BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor	DOCKET NO. 140001-EI
________________________________/	FILED: December 12, 2014

CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF

Pursuant to Order Nos. PSC-14-0084-PCO-EI and PSC-14-0667-PHO-EI, the Citizens of the State of Florida, by and through the Office of Public Counsel, hereby submit their Post-Hearing Statement of Positions and Post-Hearing Brief.

SUMMARY OF ARGUMENT

Florida Power & Light Company's ("FPL's") June 25, 2014 Petition ("Petition") can be summed up as a new way to eliminate shareholder risks and ensure shareholder profits. Under FPL's proposal, FPL will shift all risks of investing in gas reserves to the customers in exchange for promises of potential customer fuel savings and guaranteed trued-up profits (or returns) for shareholders. The Office of Public Counsel ("OPC" or "Citizens") is not opposed to *guaranteed* fuel cost savings to customers; however, FPL simply cannot guarantee those savings to customers over the next 50 years.

The proposed Woodford Project is a speculative investment in an Oklahoma gas reserve. FPL is speculating that the Woodford Project will produce an estimated annual gas quantity at a forecasted per-unit cost level (where forecasted costs are based on numerous FPL assumptions, forecasts, and estimates) that is lower than FPL's estimate of future natural gas market prices. Based on FPL's Revised Exhibit SF-8, which relied upon FPL's July 28, 2014 Fuel Forecast, FPL projects that customers will receive approximately $51.9 million in fuel savings over the projected 50-year life of the Woodford Project. EX 54, BSP 369. This same exhibit estimates the total revenue requirement (including FPL shareholder profits collected from customers) will be approximately $709.4 million over the same time period. In other words, customers will pay FPL and its shareholders approximately $709.4 million to potentially save approximately $51.9 million in fuel over 50 years. **While this estimated, projected, but not guaranteed $51.9 million in fuel savings amounts to less than 2 cents a month for the next 50 years when broken down per customer, FPL's shareholders will receive a fixed 10.5% return or guaranteed profit on the investment.**[1]

[1] According to Order No. PSC-14-0036-TRF-EI, issued January 14, 2014, in Docket No. 130223-EI, FPL has approximately 4.5 million customers. Thus, taking $51.9 million / 4.5 million customers = $11.53 per customer

OPC maintains that the Florida Public Service Commission ("PSC" or "Commission") lacks subject matter jurisdiction over FPL's Petition and proposal to recover costs associated with gas reserves investments in general and the Woodford Project in particular. Nothing within Chapter 366, F.S., countenances allowing a rate-regulated electric monopoly utility to expand beyond "generation, transmission, and distribution" functions expressly recognized in statute. Because the Commission does not possess the express or implied statutory jurisdiction to approve FPL's Woodford Project, or even the ability to adequately review the reasonableness or prudence of FPL's proposed gas reserves costs for cost recovery, OPC submits such a decision would be a clear abuse of discretion and a radical departure from the essential requirements of law as set forth by the Legislature in Chapters 120, 350, and 366, F.S. Additionally, FPL's request is barred by the express terms of the one-sided settlement approved by Order No. PSC-13-0023-S-EI.

Further, the Commission has stated (and FPL has agreed) that public utilities subject to the Commission's jurisdiction are not allowed to make any profit on fuel costs that flow through the fuel cost recovery clause. This principle derives from, and is consistent with, the statutory definition of utility-related activities and the corresponding limits of the Commission's jurisdiction. Because FPL's shareholders would receive a fixed return or guaranteed profit on every dollar invested in natural gas reserves, FPL's proposal would violate the requirement that regulated utilities are not allowed to profit on fuel acquired for their customers.

In addition, FPL's gas reserves proposal does not comport with the Commission's strict policy that restricts what fossil-fuel related costs may be recovered through the Fuel Adjustment Clause ("Fuel Clause"). While the Commission may be exempt from some aspects of rulemaking pursuant to Section 120.80(13)(a), F.S., PSC Order No. 14546 and its progeny serve as surrogate rules. These orders are polestars, guiding Commission policy as it relates to allowing fossil-fuel related costs normally recovered through base rates to be recovered through the Fuel Clause that **will** result in fuel savings to customers. Simply put, **50 years is a long time to speculate that customers will receive a potential 2 cents a month in savings that may never be realized.** And, in exchange for approximately two cents a month in non-guaranteed fuel savings for the next 50 years, FPL wants its customers to bear all the risks with this investment – regardless of the market price of natural gas and regardless of whether the volume of gas from the Woodford Project can or will be realized. In sum, the customers' potential fuel savings would not be guaranteed, while under the same proposal FPL's profits would be 100% guaranteed over the 50 years period. Therefore, since FPL's Petition (whether approved in part or in whole) cannot satisfy the requirements of Commission policy delineated in Order No. 14546 and its progeny, it must be denied.

Furthermore, FPL's Petition is not a hedge against fuel price volatility to the benefit of customers as contemplated by the Commission's 2002 and 2008 fuel hedging orders and hedging guidelines. The Commission's Hedging Guidelines Order defines "hedging activities" as "natural

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over the life of the project. Then, taking \$11.53 / 50 years = \$0.23 per year. Lastly, \$0.23 / 12 months = \$0.01922 per month, or approximately two cents a month savings per customer for the next 50 years.

gas and fuel oil fixed price financial or physical transactions. . . ." Order No. PSC-08-0667-PAA-EI at 15 (emphasis added). A long-term physical hedge typically involves a contractual quantity of gas at a fixed price to be delivered at some agreed future period. The Woodford Project is not a hedge because the Woodford Project does not fix any production costs or volumes of gas. Instead, the production costs and volumes of gas are projected or estimated. Further, instead of apportioning the risks between FPL and PetroQuest, as is done in financial hedging, FPL's proposal would require its customers to assume all of FPL's shareholders' risks regardless of the success or failure of its proposed natural gas reserves investment.

Unlike a true financial or physical hedge, there is nothing fixed within FPL's request for approval of costs associated with gas reserves investments except the 10.5% fixed returns (guaranteed profits) FPL shareholders will receive on the approximately $190 million to be invested in the Woodford Project, and the $709.4 million collected from customers over the next 50 years. Similarly, pursuant to FPL's Guidelines, FPL's request provides fixed returns or guaranteed profits to FPL's shareholders on future investments of up to $750 million per year.

OPC adopts and incorporates by reference herein the remainder of its "Basic Position" as set forth in the Prehearing Order No. PSC-14-0667-PHO-EI, issued November 21, 2014, in this docket.

Thus, for the reasons stated herein, FPL's Petition to recover any costs related to the Woodford Project and any costs related to future investments in gas reserves projects should be denied.

PROCEDURAL MATTERS

OPC has combined its Post-Hearing Statement of Positions and its Post-Hearing Brief into a single document ("Brief"), and will address Issues 1, 2, 3, and 6. The remainder of the issues will be addressed by a separate Brief. Issue 8, on which Citizens take no position, is not reflected in this Brief. OPC also renews the following objections: (1) the Commission's decision to deny OPC's Motion to Dismiss FPL's June 25, 2014, Petition for Lack of Subject Matter Jurisdiction; and (2) the Commission's decision to admit into the hearing record Exhibits 55-58, which reflect the full deposition transcripts of FPL's witnesses, over OPC's objections.[2]

[2] Since the Commission, at the request of staff, placed these deposition transcripts into evidence over the objection of OPC, instead of conducting cross-examination of FPL witnesses on testimony contained in OPC's and the Florida Industrial Power Users Group's ("FIPUG's") portions of the transcripts, OPC relied upon portions of some of the deposition transcripts which OPC sought to exclude from the hearing record. By relying on these portions of the deposition transcripts, OPC does not waive its objection that it was improper to admit entire deposition transcripts into the hearing record, over the objection of a party, which contained "Irrelevant, immaterial, or unduly repetitious evidence" that should have been excluded. Section 120.569(2)(g), F.S. Furthermore, staff moved the depositions into the record contrary to Florida Rule of Civil Procedure 1.310(f)(3), which only allows *parties* to file depositions absent a finding by the court that the deposition was necessary for the decision, and Florida Rule of Civil Procedure 1.330(a)(4), which allows any other *party* to introduce any other parts. (emphasis added). Both of these rules apply to the Commission under Rule 28-106.206, F.A.C. Whereas staff argued in this very docket that it is not a party and the Commission failed to find the depositions necessary in this case, the Commission did not comply with the rules governing the use of depositions.

ISSUES AND POSITIONS

<u>ISSUE 1</u>: Should the Commission approve FPL's request to recover the amounts it would pay to its subsidiary for gas obtained from the PetroQuest joint venture through the fuel cost recovery clause on the basis and in the manner proposed by FPL in the June 25 Petition?

*No. It should be denied. First, the Commission has only the authority or jurisdiction granted it by the Legislature. The Commission lacks subject matter jurisdiction to approve projects and allow recovery of costs that are beyond the "generation, transmission, and distribution" functions expressly recognized in statute for an electric monopoly utility. Prior Commission orders show that the Commission lacks jurisdiction over unregulated subsidiaries and affiliates, such as the one FPL is proposing.

Second, FPL's Petition violates Commission orders and rules. The Woodford Project does not satisfy the criteria for Fuel Clause recovery because its costs are not capital costs normally recovered through base rates as required by Order No. 14546. FPL's proposal is also beyond the policy adopted by the Commission for dealing with fossil fuel-related costs normally recovered through base rates that will result in fuel savings to customers. Further, it does not fit within the regulatory framework established by Commission accounting rules or the Uniform System of Accounts for electric utilities which FPL must follow.

Third, FPL promises fuel savings which it cannot ensure will be delivered over the 50 year life of the Woodford Project. Woodford Project fuel savings are built solely on "projections." FPL cannot fix gas production costs or volumes, and cannot ensure that the cost of Woodford gas will be lower than market prices over the life of the project.

Fourth, FPL's proposal is not hedging. Moreover, assuming arguendo it was hedging, it violates the Commission's hedging guidelines definition of "hedging activities" because none of the costs associated with the gas reserves investment are fixed, except for the fixed cost of shareholder returns and guaranteed profits built into the revenue requirement. Without fixed costs of production or volumes of gas, the customers may pay more than market or worse, pay for gas twice.

Finally, the annual resetting of the fuel factor already effectively mitigates against fuel price volatility experienced by customers without any additional cost or risk. Thus, FPL's proposal to physically hedge gas through gas reserves is unnecessary given all the attendant risks to be borne by the customers. (Ramas, Lawton).*

ARGUMENT:

FPL's Petition Must be Dismissed for Lack of Subject Matter Jurisdiction

In its Motion to Dismiss FPL's June 25, 2014 Petition For Lack Of Subject Matter Jurisdiction ("Motion"), the Citizens demonstrated that the plain language of applicable statutory provisions do not contemplate or authorize an investment in natural gas exploration, drilling, and production that can be included in a public utility's rate base. The Commission denied this Motion on November 25, 2014 before the hearing started. At the outset of the hearing on December 1, OPC renewed its Motion (TR 13) and objection to the Commission's decision and did so again at the conclusion of the hearing on December 2 . TR 1086-87. The Public Counsel's objection to the Commission asserting, maintaining and/or exercising subject matter jurisdiction over FPL's Petition to invest in natural gas reserves is an ongoing one and is not waived by our continued participation in this docket. *Seven Hills, Inc. v. Bentley,* 848 So. 2d 345, 350 (Fla. 1st DCA 2003) ("Subject matter jurisdiction, which arises only as a matter of law, cannot be created by waiver, acquiescence or agreement of the parties, by error or inadvertence of the parties or their counsel, or by the exercise of the power of the court. . . . And we review this issue de novo.") OPC incorporates herein the entirety of its Motion to dismiss and the arguments made therein.

The Legislature has given this Commission the power to regulate the rates and service of "public utilities" only as those powers are defined by Section 366.04, F.S. *See Rinella v. Abifaraj,* 908 So. 2d 1126, 1129 (Fla. 1st DCA 2005) ("An administrative agency has only such power as granted by the Legislature and may not expand its own jurisdiction"); *Diamond Cab Owners Ass'n v. Florida R. & Public Utilities Com.*, 66 So. 2d 593, 596 (Fla. 1953) ("Commission may make rules and regulations within the yardstick prescribed by the Legislature, but it cannot amend, repeal or modify an Act of the Legislature by the adoption of such rules and regulations.").

Further, without express statutory language and absent subsequent Legislative enactment, the Commission lacks authority over FPL's Petition. *Tampa Elec. Co. v. Garcia,* 767 So. 2d 428, 435 (Fla. 2000) ("[W]e find that the Legislature must enact express statutory criteria if it intends such authority for the PSC."); *Panda Energy Int'l v. Jacobs,* 813 So. 2d 46, 54 n.10 (Fla. 2002) (noting that when PSC lacks express statutory criteria for authority, ". . . the solution for the PSC or other interested entities if they desire to expand the PSC's authority is to seek an amendment to the statute.").

Section 366.02(1), F.S., defines "public utility" as "every person, corporation, partnership, association, or other legal entity. . . supplying electricity or gas. . . to or for the public within this state." FPL is an "electric utility" pursuant to Section 366.02(2), F.S., which defines "electric utility" as ". . . any municipal electric utility, investor-owned electric utility, or rural electric cooperative which *owns, maintains, or operates an electric generation, transmission, or distribution system* within the state." (emphasis added). In its statutory framework to regulate public utilities, the Legislature granted monopolies to utilities that operate in the "*electric generation, transmission, or distribution system*" space, but this framework does not authorize any Commission rate-regulated utilities to expand into competitive markets such as the oil and gas exploration, drilling, fracking, and production industry. Section 366.06(1), F.S., further provides that only utility property that is "used and useful[3] in serving the public" is to be reflected in the rates that customers pay.

[3] As demonstrated at hearing, an investment in "gas reserves is largely an investment in the right to drill," and the nature of the asset under Oklahoma law is only the right to explore and drill for natural gas which does not constitute an ownership interest in the gas. *See Sunray Oil Co. v. Cortez Oil Co.,* 188 Okla. 690 (OK 1941). Once gas is "captured," it is no longer an asset of the type that is subject to a "used and useful" determination within the plain

Investing in the exploration, drilling, and fracking of shale to release gas is not part of "own[ing], maintain[ing], or operat[ing] an electric generation, transmission, or distribution system." Consequently, the Commission lacks the jurisdiction to authorize the inclusion of investments in natural gas reserves in regulated rate base and base rates. This issue was conclusively resolved in PSC Order No. 21847 ("EFC Order"), issued in Docket No. 860001-EI-G. There, the Commission ruled that Florida Power Corporation's ("FPC's") Affiliate (not the rate-regulated monopoly electric utility) that owned coal reserves and the "complex supply and delivery network" they created were not subject to the Commission's jurisdiction. In that case, the subject that the Commission addressed was the manner in which FPC (now Duke Energy Florida) created subsidiaries and/or affiliated companies to own and operate coal mines and transport coal to FPC's generation sites. In Order No. 21847, the Commission first described the corporate arrangements in place to provide coal to FPC:

> In March, 1976, Electric Fuels Corporation was established as a wholly-owned subsidiary of Florida Power Corporation and signed a Coal and Supply Delivery Agreement for the purchase and delivery of coal to Crystal River Units 1 and 2. . . . Since 1982, when Florida Progress Corporation, a holding company, was formed, EFC has been an affiliate of FPC.[4]

The Commission then deliberately and unequivocally distinguished between FPC, which was subject to its jurisdiction, and FPC's fuel supply affiliates, over which it possessed no subject matter jurisdiction:

> Chapter 366, Florida Statutes (1987), provides the statutory basis for the exercise of the Commission's jurisdiction over public utilities. Public utilities are defined as "every person, corporation. . . supplying electricity. . . to or for the public within this state." Section 366.02, Florida Statutes. FPC is a public utility as defined in Chapter 366 and is therefore subject to the jurisdiction of the Commission. EFC and the complex supply and delivery network they have created are not subject to the jurisdiction of the Commission under Chapter 366.

Order No. 21847 at 2-3.

By finding that a non-regulated investment is outside its jurisdiction in Order No. 21847, the Commission also effectively identified the coal reserves as an investment that would **not** be eligible for inclusion in rate base. The Commission adjudicated that case because the electric utility did not seek to make **the investment** in the coal reserves part of the electric utility's rate base or to include any portion of the then subsidiary and later affiliate's operations in the regulated operations, or to

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and ordinary meaning of that regulatory concept. Clearly, natural gas reserves fall outside the plain meaning of Florida's "used and useful" statute.

[4] In Order No. 21847, the Commission described a complex arrangement that EFC had entered into for the purchase and delivery of a specific coal to FPC, the details of which have been omitted here because they are not pertinent to this docket. However, it is clear from the order that the Commission was assessing a situation in which EFC, a subsidiary and later an affiliate of FPC, acquired ownership interests in coal reserves that it mined, transported, and sold to FPC.

seek a regulated return or profit on that coal reserves investment. Instead, the issues adjudicated in that case were the affiliate pricing terms between the non-regulated (but affiliated) vendor and the regulated utility. That same type of non-regulated investment – albeit in natural gas as opposed to coal – is present in FPL's proposed gas reserves investments. Therefore, by asking for authority to create the so-called "regulated subsidiary" and to place the assets of that subsidiary into rate base for Fuel Clause purposes and to set rates based on that investment, FPL has crossed an impermissible jurisdictional line.

PW Ventures, Inc. v Nichols, 533 So. 2d 281 (Fla. 1988), reveals the Supreme Court's view of the Legislative mindset when it defined the Commission's jurisdiction. In that case, the Court effectively observed that the Commission's jurisdiction or authority to regulate is co-extensive with the monopoly provision of service. Id. at 282-83. This is significant. The scope of FPL's monopoly is defined by its authority to produce and sell electricity to the public. Id. at 283. *PW Ventures* illustrates that FPL's monopoly authority and the Commission's jurisdictional authority are co-extensive. Exploring, drilling and fracking for and producing natural gas 1,000 miles away in Oklahoma does not fall within FPL's monopoly provision of electric utility service to the public in Florida by any stretch of the imagination. Not surprisingly, FPL's own regulatory expert, witness Terry Deason agreed that the reach of the Commission's jurisdiction coincided with the extent of a utility's monopoly. TR at 943-44. As a result, the *PW Ventures* decision is instructive for this case, and, when read in conjunction with the EFC Order, it is a compelling indicator of the jurisdictional boundary lines that circumscribes the Commission's jurisdiction. The production of natural gas and, of course, the associated investment in that activity fall outside Commission subject matter jurisdiction as a matter of law.

There are two additional Supreme Court cases on point that describe the limits of the Commission's subject matter jurisdiction. *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428 (Fla. 2000) involved a case where the Commission granted a joint determination of need for a power plant with a Florida municipal electric monopoly and an out-of-state wholesale electric generator which was not subject to the rate regulation or jurisdiction of the Commission as a "public utility." In reversing the Commission's decision, the court stated:

> Our decision is founded upon our continuing recognition that the regulation of the generation and sale of power in Florida *resides in the legislative branch* of government. The PSC . . . is an arm of the legislative branch in that the *Commission obtains all of its authority from legislation*."
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> . . .
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> Accordingly, we find that the statutory scheme embodied in the Siting Act and FEECA was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates. Rather, *we find that the Legislature must enact express statutory criteria if it intends such authority for the PSC.*

Tampa Elec. Co. v. Garcia, 767 So. 2d 428, 434-435 (Fla. 2000) (emphasis added).

In a subsequent need determination case, *Panda Energy Int'l v. Jacobs*, 813 So. 2d 46 (Fla. 2002), the court further explained its decision in *Tampa Elec. Co. v. Garcia,* noting that when PSC lacks express statutory criteria for authority, ". . . the solution for the PSC or other interested entities if they desire to expand the PSC's authority is to seek an amendment to the statute." *Panda Energy Int'l v. Jacobs*, 813 So. 2d 46, 54 n.10 (Fla. 2002).

Further, it is axiomatic that an administrative agency, such as the Commission, is vested only with the express or implied statutory authority granted by statute. *Dep't of Revenue ex rel. Smith v. Selles*, 47 So. 3d 916, (Fla. 1st DCA 2010); *City of Cape Coral v. GAC Utilities, Inc.*, 281 So. 2d 493 (Fla. 1973); *Teleco Communs. Co. v. Clark*, 695 So. 2d 304, 308 (Fla. 1997). Any reasonable doubt as to the lawful existence of a particular power of the Commission must be resolved against it. *City of Cape Coral*, at 495. In the case at hand, a review of Chapter 366, F.S., clearly indicates that the Legislature has not expressly or impliedly granted the Commission any statutory jurisdiction to allow rate-regulated monopoly electric utilities to invest in natural gas reserves, to place those fugacious investments in rate base, or to recover any costs associated with natural gas reserves in customer rates (whether in base rates or through the Fuel Clause as FPL is proposing).

FPL's Petition Violates Applicable Commission Orders and Rules

While the FPL petition lacks a jurisdictional basis in Chapter 366, F.S., it also fails when the facts of the proposal are applied to the applicable Commission orders and rules. FPL has proposed that the Commission approve the petition on the basis that this investment is eligible for cost recovery under the Fuel Clause. There is no alternative proposal for recovery before the Commission.5 Moreover, jurisdiction is also lacking on this factual basis for at least three reasons.

First, the lack of the Commission's authority is manifested in the tortured way FPL seeks to make this transaction fit into the Commission's orders and rules that are the product of decades of regulating co-extensively with the monopoly provision of electric service to customers through the owning, maintaining, or operating an electric generation, transmission, or distribution system.

Second, FPL's plan to create a subsidiary to participate in the role now held by USG does not distinguish its situation from that which the Commission addressed in Order No. 21847 and it cannot confer jurisdiction upon the Commission to regulate this subsidiary. FPL's claim that the subsidiary would be "fully consolidated with FPL for regulatory. . . purposes,"6 is a unilateral, self-serving, baseless pronouncement. Evidence taken in the hearing shows that FPL's proposal is vague, contradictory, elusive, and not consistent with the Commission's traditional exercise of jurisdiction. See, for example, FPL witness Kim Ousdahl deposition testimony at 86-87. EX 56. Then, compare with hearing testimony (TR at 428-432) where witness Ousdahl tries to create a blurred division between what the Commission can and cannot oversee. Subject matter jurisdiction arises by virtue of

[5] In fact, FPL affirmatively stated that the project will effectively go away with respect to FPL if it is not approved for recovery in the Fuel Clause. TR at 390; EX 13 at 1

[6] Petition at 23. In his prefiled testimony that accompanied the petition, FPL witness Sam Forrest refers to the entity as a "fully regulated FPL subsidiary." TR at 86

law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence. See Board of Trustees of Internal Improvement Trust Fund of State v. Mobil Oil Corp., 455 So. 2d 412 (Fla. 2d DCA 1984), quashed in part on other grounds by Coastal Petroleum Co. v. American Cyanamid Co., 492 So.2d 339 (Fla. 1986).

Third, as discussed in more detail infra, the gas reserves project ("GRP") fails every test the Commission has established for eligibility for cost recovery whether by Fuel Clause or base rates as set out in Orders Nos. 14546; PSC-11-0080-PAA-EI; and PSC-13-0023-S-EI.

FPL's Proposed Gas Reserves Investments Fails the "Three-Prong Test" Established by Order No. 14546

In its Petition, FPL cites Order No. 14546 in support of its request to include such investments in the fuel cost recovery clause. Petition at 7, 21, 22. Order No. 14546 and its progeny set forth the Commission's strict policy concerning what fossil fuel-related costs normally recovered in base rates may be recovered through the Fuel Clause. FPL witnesses Sam Forrest, Kim Ousdahl and Terry Deason also filed testimony in an effort to support this request. However, Order No. 14546 provides no jurisdictional support for FPL's petition. The reason is simple and straightforward. Order No. 14546 identifies, as candidates for the fuel cost recovery clause, items that are ". . . normally recovered through base rates." Order No. 14546 at 4. EX 65. In other words, before an item involving a capital investment can qualify for the alternative ratemaking mechanism of the Fuel Clause, it must first qualify for rate base. Investments in the competitive gas production industry do not qualify for rate base, and so are not "normally recovered through base rates." Accordingly, these investments do not, as a matter of law, Commission precedent, or plain English and common sense, qualify for fuel cost recovery clause under Order No. 14546 or its progeny.

In support of its Petition, FPL offered the testimony of Ms. Ousdahl as its primary witness to "address the appropriate accounting and regulatory treatment" for the proposed investment in Oklahoma gas reserves. TR at 351. Witness Ousdahl suggests that the project qualifies for recovery through the Fuel Clause based on Item 10 of Order No. 14546. TR at 369-370. While expressly referring to this provision of the order as a "test" (TR at 370, line 1), she claims the Woodford Project "clearly and directly meets" that test. She is wrong. The Woodford proposal flunks the test with flying colors.

In applying Order No. 14546, FPL has a major problem. The Woodford Project, which holds the promise of highly coveted, guaranteed profits to FPL's shareholders on the fuel expense that the Company historically has passed through to customers without earning any profits, presents a Catch-22. The only way FPL can meet the test set out in Order No. 14546 (which it expressly recognizes as the Commission's expression of uniform policy)7 is if the Woodford Project meets all three prongs of the test in Item 10, which states:

Fossil fuel-related costs normally recovered through base rates but which were not recognized or anticipated in the cost levels used to determine current base rates and which, if expended, will result in fuel savings to customers. Recovery of such costs should be made on a case by case basis after Commission approval.

However, if the Woodford Project meets the requirements of the three-prong test, then the project is barred from Fuel Clause recovery by the express provisions of Paragraph 6 of the 2012 Settlement. See Order No. PSC-13-0023-S-EI at 14. Paragraph 6 prohibits Fuel Clause recovery for any costs that meet the first prong of the Item 10 test. FPL literally meets itself coming around the corner in this conundrum; however, the allure of fixed shareholder returns and guaranteed profits on natural gas fuel expenses was perhaps too strong to resist. Thus, FPL appears to be pursuing a simple strategy to evade the problem: just act like the problematic "normally recovered through base rates" provision of Item 10 doesn't exist! This is exactly what witness Ousdahl did. And, if that does not work, hire a former Commissioner to attack the OPC witnesses who point out this obvious oversight(s).

FPL witness Deason testified that this provision of Order No. 14546 sets out a three-prong test and that each prong must be satisfied in order for a project to be "eligible" for Fuel Clause recovery. EX 58 at 25. He opined that the Commission, on a case by case basis, must still make a separate prudence determination on otherwise eligible projects. EX 58 at 30-31. The three prongs test is as follows:

1. Fossil fuel-related costs normally recovered through base rates;
2. But which were not recognized or anticipated in the cost levels used to determine current base rates; and
3. Which, if expended, will result in fuel savings to customers.

The concluding sentence "Recovery of such costs should be made on a case by case basis after Commission approval" is the case by case prudence determination that witness Deason discussed. EX 58 at 30-31. It is clear that prongs 1 and 2 are independent of each other and require different showings. The third prong requires the utility to demonstrate that the fossil fuel-related costs will (not may) result in fuel savings to customers. By the existence of the second prong, it is

[7] Order No. 14546 states that the order expresses its "intent in the Order to establish comprehensive guidelines for the treatment of fossil-fuel-related costs..." Order No. 14546 at 5. EX 65. Clearly, this order is an expression of industry-wide policy for the electric utilities that are subject to the Commission's jurisdiction. While the Commission is exempt from rulemaking for the Fuel Clause per Section 120.80(13)(a), F.S., the agency is not free to disregard this uniform policy. As discussed *infra*, the agency has recently taken pains to restrict expansionist efforts by FPL to allow the exceptions to swallow the rule. See also Order No. PSC-11-0080-PAA-EI at 9-10. OPC submits that with respect to precedent applicable to circumstances like the Fuel Clause where the Commission has established policy in lieu of rulemaking, disregarding or selectively applying the express provisions of Order No. 14546 would be arbitrary and capricious and an abuse of agency discretion.

clear the Commission recognizes and intends that the project costs are new and not already included in base rates. Witness Deason concurs with this by acknowledging that the intent is that the "fossil fuel-related costs" in prong one must be "***of the type***" that are "normally" or "typically" recovered in base rates. EX 58 at 23-25, 28

In her testimony, witness Ousdahl portrays the Order No. 14546 three-prong test in the following way by describing a blanket rule that depends solely on the utility's intent:

> Item 10 of FPSC Docket No. 850001-EI-B, Order No. 14546 provides that Fuel Clause recovery is appropriate for projects that are intended to lower the delivered price of fuel when those costs were "not recognized or anticipated in the cost levels used to determine current base rates."

TR at 369. Perhaps a better way to portray her convenient re-writing of Item 10 is to look at it as witness Ousdahl has effectively revised it to read:

> ~~Fossil fuel-related~~ costs ~~normally recovered through base rates but which were~~ not recognized or anticipated in the cost levels used to determine current base rates and ~~which, if expended, will result in~~ are intended to lower the delivered price of fuel ~~savings~~ to customers. ~~Recovery of such costs should be made on a case by case basis after Commission approval~~.

This opportune revision may be expedient for FPL, but nowhere can witnesses Ousdahl or Deason point to a Commission order or other authority to justify these edits to the Commission's fuel cost recovery policy.

In an astonishing and audacious effort to meet the test, witness Ousdahl deletes the first prong completely. Why? First, because it is highly unlikely that FPL can meet the test since ephemeral investments in the right to explore, drill, and extract natural gas in Oklahoma do not meet the more fundamental test for jurisdictional activities over which the Commission has jurisdiction. Second, assuming, *arguendo,* that FPL can evade the jurisdictional bars that prevent the Commission from even allowing the investment into rate base, it is not of the type that meets the test of being historically, traditionally and typically included in rate base, as pointed out by OPC expert witness Donna Ramas. TR 562

Witness Ramas testified that investments in gas exploration, drilling, and production clearly do not fall under items that would be "normally recovered through base rates" for regulated electric utilities. *Id.* She points to the contorted and tortured accounting path that FPL intends to follow to bootstrap the investment into its regulated books and then presumptively into rate base for subsequent transfer to the Fuel Clause as providing circumstantial evidence that the Woodford Project does not qualify for rate base, and thus base rate treatment and recovery. *Id.* See also testimony of witness Ousdahl at TR 363-366, 373-374; EX 56 at 50-53, 66-85.

FPL offered former Commissioner Deason as their regulatory philosophy expert to rebut the OPC witnesses' testimony that presented the straightforward holdings of the key orders relied upon by FPL. In a display that can only be characterized as gall, he resorted to what amounts to be "name-calling" and accused witness Ramas of contorting, being "misguided and myopic," and of misusing Commission orders in challenging the FPL case. TR at 879, 881, 888, 889. Then, in a desperate attempt to justify the gas reserves investment as being eligible for Fuel Clause, Mr. Deason's own prefiled testimony performed cut-to-fit surgery on the language of Order No. 14546, the fundamental precedent relied upon by his client.

Initially, he sought to create the illusion that the three prongs of the eligibility test in Item 10 of that order are really collapsed into two tests. In response to witness Ramas' testimony that the gas reserves investment is not of the type normally recovered in base rates, he mistakenly mischaracterizes her testimony saying Ms. Ramas testified the deficiency is that the investment is not already in base rates. TR at 885. He acknowledged this error in his deposition. EX 58 at 49-50. He hardly needed to have done that since the error is self-revealing and because the second prong of the test requires FPL to demonstrate that the cost is not included in current base rates. In his deposition, Mr. Deason acknowledged that there are three prongs and that all three prongs must be met in order for the investment to even be eligible for consideration. EX 58 at 25.

Witness Deason testified unequivocally that the first prong required FPL to make the threshold demonstration that the cost proposed for recovery was "of the type" "normally" or "typically" recovered through base rates. EX 58 at 23-25, 28.8

In its Petition, FPL mentions Order No. PSC-93-1331-FOF-EI (gas pipeline lateral); Order No. PSC-95-1089-FOF-EI (rail cars); and PSC-97-0359-FOF-EI (power plant modification) as examples of capital items that were allowed to be recovered through the fuel cost recovery clause. (Petition, at 21-22) None of these orders support FPL's request for recovery of costs associated with speculative gas reserves investments in a competitive industry. In each of them, the Commission approved – not a capital investment in a nonutility, competitive fuel production industry – but an investment that made the fuel or the delivery of fuel produced by and procured from suppliers more economical.[9] Mr. Deason and Ms. Ousdahl cite the same orders in their prefiled testimony with no helpful explication accompanying the citations.

Witness Ousdahl's proffer of further justification for her self-serving interpretation of the Commission's "comprehensive guidelines for the treatment of fossil fuel-related costs" comes in the

[8] In his deposition, Mr. Deason also made the unsupported claim that an electric utility could meet the test by any investment no matter what type. EX 58 at EX 58 at 28-30. However, he acknowledged elsewhere in his deposition that there was no language modifying or amending the language in the first prong and he could point to no order or other authoritative source that so modified the threshold test. *Id.* At 26-27. He also explained that the phrase was really intended to describe the new willingness by the Commission to consider in the Fuel Clause costs previously only base rate recoverable. EX 58 at 28

[9] For instance, by supplying its own rail cars, FPL effectively "bought down" the cost of transporting coal to its plant site, but the rail company continued to provide the (nonutility) transportation service.

form of four later-issued orders. These orders do not change the test that she claims the Woodford project passes, as will be discussed below. Ms. Ousdahl's portrayal of Order No. 14546 and her citation to the other orders is at best incomplete and, at worst, misleading and distorts beyond recognition the very authority FPL purports to rely on.

Principally, she cites to Order No. PSC-11-0080-PAA-EI as somehow supporting her erroneous claim that the heavy editing she has done to Order No. 14546 is the correct Commission policy. Order No. 11-0080 reaches the opposite result, however, and provides no support for her reliance on (the heavily edited) Order No. 14546. In Order No. PSC-11-0080-PAA-EI, the Commission took pains to carefully inventory the circumstances that resulted in capital costs being included in the Fuel Clause. In ***rejecting*** FPL's overreaching attempt to recover a turbine upgrade through the clause, the Commission reaffirmed the provisions of Order No. 14546 and Item 10 in all respects. Notably, with regard to the third prong of the Item 10 test, the Commission stated the following while quoting Item 10 in full:

> As Order No. 14546 states, recovery may be allowed for:
>
> > Fossil fuel-related costs normally recovered through base rates but which were not recognized or anticipated in the cost levels used to determine current base rates and which, if expended, will result in fuel savings to customers. Recovery of such costs should be made on a case by case basis after Commission approval.
>
> We find that the appropriate interpretation of this section of Order No. 14546 is that capital projects eligible for cost recovery through the Fuel Clause <u>should</u> produce fuel savings based on lowering the delivered price of fossil fuel, or <u>otherwise result in burning lower price fuel</u> at the plant.

Order No. PSC-11-0080-PAA-EI at 9. (emphasis added). There are three highly significant aspects of this Order:

First, by quoting Item 10 in its entirety, the Commission reaffirms the test in its entirety and tacitly acknowledges that there are threshold determinations – prongs one and two – that projects must satisfy in order to be eligible for cost recovery under the entire Item 10 provision. This is easily apparent from the context of the order. No regulatory expert is needed to provide context or intent. The only issue in dispute in the turbine upgrade case was whether the upgrade lowered the delivered price of the fuel (coal). Base rate recoverability and exclusion from current base rates were not disputed and, thus, were not at issue. Consequently, the Commission had no reason to interpret or modify those provisions and did not do so. Prongs one and two were left undisturbed.

Second, the Commission used the phrase "should produce fuel savings." It did not use the morph that FPL and witness Ousdahl have proffered – that is, "intended to produce savings." Contrary to FPL's claims, the Commission expressed a strong desire for a high degree of certainty.

The proposal in this docket for which the contrived savings drop over 50% within six months of the filing cannot meet that high threshold. Compare EX 9, SF-8 with EX 54, BSP 369, Revised SF-8.

Third, in the alternative phrasing, the Commission said the project "should... otherwise result in burning lower price fuel . . . ." This bolsters the Commission's policy pronouncements and OPC's position that the savings must be concrete and more certain in nature and not speculative or merely "intended." The very narrow interpretational guidance given by the 2011 order provides no support to include the Woodford investment in the Fuel Clause.

It is especially disappointing that FPL seeks to create an enormous loophole by seeking to rely on an order that is a clear expression of the Commission's desire to reign in and discourage inappropriate and unintended uses of the Fuel Clause as well as FPL's historical efforts to bypass the limited the scope of Order No. 14546. In reaffirming the viability of Order No. 14546 and rejecting FPL's overreaching turbine upgrade clause recovery effort, this very same Commission cited two examples of inconsistencies – both FPL projects – that they clearly indicated were incompatible with the policy established in Order No. 14546 and are isolated to the facts and obviously not to be relied on as exceptions.[10] The Commission concluded, in light of the specific issue presented in the turbine upgrade case and the two inconsistent cases that:

> While it is true that we granted recovery of "non-fossil fuel-related" costs through the Fuel Clause in those two discreet instances, we believe that the appropriate policy ***going forward*** is to restrict capital project cost recovery through the Fuel Clause to projects that are "fossil fuel-related" ***and that lower*** the delivered price, or input price, of fossil fuel.

Order No. PSC-11-0080-PAA-EI at 10. (emphasis added).

It cannot be emphasized enough that Order No. PSC-11-0080-PAA-EI did not in any way change the test contained in Item 10 of Order No. 14546, nor did it expand the scope of Order No. 14546 – which was a stipulated order among the investor-owned utilities (IOUs), Commission staff, *and* OPC. The Commission further used the phrase "and that lower" in addressing the savings aspect of prong three. This is further evidence that the required showing to satisfy prong three is more than a forecast, projection, or estimation of customer fuel savings. FPL's misrepresentation of the order is an audacious and impermissible one. When put in the context of the turbine blade issue before this Commission just three years ago, the order can clearly be seen as more in the nature of a rebuke to FPL for misusing the uniform policy of Order No. 14546 and an effort to restrict the Fuel Clause to the intent agreed upon in 1985 by all the signatories and adopted by the Commission. FPL cannot self-anoint itself or its outside consultant to recast the Commission's established expression of policy

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[10] One instance was the security costs in the aftermath of September 11, 2001, that were allowed "under unique circumstances" and later transferred to the capacity cost recovery clause. The other instance was an FPL nuclear plant thermal power uprate at Turkey Point Units 3 and 4.

to support FPL's non-jurisdictional ventures in Oklahoma or other states.[11] Therefore, this Commission should reject FPL's new efforts to abuse the Fuel Clause by first selfishly misconstruing and reinterpreting Item 10 and then mischaracterizing Order PSC-11-0080-PAA-EI to support its brazen revision.

FPL's Request Fails the Second Prong of the Item 10 Test in Order No. 14546

In addition, FPL falls short of meeting its burden to demonstrate that the Woodford Project meets the second prong to the Item 10 test – namely that the costs are "...not recognized or anticipated in the cost levels used to determine current base rates..." The sole effort mustered by FPL to meet the second prong of this test is witness Ousdahl's irrelevant claim that "[m]oreover there was neither recognition nor anticipation of gas reserve project costs in the 2013 test year that formed the basis for FPL's current base rates." TR at 370. On its face, this 26-word statement cannot be accepted as evidence in this case. There was no test year upon which FPL's current base rates were established as the Commission approved a stipulation in Order No. PSC-13-0023-S-EI that involved a negotiated revenue requirement (or "black box settlement") that was not tied to any cost basis, test year, or minimum filing requirements ("MFRs"). It also included a four-year base rate freeze and injected two new issues not originally included with FPL's rate case, affecting the viability of the four-year stay-out term[12] (including significant amortization discretion totaling $400 million). The relevant point is that the "basis" for establishing current rates is effectively on a four-year, moving basis as FPL is allowed to amortize and/or reverse the amortizations as it sees fit to achieve a desired achieved earnings anywhere between a maximum return on equity of 11.5% and a minimum of 9.5%. Order No. PSC-13-0023-S-EI at 6, 19-21. Even more significant is the testimony of witness Forrest that the Company was "actively" looking at gas reserves projects as early as 2011,[13] which predates the filing of FPL's 2012 rate case. Furthermore, both witnesses Ousdahl and Forrest acknowledged that the asset optimization incentive mechanism approved in the 2012 rate case order

[11] Witness Deason provided testimony that is nothing more than a strained spin of the two crucial orders (Nos. 14546 and 11-0080). However, his testimony on this point should be heavily discounted, as he acknowledged that his testimony was largely just his opinion and he could not point to orders or authoritative sources to support his recasting and reinterpretation of the orders. EX 58 at 26-27. The orders speak for themselves and OPC has demonstrated that they do not support FPL's position.

[12] Order Nos. PSC-12-0529-PCO-EI and PSC-12-0617-PHO-EI further cast heavy doubt that FPL could ever meet its burden. The four-year term of the agreement contains a base rate freeze that is coupled with FPL's ability to amortize $400 million in depreciation reserves surpluses. This term of the settlement was not included in the original rate case filing and is described by the Commission in the two procedural orders as "specific issues that are part of the proposed settlement agreement, but supplemental to [the issues in the originally filed rate case]." Two of the issues referenced by those orders are relevant to FPL's claim about what was included in establishing base rates. Issues 2 and 4 were new issues that did not relate to the 2013 Test Year and involved authority to amortize up to $400 million of reserve surpluses over the four-year term of the agreement and the creation of the so-called asset optimization incentive mechanism. Order 12-0529 at 11

[13]Mr. Forrest admitted that FPL was actively looking for a gas reserves project as early as 2011. TR at 131; EX 55 at 113-14. FPL's interest was based upon an April 2011 order in Oregon for Northwest Natural. *Id.*; EX 44 (FPL's Response to Staff Int. No. 87)

would or could have a role in the procurement of gas from the proposed gas reserves project(s). TR at 292-294; EX 56 at 46

Witness Ousdahl also admitted that she could not testify whether others in FPL or NextEra were not strategizing or anticipating a gas reserves venture into base rates prior to the filing of the settlement in the 2012 rate case. She could only affirmatively give her opinion that ***the filed MFRs*** did not include a gas reserves estimate. EX 56 at 44-45. However, this is beside the point as the final negotiation of the revenue requirement forming the basis for FPL's current base rates was completed on December 13, 2012; the revised "black box" settlement was not tied to the company's rate case MFRs. Order No. PSC-13-0023-S-EI at 2; TR at 421-26. The only effort to overcome this deficiency in her prefiled direct testimony was Ousdahl's tepid observation at hearing that "I know there were no gas reserve estimates in our filing."[14] TR at 426

There are two problems with FPL's attempt to meet prong two of the test. The MFRs did not, as a matter of law, form the basis for the current base rates. A review of Order No. PSC-13-0023-S-EI indicates that there is nothing in the Order or the settlement that states that the revenue requirement is based on anything other than negotiation. Tellingly, Ousdahl conceded that this was the case (TR at 424) and confirmed under cross-examination: (a) that the negotiated revenue requirement was allocated to customers on the MFR billing determinants for allocating the revenue requirement (TR at 422-423; Order No. 13-0023 at 3,12); (b) that the Canaveral Modernization Project (a generation base rate adjustment or "GBRA") revenue requirement was expressly based on the filed petition and the MFRs (TR at 423-25; Order No. PSC-13-0023-S-EI at 4, 6); and (c) that previously stipulated issues [contained in the first prehearing order dated August 12, 2012] were superseded by the settlement. TR at 424; Order No. PSC-13-0023-S-EI at 8. All of these express terms conclusively demonstrate – by contrast to what is not mentioned in the order with respect to MFRs forming a basis for the negotiated revenue requirement – that there is no "test year" or "MFRs" upon which current base rates were determined. Thus, there is no credible evidence that can

[14] Order No. PSC-13-0023-S-EI speaks for itself and is completely silent on what went into the settlement revenue requirement. In fact, Order PSC-12-0617-PHO-EI contains the following statement by FPL regarding the nature of the settlement:

> As with all negotiated solutions, the Proposed Settlement Agreement represents a series of interrelated compromises reached by independent parties with varied interests, which differ from their litigation positions. Settlement negotiations also offer an opportunity to innovate. The Proposed Settlement Agreement is not an exception. While none of the terms breaks new substantive ground, the parties resourcefully assembled various elements in a way that strikes a fair balance. And, as with any settlement, the merits of the Proposed Settlement Agreement should be considered as a whole, rather than focusing on any individual provision or subset of provisions in isolation.

FPL's own words at the time the Commission considered and approved the 2012 rate case settlement indicate that there was a negotiated number and no issue was identified as "in or out." The only "term" related to base rates was a single number: $378 million (later re-negotiated downward to $350 million on December 13, 2012). As a stand-alone number and a "term" of the agreement, that number does not break new substantive ground and FPL was careful not to state what went into its formulation other than that it was part of "a series of interrelated compromises."

legally support a finding that FPL made even a rudimentary showing that the second prong of the Item 10 test ("costs. . . which were not recognized or anticipated in the cost levels used to determine current base rates") is met.

The significance of the amortization authorization is that its availability and flexibility mean that FPL has wider latitude during the four-year base rate freeze to effectively include in rates projects not originally included in the 2012 rate case MFRs as opposed to a situation where a static test year and the accompanying MFRs would be used to establish rates. Additionally, in the instant case, FPL has indicated a linkage between the gas reserves project(s) and the asset optimization incentive mechanism which was also a new or incremental issue that was added after the MFR-based filing was made and upon which an additional hearing was required in the 120015 rate case. TR at 292-94; EX 56 at 46. Admittedly, the existence of these facts relating to the new issues that were included in the settlement and the order approving it do not prove conclusively that FPL did recognize or anticipate that the gas reserves project is affirmatively "baked into" current base rates. The new settlement issues completely dissolve the notion that current base rates are based on a single test year (of 2013) or on whatever FPL initially included for cost recovery in that filing. Given witness Forrest's admission that FPL was "actively" pursuing a gas reserve project as early as April 2011 – or nearly one year before the filing of the 2012 rate case on March 17, 2012 – and the insertion of the two post-filing amortization and asset optimization issues, FPL's burden to prove compliance with the second prong is greatly heightened and witness Ousdahl's paltry and erroneous disavowal falls woefully short of meeting that burden.

Ultimately, OPC does not have to prove that a gas reserves project was included in current base rates. Rather, <u>FPL</u> has the burden to prove that it is not "recognized or anticipated in current base rates." As a matter of law, FPL's sole basis for meeting this prong of the test fails because the basis for establishing rates was not the test year from the filed MFRs. What witness Ousdahl claims FPL did or did not include in the test year costs is completely irrelevant to what was recognized or anticipated in current base rates, and the 26-word statement offered in her direct testimony is factually incorrect, constituting the sole effort mustered by FPL to satisfied the second prong of this test. TR at 370.

FPL's Request Fails the Third Prong – "Fossil fuel-related costs . . . which, if expended, will result in fuel savings to customers"

Having failed the first two prongs of the mandatory three-prong eligibility test (which are the three prongs witness Deason acknowledges must be met), the passage or failure of the third prong is a moot point. However, needless to say, FPL flunks that test as well. The third prong requires FPL to demonstrate that "[Such costs] ... if expended, will result in fuel savings to customers." In an attempt to meet this test, witness Ousdahl reinterprets the plain language of Order No. 14546 to fit FPL's speculative savings proposition. She transforms the phrase "will result in fuel savings to customers" into the phrase "are intended to lower the delivered price of fuel." TR 369. When challenged about her blatant mischaracterization of Order No. 14546, witness Ousdahl claimed that the re-characterization was merely her "interpretation" of the order. TR at 419

In applying the third prong of the test in a straightforward manner, OPC witnesses Ramas and Lawton demonstrate that the supposed projected savings in the Woodford Project are too speculative and render it unreliable and insufficient to meet the standard of Item 10 ("will result in fuel savings to customers"). TR at 562, 588, 689-711, 745. Part of Ms. Ousdahl's re-characterization is grounded in her claim that the Commission has allowed companies to meet the test where they merely "project a savings to customers" in fuel costs. TR at 418-419. There is no basis (legal or otherwise) for this claim. At one point, witness Ousdahl describes FPL's purported savings forecasts as "estimated to result in savings to customers" (TR at 370) and she apparently equates "estimated" with "will result."

Witness Deason attempts to bolster this attempt to redefine the third prong and to equate "estimated" with "will result" by pointing to the Scherer rail car decision in Order No. PSC-95-1089-FOF-EI.[15] Mr. Deason seeks in vain to make that order conform the Woodford Project to the third prong by pointing, not to the actual rail car decision but to Order No. PSC-11-0080-PAA-EI, which discussed the rail car decision. TR at 883-884. In that case (as noted elsewhere herein), in a stinging rebuke to FPL for seeking to pass an unqualified turbine project through the Fuel Clause, the Commission inventoried the decisions allowing capital investments to be recovered therein. One of the decisions inventoried was the 1995 Scherer rail car decision. While witness Deason correctly notes that the Commission allowed the rail car assets to be recovered pursuant to the Item 10 test, he uses some grammatical sleight of hand to convert a simple retrospective recounting of what happened – that the buy-versus-lease savings had been estimated – into some sort of substantive prospective ruling by the Commission that fuel savings comparisons would thereafter be "estimated." This simply did not happen.

The cited language was a mere factual recitation and one that actually supports OPC's true reading of the third prong requiring savings to be more certain and less speculative. Mr. Deason also did not mention that review of the underlying order indicates that the issue was stipulated, and he acknowledged under cross-examination that the "estimate" that had occurred was not one that involved estimating fuel prices as is the problem FPL faces in selling the Woodford proposal to the Commission. TR at 916-17.[16]

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[15] While witness Ousdahl cites to the same Scherer rail car decision (TR at 369), she provides no explication as to how it supports the Company's request.

[16] Under re-direct, when asked to provide similarities between the stipulated recovery of the rail cars and the proposed Woodford Project investment, Mr. Deason made an unsubstantiated claim that "the investment in the rail cars, that was a cost, an investment that had not traditionally been included in base rates, so there's that similarity." TR at 991. Yet, Order No. PSC-95-1089-FOF-EI makes no mention that the Commission made a finding about whether the rail cars met the first prong of the eligibility test (i.e., being ***of the type*** normally recovered in base rates) in Item 10 of Order No. 14546. The matter was stipulated as noted in Order No. 95-1089 at the outset of the discussion on the rail cars. Mr. Deason also claimed that "[i]t was an investment made that showed net savings for customers, projected net savings for customers, similar to the project that's in front of the Commission presently."

Further Evidence that FPL's Petition Violates Order No. 14546 and Falls Outside the Commission's Jurisdiction

Since FPL and witness Ousdahl ignored the existence of the first prong of the Item 10 test, OPC witness Ramas addressed both the existence of the first prong and the applicability of it to the facts of the FPL petition. TR at 561-62, 568-75. Ms. Ramas points out that Commission Rule 25-6.014, F.A.C., mandates that all investor-owned electric utilities "shall" maintain its accounts and records in conformity with the Uniform System of Accounts (USOA) [as required by the Federal Energy Regulatory Commission (FERC) for electric utilities]; however, FPL will not record this project in accordance with these rules. TR at 570-71. Ms. Ramas correctly recognizes that this is evidence that even FPL views the Woodford Project as "inconsistent with regulated monopoly operations for which the FERC USOA would apply." TR at 571

She observes that FPL intends to use for the activities in Oklahoma a form of accounting that is entirely unknown to the Commission's regulation of the electric (or gas) industry. Instead of using the form of accounting and chart of accounts mandated by Commission Rule 25-6.014, F.A.C., FPL intends to use Accounting Standard Codification (ASC) 932 – Accounting for Oil and Gas Exploration. Witness Ramas notes that this departure from Commission rules is an indicator that this investment is outside the Commission's jurisdiction and axiomatically does not meet the test established in prong one of Item 10. TR at 562, 572. Witness Ousdahl admits this as well. In her deposition, she stated: "The rules don't contemplate – clearly the rules don't contemplate an electric utility investing in a gas development production. That's clear. . . ." EX 56 at 62

Witness Ramas also demonstrates that the depletion accounting that FPL intends to use is not contemplated by the Commission rules for electric utilities.[17] Ms. Ousdahl also acknowledged as much. EX 56 at 94-95

FPL intends to utilize ASC 932, which includes something called "successful efforts" accounting to record the Woodford transaction on the books of what it calls a "fully regulated subsidiary" using the accounting conventions and chart of accounts common to and standard in the wholly unregulated and competitive oil and gas exploration and production industry (TR at 86, 363) because its non-regulated NextEra cousins that explore for oil and gas have already chosen to use this system of accounts. TR at 572. This further supports a lack of Commission jurisdiction over the activities in Oklahoma.

If this was not enough evidence of an absence of even rudimentary compliance with the first prong of the Item 10 test ("Fossil fuel-related costs normally recovered through base rates. . . "), FPL

TR at 991. Again, the recovery was stipulated (and thus compliance with Item 10 must be presumed); furthermore, the projection of savings was not based on forecasting the price of the fuel commodity. TR at 916-917

[17] The Commission's rules for gas utilities likewise do not contemplate the use of depletion accounting in lieu of depreciation accounting. See Rule 25-7.014(3), F.A.C.

intends to use the FERC USOA for Natural ***Gas*** utilities[18] as a way of "translating" the chart of accounts used in a competitive industry to a system of accounts that is mandated for regulated gas companies and not authorized for electric companies. And then to further extend the boundaries beyond standard accounting procedures, FPL states its intent to use what it calls a "consolidated" USOA for Natural Gas Companies and then to effectuate that "translation" using only the selected instructions that FPL sees fit to use. EX 56 at 69-70, 72-74

After travelling this muddled path of accounting translations to get to the unauthorized USOA for Natural Gas Companies, FPL then proposes to unilaterally inject the gas reserves project <u>into its rate base</u> by recording the investment in the subsidiary in Accounts 123.1 and 145. TR at 451; EX 56 at 51-53. Once this is done, FPL asserts that the investment in the Woodford Project is presumptively in rate base. EX 56 at 53. Finally, having navigated this byzantine maze of Chart of Accounts, FPL indicates they will then take the final step of removing it from rate base and recording it as an investment for Fuel Clause purposes for recovery from customers and receipt of its guaranteed 10.5% ROE. TR at 373. The point here is that the accounting (including depreciation/depletion) treatment proposed by FPL is indirect but compelling evidence that the transactions lie far outside of the Commission's jurisdiction as evidenced by the rules that the agency has developed over decades to monitor, audit, and fully regulate electric utilities and their provision of electric service to the public.

Ironically, aside from demonstrating that the Woodford investment is extra-jurisdictional, FPL's proposed ultimate recording of those investments on the books of FPL in rate base is compelling evidence that FPL ***believes*** that the cost is of the type that is presumptively includable in rate base and, thus, in ***base rates***. While OPC has shown that the overwhelming weight of the evidence demonstrates that the Woodford investment flunks the first prong of the Item 10 test ("costs normally recovered through base rates"), FPL's intent to ultimately record its investment in rate base is significant in demonstrating FPL's belief that it meets the test of Item 10, which simultaneously causes it to fail the test of Paragraph 6 of Order No. PSC-13-0023-S-EI. The analysis supporting why the express language of Order No. PSC-13-0023-S-EI bars FPL's request is discussed *infra* under Issue 6.

Ultimately, however, the Woodford investment fails the tests(s) for cost recovery on several levels: (1) the Commission's lack of subject matter jurisdiction; (2) the investment fails to meet the first prong of the Item 10 test (among other prongs); and (3) it is disqualified from base rate and Fuel Clause recovery under the settlement approved in Order No. PSC-13-0023-S-EI.

For these reasons, FPL's Petition must be denied fundamentally because the Commission does not have jurisdiction over a competitive investment in gas reserves, which are not part of

[18] Commission Rule 25-7.014, F.A.C., mandates that a natural gas utility subject to its jurisdiction shall maintain its accounts and records in conformity with the USOA as required by FERC for natural gas utilities. Witness Ousdahl testified that FPL is not certificated as a natural gas utility and is not authorized to sell natural gas to the public by this Commission, the FERC, or within the franchised territories in Florida. TR at 391-392; EX 56 at 59

owning, maintaining, or operating an electric generation, transmission, or distribution system. Furthermore, the Petition fails all of the tests established by the Commission for determining eligibility for recovering costs through the Fuel Clause. Finally, FPL is prohibited by the 2012 Settlement it entered into from recovering the Woodford investment through the Fuel Clause, as further demonstrated in Issue 6.

FPL's Fugacious Woodford Project Savings

Risk Analysis

The Woodford Project, seeking to recover gas reserves investment costs through the Fuel Clause, is a first of its kind before this Commission. However, similar type affiliated coal mining operations were acknowledged to be non-jurisdictional by this Commission. See previous section of Brief. The record contains references to only four orders from other jurisdictions allowing gas reserves in rate base; however, three of those orders involve gas local distribution companies ("LDC's") (TR at 131-132) and, in the fourth, the Montana PSC limited the inclusion of gas reserves to natural gas utilities' rate base and limited the use of the natural gas to natural gas customers only. EX 60 at 1, 13; TR at 134-135. FPL alleges the Woodford Project is "effectively de-risked" (TR at 268-269); yet, FPL then acknowledges risks such as variations in production, environmental risks (including contamination and moratoria), geologic risks, drilling risks, and operating cost risks.19 Contrary to FPL's assertion that the Woodford Project is de-risked, many risks actually do exist, and the Woodford Project proposes to place these risks squarely on the shoulders of FPL's ratepayers.

As discussed in more detail below, FPL witness Dr. Tim Taylor, who is employed by NextEra, testified that production levels and operating costs are examined within a range of values. TR at 856, 859-860. Witness Forrest admitted that production costs are not fixed, production levels are not fixed, and customer savings are not fixed. TR at 159-161. In fact, of all the inputs regarding the Woodford Project, the only item that the record supports as being fixed is FPL's ability to earn an authorized return of 10.5% on its investment. TR at 161, 728

Under the Fuel Clause as it currently operates, FPL's customers feel the mitigated effects of market price fluctuation through an annual adjustment (unless a mid-year correction occurs) to the fuel factors. TR at 788. As it stands today, if one of FPL's fuel suppliers does not deliver fuel in accordance with an existing contract, the possible harm to FPL's customers is that FPL may have to secure higher-priced fuel on the market to replace the undelivered fuel, the cost of which would be passed through to ratepayers. TR at 165-166; EX 55 at 33. Under the Woodford Project, FPL's customers will pay to have a well drilled, and if that well does not produce as expected or if the well is dry, then FPL's customers will also have to pay for FPL to procure natural gas at market prices to replace the gas that was anticipated from the well but not obtained. TR at 165-166. Although FPL alleges its customers face risks in the current natural gas market embodied in varying prices (EX 55 at 36), FPL's customers do not currently face the risk of paying twice for gas. EX 55 at 33.

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[19] *See* TR 139-145, 714-719. *See also* EX 55 at 11-15, and EX 57 at 34-36, and 77-80 for discussion regarding types of risk identified by witnesses Forrest and Taylor, respectively.

As discussed during the hearing, the Drilling and Development Agreement ("DDA", which is listed as EX 5) contains many provisions that create undue risk for FPL's customers. Witness Ousdahl contends this Commission will have access to any information FPL has in its possession when reviewing the prudence of Woodford Project costs. TR at 434-438. However, witness Forrest testified that, although there may be a free flow of information between PetroQuest and FPL, the terms contained in section 4.2(a)(viii) of the DDA control the flow of information (EX 5 at 17), and witness Forrest also testified that it is not unusual to have to place "request[s] for information." TR at 147-148. This Commission should not minimize its ability to conduct any prudence review, which places further undue economic risk on FPL's customers, by relying on a regulated entity's request for information from an unregulated third party.

Other provisions, such as sections 4.4(a)(i) and 4.4(d) of the DDA, shift risk to FPL and, correspondingly, to FPL's customers. EX 5 at 18-19; TR at 148-149. Witness Forrest attempted to dismiss provisions such as these by stating "the operating agreement would cover that," referencing default provisions in the operating agreement. TR at 148-149. Yet, witness Forrest acknowledged that the DDA trumps the operating agreement (TR at 154), which causes ratepayer protections to evaporate, much like FPL's projected customer savings. Witness Forrest acknowledged that the incentive to "consent" to the drilling to the initial well for a particular well unit in the DDA will be ignored by FPL (TR 152-153), and such non-consent of the first well-per-well unit could result in potential loss of mineral interest.20

Finally, the record in this proceeding clearly indicates that FPL's customers will move from bearing variability in the market price of natural gas arena to an arena in which FPL's customers bear the variability in the exploration, drilling, and production of natural gas. Currently, FPL's customers pay a market price for natural gas that includes the embedded costs for risks associated with exploration, drilling, production, and delivery. However, under the Woodford Project, FPL's customers will bear the direct variability of production levels, operating costs, and expenses of writing off wells,[21] as well as the risks associated with natural gas exploration and production. TR at 680

Four Key Flawed Assumptions Necessary for Customer Fuel Savings

The Proposed Woodford Project relies on speculation to offer hypothetical customer savings. As of June 2014, FPL projected customer savings of $106.9 million, which were predicated on the following assumptions: (1) all of the proposed wells are drilled successfully; (2) all of the wells produce within a plus or minus 10% range; (3) all other owners non-consent; and (4) FPL's natural

[20] On TR 152-153, witness Forrest discusses a provision of the DDA wherein if FPL chooses to non-consent on the first well of a drilling unit, then FPL loses its interest in all wells of that unit. Although the term encourages FPL to consent to ensure its interest in the remaining wells of the unit, witness Forrest testified that FPL will look at all well consent/non-consent decisions in the same manner, essentially ignoring this term of the DDA and the possible loss of mineral rights it entails.

[21] TR 444-445 regarding the accounting for expensed wells.

gas price forecast is correct. TR at 177. A review of the record shows that FPL's assumptions are not only speculative, but downright flawed.

First, PetroQuest, FPL's second attempt at bringing a fracking partner before this Commission (TR at 383-385), is 60% behind schedule on drilling rig number 1. TR at 187; EX 5 at 60. PetroQuest is also 100% behind schedule on drilling rig number 2, because PetroQuest cannot obtain another rig. TR at 187-188; EX 5 at 61. Witness Taylor further acknowledged that, although he calls PetroQuest an industry leader in the Arkoma Woodford region, he did not analyze the performance of any other companies in the Arkoma Woodford region. TR at 860. A sample size of one does not an industry leader make. PetroQuest's current inability to complete even half of the wells on time severely undermines FPL's assertion that all wells will be successfully drilled.

Second, FPL's projected savings rely on a sensitivity analysis using a plus or minus 10% production level. TR at 116-117. Witness Forrest clearly states FPL is relying on the expertise of Dr. Taylor regarding production levels (TR at 117); however, FPL apparently did not rely on Dr. Taylor's expertise when filing this petition before the Commission. Dr. Taylor's direct testimony filed with FPL's Petition does not allege a plus or minus 10% variance level. Witness Forrest also confirmed that Dr. Taylor did not allege a 10% variance level in his direct testimony. Further, FPL's use of a 10% variance for production levels to calculate savings was information that was uncovered in discovery (EX 55 at 69), which was submitted to staff one month after the submission of the Petition. EX 44, Interrog. No. 90, BSP 88

Although witness Forrest testified he relies on Dr. Taylor's expertise regarding production levels (TR at 1040-1041), the record proves the opposite. Witness Forrest claims that 10% is an industry standard (TR at 117); yet, Dr. Taylor clearly states there is no industry standard for production levels. EX 44, Interrog. No. 90, BSP 88; EX 57 at 17-18. And, not only did Dr. Taylor not allege a 10% production variation in his direct testimony, regarding output and reserve levels, he also stated that he did "not expect any such variances to be significant." TR at 845. Dr. Taylor further testified that, in this context, significant is a variance of "ten to 20 percent in the aggregate." TR at 856. In addition, utilizing a production variance of plus or minus 20%, as testified to by Dr. Taylor, this 20% variance increases the number of nine-box scenarios in which FPL's customers lose money to 1 in 3. EX 64, Att. 3.

FPL attempts to assuage any of the Commission's concerns on this issue by stating that Forrest A. Garb and Associates performed an "independent, confirmatory analysis." TR at 112; EXH 55, at 92-93. However, FPL acknowledges that Forrest A. Garb only reviewed information provided by PetroQuest, USG, FPL, and any publically available information. TR at 163-65. The Forrest A. Garb report clearly delineates the assumptions used in its verification of Dr. Taylor's projections.22 Essentially, Forrest A. Garb checked Dr. Taylor's arithmetic (TR at 769) without

[22] Ex 30 at 3, 26, ¶ 5 lists clauses about the assumptions made in Forrest A. Garb's analysis. Witness Forrest (EX 55 at 94-95) and witness Taylor (EX 57 at 26-27) both verified that the assumptions listed therein applied in the analysis.

independently challenging or verifying any of the underlying assumptions. Perhaps most tellingly, Dr. Taylor acknowledged that this Commission does not have a requirement for a third-party analysis (TR at 518) and, as he testified, one would not hire a third-party to perform an analysis "if you trusted your internal analysis and you didn't have a requirement to go outside for a third party analysis." (EX 57, BSP 933)

Third, FPL's total estimated fuel savings is contingent on all other owners non-consenting to drill wells, which is a variable totally outside of FPL's control. If other owners consent to drill, that changes the economics of the project. In this scenario, FPL's capital expenditures would be reduced to $125 million,23 and customer savings could be reduced by approximately 40%. EX 55 at 74. However, if all other owners non-consent because the economics of producing gas from the Woodford Project are lacking (i.e., the cost of production exceeds market prices), then it calls into question whether it is reasonable or prudent for FPL to consent to additional wells in the Woodford Project.

Fourth, FPL acknowledges that the primary driver for projected customer savings is FPL's forecasts for natural gas prices. EX 55 at 77-78. FPL's Petition alleged "approximately $107 million" in expected customer savings. PET at 7, ¶ 12. FPL based the Petition's fugacious customer savings on a natural gas price forecast from October 2013. TR at 173. However, FPL developed a new natural gas price forecast in July 2014, which showed that projected customer savings dropped to $51.9 million. EX 63. Witness Forrest argues that the Commission should view the $51.9 million as being within the original bands of FPL's base fuel projected savings (TR at 175-177); thus implying that the Commission should still consider FPL's original projection of $107 million in savings to be valid. TR at 1041. Yet, in contradiction to his own testimony, witness Forrest also testified that the Commission should rely on FPL's natural gas price forecasts prepared in support of filings before the Commission, and that the July 2014, natural gas price forecast was prepared to support FPL's 2015 fuel filings before the Commission. TR at 1041. Witness Forrest further acknowledged that it would be appropriate for the Commission to consider the matrix (listed as EX 64, Att. 2) using FPL's July 2014 price forecasts. EX 55 at 80-81. Therefore, according to witness Forrest, when considering FPL's hypotheticals for customer savings, the Commission should consider the most recent forecasts presented by FPL, showing that customers experience losses in 1 out of 3 scenarios and projected savings are only half of what FPL predicted just six short months ago.24

These key assumptions place FPL's customers in a position never before envisioned by this Commission. Although witness Deason suggested the Commission could "vertically integrate the utility one more step on that ladder to go start locking down some gas reserves" (TR at 968-969) by

[23] *See* FPL's Errata Sheet filed November 5, 2014, incorporated in record TR at 77.
[24] *See* EX 64, Att. 2 and 3 using July 2014 Fuel Curve. In both the 10% and 20% production scenarios, customers experiences losses in 1 out of 3 scenarios. As discussed above, FPL relied on Dr. Taylor's expertise in determining production levels, and Dr. Taylor predicts a variation range of 10% to 20% in the aggregate, which supports the use of Att. 3 in the Commission's analysis of the Woodford Project.

somehow expanding the Commission's jurisdiction through public interest determinations, notwithstanding that there is absolutely no statutory authority to authorize electric utility monopolies to vertically integrate into the competitive natural gas exploration, drilling, and production industry, the speculation required to make a determination of prudence or to find the Woodford Project in the public interest is far too great. The testimony indicates FPL is either misunderstanding or not listening to the advice of its NextEra expert. The record, as evidenced by Revised Exhibit SF-8, indicates that half of the projected customer savings can quickly evaporate on a gas reserves project that could last 50 years on the vagaries of a fuel price forecast – which is just one of a multitude of variables that FPL cannot control. Approval of the Woodford Project will subject FPL's customers to the risks, assumptions, and speculation outlined above while fixing FPL's shareholders return or guaranteed profit at 10.5% on every dollar invested in gas reserves projects. Therefore, based solely on the speculative and uncertain nature of FPL's projected cost savings, production costs, and future gas market prices, FPL's request should be denied.

FPL's Gas Reserves Investments Violate the Commission's Hedging Policy and Guidelines

In addition to promising tepid, and speculative, customer fuel savings which FPL cannot guarantee, FPL states its proposal is a hedge against fuel volatility. PET at 6, ¶ 11. In its direct case, FPL stated that PetroQuest's Woodford Project in particular and speculative gas reserves investments in general would be, in effect, a longer-term physical hedge, serving as a "low-cost alternative to financial hedges." TR at 92, 96, 115. FPL argued it would operate as a long-term physical hedge against market-price volatility for multiple decades. PET at 6, ¶ 11, 21, 41. In rebuttal, FPL strongly espoused that its gas reserves proposal was consistent with the Commission's hedging policy as a hedge against volatility in natural gas market prices. TR at 887-88, 891, 901-03, 1001-03. FPL witness Deason testified that shareholders should not bear the risk of gas reserves hedges that exceed volatile market prices. TR 887-888. Mr. Deason claimed that "the gas reserves project is to mitigate risks through hedging for the benefit of customers" and provide "hedging benefits." TR at 894, 903, 909, 926. Witness Deason later testified that there would <u>hopefully</u> be hedging benefits of more stable gas prices associated with FPL's proposal. TR 967, line 20. Mr. Deason also testified that gas prices "are probably less volatile now than they have been in the recent past, but there have been instances of volatility.... Right now we may be in a little bit of a lull with that volatility...." TR 977-978

FPL witness Forrest stated "customers will benefit from the Woodford Project because it is a long-term physical hedge against highly volatile gas prices." TR 1003. Mr. Forrest later testified that FPL's proposal was a "form of hedging." TR 1021. He disagreed with Mr. Lawton's "very narrow definition of what constitutes hedging." TR 1036. However, witness Forrest testified that FPL can provide no assurances that the projected production costs for the Woodford Project would be less than the current market price, or that any fuel savings would materialize. TR 1070-71. He further testified that production costs were "not fixed in the sense that a [hedging] swap is fixed" and that nothing under FPL's proposed gas reserves Guidelines fixes the costs for those future investments. EX 55 at 21. FPL is clearly mistaken in its assertions that its proposed gas reserves investments would be a long-term physical hedge, that its proposal is consistent with the Commission's hedging policy and fuel hedging guidelines, and that the proposal will mitigate fuel price volatility for the benefit of the customers. Gas reserves investments are not long-term physical hedges because they cannot fix any costs, they cannot guarantee customer fuel savings, they cannot adequately mitigate fuel price volatility, and they cannot protect against market swings to the benefit of the customers. TR 684-685

FPL's proposal is qualitatively and quantitatively different from the physical and financial fuel hedging program and hedging guidelines approved by the Commission starting with its approval of a hedging settlement between the four large IOUs and Intervenor parties in 2002, and its later clarification and approval of hedging guidelines in 2008. See Order Nos. PSC-02-1484-FOF-EI, issued October 30, 2002, in Docket No. 011605-EI ("2002 Hedging Order"); Order No. PSC-08-0667-PAA-EI, issued October 8, 2008, in Docket No. 080001-EI ("Hedging Guidelines Order").

In 2002, the Commission approved a settlement between the four generating IOUs, OPC, and the Florida Industrial Power Users Group ("FIPUG") related to IOU fuel procurement and hedging practices. See Order No. PSC-02-1484-FOF-EI, issued October 30, 2002, in Docket No. 011605-EI ("2002 Hedging Order"). However, the 2002 Hedging Order failed to address the issue of "regulatory risk" and how to mitigate that to the IOUs' satisfaction. Regulatory risk is the perceived risk that the regulator may determine some or all of the costs were unreasonable or imprudently incurred and, thus, could disallow some or all of those costs.

Following the 2007 Fuel Clause proceeding, the Commission undertook two comprehensive audits of the IOUs' fuel hedging programs and practices. Order No. PSC-08-0667-PAA-EI, issued October 8, 2008, in Docket No. 080001-EI ("Hedging Guidelines Order"). During the 2008 Fuel Clause cycle, FPL requested approval of fuel hedging guidelines. Hedging Guidelines Order at 3. These guidelines were a "response to the asymmetric reactions of certain stakeholders to gains and losses" associated with FPL's hedging activities, and were FPL's attempt to address perceived regulatory risk. Id. at 3

Black's Law, 7th Edition, defines "hedge" as "to make advance arrangements to safeguard oneself from loss on an investment, speculation, or bet, as when a buyer of commodities insures against unfavorable price changes by buying in advance at a fixed rate for later delivery." OPC witness Lawton defined a physical hedge as "a bilateral contract for gas at a fixed price" but without the protections of a fixed price hedge. TR 685. FPL's fuel hedging guidelines, approved and adopted by the Commission, define "hedging activities" in pertinent part: ". . . natural gas and fuel oil <u>fixed price</u> financial or physical transactions; instruments include <u>fixed price</u> swaps, options, etc. . . ." Id. at 15 (emphasis added). The approved hedging guidelines set forth seven "guiding principles that the Commission recognizes as appropriate and will follow in reviewing [hedging/risk management] Plans and an IOU's hedging actions. . . and the terms of an approved Plan <u>will control for the</u>

purposes of reviewing hedging actions. . . ." Id. at 16-17 (emphasis added). FPL's fuel hedging guidelines limited the scope of the Commission's ability to review the prudence of hedging practices and risk management plans to these guiding principles. Id.

The guiding principles included the following statements about hedging: ". . . the purpose of hedging is to reduce the impact of volatility in the fuel adjustment charges paid by an IOU's customers. . ."; ". . . a well-managed hedging program does not involve speculating. . ."; hedging's ". . . primary purpose is not to reduce an IOU's fuel costs paid over time, but rather to reduce the variability or volatility in fuel costs paid by customers over time. . . ."; ". . . The Commission does not expect an IOU to predict or speculate on whether markets [prices] will ultimately rise or fall. . . ."; ". . . market prices and forecasts of market prices have experienced significant volatility and are expected to be highly volatile and . . . an IOU will [not] try to 'outguess the market' in choosing the specific timing for effecting hedges or the percentage or volume of fuel hedged." Id. at 16 (emphasis added). This partial list of "guiding principles" is illustrative that market prices can be highly volatile, that IOUs were not expected to speculate when hedging, and that they were not expected to accurately predict or forecast the future market prices of fuel. Under the hedging guidelines, IOUs would not try to "outguess the market."

However, FPL's gas reserves investment proposal runs counter to these and the other guiding principles which the Commission and the IOUs are supposed to follow. One of the key guiding principles was to remove prediction and speculation from the IOUs' hedging/risk management plans. In the Woodford Project, FPL is attempting to forecast the market price of gas for the next 50 years, and is attempting to "outguess the market" by speculating that FPL can obtain substantial volumes of natural gas at the wellhead at or below market prices. But, these are activities that the Commission's fuel hedging guidelines expressly prohibit.

Moreover, FPL's Woodford Project is not like a physical hedge because it violates the definition of "hedging activities," which FPL crafted. "Hedging activities" are ". . . fixed price financial or physical transactions; instruments include fixed price swaps, options, etc. . . ." (emphasis added). There is nothing fixed about FPL's Woodford Project. FPL projects possible customer fuel savings; projects the cost of production will be lower than FPL's forecasted market price for natural gas for the next 50 years; and projects/estimates the volumes of gas it projects to obtain from the Woodford Project. Therefore, by FPL's own definition of "hedging activities," FPL's Woodford Project simply cannot be a physical hedge.

With financial hedging, (1) there is a limited number of credit-worthy "hedge" partners; (2) costs and quantities of gas are fixed; (3) remedies are defined if there is a default by a counterparty; and (4) there is no possibility of paying twice for gas. Unlike financial hedging, gas reserves investment activities have multiple variables outside of FPL's control. A few of these variables include, but are not limited to, multitudes of potential gas reserves partners with varying degrees of credit-worthiness; the number of different shale plays with differing physical characteristics; the risk of increasing production costs; the risk of a decreasing market price for gas; the risk of dry wells; etc.

Each variable outside of FPL's control leads to a nearly unlimited number of factors that cannot be fixed or hedged by FPL. As a result, there is a distinct possibility that customers could either (1) pay more than the market price for gas over the life of the project or (2) pay twice for natural gas if gas reserve investments do not produce the volume of gas required.

According to the 2002 and 2008 fuel hedging orders, reducing the volatility of the market price of fuel is the main reason to enter into financial or physical fixed price hedging contracts. FPL cannot guarantee that its gas reserves investments will reduce fuel price volatility in a manner which will meaningfully benefit its customers. FPL's customers bear the risk that the production cost of Woodford Project gas could exceed the market price for gas in each year of the expected 50-year life of the project, thus resulting in higher than market prices being paid by customers. However, overpaying for natural gas for the next 50 years is not a hedge against fuel price volatility or a customer benefit. In addition, over this same 50-year period, FPL's shareholders will receive a guaranteed, trued-up return of 10.5% on this investment regardless of which way the market moves on the price of natural gas.

Fuel Price Volatility Mitigated by the Annual Fuel Clause

While FPL states reducing fuel price volatility is one of the projected outcomes from its proposed gas reserves investments (TR 1010), it is undisputed that the Commission has already meaningfully reduced the market price volatility experienced by utility customers through judicious reforms to the Fuel Clause by shifting from monthly to semi-annual and then to annual hearings to reset the fuel factor. When the Commission shifted to annual fuel adjustment hearings, the Commission found in part that "an annual factor <u>will</u> provide customers with more certain and stable prices... industrial and commercial customers prefer more stable electricity prices... and residential customers would prefer the simplicity of one fuel factor for an entire year." Order No. PSC-98-0691-FOF-PU, issued May 19, 1998, in Docket No. 980269-PU. (emphasis added). Therefore, unlike FPL's gas reserves investment proposal, the Commission's shift to an annual hearing to reset the fuel factor has effectively mitigated the fuel price volatility experienced by utility customers, and has provided cost-certainty to customers at no additional costs or risks to customers. [25]

Finally, by asking for presumptive recovery of all its Woodford Project costs, FPL is attempting to fully mitigate its "regulatory risk" (in this case, the possible disallowance of imprudently incurred gas reserves investment costs) at the expense of its customers by seeking front-loaded presumptive prudence review of all its projected Woodford Project costs, and limiting the Commission's back-end prudence review to whether or not FPL's request for the recovery of Woodford Project costs simply matches the invoices paid by FPL to its gas exploration, drilling, and production partners. By limiting the Commission's regulatory prudence review, FPL is effectively

[25] For FPL, the residential customer fuel factor for the first 1,000 kWh peaked at 6.413 cents/kWh in the periods January-May 2009 and January-May 2010, and has steadily declined from that peak in 2010 down to 2.947 cents/kWh; thereby, demonstrating that volatility in the cost of fuel <u>as experienced by customers</u> has decreased while the fuel factor has trended downwards, benefiting FPL's customers.

mitigating its regulatory risk, and providing fixed 10.5% returns (guaranteed profits) to FPL's shareholders on all its costs associated with gas reserves investments.

<u>ISSUE 2</u>: If the Commission answers Issue 1 in the negative, what standard should the Commission apply to a request by FPL to recover the price that FPL pays to its subsidiary/affiliate for gas obtained through the joint venture with PetroQuest?

If the Commission denies FPL's Petition and answers Issue 1 in the negative, consistent with the Commission's prior findings related to the acquisition from affiliated entities of fossil fuels for which a competitive market exists, the Commission should make it abundantly clear in this case that if FPL purchases gas from the proposed joint venture between PetroQuest and FPL's yet-unnamed subsidiary (or even if it directly enters into the joint venture with PetroQuest), and from other potential future joint ventures, the amount to be recovered from customers through the fuel cost recovery clause will be limited to, and will not exceed, the market price of gas. The market price of natural gas is readily available to the Commission and its staff. Thus, if the Commission denies FPL's request for approval of the Woodford Project with PetroQuest, and an FPL subsidiary/affiliate sells any gas from the Woodford Project to FPL, the utility should recover the lesser of fully allocated costs or market price. (Ramas, Lawton)

ARGUMENT: Same as Position.

<u>ISSUE 3</u>: What amount, if any, associated with the transactions proposed in FPL's June 25 Petition should be included for recovery through FPL's 2015 fuel cost recovery factor?

No amount should be included for recovery through FPL's 2015 fuel cost recovery factor. Nevertheless, if FPL's subsidiary goes forward with the transaction, then any natural gas obtained by FPL from such subsidiary should be recovered through FPL's 2015 fuel cost recovery factor based on the market price of gas, consistent with how fossil fuel costs obtained from affiliated entities are recovered. However, if the Commission finds that the transaction falls within its regulatory jurisdiction, despite OPC's strong contention that it does not have such authority, then the amount recovered through the 2015 fuel cost recovery factor should be based on the lower of cost or market for the gas obtained from the subsidiary. (Ramas, Lawton)

ARGUMENT:

No costs associated with gas reserves projects should be approved for recovery under FPL's proposal. While OPC appreciates staff's attempt to split the risks and rewards of investing in natural gas reserves, OPC opposes the staff's hypothetical proposal of 50-50 sharing on jurisdictional grounds, believing the Commission lacks any jurisdiction to allow any costs associated with these investments to be recovered risk-free through the Fuel Clause. Similarly, OPC does not support OPC witness Ramas' rational, alternative proposal on jurisdictional grounds.[26]

[26] At the request of some Commissioners, OPC witness Ramas articulated a rational alternative suggestion to the utility's proposal. TR 625-638. OPC witness Ramas stated that the Commission could set the market price of natural gas as a cap for Fuel Clause cost recovery. Her alternative proposal equalizes and appropriately apportions the risks between shareholders and customers. If FPL's forecasts for well and production costs are below the market

ISSUE 6: Is FPL contractually precluded by paragraph 6 of the Stipulation and Settlement Agreement dated December 12, 2012 and approved by the Commission in Order No. PSC-13-0023-S-EI from seeking to increase rates as it proposes?

Order No. PSC-13-0023-S-EI speaks for itself. FPL witnesses testified that its proposed gas reserves investments could be in rate base, thus recoverable through base rates. However, by the express terms of the 2012 Settlement, FPL is barred from recovering any "base rate" costs through the fuel clause until after the expiration of the base rate freeze.

ARGUMENT:

Assuming, *arguendo*, that the Commission finds it has subject matter jurisdiction over the ownership of the rights to drill for natural gas in Oklahoma and elsewhere, and that the investments in such rights to drill meet the provisions of Order No. 14546, FPL's request for recovery through the Fuel Clause must be denied because such recovery is expressly prohibited by Commission Order No. PSC-13-0023-S-EI.

FPL's Request Barred by Paragraph 6 of the 2012 FPL Stipulation and Settlement

The first two sentences of Paragraph 6 of the Stipulation and Settlement attached to Order No. PSC-13-0023-S-EI state:

> Nothing shall preclude the Company from requesting the Commission to approve the recovery of costs (a) that are of a type which traditionally and historically would be, have been, or are presently recovered through cost recovery clauses or surcharges, or (b) that are incremental costs not currently recovered in base rates which the Legislature or Commission determines are clause recoverable subsequent to the approval of this Agreement. It is the intent of the Parties in this Paragraph 6 that FPL not be allowed to recover though cost recovery clauses increases in the magnitude of costs of types or categories (including but not limited to, for example, investment in and maintenance of transmission assets) that have been and traditionally, historically and ordinarily would be recovered through base rates. . . .

Order No. PSC-13-0023-S-EI at 14. FPL's Petition for recovery of gas reserves investments costs must satisfy the first two sentences in Paragraph 6. Part (a) of Paragraph 6 creates a narrow exception to the base rate freeze and removes what would otherwise be a prohibition on FPL merely "requesting" recovery of the investment in the Woodford Joint Venture if the costs "are of a type

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price of gas, FPL's shareholders benefit up to the market price of gas. If FPL's forecasted well and production costs exceed the market price of gas, then FPL's shareholders bear that downside risk and cannot recover costs in excess of the market price of gas. The customers are held harmless, but only if FPL is able to secure the volumes of gas it projects to receive from the gas reserves. However, Ms. Ramas' articulated proposal neither addresses the risk to customers if FPL drills a "dry hole" or is not able to secure the volumes of projected gas, nor who is responsible for the cost of "replacement gas." In addition to the jurisdictional reasons, this is why OPC does not support this alternative proposal. This articulated suggestion, while much better than FPL's unilateral, asymmetrical risk proposal, is not shared by OPC.

which traditionally and historically would be, have been, or are presently recovered through cost recovery clauses or surcharges." In order to satisfy the first prong of Order No. 14546, FPL claims that gas reserves investments are "Fossil fuel-related costs normally recovered through base rates...." Further, FPL takes the position in the Prehearing Order No. PSC-14-0667-PHO-EI that

> It is FPL's position that Issue 6 is subsumed by Issue 1. Moreover, the premise of this issue is that the PetroQuest joint venture would increase rates, whereas FPL's testimony demonstrates that there is a high probability that it would reduce rates because of the fuel savings that it would make possible. The first sentence of paragraph 6 in the Stipulation and Settlement Agreement provides expressly that "[n]othing shall preclude the Company from requesting the Commission to approve the recovery of costs (a) that are of a type which traditionally and historically would be, have been, or are presently recovered through cost recovery clauses or surcharges. . . ." FPL's request to recover costs associated with the PetroQuest joint venture through the Fuel Clause is fully consistent with the Commission's traditional and historical practices under Order No. 14546 (fuel-saving measures) and Order Nos. PSC-02-1484-FOF-EI and PSC-08-0667-PAA-EI (hedging), because it is projected to provide net savings for customers and would serve as a valuable longer term physical hedge.

What is notable about FPL's position is that cited Order No. 14546 as authority to request recovery through the Fuel Clause. If, *arguendo*, the investment in gas reserves is eligible for Fuel Clause recovery through Order No. 14546, then it must by definition satisfy the first "normally recovered through base rates" prong of Order No. 14546.

Further, FPL's position statement quoted only part (a) of the first sentence, but it failed to include the second sentence: "It is the <u>intent of the Parties</u> in this Paragraph 6 <u>that FPL not be allowed to recover though cost recovery clauses</u> increases in the magnitude of costs of types or categories (including but not limited to, for example, investment in and maintenance of transmission assets) that have been and <u>traditionally, historically and ordinarily</u> would be recovered through base rates." (emphasis added). The second sentence is controlling over the first, and restricts what, if any, costs can be recovered.

In order to satisfy the "base rates" requirement prong of Order No. 14546, witness Deason provided testimony, alleging that the gas reserves investment costs are normally, typically, and historically base rate recoverable or recovered. EX 58 at 23-28.[27] If, *arguendo*, this is true, then it

[27] FPL's Comptroller Ousdahl testified in her deposition when asked about her prefiled direct testimony at TR 373 about removing the proposed investment from rate base and transferring it to clause recovery:

> Q: So are you presuming that GRCO would be a regulated above-the-line operations [sic] for purposes of including it where you do; you're just transferring it from base rates to clause?
>
> A: That's correct.

EX 56 at 53.

would seemingly satisfy part (a) of the first sentence of Paragraph 6 and, if such is the case, then the proposed investment is *de facto* ineligible under the second sentence of Paragraph 6.

FPL has chosen to put all its eggs in the basket created by Order No. 14546 and, therefore, obligates itself to meet the burden of demonstrating compliance with all three prongs of Item 10. In so doing, however, FPL's Petition automatically fails on the basis that the second sentence – "the intent of the Parties" – outlaws increases in any clause if the investment would be "traditionally, historically and ordinarily" recovered in base rates. While the first sentence may permit FPL to ***request*** recovery of costs that would ordinarily be clause recoverable, but pursuant to the "intent of the Parties" in the second sentence, such costs ***cannot*** be recovered in the Fuel Clause. It is self-evident then, that if the Woodford investment passes the Item 10 test in Order No. 14546, then it simultaneously fails the second "intent of the Parties" sentence of Paragraph 6. FPL created its own Catch-22 situation by entering into the 2012 Settlement. It was a management decision at the time and now the Company must live with the deal it struck and which it induced the Commission to approve. FPL cannot have its cake and eat it, too.

Part (b) of the first sentence relates to "incremental costs not currently recovered in base rates" that could become clause recoverable subsequent to the settlement. However, there is nothing "incremental" about FPL's proposed recovery of its proposed gas reserves costs. To the extent the Commission would be inclined to consider the gas reserves investment under part (b) of Paragraph 6, OPC contends that FPL cannot demonstrate that the costs are "incremental costs" and not already included in current base rates as a result of the 2012 Settlement (see discussion *supra*).

With respect to the notion that the gas reserves investment are "hedges" and being a hedge provides an independent basis for Fuel Clause eligibility separate and apart from Order No. 14546, OPC maintains its position reflected in testimony and elsewhere in this Brief that the Woodford Project's projected costs are not a hedge. Assuming, *arguendo,* that the gas reserves investment does constitute a hedge, it is nevertheless not lawfully recoverable pursuant to the second sentence of Paragraph 6 inasmuch as (and only to the extent that they would be jurisdictional costs) they would be recorded in rate base and presumptively recovered in base rates[28] absent FPL seeking to recover them pursuant to Order No. 14546.

ISSUE 8: What effect, if any, does Commission's decision on Issue 3 have on the fuel cost recovery factor and GPIF targets/ranges for the period January 2015 through December 2015??

No position.

[28] See EX 56 at 53.

CONCLUSION

For the reasons stated herein, the Commission should deny FPL's Petition for approval of recovering costs associated with the Woodford Project and instruct FPL that it will not entertain any further consideration of FPL's desire to enter into the competitive natural gas exploration, drilling, fracking, and production industry.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF** has been furnished by electronic mail and/or U.S. Mail on this 12th. day of December, 2014, to the following:

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