Lines, Inc.*, 212 So. 2d 7, 8 (Fla. 1968) (striking an amicus brief and appendix because "they attempt to interject in these proceedings matters dehors the record herein").

Substantively, the AARP's brief is based on the misconception that the Woodford Project will raise utility rates, instead of lowering them as the

Commission found. The AARP's commerce clause argument also is based on the false premise that the Commission would be regulating natural gas activities in Oklahoma. It would not: Oklahoma authorities would regulate the extraction of natural gas at the project site (T6. 866-67). The Commission only authorized FPL to recover the costs of those activities in its rates. Nothing about the Commission's exercise of jurisdiction to review utility rates implicates the commerce clause.

CONCLUSION

For the reasons stated, the Court should affirm the orders under appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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I certify that on a copy of this brief was served by email on August 17, 2015 to all counsel on the attached service list

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