IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, ETC.,

Appellant(s),

vs.

ART GRAHAM, ETC., ET AL.

Appellee(s).

Case No.: SC16-141
Lower Tribunal No.: 150001-EI

CITIZENS' INITIAL BRIEF

J.R. KELLY
Public Counsel
Florida Bar Number: 768359

CHARLES J. REHWINKEL
Deputy Public Counsel
Florida Bar Number: 0527599

PATRICIA A. CHRISTENSEN
Associate Public Counsel
Florida Bar Number: 989789

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Rm. 812
Tallahassee, FL 32399-1400

Attorneys for the Citizens of the State of Florida

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PRELIMINARY STATEMENT

Within this Initial Brief, the Appellants will be identified also as "Citizens," "Public Counsel," or the "Office of Public Counsel," which will be shortened to "OPC." OPC will refer to the order being appealed, Order No. PSC-15-0586-FOF-EI, as the "Fuel Order." OPC will refer to the Florida Public Service Commission as the "PSC" or the "Commission." OPC will refer to the active parties in the Florida Public Utilities Company portion of the proceedings below as follows: 1) Florida Public Utilities Company as "FPUC" or "Company;" 2) Florida Industrial Power Users Group as "FIPUG;" and 3) Florida Retail Federation as "FRF," and White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs as "PCS." Commission Orders available on the Commission's website will be cited as Order No. PSC-XX-XXXX, and for older Commission orders not available on the website, those orders will be listed as Order No. XXXXX and a citation to Fla. PUC Lexis will be included along with the order number. Order No. PSC-14-0517-S-EI will be referred to as the "2014 FPUC Settlement Order" or "2014 Settlement Order" and the Stipulation and Settlement incorporated into that order will be referred to as the "FPUC Settlement" or "Settlement." The Fuel Order, and the 2014 FPUC Settlement Order (along with the FPUC Settlement documents incorporated by reference in that order) are included in the Appendix, along with an excerpt of Order

Nos. PSC-13-0443-FOF-EI (approving a Tampa Electric Company settlement) and PSC-13-0670-S-EI (approving a Gulf Power Company settlement and the settlement documents incorporated by reference in that order). The PSC's annual Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor rate recovery mechanism proceeding will be referred to as the "Fuel Clause" or "Fuel Adjustment." The hearing in which the Fuel Clause rates were established in the case below will be referred to as the "Fuel Clause Hearing" or the "Fuel Adjustment Hearing."

The second sentence of paragraph VI of the FPUC Settlement will be referred to as the "Base Rate Freeze Anti-Circumvention Provision" or "BRFA." The interconnection/transmission and substation investment-related cost that is the subject of this appeal and of Issue 4A in the 2015 Fuel Clause Hearing will be referred to as the "Transmission Investment Asset" or "TIA."

OPC will refer to the volumes of the record on appeal as "R.V.__, p.__." Florida Statutes will be referred to as "F.S." and will refer to the 2015 version of the statute, unless otherwise noted. The Florida Administrative Procedure Act will be abbreviated as "APA." Pages in the attached Appendix have been Bates numbered and will be referenced as "Appendix, p.___."

STATEMENT OF THE CASE AND OF THE FACTS

The Citizens seek review of, and for the Court to set aside, the December 3, 2015 action of the Commission authorizing, through the Fuel Clause, recovery of $107,333 in depreciation expense, taxes, and return on investment related to a transmission and transmission-related asset investment (the Transmission Investment Asset or TIA) in the total amount of $3.5 million as being in direct violation of the policy contained in the 2014 Settlement approved by the Commission on September 15, 2014. No other aspect of the Fuel Order is challenged by Citizens or is the subject of this appeal.

This case has its origins on April 28, 2014, when FPUC filed a petition seeking a $5.85 million increase in its base rates.[1] Appendix, p. 41. OPC intervened in that

[1] The Commission has described the distinction between base rates and the Fuel Clause at a high level in this manner:

> The fuel clause is a regulatory tool designed to pass through to utility customers the costs associated with fuel purchases. The purpose is to prevent regulatory lag, which occurs when a utility incurs expenses but is not allowed to collect offsetting revenues until the regulatory body approves cost recovery. Regulatory lag has historically been a problem for utilities because of the volatility of fuel costs. It is not as much of a problem, however, when expenses, such as capital improvements, and operations and management costs, can be planned for and included in base rate calculations.

docket on behalf of FPUC's customers. Appendix, p. 46. The case was scheduled for hearing beginning on September 15, 2014. Appendix, p. 47. Before that hearing was held, FPUC and OPC reached a comprehensive settlement, dated August 29, 2014, that yielded a general (base rate) revenue increase of $3.75 million, effective November 1, 2014. Appendix, p. 41. A key term of the Settlement was that, absent an unforeseen change in FPUC's profit level – meaning FPUC's earnings falling below 9.25% return on common equity ("ROE") – the Company's base rates would remain frozen and not be subject to increase until December 31, 2016. Appendix, pp. 42, 61.

The Settlement includes a Paragraph captioned "VI. Other Cost Recovery" that contains two sentences, the latter of which prohibits the Company from seeking or receiving alternative rate recovery through the available cost recovery clauses, including the Fuel Clause, for increases in the types or categories of investment costs traditionally and historically recovered in base rates. R.V. 4, p. 798; Appendix, p. 60. The last sentence of this provision, which OPC has previously identified for

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In re: Petition by Florida Power & Light Company to recover Scherer Unit 4 Turbine Upgrade costs through environmental cost recovery clause or fuel cost recovery clause, Order No. PSC-11-0080-PAA-EI, at 6 (January 31, 2011).

simplicity as the "Base Rate Freeze Anti-Circumvention Provision" ("BRFA") is a foundational element of a comprehensive customer rate policy in the Settlement and Settlement Order. That sentence reads:

> Except as provided in this agreement, it is the intent of the Parties in this Paragraph VI that FPUC not be allowed to recover through cost recovery clauses increases in the magnitude of costs, incurred after implementation of the new base rates, of the types or categories (including but not limited to, for example, investment in and maintenance of transmission assets) that have been traditionally and historically recovered through FPUC's base rates.

R.V. 4, p. 798; Appendix, p. 60.

Other provisions in Settlement Paragraph XVI provide that all of the Settlement must be adopted as a whole in order for any one provision to be effective. The Commission found the Settlement to be in the public interest "when taken as a whole" and adopted it "in its entirety without modification" as requested by FPUC and OPC (Appendix, pp. 41, 64) in its 2014 Settlement Order, stating:

> Ruling
>
> Having reviewed the Settlement and the pleadings, and heard argument of counsel, we find that the Settlement is in the best interests of FPUC's ratepayers and hereby approve it. All parties to this case have signed the Settlement and all have asserted that, when taken as a whole, this Settlement is in the ratepayers' best interests, meets the need for reliable electric service and price stability in a balanced manner, and establishes fair, just and reasonable rates. OPC, the entity statutorily charged with representing people of the state of Florida in proceedings before us, negotiated this Settlement and is fully satisfied that the terms of the Settlement protect ratepayers' interests and equitably resolve all

> issues in the case. We agree and find the Settlement to be in the public interest.

Appendix, pp. 41-42.

The 2014 Settlement Order was not the subject of reconsideration or appeal and became final agency policy for all purposes on October 29, 2014. FPUC availed itself of the benefits of the Settlement and increased its base rates on November 1, 2014. TR V. 4, p. 611. On September 1, 2015, as part of the Fuel Adjustment Hearing process[2], FPUC filed a petition and the testimony of Curtis D. Young seeking, among other things, approval of the recovery in the Fuel Adjustment Clause rates for the cost of constructing a substation and transmission line (the aforementioned "Transmission Investment Asset" or "TIA") to facilitate the delivery of lower cost purchased power from Florida Power & Light Company ("FPL"). R.V. 1, p. 142; 153-155. The Company also sought recovery of legal and consulting fees generally associated with efforts to procure its power supply. During the pre-trial process, the Commission conducted an issue identification process (R.V. 1, p. 186),

[2] Each year, the Commission creates a docket to review and allow cost recovery of fuel expenditures by Florida's investor-owned utilities. This docket is generally referred to as the "Fuel Clause" or "Fuel Docket." In 2015, the Fuel Docket is 150001-EI (R.V. 1, pp. 85-86). FIPUG, FPUC, PCS, Citizens (through OPC), and FRF all reaffirmed party status in the Fuel Dockets. R.V. 1, pp. 97-99; 104-107; 108-109; 110-111; 112-113. These are the only parties participating in the FPUC portion of the Fuel Clause Hearing.

and issued Prehearing Order PSC-15-0512-PHO-EI containing the issues to be litigated in the Fuel Clause. Two issues, numbered 4A and 4B, were designated in the Prehearing Order for a decision in the FPUC portion of the Fuel Clause Hearing.[3] R.V. 3, pp. 451-452. These issues correlated to the two distinct types of costs for which the Company sought recovery – (1) the investment and asset-related costs of the TIA to be addressed in one issue (4A), and (2) the legal and consulting expenses to be addressed in the other (4B). OPC objected to the recovery of both types of costs in its Prehearing Statement, filed on October 9, 2015. R.V. 2, pp. 235-236.

At the November 2-3, 2015 hearing on the FPUC petition, FPUC witness Mark Cutshaw conceded that the Company's own transmission asset investment costs had never been recovered by FPUC outside of its base rates and that, in fact, he was unaware of any Florida utility ever recovering its own transmission asset investment costs outside of base rates. He also admitted that the only transmission costs FPUC had recovered historically through the Fuel Clause were expenses that are passed along to FPUC as a part of a purchased power agreement with another

[3] Issue 4A reads as follows: "Should FPUC be permitted to recover the cost (depreciation expense, taxes, and return on investment) of building an interconnection between FPL's substation and FPUC's Northeast Division through the fuel recovery clause?"
Issue 4B reads as follows: "Should FPUC's request to recover consulting and legal fees through the fuel clause be approved?"

utility representing another utility's transmission investment costs. TR V. 4, pp. 615-616.

In its post-hearing brief, OPC argued that the Settlement expressly barred both FPUC's request for recovery and its actual recovery of the Transmission Investment Asset costs. In its petition, testimony and brief, FPUC took a contrary view contending that the Commission could use the first sentence of Paragraph VI of the Settlement to allow recovery of these costs under the theory that the investments were not included in its last base rate case and would save fuel costs, citing *In re: Cost recovery methods for Fuel-Related expenses,* Order No. 14546 (July 8, 1985); Fla. PUC Lexis 531. With regard to the BRFA, the Company did not contend that the BRFA was inapplicable to the TIA, but rather that the costs met the test of Order No. 14546 by arguing that: (1) the TIA costs were not included in base rates and were not "merely" an increase in the magnitude of costs of an "item;"[4] (2) the TIA was not on a demonstrative list of capital projects that was attached to the Settlement; (3) the TIA is more than a transmission project and that it includes a substation

[4] The BRFA does not use the term "item" but instead refers to "increases in the magnitude of costs, incurred after the implementation of the new base rates, of <u>*types or categories*</u>…" [Emphasis added]. This is a crucial distinction inasmuch as it is the broad asset investment type that is covered by the provision and not discrete projects or pieces of equipment or "items" subject to the Company's internal characterization or categorization.

expansion and helps reliability and access to lower cost power and is not a "traditional"[5] transmission project; and (4) FPUC currently recovers costs[6] for transmission through the Fuel Clause. R.V. 4, pp. 644-645.

On November 20, 2015, the Staff of the Commission filed a Memorandum containing its legal analysis and recommendation to the Commission to the effect that the provisions of the Settlement, specifically the "plain language," "explicit terms," and "specific prohibition" of the BRFA in Paragraph VI, barred recovery of the Transmission Investment Asset costs through the Fuel Clause. R.V. 4, p. 708. The Staff cited FPUC's own characterization of the BRFA in the Motion filed in support of the 2014 Settlement as expressing the joint view of FPUC and OPC that the Company "cannot seek recovery of costs that the Company has traditionally and historically recovered through base rates" and unequivocally recommended that the TIA cost aspect of FPUC's petition be denied. R.V. 4, p. 708; Appendix, p. 52. The

[5] In its brief before the Commission, FPUC used the word "traditional" as an adjective modifying its characterization of the TIA as a project; however, the BRFA used the adverbial form of "traditionally" to modify the method of cost recovery.

[6] The Company omits to mention in its brief before the Commission that the BRFA expressly refers to "investment in and maintenance of transmission assets." The costs FPUC references are expenses associated with a purchased power agreement that include another utility's own transmission costs and thus cannot represent FPUC's own investment in an asset. TR V. 4, pp. 615-616. The Transmission Investment Asset is different in that it is capitalized and a return is earned and as such it is encompassed within the express language of the BRFA.

Staff's analysis rejected each of the FPUC contentions that the BRFA did not bar recovery of the TIA costs. R.V. 4, pp. 706-708.

On December 3, 2015, the Commission convened a meeting called a Commission Conference Agenda ("Agenda") to deliberate and vote on the Fuel Clause Hearing issues, which were designated "Item 4." R.V. 4, p. 734. During a brief deliberation discussion relating to the FPUC portion of the Fuel Clause Hearing for Issue 4A, only two of the five Commissioners spoke and both discussed the request for Fuel Clause recovery of the Transmission Investment Asset costs. In these deliberations, both Commissioners expressed acknowledgement that the recovery of the TIA costs in the pending Fuel Clause recovery docket were prohibited. No Commissioner challenged, or otherwise expressed disagreement with, any portion of the Staff's legal analysis or recommendation. Clearly reinforcing her understanding that the BRFA was a prohibition on TIA recovery, one Commissioner asked if the Company could make this same Transmission Investment Asset recovery request in the 2016 Fuel Clause hearing for recovery in 2017 and it would not be prohibited by the Settlement. She was told "yes." Immediately after that lone exchange with Staff, the Commission voted 5-0 to reject Staff's recommendation and approve the petition, without expressing a basis or rationale for ignoring or overriding the BRFA or for granting Fuel Clause cost recovery of the

TIA costs. The Commissioner making the motion[7] to reject Staff's legal analysis and advice stated:

> "Then I would move that we disagree with -- reject the staff recommendation on Item 4 and approve recovery of the costs for the interconnection between FPL's substation in FPUC's northeast division through the fuel recovery clause. That's my motion. My thinking on that is I do believe that it will have cost savings in fuel for the customers moving forward."

R. V. 4, p. 771.

The official vote sheet relating to Issue 4A contained a hand-stamped notation of "MODIFIED" and a handwritten notation that:

> FPUC should be permitted to recover the cost of building an interconnection between FPL's substation and FPUC's NE Division through the recovery clause. Staff is granted authority to make fallout adjustments.

R. V. 4, p. 730.

No additional explanation, rationale, or guidance was provided in the vote sheet or the official transcript for the Staff's use in its role in developing the Fuel Order regarding the basis for rejecting the Staff recommendation or for granting Fuel Clause cost recovery of the TIA costs. No Commissioner publicly stated in noticed, public deliberations that the BRFA did not apply or, if it did not apply, why it did

[7] The Commission Chair referred to this as the "Edgar 2 motion." R. V. 4, p. 771. Two other similarly designated motions by the same commissioner were made during the Fuel Clause Hearing deliberations within Agenda Item 4 deliberations. R. V. 4, p.772; 776.

not apply so as to bar recovery and why the OPC or Staff positions should be rejected. There was no finding that the position(s) of FPUC were adopted either.

On December 23, 2015, the Commission issued Order No. PSC-15-0586-FOF-EI authorizing Fuel Clause recovery of the Transmission Investment Asset costs. The Order contained a discussion that addressed Issues 4A and 4B together and with a common analysis, and issued a combined ruling – in a single sentence – that covered both issues as if they involved the same facts and governing authorities. R.V. 4, p. 796 – R.V. 5, p. 802; Appendix, pp. 10-16.

On January 22, 2016, OPC filed its Notice of Administrative Appeal of the Fuel Order. The Citizens' appeal only addresses the December 3, 2015 vote, allowing recovery of the TIA costs, and the Fuel Order's lack of explanation of the Commission's failure to follow the policy contained in the BRFA in its authorization of Fuel Clause cost recovery of the $107,333 related to the Transmission Investment Asset costs in 2016 customer rates.

SUMMARY OF ARGUMENT

The Commission departed from the essential requirements of the law when it deviated from prior policies/decisions in acknowledging the effect of, but failed to explain why it ignored, the Base Rate Freeze Anti-Circumvention Provision of the 2014 FPUC Settlement that prohibited fuel clause recovery of costs representing investment in and maintenance of transmission assets, and instead allowed recovery of the transmission investment costs through the Fuel Clause.

The APA, in Section 120.68(7)(e)3, F.S., states a court shall remand a case or set aside agency action, as appropriate, when the agency's exercise of discretion was "[i]nconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency." Aside from rules, agency orders also contain official agency policy. *Gessler v. Dep't of Bus. & Prof'l Regulation*, 627 So. 2d 501, 503 (Fla. 4th DCA 1993) citing *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 582 (Fla. 1st DCA 1977). See also *Southern States Utils. v. Florida PSC*, 714 So. 2d 1046 (Fla. 1st DCA 1998). When the Commission approved the Settlement between FPUC and OPC, all matters encompassed therein became final and binding Commission policy. The Settlement Order approving and adopting the 2014 FPUC Settlement was final in all respects and had passed out of the control of the Commission by November 1, 2014 when FPUC increased its base rates pursuant to the agreement. Administrative finality attached to the Settlement Order and it was not subject to modification by the Commission. *Reedy Creek Utils. Co. v. Fla. Public Serv Comm.*, 418 So. 2d 249, 253 (Fla. 1982); *Austin Tupler Trucking v. Hawkins*, 377 So. 2d 679 (Fla. 1979). In allowing FPUC to recover the costs of the Transmission Investment Asset through the Fuel Clause, the Commission's rendition of the Fuel Order failed to address or even discuss the agency's deviation from existing Commission precedent and policy

with regard to the applicability of the BRFA to the disputed costs, even after the Commission acknowledged that the BRFA prohibited FPUC's requested rate increase.

The recognition by the Commission that the BRFA prohibited Fuel Clause recovery of the TIA costs, and the resulting failure to explain the rationale for its decision requires the Court to set the order aside as a departure from the essential requirements of law. It is well-settled law that an agency cannot deviate from its own rules or policies without an explanation. Section 120.68(7)(e)3, F.S., mandates remanding or overturning an agency decision that is inconsistent with a stated agency policy. Citizens ask the Court to: (1) set aside the Commission's Order on this point; (2) to direct the Commission to enforce the policy in the BRFA; and (3) order customer rates to be reduced accordingly.

STANDARD OF REVIEW

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

ARGUMENT

I. THE COMMISSION DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW WHEN IT ACKNOWLEDGED THE EFFECT OF, BUT FAILED TO EXPLAIN WHY IT IGNORED, THE PROVISION OF THE 2014 FPUC SETTLEMENT PROHIBITING FUEL CLAUSE RECOVERY OF COSTS REPRESENTING INVESTMENT IN, AND MAINTENANCE OF, TRANSMISSION ASSETS, AND INSTEAD ALLOWED RECOVERY OF THE TRANSMISSION INVESTMENT COSTS THROUGH THE FUEL CLAUSE.

The Citizens present a single issue for the Court to address. In the 2015 Fuel Clause hearing, the Commission departed from the essential requirements of the law when it failed to follow its own policy and failed to explain why it ignored a fundamental provision of a final 2014 general base rate case settlement that prohibited FPUC from using the Fuel Adjustment Clause to recover $107,333 in costs related to investments historically and traditionally recovered through base rates. The simplicity of this case is found in the contrast of the plain language of the Settlement and the actions of the Commission to ignore that provision and utterly fail to explain why it did so.

A mere twelve months before the Fuel Clause case went to hearing, the OPC entered into a settlement agreement with FPUC that ended a general base rates rate case. In settling that case, OPC surrendered its rights to contest the full amount of the revenue increase sought by the Company. The reason OPC gave up its rights was at least partially embodied in the fundamental elements of the deal that was

struck. There was a compromise between the two parties on the revenue requirement, limiting the revenue increase and customer impact to $2.02 million less than what FPUC originally had sought. Base rates were also frozen for approximately two years. Appendix, pp. 42, 52, 59. The BRFA was included in the Settlement (Appendix, pp. 12, 52, 60) as a backstop to prohibit the Company from circumventing the base rate freeze by recovering traditional base rate-type costs through a cost recovery clause such as the Fuel Clause. As the Commission noted in its order approving it, the Settlement had a minimum term of 26 months, expiring in December 2016. Appendix, p. 42. When the Commission approved the Settlement between FPUC and OPC, all matters encompassed therein became final and binding Commission policy. The Settlement Order was not appealed and thus passed out of the Commission's control and became final within the meaning of this Court's settled principles of administrative finality. *Reedy Creek Utils. Co.* 418 So. 2d 249, 253 (Fla. 1982).

The Commission made that entire Settlement Order determination its policy and became obligated to uphold the Settlement and enforce all of its terms, including the BRFA. *Seminole Elec Coop., Inc. v Dep't of Envtl Prot.*, 985 So. 2d 615 (Fla. 2008). (The Court remanded to the agency to issue an order consistent with the parties' stipulation and the agreed-upon recommended order, stating that the

agency's stipulation could not be simply set aside in a final order by the agency head by an assertion that it was not supported by the record.)

The *Seminole Electric* case is instructive here in that the agency had adopted a stipulation and refused to honor it without any basis in fact and in contravention of the plain language of the agreement. This Court took note of the summary repudiation of stipulation in that case, noting:

> Oddly, the order did not acknowledge or mention the systematic analysis in DEP's Staff Analysis Report, the other agency reports, the PSC's Determination of Need, other portions of the extensive stipulated record, or the detailed findings of fact set forth in the statutorily authorized stipulated proposed final order. Nor did the Secretary's order attempt to identify: (1) any specific legal error or omission in the procedure followed by the parties and the ALJ; (2) any Siting Act criteria not fully addressed by the parties stipulations; or (3) any fact in the extensive stipulated record that would weigh against Siting Act approval.

Seminole Elec., 985 So. 2d 615 at 621. While the circumstances of the Commission's actions are slightly different here, a similar unseen hand seems to be at work. Here the agency's adoption of the Settlement as its policy governing the rates and cost recovery relationships between the Company and its customers requires it to uphold and enforce all of the provisions of the Settlement or demonstrate what compelling circumstances exist to completely and mysteriously ignore it. The Commission – like the DEP Secretary – cannot just choose to simply

act as if the Settlement does not exist. In accord with the rebuke effectively given to the then-agency head of the DEP to adhere to the clear terms of the stipulation, the Citizens urge the Court to similarly require the Commission to adhere to the ratemaking policy it established when it approved the 2014 FPUC Settlement.

In the Fuel Clause case here, neither the Commission nor FPUC asserted that the Settlement Order or the Settlement Agreement were subject to modification or had been rendered inoperative by a significant change in circumstances or a demonstrated public interest or extraordinary circumstances. *Fla. Power & Light Co. v. Beard* 626 So. 2d 660, 662 (Fla. 1993) (significant change of circumstances or a demonstrated public interest are exceptions to the doctrine of administrative finality), citing *Peoples Gas System v. Mason*, 187 So. 2d 335, 339 (Fla. 1966); *Richter v. Fla. Power Corp.*, 366 So. 2d 798, 800 (Fla. 1979) (agency may alter final decision under extraordinary circumstances). OPC, FPUC's customers and FPUC itself were entitled to rely on the full scope of the Settlement as being final and dispositive of the rights, obligations, and issues contained within it. *Peoples Gas*, 187 So. 2d at 338.

When FPUC filed for Fuel Clause recovery of the transmission investment costs on September 1, 2015, the Company itself ignored the plain language in Paragraph VI of the Settlement. Instead, FPUC sought to portray the TIA as eligible

for Fuel Clause recovery based on a provision of the Settlement that was clearly not intended to apply in the face of the express prohibition on increases in categories or types of costs like transmission assets or investments being recovered through the Fuel Clause. In its objection to the TIA, OPC argued to the Commission that:

> The Commission must enforce the provisions of the Settlement. It is a bilateral agreement between two equal parties that involves an agreement by the customers to give up certain positions in exchange for – among other things – a base rate freeze that must be afforded substantive meaning by the Commission if the settlement is not to result in a sham. Ignoring the express language would render the *quid pro quo* of the 2014 FPUC Settlement (and others with similar provisions) illusory and ultimately contrary to the public interest. The anti-circumvention provision must be enforced.

R.V. 4, p. 610.

The Commission's Staff analyzed the Company's proposal, the evidence, and the briefs and agreed with OPC, and the Staff provided a detailed analysis in advising the Commission in their November 20th Memorandum that:

> First, the only transmission costs that FPUC has historically recovered through the fuel clause are those of JEA and Gulf Power embedded in its current wholesale power purchase agreements with both parties. (TR 577, 615-616) None of FPUC's own transmission costs have ever been recovered through the fuel clause. (TR 616) Nor have any other IOU transmission costs been "historically" or "traditionally" recovered through the fuel clause. (TR 616) It should also be noted here that one of the benefits of the FPL interconnection testified to by witness Cutshaw is that the interconnection will significantly improve the reliability of service to Amelia Island. (TR 595-597, 600) However, capital improvements to enhance service reliability have neither

"historically" nor "traditionally" been recovered through the fuel clause.

R.V. 4, p. 707.

The heart of the Staff's analysis is found in the following passages:

Finally, FPUC has argued that the FPL interconnection is not prohibited by the settlement agreement because it will allow FPUC to reduce the price of its wholesale purchased power. For FPUC reducing the price of purchased power is the equivalent of reducing the price of fossil fuels for the other IOUs. (FPUC BR 10) FPUC argues that Order No. 14546 [citation footnote omitted] applies to purchased power as well as fossil fuels and should be used here to allow recovery of the FPL interconnection costs. (FPUC BR 10-12) FPUC dismisses the plain language of Section VI of the settlement agreement which does not allow recovery of "investment in and maintenance of transmission assets that have been traditionally and historically recovered through FPUC's base rates" on two rationales. First, Exhibit A to the settlement agreement entitled "Planned Capital Improvements" covering the period 2016-2019 does not list the FPL interconnection project. (FPUC BR 19) Second, the prohibition against recovery of transmission projects in the settlement agreement applies only to "investment in, or maintenance of, existing transmission." (FPUC BR 19-20)

Staff agrees with FPUC that if the provisions of Order No. 14546 are not applied to purchased power, there is very little guidance as to what is recoverable in terms of purchased power through the fuel clause. (FPUC BR 10) Certainly, this is the first instance in which FPUC, the only non-generating electric utility in the state, has requested recovery of a transmission asset through the fuel clause. However, staff does not agree that the *explicit terms* of the settlement agreement should be dismissed summarily.

The settlement agreement does not state that the prohibition against recovery of transmission costs through the fuel clause is <u>limited</u> to the projects listed on Exhibit A. In its joint motion with OPC for approval of stipulation and settlement, FPUC stated that "FPUC will use all reasonable infrastructure projects, consistent with those outlined in

demonstrative Exhibit A, attached to the Agreement, in order to maintain the reliability of its electrical system." (Motion at 6) The joint motion also reiterates that "The Company may continue to seek recovery of costs through recovery clauses, but cannot seek recovery of costs that the Company has traditionally and historically recovered through base rates." (Motion at 7) Given the language in its motion, the fact that the FPL interconnection was not included on Exhibit A does not support the conclusion that its costs are exempt from the settlement agreement's *specific prohibition* against the recovery of transmission costs through the fuel clause. *Nor does the motion's or the settlement agreement's prohibition against recovery through the fuel clause contain any language limiting prohibited transmission projects to existing projects. FPUC has cited no specific provision of the settlement agreement to support this contention nor is there any testimony or record evidence to support it.*

Witness Cutshaw agreed that transmission rate base costs were normally recovered through base rates and that the proposed FPL interconnection was part of a transmission asset. (TR 616, 621) While there may be potential savings associated with the project, *the plain language of the settlement agreement prohibiting recovery of the capital costs of transmission projects does not support recovery of these costs through the fuel adjustment clause.*

Conclusion

For the reasons stated above, staff recommends that FPUC should not be allowed to recover the cost (depreciation expense, taxes, and return on investment) of building an interconnection between FPL's substation and FPUC's Northeast Division through the fuel recovery clause.

R.V. 4, p. 707-708. [Emphasis added]

During the public deliberations at the Agenda, only two of the five Commissioners commented or otherwise discussed the evidence, briefs, or Staff's recommendation on the TIA issue. The transcript demonstrates that there was no

disagreement expressed in the deliberations about the prohibitory effect of, or the applicability of, the BRFA to recovery of the TIA. To the contrary, the only public, deliberative expressions were ones of acknowledgement that the BRFA did indeed bar recovery through the Fuel Clause. This is patently obvious in the full transcript of the FPUC deliberations, included as follows:

> **COMMISSIONER EDGAR:** Thank you, Mr. Chairman. Then I would suggest, if it is your pleasure, that we move to consideration of Issues 4A and 4B, and I do have some comments, perhaps questions, on that, if you're ready.
>
> **CHAIRMAN GRAHAM:** Okay. You have the floor.
>
> **COMMISSIONER EDGAR:** Thank you, Mr. Chairman. Looking at 4A and 4B, both together and separately, I find 4A in particular to be, once again, maybe one of those issues where we're in a bit of a box due to the hearing process. Not a complaint but just kind of, you know, the process is what the process is required to be.
>
> From the record evidence what we have in 4A before us is cost recovery for a project by FPUC that is -- the testimony says will be an improvement to the transmission for that small transmission and distribution utility, that it will reduce the price of wholesale purchased power, that it will save fuel costs, and that it is in the public interest.[8] That is my understanding of the testimony. If anybody disagrees, I certainly am open to discussing that. *But yet it is being recommended,*

[8] A search of the record – specifically the transcript of the testimony at the November 2-3, 2015 hearing, does not reveal any live or pre-filed testimony that the transmission asset project was in the "public interest." The phrase "public interest" only shows up one time during the hearing in an OPC witness' testimony in relation to hedging issues that are not relevant to FPUC in any way or that are part of this appeal. This appears to be a mistaken recollection and was not made a finding of the Commission. Clearly, no evidence was adduced, nor was there any finding that any "public interest" rationale existed that would undermine the finality of the Settlement. See, *Richter v. Florida Power Corp.*, 366 So. 2d 798 (Fla. 1979).

and I understand the reasons why, for not recovery for costs through the fuel clause even though, again, the project is intended to have fuel savings.

There is the complicating factor of the settlement agreement in the last rate case that we approved, and I do believe that the settlement agreement was in the public interest as we voted at that time. But, Commissioners, I would just ask if there are thoughts or if there are discussions about the staff recommendation on this item.

CHAIRMAN GRAHAM: That question was to staff?

COMMISSIONER EDGAR: No, it was to my colleagues.

CHAIRMAN GRAHAM: Commissioner Brown.

COMMISSIONER BROWN: Well, I -- thank you, Mr. Chairman. I looked at this issue. I actually highlighted this one specifically because I remember the testimony of the witness, and it was an important project, an integral project. *Unfortunately the utility is hamstrung, hamstrung by the hamstring by the settlement agreement, which I believe reads that specifically this type of cost recovery is not allowed under clauses and it cites investment and maintenance of transmission assets.*

Staff, that settlement agreement is part of the record, and what is the expiration date of that agreement?

MS. BROWNLESS: The minimum term of the settlement agreement ends on December 31st, 2017.

COMMISSIONER BROWN: 2017.

MS. BROWNLESS: 2016. I'm sorry.

COMMISSIONER BROWN: 2016. *So could the utility file testimony in the next year's fuel docket to recover costs associated with this?*

MS. BROWNLESS: *Yes, ma'am.*

COMMISSIONER BROWN: Okay. *And not be prohibited under the settlement agreement.*

MS. BROWNLESS: Yes.

COMMISSIONER BROWN: *Okay. Those are really my only thoughts.*

CHAIRMAN GRAHAM: Okay. I would still entertain a motion.

Commissioner Edgar.

COMMISSIONER EDGAR: Thank you, Mr. Chairman. *Then I would move that we disagree with -- reject the staff recommendation on Item 4 and approve recovery of the costs for the interconnection between FPL's substation in FPUC's northeast division through the fuel recovery clause. That's my motion. My thinking on that is I do believe that it will have cost savings in fuel for the customers moving forward.*

CHAIRMAN GRAHAM: Okay. We have the Edgar 2 motion moved and seconded. Is there any further discussion on that motion? Seeing none, all in favor, say aye. Any opposed? All say aye.

(Vote taken.)

Thank you. All opposed? Any Opposed? Seeing none, you have approved that motion.

Commissioner Edgar.

COMMISSIONER EDGAR: Thank you, Mr. Chairman. I would move approval of staff recommendation for Item 4B.

CHAIRMAN GRAHAM: It's been moved and seconded, staff recommendation on 4B. Any further discussion? Seeing none, all in favor, say aye.

(Vote taken.)

Any opposed? By your action, you've approved that motion.

R.V. 4, p. 768-772. [Emphasis added]

Clearly, the Commission in its public deliberations expressed only agreement with the Staff's unequivocal analysis and advice that "while there may be potential savings associated with the project, *the plain language of the settlement agreement prohibiting recovery of the capital costs of transmission projects does not support recovery of these costs through the fuel adjustment clause.*" Commissioner Edgar invited the other four Commissioners to discuss the Staff recommendation. Only Commissioner Brown accepted the invitation and opined "specifically this type of cost recovery is not allowed under clauses." Her question to Staff exposed and reinforced her clear understanding that the BRFA barred TIA cost recovery in the Fuel Clause – at least in 2016. No other Commissioner expressed a contrary view. Commissioner Edgar's public statement about the Staff recommendation before she made her "Edgar Motion 2" also expressed acceptance of the analysis. In effect, these public deliberations accepted and agreed with the Staff and OPC view that the BRFA prohibits TIA cost recovery in the Fuel Clause. By voting to nevertheless allow Fuel Clause recovery, the Commission failed to follow its own policy and this failure was neither explained in the deliberations nor in the Fuel Order. This abdication of the agency's duty requires the decision to be set aside. Section 120.68(7)(e)3, F.S.

Rather than explain its decision on the TIA cost recovery issue in the Fuel Order, the Commission chose instead to try to sidestep its obligation by merging the two different issues (4A and 4B) in the Fuel Order language and treating them as indistinguishable using the same purported cost recovery rationale. The BRFA simply vanishes from any of the analysis or decision as if it never existed or was never raised. This does not comport with the Commission's obligation under the APA to explain its decisions.

As pointed out by the First District Court of Appeal, Section 120.57(1), F.S., generally requires an agency to explain its discretionary action affecting a party's substantial interests. *McDonald v. Department of Banking and Finance,* 346 So. 2d 569, 583 (Fla. 1st DCA 1977). In reversing the Department of Banking and Finance's unexplained rejection of the hearing officer's findings of fact, the Court in *McDonald* noted that Section 120.68, F.S. also requires an agency to explicate any deviation from its existing policy or a prior agency practice – *e.g.*, here, the BRFA. The court stated that the final order must display the agency's rationale and must address countervailing arguments developed in the record and urged by (in that case a hearing officer's) recommended findings and conclusions. *McDonald,* 346 So. 2d 569. The same rationale applies to a hearing by the Commission and the

recommendation of its professional Staff after considering all the parties' arguments. The court continues:

> Failure by the agency to expose and elucidate its reasons for discretionary action will, on judicial review, result in the relief authorized by Section 120.68(13): an order requiring or setting aside agency action, remanding the case for further proceedings or deciding the case, otherwise redressing the effects of official action wrongfully taken or withheld, or providing interlocutory relief.

McDonald, 346 So. 2d 569 at 584.

Such a failure to "expose and elucidate" reasoning was manifest in the Fuel Order and the decision-making it purports to represent. The TIA was the subject of Issue 4A. Certain legal and consulting expenses that OPC challenged at hearing were the subject of Issue 4B. Obviously, the parties addressed the basis for the latter category of costs in a separate issue because they are distinguished as expenses and are not investment and asset costs.[9] Thus, these expenses are not squarely addressed or impacted by the express prohibitory language of the BRFA dealing with transmission assets.

Despite this, the Fuel Order analysis treats the Transmission Investment Asset matter as if it is a *component of* the legal and consulting fee matter addressed in Issue

[9] In the testimony accompanying the September 1st petition, FPUC witness Young described the TIA costs as "other fuel related costs" and referred to the "investment" contrasting them to the (soon-to-be-designated Issue 4B) expenses discussed in the preceding pages of his testimony. R.V. 1, p. 153.

4B. The relevant portions of the Fuel Order demonstrate this improper convergence that the Commission uses to, first, obscure the agency's failure to meet its obligation to address the BRFA impact on the TIA, and then, second, to fog the agency's failure to follow the policy of the BRFA in accord with Section 120.68(7)(e)3, F.S.

The Commission has included at pages 10-16 of the Fuel Order (R.V. 4, p. 796 – R.V. 5, p. 802; Appendix, pp. 10-16) a total of 21 un-numbered paragraphs analyzing the costs at issue for FPUC. It is here that the TIA costs that are solely the subject of Issue 4A are "shoehorned" into the Issue 4B analysis.

The Fuel Order begins by providing an accurate portrayal of the posture of Issue 4A and the issue of recoverability of FPUC's investment in its own (Transmission Project) assets of the type covered by the BRFA in the first six of the paragraphs in the FPUC section of the Fuel Order (found generally at R.V. 4, p. 796-798; Appendix, pp. 10-12). The obfuscation and the manifestation of the agency's ultimate departure from the essential requirements of the law is found in the 15 paragraphs that follow the initial six. R.V. 4, p. 798 – R.V. 5, p. 802; Appendix, pp. 12-16.

The context of the evidence being discussed in the 13 paragraphs that follow (i.e., the 7th-19th paragraphs) is overwhelmingly, if not entirely, related to the expenses that are the subject of Issue 4B. In the 20th paragraph, the language of the

Order abruptly injects the Transmission Investment Asset consideration into the heretofore Issue 4B-only analysis, with this paragraph followed by the final ultimate, single-sentence ruling paragraph (21st paragraph) with the TIA cost recovery determination literally crammed into the ruling on the expenses:

> All parties agree that the proposed interconnection with FPL will result in improved system reliability for Amelia Island. Nor is there disagreement that interconnection with FPL will offer wholesale power purchase options not currently available to FPUC when its wholesale power agreement with JEA expires in December 2016. *The disagreement rests with OPC's conclusion that Order No. 14546 prohibits cost recovery until cost savings are received by ratepayers. We do not read Order No. 14546 that restrictively.*[10]
>
> Therefore, we find that the interconnection with FPL and the consulting and legal fees associated with the development and enactment of projects designed to reduce fuel rates to FPUC's customers, costs associated with the development and negotiations of power supply contracts, and costs to consultants engaged in performing due diligence in review and analysis of the Renewable Energy Agreement between FPUC and Rayonier shall be recovered through the fuel cost recovery clause.

R.V. 5, p. 801; Appendix, p. 15. [Emphasis added]

The final two paragraphs of the Fuel Order are a stark and irreconcilable contrast to the Staff's recommendation, the bifurcation of the two issues (4A and

[10] While OPC did raise an objection to Fuel Clause recovery pursuant to Order No. 14546 in its post-hearing Brief related to Issue 4A, this was clearly a secondary objection at best. A fair reading of the eight pages of the Citizens' brief devoted to this issue reveals that the BRFA prohibition was the primary objection. R.V. 4, pp. 607-614.

4B) and, most significantly, the candid acknowledgement and acceptance by the Commission at the deliberation stage that the BRFA controls and bars the recoverability of the TIA. The Staff's recommendation summarized the evidence and framed the issue for a vote the same way and found the BRFA to be a legal barrier. Moreover, the Commissioners also clearly recognized the prohibitory impact of the policy embodied in the BRFA in their deliberations without providing a rationale for why it could ignore it. Even FPUC itself recognized in its brief that there are different analyses ("albeit for different reasons") that need to be performed depending on the type of costs. R.V. 4, p. 644. Both parties addressed the evidence in similarly demarcated fashion. Not even FPUC tried to mix the TIA cost recovery in with the legal and consulting expenses in its advocacy.

Staff's analysis on this issue was similarly clearly delineated pursuant to the Issue 4A and 4B separation. R.V. 4, pp. 704; 709. Their analysis was unequivocal that the last sentence of the BRFA is an express prohibition on FPUC recovering the costs for the Transmission Investment Asset in the Fuel Clause. The Staff never presented any rationale to the Commission linking the two issues, nor did the Commission suggest in its public deliberations that the two issues should be linked for purposes of decision. In fact, a separate vote was taken on each issue. R.V. 4, pp. 771 (Issue 4A), 772 (Issue 4B).

Nevertheless, the Commission's entire discussion in the Order combines the two very different types of costs into a single analysis that centers only on Order No. 14546 and completely ignores the BRFA that it recognized in its public deliberations barred Fuel Clause recovery. This intentional, single sentence treatment of two different types of costs is an embarrassing and incongruent convergence of the two separate and distinct issues, which can only be fairly described as administrative agency decisional "sleight of hand." It fails to rise to the level of an explanation as to why the BRFA policy was not followed. The Commission failed to indicate in its public deliberations what was the actual legal basis for the TIA cost recovery. No record evidence was identified or cited in a Commission finding supporting application of a (unstated) legal basis for recovery.[11]

[11] The Staff noted in its Memorandum that there was no competent substantial evidence (no "testimony or record evidence to support it") that the BRFA was intended to limit the prohibition to "existing projects." R.V. 4, p. 708. Similarly, the Company's notion that the TIA was not included in base rates stands in direct contrast to the language in the BRFA that prohibits clause recovery of increases in the magnitude of costs of the type or categories traditionally and historically recovered through FPUC's base rates. These words plainly indicate that the BRFA is intended to prohibit recovery of costs that are expressly NOT included in base rates, while recognizing that similar categories or types of costs are already being recovered in base rates. Evidence offered by FPUC as to inclusion (or not) of the TIA in existing base rates – assumedly to meet a test for inclusion under Order No. 14546 – is completely beside the point and irrelevant and could not have supported

Any notion that Order No. 14546 was the essence of the source of disagreement between the parties is simply a misstatement of the record and evidence. The Citizens and Staff were both clear that the dispute centered on the BRFA and that it was the dispositive authority. Staff's analysis did not even present an Order No. 14546-related disagreement to the Commissioners on the TIA recovery.[12] Furthermore, in its public deliberations the Commissioners gave Staff no direction for drafting the Fuel Order to the effect that the Issue 4A dispute about the TIA needed to be addressed in the context of Order No. 14546 or based on the evidence adduced relative to Issue 4B.

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a finding of recovery by the Commission, even if it had sought to identify one in its public deliberations.

[12] Staff advised the Commission that they did not reach any conclusion or perform an analysis about applicability of Order No. 14546 thusly:

> The analysis of this issue has two parts. First, are the costs of this rate base transmission project appropriately recovered through the fuel clause? And, second, if so, is this transmission project reasonably expected to result in reductions to the purchased power costs of FPUC? Unless the first question is answered in the affirmative, the second question need not be addressed. Staff agrees with the intervenors that the rate case stipulation and settlement agreement entered into between OPC and FPUC on August 29, 2014 and approved by this Commission in Order No. PSC-14-0517-S-EI, issued on September 29, 2014, (Order No. PSC-14-0517) prohibits the recovery of costs associated with the FPL interconnection through the fuel clause.

(Staff's case citation footnote omitted) R.V. 4, p. 706.

Under these circumstances, the Commission has an obligation to state the basis for its decision given that OPC and at least some of the other intervenors[13] raised the issue of the BRFA and disputed the Fuel Clause recovery of the TIA costs. Section 120.57(1), F.S.; *McDonald*, 346 So. 2d 583. However, the Fuel Order is devoid of the explanation that the APA requires when an agency departs from its established policy. Section 120.68(7)(e)3, F.S.

Commissioner Brown's observation was an accurate one. The OPC insisted on the "hamstring" of the BRFA in the drafting of the 2014 Settlement because of its concern that – as FPUC has aptly demonstrated here – there would be a potential for utilities to use the various clause recovery mechanisms to evade the base rate freeze in settlements.[14]

[13] FIPUG, FRF and PCS also took positions in opposition to the TIA cost recovery in their positions reflected in the Prehearing Order (R.V. 3, p. 452) and FIPUG (R.V. 3, p. 583) and PCS (R.V. 3, p. 672) separately filed in opposition through their post-hearing briefs. The FRF filed a Notice of Joinder in OPC's post-hearing brief. R.V. 3, pp. 560-561.

[14] OPC pointed out to the Commission that all four of the other Florida electric utilities were operating under settlement agreements with similar terms, including BRFA-like provisions. R.V. 4. p. 607. At least two of those utilities (Gulf Power Company and Tampa Electric Company) have specific provisions that would arguably allow them to petition for and recover assumedly larger transmission asset investments based on specific "most favored nation" ("MFN") clauses in their settlements if the Commission does not enforce the provisions of the BRFA –

The Citizens urge this Court to not allow a post-hoc rationalization supporting TIA cost recovery. The Commission cannot now offer a different rationale than was expressed at its public deliberations after having agreed with the Staff and OPC that recovery was prohibited. Section 120.68(7)(e), F.S., requires the decision to be set aside or remanded. These facts are so egregious on their face that the Court should set aside the Commission's order on this issue and direct that the Settlement be given effect and TIA recovery is barred through the Fuel Clause.

CONCLUSION

In allowing FPUC to recover the costs of the Transmission Investment Asset through the Fuel Clause, the Commission's Order failed to address or even discuss the agency's deviation from existing Commission precedent and policy with regard to the applicability of the BRFA to the disputed costs, even after the Commission acknowledged that the BRFA prohibited FPUC's requested cost recovery. The

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relative to investments in assets like transmission facilities – in the FPUC Settlement. The Tampa Electric MFN clause is identical to the Gulf Power one and reads:

> This paragraph 4 does not preclude Tampa Electric from seeking clause recovery of a type of cost (and for the same or similar reasons) not heretofore recovered through a clause which the Commission or the Legislature authorizes or has authorized another electric utility to recover through a clause before or during the Term of this Agreement.

Appendix, pp. 117, 160. These and other settlements and their associated orders with the BRFA-like provisions collectively constitute a broader non-rule agency policy that the Commission must also enforce along with the FPUC BRFA.

recognition by the Commission that the BRFA prohibited Fuel Clause recovery of the TIA costs and its resulting failure to explain the rationale for the decision requires the Court to set the order aside as a departure from the essential requirements of law. It is well-settled law that an agency cannot deviate from its own rules or policies without an explanation.

The Commission cannot now supply an "after-the-fact" explanation for a public deliberation that was an abject failure to meet the rudiments of the APA. The Settlement which the Citizens entered into in good faith, and which the Commission adopted as its policy, must mean something and its role in the TIA cost recovery dispute resolution cannot be made to vanish by agency fiat. Section 120.68(7)(e)3, F.S., mandates remanding or overturning an agency decision that is inconsistent with a stated agency policy.

Citizens ask the Court to set aside the Commission's Fuel Order on this limited point and to direct the Commission to enforce its own policy contained in the BRFA and Order No. PSC-14-0517-S-EI and to order FPUC customers' fuel adjustment cost recovery clause rates to be reduced by $107,333 accordingly.

Respectfully submitted,

J.R. KELLY, PUBLIC COUNSEL

s/ Charles J. Rehwinkel
Charles J. Rehwinkel
Florida Bar No. 527599
Patricia A. Christensen
Florida Bar No. 989789
Office of Public Counsel
c/o The Florida Legislature
111 West Madison St., Rm. 812
Tallahassee, FL 32399-1400
(850) 488-9330

Attorneys for the Citizens of
the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **CITIZENS' INITIAL BRIEF** has been furnished by electronic mail on this 2nd day of May, 2016, to the following:

Samantha Cibula, Esq.
Martha Barrera, Esq.
Office of General Counsel
FL Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

John T. Burnett, Esq.
Dianne M. Triplett, Esq.
Duke Energy
299 First Avenue North
St. Petersburg, FL 33701

Beth Keating, Esq.
Gunster Law Firm
215 S. Monroe St., Suite 601
Tallahassee, FL 32301-1804

Michael Barrett
Division of Economic Regulation
FL Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

James D. Beasley, Esq.
J. Jeffrey Wahlen, Esq.
Ashley M. Daniels, Esq.
Ausley & McMullen
P.O. Box 391
Tallahassee, FL 32302

Jeffrey A. Stone, Esq.
Russell A. Badders, Esq.
Steven R. Griffin, Esq.
Beggs & Lane
P.O. Box 12950
Pensacola, FL 32591-2950

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

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

Florida Retail Federation
c/o Robert Scheffel Wright, Esq.
John T. LaVia, III, Esq.
Gardner, Bist, Wiener, et. al
1300 Thomaswood Drive
Tallahassee, FL 32308

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

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

Cheryl Martin
Florida Public Utilities Company
1641 Worthington, Rd., Ste. 220
West Palm Beach, FL 33409

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

Paula K. Brown
Tampa Electric Company
PO Box 111
Tampa, FL 33601

s/ Charles J. Rehwinkel
Charles J. Rehwinkel
Deputy Public Counsel

CERTIFICATE OF COMPLIANCE

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

s/ Charles J. Rehwinkel
Charles J. Rehwinkel
Deputy Public Counsel