

IN THE SUPREME COURT OF FLORIDA

SOUTHERN ALLIANCE FOR)
CLEAN ENERGY)

Appellant,)

v.)

FLORIDA PUBLIC SERVICE)
COMMISSION, FLORIDA POWER)
AND LIGHT COMPANY, and)
PROGRESS ENERGY FLORIDA,)
INC.)

Appellees.)

CASE NO.: SC11-2465

PSC Docket No.: 110009-EI

ON APPEAL FROM THE FORLIDA PUBLIC SERVICE COMMISSION

**BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF APPELLANT
SOUTHERN ALLIANCE FOR CLEAN ENERGY**

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STATEMENT OF INTEREST OF AARP

AARP is the largest nonpartisan, nonprofit organization representing the interests of people age 50 and older. Older consumers in Florida, including AARP members, will be detrimentally impacted by the utility charges at issue in this appeal.

Reasonable utility rates and service are essential for older people's health and financial wellbeing. Older people living on low or fixed incomes are most vulnerable to high utility costs. People who can no longer afford their utilities may be forced to reduce expenditures on other basic needs, including food and medicine or to reduce their levels of heating and cooling beyond safe levels. Older people may be more sensitive to heat or cold or may suffer from health conditions, such as diabetes, lung disease, and heart disease, which make them especially sensitive to heat. High utility costs may also threaten the ability of older people to continue to live independently and may force some into nursing homes prematurely or even into homelessness.¹

During this period of economic hardship, the rising cost to provide *current* electric utility service is severe enough to raise alarm, making utility rate advocacy one of AARP's top priorities. AARP is intensely interested in this case because of

¹ See Howat & Taormina, *Home Energy Costs: The New Threat to Independent Living for the Nation's Low-Income Elderly*, Clearinghouse Review, 552-560, (Jan.-Feb. 2008).

the *additional* impact of the subject Nuclear Cost Recovery Mechanism charges related to power plants from which the ratepayers are receiving no service or benefits and which will not become operational, if ever, for many years into the future. In fact, the projected in-service dates are so far out that it is likely many rate-paying consumers will die before the plants produce any electricity. Worse, one or more of the power plants associated with these charges ultimately may not be built at all, and thus will provide no benefit to any of the consumers who are being forced to pay these charges.

STATEMENT OF FACTS

Amicus Curiae AARP adopts the Statement of Facts provided in the Initial Brief of Appellant Southern Alliance for Clean Energy (“SACE”), pp. 2-9.

SUMMARY OF THE ARGUMENT

The Florida Legislature failed to provide appropriate guidance to protect consumers from unjust and unreasonable utility charges when it permitted advance cost recovery mechanisms to encourage investment in nuclear power plants. As a result, consumers are being saddled unfairly with billions of dollars of costs for power plants that may never be built in their lifetime, if ever. The utilities have only demonstrated their intent to pursue an option to build rather than the requisite intent to build the power plants.

Regulators of utility monopolies are obligated to protect captive consumers from paying unjust rates. Reliance on traditional prudence standards to protect consumers is only effective in the context of an after-the-fact review. Absent appropriate statutory guidance on how to protect consumers during advance cost recovery, the Florida Public Service Commission (“Commission”) has arbitrarily authorized unfair rates. Consumers are substantially harmed because they are forced to pay for power plants from which many will not live to receive any benefits. This Court should protect consumers from being forced to pay the subject charges.

ARGUMENT

I. THE FLORIDA LEGISLATURE’S FAILURE TO PROVIDE STANDARDS GOVERNING NUCLEAR COST RECOVERY HARMS ELECTRIC UTILITY CONSUMERS.

Electric utility consumers in Florida are being harmed by being forced to pay rates that are not “just and reasonable.” *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 600, 603 (1944). When the Florida Legislature enacted Section 366.93 Fla. Stat. it authorized the Commission to permit charges to “promote utility investment in nuclear power plants.”² In violation of the non-

² Section 366.93 (2) Fla. Stat. provides:

366.93(2) Within 6 months after the enactment of this act, the commission shall establish, by rule, alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of a nuclear power plant, including new,

delegation doctrine of the Florida Constitution, the Legislature failed to provide guidance on how the Commission should further that goal while also meeting its duty to protect consumers from paying arbitrary and unfair rates.³

Utility ratemaking traditionally occurs in the context of an operating power plant from which consumers are receiving benefits and services. *See* James C. Bonbright, *PRINCIPLES OF PUBLIC UTILITY RATES*, Columbia Univ. Press (1961). The financial risk of building power plants traditionally is borne by shareholders of regulated monopoly electric utilities in return for the payment of utility rates that return not only their investment, but also a profit on their investment. In a stark departure from traditional ratemaking, the Legislature shifted this risk to rate-paying consumers by permitting recovery of costs in advance of the operation of the power plants when it enacted Section 366.93 Fla. Stat. Consumers, not

expanded, or relocated electrical transmission lines and facilities that are necessary thereto, or of an integrated gasification combined cycle power plant. Such mechanisms shall be designed to promote utility investment in nuclear or integrated gasification combined cycle power plants and allow for the recovery in rates of all prudently incurred costs and shall include, but not be limited to . . .

³ As discussed in detail in the Initial Brief filed by SACE, the statute violates Article II, Section 3 of the Florida Constitution, which contains a strict “non-delegation” doctrine. The Court has stated that legislation “may not be drafted in terms so general and unrestrictive that administrators are left without standards for the guidance of their official acts.” *State Dep’t of Citrus v. Griffin*, 239 So.2d 577, 581 (Fla. 1970). “The statute must so clearly define the power delegated that the [executive branch] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion.” *Bush v. Shiavo*, 885 So.2d 321, 329 (Fla. 2004).

shareholders, are being forced to pay fees for the cost of “siting, design, licensing, and construction” of power plants in advance of the plants becoming operational. Section 366.93 Fla. Stat. Indeed, consumers bear the risk of preconstruction and construction costs, plus interest, even for a nuclear power plant that “the utility elects not to complete or is precluded from completing.” Subsection 366.93(6) Fla. Stat.

In shifting the timing of the cost recovery, the Legislature abandoned fundamental principles that protect consumers from paying unreasonable rates. The Legislature failed to replace those principles with alternatives that function properly in the advance recovery context—i.e., to meet the regulatory obligation to protect consumers. Although there are a variety of options available to protect consumers while permitting advance recovery, the Legislature failed to instruct the Commission on how to counter or mitigate the harms associated with charging current consumers for the cost of power plants that do not and may never provide electricity. See Scott Hempling, Esq. and Scott H. Strauss, Esq., *Pre-Approval Commitments: When And Under What Conditions Should Regulators Commit Ratepayer Dollars to Utility-Proposed Capital Projects?*, 19-22, Nat’l Regulatory Research Inst. (Nov. 2008) (discussing a variety of regulatory standards and approaches to abandoned nuclear power plants, or the possibility of abandonment);

see also Public Utility's Right to Recover Cost of Nuclear Power Plants Abandoned Before Completion, 83 A.L.R.4th 183 (1991).

As a result, electric consumers are unprotected from unintended consequences and significant financial harm, such as paying for costs which do not benefit them or which are not prudently incurred. That harm is clearly demonstrated in PSC Docket No. 110009 EI, in which the Commission determined that Florida Power And Light Company ("FPL") and Progress Energy Florida ("PEF") qualified for hundreds of millions of dollars in cost recovery from consumers for power plants which may never be built, much less in the lifetime of many of the current consumers.

While implementing the statutory goal of encouraging the development of nuclear power plants, the Commission must also protect consumers and preserve the incentive for cost effective investment and management over the development of energy resources. *See Hope Natural Gas Co.*, 320 U.S. at 600, 603 (holding regulators are obligated to set "just and reasonable" rates). Public utilities that enjoy the benefits of monopoly service areas must "serve on reasonable terms all those who desire the service it renders." *United Gas Co. v. R.R. Comm'n*, 278 U.S. 300, 309 (1929). By approving unfair charges to consumers who are not receiving any benefits, without adequate assurance that the power plants will ever become

operational, the Commission has authorized unfair rates and acted arbitrarily under an unconstitutional statute.

A. The Statute Fails To Protect Against Unfair Charges For Plants Which May Not Be Built In The Lifetime Of Current Consumers.

Lacking any statutory guidance, the Commission has failed adequately to protect consumers. Moreover, the Commission's interpretation of the requirements necessary to qualify for cost recovery is a moving target. The Commission interpreted Section 366.93 Fla. Stat. and the Commission's Rule 25-6.0423 F.A.C., in its Final Order issued in Docket 100009-EI, finding that a utility "must continue to demonstrate its intent to build the nuclear power plant for which it seeks advance recovery of costs to be in compliance with Section 366.93, F.S." Order No. PSC-11-0095-FOF-EI, Docket 100009-EI (Feb. 2, 2011), *In re: Petition For Limited Proceeding To Approve Stipulation And Agreement By Progress Energy Florida, Inc.*, p. 9. Inconsistent with its earlier interpretation of the statute, however, the Commission's decision in Docket 110009-EI, from which SACE appeals, permits cost recovery without the requisite intent to build. The Commission decision interprets "intent to build" to include the mere intent to continue considering the possibility of making a decision in the future regarding building (i.e., the "option to build").

Specifically, the evidence presented on the record shows only that both FPL and PEF intend to pursue a Combined Operating License from the Nuclear

Regulatory Commission for their proposed new nuclear power plants, thereby merely “creating the options” to build. Order No. PSC-11-0547-FOF-EI, Docket 110009-EI (Nov. 23, 2011), *In re: Nuclear cost recovery clause*, p. 10. As SACE explains in greater detail in its Initial Brief, this “option creation” approach does not satisfy the Commission’s “intent to build” standard. SACE Initial Brief, pp. 15-30. The Commission’s finding that FPL and PEF demonstrated the requisite intent to build is arbitrary and unsupported by substantial competent evidence in the record. *Id.* The decision rests on a completely different standard from that previously articulated by the Commission. It also forces electric utility consumers to pay costs that may be incurred over an indeterminate and unbounded number of years based upon the mere possibility that a power plant may be built at some point in the future.

B. It Is Arbitrary And Patently Unfair To Force Current Consumers To Pay Costs For A Power Plant Absent Assurance Of An Intent To Build.

It is patently unfair to shift the risk that the utilities will never actually produce anything of value for the billions of dollars collected from consumers when the utility is not able to demonstrate the requisite intent to build. At a minimum, the Commission should have required a showing of “intent to build” consistent with its previously articulated interpretation of the statute. Alternatively, the Commission could have set objective performance conditions

before approving the charges in question, consistent with its previously articulated interpretation of the statute. See Hempling, *Pre-Approval Commitments*, at 20 (noting “commissions may seek to ensure ratepayer benefits by implementing corresponding performance conditions. One approach is to limit pre-approval to projects that have a high probability of completion. An indicator of likely success is whether the project has met certain milestones.”).

By approving the subject charges without requiring a demonstrated “intent to build” the Commission arbitrarily ignored the significant risk that none of these subject nuclear power projects will ever reach completion despite billions of dollars being charged to consumers. This risk has been completely shifted from the shareholders/owners to the rate-paying consumers, who have no control over the fate of the project.

The risk of non-completion of the nuclear power plants in this case is very high. The cancellation or indefinite delay of nuclear power plant projects is fairly common, and can result from factors within a utility’s control, such as poorly timed business decisions regarding equipment purchases, as well as from changes outside a utility’s control, such as changes in regulatory policy.⁴ The risk of any

⁴ See Diana S. Powers, *Nuclear Energy Losses Cut Advantage*, NY Times, July 26, 2010, available at http://www.nytimes.com/2010/07/27/business/global/27iht-renuke.html?_r=1&pagewanted=all (discussing difficulties of U.S. nuclear power projects in the recent economic climate, where 90% of applications at the Nuclear Regulatory Commission faced delay, cancellation, a design problem, cost

one of these variables changing for a plant that is currently only in the “option creation” phase is naturally greater than for one undergoing construction.

The facts presented before the Commission indicate a substantial risk that at least one of the power plants for which cost recovery was authorized in the Commission’s decision will not be built. For example, PEF has decided to further delay the schedule for its Levy Nuclear Power (“LNP”) project and has canceled its Engineering Procurement and Construction contract altogether.⁵ Inexplicably, the Commission even cited as justification for PEF’s “intent to build” PEF’s activity of “disposing of” (canceling) long lead equipment purchase orders. Order No. PSC-0547-FOF-EI, p. 88. The cancellation of a contract does not demonstrate the “intent to build” adequate to justify charging the rate-paying public. In fact, it implies the opposite – that they do not intend to build.

C. The Commission Decision Forces Consumers To Sign A Blank Check And Removes Important Utility Incentives To Control Costs.

The shifting sand underlying the Commission’s interpretation of Section 366.93 Fla. Stat. arises from the lack of adequate statutory guidance. It also raises the stakes for consumers while shielding the utilities from the consequences of increases, or a downgraded utility bond and noting nuclear power industry’s failure to heed warnings).

⁵ See Docket No. 120022-EI (Jan. 20, 2012), *In re: Petition For Limited Proceeding To Approve Stipulation And Agreement By Progress Energy Florida, Inc.*

their current and future decisions surrounding these projects. In authorizing the “mechanisms ... designed to promote utility investment in nuclear ... power plants” the Legislature’s only articulated guidance is to “allow for the recovery in rates of all prudently incurred costs.” Section 366.93 Fla. Stat.

Recovery of utility investments have long been contingent on being prudent, but the review is traditionally conducted “in an after-the-fact cost recovery review, [when] regulators have access to all relevant construction facts before making prudence and rate recovery decisions.” Hempling, *Pre-Approval Commitments*, at 5.⁶ An after-the-fact cost recovery in which the shareholders bear the risk of loss has long proven to be an appropriate incentive for the utility to pursue the most cost effective means of planning and constructing a power plant. Utilities know the consumers in the end will pay rates that provide shareholders full recovery of and appropriate return on utilities’ prudently incurred investments. *Id.* Recovery of other costs will be disallowed. Thus, utilities traditionally have a strong incentive to keep costs to a minimum.

The nuclear cost recovery mechanism at issue in this case significantly weakens the utility’s incentive to “sharpen the pencil” and to aggressively pursue

⁶ See the Commission’s discussion of the long-standing legal standard for prudence in its Order No. PSC-08-0749-FOF-EI, Docket 080008-EI (Nov. 12, 2008), *In re: Nuclear cost recovery clause; Missouri ex rel. S.W. Bell Tele Co. v. Public Serv. Comm’n*, 262 U.S. 276 (1923) (Brandeis, dissenting); James Bonbright, *PRINCIPLES OF PUBLIC UTILITY RATES* (1961).

cost saving measures. The utility's money is not at risk, and the Commission has arbitrarily and uncritically approved billing of consumers for all costs requested by FPL and PEF, despite significant cost overruns. For example, the projected cost for LNP has increased from \$14 billion, quoted in PEF's determination of need hearing at the Commission in 2008, to \$22.5 billion in 2011.⁷ The projected cost of FPL's Turkey Point 6 & 7 nuclear reactors has increased from \$18 billion to \$19 billion since their determinations of need.⁸ Witnesses for both utilities would not rule out the prospect of further cost overruns as these projects develop.⁹

Historically, nuclear power plants that are financed in advance, during the planning and construction phases, tend to have higher and more frequent cost overruns. That is often because imprudent decisions that lead to cost overruns are not discovered until after the prudence reviews associated with the advance

⁷ Order No. PSC-08-0518-FOF-EI, Docket 080148-EI (Aug. 12, 2008), *In re Petition for Determination of Need for Levy Units 1 & 2*.

⁸ Transcript Volume 2, p. 273 of the underlying PSC Docket No. 110009-EI.

⁹ *Id.* at 273-274; Transcript Volume 11, p. 1939 of the underlying PSC Docket No. 110009-EI.

charges.¹⁰ The cost overruns for many nuclear power plant developments have reached shocking levels.¹¹

Accordingly, the statutory reiteration of the traditional prudence guidance is insufficient to protect consumers in the context of advance cost recovery. By definition, regulators do not have access to all the facts before evaluating the prudence of the utility's investment decisions. Despite the significant difference in the timing and context of the review, the statute fails to advise the Commission how to ensure that consumers are paying only for prudently incurred costs. By omission of appropriate standards, the statute essentially forces ratepayers to sign a blank check, contrary to the obligation of regulators to ensure ratepayers are charged "just and reasonable" rates. *Hope Natural Gas Co.*, 320 U.S. at 612.

Although Section 366.93 Fla. Stat. fails to provide the necessary guidance for regulators to protect consumers, this Court should find that the Legislature did not intend to abandon consumer protections that ensure "just and reasonable" rates when it authorized alternative cost recovery mechanisms. Consumers should not

¹⁰ See *White Springs Agricultural Chemicals, Inc. d/b/a PSC Phosphate-White Springs' Reponse to Progress Energy's First Set of Interrogatories*, 13, PSC Docket No. 080148-EI (May 8, 2008).

¹¹ *Id.* at 16 (indicating, *inter alia*, the Shoreham nuclear plant, estimated originally to cost \$75 million, ultimately cost more than \$5 billion; Diablo Canyon nuclear units, estimated originally to cost \$320 million, ultimately cost more than \$5 billion; Seabrook unit was expected to cost about \$200/kW and wound up costing more than \$5000/kW; Zimmer plant was expected to cost \$230 million and was cancelled after the estimate reached \$3.4 billion).

be forced to sign the blank check the Commission has authorized because the Legislature failed to provide adequate statutory guidance to protect consumers.

II. CHARGING CONSUMERS FOR POWER PLANTS THAT MAY NOT BE OPERATIONAL IN THEIR LIFETIMES IS PATENTLY UNFAIR.

Despite charging billions of dollars to consumers, there is a very real possibility that the plants at issue will never be built and, even if built, will not become operational until 2022 at the earliest. *See* Order No. PSC-11-0095-FOF-EI, Docket 100009-EI (Feb. 2, 2011), *In re: Nuclear recovery clause*. Current ratepayers will be forced to pay for the power plant for at least ten years before receiving any benefit. Neither the Legislature nor the Commission has imposed any limitation whatsoever on how long the utilities have to decide whether they will build the plants, how long the utilities may delay decisions about building the plants, or how long the utilities may take to commence construction and still be deemed to qualify for advance cost recovery. Despite those uncertain circumstances, utilities will continue to collect the cost recovery fees from consumers who receive no benefits.

The projected in-service dates for the nuclear power plants at issue in the instant case have already been significantly delayed. Specifically, in 2010, PEF pushed out the projected in-service date of the LNP from 2016 to 2021. *Id.* More recently, PEF entered into a Stipulation and Agreement regarding its plans to

terminate its EPC contract and to delay indefinitely a decision about whether to further pursue any further construction on LNP.¹² The Commission is nevertheless permitting the costs associated with LNP to continue to be charged to current ratepayers. *Id.* Charging consumers under these circumstances is patently unfair and threatens the health and wellbeing of older consumers.

A. The Health And Wellbeing Of Older And Low Income Consumers May Be Endangered When Forced To Pay Higher Utility Costs Without Receiving Any Benefit.

In approving the nuclear cost recovery charges challenged in this appeal, the Commission forces older and low income consumers to make choices -- between cooling and eating, or lights and medication -- that endanger their health and wellbeing. See Lynne Page Snyder & Christopher A. Baker, *Affordable Home Energy & Health: Making the Connections*, 14, AARP Pub. Pol. Inst., (2010). (finding “74 percent of households that include older adults report that they cut back on the purchase of household necessities because of high home energy bills.”). Utility costs typically comprise a large percentage of a consumer’s budget. The average low-income household spends 16 percent of its annual income on home energy costs. *Id.* AARP analysis of Energy Information Administration data indicates that older consumers with household incomes less than \$15,000 have

¹² Order No. PSC-12-0104-FOF-EI, Docket 120022-EI (Mar. 8, 2012), *In re: Petition for limited proceeding to approve stipulation and settlement agreement by Progress Energy Florida, Inc.*

experienced a 32 percent rise in cooling costs since 2005.¹³ In general low-income older consumers tend to use less electricity than higher-income older groups, but rising costs consume a disproportionate percentage of their lower incomes. To reduce utility costs, lower income older people may reduce their heating and cooling to unsafe levels, increasing their risk of death. Between 1999 and 2003, 40 percent of those who died from hyperthermia — exposure to extreme heat — were 65 or older.¹⁴ In 2010, 71 percent of the 138 heat related deaths occurred among people age 50 or older.¹⁵ Heat related deaths occur most often inside of permanent homes with little or no air conditioning. *Id.*

The tradeoffs consumers are forced to make also extend to more mundane but equally important choices for financial wellbeing. The charges consumers are being forced to pay for unproductive power plants is diverting money they could be saving for a rainy day, their retirement, or payment of debt. These are significant concerns for older people who may not have enough money to sustain

¹³ Ann McLarty Jackson, Neal Walters, *Summer Cooling Costs and Older Households – August 2011*, 5, AARP Pub. Pol. Inst., (Aug. 2011), available at <http://assets.aarp.org/rgcenter/ppi/econ-sec/2011-summer-cooling.pdf>.

¹⁴ Heat-Related Deaths—United States, 1999-2003, Morbidity and Mortality Weekly Rep., Ctr. For Disease Control & Prevention, Atlanta, Ga., Jul. 28, 2006, at 797, available at <http://www.cdc.gov/mmwr/PDF/wk/mm5529.pdf>.

¹⁵ See National Oceanic and Atmospheric Administration, 2010 Heat-Related Fatalities, 2 (July 2011), available at <http://www.nws.noaa.gov/om/hazstats/heat10.pdf>.

them through their retirement years, or for the low income older Floridians who rely on Social Security for more than 75 percent of their income.¹⁶

B. Older Consumers Should Not Bear The Cost Of Power Plants That May Only Benefit Future Consumers.

When *current* utility consumers are charged for costs associated with potential future power plants, they are forced to pay for energy production that will benefit a different group of *future* electric consumers. This is known as “intergenerational inequities.” See Hempling, *Pre-Approval Commitments*, at 24. Preventing or minimizing such a disconnect between the electric rates being charged for an investment and those consumers who may actually benefit from that investment is one of the fundamental goals of proper utility ratemaking.¹⁷ *Id.*

Forcing present ratepayers to pay for nuclear cost recovery charges that should fall upon future ratepayers is both undesirable and unfair. A utility’s residential consumer base constantly “churns” for various reasons. Each year, some consumers will move out of the utility’s service area, and some will change their residence to a place where they are not responsible for paying the electric bill. Especially in areas in which the population demographics are older, such as

¹⁶ See Gary Koenig, Lina Walker, Fact Sheet, *Why Social Security and Medicare are Vital to Florida’s Seniors*, AARP Pub. Pol. Inst. (Oct. 2011), available at http://assets.aarp.org/rgcenter/ppi/econ-sec/2011-ss-medicare-stateprofiles/FL_SSandMedicareFS.pdf.

¹⁷ See *Legislative Utility Consumers’ Council v. Public Service Company*, 119 N.H. 332, 402 A.2d 626, 635 (1979).

Florida, the harsh reality is that many of the utility's residential consumers will simply pass away before they receive any benefit for a power plant to be built at some future point in time. This actuarial reality exacerbates the harm of intergenerational inequity for older electric consumers. The degree of harm will grow as the delay grows between when the charges are placed on utility bills and when the power plant is placed into service.

C. Intergenerational Inequities Can Be Mitigated To Prevent Harm To Current Consumers.

In contrast to the decision of the Commission below, other regulators have found ways to mitigate intergenerational inequity associated with the payment of advance charges for future nuclear power plants. For example, the Federal Energy Regulatory Commission ("FERC") has approved a waiver of its fuel cost recovery rules to avoid the intergenerational inequity which would result if current ratepayers receive the benefits of fuel savings from a plant not yet included in rate base. The waiver permits the utility to exclude the effect of test power during test operations of the utility's new nuclear plant. *In re: Pennsylvania Power & Light Company*, Opinion No. 176, 23 FERC ¶ 61,395 (1983).

Several utility regulatory bodies have addressed intergenerational inequities in the context of deciding how to charge for the cost of decommissioning a nuclear power plant. See Gary L. Johnson, *Procedures, Costs and Rate Structures for Decommissioning Nuclear Reactors*, 5 *Journal of Energy Law & Policy* 245

(1984). A great deal of regulatory effort has been expended to ensure that the consumers who are benefiting from a current nuclear power plant are the same ones who pay for its ultimate decommissioning. In contrast, little or no effort has been expended in Florida to mitigate intergenerational inequity on the front end of such large power plant projects.

Despite ignoring the problem of intergenerational inequity with PEF's utility rates in this case, the Florida Commission previously acted to address the concern in the context of a depreciation issue. The Commission deemed PEF's depreciation reserve to be extraordinarily high. Order No. PSC-10-0131-FOF-EI, Docket Nos. 090079-EI (Mar. 5, 2010), *In re: Progress Energy Florida, Inc., et al.* According to the Commission, "the very presence of a reserve imbalance indicates the existence of an intergenerational inequity." *Id.* In other words, former consumers essentially overpaid the depreciation component of rates due to ill-conceived utility plant life cycles and salvage values, while only current and future consumers will benefit from the reset depreciation estimates. To correct the surplus situation, the commission held that it should be applied toward the utility's requested rate increase, thus negating any need for additional revenues. *Id.*, p. 2.

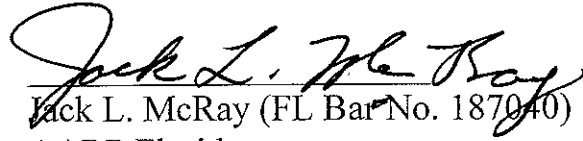
Unacceptably, the Commission's implementation of Section 366.93 Fla. Stat. has not focused the same attention to the much larger and much thornier problem of intergenerational inequity with regard to nuclear cost recovery

mechanisms. Despite the absence in the statute of any standards governing the Commission's exercise of authority, traditional principles of ratemaking should prevent such gross and patent unfairness. Too much is at stake for Florida's older and vulnerable consumers for the Commission to simply surrender to the electric utilities and not to insist upon greater consumer protections when administering the law.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* AARP respectfully supports the remedies requested by Appellant SACE, asking that the Court find that (1) the Commission's 2011 Nuclear Cost Recovery order, Order No. PSC-11-0547-FOF-EI, Docket 110009-EI (Nov. 23, 2011), *In re: Nuclear cost recovery clause.*, is arbitrary and unsupported by substantial competent evidence in that FPL and PEF failed to demonstrate in Docket 110009-EI that the utilities intended to build their respective proposed new nuclear power plants, as required in order to be eligible for cost recovery, and remand that decision back to the Commission with the direction for FPL and PEF to refund to consumers all cost recovery associated with that order; and (2) that Section 366.93 Fla. Stat. is unconstitutional because it constitutes an unconstitutional delegation of legislative authority in violation of the separation of powers doctrine of the Florida Constitution.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Jack L. McRay". The signature is written in black ink and is positioned above the printed name and contact information.

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Dated this 12th day of April, 2012.

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of April, 2012, the foregoing *Brief Amicus Curiae of AARP in Support of Appellants SACE* was filed electronically to the Florida Supreme Court, Attention: Clerk's Office, 500 South Duval Street, Tallahassee, Florida, 32399-1927 and an original and eight (8) copies of the brief were served via FedEx mail. I also hereby certify that one (1) copy of the foregoing *Brief Amicus Curiae of AARP in Support of Appellants SACE* was served via First Class Postage prepaid U.S. mail to:

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I HEREBY CERTIFY that the foregoing **Brief *Amicus Curiae* of AARP in Support of Appellants** has been prepared utilizing Times New Roman 14-point font.


Jack L. McRay